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Volume 38
Number 2 *Symposium: Federal Privileges in the
21st Century*

Article 1

12-1-2004

Introduction

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Recommended Citation

David P. Leonard, *Introduction*, 38 Loy. L.A. L. Rev. 515 (2004).
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SYMPOSIUM

FEDERAL PRIVILEGES IN THE 21ST CENTURY

INTRODUCTION

*David P. Leonard**

Thirty years after the adoption of the Federal Rules of Evidence,¹ privileges remain uncodified. Though the rules as promulgated by the Supreme Court contained nine separate privileges,² the issue of privileges became contentious when Congress took up the proposed rules,³ and threatened to sink the

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1. Pub. L. No. 93-595, 88 Stat. 1926 (1975).

2. FED. R. EVID. art. V (Proposed Draft 1972). The proposed rules would have created a privilege covering reports and returns required by law (Proposed Rule 502), an attorney-client confidential communications privilege (Proposed Rule 503), a psychotherapist-patient confidential communications privilege (Proposed Rule 504), a privilege for one spouse to prevent the other spouse from testifying against him or her in a criminal proceeding (Proposed Rule 505), a privilege for confidential communications between clergy and a person consulting the member of the clergy (Proposed Rule 506), a privilege protecting the secrecy of political votes (Proposed Rule 507), a trade secrets privilege (Proposed Rule 508), a state secrets and official information privilege (Proposed Rule 509), and a privilege protecting the identity of informers (Proposed Rule 510). *Id.* Each proposed privilege also had specified exceptions, and other rules dealt with issues of waiver (Proposed Rule 511), privileged matter disclosed under compulsion or without the opportunity to claim the privilege (Proposed Rule 512), and comment upon or inference from a claim of privilege (Proposed Rule 513). *Id.*

3. The story of how and why Congress rejected the Supreme Court's draft on privileges has been told many times. Kenneth Broun, a contributor to this Symposium, has written:

The presence of those rules became a rallying point for general opposition to the entire proposal and a symbol for all that was perceived to be wrong with the rules as a whole. Not only was the

entire enterprise of codifying federal evidence law.⁴ To break the impasse, Congress rejected the specific privileges originally proposed and substituted a single general rule. Federal Rule of Evidence 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.⁵

The effect of Rule 501 is to leave the creation, refinement, and evolution of federal privileges to the common law process. There are advantages to this approach. For one thing, the legislative

substance of the proposed privilege rules vigorously attacked by scholars, practitioners, judges and members of Congress, the idea that the federal law of privilege should be codified was rejected by many. Many academics and practicing lawyers preferred an uncoded federal law of privilege, and, in particular, one that relied upon state privilege law. There was especially widespread criticism of a federal law of privilege insofar as it would govern diversity cases.

Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 769 (2002); see also 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5241, at 652 (1980) (“[T]he controversy over issues of privilege was to be a major factor in the decision of Congress to intervene for the first time in the rulemaking process.”); Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 87–90 (1992) (citing many reasons for Congress’s rejection, most importantly concern that privilege rules are substantive in nature and thus that Congress did not have the power under the *Erie* doctrine or the Rules Enabling Act to enact them).

4. “The testimonial privilege rules in the Proposed Rules of Evidence submitted to Congress by the United States Supreme Court in 1972 almost doomed the total project.” Broun, *supra* note 3, at 769.

5. FED. R. EVID. 501.

recognition of privileges has too often had more to do with the relative degrees of influence particular professions have in the legislatures than with the substantive values and goals supporting privileges.⁶ Given that fact, it is not surprising that lawyers enjoy a very broad privilege, while physicians (at least those not rendering mental health care services) have very limited privileges.⁷ In addition, leaving the recognition and shaping of privileges to the common law process allows privileges to evolve over time, a process

6. See 23 WRIGHT & GRAHAM, *supra* note 3, § 5422, at 673–76 (1980). The authors state:

In a society with egalitarian pretensions, the creation and justification of a privilege to refuse to respond to a judicial inquiry is essentially a political question; i.e., it is an allocation of power as between the various components of the society. At one level it involves the power of the judge against the power of the witness, and this allocation can have ramifications in terms of the power relationships of the litigants who depend upon the court for the enforcement of their rights.

....

Given the political nature of privileges, it is not surprising that in most states the allocation of these exemptions tends to follow the distribution of political power in contemporary society. Powerful institutions—such as the church, government, and corporations—and professions that primarily serve a monied clientele (and are therefore thought prestigious)—doctors, lawyers, and psychiatrists—are given privileges to preserve their secrets and those of their clients. But professions and institutions that serve analogous functions for working class people are denied such protection; compare, for example, the treatment of communications to tax lawyers with those to storefront tax preparers. Even the privileges nominally available to persons of modest means tend to be of less significance because of the existence of extra-judicial powers of compulsion or the way in which the privilege is administered in the courts. As a cynic once remarked, “the poor man’s only privilege is perjury.”

Id. (footnotes omitted).

