In the Light of Reason and Experience: Should Federal Evidence Law Protect Confidential Communications Between Same-Sex Partners?

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Federal Rule of Evidence 501 embodies Congress's mandate that the federal judiciary develop evidentiary privileges "in the light of reason and experience." In considering whether to create a new evidentiary privilege or to expand the scope of an existing one, federal courts consider: (1) whether federal policy supports the privilege; (2) whether states have recognized the privilege; (3) whether recognizing the privilege serves the same policy goals that traditionally have informed the development of privilege law; and (4) whether scholars have advocated for the privilege's adoption.

The marital communications privilege protects confidential communications made between spouses in a valid marriage. Recent developments with respect to marriages or other unions between same-sex partners raise the question whether confidential communications between same-sex partners should be protected by the marital communications privilege.

This Article details Congress's mandate that the judiciary develop evidentiary privileges "in the light of reason and experience," examines the history of and rationales for the marital communications privilege, sets forth the analysis courts use to develop privilege law, explores how courts might conduct that analysis when considering whether to protect confidential communications between same-sex partners and addresses some practical considerations that might arise in conducting that analysis.

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I. INTRODUCTION

The Federal Rules of Evidence specifically grant the federal judiciary control over the development of testimonial privileges: Rule 501 instructs federal courts to recognize and apply privileges "in the light of reason and experience." Congress gave the federal judiciary this mandate for flexibility so that it might shape new privilege law in response to a dynamic society. And since the Rules were adopted in 1975, federal courts have wielded the mandate to apply privileges in circumstances where they were not previously recognized. In exercising "reason and experience," federal courts are guided by several factors: (1) whether federal policy supports the privilege; (2) whether states have recognized the privilege; (3) whether recognizing the privilege serves the same policy goals that traditionally have informed the development of privileges at common law; and (4) whether scholars have advocated for the privilege’s adoption.

The marital confidential communications privilege, which protects confidential communications made between partners in a valid marriage, had long been established at federal common law when the Rules were adopted. Its long history illustrates both the importance of the policy goals it serves and the extent to which it has become embedded in the fabric of American law and society. Since the Rules were adopted, the federal judiciary, despite some debate concerning the privilege’s utility, has continued to recognize and even to broaden the scope of the marital communications privilege. This Article considers whether federal courts should expand the scope of the privilege to protect confidential communications between same-sex partners.

Part II of this Article details Congress’s mandate to the federal judiciary to develop evidentiary privileges on a case-by-case basis “in the light of reason and experience.” Part III examines the history of, and traditional rationales for, the marital communications privilege. Part IV sets forth the four-part analysis that federal courts use when developing privilege law under Rule 501’s mandate for flexibility. Part V explores how federal courts might conduct that analysis when considering whether to protect confidential communications between same-sex partners. Finally, Part VI addresses some practical considerations that might arise in applying the marital communications privilege to confidential communications between same-sex partners.

1. FED. R. EVID. 501.
2. Neither the debate concerning the utility of the marital communications privilege, nor its sister privilege, the adverse spousal testimonial privilege, is examined in this Article.
II. CONGRESS GRANTED THE FEDERAL JUDICIARY THE POWER TO RECOGNIZE NEW EVIDENTIARY PRIVILEGES IN RESPONSE TO A DYNAMIC SOCIETY

A. The Federal Rules of Evidence

The Federal Rules of Evidence were enacted in 1975 after years of consideration and debate. In 1962, Chief Justice Earl Warren appointed an Advisory Committee on Rules of Evidence to explore whether it was advisable and feasible to establish federal rules of evidence. The Advisory Committee's preliminary report to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States answered that question in the affirmative. Three years later, in 1965, the Chief Justice instructed the Advisory Committee on Rules of Evidence to draft these rules.

The Advisory Committee held fourteen sessions in Washington, D.C. between 1965 and 1968, and issued its first draft of the proposed rules in 1969. The preliminary draft was widely circulated to the bench, bar, and academy, and comments were received through 1970. Based on those comments, the Advisory Committee modified the proposed rules in late 1970 and transmitted them to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference. The Standing Committee then approved the modified rules and transmitted them to the Supreme Court in late 1970 with the recommendation that they be enacted.

The Court republished the proposed rules for comment as the Revised Draft. Based on comments received in response to the

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4. Id. at 77.
8. Hearings, supra note 6, at 15.
9. Id.
10. Id.
Revised Draft, the Advisory Committee again modified the proposed rules. The Standing Committee approved that modified draft and sent it to the Court in late 1971 with the suggestion that the rules be enacted. On November 20, 1972, the Court approved the new Rules of Evidence for use as of July 1, 1973—unless vetoed by Congress within ninety days of the Court's transmittal of the Rules to Congress. The Court transmitted the Rules to Congress on February 5, 1973. But Congress, requiring more than ninety days to review the proposed rules, passed legislation the following month that required express congressional approval of the proposed rules before they went into effect.

Having legislated time for a plenary review, Congress held extensive hearings concerning the proposed federal rules of evidence in early 1973. The hearings spanned six days; twenty-five witnesses testified and twenty-two witnesses submitted statements. Based on the testimony it had received, the House Judiciary Committee's Subcommittee on Criminal Justice then proposed its own amendments to the Court's draft of the proposed rules. Those amendments were printed in the Congressional Record and circulated nationwide for comment. After receiving more than ninety comments, the Subcommittee revised its proposed rules and, on October 10, 1973, submitted them to the House Judiciary Committee for consideration. The House Judiciary Committee amended the Subcommittee's draft, published it on November 15, 1973, and passed it on February 6, 1974.

In June 1974, the Senate held hearings on the proposed rules, passing them on November 22, 1974. After the House and Senate

12. Hearings, supra note 6, at 15.
13. Id.
15. Rothstein, supra note 5, at 125 n.2.
17. See generally Hearings, supra note 6, at 1-589.
22. Id.
resolved differences between the two bills, Congress finally adopted the Federal Rules of Evidence on January 2, 1975. After years of research, drafting, and analysis by the Court, by Congress and by the greater legal community, the Rules became effective on July 1, 1975.\textsuperscript{23} For the first time, there was a codified body of federal evidence law.

\textbf{B. Evidentiary Privileges in American Jurisprudence}

The Federal Rules of Evidence, like the federal common law of privilege, are designed to facilitate accurate truth-finding.\textsuperscript{24} Testimonial privileges, which allow otherwise admissible evidence to be excluded, are an exception to the rule because they have the potential to hamper accurate fact finding.\textsuperscript{25} Yet American jurisprudence has long recognized testimonial privileges because, even though they "retard the truth-seeking process,"\textsuperscript{26} they serve other, more important goals.\textsuperscript{27} Those goals are both humanistic and instrumental.

Early Elizabethan cases relied on humanistic rationales in creating testimonial privileges because "privileges reflected the legal system's respect for human dignity."\textsuperscript{28} Indeed, early English courts held that the disclosure of confidential information itself was morally wrong.\textsuperscript{29} Under the humanistic rationale, a privilege "embodi[es] . . . the fundamental

\begin{itemize}
  \item \textsuperscript{24} FED. R. EVID. 102 ("These rules shall be construed . . . to the end that the truth may be ascertained and proceedings justly determined.").
  \item \textsuperscript{26} A Discussion of the Proposed Federal Rules of Evidence before the Annual Judicial Conference, Second Judicial Circuit of the United States, 48 F.R.D. 39, 74 (1969) [hereinafter Discussion].
  \item \textsuperscript{27} Krattenmaker, \textit{supra} note 25, at 65 ("to protect interests and relationships quite apart from the goal of assuring accurate fact finding"); Discussion, \textit{supra} note 26, at 74 (stating that "purpose is to serve extrinsic social policies"). See also David W. Louisell, \textit{Confidentiality, Conformity and Confusion: Privileges in Federal Court Today}, 31 TUL. L. REV. 101, 110 (1956-57), stating that:

  \begin{quote}
  \[T\]here are [certain] things even more important to human liberty than accurate adjudication. One of them is the right to be left by the state unmolested in certain human relations . . . [W]hatever handicapping of the adjudicatory process is caused by recognition of the privileges, it is not too great a price to pay for secrecy in certain communicative relations . . . .
  \end{quote}

  \textit{Id.}
  \item \textsuperscript{28} \textit{EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES} \S 2.3 (2002).
  \item \textsuperscript{29} \textit{Id.}
\end{itemize}
regard in which society does, and should, hold” individual rights.\textsuperscript{30} Considered from the humanistic perspective, privileges protect “significant human values”\textsuperscript{31} and are created “out of respect for personal rights”\textsuperscript{32}—especially privacy and autonomy.\textsuperscript{33}

Charles Wright and Kenneth Graham illustrate the crux of the humanistic rationale when they observe that “[t]he question of privilege is not really ‘what are the empirical results of permitting this witness to remain silent?;’ it is ‘what kind of people are we who empower courts in our name to compel parents, friends, and lovers to become informants on those who have trusted in them?’”\textsuperscript{34} This concern for individual autonomy is the fundamental concept underlying the humanistic rationale for confidential communication privileges.

