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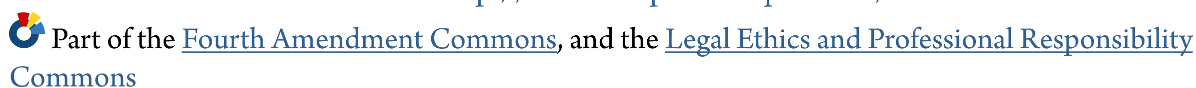
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The Danger to Confidential Communications in the Mismatch Between the Fourth Amendment's "Reasonable Expectation of Privacy" and the Confidentiality of Evidentiary Privileges

ROBERT P. MOSTELLER & KENNETH S. BROUN*

INTRODUCTION

In May 2009, a bare majority of the Supreme Court of North Carolina decided *State v. Rollins*,[1] making a serious mistake in privilege law that if applied generally will undermine the valued protections of evidentiary privileges. Ordinarily, few might criticize a ruling admitting statements like those made by the defendant, Mickey Rollins, who indicated his guilt for a homicide.[2] However, Rollins' statements were made to his wife, and under established precedent, those conversations should have been ruled a privileged marital communication.

The conversations were recorded by the defendant's wife for the authorities during her visits with him in prison.[3] Rollins was relying on the confidence of the marital relationship in confiding his guilt to

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1. State v. Rollins, 675 S.E.2d 334 (N.C. 2009).
2. Rollins was charged with murdering an elderly woman in her home. *Id.* at 335. After his motions to exclude this and other statements were denied, he entered a plea of guilty to homicide and was given a sentence of life without parole. However, Rollins reserved the right under the plea to challenge the trial court's rulings, and an appeal followed. *Id.* at 336; *cf. infra* note 9 (describing the independent basis for reversal in a Fifth Amendment violation regarding a different statement).
3. *Rollins*, 675 S.E.2d at 335. The circumstances that led Rollins' wife to agree to record her conversations with her husband are discussed below. *See infra* text accompanying notes 35-40.

his wife. He was acknowledging his guilt of a past crime, not securing help for a future one or enlisting his wife in justice-thwarting conduct. He had secretly lost her support and was deluded in the confidence he placed in her, but the marital privilege for confidential communications protects communicating partners from that type of betrayal. On all these dimensions, his statements were within the protections of the privilege, and therefore the court erred in its conclusion to the contrary.[4]

With respect to one issue—required confidentiality—Rollins' statement was close to the line but inside it under prior precedent. Clearly, Mickey Rollins had the subjective intent to keep the conversation secret, but had he taken reasonable precautions to ensure no third party overheard? In that effort, he had little margin to work with, for he was talking to his wife in a public visiting area inside a prison.[5] But he did what he could and his efforts proved effective. They spoke quietly, and he was not overheard by those around the couple.[6]

Had the majority simply ruled under these facts, that Mr. Rollins' attempts to ensure confidentiality were insufficient, its narrow holding would not have threatened the policies behind the marital communications privilege. However, the majority did not rule narrowly. It did not hold on a factual basis that the conversation lacked the requisite confidentiality because Mr. Rollins was not sufficiently careful.[7]

4. For further discussion of the established law, see *infra* notes 43-52, 68 and accompanying text.

5. *See Rollins*, 675 S.E.2d at 335.

6. *Id.* at 340 (Timmons-Goodson, J., dissenting).

7. The federal and state courts have decided numerous cases involving prisoners using telephones, which as a matter of prison or jail policy and public notice are monitored and/or recorded. These cases provide examples of fact-based rulings that raise no significant challenges to established privilege law because communications intercepted in the face of such notice lack confidentiality under ordinary privilege confidentiality principles. *See, e.g.*, United States v. Madoch, 149 F.3d 596, 602 (7th Cir. 1998) (holding no marital privilege for telephone conversation recorded by the government while one member of the couple was incarcerated; the court affirming the decision of the district judge who reasoned that given the likely monitoring "it is unreasonable to intend such a communication to be confidential"); United States v. Lentz, 419 F. Supp. 2d 820, 823-24, 827-28 (E.D. Va. 2005) (finding no attorney-client privilege for calls made on regular phones because "[t]he record convincingly establishe[d] that during the period in question, all outgoing telephone calls from [the jail] were recorded and subject to monitoring by jail officials and that [the defendant] and his counsel knew this was so"); United States v. Pelullo, 5 F. Supp. 2d 285, 288-89 (D.N.J. 1998) (finding no attorney-client privilege in call made on regular prison telephone because the standard practice at federal prisons is to monitor and record calls, and inmates are advised that calls are subject to monitoring with signs posted on each telephone advising of the practice; the court also noting that as a highly sophisticated

Instead, the majority ruled *as a matter of law* that, because the defendant lacked the ability to protect his privacy while in prison against the government under the Fourth Amendment and therefore lacked a "reasonable expectation of privacy," he had no evidentiary privilege for confidential marital communications.[8]

Perhaps the court's mistake will prove minor in terms of outcomes because even the majority that adopted it should easily recognize the error in theory and find ways not to extend it.[9] However, as a matter of

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prisoner, the defendant surely knew his calls were monitored and recorded); People v. Santos, 102 Cal. Rptr. 678, 679-81 (Cal. Ct. App. 1972) (holding that conversation monitored by a police officer conducted on a jail intercom telephone was not protected by marital communications privilege because the parties realized at the time they spoke that their conversations were being monitored); *cf.* United States v. Griffin, 440 F.3d 1138, 1144-45 (9th Cir. 2006) (holding letter the defendant sent from prison to his wife was not a protected confidential marital communication because state law denies the right to communicate by mail confidentially with one's spouse); United States v. Sababu, 891 F.2d 1308, 1329 (7th Cir. 1989) (recognizing that prisoners are given notice of call monitoring and interception in multiple ways, including published prison regulations and signs posted at eye level on each telephone that the calls are subject to monitoring, and concluding that such notice defeats even a claim of a subjective expectation of privacy under the Fourth Amendment of a call recorded by federal authorities). The litigation involving former Panama strong man Manuel Noriega, although factually complex, is part of this body of law. *See* United States v. Noriega, 917 F.2d 1543, 1551 (11th Cir. 1990) (holding, on review of an ambiguous record, that a release Noriega signed regarding calls on a telephone outside his cell raised questions whether he waived his attorney-client privilege because the calls were not reasonably expected to be confidential); United States v. Noriega, 764 F. Supp. 1480, 1485-88 (S.D. Fla. 1991) (describing, on remand, the notice of monitoring and recording on standard prison telephones—which would not be protected and which Noriega used—and the alternative of a "properly placed telephone call to an attorney," although this protected alternative may not have been properly explained to Noriega and therefore may have left his understanding of confidentiality ambiguous).

But in *Rollins*, none of the arguments just described supported the supreme court's holding. The couple did not talk by external or internal telephone. Nothing would have indicated to them that conversations in visiting areas were monitored or recorded. Moreover, there was no evidence that the prisons even had a program for monitoring or recording visiting room conversations. *See infra* sources and text accompanying notes 35-40.

8. State v. Rollins, 675 S.E.2d 334, 340 (N.C. 2009). As discussed below, the Second Circuit reached the different and we believe correct conclusion that the Fourth Amendment's "reasonable expectation of privacy" inquiry and the confidentiality determination under privilege law "are independent of each other." *See* United States v. DeFonte, 441 F.3d 92, 94 (2d Cir. 2006); *infra* text accompanying notes 24-30.

9. Indeed, the decision of the Supreme Court of North Carolina that marital privilege did not bar admission of Rollins' statements to his wife did not even alter the order for a new trial that the court of appeals initially entered. *See* State v. Rollins (*Rollins I*), 658 S.E.2d 43, 52 (N.C. Ct. App. 2008). On remand, the court of appeals

theoretical treatment of confidentiality within the area of evidentiary privileges, *Rollins* represents an error that could undercut the protection of conversations by married couples, lawyers and clients, patients and their doctors, and penitents and clergy across the state that heretofore were understood by all to be protected. Cautious professionals may change practices at the cost of efficiency and ordinary understandings of confidentiality.

The "reasonable expectation of privacy" concept relied upon by the majority is a Fourth Amendment concept and its application to privilege law would both change outcomes in many and perhaps unintended ways, and engender confusion.[10] When using normal modern modes of electronic communication, many of those communications lack the "reasonable expectation of privacy" required for Fourth Amendment protection.[11] If the confidentiality required for most privileges disappears whenever we have no "reasonable expectation of privacy" under the Fourth Amendment, our zone of protection under the

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again ordered a new trial. *See* State v. Rollins (*Rollins II*), 682 S.E.2d 411, 414 (N.C. Ct. App. 2009). It did so because its initial decision had found a second error, the admission of another statement by Rollins to a correctional officer in violation of the defendant's Fifth Amendment rights. *See id.* The supreme court had not granted review on that issue, and it therefore was unaffected by the reversal of exclusion of Rollins' statement to his wife on privilege grounds. *Id.* In addition, Rollins had objected to admission of his statement to his wife on the basis that it was involuntary under the Due Process Clause, but the court of appeals had not reached that issue in its initial opinion because it ruled the statement inadmissible on other grounds; namely, marital privilege. *See Rollins I*, 658 S.E.2d at 51. After the supreme court reversed the court of appeals' marital privilege holding, the latter had no choice but to reach the due process issue, and ruled that Rollins was entitled to a new suppression hearing because the trial judge had failed to make written conclusions of law on the issue or provide any basis or rational for its holding, having stated only that the motion was denied. *See Rollins II*, 682 S.E.2d 411, 414. The ultimate resolution of the charges and the case depends on future developments.

10. In dissent, Justice Timmons-Goodson stated that the "reasonable expectation of privacy" concept from the Fourth Amendment "need not be applied here and serves only to muddy the already murky waters of our law of confidential communications." *Rollins*, 675 S.E.2d at 341 (Timmons-Goodson, J., dissenting). We find her criticism well taken but believe it understates the potential damage that importing Fourth Amendment law to privileges would have upon its more flexible and generally reasonable treatment of confidential communications.

11. *See infra* Part IV.B (discussing the uncertain Fourth Amendment status of much modern communication); *see also* Micah K. Story, *Twenty-First Century Pillow-Talk: Applicability of the Marital Communications Privilege to Electronic Mail*, 58 S.C. L. REV. 275, 284-88, 293-96 (2006) (recognizing the limited protection that not only the Fourth Amendment but also statutory law provides web-based e-mails but assuming that confidentiality under privilege law can be determined differently and independently).

privileges will have suffered a major limitation that is not easily rectified.[12]

The reasonable protection of confidentiality, which is essential to the marital confidential communications privilege and to other evidentiary privileges, and the Fourth Amendment's "reasonable expectation of privacy" overlap in many circumstances, but they are distinct from one another. To confuse the two is both to change the privilege law and—we believe—to damage important interests in maintaining privacy of intimate marital and professional communications in an increasingly interconnected world.

In many states, including North Carolina, married couples have two quite distinct privileges that protect them. One of these privileges is unique among evidentiary privileges. It is the spousal immunity privilege,[13] which allows a wife or husband who is married to the defendant at the time of his or her criminal trial simply to decline to testify against the spouse if called as a witness by the prosecution.[14] The privilege applies only to criminal cases, protects only couples who are married at the time of the trial, and requires no confidentiality of communications.

All three of these aspects differ from the other privilege, the marital confidential communications privilege. The *Rollins* case did not involve the spousal immunity privilege because the testifying spouse, Mrs. Rollins, was quite willing to testify to the communications. The

12. Few courts or scholars have even suggested a way to mesh the ancient concepts of the Fourth Amendment with the digital age. Professor Chris Slobogin provides one of the rare alternative visions. *See* CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT (2007) (arguing for a vastly different system based largely on a balancing process that provides broad but limited protection to privacy against various forms of government monitoring and uses explicit polling regarding society's values); *cf.* DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE (2006) (reconceptualizing privacy in the context of modern methods of data collection and storage).