7. The version of the proposed Federal Rules of Evidence transmitted to Congress did not contain a general physician-patient privilege. Federal courts today generally do not recognize the privilege. EDWARD J. IMWINKELRIED, 1 THE NEW WIGMORE: A TREATISE ON EVIDENCE; EVIDENTIARY PRIVILEGES § 6.2.6, at 491–92 (2002); see also 98 C.J.S. *Witnesses* § 341 (2002) (stating that some jurisdictions do not recognize any general physician-patient privilege); Brett T. DeLange, Recent Development, *Waiving the Physician-Patient Privilege in Involuntary Commitment Proceedings in Washington*—In re R., 97 Wn. 2d 182, 641 P.2d 704 (1982), 59 WASH. L. REV. 103, 105 (1983) (stating that Washington state courts “have tended to construe the statutory privilege narrowly, holding it to be in derogation of the common law”).

that does not occur as easily when rules are legislated.

On the other hand, to the extent uniformity, certainty and predictability are important in effectuating the goals of privilege law,⁸ leaving the development of privilege law to the courts has its disadvantages. Two hundred years of common law development have given us divergent rules of privilege, making it particularly difficult for a litigant or potential litigant to predict which, if any, conversations, actions, or information will be within the scope of a privilege. In addition, as Wright and Graham have pointed out, there is reason to suspect the objectivity of courts in fashioning privileges because "every expansion of privilege is of necessity a diminution in the power of the judiciary."⁹ Because of this inherent tension, the judiciary can be expected to resist any effort to expand the number of privileges or the scope of existing privileges, even when social values might support such moves.

To assume, however, that Congress can do a better job of setting forth the limits of privilege might be unjustified as well. If judges are subject to the biases inherent in their position, Congress is often captive to interest groups that do not necessarily reflect the broader interests of society at large. Thus, even as a general question, the wisdom of codification is unclear. But should Congress conclude that the time has come to add specific rules of privilege to the Federal Rules of Evidence,¹⁰ it still must resolve many issues. One key issue has to do with the nature of the Federal Rules as a whole. The Federal Rules of Evidence are not an exhaustive catalog of specific provisions.¹¹ In fact, few of the rules categorically admit or

8. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) ("[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.")

9. 23 WRIGHT & GRAHAM, *supra* note 3, § 5422, at 669. The authors see this lack of judicial objectivity as at least one argument for legislative control over the creation of privileges. *Id.*

10. Federal law requires that any rules of privilege be enacted by Congress. 28 U.S.C. § 2074(b) (1994 & Supp. 2004) ("Any . . . rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.")

11. See Eileen A. Scallen & Andrew E. Taslitz, *Reading the Federal Rules of Evidence Realistically: A Response to Professor Imwinkelried*, 75 OR. L.

exclude evidence; most are written to give the trial court flexibility.¹² Trial judges are explicitly instructed to apply the rules in a manner that achieves “fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”¹³ Thus, judicial development and refinement of evidence law is a built-in feature of the Federal Rules.¹⁴

REV. 429, 439–40 (1996). “The Evidence Advisory Committee . . . adopt[ed] a code, not a creed or catalogue, ‘draw[ing] a series of rules in general terms covering the larger divisions and subdivisions of the subject without attempting to frame rules of thumb for specific situations and to make the trial judge’s rulings reviewable for abuse of discretion.’” *Id.* (alteration in original) (footnotes omitted).

12. See generally David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937 (1990) (concluding evidence law does not accord trial courts the freedom generally associated with true discretion); Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413 (1989) (arguing the drafters of the Federal Rules of Evidence intended to allow trial courts to fairly apportion the benefit of close rulings between parties).

13. FED. R. EVID. 102.

14. Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329, 395–96 (1995) (“Congress’s main purpose in passing the Federal Rules of Evidence was to adopt the views of the Supreme Court and the Advisory Committee; the Rules should be interpreted accordingly. But the Advisory Committee intended to create a system of guided discretion for trial judges, limited appellate review, and room for case-by-case growth of the law of evidence.” (footnotes omitted)); see also Victor J. Gold, *Do the Federal Rules of Evidence Matter?*, 25 LOY. L.A. L. REV. 909, 921 (1992) (“Implicit in every undefined [Rules’] term . . . is the hope that the courts will finish the job of rulemaking.”); Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1310 (1992) (“[T]he Federal Rules of Evidence were consciously drawn with a recognition that the federal trial judiciary possess substantial inherent discretion in interpreting, expanding upon, and applying the Rules.”). Reviewing the debates that preceded the drafting of the Federal Rules, one author has stated that what emerged is a middle ground between a catalog and a single, simple rule of discretion:

Writing in 1930, Professor McCormick noted that “the present system in vogue in the United States” was typified by “sharply defined rules prohibiting the admission of many rigidly classified types of evidence,” and he hypothesized that one orientation for reform “might lean toward vesting a large discretion in the trial judge to admit or exclude, guided only by certain general canons and standards.” A

The need for judicial development of evidence law becomes even more evident when one considers that the rules are not even comprehensive in subject-matter coverage. Some areas of the law, including presumptions¹⁵ and witness impeachment,¹⁶ are left only partially codified. Some important matters of evidentiary practice and policy are left out of the Federal Rules entirely.¹⁷ John Henry Wigmore, no friend of codification but one who believed that any codification undertaken should be specific and comprehensive,¹⁸

decade later, the American Law Institute debated the form for the Model Code of Evidence it was preparing. Wigmore, the giant of American evidence law, urged a detailed catalog, while Judge Charles Clark—who drafted the Federal Rules of Civil Procedure as an academic before appointment to the bench—urged adoption of “one broad rule of admissibility of relevant evidence,” with a few subordinate clarifying rules. Ultimately, the federal evidence rules went beyond Clark’s minimalist approach, but left broad areas subject mainly to the control of the trial judge in light of the circumstances of the case.

Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1579 (2003) (footnotes omitted). Another article refers to the list of privileges contained in the Advisory Committee’s draft of the Federal Rules of Evidence as a “catalog.” *The Supreme Court 1995 Term, Rule 501—Psychotherapist-Patient Privilege*, 110 HARV. L. REV. 287, 287 (1996).

15. See FED. R. EVID. 301 (setting forth a general rule for application of presumptions in civil cases, but containing no provision for criminal trials).

16. See FED. R. EVID. art. VI (governing certain witness impeachment issues and methods, but leaving out others).

17. One example is the court’s right to sum up or comment upon the evidence. The draft that was submitted to Congress contained a provision regulating this (Proposed Rule 105), but Congress rejected it, leaving the Federal Rules silent on the subject.

18. Wigmore opposed earlier codification efforts such as the Model Code of Evidence partly on the ground that they were incomplete statements of the law. The Introduction to the Model Code of Evidence, to which Wigmore served as Chief Consultant, specifically notes Wigmore’s “emphatic” disagreement with the form and substance of the draft ultimately approved: “From the inception of the task, . . . Mr. Wigmore, emphatically disagreed with the way in which the problems of drafting should be approached and formulated. . . . [T]here is a fundamental difference of approach and method between the Reporter and his Advisers on the one hand and Mr. Wigmore’s on the other.” William Draper Lewis, *Introduction to MODEL CODE OF EVIDENCE* xiii (1942). Wigmore was wary of any effort to codify evidence law, but believed if codification were to occur, it should be comprehensive. He proposed a code that would have contained several hundred rules and ran well over 500 pages. JOHN HENRY WIGMORE, *WIGMORE’S CODE OF THE RULES OF EVIDENCE IN TRIALS AT COMMON LAW* (3d ed. 1942).

surely must be spinning in his grave,¹⁹ for the Federal Rules are neither.

What, then, to make of the federal law of privileges? At present, federal privilege law is highly uncertain. Except where the Supreme Court has interceded,²⁰ it is not yet clear which privileges are recognized under federal law, and even where there is consensus on the existence of a privilege, its precise form varies from court to court. To a great degree, this is a necessary consequence of the nature of judicial process as compared with legislation. Because courts resolve only the issues before them, the development of detailed rules and standards requires numerous cases and often a lengthy period of time. By contrast, a legislature may create a detailed set of rules covering a particular privilege as well as its exceptions. This does not mean legislatures more often get it right;

19. After writing these words, I discovered that I am not the first one to express in print the possibility that Wigmore is not resting comfortably in his grave. Tennessee maintains an unusual version of the spousal communications privilege which actually appears to require the trial judge to assess whether Wigmore's four criteria for recognition of a privilege would be met in *the particular case before the court*. TENN. CODE ANN. § 24-1-201(c) (2004). Thus, in *State v. Mitchell*, 137 S.W.3d 630 (Tenn. Crim. App. 2003), the appellate court assessed the state of the marriage at the time of trial, and decided that because the marriage was on the rocks at that point, the privilege did not apply to the murder defendant's statement to his wife that he had killed the victim for touching her inappropriately. Calling the statute "crazy," one commentator wrote that Wigmore "is turning in his grave." Donald F. Paine, *Autopsy on Spousal Privilege*, 40 TENN. B.J. 32, 32 (2004).

Another commentator expressed similar frustration with a call to interpret the Maine Constitution's self-incrimination privilege, ME. CONST. art. 1, § 6, to forbid involuntary blood-alcohol testing. See Donald W. Macomber, *The Maine Constitution's Privilege Against Self-Incrimination Revisited—A Response to Mr. Waxman*, 11 ME. B.J. 380, 380 (1996) (responding to a suggestion made by Michael J. Waxman, *Fifth Amendment, Shmifh Amendment: For Real Protection Against Compelled Self-Incrimination in OUI Prosecutions, Look to the Maine Constitution*, 11 ME. B.J. 148 (1996)). The author quotes Greenleaf's statement that the privilege only applies to oral or written statements, and not to physical evidence, Macomber, *supra* (citing 1 GREENLEAF, EVIDENCE § 469(e) (14th ed. 1899)), and states, "Professor Greenleaf, I fear, is rolling over in his grave!" *Id.* Wigmore, it should be noted, was the reviser of the volume of Greenleaf's Fourteenth Edition that contains this material. In a sense, then, Wigmore is rolling over right alongside Greenleaf.

20. One notable example is the Court's recognition of a broad therapist-patient privilege. See *Jaffe v. Redmond*, 518 U.S. 1 (1996) (resolving a split among Courts of Appeals and recognizing the privilege).

experience shows that this is often not true.²¹ But at least legislative process is more suited to the creation of comprehensive rules.

