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He Said, She Said: Sex Crime Prosecutions and Spousal Privileges Under the Federal Rules of Evidence

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HE SAID, SHE SAID: SEX CRIME PROSECUTIONS AND SPOUSAL PRIVILEGES UNDER THE FEDERAL RULES OF EVIDENCE

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INTRODUCTION

On May 10, 2005, in connection with his own criminal investigation and arrest, Shon Lindstrom provided the Federal Bureau of Investigation ("FBI") with information regarding an online child pornography exchange in which he had participated.[1] Lindstrom informed police that a man by the name of Jerry Banks had electronically shared with Lindstrom pornographic videos depicting Banks's sexual abuse of his two-year-old grandson.[2] The FBI's subsequent investigation revealed that Banks was the moderator and host of an online chat room called "Kid Sex and Incest," where "numerous" child pornography files were available for download.[3] On May 21, 2005, a search warrant was executed upon Banks's computer and electronic storage devices.[4] Among these devices, the FBI found material constituting child pornography, including a video portraying Banks's masturbation of his grandson, as had been described by Lindstrom.[5] Banks, who had already served time in prison for sexually abusing his own son, was arrested and charged with the possession, production, transportation, and receipt of images of child pornography.[6]

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[1] United States v. Banks, No. CR. 06-051-S-BLW-WBS, 2006 U.S. Dist. LEXIS 82368, at *1–2 (D. Idaho Oct. 27, 2006).

[2] *Id.*

[3] *Id.* at *2–3.

[4] *Id.* at *3.

[5] United States v. Banks, 556 F.3d 967, 971 (9th Cir. 2009).

[6] *Id.* at 971; *id.* at 982 (Alarcón, C.J., concurring); *see* 18 U.S.C. § 2251 (2006 & Supp. II 2008).

At his bench trial, the defendant's wife, Kathryn Banks, testified as to incriminating comments her husband made to her prior to his arrest regarding the video.[7] Banks was convicted at the trial level and later appealed to the U.S. Court of Appeals for the Ninth Circuit, arguing that under the federal common law doctrine of spousal privilege, the district court had erred by not allowing him to invoke the spousal communications privilege in order to preclude his wife's testimony.[8] The Ninth Circuit agreed, rejecting the district court's somewhat progressive application of the spousal privilege.[9] Specifically, the Ninth Circuit disagreed with the district court's extension of an existing exception to the spousal privilege—namely, the spousal crime exception, which rendered the privilege inapplicable when the defendant was charged with committing crimes against his or her spouse—to also encompass cases where, as in the instant case, the defendant was charged with crimes against his or her grandchild.[10] Rather, the Ninth Circuit held that the scope of the exception was limited to instances in which a defendant was charged with crimes against a child or the "functional equivalent" of a child of one or both of the spouses and further stated that Banks's grandson did not qualify as the "functional equivalent" of his or his wife's child.[11]

Through its holding in *Banks*, the Ninth Circuit effectively decided that the spousal communications privilege, an evidentiary canon aimed at protecting confidential communications between spouses,[12] should prevail even where a defendant is accused of a devastating and morally reprehensible crime—but only if the victim was not the "functional equivalent"

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[7] *Id.* at 971 (majority opinion) (stating that Mrs. Banks testified that the defendant had made statements to her wherein he admitted to creating the video in order to assure her that "nothing went on in changing the diaper because of past things").

[8] *Id.* at 974.

[9] *Id.* at 975–78.

[10] *Id.* at 976.

[11] *Id.* at 974–78. The court explained that relationships that would be considered the "functional equivalent" of a parent-child relationship would carry "indicia of guardianship and responsibility." *Id.* at 976. It went on to note other factors relevant to such a determination, including whether there was a consistency of care greater than "[i]nfrequent overnight visits" and whether the child-victim lived on a full time basis with the defendant at the time of the alleged incidents. *Id.*

[12] *See infra* Part I.B.

of his or his spouse's child.[13] Other federal courts, including the Eighth Circuit in *United States v. Allery*[14] and the Tenth Circuit in *United States v. Bahe*,[15] had previously considered the applicability of the spousal communications privilege or its counterpart, the adverse testimonial privilege, in cases where the defendant was accused of sexual crimes against a minor. While both the Eighth Circuit and the Tenth Circuit considered general policy goals in their decisions, each court limited its analysis to address only circumstances involving allegations with a child or minor as alleged victim.[16] All three circuits, therefore, in focusing on the status of the alleged victim, failed to adequately consider the particularly heinous nature of the types of crimes alleged in the three cases—attempted rape,[17] sexual abuse,[18] and the production and distribution of child pornography.[19]

Both the spousal communications privilege and the adverse testimonial privilege are rooted in ancient evidentiary principles favoring the promotion of marital intimacy and privacy.[20] Over time, federal courts began recognizing an exception to these privileges—known as the "spousal crime" exception, involving crimes committed by one spouse against the other—in the interests of justice and fairness.[21] As seen in *Banks*, *Allery*, and *Bahe*, courts have contemplated, and disagreed about, whether this exception should extend to sexually abusive crimes committed against minors.[22] This Note argues that federal courts, in considering the applicability of either the spousal communications privilege or the adverse testimonial privilege,[23] should look to the *type* of crime alleged against the defendant and should carve out an exception rendering these privileges

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[13] *Banks*, 556 F.3d at 976.

[14] United States v. Allery, 526 F.2d 1362, 1367 (8th Cir. 1975).

[15] United States v. Bahe, 128 F.3d 1440, 1446 (10th Cir. 1997).

[16] *See Bahe*, 128 F.3d at 1446; *Allery*, 526 F.2d at 1366–67.

[17] *Allery*, 526 F.2d at 1363 (stating that the defendant was charged with attempting to rape his twelve-year-old daughter).

[18] *Bahe*, 128 F.3d at 1441 (stating that the defendant was charged with sexual abuse for allegedly penetrating his eleven-year-old female relative's vagina with his hand and finger).

[19] United States v. Banks, 556 F.3d 967, 970–71 (9th Cir. 2009).

[20] *See infra* Part I.

[21] *Allery*, 526 F.2d at 1365.

[22] *See Banks*, 556 F.3d at 974; *Bahe*, 128 F.3d at 1441; *Allery*, 526 F.2d at 1365.

[23] Two separate spousal privileges exist: the spousal communications privilege and the adverse testimonial privilege. *See infra* Part I.

unavailable wherever the defendant has been charged with a sex crime,[24] regardless of the victim's age or relationship to the defendant. This Note discusses and explains the uniquely heinous nature of such crimes, their markedly devastating effects on victims, and the inherent challenges and difficulties in successful prosecution, in order to emphasize the importance of allowing them special evidentiary consideration.

Part I discusses the history of spousal privileges, the two types of spousal privileges, and the justifications most often cited in support of their continued application. Part II reviews the evolution of the spousal crime exception and how different federal courts have broadened or expanded the scope of the exception in the context of cases involving crimes allegedly committed against a child victim. Part III discusses Federal Rules of Evidence 413, 414, and 415—landmark changes to federal evidentiary law reflecting Congress's special concern for admitting certain probative evidence in sexual assault and child molestation cases. Lastly, Part IV argues that, in light of the unique characteristics of sex crimes—namely, their particularly reprehensible nature, their lasting effects upon both victims and society at large, the inherent difficulties in prosecuting them, and the pressing need to successfully and correctly convict sex offenders—which set them apart from other crimes, the traditional justifications behind spousal privileges fail to support their continued application to cases involving alleged sex crimes.

[24] For the purposes of this Note, the term "sex crime" encompasses crimes prosecuted under the following federal statutes: 18 U.S.C. § 2241 (2006 & Supp. I 2007) (entitled "Aggravated sexual abuse"); 18 U.S.C. § 2242 (2006 & Supp. I 2007) (entitled "Sexual abuse"); 18 U.S.C. § 2243 (2006 & Supp. I 2007) (entitled "Sexual abuse of a minor or ward"); 18 U.S.C. § 2244 (2006 & Supp. I 2007) (entitled "Abusive sexual contact"); and any other federal offense, including offenses relating to the production, distribution, receiving, or possession with intent to distribute of obscene material involving minors engaging in sexually explicit conduct, where it is alleged that the defendant, in furtherance of the offense, committed acts which would tend to satisfy the elements of one of the above listed crimes at a prima facie level, regardless of whether the defendant was formally charged with any of the above listed crimes. For example, the author's definition of "sex crime" would apply in the *Banks* case, because the defendant was accused of committing acts against his grandson which would constitute at least a prima facie case under section 2243 of the United States Code.