13. No uniform name appears to exist for this privilege. The terminology we use is descriptive of the privilege.

14. *See generally* 1 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 66 (6th ed. 2006) [hereinafter MCCORMICK ON EVIDENCE] (discussing this general privilege). In *Trammel v. United States*, 445 U.S. 40, 53 (1980), the United States Supreme Court held that, as to the federal spousal immunity privilege, the testifying spouse controlled whether he or she would waive the privilege and could do so by simply deciding to testify. North Carolina reached the same result through judicial construction and by statute. *See* State v. Freeman, 276 S.E.2d 450, 452-54 (N.C. 1984) (adopting, in the wake of *Trammel*, the position that spouses were competent to testify against each other except as to confidential marital communications); N.C. GEN. STAT. § 8-57(b) (2007) ("The spouse of the defendant shall be competent but not compellable to testify for the State against the defendant . . . .").

key difference with the privilege at issue in the case, the marital confidential communications privilege, is the confidentiality element of this privilege.

The marital confidential communications privilege also differs in who controls or "holds" the privilege. This privilege is designed to encourage marital confidences and thereby support the institution of marriage. Proceeding from its purpose to encourage confidential communications, the privilege, whether held exclusively by the communicating spouse or by both spouses, gives the communicating spouse the right to refuse to testify about the statement and to prevent his or her spouse from testifying regarding the confidential communications.[15] It similarly permits the communicating spouse to prevent his or her marital partner from secretly betraying the relationship and revealing or transmitting the confidential communication to others.[16] Thus, under the facts of this case and settled law, Mr. Rollins had the right to prevent his wife from testifying and to bar the introduction of the tape recording she secretly made of the communications, provided they were *confidential* communications within the meaning of the privilege.

In requiring confidentiality, the marital confidential communications privilege shares a kinship with the other historically recognized evidentiary privileges—attorney-client, doctor-patient, and clergy-penitent privileges. These privileges exist because courts and legislatures historically have recognized the societal benefit in protecting confidences in these relationships. They each require that the communications protected must have been made confidentially, and while the concepts may differ slightly at the margins,[17] the confidentiality concepts are broadly shared and largely consistent.

To understand the magnitude of the error in *Rollins*, one simply needs to contemplate the potential impact of the decision's logic. The majority in *Rollins* based its holding on its determination that a prisoner has no expectation of privacy in a prison facility. Thus, it would not have mattered whether the visiting area was empty except for the married couple.

15. *See* 1 MCCORMICK ON EVIDENCE, *supra* note 14, § 83.

16. *See id.* § 82.

17. The marital confidential communications, attorney-client, and doctor-patient privileges may differ slightly between jurisdictions on whether family members can be present without apparently destroying the privilege, and they also differ as to whether observations made in private may be protected if not part of an explicit communication. *See, e.g.*, CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:40, at 748-53 (3d ed. 2007) (discussing the differing determinations on whether to cover confidential observations, as opposed to communications and communicative acts).

Similarly, individuals (whether or not prisoners) do not have a "reasonable expectation of privacy" in the parking lot of the correction facility because they have no rights in this space; this outcome does not depend on whether others are around or the lot is deserted and isolated. Even if otherwise empty (or if others are present but not nearby), members of the public do not have a Fourth Amendment "reasonable expectation of privacy" in the waiting area of a train station, outside a school administrator's office where they wait to discuss a matter involving their children, or in a department of social services' waiting area or its offices. Even if married couples speak in inaudible whispers, they simply have no constitutionally protected right under the Fourth Amendment in such public space.

Again, the presence of others could destroy the "reasonable expectation," but their absence does not ensure it. Marital partners have no expectation of privacy on a deserted beach or on a secluded path in the midst of a wilderness park. Under the logic of *Rollins*, the conversation is not privileged in any of these places, even if the other spouse is not recording it and even if that spouse is unwilling to cooperate with authorities.[18]

In addition, if "reasonable expectation of privacy" under the Fourth Amendment is the test, then there is no privilege whenever the witness spouse is willing to cooperate with authorities. This is true even if the conversation takes place in the home. Under the Fourth Amendment, there is no "reasonable expectation of privacy" when the person who receives the communication is a cooperative witness. The Fourth Amendment test would mean that conversations could always be secured as long as done with the "connivance" of one of the spouses.[19]

18. In those states that have entirely abolished the spousal immunity privilege, *see Freeman*, 276 S.E.2d at 453 n.1 (observing that four states had abolished the spousal immunity privilege entirely), the witness spouse could be forced to testify against the defendant because under the logic of *Rollins* the marital confidential communication would be unavailable.

19. The marital partners would have no "reasonable expectation of privacy" in this conversation under the Fourth Amendment for two reasons. First, the conversation occurs in "an open field." *See infra* Part III.B.2. Second, the Fourth Amendment recognizes no expectation of privacy in any conversation to another individual if the other party willingly discloses it to authorities under the doctrine of "misplaced confidences." *See infra* Part III.B.1. The Fourth Amendment's "reasonable expectation of privacy" under this second concept is indeed incompatible with the marital privilege regardless of where the conversation takes place, as long as the other party to the conversation is willing to divulge it to the police. The Fourth Amendment protects the martial home because it is a home, but it would not on its own protect a conversation with another party, even if in the home, as long as that partner in the communication

Moreover, the theory adopted in *Rollins* is not obviously limited to the marital privilege and logically should apply to attorney-client, doctor-patient, and communicant-clergy privileges as well. The attorney-client privilege may receive protection in criminal cases from the Sixth Amendment right to counsel, but that protection has significant limitations[20] and does not apply in civil cases. Most lawyers speak with their clients face to face in space to which they have a relationship that would allow a "reasonable expectation of privacy," but by no means would all conversations be protected if the test for confidentiality requires the Fourth Amendment standard to be satisfied.

Lawyers do occasionally speak with their clients over lunch in public restaurants, albeit away from others, or at park benches isolated from others, or in the unoccupied corner of a courthouse hallway just before a hearing for last minute details. Occasionally, a person will seek to consult a lawyer about a matter of concern at a chance encounter at a social event and the lawyer takes the individual to the side or into an unoccupied room nearby,[21] or during an early morning workout at a health club when machine noise or physical isolation makes a private conversation possible. Some lawyers enjoy mixing business with golf, discussing the confidences of the case on the fairway or edge of the green or while on a hunting trip walking in apparent isolation watching the dogs work the field. None of these situations

(as Ms. Rollins willingly did) divulges it to authorities. This Fourth Amendment and the privilege concepts, like oil and water, are not normally expected to mix.

20. The Sixth Amendment right to counsel is far from complete in criminal cases. First, it applies only to cases where the defendant has been formally charged. *See* Kirby v. Illinois, 406 U.S. 682, 689 (1972) (recognizing that the right to counsel commences only upon "the initiation of adversary judicial criminal proceedings," which occurs "by way of formal charge, preliminary hearing, indictment, information, or arraignment"). Second, it is in a narrow sense charge-specific, only applying to those specific offenses listed in the charging document. *See* Texas v. Cobb, 532 U.S. 162, 174 (2001) (holding that the constitutional right was inapplicable to capital murder charges even though those crimes were closely connected to the burglary during which the murders occurred because, when the police questioned the defendant, he had been formally charged only with burglary).

21. Unexpected conversations at social events that previously, with a few simple precautions, could be covered by the attorney-client privilege may no longer enjoy such protection. For example, if a person starts asking questions of a lawyer at a friend's holiday party, the lawyer would be well advised not only to pull the person aside to a private place but to find some space, such as perhaps her car parked outside in which she has ownership interest, where the conversation can be held. Regardless of how isolated one might be within a casual friend's house or at the neighborhood holiday party, an attorney likely has no "reasonable expectation of privacy" in the space absent a substantial relationship with the owner.

permits a "reasonable expectation of privacy" under the Fourth Amendment.

Even more problematic in potential significance are the uncertainties of Fourth Amendment protection of common modern forms of communication by electronic means. Serious questions exist as to whether telephone conversations in which either party uses a cordless telephone are constitutionally protected.[22] The status of e-mail messages left for another party and trash disposal, even with shredding, are either under a constitutional cloud or unprotected.[23] Under the Fourth Amendment, it is uncertain that any of these communica-

22. *See* United States v. Mathis, 96 F.3d 1577, 1583-84 (11th Cir. 1996) (noting that no federal statutory law protected interception of cordless telephone calls at the time made and suggesting, perhaps, that the call thereby had no attorney-client privilege).

23. We do not deal with how the government or the opponent obtains knowledge of a conversation. Often "loose lips" give the other party a clue to what was said and/or where it was said. If the party learns of a conversation and it is not protected by the privilege, then disclosure may be forced by legal process and the revelation need not be voluntary.

The clearest case for constitutionality occurs when informants, perhaps through elaborate camouflage, secret themselves within hearing range of the conversation. Acquisition of the conversation may be possible by innovative adversaries using technology. For example, outdoor conversations may be amplified by parabolic microphones. *See* Gary T. Marx, *Forget Big Brother and Big Corporation: What About the Personal Uses of Surveillance Technology as Seen in Cases Such as* Tom I Voire?, 2 J. LEGAL TECH. RISK MGMT. 24 (2007) (discussing legal use of a parabolic microphone to monitor distant conversations). Despite the recognition, in ominous terms, over forty years ago of the threat to privacy from parabolic microphones, which can "pick up conversations held in the open at distances of hundreds of feet [and] are available commercially," Berger v. New York, 388 U.S. 41, 126 (1967) (White, J., dissenting), the use of parabolic microphones to capture and record conversations in an "open field" has not been recognized as a violation of the "reasonable expectation of privacy" under the Fourth Amendment in any Supreme Court case, either directly or by implication. Nevertheless, the interception of aural communications are much more carefully regulated by statute and may run afoul of Title III's prohibitions, *see* 18 U.S.C. §§ 2510-2522 (2006), despite lacking constitutional protection.

Interception of aural communication is subject to far greater scrutiny under the Fourth Amendment and statutory law than is visual enhancement, which has largely been unregulated if within reasonable ranges of publicly available technology. Thus, interception of communications could be achieved without running afoul of any constitutional or statutory provision if the mouths of the speakers are visible using visual enhancement and a trained lip reader. *See* David A. Sklansky, *Back to the Future:* Kyllo, Katz, *and Common Law*, 72 MISS. L.J. 143, 204-05 (2002) (arguing that the Fourth Amendment should regulate the use of a telescope to peer into the home or to read the lips of someone talking in a telephone booth, but making no claim regarding observations in "open fields"). For further discussion of related issues involved in modern forms of communication, see *infra* Part IV.B.

tions are protected by a "reasonable expectation of privacy," and certain that many are not.

One cannot have such an expectation in a public building hallway or "open fields" and cannot construct a reasonable expectation regardless of how cautious one is. The space and the speaker's relationship to it define the Fourth Amendment right, and prisons and courthouse hallways do not differ in this regard. The concept of "open fields" makes it impossible to protect a conversation in a park, in a parking lot of a prison (or a shopping center), or a hunting reserve (or golf course). As to such places, fences and signs make no difference.

By contrast, privilege law has permitted individuals to create privileges outside of space they own or control. Privilege permits pockets of temporarily constructed confidentiality to follow the communicators as long as reasonably effective precautions are taken to provide physical privacy. It does so because it depends on the similar, but distinct, concept of reasonable expectation of confidentiality.

The majority of justices on the Supreme Court of North Carolina missed the distinction between privilege and Fourth Amendment law. Its holding, if not entirely unique, is highly unusual in American privilege law. It is a mistake as a matter of precedent and theory.

We believe that the Second Circuit, by contrast, employed the correct analysis in *United States v. DeFonte*, in holding that the determination of a "reasonable expectation of privacy" under the Fourth Amendment and the confidentiality determination under privilege "are independent of each other."[24] In that case, a witness for the prosecution kept a journal recording conversations with her attorney about incidents involving the defendant while she was incarcerated.[25] The journal was taken from her cell by prison officials.[26] When the defendant asked for its production, the witness asserted that the attorney-client privilege protected entries that recounted her conversations with her attorney and other material prepared for those conversations.[27] The district judge declared the attorney-client privilege claim invalid, relying in part on the lack of Fourth Amendment protection for documents of a prisoner.[28] The Second Circuit vacated the order and remanded the case,[29] stating:

24. United States v. DeFonte, 441 F.3d 92, 94 (2d Cir. 2006).

25. *Id.* at 93-94.

26. *Id.*

27. *Id.* at 94.

28. *Id.*

29. *See id.* at 96.

