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Relational and Informational Privileges and the Case of the Mysterious Mediation Privilege

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RELATIONAL AND INFORMATIONAL PRIVILEGES AND THE CASE OF THE MYSTERIOUS MEDIATION PRIVILEGE

*Eileen A. Scallen**

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I. INTRODUCTION

[Privileges] do not in any wise aid the ascertainment of truth, but rather they shut out the light. Their sole warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.¹

[T]he public . . . has a right to every man's evidence.²

Confidentiality is vitally important to mediation because it facilitates disclosure. People will not disclose personal needs, strategies, and information if they feel it might be used against them.³

Evidentiary privileges,⁴ of all kinds, are mixed blessings. On the one hand, privileges are created to protect "interests and relationships" deemed "of sufficient social importance."⁵ On the other hand, they permit the exclusion, or "sacrifice," of potentially relevant, reliable, and credible evidence, often the kind of evidence that many would not call "incidental."⁶ Eminent evidence scholars including Jeremy Bentham,⁷ John Henry Wigmore,⁸ Charles Alan

1. Charles T. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 447-48 (1938).

2. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 70 (McNaughton rev. 1961).

3. Kent L. Brown *Confidentiality in Mediation: Status and Implications*, 1991 J. DISP. RESOL. 307, 310.

4. Evidentiary privileges are different from substantive privileges. Substantive privileges partly or completely shield the holder from liability for certain claims. McCormick, *supra* note 1, at 447. Evidentiary privileges, however, only shield the holder from providing certain evidence. *Id.*

5. *Id.* at 448.

6. *Id.*

7. See generally JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE (Etienne Dumont ed.) (microfiche reproduction 1987) (1825) (arguing that privileges are unjustified obstructions to fact-finding).

8. See generally 8 WIGMORE, *supra* note 2 (establishing the instrumental rationale, which is the prevailing theory of privileges).

Wright and Kenneth W. Graham, Jr.,⁹ and Edward J. Imwinkelried¹⁰ have explored the rationales for evidentiary privileges, but they have done so largely by considering privileges as a unitary concept. In this article, I suggest that the justifications for privileges may differ depending on whether the privilege is designed to protect certain information or to enhance specific relationships. Both the drafters and interpreters of evidentiary privileges would benefit, in terms of greater clarity, predictability, utility, and integrity, from recognizing two different concepts of evidentiary privilege: informational privilege and relational privilege. With these starting points, it is possible to make better sense of the complexities that attend the law of privilege.

Part II of this article identifies and argues for a theory of privilege that distinguishes between relational and informational interests. Part III of the article provides case study of the problems with drafting and interpreting privileges without a sound understanding of the interests involved—the recent and mysterious “mediation privilege”. Where parties are engaged in the various forms of alternative dispute resolution known as mediation,¹¹ legislators and other rule drafters have granted different levels of protection for statements made by various persons during the mediation process and for materials prepared in the course of

9. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5422 (1980) (Supp. 2000).

10. See generally 1 EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 5 (Richard D. Friedman ed., 2002) (challenging the instrumental and humanistic rationales and arguing for a normative rationale).

11. The term mediation is problematic because there are different types of interaction that can be called mediation. See Alan Kirtley, *The Mediation Privilege's Transition From Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 5–10. There are many definitions for mediation, but “[a]t its essence, mediation is a process of negotiations facilitated by a third person(s) who assists disputants to pursue a mutually agreeable settlement of their conflict.” *Id.* at 5. Kirtley goes on to note that a broad approach to the definition of mediation “yields uncertainty and the potential for over-inclusiveness.” *Id.* at 22; see also CAL. EVID. CODE § 1115 (Deering 2004) (providing a broad definition of mediation).

mediation.¹² The rationale and scope of these provisions are far from clear, however. I use the California Supreme Court's recent interpretation of the mediation privilege in *Rojas v. Superior Court*¹³ to illustrate the difference between relational privileges and informational privileges and the problems that ensue when the concepts are confused. By mixing the concepts of relational privilege and informational privilege, the drafters and interpreters of the California mediation privilege have created unwarranted, absolute barriers to the resolution of disputes in a manner that inhibits rather than promotes "the administration of justice."¹⁴

Behind the struggle to define and apply privileges there are lessons to be learned about evidence rule making. In constructing relational and informational privileges, there is a role for both legislatures, which can dictate the values behind each privilege, and courts, which interpret the legislature's abstract language in concrete settings. There is inevitable tension between these roles, but that tension merely reflects the incongruity of privilege law, where we are willing to sacrifice potentially relevant, probative evidence for special reasons that have nothing to do with accurate dispute resolution. Both effective legislative and judicial functions are essential if the law of privilege is to balance these competing concerns successfully. Thus, to carry out their functions properly, legislatures and courts need a better theory of evidentiary privilege.

II. RETHINKING PRIVILEGES AS PROTECTING RELATIONAL AND INFORMATIONAL INTERESTS

What is a "privilege?" It seems like a simple question, but when one takes a closer look the question grows increasingly difficult. The first section of this Part looks at the wide variety of evidentiary concepts that, at some point, have been called "privileges." The thrust of this section is to demonstrate the theoretical and doctrinal confusion that has resulted from inadequate understanding of privilege law. The second section looks at the traditional rationales for privilege law and concludes that the "one-size-fits-all" approach

12. See Kirtley, *supra* note 11, at 20–22 (surveying various circumstances subject to a "mediation privilege").

13. 93 P.3d 260 (Cal. 2004).

14. McCormick, *supra* note 1, at 448.

to understanding privilege simply does not work. The final two sections of this Part set forth a different theory of privilege—one that posits different rationales for privileges that serve to enhance specific relationships and privileges that protect interests in specific types of information—and show the legislative and judicial consequences of reframing our understanding of privilege in this way.

A. The Confusing Variety of Privileges

There is an extraordinarily wide variety of concepts bundled under the term “privilege.” The most familiar are testimonial privileges and confidential communication privileges, each of which can provide absolute or qualified protection.¹⁵ Alongside these core concepts, there are a range of doctrines that are referred to as privileges because they involve concepts of privacy or confidentiality.¹⁶ These doctrines include the work product “privilege” and the “privilege” for settlement discussions and offers.¹⁷ This section reviews the confusion surrounding these doctrines, relying primarily on federal and California law to illustrate the problems.

One can begin to see the problem by considering the concept of “absolute privileges.” There are no absolute privileges. Although the term “absolute privilege” exists, no evidentiary privilege offers absolute protection, in the sense of an impenetrable shield. All privileges can be waived by parties, whether intentionally or unintentionally.¹⁸ Moreover, virtually all privileges (except perhaps the mysterious mediation privilege discussed in Part III of this Article) are subject to multiple exceptions, meaning that even though a holder of a privilege may want to refuse to provide certain evidence, as a matter of policy lawmakers could not allow the evidence to be withheld from the trier of fact. The most famous example of this principle is the crime-fraud exception, which applies to many privileges. Where the privileged communication is used to further a crime or fraud, the protection of privilege vanishes, no

15. 1 IMWINKELRIED, *supra* note 10, § 1.2.1, at 14 (explaining that some “communication privileges can be overridden by an ad hoc showing of compelling need for the underlying information”).

16. *See* 1 *id.* § 1.3 (discussing doctrines related to evidentiary privilege).

17. *Id.*

18. *See e.g.*, CAL. EVID. CODE § 912 (Deering 2004) (listing various circumstances under which the holder of a privilege may waive it).

matter how much the holder of the privilege wishes to protect the privileged evidence.¹⁹ Nevertheless, most scholars and commentators divide “absolute” privileges into two categories: testimonial and confidential communications.²⁰

Testimonial privileges are the broadest in terms of the scope of protection. The holder of a testimonial privilege cannot be compelled to provide testimony on any topic, whether it pertains to matters observed, matters discussed in confidence, or matters discussed in public. The most common testimonial privilege is the spousal privilege.²¹ The central tenet underlying this privilege is that the relationship between spouses is sufficiently important such that no spouse should be forced to testify against the other spouse.²²

Testimonial privileges are frequently confused with other rules of evidence that flatly prohibit particular witnesses from testifying, however. For example, California Evidence Code section 703.5 bars persons in a judicial or quasi-judicial position from testifying in any subsequent proceeding, and it prohibits mediators or arbitrators from testifying in a subsequent civil proceeding, with some exceptions.²³

19. See, e.g., CAL. EVID. CODE § 956 (Deering 2004) (crime-fraud exception to attorney-client privilege); *id.* § 981 (crime-fraud exception to marital confidential communication privilege); *id.* § 1018 (crime-fraud exception to psychotherapist-patient privilege).

20. Professor Edward Imwinkelried, author of the treatise, *The New Wigmore: Evidentiary Privileges*, chose not to address testimonial privileges in the treatise. However, he noted that Dean Wigmore and the Advisory Committee that drafted the proposed federal rules of privilege did include testimonial privileges in the definition of “privilege.” See 1 IMWINKELRIED, *supra* note 10, § 1.3, at 21–22 & nn.3, 15 (citing 8 WIGMORE, EVIDENCE, *supra* note 2 §§ 2175, 2227–45).

21. See *Trammel v. United States*, 445 U.S. 40, 43, 46 (1980) (noting the privilege’s ancient roots and the fact that it is recognized by a majority of states). See generally CAL. EVID. CODE §§ 970–71 (Deering 2004) (defining the spousal testimonial privilege). Another testimonial privilege grows out of constitutional law: the privilege of a criminal defendant not to testify and not to be called as a witness. U.S. CONST. amend. V. Some jurisdictions have also codified this privilege. CAL. EVID. CODE § 930 (Deering 2004).

22. See, e.g., *Trammel*, 445 U.S. 40 at 53 (stating that the spousal privilege “furthers the important public interest in marital harmony”).

23. CAL. EVID. CODE § 703.5 (Deering 2004). Another example of a disqualification statute is CAL. EVID. CODE § 1150, which disqualifies a juror or any other person from giving testimony (whether the person wants to testify or not) about “the subjective reasoning process” of the jury. See EILEEN A.

Yet this type of disqualification statute can be distinguished from testimonial privileges because disqualification statutes prohibit all persons from testifying, even those who would wish to testify.²⁴ A testimonial privilege empowers the holder of the privilege to decide whether to testify or not.

Testimonial privileges stand in contrast to confidential communication privileges. A court can compel the holder of a confidential communication privilege to testify about some matters, but prohibit testimony about confidential communications the privilege holder had with specific persons.²⁵ In the United States, these privileges extend only to a few particular relationships: attorney-client, psychotherapist-patient, husband-wife, doctor-patient, and penitent-clergy.²⁶ Like testimonial privileges, these privileges tend to be “absolute,” meaning they are only subject to waiver and exceptions.²⁷

Some jurisdictions, however, do not grant absolute protection to certain confidential communication privileges, and these stand out as anomalies. For example, California recognizes a “sexual assault victim-counselor” privilege²⁸ and a “domestic violence victim-counselor” privilege.²⁹ In some ways, these “victim-counselor” provisions are structured after other confidential communication

SCALLEN & GLEN WEISSEBERGER, *CALIFORNIA EVIDENCE COURTROOM MANUAL* § 1150, at 670–74 (2004). These disqualification provisions should be distinguished from “competency” statutes, which declared certain categories of individuals unfit to testify. The general trend of modern evidence law is to eliminate categorical incompetence rules, leaving problems with a particular witness’s testimony to go to the credibility of the witness’s evidence. *See id.* § 700, at 227.

24. *See* 1 IMWINKELRIED, *supra* note 10, § 1.3.6, at 45–49 (discussing the difference between spousal communication and disqualification privilege).

25. 1 IMWINKELRIED, *supra* note 10, § 6.2, at 441; *see* EDWARD J. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* (4th ed. 1998) (stating confidential privileges apply in any proceeding in which testimony can be technically compelled through a subpoena; however the person holding the privilege may still refuse to disclose the privileged information).

26. 1 IMWINKELRIED, *supra* note 10, § 6.3, at 522–24.

27. Edward J. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come into Conflict with Modern Humanistic Theories?*, 55 *ARK. L. REV.* 241, 256–57 (2002).

28. *CAL. EVID. CODE* §§ 1035–1036.2 (Deering 2004).

29. *Id.* §§ 1037–1037.8.

privileges in that the communication must be made in confidence between persons in the specified relationship.³⁰ The statute applies to a "victim," a person who alleges a sexual assault or act of domestic violence and who seeks counseling for the trauma.³¹ The privilege applies to the victim's communications made "in confidence" to a counselor who has had training and education in counseling these specific victims, or is employed by an organization that focuses on counseling victims of sexual assault or domestic violence and is qualified by education and training.³² "In confidence" means that neither the victim nor the counselor discloses the information to "third persons other than those who are present to further the interests of the victim in the consultation or those to whom disclosures are reasonably necessary for the transmission of the information or an accomplishment of the purposes for which the sexual assault [or domestic violence] counselor is consulted."³³ The holder of the privilege (the victim, a guardian or conservator of a victim, or a person authorized to claim the privilege by the holder of the privilege)³⁴ must claim the privilege or it is waived. The counselor "may not claim the privilege, however, if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure."³⁵

Yet unlike other confidential communication privileges, both of these "victim-counselor" privileges can be overcome in a criminal action by a showing of sufficient need for relevant evidence of the facts and circumstances involving the alleged sexual assault or act of domestic violence "if the court determines that the probative value outweighs the effect on the victim, the treatment relationship, and the treatment services if disclosure is compelled."³⁶ With the victim-

30. *Id.* §§ 1035.4, 1037.2.

31. *Id.* §§ 1035, 1037, 1037.7.

32. *Id.* §§ 1035.2, 1037.1.

33. *Id.* §§ 1035.4, 1037.2.

34. *Id.* §§ 1035.6, 1037.4.

35. *Id.* §§ 1035.8, 1037.5.