I. HISTORY OF SPOUSAL PRIVILEGES

The very existence of privileges in the realm of evidentiary law signifies a weighty societal importance bestowed upon certain relationships, as such privileges often operate to exclude accurate, reliable, and extremely probative evidence that is often otherwise unattainable.[25] In particular, privileges emphasize and encourage free disclosure and the protection of privacy and trust in certain revered personal and professional relationships.[26] Examples of these traditionally revered relationships include attorney-client, clergy-penitent, psychotherapist-patient, and, significantly, husband-wife.[27] Dating back centuries, spousal privileges have long functioned to protect the marital relationship and promote familial harmony.[28]

Another unique attribute of privileges, at least in the realm of evidentiary rules, is that they are guided by federal common law.[29] In 1958, the drafting process of the Federal Rules of Evidence began with the goal of codifying and clarifying the common law rules, which had dominated the federal courts for centuries.[30] The judiciary committee that drafted the rules struggled to overcome internal conflict and reach agreement over how to draft rules governing evidentiary privileges.[31] Ultimately, the judiciary committee recommended through Draft Article V that many traditionally recognized privileges be eliminated.[32] Congress, however, reacted vehemently to the committee's suggestions in Draft Article V, and a "fruitless" two-year debate ensued.[33] The "hot potato" of privilege doctrine proved both "controversial" and "emotionally provocative,"[34] and eventually Congress decided that Federal Rule of Evidence 501 would

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[25] Emily C. Aldridge, Note, *To Catch a Predator or To Save His Marriage: Advocating for an Expansive Child Abuse Exception to the Marital Privileges in Federal Courts*, 78 FORDHAM L. REV. 1761, 1767 (2010).

[26] *Id.*

[27] Trammel v. United States, 445 U.S. 40, 43–52 (1980).

[28] *See infra* Part I.C.

[29] Aldridge, *supra* note 25, at 1765.

[30] Edward J. Imwinkelried, *Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted: The Strength of the Ingroup Loyalty of the Federal Judiciary*, 58 ALA. L. REV. 41, 44–45 (2006).

[31] *Id.* at 46–47.

[32] *Id.* at 47.

[33] *Id.* at 47–48; Aldridge, *supra* note 25, at 1770.

[34] Imwinkelried, *supra* note 30, at 48, 50.

replace any precise rules governing evidentiary privileges.[35] As a result, Federal Rule of Evidence 501 is the only rule covering evidentiary privileges and functions to give the power to the federal courts themselves to expand, limit, shape, and change the law of privileges as they see fit "in light of reason and experience."[36]

This power—that is, the power to shape privileges as time goes on and societal norms change—necessarily indicates that the Legislature intended this area of evidentiary law to be dynamic. This Note argues that "reason and experience" have shown that sex crimes, with their uniquely reprehensible nature, traumatic effect on their victims, serious risks to society, and difficulties in prosecution warrant their own exception to the traditionally-recognized spousal privileges in federal courts. In order to familiarize the reader with spousal privileges, how they work, and the justifications behind their current application in federal courts, Parts I.A and I.B will explain the two types of spousal privileges and how they differ. Part I.C will then discuss the two principally-cited justifications for the continued application of spousal privileges in federal courts.

A. Adverse Testimonial Privilege

The adverse testimonial privilege[37] prevents a witness from being compelled to testify against his or her spouse.[38] A "vestige of a long-abandoned common law rule,"[39] the privilege dates back

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[35] Aldridge, *supra* note 25, at 1770–71.

[36] FED. R. EVID. 501 ("The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court.").

[37] The adverse testimonial privilege has also been called the "testimonial privilege," the "marital testimonial privilege," the "spousal testimonial privilege" or the " 'marital or spousal 'disqualification' privilege." Mark Glover, *Evidentiary Privileges for Cohabiting Parents: Protecting Children Inside and Outside of Marriage*, 70 La. L. Rev. 751, 761 (2010); R. Michael Cassidy, *Reconsidering Spousal Privileges After* Crawford, 33 Am. J. Crim. L. 339, 356 (2006); Aldridge, *supra* note 25, at 1765. In other contexts, it has also been called the " 'anti-marital facts' privilege." United States v. White, 974 F.2d 1135, 1137 (9th Cir. 1992). For the purposes of this Note, the privilege will be referred to as the "adverse testimonial privilege."

[38] Amanda H. Frost, *Updating the Marital Privileges: A Witness-Centered Rationale*, 14 WIS. WOMEN'S L.J. 1, 12 (1999).

[39] Cassidy, *supra* note 37; *see also* Trammel v. United States, 445 U.S. 40, 43–44 (1980); Glover, *supra* note 37, at 762.

to the seventeenth century and the doctrine of spousal incompetency,[40] which dictated that, because a woman was her husband's property, allowing her testimony against her spouse would effectively amount to forced self-incrimination.[41] Running concurrently with that doctrine was the canon that a party may not testify on his own behalf given his interest in the outcome of the proceedings.[42] Although the Supreme Court abrogated the doctrine of spousal incompetency in 1933 through its holding in *Funk v. United States*,[43] the Court preserved the adverse testimonial privilege itself.[44] Later, in *Hawkins v. United States*, the Supreme Court explicitly stated that the adverse testimonial privilege operates to preserve the marital relationship.[45] Approximately twenty years later, in *Trammel v. United States*, the Court retreated somewhat from its earlier views and significantly changed the scope of the privilege by limiting the ability to invoke its protection to the witness-spouse only, effectively eliminating a defendant-spouse's right to single-handedly bar testimony of his or her spouse.[46] In doing so, the Court reasoned that, where a witness-spouse is willing to testify in a criminal proceeding against his or her spouse, the marriage is likely in "disrepair" and the rationale behind the spousal privilege would not be furthered by allowing a defendant-spouse to bar such testimony.[47]

In order for the adverse testimonial privilege to apply, three requirements must be met: (1) the proceedings for which the privilege is sought to be invoked must be of a criminal nature; (2) the couple must be legally married at the time of trial; and (3) the invoking party may only invoke the privilege with respect

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[40] Aldridge, *supra* note 25, at 1772.

[41] *Trammel*, 445 U.S. at 44; Glover, *supra* note 37, at 762.

[42] *Trammel*, 445 U.S. at 44; Cassidy, *supra* note 37.

[43] 290 U.S. 371, 381 (1933).

[44] *Id.* at 386–87 (overturning prior cases which held that a wife was excluded from testifying for her husband due to her interest in the event, without regard to the type of testimony she might give).

[45] 358 U.S. 74, 77–79 (1958) (explaining that "[a]dverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage").

[46] *Trammel*, 445 U.S. at 53.

[47] *Id.* at 52 ("When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve.").

to testimony tending to incriminate the defendant-spouse.[48] The testimonial privilege thus specifically operates to preserve marriages currently in existence at the time of trial, without regard to whether the defendant and his or her spouse were legally married at the time of the event in question.[49]

Much criticism has been leveled at the adverse testimonial privilege over the years.[50] Courts and scholars have long denounced the idea that wives are their husbands' chattel and similarly have rejected the ancient doctrine that assumes only one shared, unitary identity between spouses.[51] The Supreme Court's holding in *Trammel* belies its own discomfort with the prospect of preserving a marriage at the expense of justice in cases where the witness-spouse is willing to actively assist in the defendant-spouse's conviction. In the struggle to balance competing interests in justice and preserving marriage through the adverse testimonial privilege's continued application, some courts have even taken it upon themselves to impose a judicial review of a marriage's viability, attempting to reach a judicial determination regarding whether a marriage is stable enough to warrant legal protection where the defendant-spouse and the witness-spouse are separated at the time of trial.[52]

B. Spousal Communications Privilege

The spousal communications privilege[53] may be one of the oldest testimonial privileges in English common law.[54] Its function has long been to bar disclosure of information obtained through private communications between the spouses, and generally may be invoked by either the witness-spouse or the

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[48] Frost, *supra* note 38.

[49] *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1567 (1985) [hereinafter *Developments in the Law*].

[50] Frost, *supra* note 38, at 13 ("The adverse testimony privilege has been under continuous attack . . . .").

[51] Aldridge, *supra* note 25, at 1775.

[52] *Developments in the Law*, *supra* note 49, at 1566; Frost, *supra* note 38, at 14.

[53] The privilege has also been called the "marital communications privilege" or "confidential communications privilege." *See Developments in the Law*, *supra* note 49, at 1564–65. For the purposes of this Note, the privilege will be referred to as the "spousal communications privilege."

[54] Cassidy, *supra* note 37, at 357. *But see* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2227 (McNaughton ed., 1961); *Developments in the Law*, *supra* note 49, at 1565; Frost, *supra* note 38, at 8.

defendant-spouse in federal courts.[55] The sanctity of marital trust and intimacy traditionally has been deemed so "essential" to preserving marriage as to outweigh the justice system's interests in using evidence barred by the privilege to secure criminal convictions.[56] The spousal communications privilege therefore operates to guard marital intimacy and privacy, in that it protects all confidential communications made between spouses during the course of their marriage without regard to whether that marriage remains intact at the time of trial.[57]

In order for the spousal communications privilege to be applicable, three prerequisites must be met.[58] First, there must have been a communication between the spouses.[59] These communications generally involve written and verbal expressions made with a "subjective intent to transmit information."[60] The second requirement is that the communication was intended to be kept confidential.[61] While there is a general presumption that spousal communications are confidential, this presumption may be rebutted either by showing that the spouses knew that a third party was present for the communication or that, regardless of the circumstances under which the communication was actually made, the communicating spouse intended the statements to be disclosed to others.[62] Lastly, the defendant-spouse and the witness-spouse must have been legally married at the time the communication was made.[63]

The spousal communications privilege differs from the adverse testimonial privilege in a few ways. While the adverse testimonial privilege is held by the witness-spouse, in that he or she has the ability to choose whether to testify against the

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[55] Aldridge, *supra* note 25, at 1776–77.