In the eighteenth century, the humanistic rationale shifted to an instrumental one: Jurists began to justify confidential communication privileges by observing that, without such protection, the relationships in question would suffer.\textsuperscript{35} The latter articulation is largely a result of the work of Lords Coke and Hardwicke.\textsuperscript{36} For example, Lord Coke, speaking of the adverse spousal testimony privilege from which the marital communications privilege derives, rationalized that forcing a spouse to testify would “be a cause of implacable discord and dissention”\textsuperscript{37} in the marriage. Lord Hardwicke, also addressing the adverse spousal testimony privilege, explained that the privilege was necessary to “preserve the peace of families.”\textsuperscript{38} In a modern twist on Lord Coke’s and Lord Hardwicke’s work, Thomas Krattenmaker observed that to ensure the protection of the few confidential utterances that bear on litigation, the law by definition protects all those utterances that may bear on it.\textsuperscript{39}

The instrumental rationale for testimonial privileges was most fully and clearly articulated by John Henry Wigmore.\textsuperscript{40} Considered from

\begin{itemize}
\item 30. Krattenmaker, supra note 25, at 92.
\item 31. Louisell, supra note 27, at 101.
\item 32. IMWINKELRIED, supra note 28, § 5.1.2.
\item 33. Id.
\item 34. 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5422.1 (Supp. 2000).
\item 35. IMWINKELRIED, supra note 28, § 2.4.
\item 36. Id.
\item 37. Id. (citing SIR EDWARD COKE ET AL., A COMMENTARIES UPON LITTLETON 6b (1628)).
\item 39. Krattenmaker, supra note 25, at 92.
\item 40. As has been keenly observed, Dean Wigmore was influenced strongly by Jeremy
\end{itemize}
Wigmore's purely instrumental perspective, privileges are solely a means to achieve an end—in the case of testimonial privileges, privacy, autonomy, or freedom of speech. Testimonial privileges "provide a barrier to officially sponsored penetration of private communications" because they give citizens the power to control information about themselves. Although privacy can be—and often is—an end in itself, it also serves other ends. First, privacy promotes and protects personal autonomy by providing both a context for emotional release and the room for self-evaluation before making important life choices. Second, privacy protects and promotes freedom of speech. A liberal democracy depends on measured, free, and informed public debate. Yet without the opportunity to first test one's speech in private, citizens cannot participate fully in that debate. Thus, privileges serve a free society because they allow citizens to test in a safe environment speech which, once vetted and made public, informs the civic debate. Both of the ends served by privacy—personal autonomy and an informed civic debate made possible by freedom of speech—are central to a liberal democracy. And testimonial privileges are one means to that end.

C. Privileges Under the Federal Rules of Evidence

The Advisory Committee's first draft of the Federal Rules of Evidence was based almost solely on instrumental policy and, consequently, eliminated most all confidential communications privileges. When the Supreme Court transmitted its Proposed Rules to Congress, Article V, relating to privileges, contained nine specific privileges:

1. required reports privileged by statute;
2. lawyer-client privilege;

Bentham, the late eighteenth and early nineteenth century British philosopher whose work assumed the superiority of utilitarianism supported by empirical study. IMWINKELRIED, supra note 28, § 2.5.
41. Krattenmaker, supra note 25, at 85.
42. Id. at 86.
43. Id. at 88 ("[P]rivacy is further an end in itself—an essential condition of political liberty and... humanity.").
44. Id. at 87.
45. Id. at 90.
46. Id. at 87-91.
47. Id. at 91 ("The Advisory Committee apparently subscribed to such [instrumental] views.").
Only those nine enumerated privileges would have existed under the Court's proposed rules: All other privileges would have ceased to be recognized, and the law of privilege would have been frozen in that state.

Under the Supreme Court's proposed rules, "testimonial privileges generally employed to protect individual, interpersonal relationships [were] eviscerated, if not wholly omitted" in favor of privileges protecting corporate information. This included the marital communications privilege, which was excluded from the Court's proposed rules. Proposed Rule 505 would have codified only the spousal testimonial privilege, which protects current spouses from testifying against each other in criminal cases. The federal marital communications privilege, which protects forever confidential communications made during a valid marriage, would have been "quietly buried."

The congressional hearings concerning the proposed rules highlighted the controversy over whether there ought to be codified federal rules of evidence and, in particular, how federal privilege law ought to develop. Several witnesses testified that federal courts should address the existence and application of privileges as those questions arose before them. Other witnesses testified that Congress should

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48. The husband-wife privilege was the adverse testimonial privilege, which allows a criminal defendant to prohibit his or her spouse from testifying against him or her. The Supreme Court's proposed rules "recognize[d] no privilege for confidential [marital] communications." Proposed Rules, supra note 14, at 245 (Advisory Committee's Note).


50. Krattenmaker, supra note 25, at 66; Hearings, supra note 6, at 174 (statement of Charles Halpern and George Frampton, Jr. on behalf of the Washington Council of Lawyers).

51. Proposed Rules, supra note 14, at 244 (Proposed Rule 505).

52. Krattenmaker, supra note 25, at 83.

53. See, e.g., Supplement, supra note 20, at 138–41 (statement of James Schaeffer on behalf of the Association of Trial Lawyers of America), 192 (statement of Professor Charles Black, Jr.), 307 (statement of the Association of the Bar of the City of New York); Hearings, supra note 6, at 423 (statement of Alan Morrison on behalf Public Citizen, Inc.), 551 (reply
enumerate specific privileges for the courts to apply. In presenting the final rules to Congress, William Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, who held the hearings, noted that "fifty percent of the complaints in our committee related to the section on privileges."

In response to this controversy, the Judiciary Committee amended Article V, eliminating the enumerated privileges and replacing them with a mandate to the federal courts to identify and apply privileges on a case-by-case basis. Rather than specifying which privileges then recognized at common law would survive and forbidding federal courts from recognizing any others, the Judiciary Committee "left the law of privileges in its present state and further provided that privileges shall continue to be developed by the courts of the United States." This version of the Rules, with its mandate of flexibility to the federal judiciary, ultimately was adopted.

Thus, since 1975, Article V of the Federal Rules of Evidence has consisted solely of Rule 501, which provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

In short, federal courts are to recognize privileges "in the light of reason and experience." Rule 501 "amounts to a total rejection of the approach taken by the Advisory Committee and the Supreme Court on the matter of privileges—a rejection not only of the specific proposals [of] the Committee and the Court, but also of the basic premises..."
underlying the proposal.” Rather, Congress declared that “the development of [federal] privilege law should not be codified by the legislature, but instead should be continually developed and modified by the courts.”

