

ARTICLES

THE DANGEROUS TREND BLURRING THE DISTINCTION BETWEEN A REASONABLE EXPECTATION OF CONFIDENTIALITY IN PRIVILEGE LAW AND A REASONABLE EXPECTATION OF PRIVACY IN FOURTH AMENDMENT JURISPRUDENCE

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“Never the twain should meet.”¹

The Fourth Amendment exclusionary rule and the privileges for confidential communications are two of the most important contemporary evidentiary doctrines. The constitutional rule excluding evidence obtained through illegal searches and seizures attracts more attention than any other exclusionary rule. For example, it is the subject of the famous multi-volume work, *Search and Seizure: A Treatise on the Fourth Amendment* by Professor Wayne R. LaFare.² The United States Supreme Court hands down more decisions relating to the Fourth Amendment exclusionary rule than to either the Fifth or Sixth Amendment rule.³ Like the Fourth Amendment rule, the doctrine protecting privileged communications has gained prominence. When the Supreme Court submitted the draft of the Federal Rules of Evidence to Congress in 1973, the submission triggered a veritable “crisis”⁴ in the rule-making process, straining relations between

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1. RUDYARD KIPLING, *BARRACK-ROOM BALLADS* (1892).

2. 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (4th ed. 2004).

3. *See, e.g.*, Carol Garfiel Freeman, *Court Addresses Sentencing and Fourth Amendment Issues*, 24 CRIM. JUST. CERT. ALERT 54, 56-57 (2009).

4. Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 675, 682-85 (1975).

Congress and the Court. Most of the complaints related to drafting dealt with evidentiary privileges.⁵ Since the final enactment of the Federal Rules in 1975, the Supreme Court has handed down more opinions addressing privilege law than any other part of the Federal Rules.⁶

The Fourth Amendment exclusionary rule and the privilege protection are not only similar in their importance, but they also share several other common denominators. To begin with, they both can have the effect of suppressing highly relevant, trustworthy evidence. An application of the Fourth Amendment exclusionary rule can lead to the exclusion of a murder weapon bearing the accused's fingerprints or DNA. Likewise, a successful invocation of the attorney-client or spousal privilege can lead to the suppression of testimony about the accused's explicit admission of guilt. Moreover, both doctrines exclude the evidence to promote extrinsic social policies, while most evidentiary rules rest on the courts' institutional concerns, such as the protection of the integrity of the fact-finding process, by barring unreliable testimony.⁷ In sharp contrast, the exclusionary rule and privileges are calculated to foster extrinsic policies.⁸ The rationale for the exclusionary rule is that by barring the admission of illegally acquired evidence, it removes an incentive for police misconduct.⁹ Such misconduct ordinarily occurs during police efforts to collect evidence; and if the police realize beforehand that the courts will exclude the seized evidence, then that realization will presumably deter the misconduct. For their part, the privileges for confidential communications are intended to encourage laypersons, such as clients, patients, and married persons, to reveal sensitive information to confidants, such as attorneys, therapists, and spouses.¹⁰ As Representative Holtzman remarked in the final House report on the proposed Federal Rules of Evidence, privilege rules loom large because they affect citizens' behavior "outside of the courtroom."¹¹ The doctrines are so cognate that in a given case with the right facts, both a privilege and the exclusionary rule could come into play and mandate the exclusion of the same item of evidence.

In fact, the exclusionary rule and the privilege doctrine share another

5. Comm. on Fed. Courts, *Revisiting the Codification of Privileges under the Federal Rules of Evidence*, 55 REC. ASS'N B. CITY N.Y. 148, 149-50 (2000).

6. Molly R. Bryson, *Protecting Confidential Communications Between a Psychotherapist and Patient: Jaffee v. Redmond*, 46 CATH. U. L. REV. 963, 963 n.1 (1997).

7. RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 327 (6th ed. 2007).

8. *Id.* at 10, 327; 8 J. WIGMORE, EVIDENCE 3 (McNaughton rev. 1961).

9. *Mapp v. Ohio*, 367 U.S. 643, 653-54 (1961).

10. Fred Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 396 (1989).

11. H.R. REP. NO. 93-650, at 7097 (1973).

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commonality; to invoke either, the claimant must demonstrate that he had a certain state of mind. In the case of a communications privilege, at common law the person claiming to be a holder must demonstrate that he had a reasonable expectation of confidentiality.¹² In the words of one treatise, “[i]t is of the essence of the privilege that it is limited to those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended.”¹³ The modern codifications of the privilege doctrine incorporate this requirement. For example, the draft of Federal Rule of Evidence 503(b), the attorney-client privilege, limited the scope of the privilege to “confidential” communications.¹⁴ Uniform Rule of Evidence 502(b) dealing with the same privilege uses identical language.¹⁵ Similarly, California Evidence Code § 952 restricts the privilege to “confidential” communications.¹⁶

Prior to the Supreme Court’s 1967 decision in *Katz v. United States*,¹⁷ property law dominated Fourth Amendment analysis.¹⁸ In *Katz*, the Court dealt with a listening and recording device attached to the outside of a phone booth used by the accused. The F.B.I. had not obtained a warrant for using the device.¹⁹ The prosecution argued that, since the F.B.I. placed the device on the exterior of the booth without penetrating the booth’s interior, they had not committed a trespass against the accused; and even if the defendant had a temporary possessory interest in the interior of the booth, the device had not invaded the interior.²⁰ The prosecution contended that, since the police had not violated any of the defendant’s property rights, they had not invaded his Fourth Amendment rights.²¹ In the majority opinion, Justice Stewart rejected the government’s position.²² He penned the memorable line that “the Fourth Amendment protects people, not places.”²³ However, in his concurrence, Justice Harlan made what has proved to be, in the long term, an even more influential and more frequently quoted pronouncement. He asserted:

12. MCCORMICK ON EVIDENCE §§ 80, 90, 101 (6th ed. 2006) [hereinafter MCCORMICK].

13. *Id.* § 91.

14. FEDERAL RULES OF EVIDENCE 2010-2011 EDITION 252 (2010).

15. *Id.* at 320.

16. CAL. EVID. CODE § 952 (West 2010).

17. *Katz v. United States*, 389 U.S. 347 (1967).

18. LAFAVE, *supra* note 2, § 2.1(b), at 431.

19. *Katz*, 389 U.S. 347.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 351.

[T]he rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as “reasonable.”²⁴

That passage is now widely regarded as the enunciating test for the scope or reach of the Fourth Amendment.²⁵ Today it is generally understood that, to establish a Fourth Amendment claim, the accused must demonstrate that the police violated his “reasonable expectation of privacy.”²⁶

Until very recently, while the Fourth Amendment cases employed Justice Harlan’s expression of “reasonable expectation of privacy,” the privilege cases continued to utilize the traditional terminology of “reasonable expectation of confidentiality.”²⁷ However, within the past few years a new trend has emerged. The trend is that the privilege cases have begun to abandon the traditional terminology and adopt the “reasonable expectation of privacy” expression.²⁸ This trend is evident in both state and federal decisions.²⁹

Although this linguistic development is interesting, the far more significant development is that some cases have begun to equate the substantive standards governing the expectation of privacy in privilege law with the expectation of privacy in Fourth Amendment jurisprudence.³⁰ A 2009 North Carolina decision, *State v. Rollins*,³¹ is illustrative. That case involved the spousal privilege; the accused confided in his spouse during her visits to him in prison.³² Under the circumstances, the accused took all the precautions he could to ensure that no one overheard the content of the

24. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); LAFAVE, *supra* note 2, § 2.1(b), at 434.

25. LAFAVE, *supra* note 2, § 2.1(b), at 434.

26. *Id.*

27. See Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853 (1998).

28. *Convertino v. U.S. Dep’t of Justice*, 674 F. Supp. 2d 97, 110 (D.D.C. 2009); *United States v. Etkin*, No. 07-CR-913, 2008 U.S. Dist. LEXIS 12834, *10, 16-17 (S.D.N.Y. Feb. 19, 2008); *Kaufman v. SunGard Inv. Sys.*, No. 05-cv-1236, 2006 WL 1307882 (D.N.J. May 10, 2006); *Shanahan v. Superior Court*, No. B220947, 2010 Cal. App. Unpub. LEXIS 5756 (Cal. Ct. App. July 21, 2010); *State v. Rollins*, 675 S.E.2d 334 (N.C. 2009); *Scott v. Beth Israel*, 847 N.Y.S.2d 436, 440-41 (N.Y. Sup. Ct. 2007); *Banks v. Mario Indus. of Va., Inc.*, 650 S.E.2d 687, 695 (Va. 2007).

29. See *Banks*, 650 S.E.2d at 695.

30. See generally Robert P. Mosteller & Kenneth S. Broun, *The Danger to Confidential Communications in the Mismatch Between the Fourth Amendment’s “Reasonable Expectation of Privacy” and the Confidentiality of Evidentiary Privileges*, 32 CAMPBELL L. REV. 147 (2010).

31. *State v. Rollins*, 675 S.E.2d 334 (N.C. 2009).