[56] Wolfle v. United States, 291 U.S. 7, 14 (1934) (stating that "[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"); *see also* Cassidy, *supra* note 37, at 358.

[57] Aldridge, *supra* note 25, at 1777–78.

[58] Cassidy, *supra* note 37, at 357.

[59] *Id.*

[60] *Developments in the Law*, *supra* note 49, at 1572; *see also* Cassidy, *supra* note 37, at 357 (describing communications as "words or utterances intended to convey a message").

[61] Cassidy, *supra* note 37, at 357–58.

[62] Glover, *supra* note 37, at 765.

[63] Cassidy, *supra* note 37, at 357.

defendant-spouse, the spousal communications privilege may be invoked by either the witness-spouse or the defendant-spouse—thus allowing a defendant-spouse to bar his or her spouse from testifying, regardless of the witness-spouse's desire to testify.[64] Furthermore, unlike the adverse testimonial privilege, the spousal communications privilege applies in both criminal and civil proceedings.[65] Lastly, while the applicability of the adverse testimonial privilege hinges on whether the spouses are still legally married at the time of trial, the applicability of the spousal communications privilege is contingent only on whether the defendant-spouse and the witness-spouse were legally married at the time the communications in question occurred.[66]

The spousal communications privilege generally has received less scrutiny than its sister privilege.[67] Commentators, however, have noted that the application of the confidential communications privilege can be complicated because marriages do not consist wholly of oral and written communications.[68] For example, it may be difficult to determine whether nonverbal signals and gestures—typically well understood between spouses—technically constitute "communications," despite the fact that the purported justifications behind the privilege would seem to render these nonverbal signals just as subject to protection as their verbal counterparts.[69] Additionally, as seen in *Banks*, communications between spouses may be particularly probative and compelling, and the inadmissibility of such communications at trial arguably represents a more significant impediment to the administration of justice than even the adverse testimonial privilege.

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[64] *Id.* at 356–58.

[65] Aldridge, *supra* note 25, at 1776.

[66] *Id.* at 1777–78.

[67] Ryan v. Comm'r, 568 F.2d 531, 544 n.6 (7th Cir. 1977) (discussing how the spousal communications privilege has avoided the "intense criticism" that has accompanied the adverse testimonial privilege); *see also* Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2056–57 (1995).

[68] Frost, *supra* note 38, at 11–12.

[69] *Id.*; *see* United States v. Bahe, 128 F.3d 1440, 1441 (10th Cir. 1997) (describing how the defendant often inserted his finger into his wife's vagina while she was asleep, bent his finger into a "hook," and pulled it out forcefully in order to signal to her that he wanted to have sex—a maneuver he also allegedly performed on an eleven-year-old female relative he was accused of sexually abusing).

C. Justifications for Spousal Privileges

While spousal privileges traditionally have been supported on a variety of different policy grounds, there are two main justifications that commentators cite as rationale for their continued application.[70] The utilitarian rationale, first promulgated by Professor Wigmore through a four-factor balancing test, has been applied to virtually all modern federal privileges[71] and is frequently invoked by courts in balancing the costs and benefits to applying and/or extending evidentiary privileges.[72] The other primary rationale among commentators and courts is the protection of marital and familial privacy, often called the "humanistic rationale."[73] Each of these justifications is discussed in turn below in Parts II.C.i and II.C.ii.

In addition to these widely accepted justifications, other theories have been suggested to support the legacy of spousal privileges. The "image theory," although "never explicitly invoked by courts," justifies the privilege as protecting the public perception or "image" of the legal system.[74] This theory posits that the general public would find it repulsive for the legal

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[70] *See, e.g.*, Cassidy, *supra* note 37, at 358 (stating that the primary justifications for spousal privileges are utilitarian and humanistic); *Developments in the Law*, *supra* note 49, at 1577 (stating that marital privileges are mainly supported on utilitarian grounds); Frost, *supra* note 38, at 15 (calling the utilitarian rationale the "most frequently cited justification" for at least the testimonial privileges).

[71] Imwinkelried, *supra* note 30, at 63 (stating that both draft Article V and modern federal privilege law are supported primarily by Wigmore's utilitarian analysis); *see also* Pamela A. Haun, *The Marital Privilege in the Twenty-First Century*, 32 U. MEM. L. REV. 137, 141 (2001) (discussing how Wigmore's analysis "should lie at the foundation of every rule of privileged communications").

[72] For courts that have considered Professor Wigmore's analysis or a variation thereof, see *Jaffee v. Redmond*, 518 U.S. 1, 10–15 (1996) (adopting a similar test); *ACLU v. Finch*, 638 F.2d 1336, 1344 (5th Cir. Unit A. Mar. 1981), *aff'd sub nom*, ACLU v. Mississippi, 911 F.2d 1066, 1068–69 (5th Cir. 1990); and *Garner v. Wolfinbarger*, 430 F.2d 1093, 1100–01 (5th Cir. 1970) (applying analysis to attorney-client privileges).

[73] *See* Cassidy, *supra* note 37, at 360–61; *Developments in the Law*, *supra* note 49, at 1583–85.

[74] *See Developments in the Law, supra* note 49, at 1585 (stating that compelling an unwilling spouse to testify would place the legal system in a no-win situation, in that regardless of whether the witness was truthful or dishonest, the public could deem the forced testimony unfair); s*ee also, e.g.*, A & M v. Doe, 61 A.D.2d 426, 433, 403 N.Y.S.2d 375, 380 (4th Dep't 1978) (holding that compelling adverse spousal testimony could "undermine" public trust in the legal system as a whole); Frost, *supra* note 38, at 20 (discussing how the image theory protects the reputation of the legal system by keeping out potentially unreliable testimony).

system to compel a person to testify against, and assist in the conviction of, his or her spouse in a criminal proceeding.[75] This argument, however, fails to acknowledge the—presumably—equally upsetting result of allowing a true criminal to avoid punishment and denying a true victim retribution. The image theory further contends that the possible result of perjury where the law compels adverse spousal testimony may similarly serve to weaken the public's faith in the justice system.[76] Again, however, this position does not give due deference to the protections the justice system has in place for preventing perjury in the many circumstances where a witness may be reluctant to testify truthfully. Because the possibility for perjury always exists—albeit in varying measures, depending on a multitude of factors—faith in the accuracy and legitimacy of the adversary system necessarily must depend on public trust in protections such as the oath taken by each witness, the process of cross-examination, and an impartial jury's role as fact-finder to stave off the inherent risk of false testimony.[77]

Another secondary theory, the preservation of marriage theory, similarly has been offered as a justification for the continued application of spousal privileges.[78] This theory posits that the preservation of domestic harmony is an important societal goal which sets marital privileges apart from professional privileges generally.[79] This theory, however, tends to fold into the utilitarian analysis, as the weight of such a societal goal must ultimately be judged against the competing societal goal of administering justice. This Note therefore does not address these two ancillary and less prevalent justifications, and instead focuses on the oft-cited utilitarian and humanistic theories of spousal privileges.[80]

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[75] Frost, *supra* note 38, at 20.

[76] *Id.*

[77] *See id.* at 21 (stating that the system is well-equipped to deal with biased witnesses and possesses the ability to charge those unwilling to testify with contempt of court).

[78] Aldridge, *supra* note 25, at 1780–81; *see also* Frost, *supra* note 38, at 21–22.

[79] Frost, *supra* note 38, at 21–22.

[80] *See infra* Part I.C.1–2.

1. The Utilitarian Analysis and Professor Wigmore's Test

The utilitarian rationale focuses on a social cost-benefit analysis wherever an evidentiary privilege functions to exclude probative evidence.[81] Professor Wigmore set forth a four-factor test involving four separate considerations for courts to use in deciding whether the social benefit of recognizing an evidentiary privilege tends to outweigh any resultant harm from the loss of the privileged evidence at trial.[82] The utilitarian test allows an invoking court, in evaluating the applicability of a privilege, to determine whether the relationship at stake should ultimately be valued above the truth-finding function of the court.[83] The utilitarian analysis generally differs from the "humanistic" approach[84] in that it weighs systemic costs and benefits, as opposed to the narrower consideration of the importance of marital privacy for its own sake.[85]

According to Professor Wigmore, the following four conditions must be met in order for a court to grant or recognize a privilege:

> The communications must originate in a *confidence* that they will not be disclosed[;]
> This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties[;]
> The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*[; and]
> The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[86]

While Professor Wigmore's test specifically addresses communications, its basic idea can be and has been applied to a variety of evidentiary privileges, including the adverse testimonial privilege, through the fourth factor's cost-benefit analysis.[87]

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[81] Cassidy, *supra* note 37, at 358 (stating that the utilitarian rationale justifies the recognition of a privilege "where the social benefits to be achieved from excusing the witness exceed the social costs of losing the testimony.")