Rule 501’s language, “reason and experience,” derives from the Supreme Court’s 1934 opinion in Wolfle v. United States, which confirmed the importance of the marital communications privilege, already long recognized at federal common law. Conrad Wolfe had been prosecuted in a criminal matter. His letter to his wife had been introduced into evidence over his objection that it was protected by the marital communications privilege because the district court reasoned that it had been unnecessarily dictated to a stenographer and was therefore not made in confidence. The Ninth Circuit affirmed the admission of the letter. The Supreme Court also affirmed the admission of the letter, but noted the important role of the privilege: “[T]he basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails.” In explaining the role privileges play, the Wolfe Court set forth the test for determining when privileges, including the marital communications privilege, ought to apply. The court stated that “rules governing the competence of witnesses in criminal trials in the federal courts are... governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience.”

By rejecting a clearly articulated, but static, set of privileges and instead incorporating Wolfle’s “reason and experience” standard into its mandate, Congress demonstrated its belief that privilege law ought not be frozen, but rather respond to a changing society. As the Senate Report explained, Rule 501 “should be understood as reflecting the

60. Miller, supra note 55 at 774-75. In one sense, then, the debate over Article V—whether it should be a static set of clearly defined privileges or a mandate for dynamic development—mirrors the debate between natural law theorists and legal positivists.
61. 291 U.S. 7 (1934).
62. Id.
63. Id. at 12.
64. Id.
65. Id. at 14.
66. Id. at 12 (emphasis added).
view that the recognition of a privilege based on a confidential relationship... should be determined on a case-by-case basis."67 Scholars, too, have recognized that the judiciary, because it can better explain the rationales for privileges, because it minimizes the influence of politically powerful groups who lobby for privileges, and because it can create more flexible privileges than those enacted via legislation, is in a better position than the legislature to develop evidence law.68 And courts consistently have recognized that Congress assigned them this special role. Indeed, the Supreme Court itself noted that Congress’s adoption of Rule 501 “manifested an affirmative intention not to freeze the law of privilege”69 but to instead ‘‘provide the courts with the flexibility to develop rules of privilege on a case-by-case basis’ and to leave the door open to change.70

III. THE MARITAL COMMUNICATIONS PRIVILEGE

The marital communications privilege is a paradigmatic example of a confidential communications privilege. The privilege protects: (1) a communication, (2) that is confidential, and (3) that is made between spouses during a valid marriage.71 The federal marital communications privilege applies in federal courts in all criminal cases and in civil cases where federal law provides the rule of decision (i.e., in federal question cases).72 It does not apply in diversity cases.73

70. Id. at 47 (citing 120 CONG. REC. 40891 (1974) (statement of Rep. Hungate)).
72. See, e.g., United States v. Estes, 793 F.2d 465 (2d Cir. 1985). Estes committed theft and confessed his crime to his wife. Id. The district court admitted his wife’s testimony concerning his confession. Id. The Second Circuit reversed and remanded, holding that Estes’s confession to his wife was privileged. Id.
73. See, e.g., Caplan v. Fellheimer Eichen Braverman & Kaskey, 162 F.R.D. 490 (E.D. Pa. 1995). Maria Caplan sued her former employer, the Fellheimer law firm, for violations of Title VII. Helen Braverman, a partner at the firm who was the firm’s counsel and also was the wife of David Braverman, another partner at the firm, refused to answer deposition questions, asserting the marital communications privilege. Id. Caplan brought a motion to compel Mrs. Braverman’s responses. Id. The trial court recognized the marital communications privilege but, noting that Mrs. Braverman was conducting an internal investigation at the time of the communications, held that the sole issue was whether the communications were meant to be confidential. Id. The court thus ordered another deposition at which it instructed Mrs. Braverman to either answer the questions or give more detailed information about her basis for asserting the privilege. Id. at 492–93; see also Procter & Gamble Co. v. Bankers Trust Co., 909 F. Supp. 525 (S.D. Ohio 1995) (upholding assertion of privilege by Bankers Trust employee and his wife denying Procter & Gamble’s motion to
As early as 1839, the Supreme Court had recognized the importance of the marital communications privilege. In *Stein v. Bowman*, the Court wrote:

[The privilege] is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence.

In *Stein*, the Court recognized the marital confidential communications privilege and applied it to protect a widow from testifying about her deceased husband's alleged efforts to defraud another man's estate.

A century after *Stein*, the Court confirmed the importance of the privilege in *Wolfle v. United States*: "The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails."

The Court again underscored the significance of the marital communications privilege in American jurisprudence when, in *Blau v. United States*, it broadened the scope of its application. Irving Blau had refused to divulge the location of his wife to a federal grand jury investigating Communist party activity, asserting that he had learned her location from her in a confidential communication. The district court sentenced Mr. Blau to six months for contempt; the Tenth Circuit affirmed, noting that he had not established that his wife meant the

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74. In diversity cases (or more technically, where state law provides the rule of decision), state privileges apply. FED. R. EVID. 501; IMWINKELRIED, *supra* note 28, § 4.2.3.
75. 38 U.S. (1 Pet.) 209 (1839).
76. *Id.* at 223 (emphasis added).
77. *Id.*
78. *Id.* at 14.
80. *Id.*
81. *Id.*
communication to be confidential. The Supreme Court reversed, holding that marital communications are presumed to be confidential. By presuming the confidentiality of marital communications, the Court expanded the scope of the privilege.

Curiously, the Supreme Court’s proposed federal rules of evidence ignored this long history and refused to recognize a marital communications privilege, choosing to retain instead the adverse spousal testimonial privilege, presumably because it more transparently served instrumental goals. However, during the congressional hearings, so many witnesses objected to the Supreme Court’s refusal to recognize the marital communications privilege that the rejection of this long-recognized privilege was rescinded.

The marital communications privilege serves the same policy goals as other testimonial privileges. From the humanistic perspective, early courts felt a “natural repugnance” at forcing one spouse to testify adversely to “his intimate life partner.” There was a “humane ‘feeling’ and ‘sentiment’ that it is morally ‘repellant’ to require” one spouse to testify against another. Under this approach, the spouse’s testimony itself—without regard to any other consideration—is considered a “betrayal.” From the instrumental perspective, courts express concern that adverse spousal testimony would “be a cause of implacable discord and dissention” between spouses. Thus, like the adverse spousal testimony privilege, the marital communications privilege “preserve[s] the peace of families.” Under this approach, the privilege protects and promotes a relationship that the community believes should be fostered because, without the protection of the privilege, spouses: (1) might not

82. Id. at 333.
83. Id. (“marital communications are presumptively confidential”).
84. Proposed Rules, supra note 14, at 244 (Proposed Rule 505).
85. See, e.g., Supplement, supra note 20, at 50 (Statement of Senator John McClelan), 79 (statement of Alvin Hellerstein on behalf of the Association of the Bar of the City of New York), 90 (statement of Robert Meisenholder on behalf of the Washington State Bar Association), 333 (statement of Neil Falconer); Hearings, supra note 6, at 7 (testimony of Rep. Bertram Podell), 349 (statement of Murray Hunter, M.D., on behalf of Fairmont Clinic, Fairmont W. Va.).
86. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2228, 2333 (1961).
87. IMWINKELRIED, supra note 28, § 2.3.
88. Id.
89. Id. at § 2.4 (SIR EDWARD COKE ET AL., A COMMENTARIES UPON LITTLETON 6b (1628)).
90. Id. (citing Barker v. Dixie, 95 Eng. Rep. 171 (K.B. 1736)).
confide in their partners or (2) might lie to protect their partners.91

IV. FEDERAL COURTS HAVE DEVELOPED PRIVILEGE LAW IN THE LIGHT OF REASON AND EXPERIENCE

Since the Rules were adopted, the judiciary has followed its mandate to develop federal privilege law "in the light of reason and experience." In the last thirty years, federal courts have confirmed the privileges that existed at common law before the Rules were adopted and have addressed new privileges, all "in the light of reason and experience."92

In recognizing new privileges under Rule 501's mandate, courts consider several factors: (1) whether federal policy supports the privilege; (2) whether states have recognized the privilege; (3) whether the privilege serves the same policy goals that traditionally have informed the development of privileges at common law; and (4) whether scholars have advocated for the privilege's adoption.