The district court's decision rested in part upon the conclusion that "[the witness] cannot have intended her journal entries to remain confidential because the law affords her no reasonable expectation of privacy in her cell." It is true that, in the Fourth Amendment context, the law affords considerably less recognition to an inmate's subjective expectation of privacy. An inmate does not, however, knowingly waive an attorney-client privilege with respect to documents retained in her cell simply because there is no reasonable expectation of privacy in those documents for Fourth Amendment purposes. Rather, the two inquiries are independent of each other.[30]

I. THE DECISION IN *STATE V. ROLLINS*

A. *The Facts*

In 2005, Mickey Rollins entered a plea of guilty to the first degree murder of an eighty-eight year old woman who had been killed in her home three years earlier.[31] Notwithstanding the marital confidential communications privilege, the trial court (prior to Rollins' plea) admitted into evidence incriminating statements made by Rollins to his wife, who had secretly recorded them.[32] Tolvi Rollins had worn a recording device by agreement with an agent for the State Bureau of Investigation.[33]

Mr. Rollins had been seen on the day of the crime in the vicinity of the residence where the victim was later found murdered, and he became a "person of interest."[34] When first interviewed, Mrs. Rollins was unwilling to communicate with authorities, indicating she had no pertinent information concerning the crime.[35] When she was later arrested for felony witness intimidation in connection with an unrelated charge against her husband, she was again asked about the crime.[36] Subsequent to her arrest, Mrs. Rollins contacted the police and told them that Mr. Rollins had confessed to her that he committed the murder.[37] She was informed a reward was being offered for information in the case.[38] She agreed to wear a recording device when visiting her husband in jail, which she did on three occasions in different

30. *Id.* at 94 (citation omitted).
31. State v. Rollins, 675 S.E.2d 334, 335 (N.C. 2009).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*

prison facilities.[39] She was paid $840.00 for what were labeled "expenses" she incurred during those visits.[40]

The recorded conversations occurred in the public visiting areas of North Carolina Department of Correction facilities where Mr. Rollins was confined.[41] Rollins' plea agreement preserved his right to appeal the trial court's ruling.[42]

B. *The Court of Appeals' Decision and Analysis*

On appeal, the North Carolina Court of Appeals reversed, ruling that the marital confidential communications privilege protected Rollins' statements.[43] The court held that this privilege could not be waived through the unilateral action of the wife in revealing the communication by secretly recording the conversations with her husband and disclosing them to authorities.[44] Holding such unilateral action ineffective to destroy the privilege is consistent with long-standing North Carolina law,[45] which is generally in accord with the national understanding[46] of this privilege: one party to a confidential marital communication cannot waive the privilege by disclosure of the communication, including the recording of the conversation.[47]

The court of appeals held that the communications were privileged despite being made in the public visiting area of the prison because Mr. Rollins intended that the conversation be confidential[48] and because, despite the public nature of the area, the parties

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 335-36.

43. *See* State v. Rollins, 658 S.E.2d 43, 50-51 (N.C. Ct. App. 2008).

44. *Id.* at 48.

45. *See* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 127, at 421 (6th ed. 2004) [hereinafter BRANDIS & BROUN]. The text just cited notes the existence of an earlier, contrary case that held that the privilege is of the witness only and that the other spouse could not object. *Id.* (discussing Hagedorn v. Hagedorn, 189 S.E. 507, 509 (N.C. 1937)). As those authors recognize, *Hagedorn* was effectively overruled some thirty years later. *See id.* (describing Hicks v. Hicks, 155 S.E.2d 799, 802 (N.C. 1967)).

46. The nationally-recognized view is discussed in 1 MCCORMICK ON EVIDENCE, *supra* note 14, § 82, at 377.

47. *See, e.g., Hicks*, 155 S.E.2d at 802 (holding that surreptitious recording does not waive the privilege where conversation was otherwise confidential when made); McCoy v. Justice, 155 S.E. 452, 458 (N.C. 1930) (holding that letters that were confidential marital communications were not admissible when obtained by the cooperation of one of the marital partners).

48. *See Rollins*, 658 S.E.2d at 48.

"attempted to keep their communications from being overheard by third parties, and succeeded in doing so."[49] The court of appeals also distinguished this case from others in prison settings where the facility publicized the practice of intercepting certain types of communications and the communications intercepted by prison authorities were ruled admissible.[50] Here no one intercepted the conversations, and the Rollins couple did not use a mode of communication, such as telephone or mail advertised as subject to interception.[51] There is no indication that the prisons in which the statements were made notified prisoners or visitors that their conversations in public visiting areas were subject to voice magnification, monitoring, or recording. In fact, the court of appeals specifically noted that there was no warning that Rollins' communications might be monitored in the way they were—by surreptitious recording with a device located on his wife.[52]

C. *The Supreme Court's New Analysis*

A four-justice majority of the Supreme Court of North Carolina questioned none of the foundational facts of the North Carolina Court of Appeals. But it reached the opposite conclusion, holding that the conversations were not covered by the marital confidential communications privilege.[53] It did so for reasons no court in North Carolina had ever given. The court ignored the intent of the speaker to keep the conversation confidential and the precautions he took to successfully

49. *Id.* at 49-50.

50. *Id.* at 48-49 (discussing State v. Gladden, 608 S.E.2d 93, 95-96 (N.C. Ct. App. 2005), where the defendant spoke with family members on an outside line, with the system giving an automated message that conversations were subject to monitoring and recording, and the conversation was in fact recorded by authorities).

51. *Id.* at 49.

52. *See id.* Before the supreme court's decision in *Rollins*, such notice of monitoring through one's spouse would likely have been ineffectual. There is a relationship between a "reasonable expectation of privacy" and privilege, but it appears to run in the opposite direction from what the Supreme Court of North Carolina indicated. Although not settled in the law, the existence of legal protection through an evidentiary privilege may provide a basis in societal values for the expectation of privacy to be objectively reasonable within the meaning of *Katz*. *See* DeMassa v. Nunez, 770 F.2d 1505, 1506-07 (9th Cir. 1985) (concluding that lawyer-client privilege gave defendant standing to contest the search of his lawyer's office for client's files); State v. Howard, 728 A.2d 1178, 1181-84 (Del. Super. Ct. 1998) (holding that the Fourth Amendment reasonable expectation of privacy of a married couple was violated when their conversation in a police station interview room was surreptitiously recorded by the police in part because the state's wiretap statute exempts from interception and privilege law protects confidential marital communications).

53. State v. Rollins, 675 S.E.2d 334, 340 (N.C. 2009).

prevent anyone from overhearing. The privilege did not apply because it "does not extend to communications occurring in the public visiting areas of North Carolina [prisons] . . . *because a reasonable expectation of privacy does not exist in such areas*."[54]

The supreme court built its conclusion on two sets of authorities. First, it cited prior cases, which it asserted depended on the "circumstances in which the communication takes place, including the physical location and presence of other individuals" to answer the question of whether the veil of confidence has been removed.[55] In the first of these cases, *State v. Freeman*,[56] which involved an incriminating statement a husband made to his wife in a public parking lot while in the presence of his wife's brother, the privilege was not upheld. With *Freeman*, it contrasted two cases, *State v. Holmes*[57] and *Hicks v. Hicks*,[58] where statements were made in the home and the privilege upheld. In *Holmes*, the husband ordered two men from his home before he made the contested statement to his wife about his intent to kill one of the men.[59] The court noted that in *Hicks*, the couple's eight-year-old child

54. *Id.* at 334-35 (emphasis added).

55. *Id.* at 337.

56. State v. Freeman, 276 S.E.2d 450 (N.C. 1981). The communication in *Freeman* was not intended to be confidential irrespective of the place it occurred. The court described the legal test and the facts of that case as follows:

> [T]he question is whether the communication, whatever it contains, was induced by the marital relationship and prompted by the affection, confidence, and loyalty engendered by such relationship. . . . When this definition is applied to the facts of [this case] . . . , it is apparent that Mrs. Freeman's proposed testimony included no confidential communication which would render it incompetent under the rule established in this case. Mrs. Freeman stipulated that had she been allowed to testify, she would have stated that defendant parked his car in a public parking lot, approached her and her brother carrying a shotgun, asked if they wished to speak with him, and immediately discharged the shotgun, killing Mrs. Freeman's brother. Such actions in a public place and in the presence of a third person could not have been a communication made in the confidence of the marital relationship or one which was induced by affection and loyalty in the marriage. . . . Consequently, Mrs. Freeman's testimony is competent and admissible under the rule adopted in this case.

Id. at 454-55. The encounter described in *Freeman*—confronting a third party in the presence of one's wife and speaking to both (shortly before shooting one of them)—is not confidential under any definition. That determination does not depend on the place the conversation occurred.

57. State v. Holmes, 412 S.E.2d 660 (N.C. 1992).

58. Hicks v. Hicks, 155 S.E.2d 799 (N.C. 1967).

59. *Holmes*, 412 S.E.2d at 661.

was singing or playing in the area.[60] It drew from these contrasting results the idea that "actual physical privacy, as well as a desire for and expectation of confidentiality, are important in establishing a confidential communication."[61]

Second, it cited two "legal scholars" for the proposition that "physical privacy is germane to the existence of a confidential communication."[62] The first of these was Edward Imwinkelried, whose treatise on privilege states:

> The situs of the communication is a relevant factor in determining whether there was the requisite confidentiality at the time of the communication. It is possible to have a confidential conversation in a public place, but the public nature of the situs makes it more difficult to find the requisite privacy. The layperson must have *a reasonable expectation of confidentiality*.[63]

The opinion next cited Robert Mosteller and his coauthors of *North Carolina Evidentiary Foundations* for the proposition that "a confidential communication requires '(1) physical privacy, and (2) an intent on the holder's part to maintain secrecy.'"[64]

The supreme court then took a momentous and unfortunate step. The State had argued that the defendant had no reasonable expectation of privacy under the Fourth Amendment in any area in the prison facility, citing numerous authorities that clearly establish the accuracy of that well recognized initial proposition under the federal Constitution.[65] The momentous step was the court's agreement with the State's conclusion from this authority: because there was no Fourth Amendment protection, there was also no evidentiary privilege.

The court based its conclusion on the earlier noted authorities, in addition to a statement by Kenneth S. Broun and his coauthors in *McCormick on Evidence*:

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60. What inference the majority intended to draw from the presence of the child in the home and what significance it had are unclear. The opinion can be read to say that the child was incompetent. *Compare Hicks*, 155 S.E.2d at 802, *with Rollins*, 675 S.E.2d at 341 (Timmons-Goodson, J., dissenting) (arguing for this interpretation). Another interpretation might be that the child simply was not listening. *See Hicks*, 155 S.E.2d at 802. But clearly the *Hicks* opinion did not consider the child as an unnecessary third party who destroyed the confidential nature of the conversation.

61. *Rollins*, 675 S.E.2d at 338.

62. *Id.*

63. EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 6.8.1, at 674 (Richard D. Friedman ed., 2002) (emphasis added).

64. *Rollins*, 675 S.E.2d at 338 (quoting ROBERT P. MOSTELLER ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS § 8-2, at 8-6 (2d ed. 2004)).

65. *Id.* at 338-39.

> The rationale that the spouses may ordinarily take effective measures to communicate confidentially tends to break down where one or both are incarcerated. However, communications in the jailhouse are frequently held not privileged, often on the theory that no confidentiality was or could have been expected.[66]

These authorities discussed the importance of physical privacy, used the term "reasonable expectation of confidentiality," and noted that confidentiality tends to break down in prison situations where confidentiality is often not expected or possible. However, the authorities neither discussed the Fourth Amendment nor endorsed the application of its "reasonable expectation of privacy" to privilege. Nevertheless, the supreme court took that step and adopted the conclusion that the Fourth Amendment's concept of "reasonable expectation of privacy" controlled whether a conversation otherwise covered by the marital confidential communications privilege was protected, stating: "[C]ommunications occurring during ordinary [Department of Corrections] visits . . . do not invoke the protection [the privilege statute] affords to confidential communications because there is no reasonable expectation of privacy in such communications."[67] The loss of privilege was not because the marital partners did not intend to have a confidential communication, or because such expectation of confidentiality was not factually reasonable, or even because the spouses did not take reasonably effective steps to maintain its confidentiality.[68] Rather, the statements were not protected by the privilege

66. *Id.* at 339 (quoting 1 McCORMICK ON EVIDENCE, *supra* note 14, § 82, at 377).

67. *Id.*

68. After restating its *per se* legal conclusion that because the conversations occurred during routine visits at department of corrections facilities the couple "thereby lacked any reasonable expectation of privacy," the majority in the penultimate paragraph of its opinion also suggested the precarious nature of the conversations' confidentiality. *Id.* at 339-40. It stated that it could be inferred that Mr. Rollins doubted the privacy of the communication because at one point he checked his wife for the presence of a recording device. *Id.* Since the law does not allow the spouse to destroy the privilege by conniving with others, it would be error for a court to hold that mere apprehension of such connivance would nevertheless destroy the privilege.