Then there is the question of what qualifies as a privilege.²² All would agree that the rules governing evidentiary use of confidential attorney-client, clergy-penitent, spousal, or psychotherapist-patient communications create and define the scope of privileges, but not all rules of evidentiary secrecy fit this same two-way relational pattern. Some rules we consider to be privileges do not involve confidential communications between two parties. The privilege against compulsory self-incrimination is an obvious example,²³ but there are others.²⁴ In addition, in early editions of his treatise, McCormick categorized the rules governing evidence of compromise and subsequent remedial measures as privileges.²⁵ Though the authors of

21. California's history with respect to the psychotherapist-patient privilege is a good example. Until 1970, the definition of "psychotherapist" included only medical doctors who devote a substantial portion of their time to the practice of psychiatry (or who are reasonably believed by the patient to be psychiatrists) and licensed psychologists. See CAL. EVID. CODE § 1010 note (1995 & Supp. 2004) (Historical and Statutory Notes). In 1970, an amendment added licensed clinical social workers and credentialed school psychologists. *Id.* § 1010(c) and (d). An amendment in 1972 added licensed marriage, family, and child counselors. *Id.* § 1010(e). In 1987, the statute was amended to include supervised registered psychological assistants, child counselor interns, and associate clinical social workers. *Id.* § 1010(f). 1988 saw the addition of certain other persons under the supervision of licensed psychologists or board certified psychiatrists, supervised psychological interns, other supervised trainees, registered nurses with master's degrees in psychiatric mental health counseling, and other persons rendering mental health treatment under specified provisions of the Family Code. *Id.* § 1010(h)-(k). Though some of the gradual broadening of the definition of psychotherapist can be attributed to the growth of new classes of therapists, the earlier narrow definition almost certainly reflected class bias. Only those with fairly substantial means (or very good medical insurance plans) are able to consult psychiatrists or licensed psychologists; other professionals, such as clinical social workers and school psychologists, are available to a broader class of people.

22. It has been noted that "[t]here does not seem to be any attempt to define the term in the literature or in any of the codes." 23 WRIGHT & GRAHAM, *supra* note 3, § 5422, at 667.

23. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .").

24. For example, the authors of the current edition of McCormick's treatise refer to the constitutional doctrines protecting against the use of confessions and unlawfully obtained evidence as privileges. 1 MCCORMICK ON EVIDENCE § 72, at 299 (John W. Strong ed., 5th ed. 1999).

25. About the subsequent remedial measures rule, McCormick wrote:

the current edition of McCormick's treatise consider the treatment of these rules as privileges to be "analytically imprecise,"²⁶ they retain the notion that these rules are similar to privileges in that they are based primarily on a desire to encourage or discourage particular out-of-court conduct²⁷ rather than to preserve the "integrity of the adjudication process."²⁸ Still, McCormick had a point. When thinking about privileges, perhaps it is better to think about the nature and purpose of the rule than about what we normally call it.

In addition, advocates of codification should remember that some privileges are constitutionally based.²⁹ Among them are some of the privileges we hold most dear, including the privilege against compulsory self-incrimination³⁰ and the exclusion at trial of illegally seized evidence.³¹ Codification of these privileges in evidence rules would not be wise. The same might not be true, however, with respect to other privileges that have some basis in the Constitution but have been fleshed out primarily through the common law process. I refer here to the broad government privileges, including presidential ("executive") privilege, protection of state secrets and official information, and protection of the identity of an informer,

The dominant motive for exclusion [of subsequent remedial measures evidence], it seems clear, is the reason often relied on in the opinions; namely, the policy of discouraging the taking of steps to remove a danger. Manifestly, this is an external policy, not looking to the trial and truth-finding, but to the interest of public safety. If so, then according to the analysis suggested herein, the rule is one of privilege.

CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 77, at 159 (1954); *see also id.* § 76, at 157–58 (reaching the same conclusion with respect to evidence of compromise or compromise offers).

26. 1 MCCORMICK ON EVIDENCE, *supra* note 24, § 72.1, at 301.

27. 1 *Id.*

28. 1 *Id.* § 72, at 301.

29. One author reminds us that there are, in fact, at least four sources of current federal privilege law: "(1) privileges created by federal statute; (2) constitutional privileges; (3) privileges from 'common law principles'; and (4) state privilege law in diversity cases." Michael F. Kelleher, Comment, *The Confidentiality of Criminal Conversations on TDD Relay Systems*, 79 CAL. L. REV. 1349, 1359 (1991). The author characterizes the state of standardization of federal privilege law as "schizophrenic." *Id.*

30. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself.").

31. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

among others.³² Codifiers should consider whether it is wise to try to capture the essential elements of these privileges as they go about codifying the more familiar privileges.

Finally, any effort to codify federal privileges should recognize the constitutional constraints on application of federal law in diversity cases. In such cases, the *Erie* doctrine³³ requires federal courts to apply state substantive law to matters not governed by federal law.³⁴ Though most evidence rules are not substantive in nature, some are,³⁵ and federal courts must be mindful of that fact in situations where state and federal law conflict. The privilege rule Congress adopted took account of the *Erie* doctrine by deferring to state privilege law on issues governed by state substantive law,³⁶ a result consistent with the pre-Rules practice in most federal courts that had considered the issue.³⁷ Whether the Constitution requires that result is something codifiers might want to revisit.³⁸

I. THE SYMPOSIUM ARTICLES

Is it time to reassess the decision not to codify privilege rules in the Federal Rules of Evidence? Is uniformity less important in this area than in, say, the hearsay or character evidence rules? Where has the light of “reason and experience” taken the federal courts, including the Supreme Court, in the area of privileges? The *Loyola*

32. See 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 220, at 504 (2d ed. 1994) (listing various government privileges).

33. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

34. “Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.” *Id.* at 78.

35. See David Wadsworth, *Forma Scientific v. Biosera and the Admissibility of Evidence of Subsequent Remedial Measures in Strict Products Liability Actions*, 71 U. COLO. L. REV. 757, 780–87 (2000) (discussing the effect of the *Erie* doctrine on application of Federal Rule of Evidence 407 in diversity cases).

36. See FED. R. EVID. 501 (providing that “in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law”).

37. See 2 MUELLER & KIRKPATRICK, *supra* note 32, § 175, at 256 (asserting that later pre-Rules authority supported application of state privilege law in diversity cases).

38. For a thoughtful exploration of *Erie*’s application to privilege rules, see 2 *id.* §§ 172–177.

of *Los Angeles Law Review* has assembled a diverse group of prominent scholars to assess these and other questions related to federal privilege law. The authors were given free rein, and each chose to address a different aspect of privileges. Though some of our scholars discuss the codification question more directly than others, all address issues that must be considered by those who would attempt codification. I will not attempt to summarize each contribution in detail. Instead, I will simply touch on the major themes addressed in each.

For her contribution to this Symposium,³⁹ Professor Eileen Scallen takes on one of the most fundamental problems faced by privilege codifiers: identifying exactly what constitutes a “privilege.” Among the subjects Professor Scallen has examined in previous work are the use of “practical reasoning” in the interpretation of rules⁴⁰ and the politics of evidence rulemaking.⁴¹ Here, Professor Scallen argues that evidence codifiers should recognize that there are two types of privilege: “informational privilege” (which protects specific information) and “relational privilege” (which promotes and protects certain relationships).⁴² Professor Scallen analyzes a number of areas of judicial confusion about privileges, and also reminds us that some doctrines, such as work-product protection, are actually “quasi-privileges” because they arise from the nature of the adversary system rather than the promotion of confidentiality in certain relationships.⁴³ This, as well, should affect the shape and scope of any codification. Scallen then offers a means of “rethinking” privileges by observing the distinction between relational and informational privileges.⁴⁴ By doing so, she argues, we can see the different rationales that support the two types of privileges. This realization, in turn, should affect such fundamental questions as whether a particular privilege should provide absolute or qualified protection. Finally, Scallen turns her attention to the

39. Eileen A. Scallen, *Relational and Informational Privileges and the Case of the Mysterious Mediation Privilege*, 38 LOY. L.A. L. REV. 537 (2004).

40. Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717 (1995).

41. Eileen A. Scallen, *Analyzing “The Politics of [Evidence] Rulemaking,”* 53 HASTINGS L.J. 843 (2002).

42. Scallen, *supra* note 39, at 539.

43. *Id.* at 549.

44. *Id.* at 568–76.

“mysterious” mediation privilege created under California law.⁴⁵ She concludes that it has features of both informational and relational privileges, a fact that lends a degree of uncertainty about its proper scope, the resolution of which has not yet been achieved.

In a previous article,⁴⁶ Professor Timothy Glynn surveyed the state of the attorney-client privilege, and found enormous variation from jurisdiction to jurisdiction as well as among the federal courts. Concerned about the lack of certainty in the scope of the privilege, and asserting the importance of certainty in privileges, Professor Glynn concluded that Congress should adopt preemptive legislation providing for uniform rules of attorney-client privilege in both state and federal courts.⁴⁷ In his contribution to this Symposium,⁴⁸ Professor Glynn continues to assess the state of the attorney-client privilege. This examination is particularly important in the wake of several major corporate accounting scandals and the resulting enactment of the Sarbanes-Oxley Act, which imposes on corporate attorneys the obligation to report violations of securities law or other wrongdoing within the company.⁴⁹ He concludes that the need for clarification of the attorney-client privilege is greater than ever as a result of “intra-jurisdictional confusion, inter-jurisdictional conflict, and extrajudicial decisions,”⁵⁰ but that it is unlikely Congress will adopt preemptive legislation. As a second-best alternative, Professor Glynn proposes codification of the attorney-client privilege for federal courts. Doing so, he argues, will better serve the instrumental purpose of the privilege: to encourage candor between attorneys and clients.

45. *Id.* at 578–94.

46. Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59 (2002).

47. *Id.* at 63–64, 133–41.

48. Timothy P. Glynn, *One Privilege to Rule Them All? Some Post-Sarbanes-Oxley and Other Reflections on a Federally-Codified Attorney-Client Privilege*, 38 LOY. L.A. L. REV. 597 (2004).