For example, in 1996, the Supreme Court confirmed the privilege for confidential communications between psychotherapists and their

91. Louisell, supra note 27, at 102. Although this Article does not address the efficacy of the privilege, it would be well to note that some have argued that unlike other protected relationships in which one party is a professional (e.g., attorney-client or physician-patient), spouses might not know that their communications are privileged. Thus, the privilege cannot fairly be said to encourage freer communication. Proposed Rules, supra note 14, at 245-46 (Advisory Committee's Note to Rule 505, which states, "[n]or can it be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware"). However, there is no proof of this factual assumption. Krattenmaker, supra note 25, at 91. Even the purely instrumentalist Wigmore, who noted that it "is not, and probably cannot be known" whether spouses would continue to share confidences without the privilege, recognized the importance of the privilege nonetheless because "the compulsory disclosure of marital secrets at least might cast a cloud upon an essential aspect of the institution of marriage." WIGMORE, supra note 86, § 2332. Of course, in the thirty years since the Federal Rules of Evidence were adopted, Americans have gained tremendous access to sophisticated legal issues through the media in ways the Advisory Committee never could have anticipated. And while this argument may resonate with those who question the need for the privilege in general, it bears not at all on the application of the privilege to communications between same-sex, as opposed to heterosexual, partners. In addition, although some may argue that fact finding in any particular case would be impaired if the privilege were expanded, trial court fact finding “in this country has long been... encumbered by exclusion of [privileged] evidence, yet does not appear to have suffered noticeably for it.” Krattenmaker, supra note 25, at 93.

patients and extended that privilege for the first time to confidential communications made to a social worker rather than a psychotherapist.\textsuperscript{93} In \textit{Jaffee v. Redmond},\textsuperscript{94} a police officer sought therapy after inadvertently shooting a civilian.\textsuperscript{95} The civilian's estate sued for excessive force under federal statutes, making the litigation one of federal question so that federal privilege law applied under Rule 501. Both the social worker and the patient refused to disclose the substance of the communications made during therapy. The district court instructed the jury that it could conclude that the communications were adverse to the officer's interest, and the jury rendered a verdict for the civilian's estate.\textsuperscript{96} The Seventh Circuit reversed, recognizing a psychotherapist-patient privilege and extending it to the social worker.\textsuperscript{97} The Supreme Court affirmed.\textsuperscript{98}

Both the Seventh Circuit and the Supreme Court noted Rule 501's "affirmative intention not to freeze the law of privilege" but instead to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis" in order to "continue the evolutionary development of testimonial privileges."\textsuperscript{99} And both courts reasoned that the privilege ought to be recognized and extended to social workers because: (1) its inclusion in the draft rules of evidence and its recognition by two courts of appeals demonstrated its recognition in federal law;\textsuperscript{100} (2) state courts and legislatures had recognized it;\textsuperscript{101} (3) it served the goals of psychotherapy, whose importance had become more widely understood, particularly in the five years prior to the Seventh Circuit's decision;\textsuperscript{102} and (4) scholars had commented on the importance of privacy in the psychotherapist-patient relationship.\textsuperscript{103}

Like the \textit{Jaffee} courts, federal courts that have recognized a parent-child confidential communications privilege have based their holdings

\begin{footnotes}
\item[93] \textit{Jaffee}, 518 U.S. 1.
\item[94] \textit{id.}
\item[95] \textit{id.} at 3–4.
\item[96] \textit{id.} at 4–5.
\item[97] \textit{Jaffee v. Redmond}, 51 F. 3d 1346 (7th Cir. 1995).
\item[98] The Seventh Circuit had adopted a balancing test for determining when the privilege should apply. \textit{id.} at 1357. The Supreme Court struck the balancing test in favor of greater predictability. \textit{Jaffee}, 518 U.S. at 17–18.
\item[100] \textit{Jaffee}, 518 U.S. at 10–11; \textit{Jaffee}, 51 F.3d at 1354–56.
\item[101] \textit{Jaffee}, 518 U.S. at 11–15; \textit{Jaffee}, 51 F.3d at 1356–57.
\item[102] \textit{Jaffee}, 518 U.S. at 10–13; \textit{Jaffee}, 51 F.3d at 1355–56.
\item[103] \textit{Jaffee}, 518 U.S. at 10–12; \textit{Jaffee}, 51 F.3d at 1356.
\end{footnotes}
on a similar analysis. First, in *In re Grand Jury Proceedings (Agosto)*, the court noted the expansive scope of Rule 501's mandate, referring to Krattenmaker's theory that Rule 501's enactment in the face of the proposed rules, which offered little protection to interpersonal communications, "clearly reveals that Congress was motivated substantially by disagreement with the Advisory Committee's position that federal recognition of interpersonal testimonial privileges ought to be cut back." The *Agosto* court explained that Rule 501 "recognized and arguably even advocated the evolution of new testimonial privileges as they were deemed necessary by courts in the future." The *Agosto* court recognized a parent-child privilege based on: (1) the privilege's ability to serve traditional instrumental goals for confidential communication privileges; and (2) the fact that scholars had advocated for its adoption.

Second, in *In re Grand Jury Proceedings Unemancipated Minor Child*, the court similarly found, following the dictates of Rule 501, that "reason and experience, as well as the public interest, are best served by the recognition of some form of a parent-child privilege." In conducting its analysis, the *Unemancipated Minor Child* court explored both a federal constitutional and a federal common law basis for the privilege. Concluding first that there was no constitutional basis for the privilege, the court considered and found a federal common law basis by looking to previous federal court opinions, to state legislative decisions, to traditional rationales for testimonial privileges, and to scholarly advocacy for the privilege's adoption. Notably, the *Unemancipated Minor Child* court requested that its opinion be published because "the development of the federal common law—including recognition of new privileges and the honing of time-honored ones—is uniquely dependent on judges writing and publishing opinions

105. Id. at 1324.
106. Id.
107. Id. at 1308–10 (applying Dean Wigmore's test for recognizing new privileges).
108. Id. at 1304–08.
110. Id. at 1497.
111. Id. at 1489.
112. Id. at 1495.
113. Id. at 1493.
114. Id. at 1494–95.
115. Id. at 1495–96.
that reflect the common law's 'reason and experience.'”116 Finally, the Fifth Circuit has stated that it might consider recognizing a parent-child privilege under Rule 501's analysis.117

Any federal court considering an expansion of the marital communications privilege to protect confidential communications between same-sex partners likely will explore the same multifactor analysis used by these courts.

V. PROTECTING CONFIDENTIAL COMMUNICATIONS BETWEEN SAME-SEX PARTNERS

The debate over privileges raises the question of the relationship between the private citizen and the state—the issue “at the center of the contemporary debate about the foundations of liberal society.”118 Today, no relationship underscores the debate between private citizens and the state more clearly than the relationship between a same-sex couple and the state.119 Thus, it has been proposed that federal courts consider, “in the light of reason and experience,” whether the marital communications privilege should protect confidential communications between same-sex partners.