36. *Id.* §§ 1035.4, 1037.2 (discussing the balancing test used in the sexual assault victim-counselor and domestic violence-victim counselor privilege). However, the sexual assault victim's statements regarding his or her past sexual conduct or reputation remain absolutely protected. *Id.* §1035.4; *see also id.* § 1037.2 (discussing a similar balancing test for domestic violence victim-counselor privilege).

counselor privileges, the California legislature has tried to create statutes that accommodate both the desire to protect a therapeutic counseling relationship, in which confidentiality is perceived as necessary for the fulfillment of the purpose of the relationship, and the need for relevant evidence in criminal cases. Yet this mixture of relational privilege (victim-counselor) and informational privilege (evidence of the victim's past sexual conduct and facts relating to the alleged sexual assault or act of domestic abuse) raises questions about the utility and integrity of those privileges. As will be discussed more thoroughly in the next section of this Article, the instrumental rationale of confidential communication privilege (the belief that the privilege is necessary to encourage the parties to engage in full and productive communication) has been consistently questioned and criticized.³⁷ To the degree the instrumental rationale proves true to any extent, however, it is likely to be undercut by the recent amendment to the domestic violence-victim privilege that requires the counselor to inform a victim, either in writing or orally, of potential limits on confidentiality.³⁸

Regardless of the utility of the privilege in fostering the flow of information, the integrity of these privileges is demeaned by singling out these "special relationships" for protection, but then giving them second class status.³⁹ The treatment of these relational privileges signals a need for more thinking about the function and rationale for privileges.

In addition to "absolute" privileges, there are many privileges, adopted by some jurisdictions and not by others, that are subject to balancing by the trial judge.⁴⁰ In other words, the judge determines whether the party seeking to breach the privilege has shown that the

37. See, e.g., 1 IMWINKELRIED, *supra* note 10, § 5.2.2, at 277.

38. Act of Sept. 17, 2002, § 1, 2002 Cal. Stat. 629 (codified as amended at CAL. EVID. CODE § 1037.8 (Deering 2004)).

39. Indeed, the qualified informational privilege for the facts and circumstances of the alleged crime is unnecessary, given the defendant's rights of compulsory process and confrontation under the Sixth Amendment. Even absolute privileges have to give way to these constitutional provisions, if the defendant shows sufficient need. See 2 IMWINKELRIED, *supra* note 10, § 11.3.1, at 1263–86 (describing the constitutional balancing test for determining when the accused's need for evidence may outweigh an exclusionary rule).

40. See 2 IMWINKELRIED, *supra* note 10, § 9.3.3, at 1196–98 (describing methods for balancing).

need for the information outweighs the values behind the privilege. In California, for example, the privileges subject to balancing include trade secrets,⁴¹ the identity of confidential informants,⁴² political votes,⁴³ newsperson shield laws,⁴⁴ and self-critical reports.⁴⁵ Within these diverse categories of information, there are no readily apparent rationales for providing only qualified protection, as opposed to absolute protection.

Alongside these statutory qualified privileges, some federal courts have recognized certain governmental privileges, grounded in the federal constitution or in the official positions created in the constitution. The most familiar federal "privilege," as some legal scholars refer to it, and the only one expressly mentioned in the United States Constitution, is the Fifth Amendment right against self-incrimination.⁴⁶ This privilege, which applies in civil and criminal cases,⁴⁷ guarantees an individual the right to remain silent when questioned in a custodial context, thereby preventing the potential for making self-incriminating statements or confessions that would subject the individual to criminal charges.⁴⁸ In this sense, the Fifth Amendment operates as a type of testimonial privilege, giving the person claiming "the Fifth" at least the presumptive right not to testify about certain issues. Similarly, some states have constitutional doctrines giving rise to privileges. For example, the California constitution contains an express right to privacy.⁴⁹ This provision has been interpreted to privilege certain kinds of information.⁵⁰ But one questions whether these are true "privileges." These provisions stem from the text of the federal or state

41. CAL. EVID. CODE §§ 1060–1063 (Deering 2004).

42. *Id.* §§ 1040–1042.

43. *Id.* § 1050.

44. *Id.* § 1070.

45. 2 IMWINKELRIED, *supra* note 10, §§ 7.8–7.8.1, at 1115–24.

46. *See* U.S. CONST. amend. V; *see generally* 1 IMWINKELRIED, *supra* note 10, § 1.3.10, at 69–70 (describing the Fifth Amendment right against self-incrimination as a federal constitutional privilege).

47. 1 IMWINKELRIED, *supra* note 10, § 1.3.10, at 69–70.

48. *Id.*

49. CAL. CONST. art. I, § 1 (including the right to privacy).

50. *See* Garstang v. Superior Court, 46 Cal. Rptr. 2d 84, 88–89 (1995) (holding that the constitutional right of privacy protected communications made during mediation sessions before an ombudsperson).

constitutions itself and are not created by a specific branch of government as is the case with statutory or common law privileges.⁵¹ Moreover, the constitutional texts speak of these provisions not as “privileges,” but as “rights.” Whereas a “privilege” may be granted or withheld by the authority in question, the existence of “right” is not optional (although the scope of that right may be subject to interpretation).

Nonetheless, in addition to these questionable constitutional “privileges,” there are privileges, not expressly stated in federal or state constitutions, but that have been recognized by courts as arising from the constitutional roles of government actors. These privileges emerge from a desire to protect information that particular government offices produce and use, ostensibly to help those offices carry out their functions. The most familiar of these privileges is the executive or presidential privilege.⁵² In *United States v. Nixon*,⁵³ the United States Supreme Court recognized the existence of the executive privilege, which rests in part on the doctrine of separation of powers⁵⁴ and the typical concern for confidentiality in communications between certain individuals.⁵⁵ Because the judiciary has its own separation of powers concerns, however, the Supreme Court rejected the arguments that the president is the sole judge of whether the privilege applies and that the privilege is absolute.⁵⁶ The Court reasoned that, where there has been a showing of sufficient need for information, the judiciary may order disclosure of the information to fulfill essential functions, such as adjudicating criminal proceedings.⁵⁷ The scope of the privilege, in terms of whose communications is protected, is still unclear, but it appears to apply “when all the communicating parties fall into one of the

51. Cf. *Mitchell v. Superior Court*, 690 P.2d 625, 628 n.3 (Cal. 1984) (stating holding that California Evidence Code § 911, which permits only the Legislature to create privileges, “cannot bar privileges based on constitutional provisions, but does prevent judicial creation of new common law privileges”).

52. See 2 IMWINKELRIED, *supra* note 10, § 7.6.1; see 26A WRIGHT & GRAHAM, *supra* note 9, § 5673.

53. 418 U.S. 683 (1974).

54. *Id.* at 706.

55. *Id.* at 705–06.

56. *Id.* at 706.

57. *Id.* at 707.

following groups: the President, his or her advisors such as Cabinet officers, and their staff members."⁵⁸ When determining which communications are protected, it is clear that the privilege protects only materials created to advise the president on "official Presidential matters," regardless of whether those communications occur before, during, or after an executive decision.⁵⁹

Although it appears to rest more on instrumental grounds than separation of powers concerns, a related privilege protects the "intragovernmental communications by executive officials."⁶⁰ Behind this common law "deliberative process privilege" is the standard rationale that without the privilege, the communications would not occur and the quality of government decision making would be hurt.⁶¹ Professor Ed Imwinkelried suggests that "the deliberative process privilege should extend to any executive branch employee participating in a particular policy deliberation."⁶² Yet, the privilege covers only those parts of documents reflecting the pre-decisional deliberative process. There is no protection for documents that rationalize or justify decisions already made.⁶³ Moreover, the protection is qualified, and if there is, among other factors, a sufficient showing of relevance, need for information, or seriousness of the issues involved, the trial judge may order the production of the information.⁶⁴

The governmental privilege that creates the most tension between the need for relevant, credible, probative evidence and other societal needs, such as effective security and military operations, is the absolute privilege for military and state secrets.⁶⁵ The rationale for this privilege remains murky. It appears to have an instrumental rationale similar to that of other governmental privileges—the military, diplomatic, and security functions cannot operate

58. 2 IMWINKELRIED, *supra* note 10, § 7.6.2, at 1089–90.

59. 2 *id.* at 1093 (quoting *In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir. 1997)).

60. 2 *id.* § 7.7.1, at 1099.

61. 2 *id.* at 1101–63 (summarizing criticism of this argument as well).

62. 2 *id.* § 7.7.2, at 1105.

63. 2 *id.* at 1108.

64. 2 *id.* § 7.7.5, at 1113.

65. See 26 WRIGHT & GRAHAM, *supra* note 9, § 5663, at 568–72; 2 IMWINKELRIED, *supra* note 10, §§ 8.1–8.5, at 1141–75.

effectively if there information is open to discovery. Yet there also seem to be “constitutional overtones”⁶⁶ to this privilege because of the need to protect core government functions. The Supreme Court has, however, refused to comment directly on the constitutional underpinnings of the state secret and military privilege.⁶⁷ The courts apparently consider this privilege “absolute,” in the sense that no showing of need can justify disclosure of the information. As Professor Kenneth Graham points out in this Symposium, however, the nature and the scope of this privilege are so jumbled and confused, that it deserves far greater scrutiny than courts have been willing to give.⁶⁸

Finally, alongside testimonial, confidential communication and constitutional privileges (whether they provide absolute or qualified protection), there are many “quasi-privileges:” doctrines that have sometimes been labeled as “privileges”, yet have origins distinct from the privileges discussed so far. The most familiar of these doctrines are the work product doctrine and the exclusionary evidence rule for settlement offers and discussions.

There is substantial confusion over the nature of and level of protection for attorney work product.⁶⁹ One can view work product as privilege, a doctrine, an immunity, or some other type of evidentiary protection. Sometimes the same court describes work product with different terminology. For example, even the United States Supreme Court has said that work product is—and is not—a privilege.⁷⁰ The central point of agreement is that the only work

66. *Clift v. United States*, 808 F. Supp. 101, 110 (D. Conn. 1991) (citing *United States v. Reynolds*, 345 U.S. 1, 6 (1953))

67. *See United States v. Reynolds*, 345 U.S. 1, 6–12 (1953) (acknowledging that because the military privilege is well established in evidence law, the Court does not need to address its constitutionality, but rather, simply determine whether the invocation of the privilege is appropriate for the occasion).

68. Kenneth W. Graham, Jr., *Government Privilege: A Cautionary Tale For Codifiers*, 38 LOY. L.A. L. REV. 861 (2004).

69. The work product doctrine is recognized in civil cases and criminal proceedings. *See* FED. R. CRIM. P. 16(a)(2),(b)(2); FED. R. CIV. P. 26(b)(3).

70. *FTC v. Grolier Inc.*, 462 U.S. 19, 22–23 (1983) (referring to “the work-product privilege under the Federal Rules of Civil Procedure”); *United States v. Nobles*, 422 U.S. 225, 237–38 (1975) (stating that the Court created a “qualified privilege” in *Hickman v. Taylor*, 329 U.S. 495 (1947)); *Upjohn Co.*

product protected is that which is prepared in anticipation of litigation. Thus, a transactional lawyer has no right to keep his or her work product from being discovered or used as evidence in trial, unless it is also protected by a separate privilege, such as the attorney-client privilege.⁷¹

There are actually two kinds of litigation work product protection: the well-known protection for attorney work product and the lesser known work product protection for experts who are not expected to testify at trial.⁷² To promote adequate preparation for cross-examination, the rule permits broad discovery of the work product of experts who are identified as potential witnesses at trial.⁷³ Discovery from experts who are not expected to be called as witnesses is far more limited, however, although still not "absolute."⁷⁴

The traditional rationale for the work product doctrine (my preferred phrase) is the structure of the American adversary system, in which the parties pursue the investigation of their cases separately and eventually present their separate stories interpreting the facts and law to an independent decision maker. The United States Supreme

v. U.S., 449 U.S. 383, 397 (1981)(distinguishing between objections based on the attorney-client privilege and the "work-product doctrine").

71. See Roger W. Kirst, *A Third Option: Regulating Discovery of Transaction Work Product Without Distorting the Attorney-Client Privilege*, 31 SETON HALL L. REV. 229, 230 (2000).

72. FED. R. CIV. P. 26(b)(4). Expert work product is controlled by FED. R. CIV. P. 26(b)(4), which distinguishes between testifying and nontestifying experts:

(4) TRIAL PREPARATION: EXPERTS.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

73. See *id.* 26(b)(4)(A).

74. See *id.* 26(b)(4)(B).

Court introduced the work product doctrine in *Hickman v. Taylor*,⁷⁵ a wrongful death case arising from a tugboat accident in which the tugboat sank and five crew members died shortly afterwards.⁷⁶ During discovery, the lawyers representing the father of one of the dead crew members sought any written or oral statements from witnesses to the accident as well as any records, reports, or memoranda concerning the accident.⁷⁷ The defendants' counsel refused to produce this information. As a result, the district court held the lawyer and his clients in contempt.⁷⁸ Granting *writ of certiorari*, the United States Supreme Court held that although the attorney-client privilege did not cover the materials gathered by the defense counsel in preparation for trial,⁷⁹ defense counsel could not be ordered to produce his work product unless the opponent showed either that he could not obtain it himself without undue hardship or that he would be severely prejudiced without the information.⁸⁰

The majority opinion and concurring opinion by Justice Jackson stated four main reasons for protecting attorney work product. First, the majority opinion in *Hickman* stated that:

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of

75. *Hickman v. Taylor*, 329 U.S. 495, 511–12 (1947).

76. *Id.* at 498.

77. *Id.* at 499.

78. *Id.* at 499–500.

79. *Id.* at 508.