32. *Id.*

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conversation.³³ However, a long line of post-*Katz* Fourth Amendment authority has held that the accused lacks a constitutionally protected expectation in public areas, such as train station waiting areas and the parking lots or visiting areas of prisons.³⁴ The *Rollins* court seemingly looked to those authorities and decided that the spousal privilege did not attach to the accused's conversations with his wife in the prison visiting area. In a well-reasoned article, Professors Mosteller and Broun sharply criticized the *Rollins* decision.³⁵

The purpose of this Article is to elaborate on the differences between expectation of confidentiality in privilege law and expectation of privacy in Fourth Amendment doctrine. The first part of this Article sketches some of the general differences between communications, privileges, and the Fourth Amendment exclusionary rule. Given those differences, the second part of this Article focuses on the specific distinctions between the concept of an expectation of confidentiality in privilege and an expectation of privacy under the Fourth Amendment. The third and final part of this Article identifies some of the untoward consequences that may result if the courts lose sight of those distinctions. To minimize the risk of confusion, this Article calls on the courts to revert to traditional terminology in privilege cases and refrain from using the confusingly similar Fourth Amendment expression "expectation of privacy."

I. THE GENERAL DIFFERENCES BETWEEN THE FOURTH AMENDMENT EXCLUSIONARY RULE AND THE PRIVILEGE PROTECTION FOR CONFIDENTIAL COMMUNICATIONS

The distinctions between the confidentiality expectation in privilege law and the privacy expectation under the Fourth Amendment can be more easily appreciated if they are viewed against the backdrop of the essential differences between privilege law and the protection afforded by the exclusionary rule.

A. THE FOURTH AMENDMENT EXCLUSIONARY RULE

The Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

33. Mosteller & Broun, *supra* note 30, at 148.

34. *Id.* at 152-53.

35. *Id.*

place to be searched, and the persons or things to be seized.³⁶

The Fourth Amendment exclusionary rule applies when the police violate the mandate of the Fourth Amendment.³⁷ However, the scope of the Fourth Amendment is quite narrow. The amendment is not a sweeping guarantee of privacy rights. Rather, the constitutional text reveals that the amendment provides only qualified protection for certain types of potential evidence from government intrusion.

The protection is qualified or conditional in nature. The warrant provision indicates that the personal rights it confers can be balanced against societal needs. Suppose, for example, that at a suppression hearing the trial judge initially finds that the accused had a reasonable expectation of privacy in a certain communication intercepted by police. That finding does not dictate the conclusion that the judge must grant the motion to suppress. Add the facts that, before the interception, the police complied with Title III of the Omnibus Crime Control and Safe Streets Act,³⁸ made a showing of probable cause, and obtained judicial authorization for the monitoring that resulted in the interception. Given these additional facts, there was no Fourth Amendment violation, and the judge should deny the motion. In short, the accused's Fourth Amendment rights can be overridden by a case-specific showing of need justifying the issuance of the warrant or judicial authorization.

Just as the nature of the protection is qualified, the protected types of potential evidence are limited. By its terms, the Fourth Amendment applies only to searches or seizures of an individual's "persons, houses, papers, and effects."³⁹ If the conduct in question does not impinge on one of the listed, protected evidentiary sources, the conduct cannot run afoul of the Fourth Amendment.

Lastly, even when the conduct intrudes on one of the enumerated potential sources of evidence, the Fourth Amendment affords protection only against government intrusions. The Fourth Amendment is part of the historic Bill of Rights, conceived and adopted as a set of essential limitations on governmental power.⁴⁰ The vast majority of cases implicate the exclusionary rule in the context of a criminal prosecution, in which the accused resorts to the rule as a basis for excluding evidence gathered by

36. U.S. Const. amend. IV.

37. *Mapp v. Ohio*, 367 U.S. 643, 648 (1961).

38. LAFAVE, *supra* note 2, § 2.1(b), at 435.

39. U.S. Const. amend. IV.

40. *Watson v. Cal. Fair Political Practices Comm'n*, 217 Cal. App. 3d 1059 (Cal. Ct. App. 1990).

government agents. Admittedly, a person may assert Fourth Amendment rights in a limited category of civil cases. Thus, as in the Supreme Court's 2010 case *City of Ontario v. Quon*,⁴¹ a citizen may bring a civil rights action under 42 U.S.C. § 1983 for a violation of his or her Fourth Amendment rights.⁴² However, § 1983 is enforceable only against persons who act under at least the appearance of government authority.⁴³ By the terms of the statute, liability can be imposed only if the person acted "under color of a statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia . . .".⁴⁴ If a private person does not act under that banner, liability will not arise under § 1983.⁴⁵

B. COMMON LAW OR STATUTORY PROTECTION FOR PRIVILEGED COMMUNICATIONS

Privileges for confidential communications are more absolute, narrower in scope, and broader in application than the Fourth Amendment exclusionary rule. As previously stated, the exclusionary rule is qualified in the sense that a government showing of probable cause can justify the issuance of a warrant authorizing a search or seizure. Under the dominant Wigmorean paradigm, privileges for confidential communications are absolute.⁴⁶ On the one hand, the opposing litigant can defeat a prima facie privilege claim in two ways. The litigant can show that the holder has

41. *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

42. *Soldal v. Cook County*, 506 U.S. 56 (1992); LAFAVE, *supra* note 2, § 2.1(a), at 426.

43. 42 U.S.C. § 1983 (2006).

44. *Id.*

45. *Eddy v. V.I. Water & Power Auth.*, 955 F. Supp. 468 (V.I. 1997), *aff'd in part, appeal dismissed in part*, 256 F.3d 204 (3d Cir. 2001).

46. *Admiral Ins. Co. v. U.S. Dist. Court for the Dist. of Ariz.*, 881 F.2d 1486 (9th Cir. 1989); *United States v. Grice*, 37 F. Supp. 2d 428, 432 n.13 (D.S.C. 1998). Wigmore attempted to reconcile two policy considerations, the promotion of important social relations, such as attorney and client and the legal system's priority on rectitude of decision. In part, he did so by extending privileges only to relationships in which the protection of confidentiality is truly "essential." WIGMORE, *supra* note 8, § 2285, at 527. The assumption was that confidentiality was essential in the sense that the typical layperson would be unwilling to confide in an attorney, spouse, or therapist without the assurance of confidentiality provided by an evidentiary privilege. Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 1 WIS. L. REV. 31, 31 (2000). The layperson would presumably balk at making a revelation unless, at the very time of the communication, he or she could predict that a court would not later compel disclosure of the communication. The layperson could do so if any exceptions to the privilege were announced beforehand and stated in bright line terms. However, the layperson would be unable to make that confident prediction if a court could surmount the privilege after the fact on the basis of a showing of compelling need for the privileged information. In Wigmore's paradigm, privileges therefore had to be absolute in the sense that they cannot be surmounted in that manner. *See generally* 1 EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 3.2 (2d ed. 2010) [hereinafter *THE NEW WIGMORE*].

waived the privilege.⁴⁷ If the holder voluntarily discloses a substantial part of the communication to a third party outside the circle of confidence, the privilege has been waived.⁴⁸ Alternatively, the litigant can surmount a privilege claim by demonstrating the applicability of a special exception announced beforehand. By way of example, under the crime/fraud exception to the attorney-client privilege, the privilege never attaches if the client sought the attorney's advice to assist the client in committing a future or ongoing crime or fraud.⁴⁹ On the other hand, no matter how desperately the litigant needs the privileged information,⁵⁰ the litigant cannot overcome a privilege claim by establishing an ad hoc, case-specific need for the information.⁵¹

At first blush, it may seem strange to classify non-constitutional privileges as absolute when a full-fledged constitutional guarantee such as the Fourth Amendment is qualified in nature. However, that classification is a corollary of Dean Wigmore's paradigm. Like Jeremy Bentham, Wigmore believed that the legal system should assign priority to the goal of rectitude of decision, that is, the accurate, correct application of substantive law.⁵² Yet, he was able to reconcile the existence of seemingly obstructionist privileges with that priority. He did so by insisting that privileges meet certain criteria.⁵³

47. 1 MCCORMICK, *supra* note 12, § 83, 103.

48. CAL. EVID. CODE § 912.

49. 1 MCCORMICK, *supra* note 12, at § 95.