The court also noted that "at times other people were in close proximity and even spoke to defendant" and his wife during their conversations, but the court never asserted that anyone overheard or that the couple talked loudly enough to be reasonably overheard. *Id.* The fact that others are nearby should not affect the confidentiality of the communication if the marital partners took reasonable precautions by speaking quietly, as they did. *See* MUELLER & KIRKPATRICK, *supra* note 17, § 5:40, at 753-54.

Finally, the court noted that Mr. Rollins withheld some information until after he was released from prison. *Rollins*, 675 S.E.2d at 339-40. The effect of this observation is that Mr. Rollins was rightfully concerned about confidentiality in a difficult physical environment, which is consistent with having an intention to maintain confi-

because the Fourth Amendment's limitation on where the communication takes place does not permit "a reasonable expectation of privacy" under that constitutional provision in a public visiting area of a prison.[69]

The exchange of the word "privacy" for "confidentiality" is a major change in theory. The precedent that the substitution of words creates could have an enormous potential impact on the law of privilege. It would work a profound change in many areas and threaten protection in others. Although the concepts of confidentiality in privilege law and the required "reasonable expectation of privacy" under the Fourth Amendment have some similarity and clearly overlap in some situations, they have heretofore been clearly distinct legal concepts, and should remain so.

II. THE CONCEPT OF CONFIDENTIALITY: INTENTION AND REASONABLE PRECAUTIONS

As noted earlier, the *Rollins* majority cited three legal scholars and their treatises for concepts regarding confidentiality in which it purports to find support for adopting the Fourth Amendment's "reasonable expectation of privacy" as an element of confidentiality under the marital confidential communications privilege.[70] It is therefore useful to examine further case law on which the observations in these treatises are based. However, it bears noting that the court might have cited one additional authority. Professors Mueller and Kirkpatrick make the following statement regarding confidentiality in public spaces in their treatise, *Federal Evidence*: "Nor should it matter that a conversation takes place in the larger presence of others, as might happen on a bus or a plane or a movie theater, . . . so long as they took reasonable precautions to speak in quiet voices or whispers . . . ."[71]

The relevant language from Edward Imwinkelried's treatise on privilege, using the word "confidentiality" rather than "privacy," is repeated below:

> The situs of the communication is a relevant factor in determining whether there was the requisite confidentiality at the time of the com-

dentiality and taking reasonable precautions to maintain it. The court reached no clear factual conclusion to the contrary nor did it claim North Carolina precedent for such a finding on this or any other ground.

69. *Id.* at 339.

70. *Id.* at 337-39 (citing IMWINKELRIED, *supra* note 63, § 6.8.1, at 674-75; 1 MCCORMICK ON EVIDENCE, *supra* note 14, at 377; MOSTELLER ET AL., *supra* note 64, § 8-2, at § 8-6).

71. MUELLER & KIRKPATRICK, *supra* note 17, § 5:40, at 753.

munication. It is possible to have a confidential conversation in a public place, but the public nature of the situs makes it more difficult to find the requisite privacy. The layperson must have *a reasonable expectation of confidentiality.*[72]

Professor Imwinkelried cites eight cases from state courts with regard to the need for "a reasonable expectation of confidentiality."[73] These cases involve confidentiality applied to the major evidentiary privileges that require that concept, not just to the marital confidential communications privilege.[74] With one exception, which will be discussed in detail, none use the phrase "reasonable expectation of privacy."[75]

Gordon v. Boyles, a Colorado civil case, deals with the attorney-client privilege and states "the 'privilege applies only to statements made in circumstances giving rise to *a reasonable expectation that the statements will be treated as confidential.*'"[76] That court focused on the intention of the party to maintain secrecy and on its precautions not to disclose the communications to third parties.[77] *State v. Soto*, a Hawaii criminal case, involved the attorney-client privilege and held there was no privilege in statements made in the presence of a police informant who was not part of the defense team, because "there was no *reasonable expectation of confidentiality* in the presence of the informant."[78]

State v. List, a New Jersey criminal case involving the clergy-communicant privilege, held that a letter to the defendant's minister, left along with directions to contact authorities, "for anyone to find and read, cannot be considered to have been made with *a reasonable expectation of confidentiality*."[79] *Plate v. State*, an Alaska criminal case, also

72. IMWINKELRIED, *supra* note 63, § 6.8.1, at 674 (emphasis added).

73. *Id.* at 674 n.35.

74. *Id.*

75. *See id.*

76. Gordon v. Boyles, 9 P.3d 1106, 1123 (Colo. 2000) (emphasis added) (quoting Lanari v. People, 827 P.2d 495, 499 (Colo. 1992)).

77. *Id.*

78. State v. Soto, 933 P.2d 66, 76 (Haw. 1997) (emphasis added). The conversation occurred in a hallway in the courthouse. However, the element that destroyed the privilege was the known presence of the informant during the conversation and the clear knowledge that he was an unwelcome intruder who was not part of the defense team. *Id.* at 76-78.

79. State v. List, 636 A.2d 1054, 1057 (N.J. Super. App. Div. 1993) (emphasis added). The case also involved a Fourth Amendment claim against admitting this document and others that were found when the police entered a home where the defendant had killed five members of his family. *Id.* at 1056-58. Along with a note to the finder to contact authorities and with directions to keys to open the cabinets, the document was found by police in a file cabinet. *Id.* at 1057. The court resolved the Fourth

involved application of the clergy-communicant privilege, which turned on whether the conversation lacked "a reasonable expectation of confidentiality."[80] However, the appellate court could not resolve the issue because the trial judge, who could have concluded that the defendant "*had no subjective expectation of confidentiality*," focused solely on the intent of the pastor and therefore did not assess the reasonableness of the defendant's professed belief in its confidentiality.[81] In *State v. Martin*, the Washington Court of Appeals reviewed an order of contempt against a minister for refusing to provide testimony in a criminal case.[82] The court stated that the clergy-communicant privilege depended on the confidentiality of the communication, which "turns on the communicant's *reasonable belief that the conversation would remain private*" and "upon communicant's *reasonable expectations of confidentiality*."[83]

In *State ex rel. Joy P. v. Joseph P.*, a civil parental rights termination case involving the admission of statements to a prison psychiatrist notwithstanding the psychotherapist-patient privilege, the Wisconsin Court of Appeals stated that the patient, *inter alia*, "must show that he had *an 'objectively reasonable' belief that the discussions were 'confidential'* . . . ."[84] The court rejected the prosecution's argument that incarcerated persons who were evaluated during incarceration had no psychotherapist-patient privilege, and ruled that indeed the conversation was privileged against being used in the criminal proceeding even though the psychiatrist informed the patient that it would be shared

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Amendment claim against the defendant on the grounds of abandonment and inevitable discovery. *See id.* It did not make reference to that decision in its holding on privilege. *Id.* at 1056-58.

80. Plate v. State, 925 P.2d 1057, 1066 (Alaska Ct. App. 1996).

81. *Id.* at 1066-67 (emphasis added). The court stated that "[t]he person consulting a clergyman must believe that the conversation is to remain private, and the person's belief in the privacy of the conversation must be reasonable." *Id.* at 1066. The pastor testified that he either gave the defendant no guarantee of confidentiality or at most a conditional promise, with the predicate condition to confidentiality unsatisfied. *Id.* Because of the way the trial court made its findings, the appellate court, *inter alia*, could not resolve whether the pastor's view of the lack of confidentiality was conveyed to the defendant and, if so, how it affected the defendant's professed belief in confidentiality. *See id.* at 1065-67.

82. State v. Martin, 959 P.2d 152 (Wash. Ct. App. 1998).

83. *Id.* at 159 (emphasis added) (citing *Plate*, 925 P.2d at 1066; Nicholson v. Wittig, 832 S.W.2d 681, 685 (Tex. Ct. App. 1992)). The question in the case was whether others were present when the communications were made, which would void the privilege, but the question could not be resolved on the record before the court. *Id.*

84. State *ex rel.* Joy P. v. Joseph P., 546 N.W.2d 494, 498 (Wis. Ct. App. 1996) (emphasis added).

with her colleagues and used for his treatment while he was in the prison system.[85] *State v. Locke*, a Wisconsin criminal case also involving the psychotherapist-patient privilege, stated that not only must the patient believe the discussions were "confidential" but that belief must have been "objectively reasonable."[86]

People v. Mickey, a California criminal case, involved the marital confidential communications privilege and letters from a defendant incarcerated in Japan at the time the letters were written, which were sent to his wife in the United States.[87] The letters were turned over to authorities in America and admitted at his trial.[88] The court stated that the "record establishes that the documents were not written or sent 'in confidence.'"[89] It did, however, state that "[t]o make a communication 'in confidence,' one must intend nondisclosure . . . and have *a reasonable expectation of privacy*."[90]

The court in *Mickey*, however, was not ruling as a matter of law. Instead, it concluded that the defendant appeared not to have the required intent and certainly did not have the necessary expectation.[91] Indeed, it stated he "had no expectation of privacy, reasonable or otherwise."[92] This is because he believed his letters were being intercepted and read by authorities in Japan or the United States.[93] Indeed, he even directed comments in the letters explicitly to such "readers."[94] The court made no reference to the Fourth Amendment nor did it indi-

85. *Id.*

86. State v. Locke, 502 N.W.2d 891, 897-98 (Wis. Ct. App. 1993).

87. People v. Mickey, 818 P.2d 84 (Cal. 1991). The result in *Mickey* is consistent with other cases that conclude that confidentiality cannot even be subjectively intended and is certainly not reasonable when public notice has been given or common knowledge exists of the government's interception of specified types of communication. For example, in *Commonwealth v. May*, the wife of an incarcerated defendant testified to the content of the letter she received from her husband indicating that he had "hurt a girl and buried her in the woods." 656 A.2d 1335, 1339 (Pa. 1995). The Pennsylvania Supreme Court found that the marital confidential communications privilege did not protect the letter because the defendant, when incarcerated, had signed a form permitting prison officials to review all his incoming and outgoing mail. *Id.* at 1342. Based on this agreement, the court concluded that he "had no reasonable expectation that his communications to his wife would be held confidential." *Id.* Compare this with the result reached in United States v. Madoch, 149 F.3d 596 (7th Cir. 1998), discussed *supra* note 7.

88. *Mickey*, 818 P.2d at 101-02.

89. *Id.* at 102.

90. *Id.* (emphasis added) (citation omitted).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

cate it was using the term "reasonable expectation of privacy" as a term of art related to that doctrine.[95]

Imwinkelried's quotation also indicates that "[t]he situs of the communication is a relevant factor in determining whether there was the requisite confidentiality . . . ."[96] He cites *Scott v. Hammock*,[97] a Utah civil case, for this proposition. The *Hammock* Court was using location, not because it did not have Fourth Amendment protection, but as a proxy for the speaker's intent.[98] The court stated that "[w]hether communications between a cleric and a parishioner are confidential may depend on the facts and circumstances surrounding the communications, such as whether the situs of the communication indicates an intent that the communication be confidential . . . ."[99]

Professor Mosteller cites five North Carolina cases relating to the scope of the marital privilege.[100] Three of them, *Freeman*, *Holmes*, and *Hicks*, are described above in the discussion of the supreme court's opinion in *Rollins*.[101] Mosteller also discusses *State v. Murvin*, which involved the attorney-client privilege, to develop the point that, while *Hicks* ruled that the presence of an eight-year-old child did not destroy confidentiality, the presence of unnecessary family members generally will do so.[102] Also, *State v. McQueen* holds that even as to oral statements made to a spouse in private, the privilege exists only if they were

95. Imwinkelried cites the treatise on attorney-client privilege by Professor Paul Rice. *See* IMWINKELRIED, *supra* note 63, § 6.8.1, at 674 n.35. Rice also writes about the need for objective evidence both of the client's intent for the communication to be confidential and that the "confidentiality could reasonably have been anticipated." 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 6:6, at 6-39 (2d ed. 2009). He concludes that a conversation between a prisoner and a lawyer over a telephone the prisoner knows is being monitored is without a reasonable expectation of confidentiality and is the equivalent of having a third party present. *Id.* § 6:7, at 6-52, 6-55.