80. *Id.* at 509.

jurisprudence to promote justice and to protect their clients' interests.⁸¹

The Court expressed multiple concerns about allowing easy access to such attorney work product. First, it noted that if work product were discoverable "on mere demand, much of what is now put down in writing would remain unwritten."⁸² Justice Jackson, concurring, added, "a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."⁸³ The Court feared that unbridled discovery of lawyers' files would create a class of parasites who would prey on any lawyer who dared to memorialize the results of investigations and strategies or legal theories, and would therefore damage the adversarial quality of the trial process.⁸⁴

Moreover, the Court feared unethical lawyers. The Court stated that if the opponent was permitted to discover the lawyer's work product, "sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial."⁸⁵ The Court was silent on what it meant by "sharp practices," but others have suggested that attorneys might simply edit the files or engage in selective or strategic production of work product—adding or deleting documents in efforts to mislead their opponents.⁸⁶

Both the majority and Justice Jackson expressed concern that discovery of an attorney's work product would have a negative impact on the profession as a whole. The majority was concerned that such broad discovery would have a "demoralizing" effect.⁸⁷ Justice Jackson's concurring opinion fretted about the effect of discovery on the "welfare and tone of the legal profession."⁸⁸ Finally, Justice Jackson cautioned that if the Court did not protect

81. *Id.* at 510–11.

82. *Id.* at 511.

83. *Id.* at 516 (Jackson, J., concurring).

84. *See id.* at 516–17 (Jackson, J., concurring).

85. *Id.* at 511.

86. *See* Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 68 (1997) (suggesting that purposely misleading opposing counsel during discovery is a sharp practice).

87. *Hickman*, 329 U.S. at 511.

88. *Id.* at 515 (Jackson, J., concurring).

attorney work product then there existed the unseemly possibility that attorneys would be forced to become witnesses for their clients.⁸⁹

But neither the Supreme Court nor the Advisory Committee, in later codifying the work product doctrine, provided clear answers to the true nature of the work product doctrine.⁹⁰ Is all work product available on a showing of need, or does some work product, representing the “opinions, strategies and theories” of the attorney receive the status of a “privilege,” with absolute protection? The cases are confusing and unclear.⁹¹

Privileges sacrifice relevant, probative, and credible evidence for the sake of promoting certain social values and policies. It makes sense, then, that privileges are also confused with another category of exclusionary evidence rules that serve explicit societal functions apart from concerns about accuracy or controlling the trier of fact. Rules 407 through 411 of the Federal Rules of Evidence⁹² exclude specific kinds of evidence in order to protect or foster certain social policies.⁹³ The same types of rules can be found in Division Nine of the California Evidence Code.⁹⁴ These evidence rules are sometimes called quasi-privileges or even just privileges.⁹⁵ Unlike true

89. *Id.* at 517 (Jackson, J., concurring).

90. See Jeff A. Anderson et al., *The Work Product Doctrine*, 68 CORNELL L. REV. 720, 762 (1983) (describing the work product doctrine as “a doctrine of uncertain dimension.”); Kathleen Waits, *Opinion Work Product: A Critical Analysis of Current Law and a New Analytical Framework*, 73 OR. L. REV. 385, 386 (1994) (stating “[c]onfusion and disagreement are rampant”).

91. *Id.* Compare Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984–85 (4th Cir. 1992) (holding that opinion work product should be given absolute protection from discovery), with *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (stating “opinion work product may be discovered and admitted when mental impressions are *at issue* in a case and the need for the material is compelling”).

92. FED. R. EVID. 407 (covering subsequent remedial measures); FED. R. EVID. 408 (covering offers and discussions to compromise a claim); FED. R. EVID. 409 (covering offers to pay medical expenses); FED. R. EVID. 410 (covering guilty plea later withdrawn); FED. R. EVID. 411 (covering liability insurance).

93. See DAVID P. LEONARD, *THE NEW WIGMORE: SELECTED RULES OF LIMITED ADMISSIBILITY* (2002).

94. CAL. EVID. CODE §§ 1100–1160 (Deering 2004) (describing evidence affected or excluded by extrinsic policies).

95. 1 IMWINKELRIED, *supra* note 10, § 1.3.9, at 60.

privileges, however, which exclude evidence regardless of its probative value, these exclusionary rules are also based in part on the potential weakness in the probative value of the evidence. For example, Rule 407 of the Federal Rules of Evidence excludes evidence of remedial measures taken after an injury, in part because the drafters hope to encourage property owners and manufacturers to make their property and products safer, if possible.⁹⁶ There is also a concern about the probative value of such evidence, however: just because a property owner or manufacturer changes something about the property or product does not prove that the property or product was unsafe at the time of the injury.⁹⁷ Thus, these rules are ones of “limited admissibility.”⁹⁸ The evidence is inadmissible if it is offered to prove the forbidden issue, such as negligence, culpability, or liability; if a party offers evidence for any other purpose, however, it may be admissible. Yet with a genuine privilege there is no concept of limited admissibility—the evidence comes in or stays out.

The label “alternative dispute resolution” encompasses wide-ranging efforts to eliminate the need for full-blown civil trials in many cases.⁹⁹ Through various mechanisms, courts and commentators have attempted to cajole, convince, and order parties to try to work out their claims outside of the formal courtroom, leaving those courts free to try serious criminal cases promptly and handle only those civil trials where all other efforts at resolution have failed. The schemes for such dispute resolution include: the mini-trial, summary jury trials, court-ordered arbitration, mandatory settlement conferences, voluntary settlement conferences, mandatory mediation, negotiated mediation, mediation plus, and others.¹⁰⁰ As

96. FED. R. EVID. 407 advisory committee’s note. Professor Imwinkelried adds that the “self-critical reports” privilege recognized by some courts can be seen as an expansive reading of Rule 407 of the Federal Rules of Evidence because such reports often follow some injury or harm and are an effort to analyze why the event happened and what might have been done to prevent it. 2 IMWINKELRIED, *supra* note 10, § 7.8, at 1115–16.

97. See FED. R. EVID. 407 advisory committee’s note.

98. *Id.*

99. Kirtley, *supra* note 11, at 7 (stating “[m]ediation is now widely used to resolve a broad range of conflicts”).

100. There is growing body of commentary that describes and evaluates these procedures. *E.g.* Robert L. Ebe, *The Nuts and Bolts of Arbitration*, 22 FRANCHISE L.J. 85, 86–87 (2002); Andrew P. Lamis, *The New Age of Artificial*

these systems for dispute resolution grew in popularity, so did the development of various provisions designed to ensure confidentiality in these proceedings.¹⁰¹

The federal rule designed for this purpose is Rule 408 of the Federal Rules of Evidence. Rule 408 excludes offers to compromise a claim as well as “[e]vidence of conduct or statements made in compromise negotiations” if the evidence is offered “to prove liability or invalidity of the claim or its amount.”¹⁰² The rule does

Legal Reasoning as Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act, 15 LOY. CONSUMER L. REV. 173, 188–200 (2003).

101. See Kirtley, *supra* note 11, at 5–10 (explaining that the informal nature of the mediation process makes it a popular but risky method for resolving disputes) Thus, “[b]efore the widespread enactment of mediation privilege statutes, several non-privilege theories were advanced to address the need for confidentiality in mediation.” *Id.* at 10.

102. Rule 408 of the Federal Rules of Evidence provides that:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408. The Advisory Committee on the Rules of Evidence has proposed changes to Rule 408 that will become effective on December 1, 2006, if they are approved by the Standing Committee of the Judicial Conference, the whole Judicial Conference, and the Supreme Court, and then Congress does not act to alter the rule:

“First, the proposed amendments provide that statements of fault made during the course of settlement negotiations are not barred in a subsequent criminal case. Such statements may be critical evidence of guilt. Although statements of fault are admissible in subsequent criminal litigation, an actual settlement is not admissible to prove the validity or amount of the underlying claim. Second, the proposed amendments prohibit the use of statements made during settlement negotiations when offered to impeach a witness through a prior inconsistent statement or through contradiction. Third, the proposed

not exclude such evidence if it is offered to prove a different issue, such as “bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”¹⁰³ The rationales for this rule are that it promotes and encourages free communication during private settlement discussions in the hope of reducing the burden on the judicial system, and that it prevents the jury from giving too much weight to the evidence on the issue of liability.¹⁰⁴ The rule drafters also reasoned that the probative value of offers to settle, and the discussions surrounding those offers, is questionable. A party may decide to settle a claim for many reasons (e.g., to reduce the cost of litigation) even if the party believes the claim is unfounded.¹⁰⁵ Similarly, California Evidence Code sections 1152¹⁰⁶ and 1154¹⁰⁷ exclude from

amendments bar a party from introducing its own statements and offers of compromise made during settlement negotiations.”

See ADVISORY COMM. ON EVIDENCE RULES, JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE (STANDING COMM.), PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF PRACTICE AND PROCEDURE (2004), <http://www.uscourts.gov/rules/comment2005/CompleteBrochure.pdf>.

Commentators on the proposed amendments have been particularly critical of the amendment that would allow statements of fault or other statements made in the course of settlement negotiations admissible in a subsequent criminal case. Several commentators point out that this provision could essentially gut the utility of Rule 408, because lawyers would be reluctant to allow settlement negotiations where there was any possibility of subsequent criminal proceedings. The Department of Justice, however, is quite interested in this change, viewing the interest in prosecuting criminal cases as much greater than the interest in promoting settlement of civil cases. The comments on the proposed amendments can be read on the Federal Courts’s web site at <http://www.uscourts.gov/rules/Evidence%20Comments>.

103. FED. R. EVID. 408.

104. FED. R. EVID. 408 advisory committee’s note.

105. See *id.* But see DAVID P. LEONARD, *THE NEW WIGMORE: A TREATISE ON EVIDENCE, SELECTED RULES OF LIMITED ADMISSIBILITY* § 3.3.2 (2002) (disputing this proposition by arguing that “compromise evidence usually satisfies the test of logical relevance. Moreover, such evidence often carries substantial probative value. . . . If compromise evidence is to be excluded, such a rule must be justified, primarily at least, on other grounds.”).

106. CAL. EVID. CODE § 1152 (Deering 2004) provides as follows:

(a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as

pretrial discovery and trial both offers to compromise and the discussions surrounding those offers if a party offers to prove liability.¹⁰⁸

The California Evidence Code also recognizes a “mediation privilege” in sections 1115 through 1128.¹⁰⁹ The Evidence Code lists the mediation privilege in Division Nine (“Evidence Affected or Excluded by Extrinsic Policies”), which also includes sections 1152 and 1154, rather than in Division Eight, which is entitled

well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

(b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving an additur or remittitur, or on appeal.

(c) This section does not affect the admissibility of evidence of any of the following:

(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim.

(2) A debtor’s payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty.

107. CAL. EVID. CODE § 1154 (Deering 2004) provides that:

Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.

108. *Covell v. Superior Court*, 205 Cal. Rptr. 371, 373 (Ct. App. 1984) (citing CAL. EVID. CODE § 1152 (Deering 2004)).

109. CAL. EVID. CODE §§ 1115–1128 (Deering 2004).

“Privileges.”¹¹⁰ One reason for this may be that the California mediation privilege grew out of former California Evidence Code Section 1152.5, which provided more explicit protection for communication made in the course of mediation than did Section 1152.¹¹¹ Proponents of alternative dispute resolution argued that rules such as Federal Rule 408 and California Evidence Code Section 1152 provided unsatisfactory protection for communications made during mediation for several reasons. First, the rules allow for the admissibility of evidence of offers and discussions in settlement negotiations if such evidence is offered to prove issues other than liability.¹¹² As one commentator noted, “[s]ince mediation discussions tend to be free flowing and often unguarded, revelations later serving as impeachment, bias or ‘another purpose’ evidence are likely.”¹¹³ Second, evidence of settlement offers and discussions may be inadmissible at trial, but it is not clear whether such evidence is protected from discovery.¹¹⁴ Finally, evidence rules may not apply to certain administrative or criminal proceedings, allowing evidence created in settlement negotiations to be admissible in those subsequent proceedings.¹¹⁵ For these reasons, commentators called for a mediation privilege “of broad unambiguous scope, [which would] bar discovery, and exclude evidence in all types of proceedings.”¹¹⁶ In Part III of this Article, I argue that the critique of rules such as Federal Rule 408 and California Evidence Code Section 1152 displays conceptual confusion over the rationales for

110. Cf. *Covell*, 205 Cal. Rptr. at 373 (stating that in interpreting CAL. EVID. CODE § 1152, “[c]ommunications made in the course of settlement discussions are not ‘privileged.’ Privileged matters are defined in division 8 of the Evidence Code, comprising sections 900 to 1070. Section 1152 of the Evidence Code is contained in division 9. The statutory protection afforded to offers of settlement does not elevate them to the status of privileged material.”).

111. See CAL. EVID. CODE § 1152.5 (repealed 1997).

112. FED. R. EVID. 408; CAL. EVID. CODE § 1152 (Deering 2004).

113. Kirtley, *supra* note 11, at 13.

114. *Id.* at 12–13 (asserting that the limited scope of the rule excluding evidence of compromise negotiations leaves mediation communication “vulnerable to discovery”).

115. *Id.* at 13.

116. *Id.* at 14.

privileging some evidence, and, in the case of California, has produced a statutory scheme that can do far more harm than good.

B. *Traditional Rationales for Privileges*

This section describes and critiques the most frequently proffered rationales for “real” (as opposed to the “quasi,” discussed above) privileges. These rationales fall into three categories: instrumental, humanistic (which include arguments based on both privacy and personal autonomy), and power. This section concludes that the traditional rationales do not adequately justify the existence of “real” privileges, let alone explain or justify the bewildering variety of “quasi-privileges”.