50. There is only one exception to this generalization. In extraordinary cases, an accused can invoke a constitutional right to override a privilege claim. The Supreme Court has recognized an implied Sixth Amendment right to present critical, demonstrably reliable exculpatory evidence. *See generally* Holmes v. South Carolina, 547 U.S. 319 (2006); Rock v. Arkansas, 483 U.S. 44 (1987); Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967); EDWARD J. IMWINKELRIED & NORMAN M. GARLAND, EXCULPATORY EVIDENCE: THE ACCUSED'S CONSTITUTIONAL RIGHT TO INTRODUCE FAVORABLE EVIDENCE, at ch. 2 (3d ed. 2004). On occasion, an accused has successfully invoked this right to trump privilege claims. *See* EDWARD J. IMWINKELRIED & NORMAN M. GARLAND, EXCULPATORY EVIDENCE: THE ACCUSED'S CONSTITUTIONAL RIGHT TO INTRODUCE FAVORABLE EVIDENCE ch. 2 (3d ed. 2004). (collecting cases). However, in the vast majority of cases in which an accused resorts to this theory, the courts reject the argument and uphold the privilege. *Id.* at § 10-5.a, at 363 (the attorney-client privilege), § 10-5.c, at 368 (the physician-patient privilege), § 105.d, at 373 (the psychotherapist-patient privilege), and § 10-5.f, at 384 (the spousal privilege). Moreover, until recently, there was no authority recognizing a parallel right under the procedural due process guarantee in civil cases. *Id.* at ch. 1A. *But see* Adams v. Saint Francis Reg'l Med. Ctr., 955 P.2d 1169 (Kan. 1998); *see also* Baptist Mem'l Hosp.-Union County v. Johnson, 754 So. 2d 1165 (Miss. 2000). Hence, in the overwhelming majority of cases, the courts uphold the classification of common-law and statutory communications privilege as absolute.

51. *See* authorities cited *supra* note 46.

52. WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 27 (1985).

53. WIGMORE, *supra* note 8, § 2285, at 527-28.

The paramount criterion is Wigmore's requirement that "confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties."⁵⁴ In other words, the advocate for the recognition of a privilege must demonstrate that absent a privilege, the typical similarly situated person—the client, the patient, or spouse—would be deterred from either consulting the third party or making necessary disclosures during the consultation.⁵⁵ Without a privilege, the average person would "hold . . . back."⁵⁶ Basically, the privilege must be a necessary incentive⁵⁷ for the average person contemplating a communication with that type of confidant. If it were not for the existence of the privilege, the typical person would not consult or confide.⁵⁸ On this assumption, the recognition of evidentiary privileges comes cost-free to the judicial system.⁵⁹ It is true that in the microcosm, when a judge enforces a privilege, the judge is excluding relevant evidence that could assist the trier of fact. However, according to Wigmore's theory, the excluded evidence would not have come into existence without the privilege.⁶⁰ "Eliminate the privilege, and the communication disappears"⁶¹

Wigmore's reasoning led him to insist that the courts treat privileges that satisfy his criteria as absolute. On his assumption, the average

54. WIGMORE, *supra* note 8, § 2285, at 527-28.

55. *Id.*; *id.* at § 2291, at 552.

56. JOHN F. CUTLER & CHARLES F. CAGNEY, *POWELL'S PRINCIPLES AND PRACTICE OF THE LAW OF EVIDENCE* 102 (8th ed. 1904) ("In the absence of the above-mentioned rule, no man would dare to consult a professional adviser with a view to his defence, or the enforcement of his rights"); I.H. DENNIS, *THE LAW OF EVIDENCE* 307 (1999); 1 SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* § 238, at 277 (1842) ("If such communications were not protected, no man . . . would dare consult a professional adviser"); PAUL MATTHEWS & HODGE M. MALEK, *DISCLOSURE* 209 (2d ed. 2001) ("If the privilege did not exist at all every one would be thrown upon his own legal resources: deprived of all professional assistance a man would not venture to consult any skillful person or would only dare to tell his counsel half his case." (quoting Lord Brougham in *Greenough v. Gaskell* (1833) 1 MYL. & K. 98, 103)). The Greenleaf citation is especially important, since "Wigmore took over" that treatise, and it "evolved into Wigmore's own treatise in 1904." David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge*, 81 NEB. L. REV. 115, 119 (2002).

57. 26A CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5680, at 141 (1992).

58. 3 WEINSTEIN'S *FEDERAL EVIDENCE* § 504.03, at 504-11 (Joseph M. McLaughlin & Matthew Bender eds., 2d ed. 1997).

59. *Id.* ("The recognition of the privilege has little cost to the judicial system, because . . . if [the] privilege were not recognized, many of the confidential disclosures would never be made.")

60. *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1178 (C.D. Cal. 1998) (the recognition of a privilege satisfying Wigmore's criteria "results in little evidentiary detriment where the evidence lost would simply never come into being if the privilege did not exist"), *aff'd*, 216 F.3d 1082 (9th Cir. 2000).

61. Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 31.

layperson will not consult or confide unless, at the very time he decides whether to reveal, he can confidently predict whether a court will later protect his revelation from compelled disclosure.⁶² If a court could later surmount the privilege on the basis of an ad hoc showing of need for the information, the layperson would be unable to make the necessary prediction. The advance announcement of an exception, such as the crime/fraud doctrine, is not inconsistent with the layperson's ability to predict whether he will be protected against compelled judicial disclosure; so long as the court or legislature announces the exception beforehand, the layperson can factor the existence of the exception into his decision. However, the possibility that a judge could subsequently deny the privilege on the basis of a case-specific showing of need for the privileged information would undermine the layperson's ability. In sum, positing Wigmore's assumption about laypersons' reluctance to disclose absent a privilege, it is understandable that he insisted that privileges be classified as absolute.

Although privileges are more absolute than the Fourth Amendment exclusionary rule, in another respect privileges are much narrower in scope. As previously stated, the Fourth Amendment guarantee applies to an array of potential sources of evidence: individuals' "houses, persons, papers, and effects."⁶³ For that matter, the Fourth Amendment exclusionary rule shields both the enumerated sources and evidence derived from illegal searches or seizures.⁶⁴ The rule extends to both the immediate products of the illegal search or seizure and the fruit of the poisonous tree.⁶⁵ The reach of the Fourth Amendment rule is much wider than that of a common-law or statutory privilege. Most privileges protect only communications between the persons standing in the privileged relationship.⁶⁶ A privilege could protect an accused's communication to his or her attorney about the location of an item of inculpatory physical evidence; but, unlike the Fourth Amendment, it does not bar evidence of the subsequent police seizure of the item of evidence. Even if the attorney improperly disclosed the communication to the police and the police used the communication as an investigative tool to locate the item of evidence, the accused could not rely

62. 1 EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 3.2.4 (2d ed. 2010).

63. U.S. Const. amend. IV.

64. *Nardone v. United States*, 308 U.S. 338, 341 (1939); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

65. *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

66. CAL. EVID. CODE §§ 952 (attorney-client), 980 (spousal), 992 (physician-patient), 1012 (psychotherapist-patient), 1032 (clergy-penitent), 1035.4 (victim-sexual assault counselor), 1037.2 (victim-domestic violence counselor); *see also* 1 MCCORMICK, *EVIDENCE* § 89 (6th ed. 2006).

on the attorney-client privilege to suppress the evidence; unlike the Fourth Amendment exclusionary rule, communication privileges lack a derivative evidence component.⁶⁷

In another respect, though, the protective ambit of privileges is much broader than that of the Fourth Amendment exclusionary rule. As previously mentioned, a citizen may enforce his or her Fourth Amendment rights only against the government in a prosecution or government actors under 42 U.S.C. § 1983. The exclusionary rule does not prevent a private citizen litigant from using the fruits of the illegal search or seizure as evidence in a civil lawsuit between that citizen and the victim of the illegal intrusion.⁶⁸ In contrast, a privilege holder may assert that evidentiary doctrine against any type of opposing litigant. Ohio Rule of Evidence 101(B) states that a privilege holder may invoke the privilege against the opposition in “all actions, cases, and proceedings”⁶⁹ The privilege provisions of the California Evidence Code purport to apply the various privileges in any “proceeding,” and, in turn, Evidence Code § 901 defines “proceeding” in the following fashion:

“Proceeding” means any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given.⁷⁰

The breadth of the privileges’ applicability is understandable in light of Wigmore’s paradigm. Again, Wigmore reasoned that the fear of disclosure would deter the typical client, patient, or spouse from consulting or

67. *United States v. Squillacote*, 221 F.3d 542, 560 (4th Cir. 2000) (collecting cases dealing with the attorney-client and spousal privileges), *cert. denied*, 532 U.S. 971 (2001); *Chase v. State*, 706 A.2d 613 (Md. Ct. Spec. App. 1998); *People v. Ward*, 604 N.Y.S.2d 320 (N.Y. App. Div. 1993); THOMAS J. GARDNER, *CRIMINAL EVIDENCE: PRINCIPLES, CASES, AND READINGS* 165 (1977); Robert P. Mosteller, *Admissibility of Fruits of Breached Evidentiary Privileges: The Importance of Adversarial Fairness, Party Culpability, and Fear of Immunity*, 81 WASH. U. L.Q. 961, 962-63, 1010-16 (2003).

68. *See United States v. Janis*, 428 U.S. 433 (1976); Richard J. Hanscom, *Admissibility of Illegally Seized Evidence in Civil Cases: Could This Be the Path Out of the Labyrinth of the Exclusionary Rule?*, 9 PEPP. L. REV. 799, 803-04 (1982). Hanscom reports:

Most of the decisions concerning searches by non-law enforcement persons have upheld the admissibility of illegally seized evidence in civil cases. . . .

. . . .