96. IMWINKELRIED, *supra* note 63, § 6.8.1, at 674.

97. Scott v. Hammock, 870 P.2d 947 (Utah 1994).

98. *Id.* at 955.

99. *Id.* Similarly, with regard to whether the conversation was causal in nature or intended to be part of a covered communication about moral matters, the court stated: "[S]tatements made to a cleric in a social context are not privileged because the statements are not made to the cleric in the course of his or her professional responsibilities or in a religious context." *Id.*

100. *See* MOSTELLER ET AL., *supra* note 64, § 8-2, at 8-6.

101. *See supra* discussion accompanying notes 56-61.

102. MOSTELLER ET AL., *supra* note 64, § 8-2, at § 8-6 (addressing State v. Murvin, 284 S.E.2d 289, 294 (N.C. 1981) (holding, despite *Hicks v. Hicks*, 155 S.E.2d 799, 802 (N.C. 1967), that the presence of an aunt and a friend when the communication was made to the lawyer voided the privilege where the presence of these two individuals was not necessary to protect the interest of the client)).

made relying on marital privacy.[103] None of these cases indicate any special need for physical privacy beyond the ordinary reasonable efforts to prevent unnecessary third parties from overhearing the statements, and none of these North Carolina precedents discuss in any fashion a need for the Fourth Amendment's "reasonable expectation of privacy."

The statement from Professor Broun in the *McCormick* treatise is as follows:

> The rationale that the spouses may ordinarily take effective measures to communicate confidentially tends to break down where one or both are incarcerated. However, communications in the jailhouse are frequently held not privileged, often on the theory that no confidentiality was or could have been expected.[104]

Broun cites four cases in connection with this statement, two supporting it and two others indicating qualifications.

People v. Von Villas[105] and *State v. Smyth*[106] are cited in support. *Von Villas* allowed admission of a tape-recorded conversation between a husband and wife while the husband was incarcerated.[107] The court quoted the test from *People v. Mickey*, discussed earlier,[108] that "[t]o make a marital communication 'in confidence,' one must intend nondisclosure and have a reasonable expectation of privacy."[109] The case was easily resolved on the facts and did not turn on a Fourth Amendment determination. The couple was speaking loudly to each other through the Plexiglas partition separating them with knowledge that a guard was nearby observing them and therefore failed both aspects of the test, their conduct indicating no expectation of privacy or confidentiality during the conversation and demonstrating they did not intend nondisclosure.[110] An earlier, separate section of the opinion in

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103. State v. McQueen, 377 S.E.2d 38, 49 (N.C. 1989) (holding that a threat to do physical harm to a spouse was not privileged because it was not based on confidence engendered by the marriage). Two other cases, *State v. McLemore*, 470 S.E.2d 2, 6 (N.C. 1996), and *State v. McIntosh*, 444 S.E.2d 438, 441-42 (N.C. 1994), address the point that if the information was intended to be transmitted to others, it is not confidential.

104. 1 McCORMICK ON EVIDENCE, *supra* note 14, § 82, at 377.

105. People v. Von Villas, 15 Cal. Rptr. 2d 112 (Cal. Ct. App. 1992).

106. State v. Smyth, 499 P.2d 63 (Wash. Ct. App. 1972).

107. *Von Villas*, 15 Cal. Rptr. 2d at 135.

108. *See supra* notes 87-95 and accompanying text.

109. *Von Villas*, 15 Cal. Rptr. 2d at 138 (quoting People v. Mickey, 818 P.2d 84, 102 (Cal. 1991)).

110. *Id.* The conversation was recorded on electronic equipment installed for this case. *Id.* at 132. The conversation was loud because the telephone system was not

Von Villas explicitly held there was no Fourth Amendment protection for the conversation because of the lack of protection in prison space.[111] In its treatment of the privilege issue, the court made no reference to that earlier determination.[112] *Smyth*, meanwhile, permitted the admission of the contents of a letter written by the defendant to his wife while in prison.[113] The Washington Court of Appeals held that the contents of that letter were not protected by the marital confidential communications privilege because a letter "cannot be intended to be, nor is it, in fact, a *confidential* communication" given that the "[d]efendant admitted that he knew all outgoing mail from the jail was read before it was sent out."[114]

With these cases, Broun suggests comparing two others: *Ward v. State*[115] and *North v. Superior Court*.[116] *Ward* involves a letter written by an incarcerated husband that a witness saw him slip to his wife during a visit, which was taken from her when she departed.[117] The Arkansas Court of Appeals held that the part of the letter addressed to the wife was privileged under the marital confidential communication privilege but the part of the letter written to a witness, apparently directing his perjury was not privileged.[118]

North is the case that provides the most support for the Supreme Court of North Carolina's opinion in *Rollins*. The result in *North* is itself of no support, but some of the opinion's language indirectly might be. In that case, the marital couple visited while the husband was in jail.[119] The meeting took place in the same building as the jail, in a detective's office with the door shut.[120] It was secretly monitored and recorded.[121] The court concluded that because of the location of the visit, marital privacy could be reasonably expected to exist and that the reasonable expectation of privacy under the Constitution had

working at the time of the visit. *Id.* The amplifier had inadvertently been turned off, perhaps as a result of the installation of the recording device. *Id.*

111. *Id.* at 133-35.

112. *See id.* at 138.

113. State v. Smyth, 499 P.2d 63, 65 (Wash. Ct. App. 1972).

114. *Id.* at 66.

115. Ward v. State, 66 S.W. 926 (Ark. 1902).

116. North v. Superior Court, 502 P.2d 1305 (Cal. 1972).

117. *Ward*, 66 S.W. at 927.

118. *Id.*

119. *North*, 502 P.2d at 1306-07.

120. *Id.* at 1307.

121. *Id.*

been violated.[122] It excluded the evidence as a matter of constitutional law.[123] That holding did link the Fourth Amendment concept of "reasonable expectation of privacy" and the confidentiality concept under privilege law, but it did so where the reassuring actions of the detective in providing an apparently private location for the conversation meant that both the constitutional expectation of privacy and the confidentiality of the marital communication existed.

The *North* opinion also stated that because "an inmate of a jail or prison has no reasonable expectation of privacy, it would follow that an ordinary jailhouse conversation between spouses could not be deemed to have been 'made in confidence,' as required by [California] Evidence Code section 980 to establish the privilege."[124] However, the court apparently used this proposition as a factual rather than a legal test, treating it the same as the fact that a conversation is made under circumstances where others can overhear, which it considered "'a strong indication that the communication was not intended to be confidential and is, therefore, unprivileged.'"[125]

III. THE OVERLAP AND DISCORD BETWEEN THE FOURTH AMENDMENT'S REASONABLE EXPECTATION OF PRIVACY AND THE CONFIDENTIALITY REQUIRED BY EVIDENTIARY PRIVILEGES

A. *Theoretical Correspondence and Mismatch*

The concept of "reasonable expectation of privacy" under the Fourth Amendment is traced from the decision in *Katz v. United States*.[126] The majority opinion was written by Justice Stewart,[127] but

122. *Id.* at 1312. The California Supreme Court reached this conclusion despite testimony by the detective that allowing marital couples to meet in this space was "a frequent and normal practice," *id.* at 1307, and without the indication of any explicit promises of confidentiality in the meeting. The court focused not on the general lack of "reasonable expectation of privacy" in prison space, but on its limited view that the need for interception of communications must relate to the need to maintain jail security; here, the monitoring was instead "done . . . for the sole purpose of gathering possibly incriminating evidence" which the court believed constituted an "unreasonable governmental intrusion." *Id.* at 1312.

123. *Id.*

124. *Id.* at 1311.

125. *Id.* (quoting CAL. EVID. CODE § 917 cmt. (West 2009)).

126. Katz v. United States, 389 U.S. 347 (1967) (holding unconstitutional the warrantless recording of conversation inside telephone booth by device located on top, but outside the booth).

127. Stewart did pen some memorable phrases, including "the Fourth Amendment protects people, not places." *Id.* at 351. Stewart's statement, "[b]ut the protection of a person's general right to privacy—his right to be let alone by other people—is, like the

it is the concurring opinion of Justice Harlan that is most frequently quoted and provides the starting point for modern analysis. Harlan stated: "[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.'"[128]

Legal authorities find three components in this test for coverage by the Fourth Amendment's "reasonable expectation of privacy." First, the party must have a subjective expectation of privacy.[129] As Harlan explained, "objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."[130] Second, one must also take objectively reasonable efforts to maintain the privacy of the item or information.[131]

To this point, the requirements of the Fourth Amendment's "reasonable expectation of privacy" and the requirement of confidentiality under evidentiary privileges rather closely align. These components—an intent to keep the information confidential and reasonable efforts to maintain its confidentiality—are required elements of both. But the Fourth Amendment has an additional requirement—the expectation must be one that society is prepared to recognize as objectively reasonable.[132] Such a determination is often made by reference to the Fourth

protection of his property and of his very life, left largely to the law of the individual States," *id.* at 350-51, recognizes that the place for other protections of privacy, such as privilege, rests outside the Fourth Amendment.

128. *Id.* at 361 (Harlan, J., concurring).

129. *Id.*

130. *Id.*

131. *See* Bond v. United States, 529 U.S. 334, 341 (Breyer, J., dissenting) ("[I]t is not *objectively* reasonable to expect privacy if '[a]ny member of the public . . . could have' used his senses to detect 'everything that th[e] officers observed,'" (quoting California v. Ciraolo, 476 U.S. 207, 213-14 (1986))); *cf.* California v. Greenwood, 486 U.S. 35, 39-40 (1988) (finding lack of reasonable expectation of privacy in garbage left at the curb in plastic bags because of the lack of objectively reasonable efforts to protect privacy in the known possibility of exposure to the public as a result of the action of animals, children, scavengers, or snoops).

132. *Katz*, 389 U.S. at 361.

Amendment's text and/or history;[133] it sometimes is controlled by reference to societal values.[134]

Thus, subjective expectation of privacy and objectively reasonable efforts to maintain that privacy are necessary components of the Fourth Amendment's "reasonable expectation of privacy,"[135] but they

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133. An open field, no matter how distant from civilization, and a wilderness forest have no protection under the Fourth Amendment because they are not included among the protected elements of the Fourth Amendment's language or history. "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." Oliver v. United States, 466 U.S. 170, 176 (1984) (quoting Hester v. United States, 265 U.S. 57, 59 (1924)).

The clear impact of history can be seen in *United States v. Dunn*, 480 U.S. 294 (1987). In *Dunn*, the United States Supreme Court held that the defendant had no "reasonable expectation of privacy" relying on the historical concept of curtilage and determining that the law enforcement personnel were outside the curtilage because of the distance from the house and the configuration of the fences. *Id.* at 300-02. The Court stated:

> The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself. The concept plays a part, however, in interpreting the reach of the Fourth Amendment. *Hester v. United States*, 265 U.S. 57, 59 (1924), held that the Fourth Amendment's protection accorded "persons, houses, papers, and effects" did not extend to the open fields, the Court observing that the distinction between a person's house and open fields "is as old as the common law."

Dunn, 480 U.S. at 300. The Court then examined Blackstone's Commentaries for ancient English history, which it considered important in determining Dunn's twentieth century constitutional rights:

> In defining the terms "mansion or dwelling house," Blackstone wrote that "no distant barn, warehouse, or the like are under the same privileges, nor looked upon as a man's castle of defence. . . ." Blackstone observed, however, that "if the barn, stable, or warehouse, be parcel of the mansion-house, and within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall."

Id. at 300 n.3 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *225).

134. *See, e.g.*, Georgia v. Randolph, 547 U.S. 103, 129 (2006) (using widely-shared societal values to determine that one spouse could not consent to a search of the commonly shared home when the other spouse is present and objects to the search).

135. In his highly regarded treatise, Professor Wayne LaFave analyzes the "reasonable expectation of privacy" to involve the separate requirement of the subjective effort of the individual not to expose the information to the public. 1 WAYNE R. LAFAVE, SEARCH & SEIZURE § 2.1(c), at 438 (4th ed. 2004). As to an expectation that society is prepared to accept as reasonable, he notes that some have argued that it anticipates an objective inquiry—something along the lines of "actions or objects which the law's hypothetical man would expect to be private"—but that is erroneous and insufficient.

are not sufficient. This is where the Fourth Amendment and privilege concepts diverge. For courts other than the Supreme Court of North Carolina in *Rollins*, satisfying the subjective expectation of confidential and taking reasonably effective (objective) efforts to maintain that confidentiality are not only necessary, but they are also sufficient. Policy and values also limit the application of privileges, such as the loss of privilege for many statements when the confidential communications are made to facilitate commission of a future crime,[136] but these concepts do not rest on privacy limitation.