[82] *See* WIGMORE, *supra* note 54, § 2285.

[83] Cassidy, *supra* note 37, at 358.

[84] *See infra* Part I.C.2.

[85] *See* Cassidy, *supra* note 37, at 358; Frost, *supra* note 38, at 16.

[86] *See* WIGMORE, *supra* note 54, § 2285.

[87] *See* Frost, *supra* note 38, at 15–16.

The "traditional" utilitarian justification for the adverse testimonial privilege is that to force one spouse to testify against the other in a criminal proceeding would destroy the marriage and may promote perjury, such that the privilege, in allowing the witness-spouse to decide whether to testify, tends to prevent disharmony and encourage truthfulness.[88] Such a contention, of course, assumes that such privileges actually do promote the institution of marriage and that society actually benefits from promoting marriage.[89]

Likewise, the utilitarian argument supporting the spousal communications privilege contends that if such communications were not shielded from the reach of the court, intimacy in marriages everywhere would be "chilled."[90] However, two "[d]ebatable behavioral assumptions" underlie the utilitarian rationale.[91] First, the theory assumes that federal evidentiary laws, and specifically the spousal communications privilege, are known and thus have influence over marital behavior.[92] Second, the utilitarian theory assumes that destruction of the privilege would actually operate to discourage spouses from freely communicating.[93]

2. Marital Privacy

The marital privacy rationale, sometimes deemed the "humanistic" rationale,[94] suggests that it is "fundamentally indecent" for the legal system to intrude upon the privacy of a marriage.[95] This approach to spousal privileges differs from the utilitarian approach in that it focuses on the "value of protecting individual rights" rather than the overall benefits—and costs—to the public.[96] Because marital privacy promotes personal autonomy and fosters intimacy between partners,[97] American jurisprudence has traditionally given much weight to the

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[88] Cassidy, *supra* note 37, at 359.

[89] *See Developments in the Law*, *supra* note 49, at 1578.

[90] *See* Cassidy, *supra* note 37, at 359; *Developments in the Law*, *supra* note 49, at 1577.

[91] *Developments in the Law*, *supra* note 49, at 1578–79.

[92] *Id.* at 1578.

[93] *Id.* at 1579.

[94] Cassidy, *supra* note 37, at 360.

[95] *Id.*; *see* Charles L. Black, Jr., *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 48.

[96] *Developments in the Law*, *supra* note 49, at 1583.

[97] Frost, *supra* note 38, at 24.

"[i]nsulat[ion]" of home and family life from outside influence.[98] Supporters of the privacy theory have pointed to decisions such as *Griswold v. Connecticut*,[99] the Supreme Court case stating that there is a "private realm of family life" impenetrable by the government, as evidence that a constitutional protection for the marital relationship not only exists, but also must apply to communications made within the realm of that relationship.[100] Others have viewed the spousal privileges as protecting the privacy of the marital unit in that they shield it from "the dilemma of conflicting loyalties" inherent when a spouse is compelled by the government to testify against his or her defendant-spouse.[101]

II. THE SPOUSAL CRIME EXCEPTION AND ITS DEVELOPMENT

Despite the role spousal privileges have historically played in the federal common law, even early courts recognized that, at times, the policy supporting such privileges may be outweighed by overwhelming interests in justice. One example of such an overwhelming interest exists in the case of a crime committed by one spouse against the other.[102] In such cases, the spousal privileges would, unless modified, typically function to bar a witness-spouse's testimony. Such a situation would result in, for example, a husband being effectively immune from prosecution for crimes committed against his wife in the home, where his wife would be the "only source of eyewitness testimony."[103] In response to this undesirable phenomenon, federal courts evolved to recognize a spousal crime exception to the privileges, such that

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[98] *Id.*

[99] 381 U.S. 479 (1965).

[100] *Developments in the Law*, *supra* note 49, at 1584 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)); *see also* Black, *supra* note 95.

[101] *Developments in the Law*, *supra* note 49, at 1584–85.

[102] The other example is the joint crime exception. In crimes where both spouses are participants, some federal courts have abrogated the adverse testimonial privilege and/or the marital communications privilege. *See* Frost, *supra* note 38, at 39. Courts that have adopted the exception have stated that marriages wherein the spouses conspire to criminal activity are not "socially beneficial" and not worth preserving. *Id.*; *see* Trammel v. United States, 445 U.S. 40, 51–52 (1980); United States v. Keck, 773 F.2d 759, 767 (7th Cir. 1985); United States v. Clark, 712 F.2d 299, 300–01 (7th Cir. 1983). As such, the need to ensure the administration of justice outweighs the public policy of promoting the marriage.

[103] Cassidy, *supra* note 37, at 361; *see also* Frost, *supra* note 38, at 41.

the spousal privileges typically will be inapplicable where a defendant is accused of committing an offense against his or her spouse.[104]

In *United States v. Allery*, the Eighth Circuit became the first federal court to extend the scope of the spousal crime exception to also encompass crimes allegedly committed against the child or children of either spouse. In *Allery*, the defendant appealed the district court's decision to admit his wife's adverse testimony regarding his actions on the evening he allegedly attempted to rape his twelve-year-old daughter.[105] In contemplating the extension of the privilege, the *Allery* court noted that "a serious crime against a child is an offense against th[e] family harmony and to society as well"[106] and, as such, the purposes of the adverse testimonial privilege would not be furthered by applying the privilege.[107] The court went on to note that in child abuse cases, often the witness-spouse's testimony is crucial to conviction, due to a lack of witnesses.[108] Additionally, the *Allery* court noted that rules impeding "the discovery of truth" also impede "the doing of justice."[109] The court ultimately held that the spousal crime exception to the adverse testimonial privilege should be, and therefore was, extended in Eighth Circuit courts to apply where the defendant-spouse was charged with crimes against a child of either spouse.[110]

Seventeen years later, in *United States v. White*, the Ninth Circuit had occasion to consider whether a defendant should be able to invoke the spousal communications privilege to bar a spouse's testimony where the marital communication in question involved threats to kill the witness-spouse and her daughter.[111]

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[104] The offenses committed in this context have been broadly interpreted to include "any personal wrong done to the other, whether physically, mentally or morally injurious." United States v. Allery, 526 F.2d 1362, 1365 (8th Cir. 1975).

[105] *Id.* at 1363.

[106] *Id.* at 1366.

[107] *Id.* at 1367.

[108] *Id.* at 1366.

[109] *Id.*

[110] *Id.* at 1367. The *Allery* court also considered, in making its decision, the "strong state court authority" in favor of the premise that a crime against a child of either spouse is akin to a wrong committed against the other spouse. *Id.* at 1366. The court further noted that, at the time the court handed down its ruling, at least eleven states within the prior fifteen years alone had passed similar laws barring invocation of the spousal privilege where the defendant was accused of child abuse or neglect. *Id.* at 1367.

[111] United States v. White, 974 F.2d 1135, 1137 (9th Cir. 1992).

In *White*, the defendant was accused of voluntary manslaughter in connection with the death of his two-year-old stepdaughter, just a week after telling his wife that he would kill both her and her child if he were to be left to care for the child again.[112] Using *Allery* as guidance, the court noted that protecting threats made against a spouse or a spouse's children through application of the spousal communications privilege was inconsistent with the "long-standing public policy" interests of protecting marital integrity underlying the application of the privilege.[113] By virtue of this decision, the Ninth Circuit effectively extended the scope of the spousal crime exception to the spousal communications privilege to encompass situations where the policy interests behind the privilege were not furthered by the application of the privilege.[114]

Five years after the *White* decision, the Tenth Circuit in *United States v. Bahe* contemplated the application of the spousal communications privilege where the defendant-spouse was accused of sexually abusing an eleven-year-old female relative visiting the home.[115] In that case, the court was faced with the issue of whether the privilege should function to bar the defendant's wife from testifying about a specific sexual act the defendant often used to initiate sex with her.[116] In its reasoning, the court noted that there was "no significant difference, as a policy matter" between a crime committed against a child of the married couple, as seen in *Allery* and *White*, and a child relative merely visiting the home.[117] The court went on to note that in light of Federal Rule of Evidence 501 and its charge to federal courts to modify spousal privileges according to "reason and experience," it thought it appropriate to extend the logic of the spousal crime exception to all spousal testimony regarding abuse of a minor child within the household.[118]

Most recently, the Ninth Circuit in *Banks* rejected the more expansive views taken by its sister circuits in considering the spousal crime exception.[119] Rather, the *Banks* court opted to

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[112] *Id.*
[113] *Id.* at 1138.
[114] *Id.*
[115] United States v. Bahe, 128 F.3d 1440, 1446 (10th Cir. 1997).
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *See* United States v. Banks, 556 F.3d 967, 974–77 (9th Cir. 2009).