. . . It has been persuasively argued that it is doubtful that any law enforcement officer would ever be thinking about the possibility of using illegally seized evidence in a civil case.

Id.

69. OHIO R. EVID. 101.

70. CAL. EVID. CODE § 901.

confiding. The fact of possible disclosure generates the deterrence, and it does not matter where the disclosure occurs. So long as the disclosure occurred in a public setting—a criminal case, a civil lawsuit, or an administrative hearing—it could frighten the layperson into refraining from consultation or revelation.

II. THE FUNDAMENTAL DISTINCTIONS BETWEEN THE EXPECTATION OF CONFIDENTIALITY IN PRIVILEGE LAW AND THE EXPECTATION OF PRIVACY IN FOURTH AMENDMENT JURISPRUDENCE

As demonstrated, numerous courts have used the same language of “reasonable expectation of privacy,” to describe the required state of mind of the claimant invoking both the Fourth Amendment exclusionary rule and the communication privileges.⁷¹ However, as Part I explained, there are major differences between the nature of such privileges and the exclusionary rule. In light of those differences, it should come as no surprise that on close scrutiny, the required states of mind turn out to be quite dissimilar. They differ in three important respects: the timing, the nature, and the reasonableness of the expectation.

A. THE TIME WHEN THE REQUIRED EXPECTATION MUST EXIST

The person must possess an expectation. At what point in time, though, must the person have that expectation in mind?

1. THE FOURTH AMENDMENT EXCLUSIONARY RULE.

The Fourth Amendment protection is applicable only if the person had the required reasonable expectation of privacy at the time of the government’s intrusion into his or her privacy.⁷² Suppose that in a prosecution under Chapter 40 of Title 18 of the United States Code, the government has charged the accused with illegal manufacture of an explosive device.⁷³ The accused does not have a scientific background, but the government contends that he purchased a text on bomb-making and learned how to make explosive devices by studying the text.

A year earlier the accused purchased the text at a local bookstore. He did so in plain view of several customers who happened to be in the store at the time. When the accused stepped to the counter to make the purchase, he made no effort to hide his face or the title of the text he was buying. After

71. *See supra* note 28.

72. LAFAVE, *supra* note 2, § 2.1.

73. 18 U.S.C. § 841 (2006).

buying the text, he walked home; and as he walked, he held the book in one arm—with its title exposed to anyone who happened to pass him on the street. However, when the government begins to investigate the accused, they encounter obstacles. Although the bookstore employee remembers seeing the accused in the store, he cannot recall the title of the text the accused purchased. Moreover, since the accused paid cash for the text, there is no credit card slip tying his credit card to the purchase of that specific text. Finally, while the government has found a witness who saw the accused en route from the bookstore to his apartment, the witness cannot recall whether the accused was holding a book, much less the title of the book. Consequently, to prove that the accused had access to the book, the government conducts a search of the accused's apartment, finds the text on a shelf, and seizes it as potential evidence.

When the accused initially purchased the text and transported it to his apartment, the accused made no attempt to hide either his identity or the title of the text. The accused nonchalantly exposed the title of the text to public view. Anyone who happened to be nearby—including an Alcohol, Tobacco, and Firearms (ATF) agent—could have seen the title. However, unfortunately for the prosecution, the government cannot locate any witnesses who saw the accused, noticed the book, and remembered the title. The circumstances impelled the government to conduct the search of the accused's apartment. The Fourth Amendment applies to the intrusion; for purposes of Fourth Amendment analysis, an apartment can be a “house[.]”⁷⁴ and a book can be an “effect[.]”⁷⁵ If the government lacked probable cause and neglected to obtain a search warrant, both the search of the apartment and the seizure of the book are illegal. At the time of the search, the book was on a shelf in the accused's apartment; at that time, the accused had not knowingly exposed the book to public view, including the gaze of law enforcement agents. It is immaterial that the accused had earlier exposed the book to plain view by members of the public. The dispositive time is the time of the intrusion.

2. COMMUNICATIONS PRIVILEGES

The protection of a communications privilege is applicable only if the person had the required expectation of confidentiality at the very time of the communication.⁷⁶ Assume that a businesswoman is negotiating a new

74. *Katz v. United States*, 389 U.S. 347, 352 (1967) (citing *Jones v. United States*, 362 U.S. 257 (1960)); 1 LAFAVE, *supra* note 2, at § 2.3(b), at 571 (citing *United States v. Concepcion*, 942 F.2d 1170 (7th Cir. 1991)).

75. 2 LAFAVE, *supra* note 2, at § 4.6(e), at 639 (citing *Stanford v. Texas*, 379 U.S. 476 (1965)).

76. 1 THE NEW WIGMORE, *supra* note 46, at § 6.8.1.

contract for her sole proprietorship. While the negotiations are pending, she happens to meet her attorney at a local chamber of commerce dinner. They are sitting at the table with three other persons and speaking loudly enough that the other persons at the table can easily overhear their conversation. Although the three other persons at the table are passing acquaintances of the businesswoman, she has no privileged relationship with them; none of them is her attorney, therapist, or spouse. During the conversation, she tells her attorney that she has a certain understanding of a royalty provision in the licensing contract she is negotiating. Later the next day, she makes a note of her conversation with the attorney about the provision in the journal she keeps in plain view on her office desk. She subsequently signs the contract, and the final contract includes the royalty provision that she had mentioned to her attorney during the dinner conversation that night.

At a later point in time, a dispute arises over the meaning of the wording of the royalty provision.⁷⁷ She fears that the other party to the contract is contemplating suing her; and she realizes that in any lawsuit over the interpretation of the provision, her statement to her attorney could be damaging evidence against her current position over the proper construction of the contract clause. She consequently removes the journal from plain view in her office and places it in her safe. She is the only person who knows the combination to the safe. She later directs her attorney not to mention their dinner conversation to anyone. Later her fear is realized. The other party brings suit, and during pretrial discovery, the party files a motion for an order requiring the businesswoman to produce the journal containing the entry about her conversation with her attorney.

By the time of the attempted intrusion—the plaintiff’s production motion—the businesswoman had done everything in her power to shield the conversation and the journal from public view and to keep their contents secret. If her prior conversation with her attorney was privileged, the privilege might extend to the journal entry. There is authority that the privilege extends to both a client’s notes of a privileged conversation⁷⁸ and the attorney’s memorials of such conversations.⁷⁹ At the time of the

77. Cf. *HLC Properties Ltd. v. Superior Court*, 105 P.3d 560 (Cal. 2005) (adjudicating a dispute over the interpretation of a royalty provision in a contract between the late Bing Crosby and a record company).

78. See *United States v. DeFonte*, 441 F.3d 92, 95 (2d Cir. 2006); *Harper v. Brinke*, No. 3:06-CV-412, 2007 U.S. Dist. LEXIS 64482 (E.D. Tenn. Aug. 30, 2007).

79. RESTATEMENT OF THE LAW GOVERNING LAWYERS, § XXX (Tentative Draft No. 1, 1998) (citing *Natta v. Zletz*, 418 F.2d 633, 638 (7th Cir. 1969) (discussing a lawyer’s memorandum summarizing a meeting between a lawyer and a client)). In its 1998 decision in *Swidler & Berlin v. United States*, the Supreme Court applied the attorney-client privilege to three pages of handwritten notes that attorney James Hamilton took of his initial interview with Vincent Foster.

production motion, the businesswoman certainly intends to maintain the secrecy of the contents of the journal entry. If, as is true under the Fourth Amendment, the controlling time were the time of the attempted intrusion, the judge ought to sustain her privilege claim and deny the production motion.

However, here the critical time is the time of the communication itself. If, at that time, the businesswoman did not intend that her statement to her attorney was confidential, the privilege would not attach.⁸⁰ At the dinner, there were three persons within earshot of the conversation, and the businesswoman did not whisper to prevent them from overhearing its content. Consequently, the privilege never attached, even though she is now zealously attempting to guard the secrecy of the journal's contents. The judge should reject her privilege claim and grant the production motion. The timing requirement for the privilege is thus radically different than the timing requirement for the exclusionary rule.

B. THE NATURE OF THE BELIEF(S) CONSTITUTING THE EXPECTATION

Again, the person must possess an "expectation." But what is the substantive content of the expectation? More specifically, what beliefs comprise that expectation? Under both the exclusionary rule and the privileges doctrine, the claimant must have a certain subjective belief. In his concurrence in *Katz*, Justice Harlan referred to "an actual (subjective) expectation of privacy"⁸¹ Similarly, to make out a prima facie case for a privilege claim, the asserted holder must establish that he entertained a subjective expectation of confidentiality. In Dean Wigmore's words, the allegedly privileged communications "must [have] originate[d] in a confidence that they will not be disclosed."⁸² In the same vein, California Evidence Code § 952 states the general rule that there is no privilege if the

Swidler & Berlin v. United States, 524 U.S. 399 (1998). Likewise, in *Jaffee v. Redmond*, the Court indicated that the psychotherapist privilege would apply to "the notes taken during . . . counseling sessions." *Jaffee v. Redmond*, 518 U.S. 1, 6, 18 (1996).