No federal court has yet addressed the issue. However, considering the great swath of federal question litigation to which federal privilege law applies, it is likely simply a matter of time before a federal court is faced with the question. For example, in Patches v. City of Phoenix,120 a police officer who had been disciplined sued the city for discrimination based on gender and sexual orientation in violation of Title VII and § 1983.121 Among other complaints, Officer Patches argued that the City

116. Id. at 1495 n.11.
117. Port v. Heard, 764 F.2d 423, 430 (5th Cir. 1985) (“Were this a Rule 501 case our holding [that there is no constitutionally mandated parent-child privilege in a criminal case] might be different, since, in terms of the interests at stake, this case presents a compelling argument in favor of recognition.”). Of course, federal courts also have refused to recognize a parent-child privilege. See, e.g., In re Grand Jury Proceedings (Greenberg), 1982 WL 597412 (D. Conn. 1982); In re Grand Jury Proceedings (Starr), 647 F.2d 511 (5th Cir. 1981); United States v. Davies, 768 F.2d 893 (7th Cir. 1985).
119. EVAN GERSTMANN, SAME-SEX MARRIAGE & THE CONSTITUTION 3 (2004) (“Same-sex marriage is one of the issues that most directly challenge our commitment to genuine legal equality.”); see also Richard A. Epstein, Caste and the Civil Rights Laws: From Jim Crow to Same Sex Marriages, 92 MICH. L. REV. 2456, 2473 (1994) (“[T]he question of the legality of same-sex marriages has bullied its way to the front of the constitutional agenda.”).
120. 68 Fed. Appx. 772, No. 02-15408, 2003 WL 21206120 (9th Cir. May 12, 2003).
121. Id.
discriminated against her when it prohibited her from discussing the disciplinary proceedings with anyone other than her "attorney, minister, union representative or spouse" because she could not, by definition, have a spouse since she and her partner could not wed. The Ninth Circuit affirmed the summary judgment entered against Officer Patches, finding that she had not introduced evidence of discriminatory intent. Although it did not arise directly in Patches, it is foreseeable that a party in a Title VII, § 1983 or other federal question litigation may invoke the privilege to protect his or her confidential communications with a same-sex partner. In considering whether to extend the federal marital communications privilege to confidential communications between same-sex partners, federal courts likely will consider the following: (1) whether federal policy supports the privilege; (2) whether states have recognized the privilege; (3) whether the privilege serves the same policy goals that traditionally have informed the development of privileges at common law; and (4) whether scholars have advocated for the privilege's adoption.

A. Federal Policy

There has been no expressed federal policy concerning the privacy of communications between same-sex partners, and federal policy with respect to other issues concerning same-sex partners has been varied. First, in 1996 Congress passed, and President Clinton signed, the Federal Defense of Marriage Act ("DOMA"). DOMA relieves any state from recognizing a same-sex marriage sanctioned by another state. Although couched in the language of states' rights, DOMA's history reveals that it is an expression of federal legislative policy disfavoring same-sex marriage. The constitutionality of DOMA has not yet been tested, though recent developments regarding the legitimacy of same-sex marriage suggest that it may soon be challenged. Although it is unclear whether DOMA would be found constitutional, recent courts have been more open to applying heightened scrutiny to state actions that derogate the rights of same-sex partners. Moreover, "many court watchers believe that [by 2006 or 2011] the U.S. Supreme Court will hold that there is a constitutional right to homosexual marriage." Of

122. Id. at *2.
123. Id.
125. GERSTMANN, supra note 119, at ix–xi.
course, DOMA addresses same-sex marriage, but is silent as to rights and privileges (including evidentiary privileges) granted to other forms of same-sex partnerships, suggesting that DOMA does not illustrate federal policy with respect to protecting confidential communications between same-sex partners.

Second, the Supreme Court recently held that the Constitution protects the right of consenting adults to privately engage in same-sex sexual activities.\(^{127}\) In *Lawrence v. Texas*,\(^{128}\) the Court expressly overruled the 1986 *Bowers v. Hardwick*\(^ {129}\) decision, which had found that such activities were not constitutionally protected.\(^ {130}\) The *Lawrence* Court reasoned that: (1) "States with same-sex prohibitions have moved toward abolishing them,"\(^ {131}\) (2) there exists "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex,"\(^ {132}\) and (3) "[p]ersons in a homosexual relationship may seek autonomy for [the same] purposes . . . as heterosexual persons do."\(^ {133}\) Of course, although *Lawrence* expresses a federal judicial policy that same-sex partners ought not to be considered criminals for their sexual activities, the opinion does not address whether same-sex partners ought to receive any affirmative rights or privileges, including evidentiary privileges.

Most recently, the Supreme Court let stand the Massachusetts Supreme Judicial Court’s decision in *Goodridge v. Department of Public Health*\(^ {134}\) that legalizes same-sex marriage, suggesting at the very least a policy of tolerance toward granting rights to same-sex partners.\(^ {135}\)

A federal court considering whether to protect confidential communications between same-sex partners would likely weigh these federal precedents, and possibly others yet to emerge, to discern how federal policy affects the decision.


\(^{128}\) Id.

\(^{129}\) 478 U.S. 186 (1986).

\(^{130}\) Lawrence, 539 U.S. at 578.

\(^{131}\) Id. at 570.

\(^{132}\) Id. at 572.

\(^{133}\) Id. at 574.

\(^{134}\) 798 N.E.2d 941 (Mass. 2003).

B. States' Approaches to the Privilege

Unlike the federal government, some states have directly addressed the question whether confidential communications between same-sex partners should be privileged.

California and Vermont protect confidential communications between same-sex partners. In 1999, the Vermont legislature, instructed by the Vermont Supreme Court, passed the state’s Civil Unions Act, a new chapter added to Vermont's Domestic Relations Code. Section 1204 of the act, entitled “Benefits, protections and responsibilities of parties to a civil union,” sets forth a “nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union” and explicitly includes “laws relating to immunity from compelled testimony and the marital communication privilege.”

In 2003, the California Legislature passed A.B. 205, the Domestic Partner Rights and Responsibilities Act of 2003. The Bill was signed by Governor Davis on September 19, 2003 and became effective January 1, 2005. The initial text of California’s Act extended to same-sex partners in civil unions a nonexhaustive list of rights and obligations. With respect to evidentiary privileges, the Act as introduced explained that “California has no legitimate state interest in denying to persons in domestic partnerships . . . benefits including, without limitation, Laws relating to domestic relations, including, but not limited to, rights and obligations of financial support during and after the relationship, community property, and evidentiary privileges.” The enumerated benefits were removed in the March 24, 2003 version of the bill, in favor of a broad statement that “[t]his act is intended to help California . . . provid[e] [to] all caring and committed couples, regardless of their gender or sexual orientation, the opportunity to obtain essential rights, protections, and benefits . . . to further the state’s interests in promoting stable and lasting family relationships.”

136. Baker v. State, 744 A.2d 864, 867 (Vt. 1999) (holding that “the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law” and ordering the state legislature to draft an appropriate statute).
138. Id. § 1204(e)(15).
140. A.B. 205, as introduced January 28, 2003, § 1(b)(8) (emphasis added).
141. A.B. 205, as introduced January 28, 2003, § 1(b)(8) (emphasis added).
Although Hawaii, Maine, and New Jersey have enacted domestic partnership statutes, they do not address the applicability of evidentiary privileges to domestic partners.\(^{143}\)

On the other hand, at least one state has refused to extend the privilege to communications between same-sex partners. In *Greenwald v. H&P 29th Street Associates*,\(^{144}\) the plaintiffs sued the owner and managing agent of a rental property who refused to rent to them.\(^{145}\) During the litigation, the plaintiffs, a same-sex couple, asserted the marital communications privilege under New York’s statute.\(^{146}\) The trial court refused to apply the privilege, denying the plaintiffs the protective order they had sought.\(^{147}\) In a one-page memorandum decision, the appellate division affirmed the denial of the protective order explaining that New York’s statute “by its terms, protects confidential communications between a ‘husband’ and ‘wife’ ‘during marriage’” and thus does not protect communications between same-sex couples.\(^{148}\)

Other states, while not addressing the privilege directly, have addressed the issue of same-sex marriage. Many states have passed baby-DOMAs (state versions of the federal Defense of Marriage Act),\(^{149}\)

\(^{143}\) HAW. REV. STAT. ANN. § 572(c) (Michie 1999) (Reciprocal Beneficiaries); ME. REV. STAT. ANN. tit. 22 § 2710 (West Supp. 2004) (Domestic Partner Registry); N.J. STAT. ANN. § 26:8A (West Supp. 2004).


\(^{145}\) Id.

\(^{146}\) Id.