B. *Practical Mismatch in Categorical Non-Protection for Conversations and Places*

1. *No Expectation of Privacy in a Recorded Conversation with a Willing Government Witness Even in the Home*

In *Rollins*, the Supreme Court of North Carolina ruled that the marital confidential communications privilege was void as to the Rol-

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Id. § 2.1(d), at 439-40. He contends that what is required on this second dimension is not a high probability of remaining confidential but rather satisfaction of a set of value judgments that should involve some balance between the nature of the practice and its impact on the individual's sense of security against its utility as a law enforcement technique. *Id.* at 440-43. However, LaFave admits that decided Supreme Court cases often fail to adhere to this process and interpret privacy more as a fact than the constitutional value the *Katz* analysis should entail. *Id.* at 443-44.

136. The "crime-fraud" exception to privilege exists in some jurisdictions for many privileges. It is universally held as an exception to the attorney-client privilege. *See* 1 MCCORMICK ON EVIDENCE, *supra* note 14, § 95, at 429 ("[I]t is settled under modern authority that the privilege does not extend to communications between attorney and client where the client's purpose is furtherance of a future intended crime or fraud."). A similar exception also exists in many jurisdictions applied to marital confidential communications. *See* MUELLER & KIRKPATRICK, *supra* note 17 § 5:40, at 758-59 (describing "joint participation exception" for the marital confidential communications privilege); STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 501.02[08], at 501-78 to -79 (9th ed. 2006) (describing the exception as applying to communications made in order to facilitate crime but not to all joint participation situations). The North Carolina courts have not ruled on the existence of such an exception. *See* 1 BRANDIS & BROUN, *supra* note 45, § 127, at 422 (not listing this exception for the marital confidential communications privilege).

Professor Story proposes a different type of policy-based limitation that would eliminate the protection of privilege to e-mail communications under the marital confidential communication privilege as distinct from privileges applied to professional communications. Story, *supra* note 11, at 304-16. She makes this argument on the basis of a different rationale justifying the marital privilege. *Id.* Her arguments about the proper shape of privilege law assume that the Fourth Amendment's failure to protect such communications does not affect the varied treatment that privilege policy should dictate.

lins couple's conversation in the prison because Mr. Rollins lacked a reasonable expectation of privacy there.[137] If the test for privilege were whether Mr. Rollins had a "reasonable expectation of confidentiality" in a conversation with another person who is a willing government witness and is wearing an electronic recording or broadcasting device to provide the conversation to law enforcement authorities, the majority did not need to depend on the prison setting. Under the Fourth Amendment, there is no "reasonable expectation of privacy" in any conversation with another person who discloses it to authorities because of a concept of "misplaced confidences," which the United States Supreme Court noted is part of the human condition.[138]

Katz was correctly seen as a paradigm shift in Fourth Amendment law,[139] and its willingness to leave pure property and trespass concepts to one side in appropriate situations caused many to expect enormous changes in prior decisions. One of those areas involved conversations in private places with individuals who unknown to the speaker were cooperating then, or would later cooperate, with the government to reveal secrets learned in private.

In *United States v. White*, the United States Supreme Court stated in categorical terms that as far as the Fourth Amendment is concerned, the *Katz* decision changed nothing in terms of how the "reasonable expectation of privacy" applied to the misplaced confidence that one's confidant would not reveal the communication to authorities.[140] The result was the same for information communicated from memory or transmitted electronically by another individual to whom the defendant voluntarily divulged secrets; there is no constitutional protection.[141]

The *White* Court stated:

> The Court of Appeals understood *Katz* to render inadmissible against White the agents' testimony concerning conversations that Jackson broadcast to them. We cannot agree. *Katz* involved no revelation to the Government by a party to conversations with the defendant nor did the court indicate in any way that a defendant has a justifiable

137. State v. Rollins, 675 S.E.2d 334, 334-35 (N.C. 2009).

138. *See* Hoffa v. United States, 385 U.S. 293, 303 (1966) ("'The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak.'" (quoting Lopez v. United States, 373 U.S. 427, 465 (1963) (Brennan, J. dissenting))).

139. *See* LAFAVE, *supra* note 135, § 2.1(b), at 435 (agreeing with a description of *Katz* as representing a "watershed" event in Fourth Amendment jurisprudence).

140. United States v. White, 401 U.S. 745, 749 (1971).

141. *Id.* at 753.

and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police.

Hoffa v. United States, which was left undisturbed by [*Katz*], held that however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. . . . [T]hat amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." . . . .

If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. . . . Our problem, in terms of the principles announced in [*Katz*], is what expectations of privacy are constitutionally "justifiable"—what expectations the Fourth Amendment will protect in the absence of a warrant.[142]

In *United States v. Miller*,[143] the Court made an even more directly relevant observation. It stated:

This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.[144]

Privilege law works differently. Privacy can be shared with appropriate parties. As a matter of privilege law, not Fourth Amendment

142. *Id.* at 749-52 (citations omitted) (discussing *Hoffa*, 385 U.S. at 302). The court of appeals had concluded in *White* that *Katz* had effectively overruled *On Lee v. United States*, 343 U.S. 747 (1952), a pre-*Katz* decision that had held conversations with an informer unprotected by the Fourth Amendment. *White*, 401 U.S. at 747. The Supreme Court acknowledged that its rationale in *On Lee* that the informer had not trespassed when he entered the defendant's premises and conversed with him and therefore the Fourth Amendment was not violated did not survive *Katz*. *Id.* at 750. However, the *On Lee* decision rested on a second and independent ground that did survive: the defendant "was talking confidentially and indiscreetly with one he trusted, and he was overheard." *Id.* (internal quotation marks omitted).

143. United States v. Miller, 425 U.S. 435 (1976).

144. *Id.* at 443.

doctrine, a spouse may not reveal a confidential communication in testimony.[145] A separate body of law—confidentiality principles developed under privilege law—protects what the Fourth Amendment's "reasonable expectation of privacy" does not. If Fourth Amendment doctrine were to control, no privilege would exist because the following two factors would be decisive: (1) the will of the other party in choosing to reveal the communication and (2) the fact the conversation occurred in prison. Under either or both, the conversation lacks protection. Privilege case law consistently has ignored the fact that the Fourth Amendment recognizes no expectation of privacy when a party to the conversation chooses to reveal it.[146] As to conversations in prisons, the case law holds that an evidentiary privilege exists unless confidentiality was absent under the specific circumstances of the communication.[147]

2. *No Reasonable Expectation of Privacy in "Open Fields" Regardless of Every Precaution to Maintain Confidentiality*

Another type of case, indeed a physical area, where *Katz*' relaxation of traditional property concepts might have been expected to make changes involved the historically excepted area of the "open

145. The United States Supreme Court recognizes that privilege law and its application and waivers operate separately from Fourth Amendment expectations of privacy. *See, e.g.*, Georgia v. Randolph, 547 U.S. 103, 133 (2006) (describing the operation of the federal spousal immunity privilege that permits the wife to describe illegal activities conducted by the husband in the home even if the Fourth Amendment bars police entry when the husband objects to his wife granting consent to the search).

146. *See supra* notes 44-47 and accompanying text (discussing the generally accepted position in privilege law that a spouse cannot unilaterally waive the privilege by disclosing the confidential communication, by secret recording of the conversation, or by otherwise conniving with a third party to arrange hidden third-party overhearing of the communication).

147. See *supra* notes 24-30 and accompanying text (discussing result in the *DeFonte* case that rejects linking the loss of a "reasonable expectation of privacy" under the Fourth Amendment as to prisoner property in a prison cell and the elimination of confidentiality under the attorney-client privilege); notes 84-95 and accompanying text (discussing two state-court cases that involve an independent showing for loss of confidentiality); notes 105-25 and accompanying text (citing four additional cases with only one, *North*, even arguably supporting the Supreme Court of North Carolina's rationale but doing so in the context of finding the communication protected by both the Fourth Amendment and privilege); note 7 (discussing numerous cases where communication on a monitored telephone or similar situation in prison was viewed as outside the protection of privilege because the communication lacked confidentiality, generally relying on explicit notice that such communications are subject to official monitoring and not automatically applying of the Fourth Amendment's treatment of prison space as largely lacking a "reasonable expectation of privacy").

field." Early in the twentieth century, the United States Supreme Court ruled that "open fields," which are areas outside the home, its curtilage, and other buildings, but need be neither open nor a field, were not protected by the Fourth Amendment.[148] In *United States v. Hester*, Justice Holmes stated: "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law."[149]

In 1984, the Supreme Court examined whether that holding survived the change made in Fourth Amendment law by *Katz*' adoption of the "reasonable expectation of privacy" concept. Two cases were decided under the caption of *Oliver v. United States*.[150] In defendant Oliver's case, the Kentucky State Police encountered a locked gate on a farm and went around it.[151] They observed No Trespassing signs posted at regular intervals and were verbally warned that hunting was not allowed.[152] In the companion case, Maine police officers walked into a secluded wooded area along a path.[153]

The Court ruled that, despite the isolation of the areas searched, there was no "reasonable expectation of privacy."[154] It stated:

> The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.'"
>
> No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion. These factors are equally relevant to determining whether the government's intrusion upon open fields without a warrant or probable cause violates reasonable expectations of privacy and is therefore a search proscribed by the Amendment.[155]

148. Hester v. United States, 265 U.S. 57, 59 (1924).

149. *Id.* at 59.

150. Oliver v. United States, 466 U.S. 170 (1984) (deciding the cases of *Oliver v. United States* from Kentucky and *Maine v. Thornton* from Maine).

151. *Id.* at 173.

152. *Id.*

153. *Id.* at 174.

154. *Id.* at 182-83.

155. *Id.* at 177-78 (citations omitted).

The Court similarly ruled there was no reasonable expectation of privacy in *United States v. Dunn*,[156] for observations made on the defendant's almost 200-acre ranch that was completely surrounded by an exterior fence and also had numerous interior barbed wire fences, where the agents crossed over the exterior fence and two interior fences to make the observations.[157]

Despite some major changes that *Katz* created in the way Fourth Amendment coverage is conceived, and its certain move away from historically narrow concepts of property and physical trespass, the dimensions of the Fourth Amendment's protections have remained largely tethered to a conception of property.[158] As the Court stated in *Minnesota v. Olson*, "[s]ince the decision in *Katz* . . . , it has been the law that 'capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.'"[159] By contrast, privilege law contains no such property-based limitation.

IV. WHY THE MISTAKE OF ADOPTING THE FOURTH AMENDMENT'S "REASONABLE EXPECTATION OF PRIVACY" AS PART OF THE CONFIDENTIALITY TEST MATTERS

There are a number of reasons for concern about the impact of a holding that the confidential nature of privileged communications is lost if a party to the communication lacks Fourth Amendment protection because he or she lacks a "reasonable expectation of privacy." Important process issues, albeit not the most serious problems with the *Rollins* holding, afflict this decision. *Rollins* confuses the law[160] and potentially cedes aspects of what has previously been a matter of state law and careful nuance to the single voice of the United States

156. United States v. Dunn, 480 U.S. 294 (1987).

157. *Id.* at 297-98, 300-03 (finding that the observations were made outside the home's curtilage).

158. *See* discussion of continued effects of property law analysis on the treatment of modern forms of electronic communication in *infra* Part IV.B., which follows immediately.

159. Minnesota v. Olson, 495 U.S. 91, 95 (quoting Rakas v. Illinois, 439 U.S. 128, 143 (1978)).

160. As noted earlier, *supra* note 10, the dissent in *Rollins* particularly bemoans the greater uncertainty that the majority's adoption of the Fourth Amendment standard brings to privilege law, stating that introducing this concept of the Fourth Amendment "serves only to muddy the already murky waters of our law of confidential communications." *See* State v. Rollins, 675 S.E.2d 334, 341 (N.C. 2009) (Timmons-Goodson, J., dissenting).

Supreme Court, which often decides Fourth Amendment issues in the shadow of important police practices to control crime and security efforts to thwart terrorism. A second and more important reason for concern can be found in the handling of eavesdroppers, whether private snoops under privilege law or public investigations under the Fourth Amendment. The lenient treatment of the latter in part flows from the stunning inability of the Fourth Amendment to deal comprehensively and effectively with the technological changes that are part of the communications revolution in the digital age and the types of third party interactions we depend upon to live our modern lives and communicate messages and information.