return to the balancing factors considered in *Allery*, zeroing in on an analysis of the purposes underlying the spousal privileges—that is, promoting marital and family harmony—and the application of such privileges to offenses committed against the witness-spouse or the children of one or both of the spouses.[120] The *Banks* court noted that the rationale underlying the privileges would not be furthered by applying the spousal communications privilege to cases where the defendant was charged with crimes against the spouse or either the spouse's child or "functional equivalent" and therefore limited its extension of the spousal crime exception to encompass such cases involving only children or "the functional equivalent" of children.[121] The court declined, however, to extend this logic any further, holding that only "comparable familial ties" between actual and functional children rendered the extension of the spousal crime exception logical.[122] In doing so, the court implicitly decided that the promotion of marital harmony would be furthered by, and indeed would justify, limiting the scope of the spousal crime exception to children and functional children of the spouses and that other minor children in the household would not merit the same level of legal protection against sexual abuse in the face of concerns over promoting marriage.[123]

III. FEDERAL RULES OF EVIDENCE 413–415 AND CONGRESS'S VIEW

The notion that sex crimes warrant separate evidentiary consideration is not a new one.[124] In 1994, in response to growing public concern over sex offenders and the apparent inefficiencies of the criminal justice system in keeping post-release offenders from reoffending,[125] Congress enacted new rules to be added to

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[120] *Id.* at 976.

[121] *Id.* at 974.

[122] *See id.* at 975–76.

[123] *See id.* at 974–77; *see also* Aldridge, *supra* note 25, at 1792.

[124] *See generally* FED. R. EVID. 413–415; Sara Sun Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse*, 4 CRIM. L.F. 307, 313–15 (1993).

[125] R. Wade King, Comment, *Federal Rules of Evidence 413 and 414: By Answering the Public's Call for Increased Protection from Sexual Predators, Did Congress Move Too Far Toward Encouraging Conviction Based on Character Rather than Guilt?*, 33 TEX. TECH L. REV. 1167, 1175 (2002).

the existing Federal Rules of Evidence.[126] These new rules addressed a perceived gap in the evidentiary arena—namely, Federal Rule of Evidence 404(b)[127] and its bar against evidence regarding the defendant's prior acts to be introduced at trial.[128] A "traditional tenet[] of American evidentiary law," this prohibition against admission of character evidence was widely accepted prior to the adoption of Federal Rules of Evidence 413, 414, and 415.[129] Thus, the passage of these rules, which function to allow into evidence testimony regarding the defendant's prior acts in certain sex crime prosecutions, represents a significant acknowledgement by Congress that sex crimes warrant specific consideration.

Prior to the adoption of the new rules, Federal Rules of Evidence 404 and 405 governed the admissibility of character evidence in all types of federal prosecutions.[130] Rule 404(a) states that character evidence is generally inadmissible as propensity evidence, except in limited circumstances.[131] Rule 404(b) further states that while evidence of prior crimes or acts, like other character evidence, is not admissible to show propensity, it *is* admissible as to proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, subject to particular requirements of pre-trial notice.[132] Rule 405, for its part, states that evidence of "specific instances of . . . conduct" are admissible where a person's character is an "essential element of a charge, claim, or defense" or during cross examination of a witness's opinion or reputation testimony.[133] Thus, the ability to introduce evidence of prior specific acts or instances of conduct has long been severely limited in federal prosecutions.

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[126] Joyce R. Lombardi, Comment, *Because Sex Crimes Are Different: Why Maryland Should (Carefully) Adopt the Contested Federal Rules of Evidence 413 and 414 that Permit Propensity Evidence of a Criminal Defendant's Other Sex Offenses*, 34 U. BALT. L. REV. 103, 113 (2004).

[127] FED. R. EVID. 404(b).

[128] King, *supra* note 125, at 1168.

[129] *Id.*

[130] *See* Michael S. Ellis, Comment, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 964–65 (1998).

[131] *See* FED. R. EVID. 404(b).

[132] *Id.*

[133] *Id.* at 405.

Functionally, Federal Rules of Evidence 404 and 405 codify traditions long established in American common law that aim to reduce prejudice.[134] These traditions were born out of an attempt to prevent juries from drawing inferences about whether the defendant "acted in conformity with his character on the particular occasion when there would be little or no corroborating evidence."[135] Indeed, while evidence of prior acts may be exceedingly probative, such evidence also has a remarkable ability to confuse, surprise, and ultimately arouse prejudice within a jury.[136] Therefore, limiting the admissibility of specific prior acts or conduct to situations where either the actor's character is an essential element of a claim, or where the evidence is promulgated for certain enumerated purposes,[137] drastically limits the effect of this potentially prejudicial evidence.[138] The disadvantage of such a limitation, of course, is the exclusion of evidence that may be of the utmost relevance and probative value.[139]

Given these restrictions and their role as "one of the oldest fixtures in American Evidence law,"[140] Federal Rules of Evidence 413, 414, and 415 did not come without a fair amount of controversy.[141] Proposed and supported by United States Senator Robert Dole and Representative Susan Molinari, these Rules essentially codify a ninth exception to Rule 404(b) by allowing evidence of a defendant's prior sexual misconduct and sex offenses to be admitted at trial for the specific purpose of showing that defendant's propensity to commit that type of crime.[142] Specifically, Rules 413, 414, and 415 apply in criminal

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[134] Ellis, *supra* note 130, at 966.

[135] *Id.*; *see also* King, *supra* note 125, at 1170.

[136] *See* Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 290–292 (1994) [hereinafter *Undertaking*]; Ellis, *supra* note 130, at 967; King, *supra* note 125, at 1170–71.

[137] FED. R. EVID. 404(b).

[138] Ellis, *supra* note 130, at 967–68.

[139] *See* Beale, *supra* note 124, at 307–08.

[140] *Undertaking*, *supra* note 136, at 285.

[141] Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 141 (2001); *see also* 140 CONG. REC. H5439 (daily ed. June 29, 1994) (statement of Rep. Schumer); 139 CONG. REC. S15138 (daily ed. Nov. 5, 1993) (statement of Sen. Dole); King, *supra* note 125, at 1178–81 (discussing Congress's "[u]northodox" adoption of Rules 413 and 414).

[142] Lombardi, *supra* note 126, at 113–14.

prosecutions of sexual assault;[143] criminal prosecutions of child sex abuse;[144] and civil prosecutions alleging sexual assault or child molestation,[145] respectively.

In adopting these Rules, Congress looked to the uniqueness of sex crime cases as justification for "special standards and special treatment"—indeed, an altogether different evidentiary standard.[146] Noting that both child-victim and adult-victim sex crime prosecutions have "distinctive characteristics" which make conviction inherently more difficult given traditional evidentiary maxims, Congress ultimately decided that both types of prosecutions needed a carve-out.[147] In making this determination, Congress identified recurring issues in these prosecutions, such as credibility problems,[148] unusual and specific dispositions of defendants toward sexual violence,[149] the tendency of victims in both rape and child molestation cases to be too traumatized or intimidated to come forward,[150] and the inherent he-said-she-said credibility wars.[151] Indeed, notwithstanding the controversy surrounding the passage of these Rules,[152] it is significant that Congress felt strongly enough about these unique attributes of sex crime prosecutions to pass new evidentiary rules specifically tailored to such prosecutions.

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[143] FED. R. EVID. 413 (entitled "Evidence of Similar Crimes in Sexual-Assault Cases").

[144] FED. R. EVID. 414 (entitled "Evidence of Similar Crimes in Child-Molestation Cases").

[145] FED. R. EVID. 415 (entitled "Evidence of Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation").

[146] *See* 139 CONG. REC. S15138 (daily ed. Nov. 5, 1993) (statement of Sen. Dole).

[147] 140 Cong. Rec. H8991 (daily ed. Aug. 21, 1994).

[148] *See id.*

[149] *See id.*

[150] *See* 140 CONG. REC. H5440 (daily ed. June, 29 1994).

[151] *See* 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994); *see also* Beale, *supra* note 124, at 316–17 (discussing the "structural difficulty of proving sexual offenses" under the evidentiary rules in existence prior to the passage of Federal Rules of Evidence 413–15).

[152] *See supra* note 141 and accompanying text.

IV. WHY THE FEDERAL COURTS SHOULD ADOPT AN EXCEPTION TO THE SPOUSAL PRIVILEGES WHERE A DEFENDANT IS ACCUSED OF A SEX CRIME

Despite their well-established roots in federal evidentiary law, spousal privileges have undergone changes over the past few decades. Recently, federal courts have taken varying perspectives on whether, and how far, to expand the application of the spousal crime exception to also apply to crimes against children. In contemplating such an expansion, federal courts have looked to general policy interests and to rationales traditionally supporting the spousal privileges as guidance. Part IV of this Note explains how "reason and experience"—the tools with which Federal Rule of Evidence 501 has armed the federal courts to shape and shift the boundaries of evidentiary privileges—have evolved to show that sex crime prosecutions, regardless of the victim's age or relationship to the defendant, warrant their own exception to federal spousal privileges. Part A explains why sex crimes are particularly heinous and uniquely reprehensible relative to other crimes of violence. Part B discusses the ways in which sex crimes affect society at large, the problems inherent in prosecuting these crimes, and why the public has a particular interest in the successful and accurate resolution of such prosecutions. Part C shows that the justifications underlying the continued use of spousal privileges in federal courts cannot support their application in sex crime prosecutions in light of competing policy concerns.