\(^{147}\) Id.


have amended their constitutions to prohibit same-sex marriage,\footnote{150} or both. Although the baby-DOMAs and constitutional amendments express a policy disfavoring same-sex marriage, like the federal statute, they express no policy with respect to granting other rights and privileges to same-sex partners. Indeed, Vermont and California both prohibit same-sex marriage but simultaneously protect confidential communications between same-sex partners.\footnote{151}

Finally, one state has legalized same-sex marriage, resolving the question definitively. In November 2003, the Massachusetts Supreme Judicial Court decided \textit{Goodridge v. Department of Public Health}.\footnote{152} With \textit{Goodridge}, Massachusetts became the first state to recognize same-sex marriages, as opposed to same-sex civil unions.\footnote{153} The

\begin{itemize}
\item § 701 (West 1964 & Supp. 2004));
\item Michigan (MICH. COMP. LAWS ANN. § 551.1 (West 1988 & Supp. 2004–05));
\item Minnesota (MINN. STAT. ANN. § 517.03 (West 1990 & Supp. 2005));
\item Mississippi (MISS. CODE ANN. § 93-1-112 (1994 & Supp. 1999));
\item Missouri (MO. REV. STAT. ANN. § 451.022 (2003));
\item Montana (MONT. CODE ANN.,§ 40-1-401 (2003));
\item New Hampshire (N.H. REV. STAT. ANN. §§ 457:1, 457:2, 457:3 (2004));
\item North Carolina (N.C. GEN. STAT. § 51-1.2 (2003));
\item North Dakota (N.D. CENT. CODE § 14-03-08 (2004));
\item Ohio (OHIO REV. CODE ANN. § 3101.01 (Anderson 2003));
\item Oklahoma (OKLA. STAT. tit. 43, § 3.1 (2001 & Supp. 2005));
\item Pennsylvania (PA. STAT. ANN. tit. 23 § 1704 (West 2001 & Supp. 2004));
\item South Dakota (S.D. CODIFIED LAWS § 25-1-38 (Michie 2004));
\item Tennessee (TENN. CODE ANN. § 36-3-113 (2001));
\item Texas (TEX. FAM. CODE ANN. § 6.204 (Vernon 1998 & Supp. 2004–05));
\item Utah (UTAH CODE ANN. § 30-1-4 (1998 & Supp. 2004));
\item Virginia (VA. CODE ANN. § 20-45.2 (Michie 2004));
\item West Virginia (W. VA. CODE ANN. § 48-2-603 (Michie 2004)).
\end{itemize}


\begin{itemize}
\item 150. Alaska (ALASKA CONST. art. 1, § 25); Arkansas (ARK. CONST. amend. 83);
\item Georgia (GA. CONST. art. 1, § 4, ¶ 1);
\item Hawaii (HAW. CONST. art. 1, § 23);
\item Kentucky (KY. CONST. § 233A);
\item Louisiana (LA. CONST. art. 12, § 15);
\item Michigan (MICH. CONST. art. 1, § 25);
\item Mississippi (MISS. CONST. art. 14, § 263A);
\item Missouri (MO. CONST. art. 1, § 33);
\item Montana (MONT. CONST. art. 13, § 7);
\item Nebraska (NEB. CONST. art. 1, § 29);
\item Nevada (NEV. CONST. art. 1, § 21);
\item North Dakota (N.D. CONST. art. 11, § 28);
\item Ohio (OHIO CONST. art. XV, § 11);
\item Oklahoma (OKLA. CONST. art. 2, § 35);
\item Oregon (OR. CONST. art. 15, § 5a); and
\item Utah (UTAH CONST. art. 1, § 29).
\end{itemize}

\begin{itemize}
\item 151. CAL. FAM. CODE § 308.5 (West 2000);
\item VT. STAT. ANN. tit. 15, § 8 (1999).
\end{itemize}

\begin{itemize}
\item 152. 798 N.E. 2d 941 (Mass. 2003).
\item 153. Hawaii was technically the first state to recognize same-sex marriage. In 1993 the Hawaii Supreme Court ruled that the state’s denial of marriage licenses to same-sex couples violated the equal protection clause of the Hawaii state constitution. \textit{Baehr v. Lewin}, 852 P.2d 44 (Haw. 1993) (applying strict scrutiny analysis). The court specifically noted that marriage would extend to the plaintiffs “the benefit of the spousal privilege.” \textit{Id.} at 59. In response, five years later, the Hawaii state legislature passed the marriage amendment to Hawaii’s constitution, declaring that marriage was reserved for heterosexual couples. Haw. Legis. H.B. 117 (1997). The next year, Hawaii’s supreme court recognized that the marriage amendment precluded it from affirming its 1993 decision in \textit{Baehr v. Lewin}. Bachr v. Miike, 994 P.2d 566 (Haw. 1999). Although Hawaii has effectively foreclosed the possibility of same-sex marriage, the state has not directly addressed the question of rights (including the
Goodridge Court noted that the "benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death" and that among these benefits are "evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations." The court then observed that "[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution." On May 17, 2004, Massachusetts began issuing marriage licenses to same-sex partners, although the state has limited eligibility to receive a license to Massachusetts residents. Massachusetts' expressed policy favoring same-sex marriage necessarily encompasses the less aggressive policy of granting rights to same-sex partners.

A federal court considering whether to protect confidential communications between same-sex partners likely will weigh these state precedents, and possibly others yet to emerge, to discern how states' approaches affect the decision.

C. Policies Traditionally Served by the Privilege

Scholars have variously articulated the traditional rationales for recognizing confidential communications.

Both Wigmore and Krattenmaker propose instrumentalist tests. Wigmore's test recognizes a new privilege if:

1. The communications . . . originate in a confidence that they will not be disclosed;
2. This element of confidentiality [is] essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation [is] one which in the opinion of the community ought to be sedulously fostered; and
4. The injury that would inure to the relation by the disclosure of the communications [is] greater than the evidentiary privilege) and obligations that attach to same-sex partnerships other than marriage.

154. 798 N.E.2d at 955.
155. Id. at 956.
156. Id. at 968.
benefit thereby gained for the correct disposal of litigation.\textsuperscript{158}

This purely instrumentalist analysis requires not only that society believe a particular relationship ought to be preserved and protected, but also that the privilege actually preserve the relationship in which the communication was made. Indeed, because it requires a cause and effect analysis (presumably with sufficient supporting evidence to demonstrate the causal relationship), if it were strictly applied, it would eliminate any privilege as to which it could not be proven that the privilege actually furthers what in society's judgment is "useful" communication.\textsuperscript{159} However, even Wigmore recognized the importance of the marital communications privilege without such proof.\textsuperscript{160}

Under this strict instrumental approach, one must identify both a goal served by the privilege and evidence that the privilege achieves that goal. A federal court considering whether to protect confidential communications between same-sex partners under Wigmore's test might articulate the first goal as the concern that, without the privilege, people will choose not to pursue same-sex partnerships.\textsuperscript{161} A second goal might be that same-sex partnerships will not be as fulfilling as they could be because the partners, fearful of their confidences being betrayed, will choose not to confide in each other.\textsuperscript{162} A third goal might be that

\begin{itemize}
  \item \textsuperscript{158} 8 Wigmore, supra note 86, § 2285.
  \item \textsuperscript{159} Louisell, supra note 27, at 111. ("Wigmore... has conducted to the current confusion by his emphasis on strictly utilitarian bases for the privileges—bases which are sometimes highly conjectural and defy scientific validation."); Krattenmaker, supra note 25, at 91 (Advisory Committee Notes to Proposed Rule 505, explaining why marital communications privilege was eradicated, "embody empirical assumptions that are dubious at best... to the [Advisory Committee's] wholly unsupported assertion that married couples 'are unaware' of the privilege they typically possess, it might be sufficient to simply argue that a poll be taken, and dare the Committee to wager on the outcome."). Even Wigmore recognized this weakness, when he commented that "whether this argument [that absent the protection of the privilege, spouses would choose not to share confidences with each other] is well founded is not, and probably cannot be, known." 8 Wigmore, supra note 86, § 2332.
  \item \textsuperscript{160} 25 Wright & Graham, Jr. supra note 34, § 5574 n.40 ("[W]hatever the appropriateness of limiting the concept of 'marriage' to Noah's ark couples, it does not follow that people barred from marriage ought to be discouraged from forming long term relationships... "). Some may argue that society ought not encourage its citizens to pursue same-sex partnerships, either directly or indirectly. This is a purely political argument; an instrumentalist seeking to discredit the value of extending the privilege would argue instead that same-sex partners have formed bonds without the benefit of the privilege, thus negating any evidence that the privilege achieves its goal.
  \item \textsuperscript{162} Louisell, supra note 27, at 113 ("A marriage without the right of complete privacy
without the privilege, same-sex partners might lie to protect themselves or their spouses. Because a strict instrumental approach requires evidence that the privilege would achieve these goals, any court that applies this test is unlikely to extend the marital communications privilege to same-sex partners.