49. See 15 U.S.C. § 7245 (Supp II 2002). Section 307 of the Act requires the Securities and Exchange Commission to issue rules “setting forth minimum standards of profession conduct for attorneys appearing and practicing before the commission in any way in the representation of issuers.” *Id.* The Commission is instructed to issue a rule requiring attorneys to “report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company” *Id.*

50. Glynn, *supra* note 48, at 634.

Professor Kenneth Broun is a former member of the Advisory Committee on the Federal Rules of Evidence. Currently, he serves as a consultant to the Advisory Committee, for which he is conducting a survey of federal privilege law. For his contribution to this Symposium, Professor Broun has chosen to examine some important aspects of the medical privilege as it has evolved in the federal courts.⁵¹ Professor Broun notes that the Supreme Court's recognition of a broad federal psychotherapist-patient privilege⁵² did nothing to change the federal courts' refusal to recognize a general physician-patient privilege. Indeed, all federal courts that have considered such a privilege have rejected it.⁵³ This contrasts sharply with the practice in the states, more than forty of which do recognize a general physician-patient privilege.⁵⁴ Professor Broun surveys the emerging parameters of the federal psychotherapist-patient privilege, and reviews the arguments in favor of and against the creation of a general physician-patient privilege. Ultimately, he concludes that although there are good arguments on both sides, on balance the rationales supporting the psychotherapist-patient privilege apply as well to the more general privilege. He argues that the two privileges should have the same scope. In particular, Professor Broun would hold both privileges inapplicable where a party seeks the general medical records of patients involved only incidentally in the case.⁵⁵ However, where the issue concerns actual communications between physician and patient or notes directly reflecting such communications, Professor Broun suggests that the two privileges be given the same scope.⁵⁶ Professor Broun thus provides clear guidelines for the possible codification of the medical privileges.

Many rules of evidence rely on assumptions concerning human behavior. This is certainly true of a number of the hearsay exceptions. For example, the assumption supposedly supporting the reliability of dying declarations⁵⁷ is that people who believe they are

51. Kenneth S. Broun, *The Medical Privilege in the Federal Courts—Should It Matter Whether Your Ego Or Your Elbow Hurts?*, 38 LOY. L.A. L. REV. 657 (2004).

52. *See* *Jaffee v. Redmond*, 518 U.S. 1 (1996).

53. Broun, *supra* note 51, at 657.

54. *Id.* at 659.

55. *Id.* at 699.

56. *Id.*

57. *See, e.g.*, FED. R. EVID. 804(b)(2) (providing that in a homicide

about to die are unlikely to speak dishonestly.⁵⁸ While this is certainly true for some people, it is not true for all people and all cultures, and today the underpinnings of the dying declaration exception are highly dubious.⁵⁹ Nevertheless, the courts continue to

prosecution or a civil action, "a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death" is not to be excluded by the hearsay rule).

58. In *The King v. Woodcock*, 168 Eng. Rep. 352, 353 (K.B. 1789), Chief Baron Eyre wrote:

[T]he general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is created by a positive oath administered in a Court of Justice.

Wigmore agreed with this basic view, writing that "[a]ll courts have agreed . . . that the *approach of death* produces a state of mind in which the utterances of the dying person are to be taken as free from all ordinary motives to misstate." 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1438, at 289 (James H. Chadbourn rev., 1974); see also *Mattox v. United States*, 156 U.S. 237, 244 (1895) ("[T]he sense of impending death is presumed to remove all temptation to falsehood and to enforce as strict an adherence to the truth as would the obligation of the oath.").

The authors of one article state:

[T]he dying declarations exception arises from the cultural experience of "facing one's Maker" as a moment of truth. But in a culture that only grows more cynical about the authenticity of religious experience, the exception loses its rhetorical force. Dying declarations no longer evoke the image of a person making a solemn statement on the death bed, before a confessor, surrounded by family members. Instead, we more commonly envision a drugged, whispering patient in an impersonal hospital, alone except for a detective holding a little black book and straining to hear a name gasped against the flow of pure oxygen. The contemporary image lacks the comforting effect of the traditional one.

59. Charles R. Nesson & Yochai Benkler, *Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause*, 81 VA. L. REV. 149, 156 (1995). Even in the nineteenth century, some doubted the validity of the assumptions supporting the dying declaration exception, at least under some circumstances. One writer quoted a native of Madras, India, who stated, "Such evidence . . . ought never to be admitted in any case. What motive for telling the truth can any man possibly have when he is at the point of death?" 1 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 448-49 (1883).

adhere to the exception, and codifiers write it in stone as though there were no doubt of its validity. The same is true of a number of other hearsay exceptions⁶⁰ as well as other rules of evidence.⁶¹ Clearly, there is a need for more careful analysis of the behavioral underpinnings of evidence rules. Professor Edward J. Imwinkelried's contribution to this Symposium does just that with respect to privileges.⁶² Professor Imwinkelried is the author of a two-volume work on evidentiary privileges for *The New Wigmore: A Treatise on Evidence*.⁶³ His paper analyzes psychological literature on self-disclosure as a means of testing the behavioral assumptions that support the rules of privilege. Specifically, he tests Wigmore's assertion that confidentiality is necessary to promote disclosure within certain relationships.⁶⁴ Professor Imwinkelried shows that

60. For example, psychological research has severely undermined the assumed trustworthiness of excited utterances. See Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 COLUM. L. REV. 432, 439 (1928) (stating that "[w]hat the emotion gains by way of overcoming the desire to lie, it loses by impairing the declarant's power of observation"). But see Roger C. Park, *Visions of Applying the Scientific Method to the Hearsay Rule*, 2003 MICH. ST. L. REV. 1149, 1151 (2003). That author discusses weaknesses in the conclusions of Hutchins and Slesinger and notes that:

[T]he justification for creating an excited utterance exception to the hearsay rule begins to look better when one considers the adversarial climate. Whatever the shortcomings of excited utterances, they are generally made before the declarant has been subjected to the influence of lawyers and interested parties. Because of the absence of adversarial pressures, they are likely to be more accurate than many other types of hearsay. Moreover, jurors might be in a better position to judge and discount the effect of excitement than they are to assess institutional influences on witnesses.