80. See *Freeman v. Grubbs*, 134 F. App'x. 233 (10th Cir. 2005) (the accused made the statement to a nurse in the presence of police officers who were not involved in his medical treatment), *cert. denied*, 546 U.S. 1138 (2006); *People v. Urbano*, 26 Cal. Rptr. 3d 871 (Cal. Ct. App. 2005) (involving a loud comment by the accused at a preliminary hearing); *People v. Von Villas*, 15 Cal. Rptr. 2d 112, 140 (1992) (involving a husband-wife conversation that occurred in jail in which the spouses "were speaking loudly to one another—loudly enough to be heard beyond the plexiglass [that] separated them. They knew or reasonably should have known that third parties in the person of sheriff's deputies were present"), *modified*, 92 Cal. Daily Op. Serv. 10114, 92 D.A.R. 16832 (Cal. Ct. App. 1992), *cert. denied*, 510 U.S. 838 (1993); SANDRA PETRONIO, *BOUNDARIES OF PRIVACY: DIALECTICS OF DISCLOSURE* 196 (2002) (conversations in a restroom, on an airplane, or an elevator filled with people).

81. *Katz v. United States*, 389 U.S. 347, 461 (Harlan, J., concurring).

82. WIGMORE, *supra* note 8, § 2285, at 527.

client is actually “aware” that a third party outside the privileged relationship is present.⁸³ Although both the privacy expectation and the confidentiality expectation are subjective beliefs, the nature of the beliefs is fundamentally different.

1. THE FOURTH AMENDMENT EXCLUSIONARY RULE

In the Fourth Amendment context, the required subjective belief is a rather simple state of mind. The claimant must demonstrate that just prior to the time of the intrusion, he believed that the protected potential evidence source—for example, the house, paper, or effect—was not exposed to public gaze, including the view of government officials.⁸⁴ The language of several of the Court’s leading Fourth Amendment precedents is telling. In *Katz*, Justice Stewart stated that the amendment does not protect what a person knowingly exposes to the [general] public⁸⁵ In his concurrence in the same case, Justice Harlan advanced the thesis that the existence of the person’s reasonable expectation of privacy should be the test for Fourth Amendment coverage. However, the Justice realized that the adoption of that thesis would require an explanation of the protected expectation. As sedulous as he was in championing Fourth Amendment rights, even Justice Harlan acknowledged that a person lacks Fourth Amendment protection for “objects, activities, or statements that he exposes to the ‘plain view’ of outsiders”⁸⁶ In Justice Harlan’s view, the person is not entitled to constitutional protection when he places an object or engages in an activity out “in the open.”⁸⁷

The same judicial sentiment is evident in the Court’s 1988 decision in *California v. Greenwood*.⁸⁸ *Greenwood* dealt with a police search of garbage bags that the accused had left on the curb in front of his house.⁸⁹ Early in the majority opinion, Justice White appealed to *Katz* as authority.⁹⁰ Justice White repeated Justice Harlan’s statement that the Fourth Amendment affords no protection to “[w]hat a person knowingly exposes to the public”⁹¹ Upholding the search, Justice White wrote:

[R]espondents exposed their garbage to the public sufficiently to

83. CAL. EVID. CODE § 952.

84. *United States v. Maynard*, 615 F.3d 544, 558 (D.C. Cir. 2010).

85. *Katz v. United States*, 389 U.S. 347, 351 (1967).

86. *Id.* at 360, 361 (Harlan, J., concurring).

87. *Id.*

88. *California v. Greenwood*, 486 U.S. 35 (1988).

89. *Id.*

90. *Id.* at 39.

91. *Id.* at 41 (quoting *Katz*, 389 U.S. at 351).

defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. . . . [H]aving deposited their garbage “in an area particularly suited for public inspection” respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.⁹²

Justice White added that the lower federal and state courts had reached the same conclusion with respect to trash left for collection in an area accessible to the public⁹³ He also mentioned the Court’s 1986 decision in *California v. Ciraolo*.⁹⁴ There the Court sustained aerial surveillance of the accused’s fenced backyard.⁹⁵ He noted that the *Ciraolo* Court had reasoned that “[a]ny member of the public flying in this airspace who glanced down could have seen anything these officers observed.”⁹⁶

In his treatise, Professor LaFave reviews these Supreme Court precedents.⁹⁷ At the conclusion of the review, he cites a comment made by a perceptive commentator.⁹⁸ He approvingly quotes the commentator’s assertion that a person enjoys no Fourth Amendment protection for an object or activity if the person has “knowingly expose[d] them to the open view of the public.”⁹⁹ When the person knows that he has left the potential evidentiary source exposed to the general public, the person lacks the expectation necessary to support a Fourth Amendment claim.

2. COMMUNICATIONS PRIVILEGES

As explained above, the privacy expectation required of a Fourth Amendment claimant is a belief that he has not knowingly exposed the object or activity to members of the general public. The confidentiality expectation required of a privilege claimant is quite different. It is both more complex and different in focus. Although the courts often refer to an expectation of confidentiality in the singular, as if it were a single belief, in truth this expectation consists of a set of three distinct beliefs.

92. *California v. Greenwood*, 486 U.S. 35, 40-41 (1988) (internal citations omitted) (quoting *United States v. Reicherter*, 647 F.2d 397, 399 (3d Cir. 1981)).

93. *Id.* at 41.

94. *California v. Ciraolo*, 476 U.S. 207 (1986).

95. *Id.*

96. *Greenwood*, 486 U.S. at 41 (quoting *Ciraolo*, 476 U.S. at 213-14).

97. LAFAVE, *supra* note 2, at § 2-1(c-d).

98. *Id.* at § 2-1(c), at 439 n.96 (citing Eric Dean Bender, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. Rev. 725, 753-54 (1985)).

99. *Id.*

The first essential belief is that the listener with whom the layperson is speaking qualifies as a confidant. There is no general privilege for communications between friends,¹⁰⁰ siblings, or, in most jurisdictions, parent and child.¹⁰¹ The vast majority of jurisdictions have limited the privilege to communications with persons in essentially fiduciary relationships such as spouses,¹⁰² attorneys and their clients,¹⁰³ and physicians and their patients.¹⁰⁴ A layperson is entitled to the assurance of confidentiality furnished by a communications privilege only if, at the time of the communication, the person believes he is communicating with a confidant falling into one of these categories.¹⁰⁵ The second requirement is that the layperson believes he is making the revelation only to the confidant. As a general proposition,¹⁰⁶ if the layperson knows¹⁰⁷ that someone other than the confidant is both present and close enough to overhear the revelation, the privilege does not attach.¹⁰⁸ In that event, any person who

100. *But see* Ethan J. Lieb, *Friends as Fiduciaries*, 86 WASH. U. L. REV. 665 (2009).

101. *LaBrecque v. School Admin.* Dist. No. 57, 463 F. Supp. 2d 88 (D. Me. 2006); *State v. Willoughby*, 532 A.2d 1020, 1022 (Me. 1987); Ameer A. Shah, *The Parent-Child Testimonial Privilege – Has the Time for It Finally Arrived?*, 47 CLEV. ST. L. REV. 41, 44 (1999) (“Courts have been overwhelmingly opposed to recognizing a parent-child privilege, broad or narrow . . .”); A. Shane Weldon, *In re Grand Jury: Refusal of Federal Courts to Recognize a Parent-Child Testimonial Privilege*, 28 AM. J. TRIAL ADVOC. 465, 469-77 (2004) (“[T]he vast majority of both federal and state courts have rejected parent-child privilege. . . . The eight federal courts of appeal that have considered the issue have rejected parent-child privilege. . . . Most state courts have refused to recognize a parent-child privilege.”).

102. *See* 1 MCCORMICK, *supra* note 12, at ch. 9.

103. *Id.* at ch. 10.

104. *Id.* at ch. 11.

105. If that belief is mistaken, in certain circumstances the layperson may still claim the privilege. *See* CAL. EVID. CODE § 950 (the statutory definition of “lawyer” includes “a person . . . reasonably believed by the client to be authorized, to practice law”); CAL. EVID. CODE § 1010(a) (the statutory definition of “psychotherapist” includes “[a] person . . . reasonably believed by the patient to be . . . authorized to practice medicine”).

106. Many jurisdictions carve out exceptions for the presence of certain third parties, such as persons standing in another privileged relationship with the layperson, *Sims v. State*, 311 S.E.2d 161 (Ga. 1984), a professional confidant’s agents such as a clerk, *Michael G. Walsh, Applicability of Attorney-Client Privilege to Communications Made in Presence of or Solely to or by Third Persons*, 14 A.L.R. 594, at § 3 (4th ed. 1982), or persons sharing a common interest with the layperson, *Essex Chem. Corp. v. Hartford Accident & Indem.*, 975 F. Supp. 650 (D.N.J. 1997) (joint defense privilege), *rev’d on other grounds*, 993 F. Supp. 241 (1998). Some jurisdictions go to the length of tolerating persons present to offer the layperson moral support. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 5.13, at 331 (4th ed. 2009).