A. The Inherently Heinous Nature of Sex Crimes and the Damage to the Victim

As one scholar noted, "[f]ew types of crime command the same public attention and evoke the same level of outrage as sexual offenses."[153] Indeed, sexual assaults tend to be more psychologically damaging to their victims than other crimes.[154] In America, the general public has come to view rape as "the

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[153] Jeffrey C. Sandler et al., *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCHOL. PUB. POL'Y & L. 284, 284 (2008).

[154] Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST.: REV. RES. 43, 49 (1998).

most heinous crime," deserving of severe punishment.[155] Sexual offenses by their very nature are "personally invasive" in a manner fundamentally different from other violent crimes, in that they undermine their victims' reproductive strategies and choices.[156] Whether the victim is a child or an adult, the tremendous and arguably unparalleled psychological effects of sex crimes are compelling in their severe and enduring nature.[157]

Rape has been described as "one of the most brutal, invasive and degrading" crimes, resulting in "intense trauma" and "profound and lasting injury" to its victims.[158] In addition to the physical injuries inherent in the assault itself,[159] the emotional effects are often severe and lifelong.[160] Post-rape psychological and emotional problems include suicidal ideation, sleep disturbances, phobic responses, eating disorders, helplessness, dependency, and decreased libido.[161] Studies have indicated that rape victims are thirteen times more likely to develop major alcohol dependency and abuse problems, and twenty-six times more likely to develop major drug problems, than are other non-sexual assault victims.[162] Rape-induced trauma, sometimes known as rape-induced post-traumatic stress disorder, also affects one-third of all rape victims.[163] Symptoms of rape-induced trauma, a chronic psychological condition, include diminished self-worth, fearfulness, anxiety, sleeplessness, extreme fear,

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[155] *See* Corey Rayburn, *Better Dead than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1138 (2004); Lieb et al., *supra* note 154, at 45–46.

[156] Lieb et al., *supra* note 154, at 48.

[157] *See infra* Part IV.A; *see also* Beale, *supra* note 124, at 317 (stating that "[t]he injury resulting from sex offenses is more serious than that associated with most other offenses"); *Undertaking*, *supra* note 136, at 298.

[158] Steven Bennett Weisburd & Brian Levin, *"On the Basis of Sex": Recognizing Gender-Based Bias Crimes*, STAN. L. & POL'Y REV., Spring 1994, at 21, 30.

[159] Physical injuries can include, among other things, injury from the rape itself, injury from any physical assault accompanying the rape, and sexually transmitted diseases, including HIV/AIDS. *Id.*

[160] *See* Kathryn M. Carney, Note, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN'S L. REV. 315, 344 (2001); Lombardi, *supra* note 126, at 118.

[161] Weisburd & Levin, *supra* note 158, at 30–31; *see also* Martha R. Holmes & Janet S. St. Lawrence, *Treatment of Rape-Induced Trauma: Proposed Behavioral Conceptualization and Review of the Literature*, 3 CLINICAL PSYCHOL. REV. 417, 419 (1983).

[162] Carney, *supra* note 160, at 345.

[163] *Id.*

intrusive thoughts, nightmares, and depression.[164] Sexual dysfunctions and impaired relationships are also common aftereffects of sexual assault.[165]

Child victims of sex offenses face physical and psychological consequences all their own. For this vulnerable population, the trauma caused by the molestation or assault often leads to feelings of isolation, fear, helplessness and guilt.[166] Indeed, children who are victims of sexual abuse are more likely to develop post-traumatic stress disorder than are those who are victim to physical abuse only.[167] Moreover, child victims are more likely to engage in abnormal or unusual sexual behaviors[168] and may display violent tendencies and sexual aggression.[169] In one study, up to ninety percent of sex offenders reported that they themselves were once victims of childhood sexual abuse.[170]

B. The Social Costs: Damage to Society, Problems in Prosecution, and the Importance of Successful and Accurate Prosecutions

1. The Effects on Society

Sexual assault and abuse do not just affect the life of the victim; society also feels their effects. Aside from physical injuries, sexual assault and rape bring risks of unwanted pregnancy and sexually transmitted diseases.[171] Victims often suffer severe sexual dysfunctions with current and future intimate partners,[172] which may significantly impact the victim's own relationship or marriage. All areas of the victim's social

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[164] *Id.*; *see also* Holmes & St. Lawrence, *supra* note 161, at 418.

[165] Holmes & St. Lawrence, *supra* note 161, at 418; *see also infra* Part IV.B.1.

[166] Nathan K. Bays, Comment, *A Rush to Punishment: The Louisiana Supreme Court Upholds the Death Penalty for Child Rape in* State v. Kennedy, 82 TUL. L. REV. 339, 342 (2007).

[167] Lieb et al., *supra* note 154.

[168] *Id.*

[169] Bays, *supra* note 166.

[170] *Id.* at 341–42.

[171] Carney, *supra* note 160. One study showed that approximately 4.7% of adult women who experienced at least one rape in their lifetimes became pregnant as a result of rape. Shauna R. Prewitt, Note, *Giving Birth to a "Rapist's Child": A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape*, 98 Geo. L.J. 827, 828 (2010). Another study found that approximately fifty percent of women who became pregnant through rape underwent abortions. *Id.* at 829.

[172] Holmes & St. Lawrence, *supra* note 161, at 418–20.

functioning, including his or her work, personal interactions, and marital and familial relationships, are affected after a sexual assault.[173] Furthermore, studies have shown a strong correlation between child victims of sexual offenses and the tendency for such victims to show sexual aggression, sometimes resulting in the victim perpetrating sexual offenses against other children and adults.[174]

2. The Unique Positioning of the Victim and the Tendency To Underreport

The nature of sexual assault typically dictates that it takes place secretly and privately, only involving the victim and the perpetrator and leaving no neutral witnesses.[175] Sexual assault often puts the victim in the unique position of being the only one who can report the crime. This unique position, however, creates a new issue in turn: Sexual assault and rape trials become "unresolvable swearing matches."[176] A "credibility contest between [the] two parties,"[177] the victim must convince everyone—law enforcement, the prosecution, and ultimately the jury—that he or she is telling the truth. These credibility issues are exacerbated in sex crime prosecutions involving child-victims, where the child may be very young or have difficulty communicating his or her version of the events.[178] Furthermore, studies have shown that jurors tend to focus on irrelevant factors, such as the victim's clothing, lifestyle, and demeanor, in determining whether the victim was actually sexually assaulted.[179] Studies of jury behavior have shown that jurors tend to view victims as having brought the sexual assaults on themselves by consuming alcohol or by wearing seductive clothing.[180]

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[173] *Id.*

[174] *See supra* notes 168–70 and accompanying text.

[175] *See* David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 20 (1994); Lombardi, *supra* note 126, at 117.

[176] 140 CONG. REC. S12990 (daily ed. Sept. 20, 1994).

[177] Lombardi, *supra* note 126, at 117.

[178] Beale, *supra* note 124, at 317 & n.35.

[179] *See* Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1588 (2007); Carney, *supra* note 160, at 346.

[180] Weisburd & Levin, *supra* note 158, at 31.

In addition to the anticipated problems in prevailing over the perpetrator at trial, centuries of biased requirements in sexual assault prosecutions have led victims to shy away from reporting for fear of being victimized a second time at the hands of a biased law enforcement and legal system.[181] Even though many, if not all, of these biased requirements have been modified or abolished in modern law, the vestiges of society's message toward victims still serve to shape a victim's perception of how a reported sex crime will be treated by law enforcement.[182] Indeed, "[d]espite decades of legal reform of the formal law of rape, there has not been a substantial change in the proportion of victims who are willing to report having been raped to the police."[183] According to a 1995 study by the Bureau of Justice Statistics, rape is the violent crime that is least likely to be reported to the police.[184]

A third but significant problem in reporting is the delay with which victims decide to report, if they decide to report at all.[185] Because friends and acquaintances commit fifty-three percent of all rapes and sexual assaults,[186] there is often a considerable amount of emotional turmoil which goes into a victim's decision of whether or not to report. Aside from the shame experienced by the victim from the assault itself, there is an added layer of guilt and grief over whether to disrupt his or her social or familial network.[187] Additionally, self-blame, fear of police refusal or inability to help, and fear of retaliation from the perpetrator[188] may cause victims to be reluctant or afraid to report right away.[189] Unfortunately, this delay in reporting often translates

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[181] *See* Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 927–35 (2001) (explaining the ways in which law enforcement and state and local prosecutors tend to use a "selection process" in determining whether rape allegations are valid, whether to investigate the crime, and whether to apprehend the suspect, depending on factors such as the victim's own perceived culpability and whether the case seems winnable); Carney, *supra* note 160, at 346.