The most common rationale for the existence of privileges is the instrumental theory.¹¹⁷ Dean John Henry Wigmore is usually identified as the leading proponent of this theory.¹¹⁸ The instrumental theory holds that it is necessary to recognize privileges to foster the success of socially desirable relationships.¹¹⁹ The theory rests on the belief that unless the parties to the relationship are assured of confidentiality, they will not communicate freely, thereby endangering the viability and utility of the relationship.¹²⁰ The instrumental theory has an enticing corollary: assuming parties would not communicate about important issues “but for” the privilege, then privileges are essentially “cost free” in that they only exclude evidence that would not otherwise be created.¹²¹

117. See 1 IMWINKELRIED, *supra* note 10, § 3.1, at 119; see, e.g., Edward J. Imwinkelried, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315, 317–37, (2003) [hereinafter Imwinkelried, *Rethinking the Foundation of Evidentiary Privileges*] (describing the instrumental and humanistic rationales); Developments in the Law—Privileged Communications, *Modes of Analysis: The Theories and Justifications of Privileged Communications*, 98 HARV. L. REV. 1471, 1493–98 (1985) [hereinafter Developments in the Law] (explaining the basic tenets of the power theory).

118. Developments in the Law, *supra* note 117 at 1493–98.

119. See IMWINKELRIED, *supra* note 10, § 5.1.1, at 257–59.

120. *Id.*; 1 Imwinkelried, *Rethinking the Foundation of Evidentiary Privileges*, *supra* note 117, at 317.

121. Imwinkelried, *Rethinking the Foundation of Evidentiary Privileges*, *supra* note 117, at 317–18.

The instrumental theory has been roundly and soundly critiqued.¹²² The primary charge of critics is that the theory's underlying belief—that “but for” the privilege, the parties would not engage in essential communication and the purpose of the relationship would fail—is an unsupported empirical proposition and an unwarranted assumption.¹²³ Yet, as at least one critic has noted, there is also no clear empirical support to the contrary; there is no evidence proving that clients would still fully disclose information to their lawyers absent a privilege.¹²⁴

The problem with the empirical critique of the instrumental theory is that it seems impossible to resolve the issue convincingly one way or the other.¹²⁵ Indeed, the very nature of the issue is incompatible with an empirical methodology. For example, how does one construct a controlled experiment testing a client's willingness to disclose difficult matters to an attorney or therapist, with or without an evidentiary privilege? Would these experiments have to rely on a hypothetical abolishment of privilege and thus suffer from the same limitations of artificial jury research? If we compare jurisdictions without a particular privilege, such as a parent-child privilege, to jurisdictions with the privilege, would we be able

122. *Id.* at 320–24 (describing the instrumental theory's major weaknesses).

123. See Edward Imwinkelried, *The Rivalry Between Truth and Privilege: The Weaknesses of the Supreme Court's Instrumental Reasoning in Jaffe v. Redmond*, 518 U.S. 1 (1996), 49 HASTINGS L.J. 969, 974–82 (1998), reprinted in 1 IMWINKELRIED, *supra* note 10, § 5.2.2, at 277–98 (describing and critiquing the studies evaluating the instrumentalist rationale for privilege).

124. See Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 37 & n.32 (asserting there is no empirical evidence to show a client would reveal damaging information to a third party in the absence of a privilege).

125. See Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 793 (2002) (“There is little empirical evidence on the value of evidentiary privileges in promoting the free flow of information in the cases of protected relationships. Perhaps the best that can be said is that there is little evidence that the privileges are not effective in providing such protection.” (footnote omitted)). Developments in the Law, *supra* note 117, at 1475–76 (“No solid empirical data exists to support the estimates of either critics or proponents as to either the costs or the benefits of privilege. In short, legal decisionmakers face a perhaps unavoidable empirical indeterminacy.” (footnote omitted)).

to generalize from one geographical location to another?¹²⁶ Furthermore, can we generalize the research from one type of privilege, such as the psychotherapist-patient privilege, to other types, such as the attorney-client or penitent-clergy privileges?¹²⁷

At a minimum, such experiments would have to rely on self-reporting by the participants because it is logically impossible to have a confidential discussion when the observed know they are being observed for research purposes. I question whether such self-reports are any more reliable than the intuitive assumptions on which the instrumental rationale now rests.¹²⁸ What incentive would participants have to self-report accurately? Then again, what incentive would participants have to lie? And do the participants understand the difference between promises of confidentiality (in the sense that the listener will not volunteer or inadvertently disclose the participant's communication) and privilege (in the sense that the listener cannot be compelled by a court to testify about the participant's communication)?

At this point, I could, like some armchair evidence empiricists, 1) simply declare my job as debunker finished, 2) assert that the

126. In other words, would a privilege make more or less of a difference in confidential disclosures in the notoriously tight-lipped German-Scandinavian culture of Minnesota than in the famously laid-back, easy-going state of California? Thus far, there is no reliable research on this issue. On a more serious note, Professor Imwinkelried criticized a study that suggested differences in the scope of the spousal privilege that did not appear to make a difference in the divorce rates of different jurisdictions. 1 IMWINKELRIED, *supra* note 10, § 5.2.2, at 279 n.116 (criticizing empirical data reported in 25 WRIGHT & GRAHAM, *supra* note 9, § 5572, at 484). Professor Imwinkelried criticized the data because the researchers "made no attempt to control for the other variables that could plausibly affect the rate." *Id.*

127. Although I am intrigued by the studies of self-disclosure discussed in Professor Imwinkelried's article in this symposium, I have the same concern about how far we can generalize those results to all types of privileges. See 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. 705, 724-33 (2004).

128. Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 999 (1999) ("Social psychology studies indicate that people are often unable to say what really motivated them. Thus, empirical studies relying on self-reporting about whether the existence of a privilege affected the privilege-holders' behavior are inherently indeterminate.").

burden of proof is on the other side, and 3) assert that the burden of proof has not been met.¹²⁹ This, however, seems to be taking the easy way out. The reality is that even if academics are dubious of the instrumental argument, courts are more than happy to recite it and rely upon it.¹³⁰ Until courts are as willing to scrutinize the empirical basis for these assumptions to the same degree as they scrutinize studies of toxic tort causation, the instrumental rationale is unlikely to disappear. For this reason, I agree with Professor Ed Imwinkelried that the better tactic at this point is to try to supplement, rather than to supplant, the instrumental rationale for privileges.¹³¹

Where Professor Imwinkelried and I part company, however, is that he attempts to argue for a "humanistic" rationale of autonomy that supports a unitary concept of privilege.¹³² In the next section, I

129. By "arm-chair evidence empiricist," I mean individuals who have made careers out of critiquing the lack of empirical evidence behind certain evidentiary doctrines. However, when the arm-chair evidence empiricist is confronted with the difficulties of testing some propositions under the preferred controlled conditions, the critic refuses to suggest how satisfactory experiments could be designed, because after all, the arm-chair evidence empiricist is just an expert in evidence law. See e.g., David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 104 (1997) (noting that legal scholars' contention that some human behavior is impossible to study "shows not only the lack of scientific imagination of the speakers but also the lack of scientific training of most legal scholars.").

130. See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998) ("Knowing that confidential communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel."); *Jaffee v. Redmond* 518 U.S. 1, 10 (1996) ("[T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.").

131. See 1 IMWINKELRIED, *supra* note 10, at 13.

132. Professor Imwinkelried outlines his theory in two law review articles and summarizes them both in his treatise. See generally 1 IMWINKELRIED, *supra* note 10, § 5.3.1 (summarizing the author's views on the humanistic rationale); Edward J. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come into Conflict with the Modern Humanistic Theories?*, 55 ARK. L. REV. 241, 257-61 (2002) [hereinafter Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges*] (outlining the author's views on humanistic theory); Imwinkelried, *Rethinking the Foundation of Evidentiary Privileges*, *supra* note 117, at 325-37 (outlining the author's humanistic theory).

argue for a bifurcated notion of privilege—recognizing relational and informational privileges—that rest on separate rationales. First, though, I want to sketch out Professor Imwinkelried’s approach, for I view my work as supplementing and refining his theory rather than disputing it.

Professor Imwinkelried argues that the best basis for protecting privileged communications “is the right to autonomy or decisional privacy—the right to freedom from control or independent decision-making.”¹³³ He describes this theory as a “modern humanistic” approach, as contrasted with “early humanistic” rationales.¹³⁴ He charts the development of the earliest rationales from the recognition of the lawyer as a professional who owed a duty of confidence and trust to the client.¹³⁵ The lawyer had an obligation not to reveal the client’s confidences; thus, privilege law developed so that “evidence law should not require the attorney to do what professional or social ethics forbade the attorney from doing.”¹³⁶ As another example, he cites the early common law’s “natural repugnance” at forcing one spouse to testify against “his intimate life partner.”¹³⁷ Imwinkelried then argues that in the eighteenth and nineteenth centuries Jeremy Bentham’s instrumentalism eclipsed these humanistic rationales as the fundamental basis of privilege law, ultimately leading Dean Wigmore to reject humanistic recognition of privilege as “nothing ‘more than a sentiment.’”¹³⁸

Professor Imwinkelried argues that because the instrumental rationale is so problematic, the grounds of privilege would be strengthened by revisiting humanistic theory.¹³⁹ He notes that although the early humanistic rationale might have clashed with instrumentalism,¹⁴⁰ his modern humanistic theory can coexist with

133. Imwinkelried, *Rethinking the Foundation of Evidentiary Privileges*, *supra* note 117, at 327 (citations omitted).

134. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges*, *supra* note 132, at 244, 257.

135. *Id.* at 247.

136. *Id.*

137. *Id.* (quoting 8 WIGMORE, *supra* note 2, § 2228, at 217).

138. *Id.* at 250 (quoting 8 WIGMORE, *supra* note 2, § 2228, at 217).

139. See Imwinkelried, *Rethinking the Foundation of Evidentiary Privileges*, *supra* note 117, at 331–44.

140. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges*, *supra* note 132, at 254. This argument is a bit odd. Imwinkelried

the instrumentalist rationales for privilege, preserving whatever value the instrumentalist rationales retain.¹⁴¹

The essence of Professor Imwinkelried's humanistic theory of privilege rests on a narrow conception of personal privacy, one that is "grounded in the right to personal autonomy," meaning "decisional privacy, or freedom from control (as opposed to freedom from scrutiny)."¹⁴² Professor Imwinkelried rejects, at least for the time being, a theory of privilege resting on a general constitutional "right to informational privacy" that recognizes an "individual interest in avoiding disclosure of personal matters."¹⁴³ He argues that the "right does not exist in some jurisdictions; and even where it does exist, it is ill-defined."¹⁴⁴ For this, and other reasons described below, I agree that a general "right to privacy" does not help to rationalize the law of evidentiary privileges.

But although he rejects a generalized notion of "privacy" as a basis for privilege law, Professor Imwinkelried relies on a narrower conception of privacy rights. Drawing on liberal democratic theory, Professor Imwinkelried argues that "personal autonomy is—or at least approaches—the status of an ultimate value."¹⁴⁵ Since individuals do not always know how to maximize their autonomy, they may turn to professionals or consultants to help them decide how to make "life preference choices" in a way that maximizes their personal autonomy.¹⁴⁶ Professor Imwinkelried then turns to philosopher Joseph Raz's argument that the object of government is

notes that the theories clashed because of who was deemed the privilege-holder. *Id.* He identifies the professional (such as the attorney or physician) as the privilege-holder, because the rationale was that the law ought not make the professional violate his duty of confidence toward the client. *Id.* at 252–53. However, this view does not account for the notion of waiver. If privilege exists to protect the professional from violating his professional obligations, why would the professional be able to waive that protection? Professor Imwinkelried is on more stable ground when he makes his case that humanistic rationales, whether early or modern, should not be dismissed as sentiment.

141. *Id.* at 266.

142. *Id.* at 259.

143. 1 IMWINKELRIED, *supra* note 10, § 5.3.2, at 304 (quoting *Whalen v. Roe*, 429 U.S. 489, 599–600 (1977)).

144. 1 *id.* at 307.

145. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges*, *supra* note 132, at 259.

146. *Id.* at 259–60.

to help individuals maximize their personal autonomy.¹⁴⁷ Thus, Professor Imwinkelried argues that privilege law can be justified because it provides the privacy needed to allow individuals to enter relationships with consultants who will advise them on life preference choices that maximize their personal autonomy.¹⁴⁸ Professor Imwinkelried concludes that, despite differences in the humanistic rationales, “[i]n the final analysis, each theory represents an effort to vindicate some interest of the layperson rather than of the consultant.”¹⁴⁹

As I noted at the outset, I agree with Professor Imwinkelried’s central point—that privilege law stands on shaky ground if the only support for it is the instrumental argument that privilege is necessary to produce certain communications.¹⁵⁰ This proposition has not been proven and may not be capable of sufficiently rigorous testing to satisfy the current batch of evidence empiricists.¹⁵¹ As with other evidentiary doctrines,¹⁵² however, the instrumental argument has become so ingrained in our judicial system that it has taken on a life of its own;¹⁵³ and it is unlikely to die at this point—regardless of the empirical proof that may surface. The question now is whether the humanistic rationale, as described by Professor Imwinkelried, provides an adequate justification for privilege, either on its own or in tandem with the instrumentalist argument.

147. *Id.* at 260.

148. *Id.*

149. *Id.* at 261.

150. *Id.* at 256–57.

151. See *Developments in the Law, supra* note 117, at 1474–75 (noting that, in evaluating the costs and benefits of privileges, “legal decisionmakers face a perhaps unavoidable empirical indeterminacy”).

152. Another evidentiary doctrine unsupported by empirical research yet ingrained in our judicial system is the proposition that certain statements, such as excited utterances and dying declarations, are exempt from the hearsay rule because of the inherent trustworthiness in these statements. See Elliot B. Glicksman, *The Modern Hearsay Rule Should Find Administrative Law Application*, 78 NEB. L. REV. 135, 136–37 (1999) (explaining that evidence commentators criticize common-law developed exceptions, such as dying declarations, excited utterances and declarations against interest, for basing the exceptions on unsupported claims of reliability).