107. *Securities & Exch. Comm’n v. Lavin*, 111 F.3d 921 (D.C. Cir. 1997); *United States v. Taylor*, 92 F.3d 1313, 1331 (2d Cir. 1996), *cert. denied*, 519 U.S. 1093 (1997); *Doe v. Poe*, 664 N.Y.S.2d 120, 122 (N.Y. App. Div. 1997), *aff’d*, 92 N.Y.2d 864, (N.Y. App. Div. 1998); *Harris v. Commonwealth*, 453 S.E.2d 292, 294-95 (Va. Ct. App. 1995).

108. *See* *United States v. Taylor*, 92 F.3d 1313, 1331 (2d Cir. 1996) (“[K]nowledge of the presence of a third party defeats the application of the spousal privilege.” (citing *Pereira v. United*

heard the statement—the layperson, the confidant, or the third party—could be compelled to disclose the contents of the statement.

The third belief the layperson must entertain is the expectation that the confidant will maintain the secrecy of the information in the future. Suppose that the client speaks solely to the attorney confidant but authorizes the attorney to disclose the communication to a third party outside the circle of confidence. For instance, if the client understands that the attorney is to relay¹⁰⁹ the communication to an opposing litigant,¹¹⁰ a congressional committee¹¹¹ a government lawyer,¹¹² the Securities and Exchange Commission,¹¹³ a police chief,¹¹⁴ the client's employer,¹¹⁵ or even

States, 347 U.S. 1, 6 (1954)), *cert. denied*, Taylor v. US, 519 U.S. 1093 (1997); Fernandez v. State, 730 So. 2d 277, 282 (Fla. 1999) (involving the cleric's wife and children as well as the appellant's girlfriend and her children); Zielinski v. Clorox Co., 504 S.E.2d 683, 686 (Ga. 1998) ("in the presence of several other employees"); *see also* Cherryvale Grain Co. v. First State Bank of Edna, 971 P.2d 1204 (Kan. Ct. App. 1999); State v. Williams, 96-652 (La. App. 3 Cir. 2/5/97); 688 So. 2d 1277, 1281 (two other persons were present); Fisher v. State, 690 So. 2d 268, 272 (Miss. 1997); Doe v. Poe, 664 N.Y.S.2d 120, 122 (N.Y. App. Div. 1997), *aff'd*, 92 N.Y.2d 864 (N.Y. App. Div. 1998); Osborne v. Johnson, 954 S.W.2d 180, 184 (Tex. App. 1997); Johnson v. State, 911 P.2d 918, 927-28 (Okla. Crim. App. 1996), *cert. denied*, 519 U.S. 839 (1996); Curran v. Pasek, 886 P.2d 272, 275 (Wyo. 1994); State v. Deases, 518 N.W.2d 784, 787-88 (Iowa 1994) (after impliedly recognizing the general rule, the court discusses whether the facts of the given case constituted an exceptional situation in which there was a special need for the third party's presence to assist the physician); Hazelwood v. State, 609 N.E.2d 10, 15 (Ind. Ct. App. 1993) ("when a communication between a husband and wife is made in the presence of a third person . . . no privilege exists due to lack of confidentiality." (citing Holt v. State, 481 N.E.2d 1324, 1326 (Ind. 1985))); People v. Murphy, 609 N.E.2d 755, 760-61 (Ill. App. Ct. 1992); Factory Point Nat'l Bank v. Wooden Indian, Inc., 603 N.E.2d 216, 218 (N.Y. App. Div. 1992); State v. Howard, 577 N.E.2d 749 (Ohio Ct. App. 1990).

109. *See* Osborn v. State, S.E.2d 74, 77-78 (Ga. Ct. App. 1998); H.B.S. Contractors, Inc. v. Cumberland County Bd. of Educ., 468 S.E.2d 517, 520 (N.C. Ct. App. 1996) (involving a situation in which the client told the attorney to inform the contractor that the client was terminating the construction contract); Hoeschst Celanese Corp. v. Nat'l Union Fire Ins. Co., 623 A.2d 1118, 1122 (Del. Super. Ct. 1992) ("When the client makes a communication with the intention or expectation that it will be revealed to another person, who is not necessary for the rendition of the legal services or communication, this element of confidentiality is lacking." (citations omitted)); Crystal Cubes of Stone Mountain, Inc. v. Kutz, 411 S.E.2d 53, 55 (Ga. Ct. App. 1991) (involving a situation in which the client gave the attorney an affidavit to use in settlement negotiations with the other side); *see also* Findley v. State, 818 S.W.2d 242, 247 (Ark. 1991) (discussing a similar rule under the spousal privilege).

110. *Kutz*, 411 S.E.2d at 55.

111. *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 35 F.Supp.2d 582 (N.D. Ohio 1999).

112. *United States v. Kerik*, 531 F. Supp. 2d 610 (S.D.N.Y. 2008); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1204-05 (C.D. Cal. 1999).

113. *Ratliff v. Davis, Polk & Wardwell*, 354 F.3d 165 (2d Cir. 2003).

114. *Scott v. Edinburg*, 101 F. Supp. 2d 1017 (N.D. Ill. 2000).

115. Melissa L. Nelken, *The Limits of Privilege: The Developing Scope of the Federal Psychotherapist-Patient Privilege*, 20 REV. LITIG. 1, 12 (2000) (citing *Kamper v. Gray*, 182

the client's parents,¹¹⁶ no privilege attaches. It is not enough that the layperson believes that, at the time of the communication, he is divulging information to the confidant and the confidant alone; in addition, the totality of the circumstances must lead the layperson to have confidence that in the future the confidant will maintain the secrecy of the divulgence.

In privilege law, the "expectation" of privacy consists of this set of three beliefs. If the layperson lacks any of the three beliefs, then he does not have the required expectation, and no privilege will come into play to shield the communication.

C. THE STANDARD FOR ASSESSING THE REASONABLENESS OF THE EXPECTATION

Both privilege law and Fourth Amendment jurisprudence refer to a "reasonable" expectation. However, reasonableness must be judged from some perspective. Does the same perspective govern in both bodies of law? Just as Justice Harlan's concurrence in *Katz* required that a Fourth Amendment claimant's expectation be reasonable,¹¹⁷ many courts insist that a privilege claimant demonstrate the reasonableness of his or her expectation.¹¹⁸ However, any analyst with a modicum of legal sophistication realizes that, in different contexts, the same word can carry different meanings. Admittedly, the use of the word "reasonableness" indicates that, in both settings, the judge must employ some sort of objective standard; standing alone, the claimant's proof of a subjective expectation is insufficient to support the claim. However, the question arises: should the courts assess the reasonableness of the belief from the same perspective under both the Fourth Amendment and privilege doctrine?

1. THE FOURTH AMENDMENT EXCLUSIONARY RULE

In this setting, the most sensible interpretation of "reasonable" is that even when the claimant entertains the required subjective expectation, the judge must decide whether that expectation is acceptable from a broad¹¹⁹ social perspective. The analysis does not adopt the narrow perspective of the claimant or even a hypothetical, similarly situated person. Rather, the focus should be on the societal norms governing limitations on police

F.R.D. 597 (E.D. Mo. 1998)).

116. *United States v. Stroehn*, 421 F.3d 1017 (9th Cir. 2005), *cert. denied*, 547 U.S. 1005 (2006).

117. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

118. *E.g.*, *Cobell v. Norton*, 377 F. Supp. 2d 4 (D.D.C. 2005).

119. LAFAVE, *supra* note 2, at § 2.1(d), at 442.

activity.¹²⁰ In *Katz*, Justice Harlan did not refer to a reasonable expectation; rather, he alluded to “an actual (subjective) expectation of privacy . . . that society is prepared to recognize as reasonable.”¹²¹ The text of the Fourth Amendment cuts in favor of the same interpretation. The Fourth Amendment does not mention expectation, much less reasonable expectation. Instead, the constitutional language is “unreasonable searches and seizures.”¹²² The text strongly suggests that even after finding that the claimant entertained the requisite subjective belief, the judge must inquire further whether, given the pertinent social norms,¹²³ the Fourth Amendment ought to protect citizens against this type of intrusion. In society’s judgment, is this type or category of police activity in question an important tool for controlling crime?¹²⁴ The test is a legal one rather than a factual one;¹²⁵ the decision turns on a value judgment,¹²⁶ not a determination of fact. Under this interpretation, the outcome is determined by categorical policy judgments¹²⁷ about societal constraints on law enforcement activity.

2. COMMUNICATIONS PRIVILEGES

When the analysis shifts from the Fourth Amendment to the doctrinal area of privilege, reasonableness takes on a quite different meaning. In this setting, the perspective is the narrower one of a hypothetical, reasonable person. The reasonableness must be gauged from the point of view of the person making the communication. The claimant’s belief must be factually reasonable.¹²⁸ The issue is whether, given the specific circumstances surrounding the communication, the claimant’s belief in present and future confidentiality was objectively warranted.¹²⁹ Ultimately, the question is factual in nature,¹³⁰ depending on the particular circumstances facing the claimant at the time he decides to communicate. Under this interpretation, the precautions the claimant takes to secure present and future

120. *Oliver v. United States*, 466 U.S. 170, 178 (1984) (“our social understandings” concerning what deserves “protection from government invasion”); LAFAVE, *supra* note 2, at § 2.1(d), at 440 (social values), 441-42 (“collective”).

121. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

122. U.S. Const. amend. IV.

123. LAFAVE, *supra* note 2, at § 2.1(c), at 437.

124. *Mosteller & Broun*, *supra* note 30, at 179.

125. *Id.* at 170.

126. Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974); LAFAVE, *supra* note 2, at § 2.1(d), at 443; *Mosteller & Broun*, *supra* note 30, at 172-73 n.135.

127. *Mosteller & Broun*, *supra* note 30, at 173.

128. *Id.* at 162.

129. *Id.* at 165, 171-73.

130. LAFAVE, *supra* note 2, at § 2.1(d), at 444 (distinguishing between the two perspectives on reasonableness).

confidentiality are highly relevant.¹³¹ If the layperson and the confidant were speaking in a room, did the layperson check to ensure that the door to the room was completely closed to make it improbable that a passerby could overhear their conversation? Did the layperson explicitly instruct the confidant not to disclose the communication to any third parties without the layperson's consent? Would the circumstances, including the precautions taken, convince a hypothetical reasonable person in the claimant's position that it was justified to believe in present and future confidentiality?

III. THE DANGERS POSED BY THE INCIPIENT JUDICIAL TREND TO CONFUSE THE TWO EXPECTATIONS

The introduction noted that, in a growing number of privilege cases, the courts are borrowing the expression "expectation of privacy" from Fourth Amendment jurisprudence and that some courts are even equating some of the substantive standards in the two bodies of law.¹³² These trends are dangerous. These tendencies can result in serious doctrinal distortions in both bodies of law. In some cases, the distortions can take the form of unsound curtailments of Fourth Amendment and privilege protection while, in other cases, the tendencies could lead to unjustifiable extensions of the doctrines.

A. CURTAILMENTS OF PROTECTION

As noted in Part II.A., while the Fourth Amendment expectation must exist at the time of the government intrusion,¹³³ the privilege expectation must exist at the time of the communication.¹³⁴ Suppose that a court confused the timing requirements in a Fourth Amendment case. Assume, for instance, that a client wanted to contact his attorney. The client decides to telephone the attorney; at the time that the client places the call, the client is in his conference room with a business associate who is an employee of another company. The attorney is not in her office at the time of the call, and the client therefore leaves a voicemail message. When the client left the message, he spoke in a normal volume; and the business associate was standing within easy earshot. In a later prosecution of the client, the government suspects that the voicemail message could supply incriminating information. Unfortunately for the government, the business associate is either unavailable or cannot recall the content of the client's message. Consequently, the government seizes the attorney's voicemail records. The

131. Mosteller & Broun, *supra* note 30, at 168, 179.

132. *See supra* notes 31-35.

133. *See supra* notes 72-75 and accompanying text.

134. *See supra* notes 76-80 and accompanying text.

government does so without obtaining a warrant based on a showing of probable cause.

The client and attorney respond by joining to move to suppress the records under the Fourth Amendment. If the government persuaded the judge to focus on the time of the client's statement, as would be appropriate under privilege law, the judge might mistakenly deny the motion. At that time, the client did not exhibit an expectation of privacy; the client knew that a third party was present and close enough to hear the content of the message left for the attorney. However, in the instant case, the objection is not premised on the attorney-client privilege; rather, the objection rests on the Fourth Amendment. For Fourth Amendment purposes, the critical time is the time of the government intrusion. If, without a warrant, the government agents entered the attorney's interior personal office,¹³⁵ the entry would be the search of a "house[]," and the acquisition of the records would be the functional equivalent of a seizure of "papers."¹³⁶ Hence, the motion should be granted.

Just as a facile, generalized equation of the Fourth Amendment and the communication privileges might lead to a contraction of Fourth Amendment protection in some cases, in other situations the mistake could undermine the protection afforded by privilege doctrine. Part II.C. pointed out the difference between the meaning of reasonable in the constitutional setting and its meaning in privilege law. In the latter, the claimant must have a factually reasonable belief in present and future confidentiality; given the circumstances, a hypothetical, reasonable person would have thought it probable that only the confidant heard the person's communication and that the confidant would maintain the confidentiality in the future.¹³⁷ In contrast, in Fourth Amendment jurisprudence, reasonable denotes a societal judgment that the citizen should be protected from this type of government intrusion.¹³⁸ The confusion over the meaning of reasonable is at the root of the court's error in *State v. Rollins*,¹³⁹ the 2009 North Carolina Supreme Court sharply criticized by Professors Mosteller and Broun.¹⁴⁰

In *Rollins*, the accused conversed with his wife in the visiting room at a prison.¹⁴¹ Under the circumstances, the accused did the best he could to

135. LAFAVE, *supra* note 2, at § 2.4(b).

136. *Id.* at § 2.6(e).

137. *See supra* notes 128-31 and accompanying text.

138. *See supra* notes 119-27 and accompanying text.

139. *State v. Rollins*, 675 S.E.2d 334 (N.C. 2009).

140. *See generally* Mosteller & Broun, *supra* note 30.

141. *State v. Rollins*, 675 S.E.2d 334 (N.C. 2009).

ensure that no one other than his wife heard his revelations to his wife.¹⁴² When the government subsequently attempted to introduce evidence of the revelations against him at trial, the accused objected on the basis of the spousal privilege, not the Fourth Amendment; but the court overruled the objection.¹⁴³ In doing so, the court stressed that the location of the conversation was a public place. It is well settled that the Fourth Amendment does not apply to evidence seized by the police from certain areas such as public places and open fields.

As previously stated, before *Katz*, the scope of the Fourth Amendment was closely tied to property law.¹⁴⁴ Thus, even if the government used a mechanical device to intercept an accused's communication, there was no Fourth Amendment violation unless the government agents violated the accused's property rights by, for example, committing a trespass onto the accused's real property. While *Katz* relaxed the sway of property law over the coverage of the Fourth Amendment, the situs of the government intrusion is still an influential factor in deciding whether there has been an unconstitutional search.¹⁴⁵ Thus, many post-*Katz* cases have refused to find a Fourth Amendment violation when the police intercepted the accused's communication in public areas such as a jail cell, a jail waiting room, or a prison visiting area¹⁴⁶—the site of the communication in *Rollins*. In doing so, the courts stress the legitimate, weighty social concern about maintaining security in jails and prisons.¹⁴⁷ In effect, *Rollins* incorporated this limitation, recognized in Fourth Amendment jurisprudence, into the spousal privilege.

The *Rollins* court's fundamental mistake is its confusion over the meaning of reasonable. In the Fourth Amendment setting, the courts have reasoned that from a broad social perspective, it is unreasonable for persons to expect privacy in these public areas. The courts have concluded that the public interest in preventing and prosecuting crime justifies police surveillance in these areas. Society will not tolerate such warrantless intrusions into citizens' residences or the residences' curtilage.¹⁴⁸ Absent judicial authorization, intrusions into those intensely private areas are too reminiscent of the British practices that, in part, prompted both the

142. *State v. Rollins*, 675 S.E.2d 334 (N.C. 2009).

143. *Mosteller & Broun*, *supra* note 30, at 157-63.

144. *Silverman v. United States*, 365 U.S. 505, 511 (1961); *Olmstead v. United States*, 277 U.S. 438, 475 (1928); *LAFAVE*, *supra* note 2, at § 2.1(b), at 432.

145. *Mosteller & Broun*, *supra* note 30, at 160, 176, 178, 182.

146. *Id.* at 148 (collecting cases), 158, 161.

147. *Id.* at 148, 152, 157-58, 170.

148. *LAFAVE*, *supra* note 2, at § 2.3(e), at 599 (citing *United States v. Dunn*, 480 U.S. 294, 297 (1987) (Brennan, J., dissenting)).

revolution and the subsequent adoption of the Fourth Amendment.¹⁴⁹ The privacy interest in areas other than habitations and their curtilage is much less intense.

However, reasonableness has a different meaning in privilege law. In that setting, the question is whether, given all the surrounding circumstances, including the precautions taken by the claimant, a hypothetical, reasonable person would probably have believed that he had achieved present confidentiality and that the confidant would preserve the confidentiality in the future.¹⁵⁰ In *Rollins*, there was no one within obvious earshot at the time of the accused's conversation with his wife, the accused spoke softly to maximize the probability that no one would overhear, and the government had not put the accused on notice that conversations in the visiting area would be overheard or recorded. Judged from the perspective of the hypothetical, reasonable person, Rollins' beliefs were factually reasonable. The upshot is that as a result of the court's confusion over the meaning of reasonable in privilege law, the court denied Rollins the privilege protection to which he was rightfully entitled.