Krattenmaker similarly posits that courts should consider the following factors when recognizing testimonial privileges:

1. What privacy the privilege is protecting;
2. What individual and societal benefits flow from public protections afforded that privacy;
3. Whether a testimonial privilege actually contributes to that end; and
4. Whether less drastic means might work.

However, unlike Wigmore, Krattenmaker argues strongly for recognizing privileges to protect confidential communications between parent and child, between counselor and client, and even between roommates. Krattenmaker's flexible application of the instrumental rationale reflects an openness to recognizing new privileges that

of communication would necessarily be an imperfect union. Utter freedom of marital communication from all government supervision, constraint, control or observation, save only when the communications are for an illegal purpose, is a psychological necessity for the perfect fulfillment of marriage.

Again, some may argue that society has no legitimate interest in making same-sex partnerships as fulfilling as they can be. Others already have noted that if citizens are going to engage in same-sex marriages, society does have an interest in making sure that those marriages are as strong and healthy as they can be. See, e.g., 15 V.S.A. § 7 History (2000) ("The state has a strong interest in promoting stable and lasting families, including families based upon a same-sex couple.").

Wigmore would have thought this highly unlikely. He believed that even the physician-patient privilege was unnecessary since, under his analysis, no patient would withhold information from his or her physician based on the fear it would later be disclosed in court. IMWINKELRIED, supra note 28, § 3.2.3. Today, a different analysis may yield different results. For example, a patient who fears he might have been exposed to HIV may withhold potentially relevant information about how he might have been exposed from his physician because he lives in a state where same-sex sexual conduct is criminally punishable or might result in a derogation of his rights in a civil litigation context (e.g., his parental rights might be affected).

If the privileges are ever to be extended to nonmarital relationships, it seems likely that this will be the result of either greater emphasis on the noninstrumental justifications for the privileges or of legislative enactment.

165. Krattenmaker, supra note 25, at 86.
166. Id. at 94.
Wigmore's analysis does not. 167

Finally, Edward Imwinkelried's test is a humanistic, rather than an instrumental, one. It asks:

(1) whether the relation is a consultative one;
(2) whether there is a relatively firm societal understanding that the consultant's duty is to help the other person pursue his or her interests and make a choice; and
(3) whether the consultative relationship is centered on choices in an area of the person's life implicating a fundamental life preference. 168

Imwinkelried argues that "in the future in developing privilege doctrine, courts should place greater stress on non-instrumental, humanistic considerations." 169 His test reflects this approach by omitting the cause-and-effect analysis required by instrumentalis. Imwinkelried expresses the classic humanistic sentiment when he observes that "[w]henever there is a significant risk to the independence of a citizen's fundamental life preference choice, a liberal democracy should take affirmative steps to safeguard the autonomy of the choice." 170 Such respect for and protection of individual autonomy is the hallmark of a liberal democracy; its absence is the hallmark of regimes that stand in sharp contrast to the principles of American jurisprudence. 171

A citizen's choice to embrace privacy first was articulated as a legal

167. Louisell, supra note 27, at 111 (Wigmore's "strictly utilitarian bases for the privileges . . . are sometimes highly conjectural and defy scientific validation.").
168. IMWINKELRIED, supra note 28, § 5.4.3.
169. Id. § 2.3.
170. Id. § 5.3.3.
171. Consider, for example, that in Nazi Germany attorneys had a duty to reveal a client's confidential communications if the client's position was adverse to the collective position of the party. IMWINKELRIED, supra note 28, § 5.3.3. Consider also the hostility toward autonomous thought that forms the leitmotif of classic dystopian tales. See, e.g., GEORGE ORWELL, NINETEEN EIGHTY-FOUR 5 (Alfred A. Knopf 1992) (1949) ("You had to live . . . in the assumption that every sound you made was overheard . . . "), 210–11 ("A Party member lives from birth to death under the eye of the Thought Police. Even when he is alone he can never be sure that he is alone . . . . A Party member is expected to have no private emotions . . . ."); ALDOUS HUXLEY, BRAVE NEW WORLD & BRAVE NEW WORLD REVISITED 235 (Harper & Row 1965) (1932) ("'But people never are alone now,' said Mustapha Mond. 'We make them hate solitude; and we arrange their lives so that it's almost impossible for them ever to have it.'"); RAY BRADBURY, FAHRENHEIT 451 58 (Simon & Schuster Inc. 1993) (1951) ("'We must all be alike. Not everyone born free and equal, as the Constitution says, but everyone made equal.'") (emphasis in original).
right in the United States with the 1890 publication of Samuel Warren's and Louis Brandeis's epochal\(^{172}\) article, *The Right to Privacy*, in the *Harvard Law Review*.\(^{173}\) Warren and Brandeis argued that the elevation of privacy to a legal right was a natural step in the development of the law.\(^{174}\) The humanistic rationale for extending the marital communications privilege recognizes the fundamental truth that privacy, autonomy, and choice hold the same value for participants in a same-sex partnership as they do for participants in a heterosexual marriage.\(^{175}\)

A federal court considering whether to protect confidential communications between same-sex partners under Imwinkelried's test might note that courts already have admitted evidence and heard arguments that same-sex partnerships involve the same devotion between partners as do heterosexual marriages;\(^{176}\) that same-sex partners love each other as much as heterosexual spouses do;\(^{177}\) that same-sex partners care for their families together, including parents and children, as heterosexual spouses do;\(^{178}\) that same-sex partners' love is exclusive and long-term, as heterosexual spouses' love is;\(^{179}\) and that same-sex couples want to be bound by their commitments in the same way that heterosexual spouses are bound.\(^{180}\) Under this analysis, a court may

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172. IMWINKELRIED, supra note 28, § 5.3.3 (Dean Roscoe Pound of Harvard Law School was the first to label the article "epochal.").


174. Id.

175. Indeed, given their position as a disfavored minority, it is likely that same-sex partners look to the State to protect their privacy, autonomy, and choice more than heterosexual spouses do. *See generally The Federalist Papers, No. 51* (James Madison) 321 (Isaac Kramnick ed., Penguin Books 1987) (1778); Thomas Jefferson, First Inaugural Address (March 4, 1801) ("All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.").


177. Appellants' Brief at 3, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860) (filed Nov. 8, 2002) ("Hillary Goodridge and Julie Goodridge celebrated their fifteenth anniversary in April 2002 and live in Boston with their seven-year-old daughter. They seek to marry because they love one another.").

178. Id. at 3 ("David and Rob took care of David's parents when they were ill.").

179. Id. at 4–5 ("Maureen Brodoff and Ellen Wade ... have enjoyed an enduring and loving partnership for over twenty-one of those years."), 7 ("Gloria Bailey and Linda Davies ... celebrated their thirtieth anniversary in March 2002.").