153. Imwinkelried, *Rethinking the Foundation of Evidentiary Privileges, supra* note 117, at 320 (stating that “the instrumental theory enjoys widespread support among commentators and virtually universal judicial support”).

As I noted above, I agree that a nebulous and generalized “right to informational privacy” does not sufficiently help to justify the existence of evidentiary privileges, which keep potentially relevant, probative information from the trier of fact. In addition, I am concerned that the humanistic personal autonomy theory also does not work in its current form. It might justify the professional privileges, such as attorney-client privilege and doctor-patient or psychotherapist-patient privilege, in which the protected communications are limited to the reason the client consulted the professional and where the client is the holder of the privilege.¹⁵⁴ In these situations, it follows that the government enhances the individual’s personal autonomy by providing a privilege for communications made for the purpose of obtaining professional advice and by placing control over whether to assert or waive the privilege in the hands of the person seeking that advice.

The personal autonomy theory does not seem to explain privileges for other intimate relationships that cover confidential communications of all kinds and that make both the parties privilege-holders, however, such as the marital confidential communications privilege and the clergy-penitent privilege. For example, if one spouse wishes to assert the marital confidential communications privilege, the other spouse is barred from testifying about the confidential communication, even if he or she wants to provide that evidence.¹⁵⁵ Similarly, the long-standing clergy-penitent privilege permits the penitent to assert the privilege to prevent the clergy member from testifying about the confidential communications they

154. See 1 Imwinkelried, *supra* note 10, § 6.5, at 535 (a “holder” of a privilege is a person or entity “authorized to claim the privilege” by the law establishing the privilege). However, a member of a privileged relationship—although not the holder—may be required to assert the privilege on behalf of the holder. This is true, for example, of the attorney-client privilege, where the attorney must assert the privilege on behalf of the client unless the attorney has been instructed to waive the privilege. 1 *id.* The law recognizing a privilege may also recognize more than one holder. 1 *id.* at § 6.5.1.a; 1 *id.* at 548-549, § 6.5.3.

155. This assumes, of course, that no exception applies. See, e.g., CAL. EVID. CODE § 985 (Deering 2004) (stating that no privilege applies in criminal proceedings in which one spouse is charged with committing a crime against the other).

have had.¹⁵⁶ In either of these scenarios, it appears that one holder has the power to deny the other the freedom to disclose information, a significant barrier to personal autonomy. If privacy or the ability to keep information confidential is essential to “autonomy or decisional privacy—the right to freedom from control or independent decision-making,”¹⁵⁷ so surely is the freedom of expression.

Moreover, the personal autonomy argument does not explain the bewildering variety of absolute, qualified, and quasi-privileges. Why do some privileges provide absolute protection from discovery or admissibility, while others protect information only to a limited degree, as in the case of qualified privileges or quasi-privileges (such as work product protection or Rule 408 of the Federal Rules of Evidence, which protects offers and discussions involving compromise)?¹⁵⁸

Finally, the concept of privacy, whether conceptualized as a broad “freedom from scrutiny” or as a narrower “freedom from control,” simply does not address the full meaning of evidentiary privilege law. Evidentiary privileges do prohibit the government from compelling testimony when the holder asserts a valid privilege. Yet privileges do both less and more than this. Privileges do less, in that they cannot prevent the unauthorized disclosure of information outside of the judicial or administrative law settings. No evidentiary privilege alone would allow the holder to prohibit the dissemination of his or her secrets in public.

Privileges also do more than simply limit government intrusion into individual privacy. Some evidentiary privileges provide the only significant non-monetary remedy for breach of a fiduciary duty of confidentiality. Because of certain evidentiary privileges, the

156. See, e.g., *id.* §§ 1033–34. The traditional rationale for the clergy-penitent privilege was less the instrumental or the personal autonomy arguments than that to compel a member of the clergy, who is under a moral duty to maintain the secrecy of the confessional, would be unseemly. 1 IMWINKELRIED, *supra* note 10, § 6.5.1(b), at 550.

157. Imwinkelried, *Rethinking the Foundation of Evidentiary Privileges*, *supra* note 117, at 327.

158. See *Hickman v. Taylor*, 329 U.S. 495, 510–14 (discussing the validity of the work-product doctrine and the circumstances that necessarily limit the privilege); FED. R. EVID. 408 (establishing the limited circumstances in which evidence regarding compromise or offers to compromise is admissible).

holder of the privilege may be able to limit the damage done when a fiduciary has disclosed the confidential information outside of the privileged relationship. Privilege law allows the holder to mitigate the damage by preventing the disloyal fiduciary from further disclosing the holder's secrets in court. Because I see these problems with the "personal autonomy" rationale as well as with the more general "freedom from scrutiny" privacy rationale, in the next section of this Article I accept Professor Imwinkelried's invitation to "to join in a collaborative effort to frame a sounder normative theory for the privilege doctrine."¹⁵⁹

However, there is also a third theory of privileges, one which focuses on the power of those members of conservative and elite professions to carve out special areas of protection.¹⁶⁰ Arguably, lawyers, doctors, psychotherapists, and clergy have benefited from the shield of privilege as have their clients and parishioners.¹⁶¹ The power theory also speaks to privileges that are aimed at protecting information, such as trade secrets.¹⁶² Yet, because the power theory explains not only why privileges exist but also how privileges are created, I discuss the theory in greater detail in the next section.

C. *A Theory of Relational and Informational Privileges*

As indicated earlier, other theories or rationales of privileges tend to treat privileges as if they come in one flavor. For example, even Dean Wigmore's famous criteria for recognizing a privileged relationship focuses on only one type of privilege—confidential communication privileges.¹⁶³ Not only were these to be the only

159. Imwinkelried, *Rethinking the Foundation of Evidentiary Privileges*, *supra* note 117, at 317.

160. Developments in the Law, *supra* note 117, at 1493–98 (explaining the basic tenets of the power theory and its implications on privilege law).

161. *See id.* at 1494 (noting that those who enjoy privileges today comprise politically powerful professions).

162. Trade secrets are one of the non-constitutional privileges at common law encompassed under the Federal Rule of Evidence 501. 2 IMWINKELRIED, *supra* note 10, § 9.2.1, at 1178.

163. Wigmore's requirements for establishing a privilege against disclosure were:

(1) The communications must originate in a *confidence* that they will not be disclosed.

privileges, but they were to be absolutely privileged (only subject to exceptions or waiver).¹⁶⁴ It could be argued that these—and only these—types of confidences should be called privileged. We would abolish all qualified and quasi doctrines of confidentiality and simply refer to them as “exclusionary evidence rules.”¹⁶⁵ Yet if Dean Wigmore could not limit the concept of privilege in this way, I doubt I can do much better.

It might, however, be more helpful to the drafters and interpreters of privileges if we stopped trying to make all privileges “one-size-fits-all” in terms of their underlying rationales. I suggest that we divide the world of privilege into at least two categories: one that focuses on promoting and protecting certain relationships (relational privileges) and one that focuses on protecting specific information (informational privileges). My goal in this section is to show why reorganizing our thinking about privileges in this manner would help to rationalize and clarify all privileges, whether they are absolute, qualified or quasi.

Relational privileges include all the common confidential communication privileges: spousal, psychotherapist-patient, clergy-penitent, and attorney-client. These relationships are ones that “in the opinion of the community ought to be sedulously fostered.”¹⁶⁶ Wigmore may have scoffed at humanistic rationales as mere sentiment,¹⁶⁷ but he agreed that there are some relationships that are so special that “the community” believes they ought to be

(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 WIGMORE, *supra* note 2, § 2285, at 527.

164. 1 IMWINKELRIED, *supra* note 10, § 6.3, at 521.

165. If one wanted to obtain information covered by one of these exclusionary rules, we might call these procedural techniques “immunity challenges.” Then again, I believe that phrase has been taken, as so much has, by “reality” television shows.

166. 8 WIGMORE, *supra* note 2, § 2285, at 527.

167. *See id.* § 2283, at 217.

“fostered.”¹⁶⁸ But this begs the question—why should the community foster or protect these relationships and not others? Part of the explanation undoubtedly rests on their quality of intimacy—exchanges between parties in these relationships often occur in intensely private moments and about intensely private topics.¹⁶⁹ Moreover, if society is to lose the benefit of these communications as evidence, it is not surprising that these privileges are limited to those situations where the parties act to protect their privacy; thus the law protects only those communications uttered in confidence.¹⁷⁰

Here is where at least part of Professor Imwinkelried’s theory hits home. The statutory and common law relational privileges share a common thread. They recognize the reality of vulnerability, dependence, and trust in certain relationships. It is not surprising that most of these relationships are also described as relationships of “confidence and trust,” “special relationships,” or “fiduciary relationships.”¹⁷¹ Legislatures and courts may decide to privilege these relationships not because the privileges encourage the parties to communicate more freely, but because parties *do* communicate more freely in these intimate settings, making themselves more vulnerable to abuse of their trust.¹⁷²

168. See *id.* § 2285, at 527.

169. See *id.* at 527.

170. See *id.* at 527–28.

171. See Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 917–18 & n.87 (1993) (explaining that courts began to refer to relationships where one vulnerable party entrusts another party with the power to protect it as “special” or as one of “trust and confidence” to avoid the rigid classification of the relationship as “fiduciary”). All of these relationships share the qualities of what I termed “the new fiduciary principle:”

Under the new fiduciary principle, a fiduciary relationship exists when there is (1) dependence or vulnerability by one party on the other, that (2) results in power being conferred on the other (3) such that the entrusting party is not able to protect itself effectively, by “cover” or otherwise, and (4) this entrustment has been solicited or accepted by the party on which the fiduciary obligation is imposed.

Id. at 922; see John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 MINN. L. REV. 505, 557 (2000) (noting that if a lawyer were required to divulge client secrets, it would constitute a breach of fiduciary duty).

172. See Leslie, *supra* note 124, at 31 (noting that clients willing to risk exposure have more reason to confide in their attorney, upon whom they rely for accurate legal advice).

It is not surprising that legislatures and courts tend to provide the highest level of protection—"absolute" protection—for such relational privileges. The protection is "absolute" in the sense that the intimacy theoretically cannot be breached by judicial compulsion, unless the parties to the relationship have been careless in protecting their intimacy (waiver) or the parties have engaged in untoward behavior that deprives them of their "privilege" as a matter of social policy (exceptions).¹⁷³ Some may argue that this "absolute" level of protection is necessary to ensure full and meaningful communication between the privileged parties because it allows the fiduciary to reassure the holder of the privilege that the fiduciary cannot be forced to testify about the communications. Such arguments are misleading, because despite the alleged "absolute" protection, the fiduciary cannot predict with certainty that a court would not apply one of the exceptions to the privilege or find that the holder of the privilege has waived it, either expressly or impliedly.

In truth, even "absolute" relational privileges are fairly limited. These privileges merely minimize some of the consequences of breach of fiduciary duty by refusing to allow the disloyal fiduciary to compound the betrayal by testifying in court. Moreover, the existence of a privileged relationship does not prevent a particular court from mistakenly concluding that the privilege does not apply, has been waived, or is subject to an exception. In these cases, evidentiary privilege law provides an ad hoc remedy, excluding the evidence where a court has erroneously compelled the testimony of those in the specific "privileged" relationship.¹⁷⁴ While the availability of these privileges may promote or enhance such "special" relationships, privilege law does not protect them in a meaningful way, for the privileges can neither prevent breach of fiduciary duty nor stop erroneous judicial rulings regarding privilege.

Seeing the fiduciary quality of relational interests helps to explain why only one party holds certain privileges instead of both parties. For example, in the attorney-client relationship, the client is

173. See Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1605–28 (1986).

174. See CAL. EVID. CODE § 919 (Deering 2004) (requiring that the holder has properly asserted the privilege, but a court erroneously compels the evidence, the evidence must be excluded in later proceedings).

the vulnerable party, not the attorney.¹⁷⁵ The same is true for the vulnerable patient in the doctor-patient or psychotherapist-patient relationships.¹⁷⁶ In other relationships, both parties are vulnerable and dependent on one another and, not surprisingly, in those cases both parties may be deemed to be holders of the confidential communication privilege. Spouses place their trust in one another, the violation of which by disclosure of intimate, confidential communication can be devastating.¹⁷⁷ Thus both spouses hold the marital confidential communication privilege and can assert the privilege to stop the other from revealing confidences. The fiduciary concept also explains why the spousal relationship receives even greater protection in some jurisdictions, where a spouse can refuse to permit the other spouse to testify about even non-confidential events, even if the witness spouse is willing to testify.¹⁷⁸ The modern trend, however, is to give this privilege only to the witness spouse, for in that circumstance at least the state is not compelling a breach of fiduciary duty—the witness spouse is given the power to choose whether to betray or testify against the party spouse.¹⁷⁹ Without a doubt, spousal relationships are the most privileged of all the relationships recognized by privilege law.

This understanding of relational privileges also helps to reconcile some anomalous privileges. For example, one could argue that the clergy and penitent share a mutual vulnerability to betrayal

175. Professor Imwinkelried views the professional as potentially vulnerable as well—the privilege frees the professional to give creative solutions without concern of ridicule. But this does not follow if the client or the patient wishes to waive the privilege, they may do so. The attorney, doctor, or therapist, however, cannot waive the privilege on their own. Imwinkelried, *Rethinking the Foundation of Evidentiary Privileges*, *supra* note 117, at 336–37.

176. *Id.*

177. The spousal relationship is not often considered a “traditional” fiduciary relationship, but it is often called a relationship of “confidential relationship,” reflecting “the new fiduciary principle.” See Scallen, *supra* note 171, at 906.

178. See Charles T. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 449 & n.7 (1938); cf. Developments in the Law—Privileged Communications, *Familial Privileges*, 98 HARV. L. REV. 1563, 1567 (1985) (noting that fourteen states empower a party to prevent the adverse testimony of his or her spouse).