B. EXTENSIONS OF UNWARRANTED PROTECTION

The courts' mistaken equation of the required expectations in these two doctrinal areas is a double-edged sword. Subpart A explained that the confusion can contract the proper scope of protection under both the exclusionary rule and communications privileges. In other cases, though, the confusion could conceivably lead the court astray into granting undeserved protection.

Subpart II.B. identified the differences between the nature of the beliefs that constitute the expectation under the exclusionary rule and in privilege law. As that subpart pointed out, the essence of the belief required of Fourth Amendment claimants is that the claimant has not left the potential evidentiary source, such as the paper or effect, openly exposed to public view, including the gaze of government authorities.¹⁵¹ The expectation required of privilege claimants differs markedly. A privilege claimant must entertain the belief that he is communicating with a confidant—and only a confidant.¹⁵² It is not enough for a privilege claimant to have the negative belief, however reasonable, that the contents of the communication are not being exposed to the general public. A privilege claimant must have the affirmative belief that the person with whom they

149. *United States v. Kyllo*, 533 U.S. 27 (2001).

150. *See generally* Mosteller & Broun, *supra* note 30.

151. *See supra* notes 84-99 and accompanying text.

152. *See supra* notes 91-107 and accompanying text.

are conversing qualifies as a confidant, such as an attorney, therapist, or spouse. Hence, a claimant might possess the privacy expectation required by the Fourth Amendment without having the confidentiality expectation demanded by privilege law.

If the courts were to lose sight of that distinction, the consequences could be a significant expansion of the obstructive impact of privileges on the search for truth in litigation. In many respects, privilege protection sweeps far more broadly than that of the exclusionary rule. As discussed previously, although the Fourth Amendment can be asserted only against a government in a prosecution or government actors in civil rights actions,¹⁵³ privileges may be invoked in litigation against private parties. For example, in such litigation a holder may assert a privilege as a basis for refusing to permit pretrial discovery; the judge may not impose sanctions for the refusal.¹⁵⁴ Moreover, unlike Fourth Amendment rights, a privilege may be asserted by the holder even when he is not formally joined as party to the litigation. Albeit a non-party, a holder may intervene in a case for the very purpose of asserting the privilege.¹⁵⁵ As an intervenor, the holder does not have to prove any stake in the case other than his interest in protecting their privilege. Finally, as stated previously, unlike qualified Fourth Amendment protection that can be trumped by a warrant based on probable cause, privilege protection is absolute.¹⁵⁶ No matter how desperate the opponent's need for the privileged information or how grave the risk that the suppression of the information will cause a miscarriage of substantive justice, the judge cannot override the privilege.¹⁵⁷ Conflating the Fourth Amendment's privacy expectation with privilege law's confidentiality expectation could thus have severe consequences for the justice system.

In the near future, this may become a pressing issue. Recent years

153. *See supra* notes 40-45.

154. Federal Rule of Civil Procedure 26(b)(1) limits the scope of discovery to "matter . . . not privileged." FED. R. CIV. P. 26. A judge may impose sanctions under Civil Rule 37 only when there is a wrongful refusal to permit discovery. FED. R. CIV. P. 37. A refusal, based on a proper privilege claim, is lawful rather than wrongful. *Id.*

155. *In re Grand Jury Proceedings*, 469 F.3d 24 (1st Cir. 2006) (involving intervention as of right under Federal Rule of Civil Procedure 24(a) the court stated that "[i]f appellant had made a colorable claim of entitlement to assert privilege . . . , the district court would have been obliged to grant intervention"); *United States v. DeFonte & Callazos*, 441 F.3d 92 (2d Cir. 2006); *In re Grand Jury Subpoena*, 223 F.3d 213 (3d Cir. 2000); *United States v. Crawford Enters., Inc.*, 735 F.2d 174 (5th Cir. 1984); *United States v. Feeney*, 641 F.2d 821 (10th Cir. 1998); *M.B. v. Superior Court*, 127 Cal. Rptr. 2d 454, 461 (Cal. Ct. App. 2002) ("Third party intervention for the purpose of filing a motion to quash is generally permitted so that evidentiary privileges are not sacrificed . . .").

156. *See supra* notes 46-62 and accompanying text.

157. *But see* sources cited *supra* note 46.

have witnessed a spate of cases addressing the legal issues posed by the use of electronic means of communication by private and public employees.¹⁵⁸ Many employees use their employers' electronic communication devices for personal reasons, including communications with confidants such as attorneys, therapists, and spouses. A growing number of public and private employers have adopted policies and practices regulating such communications.¹⁵⁹ Some employers have issued formal policy statements in codes of conduct and employee handbooks.¹⁶⁰ Such policies are now commonplace in both the public¹⁶¹ and private¹⁶² sector. These policies have forbidden the use of employer-owned communication devices for personal purposes and announce that the employer may access and review the communications at any time.¹⁶³ Significantly, some of these policies state that the employee has no expectation of privacy in such communications.¹⁶⁴ Furthermore, even when they are analyzing the application of privileges—rather than the Fourth Amendment—to such communications, courts have begun to couch their analysis in terms of whether the employee has a protected expectation of privacy.¹⁶⁵ If the employee knows that the employer's computer security measures are adequate to deny outsiders, such as government investigators, access to the files containing the employee's communications, the employee might well have the privacy expectation needed to sustain a Fourth Amendment claim. However, given the employer's access to the files, it is by no means a foregone conclusion that the employee also has the confidentiality expectation required to uphold a privilege claim.

158. *City of Ontario v. Quon*, 130 S. Ct. 2619, 2629 (2010); *Convertino v. U.S. Dep't of Justice*, 674 F. Supp. 2d 97, 108 (D.D.C. 2009); *United States v. Etkin*, No. 07-CR-913, 2008 U.S. Dist. LEXIS 12834 (S.D.N.Y. Feb. 19, 2008); *Kaufman v. SunGard Inv. Sys.*, No. 05-cv-1236, 2006 WL 1307882 (D.N.J. May 10, 2006); *Shanahan v. Superior Court*, No. B220947, 2010 Cal. App. Unpub. LEXIS 5756 (Cal. Ct. App. July 21, 2010); *Stengart v. Loving Care Agency, Inc.*, 973 A.2d 390 (N.J. Super. Ct. App. Div. 2009), *aff'd in part, modified in part*, 990 A.2d 650 (N.J. 2010); *Scott v. Beth Israel*, 847 N.Y.S.2d 436, 440-41 (N.Y. Sup. Ct. 2007); *Banks v. Mario Industries of Virginia, Inc.*, 650 S.E.2d 687, 695-96 (Va. 2007); see John Gergacz, *Employee's Use of Employer Computers to Communicate with Their Own Attorneys and the Attorney-Client Privilege*, 10 COMP. L. REV. & TECH. J. 269, 283 (2006); K. Nichols, *Hiding Evidence from the Boss: Attorney-Client Privilege and Company Computers*, 2 SHIDLER J.L.COM. & TECH. 6 (2006); Donald H. Nichols, *Window Peeping in the Workplace: A Look into Employee Privacy in a Technology Era*, 27 WM. MITCHELL L. REV. 1587 (2001).

159. *Quon*, 130 S. Ct. 2619; *Shanahan*, 2010 Cal. App. Unpub. LEXIS 5756, *8.

160. *Shanahan*, 2010 Cal. App. Unpub. LEXIS 5756.

161. *Quon*, 130 S. Ct. at 2629.

162. *Shanahan*, 2010 Cal. App. Unpub. LEXIS 5756.

163. *Id.*

164. *Id.*

165. *Id.*

IV. CONCLUSION

There is a growing trend in privilege cases of courts using the expression “expectation of privacy,” coined in *Katz*, to describe the state of mind that a privilege claimant must prove. This development was probably expected. There are numerous consistencies between the two doctrinal areas,¹⁶⁶ and in many respects the doctrines closely align.¹⁶⁷ Again, in a given case with the right facts, both the exclusionary rule and a privilege can come into play; and each will require the suppression of the same item of evidence.

On reflection, though, the judicial tendency to employ an expectation of privacy in privilege cases is a dangerous one. Part I observed that despite the several similarities between the two doctrines, fundamental differences exist. Even more significantly, Part II demonstrated that on close scrutiny, there are major differences between the Fourth Amendment privacy expectation and the privilege law confidentiality expectation: they relate to different points in time,¹⁶⁸ they consist of different beliefs,¹⁶⁹ and they must be reasonable in different senses of that term.¹⁷⁰ The use of the expectation of privacy expression in privilege cases creates a grave risk that, as in *Rollins*, a court will inadvertently elide from correct analysis in one doctrinal area into flawed reasoning in the other.¹⁷¹

“A reasonable expectation of privacy” under the Fourth Amendment is not interchangeable with “a reasonable expectation of confidentiality” in privilege law. The twain should not meet—either linguistically or substantively. Simply stated, even cognate concepts should not be confused.

166. Mosteller & Broun, *supra* note 30, at 162.

167. *Id.* at 171.

168. *See supra* notes 72-80 and accompanying text.

169. *See supra* notes 81-116 and accompanying text.

170. *See supra* notes 117-31 and accompanying text.

171. *See generally* Mosteller & Broun, *supra* note 30.