180. Id. at 6–7 ("They seek marriage to make binding their love and commitment to one another. . . .") *; see also GERSTMANN, supra note 119, at 6 ("Gays and lesbians crave entry to...").
conclude that it is "morally repugnant" to force one partner to testify against another in a same-sex partnership; the testimony itself is as much a betrayal to a same-sex partnership as it is to a heterosexual marriage.\footnote{181}

D. Scholarly Approaches to the Privilege

At least two scholars have specifically advocated protecting confidential communications made between same-sex partners. Kenneth Graham has noted that he would be "happy to abolish the 'normative distinction' [between heterosexual and homosexual love], at least insofar as it affects privilege."\footnote{182} And Jennifer Brannen argues that "[e]xtension of the marital [confidential communications] evidentiary privilege would insure procedural fairness."\footnote{183}

Several other scholars have argued generally for extending the protection of a confidential communications privilege beyond a married husband and wife. As one group noted, "[m]any other relationships are also intimate and loving."\footnote{184} Similarly, Krattenmaker argued for adopting "a broader privilege for confidential communications generally,"\footnote{185} suggesting that federal courts retain authority to "examinate[e] upon their merits further claims of testimonial privilege with respect to personal confidential communications," including confidences "between parent and child or counsellor and client or roommate and roommate."\footnote{186} Indeed, he even proposed that "[a] general, qualified privilege for confidential communications that pass between individuals intimately related or in a position of close personal trust should be adopted."\footnote{187} A federal court considering whether to protect confidential communications between same-sex partners likely will weigh these scholars’ opinions, and possibly others yet to be expressed, to discern how academic approaches affect the decision.


\footnote{182.} 23 WRIGHT & GRAHAM, JR. supra note 34, § 5422.1, n.34; see also, Jennifer R. Brannen, Unmarried with Privileges? Extending the Evidentiary Privilege to Same-Sex Couples, 17 REV. LITIG. 311, 324 (1998).

\footnote{183.} Brannen, supra note 182, at 341.

\footnote{184.} Developments in the Law, supra note 181, at 1582 n.141.

\footnote{185.} Krattenmaker, supra note 25, at 94.

\footnote{186.} Id.

\footnote{187.} Id.; see also Angie Smolka, That's The Ticket: A New Way of Defining Family, 10 CORNELL J.L. & PUB. POL’Y 629 (2001) (advocating a “ticket system” under which rights, including evidentiary privileges, traditionally reserved for family members, might be allocated).
VI. PRACTICAL CONSIDERATIONS

As federal courts consider protecting confidential communications between same-sex partners under the federal marital communications privilege, they likely will struggle most analytically with the requirement of the "existence of a valid marriage." Indeed, many courts have refused to extend the privilege to heterosexual, cohabitating partners on the basis that they do not have a "valid marriage." 188

The concept of a valid marriage is dynamic and fluctuates with time and culture. 189 Consider, for example, that until the Supreme Court decided Loving v. Virginia 190 in 1967, a marriage between an African-American and a Caucasian was considered invalid in sixteen states. 191 Courts already have dealt with the issue of the existence of a "valid marriage" in the heterosexual context and their analysis in that context could inform the analysis here: where the privilege is asserted but no "official" marriage ceremony has occurred and no state-issued license exists, courts ask whether a common-law marriage exists under state law. 192 Using this analysis, many courts refuse to apply the privilege. 193 However, unmarried, heterosexual couples have been given the option to marry and have chosen not to do so. Same-sex partners, with the exception of Massachusetts residents, do not have the option to marry. 194 Thus, courts' refusal to extend the privilege to heterosexual common law marriages is largely irrelevant to this analysis.

Rather, the test might be whether the parties have assumed the benefits and burdens of a marriage. In the context of same-sex partnerships, partners who have married 195 or who have entered into a civil union make the easiest candidates for extending the privilege. 196 These partners have gone through the formal process of a ceremony, and they have assumed the legal, financial, and other obligations

188. 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 207 n.24 (2d ed. 2003) (collecting cases).
189. Milton C. Regan, Spousal Privilege and the Meanings of Marriage, 81 VA. L. REV. 2045, 2065 (1995) (“What it means to be married is constructed and reconstructed on an ongoing basis as the exigencies of daily life present legal issues that must be resolved.”).
190. 388 U.S. 1 (1967).
191. Id.
192. 2 MUELLER & KIRKPATRICK, supra note 188, § 207 n.24 (collecting cases).
193. Id.
194. IMWINKELRIED, supra note 28, § 6.9.1 (a)(1).
195. To date, only Massachusetts allows same-sex partners to marry and, as of this writing, Massachusetts grants this right only to its own residents. Abraham & Klein, supra note 157, at A1; Abraham & Castelli, supra note 157, at B1.
attendant to a marriage. Indeed, whether same-sex partners have availed themselves of whatever formalities are offered them has been recognized as the test for extending to them other benefits in other contexts. Thus, the New York courts have allowed a surviving same-sex partner to pursue his claim under that state's wrongful death statute because he and his partner had gone through the formalities of forming a civil union under Vermont's statute and their relationship had other indicia of a long term commitment.\textsuperscript{197}

In states where neither marriage nor a civil union is available,\textsuperscript{198} courts might inquire whether the partners have created as much of a marriage as the law allows them to. For example, courts might consider:

1. whether the partners cohabitate;
2. whether the partners are jointly responsible for "basic living expenses"\textsuperscript{199} or share other financial responsibilities;
3. whether the partners are both on the deed or lease to their home;
4. whether the partners have made provisions for each other (e.g., are they named on each other's insurance policies or in each other's wills?); or
5. the length of the relationship and the intentions of both partners regarding the permanence of relationship.\textsuperscript{200}

In short, the practical considerations of extending the privilege to same-sex partners are not insurmountable.\textsuperscript{201} And litigants and courts


\textsuperscript{198} Courts will have to address the question how far a same-sex couple may be required to travel before the presumption that no civil union or same-sex marriage was available should apply. For example, the \textit{Langan} court noted that the plaintiff and his partner had traveled from their home in New York to Vermont to be joined in a civil union. \textit{Langan}, 2003 WL 21294889 at *1. Had they not traveled to Vermont, the court may have chosen to consider that failure as evidence that they ought not be treated as spouses, given the geographic proximity of New York and Vermont.


\textsuperscript{200} See, \textit{e.g.}, N.J. REV. STAT. § 26:8A-4(b); SAN FRANCISCO, CAL., ADMIN. CODE, § 62.2 (2003).

\textsuperscript{201} It may be argued that such a factual inquiry will draw resources away from the issue being litigated. However, courts regularly engage in factual inquiries unrelated to the central
are becoming more accustomed to raising and addressing the issue.  

VII. CONCLUSION

At some point, federal courts likely will be asked to protect confidential communications between same-sex partners under the marital communications privilege. In conducting their analysis under Rule 501’s mandate to flexibly develop privilege law, courts will consider: (1) federal policy; (2) state approaches; (3) policy goals that traditionally have informed the development of privilege law; and (4) scholarly commentary. Although each factor offers some precedent for extending the privilege—the Supreme Court’s Lawrence opinion, the Vermont and California statutes, a liberal application of Krattenmaker’s and Imwinkelried’s analyses, and Graham’s and Brannen’s advocacy—realistically, most courts will view extending the privilege to same-sex partners as a bold move approaching judicial activism. An immediate and full-fledged extension of the privilege seems unlikely.

In the meantime, the debate between those who would protect communications between same-sex partners and those who would not more readily resembles the paradigmatic dispute between Antigone and Creon. Those who, like Creon, believe the current, state-imposed laws are inviolate will refuse the privilege. Those who, like Antigone, believe the eternal laws of family loyalty and ethical choice supercede the state’s current pronouncement of the law will seek to apply the privilege. As the two sides litigate the issue, federal courts will resolve it on a case-by-case basis, “in the light of reason and experience.”

issue being litigated. Consider, for example, the resources courts and litigants expend on evidentiary hearings to determine the propriety of expert testimony under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).


203. SOPHOCLES, ANTIGONE (1977). In Sophocles’ epic tragedy, Antigone insists on providing her slain brother Polyneices with a proper funeral despite Creon’s prohibition forbidding any citizen from performing this rite. Id. at 186. The dispute between Antigone and Creon has long represented the classic dispute between the individual and the state.