179. See Trammel v. United States, 445 U.S. 40, 49–50 (1979) (noting the “trend in state law toward divesting the accused of the privilege to bar adverse spousal testimony”).

of the confidence of the confessional. Some jurisdictions extend this privilege only where the tenets of the parties' religion require them to keep confidential the secrets of the confessional.¹⁸⁰ The priest, one could argue, would suffer betrayal if the intimate secrets of the penitent and the counsel of the priest could be compelled by subpoena. Yet this argument is more forced than that for the marital confidential communications privilege, so it makes better sense that many jurisdictions make only the penitent the holder of the privilege, for the penitent is truly the more vulnerable in the relationship.¹⁸¹

Moreover, if one treats the clergy-penitent privilege as a relational privilege, the other rationale for the privilege—societal reticence to punish clergy who refuse to violate the confidence and betray the trust of the penitent—takes on greater weight. By refusing to recognize a relational privilege, the state would be compelling a breach of fiduciary duty. This argument echoes the early humanistic rationale described by Wigmore as the “*natural repugnance*” of forcing a party to testify against an “intimate . . . partner.”¹⁸² Although Wigmore dismissed this as mere “sentiment,” the pragmatism of this rationale persists.¹⁸³

There are, however, many kinds of information that receive at least some level of protection from discovery and use as evidence at trial or other legal proceedings. This is the case even if the information is not generated as a communication between a fiduciary and beneficiary. The rationale for these “informational privileges” is quite different from that of relational privileges. The growth of the Internet, the wide dissemination of digital information, and the development of intellectual property law have underscored the reality that information has real economic and social value. Modern technology has added to this lesson by showing us all the ways information can be found, created, packaged, sold, repackaged, and sold again and again. Although some of this information may

180. See Ronald J. Colombo, *Forgive Us Our Sins: The Inadequacies of the Clergy-Penitent Privilege*, 73 N.Y.U. L. REV. 225, 233–34 (1998).

181. See Anthony Merlino, *Tightening the Seal: Protecting the Catholic Confessional from Unprotective Priest-Penitent Privileges*, 32 SETON HALL L. REV. 655, 671 (2002) (noting that a majority of the statutes extend the privilege solely to the penitent, not to the clergy).

182. 8 WIGMORE, *supra* note 2, § 2228, at 217.

183. *Id.*

receive absolute protection,¹⁸⁴ virtually all of these privileges are qualified in the sense that when the privilege is asserted, the court must balance the need for the information against the cost of disclosure. Such qualified protection makes sense from a policy perspective because while the information may have value to the holder of the privilege, there are serious costs—in terms of the accuracy of the decision making—to keeping that information away from the trier of fact.

A theory of “informational privileges” would include both qualified privileges (such as trade secrets, political vote, self-critical reports and deliberative privilege), and some quasi-privileges (such as work product protection). The hallmark of these doctrines is that they allow the court to balance private interests against societal ones. This approach is justifiable with informational interests at stake in that these privileges do not involve fiduciary relationships. Informational interests arise where parties have invested time, money, effort, skill, and education to produce information that they alone wish to possess or to control. The legislature (or court, in the case of common law privileges) may recognize a privilege in this case, granting control over the use of that information (in a judicial setting) because it recognizes that such information has value that the holder of the privilege wishes to protect against other users.¹⁸⁵

To illustrate, it is possible to read the Supreme Court’s rationale in *Hickman v. Taylor* for a work product doctrine as a defense of an informational privilege of the kind I describe here. Recall that along with the instrumental rationales (that without work product protection, lawyers would not write things down, would engage in “sharp practices” and would leech off each other’s work), the

184. Some might make the case that military and state secrets are so valuable, that they should receive absolute protection, but others argue persuasively that even this information should be available to the public upon a sufficient showing of need. Graham, *supra* note 68, pt. V.

185. See Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 313 (noting the if information were to flow freely it would reduce the ability of those who create it to reap the benefits of their efforts); Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 7 (1998) (noting that elimination of the work-product doctrine would decrease the value of legal services); cf. Richard A. Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 GEO. L.J. 1187, 1193 (1977).

majority was concerned with protecting the attorney's privacy in producing and using information:

Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.¹⁸⁶

In other words, a trial attorney's product is the production, management, and strategic—even artful—use of information. In the language of business, the mental impressions, strategies, and opinions of the lawyer are the “value-added” product that the trial lawyer can “sell” to a client. No wonder the *Hickman* majority was worried that broad discovery would have a “demoralizing” effect on lawyers¹⁸⁷ and Justice Jackson fretted about the effect on the “welfare and tone of the legal profession.”¹⁸⁸ If a lawyer's diligence and intelligence in preparing for trial could simply be stolen with the blessing of the discovery provisions of the Federal Rules of Civil Procedure, well, that would be demoralizing. A full discussion of the implications of treating work product as an informational privilege will have to wait for another article. Here, it is enough to suggest that information gathered for use in litigation has genuine value, whether it is actually intellectual property or not. The value of this property is sufficient, courts have argued, to merit restrictions on its availability for discovery and for use at trial. This is consistent with a theory of informational privilege.

Not all information currently considered “privileged” would be so under an informational theory of privilege, however. For example, evidentiary rules protecting offers of settlement and settlement discussions from being used as evidence of liability, such as Federal Rule of Evidence 408 or California Evidence Code section 1152, have sometimes been called the “privilege” for settlement discussions. Yet, these rules—while promoting the social policy of

186. *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947).

187. *Id.* at 511.

188. *Id.* at 515 (Jackson, J., concurring).

encouraging settlement out of court—would likely not be considered “informational privileges.” Information about settlement offers and discussions surrounding settlement might have genuine value to some parties, but the structure of the rule puts the use of that information in the hands of the party seeking to introduce the evidence—not the party who seeks to protect the confidentiality of the information. For example, under these rules, the party seeking to introduce such information can avoid exclusion of the evidence by offering the evidence for any purpose other than proving liability—such as “proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”¹⁸⁹ The admissibility of the evidence thus depends solely on its probative function. There is no balancing of the need for the information against the social policy behind the rule; Rule 408 simply calls for the court to make a judgment about classification—is this evidence being offered to prove liability or something else? The point is that a true informational privilege would allow the judge, on a sufficient showing of need for the evidence, to override the “social interest” in restricting the disclosure of the information in court.

D. The Legislative and Judicial Consequences of Recognizing Relational and Informational Privileges

The problem with the rationales for both relational and informational privileges is that they are not self-evident and self-effectuating. The persons empowered to create privileges must be persuaded that 1) certain relationships are fiduciary in quality and are sufficiently significant to deserve the highest level of evidentiary protection¹⁹⁰ and 2) certain types of information have economic or other value that deserves to be protected. But who gets to decide which relationships and what information deserves protection? This raises a final rationale for privilege—the power theory. This theory posits that privileges are just that—the rewards of the elite and the

189. FED. R. EVID. 408.

190. Because while we may protect some, we do not endow all fiduciary relationships with a privilege. For example, business partners are deemed to be in a fiduciary relationship, but there is no “business partner-business partner” privilege.

powerful who can influence and persuade those in authority to create privileges.¹⁹¹ One can view this theory as voicing nihilistic and radically skeptical concerns,¹⁹² but one can also recognize the pragmatism of the power theory. There will certainly be line drawing when it comes time to decide just who deserves what. And this is why we have legislators and judges. It is simply naïve to believe that the statement of pure theory—whether instrumental or humanistic—is all that is necessary to clear the confusion about privileges. These theories can only be helpful if they are accurate and if the drafters and interpreters of privileges are sufficiently educated and interested in the reasons for and consequences of the work before them.

The ultimate cynic's view is that the only interest legislators and judges have is in who will support their reelection, appointment or elevation to higher office.¹⁹³ I do not subscribe to this radically skeptical view, although I understand the pressures on all law makers and interpreters. I know that certain groups have lobbied long and hard to procure "privilege" for their professions and the professional services that they employ. One response is that this is the way the messy work of democracy gets done. But another response is that if the stakes were transparent, because of a clear focus on the relational and informational interests at stake, there would be more accountability and less ability to hide one's value choices in creating specific privileges, their exceptions, and conditions for waiver. Perhaps greater transparency and accountability is the most we can realistically expect from the current system of government.

In summary, if we were to recognize a theory of relational and informational privileges, it would be easier for lobbyists for particular privileges to make their cases—and easier for opponents of those lobbyists to make theirs—as long as we understand that what is

191. Developments in the Law, *supra* note 117, at 1493–95; see 26 WRIGHT & GRAHAM, *supra* note 9, §5663, at 569 (suggesting that governmental privilege is supported by a collectivist rationale "that [the] interests of the state prevail over the interests of the individual").

192. See Developments in the Law, *supra* note 117, at 1494–95 (noting that the heart of the power theory is its "attack on the integrity of both the traditional justification and the privacy rationale").

193. *Cf. id.* at 1494 (noting that most modern privileges are statutory, requiring exercise of political power).

at stake is in essence a value choice. Which relationships involve fiduciary qualities and which do we value most?¹⁹⁴ What information has sufficient value to warrant protection? Recognizing the difference between relational and informational interests also has implications for deciding the degree of protection; there is a significant difference in creating a relational privilege, with “absolute” protection (subject only to waiver and exceptions), versus an informational privilege that can be pierced by a sufficient showing of need. In the final part of this Article, I try to show how one legislative and judicial effort—in California—went awry in the creation of a mediation privilege. I hope to clarify the issues at stake so that other jurisdictions may avoid this problem and so, in the case of California, an appropriate legislative solution can be created.

III. THE MYSTERIOUS MEDIATION PRIVILEGE: PROTECTING RELATIONAL OR INFORMATIONAL INTERESTS?

Mediation is booming business, along with many other kinds of alternative dispute resolution.¹⁹⁵ According to advocates of mediation, the essential ingredient of successful mediation is confidentiality.¹⁹⁶ But what do they mean by confidentiality—and

194. In my earlier article, I argued that “fiduciary relationships” are far more fluid than courts sometimes lead us to believe. Scallen, *supra* note 171, at 901. Thus, I am not suggesting that relational privileges would always be limited to those we now view as “traditional” fiduciary relationships. As our understanding of the fiduciary principle grows, our legislatures and courts may recognize additional relationships worth protecting. The most obvious example is the relationship between same-sex couples.

195. See Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities*, 38 S. TEX. L. REV. 407, 415–21 (1997) (providing an overview of the growth of alternative dispute resolution in a section entitled “The Context: A Brief Intellectual History of Alternative Dispute Resolution and Legal Ethics”).

196. For example, a California court of appeal noted that without assurances of confidentiality “some litigants [would be deterred] from participating freely and openly in mediation.” *Ryan v. Garcia*, 33 Cal. Rptr. 2d 158, 161 (Ct. App. 1994). The *Ryan* court also quoted approvingly the conclusion of a practice guide that stated, “[c]onfidentiality is absolutely essential to mediation Otherwise . . . parties would be reluctant to make the kinds of concessions and admissions that pave the way to settlement.” *Id.* (quoting JUDGE H. WARREN KNIGHT ET AL., CALIFORNIA PRACTICE GUIDE: ALTERNATIVE DISPUTE RESOLUTION § 3:25, at 3–5 (1993)).

exactly how much confidentiality is required? The California Supreme Court provided no helpful answer in *Rojas v. Superior Court*¹⁹⁷ when it held that the California mediation privilege absolutely protected—from discovery and from use at trial—all material “made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation,” even offered in subsequent litigation.¹⁹⁸ I argue here that the California Supreme Court should not have construed the statute so broadly, but since it has, the California legislature must now correct and clarify the contours of the mediation privilege, a project which can benefit from the distinction between relational and informational privileges. Moreover, because many jurisdictions have enacted mediation privileges, the lessons of the *Rojas* case can have an impact beyond California.

In the *Rojas* case, several hundred tenants of a Los Angeles apartment complex sued the owner and developers after learning that the owner had settled a separate lawsuit against the developers concerning mold and water leaks in the complex.¹⁹⁹ The tenants sought to discover materials documenting the mold and water leakage, which had been cleaned up by the time they brought suit, but the Los Angeles County Superior Court denied their request.²⁰⁰ The trial court concluded that the defendants created the materials for the purpose of mediation between the owner and developer, and thus the materials were confidential under California Evidence Code section 1119.²⁰¹ Section 1119, which is the heart of the California mediation privilege, provides that neither evidence of oral

197. 93 P.3d 260 (Sup. Ct. 2004).

198. *Id.* at 270–71.

199. *Id.* at 262–63.

200. The tenants sought:

[p]roduction of all photographs (and negatives) and videotapes taken or received during the underlying action, “all recorded statements” of former or current tenants obtained in that action, all “results” from destructive testing during that action, and all “raw data” collected during that action from “air sampling for mold spores,” “bulk sampling of mold spores,” and “destructive testing.”

Id. at 263. “Coffin, Ehrlich, and Deco opposed the motion, arguing in part that all of the requested documents were undiscoverable under section 1119 because they were prepared for the mediation in the underlying action.” *Id.*

201. *See id.* at 264.

statements, including admissions, nor writings²⁰² that are “made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation [are] admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding in which, pursuant to law, testimony can be compelled to be given.”²⁰³

The Court of Appeals, however, ruled that section 1119 protects only “the substance of mediation, i.e., the negotiations, communications, admissions, and discussions designed to reach a resolution of the dispute at hand,”²⁰⁴ not the photos and test data, which the tenants sought in order to prove that they had been exposed to mold.²⁰⁵ The Court of Appeals reasoned that to read Section 1119 literally would render Section 1120 of the Evidence Code superfluous.²⁰⁶ Section 1120 provides that “[e]vidence otherwise admissible or subject to discovery outside of a mediation . . . shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation.”²⁰⁷

The appellate court held that raw test data and photographs, to the degree they can be separated from mediation communications, are analogous to fact work product, which is discoverable upon an

202. The term “writings” is defined broadly in Section 250 of the California Evidence Code as:

“Writing” means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

CAL. EVID. CODE § 250 (Deering 2004).