A. *Confusion in the Law of Privilege and Loss of State Control*

Rollins deals with prisoners who lack "a reasonable expectation of privacy" in not only their communications, but also their effects while in the close confinement of prisons. The majority states that the prisoner cannot, for that reason, have a privileged conversation with his or her spouse even when the prisoner satisfies the independent requirements of confidentiality, both in terms of his or her subjective intent to maintain confidentiality in the communications and by taking reasonable precautions to protect it from being overheard by others.[161] The same reasoning could be applied to deny protection for communications that would come within other privileges under existing case law. If the prisoner lacks the ability to create a confidential communication for the marital privilege, which other privileges does the *Rollins* theory cover? If the prisoner's conversation with his or her spouse is unique, why does the Fourth Amendment control in this situation but not others?

Heretofore, privileges have been variegated in their protections and nuanced in defining accepted methods of maintaining confidentiality that fit with the nature and needs of the privilege. For example, multiple individuals may handle a communication and it may remain confidential within the attorney-client privilege although it would be difficult to contend that allowing such sharing is actually "necessary," rather than something closer to customary, reasonable, and efficient. By contrast, such intermediaries would be viewed as unnecessary and therefore not permitted for the marital confidential communications privilege.[162] The "reasonable expectation of privacy" of the Fourth

161. *Id.* at 339-40.

162. *See* Wolfle v. United States, 291 U.S. 7, 15-17 (1934) (holding that communication by husband through a letter written with the help of his secretary voided the privilege because the secretary was not a necessary intermediary); *see also* Story, *supra*

Amendment changes based on circumstances, but it would not generally change between the privileges involved as just described. Instead, the concept of "one size fits all" would control if the "reasonable expectation of privacy" determines confidentiality for privilege purposes.

A second uncertainty is the nature of who makes privilege law decisions. If the Fourth Amendment is an embedded part of confidentiality, then it is the United States Supreme Court that decides a critical part of every privilege, not state supreme courts, which can declare for criminal cases prosecuted under state law what their own constitution's version of the right to be protected against unreasonable searches and seizures means, but not the meaning of "reasonable expectation of privacy" under the federal Fourth Amendment for which the Supreme Court is the final arbiter. Presumably, the state legislature or courts, acting in the common law tradition, can and should determine that Fourth Amendment doctrine does not control privilege law, but neither can control the interpretation of the Fourth Amendment if that controls a dimension of the scope of evidentiary privileges.

B. *An Illustration in the Treatment of "Private" Eavesdroppers for Privileges and Public Eavesdroppers for the Fourth Amendment*

At the time the Fourth Amendment was adopted, eavesdroppers who often literally stood in the eaves of houses to listen, were known nuisances, but they were subject to reasonably effective control by the cautious communicators who could simply check the surrounding space. Perhaps because they could be relatively easily thwarted by the conscientious, in early decisions eavesdroppers were often permitted to provide testimony regarding the secrets they overheard unless they operated with the connivance of one of the parties to the privileged communication.[163] As the technology available to eavesdroppers

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note 11, at 296-303 (arguing that differences in history or the marital communications privilege and necessity for third party intermediaries in communication explain differences between that privilege and privileges applied to communications with professionals regarding the relatively strict prohibition against the presence of third parties in protected marital confidential communication).

163. *See* 8 WIGMORE, EVIDENCE § 2326, at 633-34 (McNaughton rev. 1961) (taking the position that because means of preserving the privilege was largely in the client's hands, eavesdroppers should be allowed to testify and even disagreeing that connivance of a holder of the privilege should create an exception to this rule of availability of the eavesdroppers testimony); Commonwealth v. Wakelin, 120 N.E. 209, 212 (Mass. 1918) (standing as an example of the earlier approach where the court approved admission of testimony by an eavesdropper who monitored marital conversa-

became more penetrating and difficult to thwart, privilege law generally changed. The modern trend is to prohibit testimony by the eavesdropper as long as the communicators took "reasonable precautions" to maintain confidentiality.[164] Thwarting interception by the determined snoop equipped with modern technology may be virtually impossible, but admission of the intercepted communication can be denied by privilege law.

The progression of the law under the Fourth Amendment, when it comes to the "eavesdropping" efforts of law enforcement, has not been the same as for privilege law.[165] The story is obviously complicated, but sense enhancement has generally been tolerated for quite understandable reasons. The controls are not against private snoops intruding into types of communications that society has determined merit protection. Instead, the Supreme Court has been somewhat reticent to impose controls that would restrict law enforcement in finding and

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tion using "a mechanical contrivance called a dictograph," without the knowledge of either partner while both were confined).

164. 1 MCCORMICK ON EVIDENCE, *supra* note 14, § 74, at 346-47; *see also* 2 WEINSTEIN & BERGER, EVIDENCE ¶ 503(b)[02], at 503-52 (1996) ("While it may perhaps have been tolerable in Wigmore's day to penalize a client for failing to achieve secrecy, such a position is outmoded in an era of sophisticated eavesdropping devices against which no easily available protection exists."); CAL. EVID. CODE § 954 cmt. (West 2009) ("Under Section 954, the lawyer-client privilege can be asserted to prevent *anyone* from testifying to a confidential communication. Thus, clients are protected against the risk of disclosure by eavesdroppers and other wrongful interceptors of confidential communications between lawyer and client."). Under North Carolina law, the eavesdropper to a marital communication can testify if the acquisition of the information was not with the connivance of the other spouse. *See* 1 BRANDIS & BROUN, *supra* note 45, § 127, at 421-22.

165. Professor Imwinkelried traces the origin of privilege law to non-instrumental rationales, which he terms a humanistic justification that prohibits immoral disclosures. IMWINKELRIED, *supra* note 63, § 2.3, at 105-06. In the modern trend to allow privileges to bar testimony from eavesdroppers, he notes that privilege law rejected substantial contrary instrumental arguments and adhered to its earlier humanistic rationale. *See id.* § 6.6.3, at 590-93. By contrast, the Fourth Amendment, which is designed to protect citizens against oppressive governmental power, has more theoretical difficulty recognizing protection against such private betrayals, even if socially immoral. Perhaps for this reason, the Court in *United States v. White*, 401 U.S. 745 (1971), accepted the position of *On Lee v. United States*, 343 U.S. 747 (1952), and did not follow the lead of privilege law in allowing exclusion of private betrayals:

> "It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment here."

Id. at 750 (quoting *On Lee*, 343 U.S. at 754).

prosecuting crime,[166] although the Court has drawn the line with the interception of telephone communications[167] and when the intrusion is into the home.[168] However, the Court has indicated that enhancement techniques, even those peering into the home, may not violate the Fourth Amendment if the technology is "in general public use."[169]

With the special protection afforded to the home and the continued importance of property concepts under the Fourth Amendment, the overall approval and allowance of enhanced surveillance practices, combined with advances in technology, have eroded the Fourth Amendment protections in many situations encountered frequently in modern daily life. Professor Orin Kerr, who writes primarily about new technology and the Fourth Amendment, is among many who have reported the inability of the Fourth Amendment's "reasonable expectation of privacy" principle to cope with modern technology.[170] Kerr has persuasively asserted that the cases following *Katz* demonstrate not a revolutionary rejection of the linkage between property concepts and the Fourth Amendment but "have mostly matched the contours of real property law"[171] applied somewhat more flexibly.[172] He explains

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166. *See, e.g.*, Dow Chem. Co. v. United States, 476 U.S. 227 (1986) (approving photographic aerial surveillance of commercial premises using precision mapping camera); Florida v. Riley, 488 U.S. 445 (1989) (approving observations from helicopter into greenhouse on residential property).

167. *See* Katz v. United States, 389 U.S. 347 (1967) (holding unconstitutional the warrantless recording of conversation inside telephone booth by device located on top, but outside the booth); Berger v. New York, 388 U.S. 41 (1967) (striking down New York's wiretapping statute for failure to provide sufficient safeguards but providing guidelines for developing constitutionally acceptable provisions). *See generally* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 847-50 (2004) (describing the factual differences between *Katz* and *Berger* and the interplay between the Court and Congress in developing a constitutional wiretapping statute).

168. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding thermal scan of home to be a search because it yields "details of the home that would previously have been unknowable without physical intrusion"); United States v. Karo, 468 U.S. 705, 715 (1984) (holding beeper monitoring to be a Fourth Amendment search because it revealed "a critical fact about the interior of [a home] that the Government . . . could not have otherwise obtained without a warrant).

169. *Kyllo*, 533 U.S. at 34, 40.

170. *See, e.g.*, Kerr, *supra* note 167; Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101 (2008).

171. Kerr, *supra* note 167, at 827.

172. *Id.* at 818-19 (arguing that "*Katz* can plausibly be read (and implicitly has been read by many courts) not as rejecting the existing property view of the Fourth Amendment, but merely reemphasizing the Court's turn to a looser version of the property approach first introduced in [*Jones v. United States*, 362 U.S. 257 (1960)],"

that new technologies can hide what was previously exposed or reveal what was previously hidden, and in the latter case, it often reveals the information without requiring intrusion on protected property interests that would previously have been violated. Because "[n]ew technologies more commonly expose information that in the past would have remained hidden," technological advances generally have resulted in a diminishment of Fourth Amendment protections.[173]

Professor James Tomkovicz has repeated what is obvious about the Supreme Court's suggestion that even sense enhancement devices that reveal information in the home do not violate the Fourth Amendment if they are in "general public use"—no one quite knows the meaning of that term.[174] However, Professor Tomkovicz uses one set of meaning for the term and develops its implications as follows:

> [W]hen the use of a particular technology is "general," "routine," or "regular," the details that can be learned through the augmentation of human faculties are effectively "exposed" to users. Once the use of a device is known to be (or should be known to be) sufficiently widespread, it may be fair to conclude that individuals . . . forfeit the privacy interest they would otherwise have in those details. Their "revelatory conduct" yields public exposure that contradicts the legitimacy of any assertion of secrecy.[175]

He goes on to question whether such diminution in the scope of privacy of constitutional liberties vis-à-vis the government should be tolerated simply through the march of technology.[176]

As important as this general trend has been, the more significant shift in protection may result from an incompatibility between Fourth Amendment precedent and the fact that modern digital communication more commonly results in information being shared with, or accessible to, others and also in such information being "stored" by others. As noted earlier in *White*, the reasonable expectation of privacy potentially ends when information is shared with anyone, if the person receiving it decides to convey the information to authorities.[177] The Court broadened the impact of this threat to privacy in a series of cases that ruled that, when information is shared with third parties who are not intimates, they need not be willing to share the informa-

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and describing this looser version as "focused on whether the defendant's presence was 'legitimate' or 'wrongful'").

173. Kerr, *supra* note 167, at 827-28.

174. James J. Tomkovicz, *Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 MISS. L.J. 317, 412 (2002).

175. *Id.* at 412-13.

176. *Id.* at 413.

177. *See* discussion *supra* in Part III.B.1.

tion. The expectation of privacy ends upon the transfer, even if the other party is unwilling to disclose it and if the records were assumed confidential.[178] These cases are *United States v. Miller*,[179] *Smith v. Maryland*,[180] and *California v. Greenwood*.[181] As the Court stated in *Miller*,

> the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.[182]

Such sharing of information with third parties who transmit, process, and store information is almost a necessity of life in the modern world, but it is likely not protected by a "reasonable expectation of privacy" under the Fourth Amendment.[183] In addition, the defendant generally lacks the Fourth Amendment right to challenge the government when it secures information that originates from the defendant, but in which he or she has no ownership rights, and which the defendant does not possess at the time of the seizure.[184] As discussed below, much modern digital data is of this type.

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178. As the Court stated regarding bank records,

> [t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

United States v. Miller, 425 U.S. 435, 443 (1976) (citations omitted). However, the Court did not rule on the effect of evidentiary privileges that promise confidentiality. *Id.* at 443 n.4.

179. *Id.* at 443 (holding that depositors do not have a reasonable expectation of privacy in bank records despite their assumption to the contrary).

180. Smith v. Maryland, 442 U.S. 735, 743-44 (1979) (holding that phone callers have no Fourth Amendment protection in the numbers dialed because they lack a reasonable expectation of privacy in them and suggesting that telephone callers do not have "any general expectation that the numbers they dial will remain secret").