[182] *See* Anderson, *supra* note 181, at 927.

[183] *Id.* at 937.

[184] Ronet Bachman, *Is the Glass Half Empty or Half Full?: A Response to Pollard (1995)*, 22 CRIM. JUST. & BEHAV. 81, 94 (1995); *see also* Orenstein, *supra* note 179, at 1591 (stating that "rape is wildly underreported").

[185] *See* Lombardi, *supra* note 126, at 117.

[186] Anderson, *supra* note 181, at 921.

[187] *See id.* at 922 nn.78–80.

[188] Carney, *supra* note 160, at 344–45.

[189] Karp, *supra* note 175, at 20–21.

into a severe lack of current physical evidence once the assault has been reported,[190] leaving the victim with his or her credibility alone to convince a jury that the event occurred at all.

3. Recidivism Rates Among Sexual Perpetrators and Why Successful Prosecutions Are So Important

Studies have shown that sex offenders tend to be highly recidivistic.[191] Moral inhibitions, along with the threat of criminal prosecution and incarceration, operate to deter most members of society from committing sex crimes, even if they do possess the inclination.[192] However, offenders with a history of committing unwanted sexual acts upon others have demonstrated that these usual deterrents are not enough to keep them from resisting their impulses.[193] The practical and legal risks involved in committing crimes do not deter these offenders,[194] and the result is that sex offenders are four times more likely than any other released prisoner to commit another sex crime.[195] Rapists are 10.5% more likely than other released prisoners to be arrested for a subsequent rape.[196]

Studies have also indicated that sex offenders escape detection twice as often as they are apprehended for their crimes.[197] Indeed, in one study involving convicted rapists (with an average of three convictions on record) and child molesters (with an average of two convictions on record), each offender reported having committed an average of five similar offenses for which they were never apprehended.[198] A significant number of rapists and child molesters are chronic perpetrators and have avoided apprehension for dozens and even, in some cases,

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[190] Lombardi, *supra* note 126, at 117. Professor Imwinkelried has argued that the nature of sexual assault and child molestation often makes it more likely that the perpetrators will leave behind evidence such as DNA, blood, semen, or saliva which may be used at trial. *Undertaking*, *supra* note 136, at 299–300. Unfortunately, he neglects to take into account that the use of such evidence is contingent upon prompt reporting by and medical attention to the victim.

[191] Wells & Motley, *supra* note 141, at 143.

[192] Karp, *supra* note 175.

[193] *Id.*

[194] *Id.*

[195] Lombardi, *supra* note 126, at 118–19.

[196] Carney, *supra* note 160, at 348.

[197] A. Nicholas Groth et al., *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME & DELINQ. 450, 456 (1982).

[198] *Id.*

hundreds of sex crimes.[199] Presumably, given the issues with underreporting and delayed reporting, the lack of viable evidence in the prosecution of sex crimes, and the tendency of law enforcement officials and state actors to drop claims of sex offenses,[200] it is relatively easy for sex offenders to stay under the radar for a significant amount of time before they are finally convicted for a single offense. In light of these challenges and the gravity of injury caused by sex offenses, society has a "correspondingly greater need to prosecute offenders successfully."[201]

C. The Justifications and Why They Fail To Support the Application of Spousal Privileges in Sex Crime Prosecutions

Justice Frankfurter once stated that evidentiary privileges are tolerable "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[202] Although the utilitarian and marital privacy theories of justification have traditionally been promulgated in support of the spousal privileges, the "public good" in promoting marriage and protecting marital communications cannot possibly "transcend" society's interest in securing successful and correct outcomes in sex crime prosecutions.

1. The Utilitarian Analysis

a. The Utilitarian Analysis and the Adverse Testimonial Privilege

The utilitarian approach to preserving the adverse testimonial privilege does not ultimately support application of the privileges in prosecutions for sex crimes. The utilitarian arguments in favor of the adverse testimonial privilege contend that the societal goals of promoting marriage and preventing a loyal spouse's perjury outweigh the need for reliable and probative evidence.[203] However, in order to evaluate whether this

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[199] Mark R. Weinrott & Maureen Saylor, *Self-Report of Crimes Committed by Sex Offenders*, 6 J. INTERPERSONAL VIOLENCE 286, 286 (1991).

[200] *See supra* note 181 and accompanying text.

[201] Beale, *supra* note 124, at 317.

[202] Rios v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

[203] *See supra* Part I.C.

contention is true with respect to the application of the adverse testimonial privilege in sex crime prosecutions, two tiers of analysis are necessary.[204] First, one must examine whether the privilege actually tends to promote the institution of marriage.[205] Second, one must evaluate whether there is merit to the contention that society benefits from promoting the institution of marriage.[206]

Many scholars and commentators have challenged the claim that the adverse testimonial privilege actually prevents marital discord and promotes marriage.[207] Professor Wigmore has argued that, in light of the many factors which influence the marital relationship, the danger of discord arising as a result of one spouse testifying against the other is only a casual and minor one.[208] Given the small percentage of marriages that even encounter a situation where one spouse may testify against the other, it would seem a stretch at best to say that the existence of the adverse testimonial privilege has a marked effect on the institution of marriage. As one scholar noted, "[t]he degree to which privileges promote family harmony and confidentiality is speculative, while the damage of lost evidence, though difficult to assess precisely, is certain."[209]

The argument that society as a whole benefits from promoting legal—and, by extension, often solely heterosexual—marriage may be similarly misguided.[210] The institution of "heterosexual, monogamous marriage" has been traditionally viewed as the "preeminent intimate relationship in Western society."[211] However, as individuals "perceive themselves with more control than before" over decisions regarding sexuality, procreation, marriage, and divorce,[212] the modern relationship has evolved into a different institution than that which the spousal privileges originally were designed to support. As one scholar noted, if spousal privileges are designed to protect family intimacy, their "exclusive focus on legal marriage is

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[204] *Developments in the Law*, supra note 49, at 1578.
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] WIGMORE, *supra* note 54, § 2332.
[209] *Developments in the Law*, *supra* note 49, at 1581.
[210] *Id.* at 1582.
[211] *Id.* at 1581.
[212] Regan, *supra* note 67, at 2074.

inappropriate."[213] Because other intimate relationships, such as parents and children, cohabiting partners, and homosexual couples, are not afforded the luxury of spousal privileges,[214] it seems a dubious contention that it benefits society at large to continue protecting certain intimate relationships and not others. As notions of family and intimacy evolve, blind deference to the traditional institution of marriage wholly ignores other accepted and ordinary forms of loving commitment. Indeed, as one scholar commented, "[m]any other relationships are also intimate and loving, and many traditional marriages are marked by violence and domination."[215] If the goal of the adverse testimonial privilege is to foster marital harmony for the benefit of family and children, its limitation to one form of intimate relationship in this day and age is inconsistent with that stated goal. Should public perception of the legal system be a concern at all, the explicit protection of only legal, heterosexual marriage arguably could further public distrust, in that non-traditional families denied the privilege's protection may be subject to very different legal outcomes than might other, more traditional families. While the sacred nature of the marital union has long been revered, pure deference to the institution seems a shaky foundation for the continued application of the adverse testimonial privilege, at least where it operates to exclude reliable, probative, and often crucial evidence of sexual offenses.

b. The Utilitarian Analysis and the Spousal Communications Privilege

The utilitarian analysis similarly fails in supporting the application of the spousal communications privilege in sex crime prosecutions. Because the spousal communications privilege specifically concerns communications made in confidentiality between the defendant-spouse and the witness-spouse, it is subject to Professor Wigmore's four-factor analysis. While the privilege arguably satisfies the first factor, it may not satisfy the second and third, and certainly must fail the last.

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[213] *Developments in the Law*, *supra* note 49, at 1582.
[214] *See* Glover, *supra* note 37, at 752–53.
[215] *Developments in the Law*, *supra* note 49, at 1582 (footnote omitted).

To satisfy the four-prong test, Professor Wigmore first requires that the communication be based on a confidence that the communications in question will not be disclosed to others.[216] This prong is contingent on the circumstances of the disclosure itself and is reflected in the general rules, in that the communication must be made without the presence of a third party and without the understanding that the communication will or could be disclosed to a third party.[217] Because it is likely that a sex offender who makes incriminating remarks to his or spouse expects that disclosure to remain confidential, this Note will assume that this first factor is satisfied.