Id.

61. One example of such a rule in another area of evidence law is the subsequent remedial measures rule. See, e.g., FED. R. EVID. 407. The assumption that people are more likely to repair dangerous products or conditions if evidence of the repair will not be admissible in court has not been tested. See DAVID P. LEONARD, *THE NEW WIGMORE: A TREATISE ON EVIDENCE; SELECTED RULES OF LIMITED ADMISSIBILITY* § 2.4.1 (rev. ed. 2002) (discussing assumptions underlying the rule).

62. Edward J. Imwinkelried, *A Psychological Critique of the Assumptions Underlying the Law of Evidentiary Privileges: Insights From the Literature on Self-Disclosure*, 38 LOY. L.A. L. REV. 707 (2004).

63. IMWINKELRIED, *supra* note 7.

64. Imwinkelried, *supra* note 62, at 709.

although some psychological research supports Wigmore, most such research does not.⁶⁵ If this research is accurate, Professor Imwinkelried argues, Wigmore's influential view that privileges must be absolute in character rather than qualified is suspect. Imwinkelried examines the implications of this research for the law of privileges, and considers whether trial judges should have greater discretion to admit evidence of otherwise privileged communications. Though he does not specifically address codification, Professor Imwinkelried's conclusions should have an important impact on the codification effort.

Professor Paul Rice has served as Director of the Evidence Project at American University's Washington College of Law. He has authored treatises on both the federal attorney-client privilege⁶⁶ and the attorney-client privilege in the states and the District of Columbia.⁶⁷ He has written extensively about evidence codification. For this Symposium,⁶⁸ Professor Rice argues against codification of evidence law and for a return to the common law process. He reviews the way the Judicial Conference has managed the Federal Rules of Evidence, with special emphasis on the relatively brief history of the Advisory Committee on the Federal Rules of Evidence, which was not appointed until nearly twenty years after Congress adopted the Federal Rules. Professor Rice critiques the Advisory Committee's work in each year,⁶⁹ reveals the "management principles" the Committee appears to follow,⁷⁰ and reaches several potentially devastating conclusions. The most important of these is that although the Committee has focused on making the rules more functional, there have been few efforts to improve the substance of the Federal Rules.⁷¹ As a consequence, the Federal Rules fail to give meaningful structure and guidance to the law of evidence.⁷² He also

65. *Id.* at 713-15.

66. PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES* (2d ed. 1999).

67. PAUL R. RICE, *ATTORNEY-CLIENT PRIVILEGE: STATE LAW* (Rice Pub. 2004).

68. Paul R. Rice, *Back to the Future With Privileges: Abandon Codification, Not the Common Law*, 38 *LOY. L.A. L. REV.* 739 (2005).

69. *Id.* at 744-54.

70. *Id.* at 755-78.

71. *Id.* at 755.

72. *Id.* at 755-56.

voices deep concern about the influence of “special interest groups” on the Advisory Committee’s work,⁷³ which he believes has unduly affected the Committee’s focus. Professor Rice ultimately concludes:

The best . . . of both the common law and codification could be achieved if (1) the common law evidentiary rule-making authority were officially recognized by abolishing the Federal Rules of Evidence as a *binding* code, and (2) the role of the Advisory Committee on the Federal Rules of Evidence were changed. In its modified role, the Committee would facilitate the development of the rules by the judiciary by crystallizing current practices in a coherent framework. It would achieve this by exposing problems and offering preferred solutions to both existing and developing issues—compelling nothing, but influencing through reason and structure.⁷⁴

This means, of course, that privileges should not be codified, at least in the form of the other rules that currently make up the Federal Rules of Evidence. Professor Rice further supports this conclusion with a detailed examination of the evolution of the federal attorney-client privilege under the common law, a process that has allowed the courts to hone the privilege and resolve issues concerning its scope and application.⁷⁵ Professor Rice argues that had the attorney-client privilege been codified initially as part of the Federal Rules of Evidence, many of these same issues would not have been addressed, nor would they have been resolved in the years since adoption of the Federal Rules.

Like Professor Rice, Professor Paul Kirgis is a codification skeptic. Unlike Rice, however, Kirgis believes privileges should be codified. That is the primary thesis of his contribution to this Symposium.⁷⁶ Though this is Professor Kirgis’ first foray into the law of privileges, his scholarship has touched on a number of aspects

73. *Id.* at 779–81.

74. *Id.* at 806–07.

75. *Id.* at 792–804.