203. *Id.* § 1119(a)(b).

204. *Rojas v. Superior Court*, 126 Cal. Rptr. 2d 97, 107–108 (Ct. App. 2002), *rev’d*, 93 P.3d 260 (Cal. 2004).

205. *Rojas*, 93 P.3d at 262–63 (quoting CAL. EVID. CODE § 1120 (Deering 2004)).

206. *Id.* (quoting CAL. EVID. CODE § 1120 (Deering 2004)).

207. *Id.*

adequate showing of need.²⁰⁸ The court outlined the different levels of protection, using the work product analogy:

In California, the distinction between “derivative” and “non-derivative” material is the analytic framework applied to determining whether materials are protected by the attorney work-product doctrine. Three levels of protection exist. Core work product, i.e., material solely reflecting an attorney’s “‘impressions, conclusions, opinions, or legal research or theories,’” is entitled to absolute protection from discovery. Qualified protection exists for work product which is an amalgamation of factual information and attorney thoughts, impressions, conclusions. Such derivative material would include charts and diagrams, audit reports, compilations of entries in documents, records and other databases, appraisals, opinions, and reports of experts employed as non-testifying consultants. Derivative work product will be ordered disclosed if denial of discovery would unfairly prejudice the other party or result in an injustice. The party seeking disclosure must demonstrate good cause, which involves a balancing of the need for disclosure against the purposes served by the work-product doctrine. Lastly, purely factual material receives no work product protection.²⁰⁹

The Court of Appeals reasoned that the mediation privilege, which does not preclude the admissibility or discovery of evidence that is otherwise admissible,²¹⁰ “closely mirrors” the work product doctrine; thus, the court should “read [the mediation privilege] to protect materials in [the] same manner as the work-product doctrine.”²¹¹

Applying this theory to the facts at hand, the court concluded “that non-derivative material, such as raw test data, photographs, and witness statements, are not protected by section 1119.”²¹² The court also found that “derivative” material is “discoverable only upon a showing of good cause, which requires a determination of the need

208. *Rojas*, 126 Cal. Rptr. 2d at 108–09.

209. *Id.*

210. CAL. EVID. CODE § 1120 (Deering 2004).

211. *Rojas*, 126 Cal. Rptr. 2d at 110.

212. *Id.*

for the materials balanced against the benefit to the mediation privilege obtained by protecting those materials from disclosure.”²¹³ Because the tenants seeking discovery had not been parties to the earlier proceeding and did not have access to the evidence that was now destroyed, the court ordered not only the production of the non-derivative material, but also any material that could be separated from either a compilation or charts prepared for mediation.²¹⁴ Finally, the court noted that because the evidence no longer existed, “it may be appropriate that [the tenants] be given amalgamated materials if such materials cannot easily be broken into their protected and non-protected components” and ordered the trial court to make these determinations through *in camera* review.²¹⁵

The California Supreme Court rejected the appellate court’s reasoning.²¹⁶ The court concluded that Sections 1119 and 1120 can be read together to conclude that evidence obtained for mediation “is not protected ‘solely by reason of its introduction or use in a mediation’²¹⁷ but is protected only if it was ‘prepared for the purpose of, in the course of, or pursuant to, a mediation.’”²¹⁸ The court agreed with the appellate court that the mediation privilege might not automatically cover “raw data,” such as a mold spore sample, not because it is “non-derivative,” however, but rather because it is not a “writing” “prepared for the purpose of . . . mediation.”²¹⁹ Thus, the Court held that “photographs, videotapes, witness statements, and ‘raw test data’ from physical samples collected at the complex—such as reports describing the existence or amount of mold spores in a sample” are absolutely protected from admissibility and discovery, even in a subsequent action, if they were “prepared for the purpose of, in the course of, or pursuant to, [the] mediation.”²²⁰

The California Supreme Court’s ruling in *Rojas*, while controversial, should not come as a complete surprise. In *Foxgate*

213. *Id.*

214. *See id.*

215. *Id.*

216. *Rojas v. Superior Court*, 93 P.3d 260, 262 (Cal. 2004).

217. *Id.* at 266 (quoting CAL. EVID. CODE § 1120 (Deering 2004)).

218. *Id.* (quoting CAL. EVID. CODE § 1119 (Deering 2004)).

219. *Id.* at 265.

220. *Id.* at 270.

Homeowners' Ass'n v. Bramalea California, Inc.,²²¹ the California Supreme Court held that the appellate court erred in creating a judicial exception to the confidentiality requirements of sections 1119 and 1121 (regarding confidentiality of a mediator's reports and findings).²²² The Court noted that "confidentiality is essential to effective mediation, a form of alternative dispute resolution encouraged and, in some cases required²²³ by, the Legislature."²²⁴ "[T]he purpose of confidentiality is to promote 'a candid and informal exchange regarding events in the past. . . . This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.'"²²⁵ Therefore, to encourage mediation by ensuring confidentiality, the statutory scheme (which includes section 1119) "unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception."²²⁶ "Because the language of sections 1119 and 1121 is clear and unambiguous," the court reasoned, "judicial construction of the statutes is not permitted unless they cannot be applied according to their terms or doing so would lead to absurd results, thereby violating the presumed intent of the Legislature."²²⁷

221. 25 P.3d 1117 (Cal. 2001).

222. *Id.* at 1125.

223. The California Law Revision Commission cites the following examples of specialized mediation confidentiality provisions: CAL. BUS. & PROF. CODE §§ 467.4–467.5 (community dispute resolution programs), 6200 (attorney-client fee disputes); CAL. CIV. PROC. CODE §§ 1297.371 (international commercial disputes), 1775.10 (civil action mediation in participating courts); CAL. FAM. CODE §§ 1818 (family conciliation court), 3177 (child custody); CAL. FOOD & AGRIC. CODE § 54453 (agricultural cooperative bargaining associations); CAL. GOV'T CODE §§ 11420.20–11420.30 (administrative adjudication), 12984–12985 (housing discrimination), 66032–66033 (land use); CAL. INS. CODE § 10089.80 (earthquake insurance); CAL. LAB. CODE § 65 (labor disputes); CAL. WELF. & INST. CODE § 350 (dependency mediation). CAL. L. REVISION COMM'N, STATE OF CAL., 1997–98 ANNUAL REPORT app. 5, § 1119 comment, at 600, <http://www.clrc.ca.gov/publications/printed-reports/pub196-1997ar.pdf>.

224. *Foxgate*, 25 P.3d at 1126.

225. *Id.* (citations omitted).

226. *Id.* (footnote omitted).

227. *Id.* (citations omitted). Section 1119 was also interpreted in *Eisendrath v. Superior Court*, 134 Cal. Rptr. 2d 716 (Ct. App. 2003). In *Eisendrath*, a couple reached a mediated divorce settlement containing provisions regarding

Although it appears to be a model of judicial restraint, the *Rojas* court's statutory interpretation is actually far broader than necessary and raises far more questions than it answers. Under its ruling, otherwise discoverable documents and test data become absolutely privileged if they are "prepared for the purpose of" mediation. Yet, what if the material is prepared for dual purposes—mediation and, if necessary, trial? Who has the burden of proving that the material was "prepared for the purpose of" mediation? In these days of alternative dispute resolution and the "vanishing trial,"²²⁸ is there ever a time when material is arguably *not* developed for "mediation," especially given the broad definition of that term in section 1115?²²⁹

the effect of remarriage on spousal support. *Id.* at 717–18. When the ex-wife remarried, a question arose about whether the written settlement agreement accurately reflected the parties' intentions. *Id.* Thus, the ex-husband filed a motion to clarify the spousal support agreement. *Id.* at 718. The ex-wife opposed the motion, stating that the written document accurately reflected the parties' agreement. *Id.* at 719. She attempted to depose the mediator to support her contention, arguing that the "mediation confidentiality" provisions could be waived by a party to the mediation, much like any other evidentiary privilege. *Id.* Moreover, she argued that her ex-husband had "impliedly waived" the privilege by filing a motion to clarify the support agreement. *Id.*

The Court of Appeal rejected the ex-wife's argument that the mediation confidentiality provisions, similar to the attorney-client privilege, could be waived. *Id.* at 724. Relying on statutory interpretation arguments, the court reasoned "that the implied waiver provisions in sections 912, by their plain language, are limited to the particular privileges enumerated therein." *Id.* The court also interpreted section 1119 broadly, rejecting the ex-husband's view that conversations between him and his former wife, which took place outside the presence of the mediator, were admissible. *Id.* at 725. The court reasoned that, because section 1119 protects communications made "pursuant to" a mediation, the privilege covers those conversations even though they occurred outside of the mediator's presence. *Id.* The court relied on the fact that the discussions occurred before the end of mediation and were "materially related to the mediation." *Id.*

228. Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUDIES 459 (2004) (discussing, inter alia, data suggesting that the sharp reduction in cases ultimately resolved at trial may be largely due to the trend toward alternative dispute resolution).

229. CAL. EVID. CODE § 1115 (Deering 2004) sets forth the following definitions:

- (a) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.

Thus, any evidence arguably found, sought or created “for the purpose of” or “pursuant to” mediation could be shielded forever.²³⁰ As a result, the *Rojas* decision has been heavily criticized, even by those who favor mediation as a means of alternative dispute resolution, because they fear that the decision will make parties less likely, rather than more likely, to mediate.²³¹

Both the California Supreme Court and the Court of Appeals in *Rojas* purported to apply the principles of statutory interpretation to determine the meaning of the mediation privilege.²³² The California Court of Appeals arguably had the better theoretical idea when it tried to narrow the mediation privilege to an informational privilege. Although the California Supreme Court repeatedly criticized the appellate court for its “narrow interpretation” of the mediation privilege in *Rojas*,²³³ the appellate court was trying to be faithful to

(b) “Mediator” means a neutral person who conducts a mediation. “Mediator” includes any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.

(c) “Mediation consultation” means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.

230. Cf. Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tensions Between the Aspirations of A Private Facilitative Process and the Reality of Public Adversarial Justice*, 38 OHIO ST. J. ON DISP. RESOL. 509, 514 (2004):

The courts’ reluctance to supervise the mediation process, for fear that it will become less efficient in getting rid of cases, creates a virtually unregulated enclave of adversarial activity within a process loosely defined as conciliatory and facilitative. This dissonance can create, and has created, both confusion and an unfair process.

231. *California’s Top Court Endorses Mediation Law, but ADR Professionals Remain Split About the Decision*, 22 ALTERNATIVES TO HIGH COST LITIG. 127 (2004) (noting that for many ADR professionals, the reaction to the *Rojas* Supreme Court opinion “changed almost instantaneously from ‘What did it say?’ to ‘How are we going to fix this?’”); Jeff Kichaven, *Commentary: Exalting “Absolute Confidentiality” Hurts the Practice*, 22 ALTERNATIVES TO HIGH COST LITIG. 127 (2004) (suggesting that the absolute confidentiality upheld by the *Rojas* decision could lead fewer parties to agree to mediate because it would prevent disclosure of any kind of misconduct by the mediator, among other problems).

232. See *Rojas v. Superior Court*, 93 P.3d 260, 270 (Cal. 2004); *Rojas v. Superior Court*, 126 Cal. Rptr. 2d 97, 105 (Ct. App. 2002).

233. *Rojas*, 93 P.3d at 266, 269–70.

the hornbook principle when construing privileges that “[p]rivileges should be narrowly construed since they prevent the admission of relevant and otherwise admissible evidence.”²³⁴ The Court of Appeals attempted to limit the privilege to oral and written communication between the participants, stating that “section 1119 does ‘not protect pure evidence,’ but protects only ‘the substance of mediation, i.e., the negotiations, communications, admissions, and discussions designed to reach a resolution of the dispute at hand.’”²³⁵

The appellate court reached this narrow interpretation by de-emphasizing the section 1119 term “writings” and highlighting the term “evidence” in the exception provided by section 1120, which states that evidence that is otherwise discoverable or admissible is not protected by section 1119.²³⁶ Thus the appellate court held that photographs, videos, and test results—whether in raw or compilation form—were items of “evidence” that could be discoverable.²³⁷ The appellate court reasoned that such evidence might still be subject to work product protection, which gave rise to the section of the opinion comparing the mediation privilege to the work product doctrine.²³⁸

Regrettably, however, the Court of Appeals exceeded its power in its effort to narrow the scope of the privilege. As the California Supreme Court recognized in a previous decision, “the privileges set out in the Evidence Code are legislative creations; the courts of this state have no power to expand them or to recognize implied exceptions.”²³⁹ Moreover, the California Supreme Court could not

234. *Jurcoane v. Superior Court*, 113 Cal. Rptr. 2d 483, 490 (Ct. App. 2001) (quoting *People v. McGraw*, 190 Cal. Rptr. 461, 463 (Ct. App. 1983)).

235. *Rojas*, 126 Cal. Rptr. 2d at 110.

236. *Id.* at 107–08.

237. *Id.* at 106.

238. *Id.* at 108–110.

239. *Wells Fargo Bank v. Superior Court*, 990 P.2d 591, 594 (Cal. 2000). See *Rojas*, 93 P.3d at 423–24 (the “good cause” exception for work product prepared in anticipation of litigation is controlled exclusively by CAL. CODE CIV. PROC. § 2018(b)). The *Rojas* Court stressed that

the Legislature clearly knows how to establish a “good cause” exception to a protection or privilege if it so desires. The Legislature did not enact such an exception when it passed Evidence Code section 1119 and the other mediation confidentiality provisions.