The second requirement of Wigmore's balancing test mandates that the confidentiality of communications between the parties is "essential" to the maintenance of the relationship.[218] The argument that the protection of confidentiality between the parties is essential to the marital relationship necessarily implies that the general public is even aware that legal privileges protect their communications.[219] On the contrary, it is widely believed that, aside from lawyers, "virtually no one is aware of the existence of the marital privileges."[220] Spousal intimacy is "so great" and the need for communication is typically "so compelling" that it is difficult to imagine that the absence of a spousal privilege would serve to chill marital communications.[221] In contrast, the legal protection of confidentiality as to disclosures made in the context of a professionally privileged relationship—that is, communications made between a penitent and a clergyperson, a patient and a psychotherapist, or a client and an attorney—is absolutely essential in order for these disclosures to even occur.[222] Whereas it is quite believable that a client may hesitate or completely refuse to disclose sensitive information to his or her attorney without the utmost legal protections against that disclosure being used against him at trial, it is much less believable that a spouse would contemplate

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[216] *See supra* Part I.C.1.

[217] *See supra* Part I.B.

[218] *See supra* Part I.C.1.

[219] Frost, *supra* note 38, at 16.

[220] Aldridge, *supra* note 25, at 1809; *see also* Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 245–46 (1972) (stating that parties "in all likelihood are unaware" of the existence of the spousal communications privilege).

[221] Imwinkelried, *supra* note 30, at 63.

[222] Frost, *supra* note 38, at 18.

evidentiary privileges—or lack thereof—in choosing to disclose sensitive information to his or her spouse.[223] Indeed, Professor McCormick, the author of a noted treatise on evidence, has stated that "while the danger of injustice from suppression of relevant proof is clear and certain, the probable benefits of the rule of privilege in encouraging marital confidences and wedded harmony are marginal."[224]

Thirdly, Professor Wigmore requires that the relationship protected is one which must be "sedulously fostered."[225] However, it is unclear whether it is appropriate for society to place such importance on the legal marital relationship in light of the changing nature of intimate relationships.[226] Furthermore, while at least part of the motivation behind promoting candor between spouses relates to promoting healthy environments for raising children, marriage is no longer the only context in which children are typically raised.[227] As traditional notions of family change,[228] so do parental circumstances, and such circumstances may or may not involve legal marriage. It is at least debatable whether the traditional idea of marriage is something the legal system is charged with "sedulously fostering."

However tenuous the satisfaction of Professor Wigmore's first three utilitarian factors by the spousal communications privilege, the utilitarian justification must ultimately fail upon consideration of the fourth balancing factor. Professor Wigmore suggested that a court should only recognize a privilege when the injury caused to the relationship in question by the disclosure of the communications is greater than the benefit gained by the admission of such evidence at trial.[229] This fourth factor of analysis gets to the heart of the cost-benefit calculation, and within this analysis the overwhelming interests in the correct resolution of litigation[230] in sex crime prosecutions are at their most salient. Sexual offenses are widely considered to be one of

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[223] *Id.*

[224] MCCORMICK ON EVIDENCE § 86 (Kenneth S. Broun et al. eds., 6th ed. 2006).

[225] *See supra* Part I.C.1.

[226] *See supra* Part IV.C.1.a.

[227] *See* Glover, *supra* note 37, at 770.

[228] *See supra* Part IV.C.1.a.

[229] *See supra* Part I.C.1.

[230] Note, *Social Research and Privileged Data*, 4 VAL. U. L. REV. 368, 383 (1970) (quoting Note, *The Social Worker-Client Relationship and Privileged Communications*, 1965 WASH. U. L. Q. 362, 365).

the most heinous categories of crime committed against a person, and result in profound harm to the victims.[231] Their effects are felt throughout society and may even increase the number of future sexual predators.[232] Sex crimes are woefully underreported, and such reports, if made at all, may be so delayed out of fear, shame, or trauma that crucial evidence is often already lost by the time the victim comes forward.[233] Given such difficulties in prosecution, it is relatively easy for sex offenders and abusers to escape detection, with perpetrators often offending against multiple victims by the time apprehension does occur.[234] Such policy interests are overwhelming and certainly outweigh society's interests in providing debatable protection to marital intimacy.

2. The Marital Privacy Justification

The marital privacy justification, similar to the utilitarian arguments, ultimately fails to support application of the spousal privileges in federal sex crime prosecutions. Despite some commentators' claims that there is a constitutional realm of privacy, emanating from the *Griswold v. Connecticut*[235] decision and extending to the marital relationship, courts have repeatedly stated that family privileges are not constitutionally rooted.[236] If the spousal communications privilege were rooted in familial privacy, it would presumably apply throughout each family relationship, including sibling-sibling, parent-child, and parent-parent.[237] The familial or marital privacy rationale similarly cannot support the adverse testimonial privilege, as the privilege would be both under-inclusive, in that it applies to adverse, and not neutral, testimony, and over-inclusive, in that it applies to non-confidential testimony as well as confidential testimony, in

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[231] *See supra* Part IV.A.

[232] *See supra* Part IV.B.1.

[233] *See supra* Part IV.B.2.

[234] *See supra* Part IV.B.3.

[235] 381 U.S. 479 (1965).

[236] *See* United States v. Lefkowitz, 618 F.2d 1313, 1319 n.8 (9th Cir. 1980) (rejecting the argument that marital privileges are "somehow constitutionally grounded"); United States v. Doe, 478 F.2d 194, 195 (1st Cir. 1973) (per curiam) (stating that "[t]he privilege not to testify against a spouse is a common law, and not a constitutional one"); United States v. Benford, 457 F. Supp. 589, 597 (E.D. Mich. 1978) (stating that "the marital privilege has no basis in the Constitution").

[237] Frost, *supra* note 38, at 25.

its fulfillment of such an aim.[238] Moreover, the Supreme Court's decision in *Trammel* noticeably did not take marital privacy into account when it allowed the adverse testimonial privilege to be waived by the witness-spouse over the objections of the defendant-spouse.[239] Had the Court intended marital privacy to be a consideration, surely it would have considered the detriment caused to such privacy by allowing one spouse to reveal potentially incriminating facts he or she learned by virtue of the intimate marital relationship.

Whatever the normative value of privacy may be, it still must be weighed against other, competing societal interests.[240] Protecting marital privacy in the realm of evidentiary law necessarily means lost information. As one commentator noted, "[t]he more private the information, the less likely it can be obtained from a source outside the spouse, and therefore the greater the harm to the legal process if it is protected by a privilege."[241] Once again, the balancing aspect of Professor Wigmore's utilitarian analysis becomes important, as the competing interests in marital privacy must weigh against society's interest in obtaining information crucial to a criminal prosecution, which may not be found anywhere else.

Significantly, feminist critics have attacked the marital privacy rationale for an entirely different but equally relevant reason.[242] These critics have argued that the traditional notion of familial privacy frequently was used to justify isolation of the family from state interference and was instrumental in "perpetuating traditional gender hierarchies and power imbalances."[243] These notions long insulated women from the legal system, sending a powerful message that women "[were] not important enough to merit legal regulation."[244] Similar to the historical tendency for law enforcement to re-victimize victims of

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[238] *Id.*

[239] *Id.* at 26.

[240] *Id.* at 24.

[241] *Id.*

[242] *See id.* at 24–25.

[243] *Id.*; *see also* Malinda L. Seymore, *Isn't It a Crime: Feminist Perspectives on Spousal Immunity and Spousal Violence*, 90 NW. U. L. REV. 1032, 1052 & nn.147–48 (1996) (discussing the history of the exception to spousal immunity allowing wives to "elect" to testify against their battering husbands).

[244] Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 978 (1991).

sexual assault, and the lasting effect that re-victimization has had on underreporting, there is a danger that allowing "marital privacy" concerns to prevail over sexual assault victims' safety could perpetuate women's mistrust of the legal system.

CONCLUSION

While the spousal privileges have enjoyed a long and deeply rooted place in American jurisprudence, it cannot be denied that Federal Rule of Evidence 501 has bestowed upon the federal courts the ability to use their "reason and experience" to shape evidentiary privileges. This ability reflects an acknowledgement that as cultural and societal norms change, public policy interests may shift, ultimately rendering some privileges inapplicable or inappropriate in various situations. Sex crimes inflict some of the worst and most traumatic effects upon their victims among all violent crimes and indeed bear with them a unique repugnance and reprehensibility. Such crimes pose grave risks to society and, as such, it is extremely important that sex crime prosecutions are resolved successfully and accurately. However, for a variety of reasons, these prosecutions bring significant hurdles for prosecutors to overcome. In light of Congress's explicit recognition of these facts through its passage of Federal Rules of Evidence 413, 414, and 415, it is important that the legal community take a serious and focused look at spousal privileges in order to determine whether these ancient impediments to the truth-seeking function of the courts are warranted any longer in sex crime prosecutions. As federal courts struggle with whether and how to broaden the scope of the spousal crime exception, this Note urges those courts to turn their focus away from factors such as the victim's age and the relationship between the defendant and the victim and instead look to the crime alleged. In the face of the strong public policy interests in favor of successfully resolving sex crime prosecutions, the traditionally-cited justifications underlying the spousal privileges cannot support their continued application, and therefore a ripe opportunity exists to carve a new exception to the spousal privileges in federal sex crime prosecutions.