181. California v. Greenwood, 486 U.S. 35, 41 (1988) (holding, *inter alia*, that because the defendant conveyed his trash to garbage collectors for disposal he has no expectation of privacy as a result of the voluntary transfer).

182. *Miller*, 425 U.S. at 443.

183. *See generally* Peter P. Swire, Katz *is Dead, Long Live* Katz, 102 MICH. L. REV. 904, 908 (2004) (arguing that *Smith* and *Miller* stand for the "broad proposition that individuals 'voluntarily' reveal information when they give documents or data to third parties" and thereby lose Fourth Amendment rights).

184. *See id.* at 909.

After *Berger* and *Katz*, Congress responded in 1967 with the Electronic Surveillance Control Act,[185] which is commonly referred to as Title III, where it appears in the Omnibus Crime Control Act of 1968.[186] That legislation generally is understood by the courts to go at least as far as the Fourth Amendment as to wiretapping and electronic eavesdropping and, in some situations, to surpass the constitutional protection.[187] The result is that courts today do not articulate the dimensions of the Fourth Amendment in these areas but only discuss the reach of Title III.[188] Indeed, when Congress did not protect the radio portion of cordless telephone calls, the courts refused to say whether the Fourth Amendment covered them but deferred to Congress's decision not to do so.[189]

Congress responded to *Miller* in 1978 with the Right to Financial Privacy Act[190] and to *Smith* in 1986 with the Electronic Communica-

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185. 18 U.S.C. §§ 2510-2522 (2006).

186. Pub. L. No. 90-351, 82 Stat. 197 (1968).

187. As one author explains, the Wiretap Act

> has all but supplanted the Fourth Amendment in regulating wiretaps, because the protections of the Wiretap Act exceed those of the Fourth Amendment in many circumstances. For example, unlike the Fourth Amendment, the Wiretap Act's applicability does not hinge upon a reasonable expectation of privacy. Furthermore, while the Fourth Amendment only applies to government officials, the Wiretap Act applies to government officials as well as to private parties. Warrants under the Wiretap Act have certain protections that Fourth Amendment warrants lack, and . . . beyond requiring probable cause, they require a finding that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." Only certain high-ranking government officials are permitted to apply for warrants under the Wiretap Act.

Daniel J. Solove, *Fourth Amendment Codification and Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 754-55 (2005) (quoting 18 U.S.C. § 2518(3)(c) (2006)); *see also* Ric Simmons, *Can Winston Save Us from Big Brother? The Need for Judicial Consistency in Regulating Hyper-Intrusive Searches*, 55 RUTGERS L. REV. 547, 560-62 (2003) (noting as to electronic eavesdropping that courts are unanimous in ruling that Title III satisfies the requirements of the Fourth Amendment and may exceed those requirements in some situations and as to video surveillance that Title III's statutory scheme is identical to the Fourth Amendment's warrant requirement).

188. *See* Kerr, *supra* note 167, at 850 ("When confronted with claims that wiretapping violated the Fourth Amendment, courts typically fall back on the statutory protections of Title III and go no further.").

189. *See id.* at 852-53. Such calls were finally protected in 1994. Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, § 202(a), 108 Stat. 4279 (1994).

190. Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401-3422 (2006).

tion Privacy Act.[191] Also, in 1986, Congress addressed the lack of ability to challenge seizure of private information in the possession of third parties in the Stored Communications Act.[192] These statutes are not like Title III in surpassing protections that would exist if the Fourth Amendment covered the data. Instead, while some procedural protections generally are provided, they are substantially inferior to the requirement of probable cause and the preference for a warrant.[193] Also, the existence of these legislative protections do not mean that the Fourth Amendment's "reasonable expectation of privacy" protects such communications and information. Indeed, Congress stepped into the lurch because the Fourth Amendment had proved inadequate. Thus, the Supreme Court of North Carolina's holding that confidentiality depends on Fourth Amendment recognition of a "reasonable expectation of privacy" would mean much of the information we depend on today would lack confidentiality under privilege law as well.

A few examples are useful. *Katz* and *Berger* dealt with the monitoring or seizure of "in-stream" telephone calls. The seizures occurred at the moment of communication. Until the past few decades, most electronic communication was either of this in-stream type, or if it was recorded, the recording (such as an answering machine message) was housed in the same location as the recipient of the call. Thus, the communication was covered by the protection of *Katz* and *Berger*, or it was frequently protected, if recorded in the location of the mechanical recording, under the recipient's "reasonable expectation of privacy."

Those temporal and spatial givens are typically no longer accurate. As is generally known, neither e-mails nor voice mail messages are typically stored on the site of the recipient. Instead, they are housed in servers of the service provider. Moreover, many phone calls currently, and an increasingly growing number over time, spend some brief time stored in servers during transmission. As a consequence, it

191. Pub. L. No. 99-508, 100 Stat. 2848 (included in codified sections scattered throughout Title 18 of the U.S. Code).

192. Stored Communications Act, 18 U.S.C. §§ 2701-2711 (2006). *See generally* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004).

193. *See* Swire, *supra* note 183, at 916. Professor Swire observes that only the Privacy Protection Act of 1980—which was enacted after the Supreme Court held that there was no need for a warrant in the search of a newspaper office for information about news sources—provides protections comparable to those offered by a warrant. *Id.* at 916-17 (citing Zurcher v. Stanford Daily, 436 U.S. 547 (1978)).

is unclear whether Fourth Amendment protections do or will cover any of these modern forms of communication.[194]

Finally, data stored in modern form is clearly not the tangible property of the creator of that information; it is not a document written on the party's letterhead but rather electronic impulses recorded on hardware typically owned by the storage agent. When information is stored by a third party, at least absent a privileged relationship between the party storing the information and the agent, the law does not recognize the standing of the creator of that information under the Fourth Amendment to contest a search.[195]

CONCLUSION

The "reasonable expectation of privacy" concept of the Fourth Amendment is constrained by the text of the Constitution, history, and Supreme Court precedent that responds to numerous factors beyond subjective intent and objective efforts to protect confidentiality. The concept of confidentiality for evidentiary privileges shares some common features with the modern formulation of the "reasonable expectation of privacy" in *Katz*. This requires a subjective intention to keep the communication confidential, and it requires reasonable efforts to do so. However, the concept of confidentiality is not burdened with many of the value judgments and historical accoutrements that the Fourth Amendment has acquired. For example, it disables the second member of a confidential marital communication from revealing the information to the police, while the Fourth Amendment treats that willingness as by itself destroying the "reasonable expectation of privacy." Confidentiality under privilege law can have the same limits as

194. *See* Swire, *supra* note 183, at 910 (arguing that "[u]nder the case law and emerging facts, there is a surprisingly strong case for believing that *Katz* and *Berger* are no longer good law even for the contents of telephone calls").

195. *See* Couch v. United States, 409 U.S. 322, 335-36 & n.19 (1973) (recognizing no Fourth Amendment "reasonable expectation of privacy" in records in the possession of the accountant and noting that no federal privilege exists for accountants nor has any state-created accountant privilege been recognized in federal cases). Although not settled in the law, the existence of legal protection through a privilege may provide a basis in societal values for the expectation to be objectively reasonable. *See* DeMassa v. Nunez, 770 F.2d 1505, 1506-07 (9th Cir. 1985) (concluding that lawyer-client privilege gave defendant standing to contest the search of his lawyer's office for client's files); State v. Howard, 728 A.2d 1178, 1181-84 (Del. Super. Ct. 1998) (holding that the Fourth Amendment reasonable expectation of privacy of a married couple was violated by surreptitious police recording of their hushed conversation in a police station interview room because of the protection given to marital communications in the state's wiretap statute and privilege law).

the Fourth Amendment's "reasonable expectation of privacy," but it is often broader.

Perhaps in compensation, privilege law has other limitations that make it narrower than Fourth Amendment protections outside of confidentiality. For example, privilege law denies the privilege generally to conversations for the purpose of committing a crime regardless of the confidentiality of the communication, while the Fourth Amendment clearly applies to such content if its other requirements are met. Also, privilege law does not generally eliminate use of the information acquired by a breach of the privilege, only denying admission of the communication itself, while the Fourth Amendment provides in most situations protection against any use of information derived from the constitutional violation.[196] These are part of the basic nature of the separate law of privilege. Additionally, evidentiary privileges have varied from one another in the general circumstances of communications that are normally understood to be confidential, such as the parties that are presumed to be reasonably necessary to the communication. Such differences take into account the norms of the differing relationships involved in the various privileges.[197]

The critical error in *Rollins* was holding that, *as a matter of law*, the absence of the Fourth Amendment's "reasonable expectation of privacy" in the place the conversation occurred meant confidentiality under privilege law was automatically lacking. We may take comfort that an organized crime figure has no reasonable expectation of privacy under the Fourth Amendment when he speaks in his office to a hired killer about a planned "hit," his conversation and lip movement being observed through a window by the sense enhancement of a telescope in a distant building and translated by a trained lip reader. Similarly, society may be well-served by the fact that the drug dealer who transacts his business at a park table in the open and surrounded by his lieutenants is fair game for virtually any type of interception without Fourth Amendment protection because he acts in an "open field." However, conversations under these same physical circumstances, despite having no Fourth Amendment "reasonable expectation of pri-

196. *See generally* 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 (2003).

197. For example, as noted earlier, communication through a secretary is the norm and permissible within confidentiality for the attorney-client privilege but not for the marital confidential communications privilege and would be permissible for the latter privilege only in exceptional circumstances. *See supra* note 162 and accompanying text.

vacy," should remain privileged under the recognized evidentiary privileges if they concern, not future crime, but legitimate communication that is intended to be kept confidential because these circumstances—a private conversation in an office or at a secluded park bench—constitute reasonable precautions to maintain confidentiality.

The march of technology is perhaps the most important concern implicated by the error in *Rollins*. Attorney-client communication by e-mail, mobile phone, "land line" if carried on the internet in part, and messages left on cell phone voicemail may or may not have Fourth Amendment protection because they involve stored data in third-party hands or because the technology can be intercepted by devices generally available in most well equipped electronics stores.[198] Privilege law must deal with the ease of interception issue to determine whether the communication lacks reasonable confidentiality,[199] but it should not be dependent on the United States Supreme Court agreeing that Fourth Amendment protections also exist. If "stored information" is found to lack Fourth Amendment protection because of the cramped interpretation of shared privacy under *Smith*, *Miller*, and *Greenwood*, there is no reason privilege law should even take note. Similarly, under *Greenwood*, the police who dig through an individual's trash may be authorized to use the information discovered, and even the reassembled strips of a shredded letter may be admissible in the hands of the police against a Fourth Amendment challenge.[200] However,

198. Professor Daniel Solove argues that the probable impact of *Miller* and *Smith* is that individuals do not have a "reasonable expectation of privacy" in communications and records maintained by internet service providers or computer network administrators. *See* Solove, *supra* note 12, at 201.

199. *See* CAL. EVID. CODE § 917(b) (West 2009) ("A communication between persons in a relationship listed in subdivision (a) [including lawyer-client] does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication."); N.Y.C.P.L.R. § 4548 (Consol. 2007) ("No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.").

200. *See, e.g.*, United States v. Scott, 975 F.2d 927, 928-31 (1st Cir. 1992) (holding that the act of shredding documents does not create a reasonable expectation of privacy in documents discarded in the garbage and concluding despite their warrantless seizure that when successfully reassembled they could be introduced by the government).

privilege law need not permit a litigant to admit in evidence that same document.[201]

Rollins creates a legal equivalence between Fourth Amendment privacy and confidentiality under privilege law that previously did not exist. That assertion of legal equivalency is erroneous under prior authorities and precedent. While the treatises may differ on precise results, one does not find in any of them that privilege law should simply adopt the results of the Fourth Amendment case law to govern confidentiality.

Moreover, such a change in the law would be particularly unfortunate if applied outside the specific facts and circumstances of *Rollins*. Such application, which the decision does not theoretically limit, would diminish the limited zones of valuable informational security that evidentiary privileges help maintain with our marital partners and in professional relationships in a modern world where freedom from public scrutiny is an increasingly diminishing and valuable commodity.

201. Professor Rice states that tearing a document into multiple pieces before disposal should be sufficient to maintain the attorney-client privilege because that act constitutes reasonable efforts to destroy that communication, thereby satisfying the requirement of the privilege for reasonable expectation of confidentiality. *See* 1 RICE, *supra* note 95, § 6.6, at 6-42.