76. Paul F. Kirgis, *A Legisprudential Analysis of Evidence Codification: Why Most Rules of Evidence Should Not Be Codified—But Privilege Law Should Be*, 38 LOY. L.A. L. REV. 809 (2005).

of evidence law, most importantly the certification of experts⁷⁷ and the problem of the "expert juror."⁷⁸ Here, Professor Kirgis sets forth a number of standards for evaluating proposed codifications, and though he focuses primarily on the codification of privilege law, he considers the standards to be applicable more generally. As the title of the paper suggests, Kirgis approaches the topic "legisprudentially." He argues that because our legal system is rooted in the common law, legislation must be justified in relation to how it affects the common law. In particular, he argues, legislation must serve two functions: "an 'ordering' function, directed at ensuring the efficiency and fairness of existing common law rules; and a 'remedial' function, directed at correcting errors in the common law."⁷⁹ While most evidence rules are not capable of serving these two functions, privilege rules can.⁸⁰ Professor Kirgis first critiques the traditional justifications for codification, paying particular attention to the question of whether the traditional justifications of uniformity and efficiency enhance procedural justice.⁸¹ He then offers an alternative analysis of the value of codification based on normative standards of natural law, social utility, and justice, that accounts for the preeminence of the common law, and that serves both the ordering and remedial functions.⁸² He then applies these principles to evidence law, concluding, as noted above, that codification of privileges can be justified but that other areas of evidence law should not be codified. He writes: "Assuming that we believe privileges are valuable and should be maintained . . . the law of privilege is probably the area of evidence law most in need of legislation in the service of the ordering function,"⁸³ and that "the need for codification is significantly greater than for most other evidence rules because privilege law affects primary conduct."⁸⁴

Professor Kenneth Graham has written numerous volumes of a

77. Paul F. Kirgis, *Curtailling the Judicial Certification of Expert Witnesses*, 24 AM. J. TRIAL ADVOC. 347 (2000).

78. Paul F. Kirgis, *The Problem of the Expert Juror*, 75 TEMP. L. REV. 493 (2002).

79. Kirgis, *supra* note 76, at 812.

80. *Id.* at 812-13.

81. *Id.* at 813-31.

82. *Id.* at 831-44.

83. *Id.* at 856.

84. *Id.* at 858.

major treatise on the Federal Rules of Evidence,⁸⁵ including several on privileges.⁸⁶ For this Symposium, he focuses on an often-ignored area of privilege law: government privileges.⁸⁷ Like Professor Rice, he is concerned about issues of power and influence in the creation and shaping of privileges. He begins by asserting a truth that few of us know: “[T]he government enjoys more privileges than any other litigant. In addition to privileges available to ordinary citizens and organizations, such as the attorney-client privilege, the government can claim many privileges available to no other litigant.”⁸⁸ Moreover, rather than being created through a neutral mechanism (or at least one that allows for significant public comment), these privileges have been “shaped by ambitious bureaucrats, craven judges, and corrupt legislators”⁸⁹ Professor Graham argues that our government has adopted a particular model of secrecy that brings both advantages and disadvantages to those who possess the secret information.⁹⁰ Most importantly, however, this model tends to impair the development and maintenance of a democratic government. Judges, in turn, are not neutral or independent, but instead show enormous deference to government secrets. Indeed, Graham argues, judges who consider denying government claims of privilege place at risk the chances of advancement through the judicial hierarchy.⁹¹ Professor Graham also blames the promotion of government secrecy on the American economic system, which, he asserts, benefits from hidden forms of government cooperation.⁹² The result is lax regulation of corporate actions that affect the public health and well-being.⁹³ Professor Graham concludes his paper with

85. 21–25, 30–31 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* (1977).

86. 23–25 *id.*

87. Kenneth W. Graham, Jr., *Government Privileges: A Cautionary Tale for Codifiers*, 38 LOY. L.A. L. REV. 861 (2004).

88. *Id.* at 862 (footnotes omitted). Among these are privileges for state secrets, official information, identity of informers, mental processes, bank examiners, and police surveillance location. *Id.* at 3.

89. *Id.* at 862.

90. *Id.* at 870–72.

91. *Id.* at 873–74.

92. *Id.* at 874–80.

93. As an example, Professor Graham reviews the Bush administration’s development of its National Energy Policy, a process that took place outside the public eye and which proceeded largely in secret and with significant

some "Ruminations from the Ruins,"⁹⁴ in which he speculates on the desirability of codifying both government and other privileges. Perhaps most importantly, he urges a return to the fundamental moral values (including social justice for the poor) that should inform government in general and judicial process in particular, and a greater effort to understand the interrelationship between rules of evidence and substantive law.

II. CONCLUSION

The law of privileges has been attacked from two opposing directions. On one side of the divide are those who see rules of privilege as a hindrance to the search for truth. Following Wigmore's lead,⁹⁵ these commentators argue that the reach of relational privileges should be strictly confined to those relationships that cannot function effectively without the assurance of confidentiality—even from the reach of judicial process. Few relationships meet this test. On the other side are those who claim that privileges serve important values that more often outweigh the harm to the truth determination process that the recognition of the privilege might cause. These scholars also point to inequities in the scope of privileges, which often shield powerful or wealthy parties while leaving those with less access to power and money unprotected. Privileges should be expended, it is argued, into new realms such as the parent-child and financial advisor-client relationships.

involvement of business interests that stood to gain from the emerging policy. *Id.* at 880–88.

94. *Id.* at 897–902.

95. Wigmore believed that privileges should be recognized only within relationships that meet four standards:

- (1) The communications must initiate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 (John T. McNaughton rev. 1961).

I am confident that the Articles in this Symposium make significant contributions to the ongoing discussion about privileges.