Rojas, 93 P.2d 3d at 423.

condone the appellate court's attempt to read away the term "writings" in section 1119. Photographs and videos certainly fall under the broad definition of writings in California Evidence Code Section 250, as would any expert analysis of raw mold samples.²⁴⁰ Accordingly, the Supreme Court concluded that because section 1119 plainly stated that it protects such "writings" from discovery or admissibility if prepared for the purpose of mediation, the Court of Appeals had altered the scope of section 1119 through its interpretation of section 1120.²⁴¹

Nonetheless, the California Supreme Court might have helped litigants and lower courts had it narrowed its own interpretation of the statute. The court made no effort to explain how a lower court should interpret the language in section 1119, "prepared for the purpose of, in the course of, or pursuant to, mediation." The court's decision not to address the question may be attributed to the procedural posture of the case. The parties settled the case after the decision of the Court of Appeals.²⁴² Thus, the factual question that the Court of Appeals remanded to the trial court—questioning which, if any, of the materials the tenants were seeking had been "prepared for the purpose of" mediation—was rendered moot.²⁴³

Still, the California Supreme Court decided to retain jurisdiction because the case "raise[d] issues of continuing public importance."²⁴⁴ In that vein, the Supreme Court could have provided a narrower but less tortured interpretation than that provided by the Court of Appeals. Specifically, the Supreme Court might have addressed the appellate court's concern that the mediation privilege shields otherwise admissible evidence simply because a party can claim that the tests or photographs were "prepared for the purpose of, in the course of, or pursuant to, mediation." The court might have pointed out that a party who seeks to claim the benefit of a privilege has the burden of proving that it applies. Thus, a party who asserts that evidence is protected by section 1119 should have the burden of

240. *See Rojas*, 93 P.3d at 265.

241. *Id.* at 266.

242. *Id.* at 271.

243. *See Rojas*, 93 P.3d at 271 n.9.

244. *Id.* at 264 n.3. The discovery requests were also relevant in pending litigation among some of the co-defendants. *Id.*

proving the parties created it “for *the* purpose” of mediation, in the *course* of,” or “*pursuant to*” mediation. In other words, a fair but narrower interpretation of section 1119 is: “but for” the mediation, would this evidence have been created? Was this evidence produced *because* of mediation, or were there other reasons to make the photos and videos and to take mold samples, such as gathering evidence for use in litigation? By reading section 1119 narrowly, the court could have eliminated the scenario sketched out by the Court of Appeals: “Parties could simply agree to mediate, introduce all their evidence, and then refuse to settle, and claim privilege.”²⁴⁵ The appellants in *Rojas* actually argued for this narrower, “but for” interpretation of section 1119.²⁴⁶ Nonetheless, the court did not address the argument, preferring an absolutist interpretation of section 1119.

As the Supreme Court pointed out, there are no traditional types of exceptions and no waiver provisions to section 1119, except for the “supermajority” requirement that all of the parties to the mediation have to agree in writing to allow disclosure of the information.²⁴⁷ This effectively creates a “super-privilege”—impenetrable by public policies favoring disclosure (exceptions) or by the lack of interest in protecting confidentiality, as shown through their carelessness or their reliance on the material (waiver).

The only way around the problem for the courts was to narrow the circumstances in which section 1119 applies. That is why the Court of Appeals tried so hard to limit section 1119 by reference to the work product doctrine.²⁴⁸ But the Supreme Court could also have helped narrow the privilege through judicial interpretation—squarely placing the burden of proof on the party claiming the privilege to prove that the evidence would not exist “but for” the mediation.

California courts do what they can with the mediation privilege, but in California the ultimate responsibility for defining privileges

245. *Rojas*, 126 Cal. Rptr. 2d at 109.

246. Appellant’s Reply Brief at 3, *Rojas*, 93 P.3d 260 (No. S111585), 2003 WL 1918567. This “but-for” interpretation is heavily criticized in Laura A. Miles, Comment, *Absolute Mediation Privilege: Promoting or Destroying Mediation By Rewarding Sharp Practice and Driving Away Smart Lawyers?*, 25 WHITTIER L. REV. 617, 635–639 (2004).

247. CAL. EVID. CODE § 1122 (Deering 2004)

248. See *Rojas*, 126 Cal. Rptr. 2d at 108–10.

rests with the legislature.²⁴⁹ In fashioning the statutory scheme of sections 1115-1128, the legislature created a “super” relational privilege for mediation, more powerful than any other privilege, even the spousal testimonial privilege.²⁵⁰

So what exactly is the mediation privilege—a relational privilege or an informational privilege? As currently drafted by the California legislature and interpreted by the California Supreme Court, the mediation privilege is a mystifying blend of both. Given the absolute quality of the mediation privilege as interpreted by the California Supreme Court and the emphasis on fostering communication between parties and a mediator, one might argue that the mediation privilege is a relational privilege. Like other confidential communication privileges, it protects communications made “for the purpose of” mediation as well as those made during and “pursuant to” the mediation.²⁵¹ Moreover, the mediation privilege is grounded in the same instrumental rationale that grounds confidential communication privileges: participants will not be forthcoming if they are not assured that information they provide will be kept confidential.²⁵²

There are, however, several significant ways in which the mediation privilege is distinguishable from a confidential communications privilege. First, there is no requirement of confidentiality for writings or oral communication “made for the purpose of” or “pursuant to” mediation.²⁵³ All of Los Angeles could have watched the testing or photographing and demolition of the allegedly mold-ridden building, or heard about it from any of the parties to the *Rojas* mediation. Yet, under the California Supreme Court’s ruling, the results of the testing and the documentation of the building’s condition would be forever shielded from use by a trier of fact. The California legislature provided a confidentiality

249. CAL. EVID. CODE § 911 (Deering 2004); *Garstang v. Superior Court*, 46 Cal. Rptr. 2d 84, 87 (Ct. App. 1995) (stating that statutory privileges are exclusive and courts are not free to create new privileges as a matter of judicial policy).

250. CAL. EVID. CODE §§ 970–73 (Deering 2004). At least the spousal testimonial privilege can be waived and there are exceptions to it.

251. CAL. LAW REVISION COMM’N, *supra* note 223, app. 5, at 599.

252. 1 IMWINKELRIED, *supra* note 10, § 5.1, at 256–60.

253. *Id.*

requirement only for “communications, negotiations, or settlement discussions by and between participants.”²⁵⁴ The holders of the mediation privilege can, however, unlike the holders of a confidential communication privilege, allow or participate in the disclosure of the information outside of the so-called “privileged mediation” without judicial consequences.²⁵⁵ How can the privilege serve to enhance a relationship by providing a remedy for betrayal of confidence when there is no requirement that the information be confidential (and thus, no duty that can be betrayed)?

A related argument is that if the mediation privilege is a relational privilege, it is the only one to date that does not stem from a fiduciary relationship, whether under traditional or new models of fiduciary principles. Despite the conciliatory tone of mediation, the relationships between parties to a dispute remain adversarial until the dispute is resolved.²⁵⁶ To reach a productive outcome, a mediator may seek to earn the confidence and trust of the participants, and some parties may disclose sensitive information to the mediator, but the vulnerability and dependence required for a fiduciary relationship is not an essential quality of mediation. Parties do not need the mediator to resolve their dispute. Mediation is, after all, a means of *alternative* dispute resolution. Mediation is a confrontational process (although that phrase need not suggest a contentious or angry process). Thus, the qualities of personal or professional dependence and vulnerability that mark other relationship privileges (such as psychotherapist-patient relationship or attorney and client relationship) are missing from the mediator-party relationship.²⁵⁷

254. CAL. EVID. CODE § 1119(c) (Deering 2004).

255. An attorney or mediator may suffer complaints and discipline by a professional group for violating such a privilege, but this is not clear. Moreover, while mediators may subscribe to certain codes of conduct, there is no universal overseer of mediators, the way state bar organizations may oversee attorney conduct.

256. Thompson, *supra* note 230, at 515 (“The desire to win by seeking every permissible advantage through adversarial argument, persuasion, and intimidation is deeply imbedded in the hearts and minds of participants in the litigation process.”).

257. Moreover, the mediation privilege, even as currently drafted, does not “protect” the relationships in mediation, whether they are fiduciary relationships or not. As argued earlier in Part II, section C, the most any evidentiary privilege can do is attempt to prohibit the state from requiring

Finally, the mediation privilege differs from relational privileges in one more way. As the mediation privilege is currently structured, there are multiple holders of the mediation privilege—the parties, their representatives, and the mediator.²⁵⁸ Any one of these participants can assert the privilege to attempt to stop the material from being discovered or being admissible.²⁵⁹ Even if one of the parties feels aggrieved by the conduct of the mediator or another participant, the evidence of what has occurred in the mediation remains under the shield of the mediation privilege unless all participants agree to make the information public.²⁶⁰ Thus, unlike current relational privileges, a party to the mediation privilege has no power to unilaterally waive the privilege.²⁶¹ Although there can be joint holders of traditional relational privileges, such as the marital confidential communication privilege or the attorney-client privilege, in the event of a dispute between joint holders of a privilege, these privileges vanish by operation of exceptions.²⁶² To put it another way, in a “dispute” between two holders of the “privilege” (the very essence of the mediation posture), relational privileges do not allow parties to unilaterally shield information from the trier of fact when another party wishes to disclose it. Confidential communication privileges that are aimed at enhancing relational interests do not

disclosure and provide a limited remedy for unauthorized disclosure. That may “enhance” a relationship, but it cannot “protect” it in the sense of stopping or preventing undesirable behavior. Evidentiary privileges cannot stop or prevent erroneous or wrongful coercion of disclosure and cannot stop or prevent parties from talking “out of school.”

258. CAL. EVID. CODE § 1121 (Deering 2004) (stating that reports, assessments, recommendations, and findings remain confidential “unless all parties to the mediation expressly agree otherwise in writing or orally”).

259. *Id.*

260. *Id.*

261. *Eisendrath v. Superior Court*, 134 Cal. Rptr. 2d 716, 724 (Cal. Ct. App. 2003) (the waiver provisions of California Evidence Code section 912 only apply to the privileges enumerated in that section; the mediation privilege of section 1119 is not included in these privileges.).

262. *See, e.g.*, CAL. EVID. CODE § 962 (exception to attorney-client privilege where joint clients have a dispute); *id.* § 984 (exception to marital confidential communication privilege for proceedings between spouses); *id.* § 987 (exception to marital confidential communications privilege where one spouse is a criminal defendant based on, among other things, conduct toward the other spouse).

apply in disputes between joint holders of the privilege. But a mediation, under any definition, is an attempt to resolve a dispute between joint holders of the mediation privilege.

Had the California legislature been able to see the difference between protecting relational interests and protecting informational interests, it might well have decided to make the mediation privilege a qualified informational privilege, in which information made “for the purpose of” mediation as well as information disclosed during and “pursuant to” the mediation is presumptively protected, but can be discovered and used as evidence on a proper showing of need.

Although there is certainly power in the relationship dynamics of mediation (between the parties, their attorneys, and the mediator), the real “value” or “currency” in mediation is the information that is or is not disclosed—either to the mediator or to one party or the other. Information—about the parties’ needs, interests, damages, inculpatory or exculpatory evidence, among other things—provides the central movement toward (or away from) resolution.²⁶³ Thus, it makes far more sense for the Legislature to treat the mediation privilege as an informational privilege, as the California Court of Appeal tried to do by analogizing to work product protection, which is also most clearly thought of as a qualified informational privilege.²⁶⁴ The California mediation privilege simply does nothing to enhance or promote relational interests. It can, however, be a very useful means to limit the availability and use of valuable personal or proprietary information in current or subsequent litigation. There has been, however, no showing that it is necessary to create an “absolute” privilege (more absolute than any other existing privilege) in order for parties to engage in mediation.²⁶⁵ Thus, a qualified

263. Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 393 (1994) (stating that “information is the raw material of the mediator’s craft”), *quoted* in Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation—Worldwide*, 80 NOTRE DAME L. REV. 553, 563 (2005) (“In settlement mediation, exchange of information is an important aspect of the process as parties work toward reaching a consensual agreement.”).

264. This argument appears in brief in Part II, Section I of this article, but also is sufficiently significant to warrant its own article.

265. Consider this mediator’s rather candid assessment:

Theory tells us that absolute confidentiality is necessary for candor, so that the parties will talk about their weaknesses as well as their

privilege would both protect the information and yet allow disclosure where a sufficient factual showing of need exists.

As one looks toward prospective legislative action on the California mediation privilege, there is also an enduring lesson for the California courts. Some would argue that the California Supreme Court appropriately declined to resolve the problem through interpretation—that the legislature created the problem and the legislature should solve it. This overlooks the judiciary’s unique role and responsibility when it comes to interpreting evidentiary rules, however. Because of overwhelming political pressure or enthusiasm, legislatures sometimes overreach. Statutory language is often imperfect. Courts exist to bring that abstract language to life in particular cases, and the consequences of some legislation may not come to light until this happens. While it is certainly appropriate for a court to refuse to decide a case by wholesale redrafting of a statute, in most cases this approach is less satisfactory in the context of evidence rules. Evidence rules, as well as other procedural provisions, are central to the functioning of the judicial system; thus, the judiciary has a special place in their interpretation.

When problems arise in a legislative scheme directed at controlling the access of information in courts, courts should not feel as constrained in interpreting these statutes as they might in areas wholly unrelated to the functioning of the judicial system. Even under the “power” theory of privilege, judges have legitimate power to exercise through judicial interpretation. Judges must not allow shrill threats directed at “judicial activism” to discourage them from carrying out their interpretative responsibilities. In days when legislative agendas are full and the desire to “fix” gaps in procedural legislation fight inertia, courts arguably have even greater responsibility to see if the issue can be resolved through their expertise in interpreting abstract language in concrete cases.

strengths.

But, let’s face it, the gaming of mediation has evolved far beyond such naïveté. Nobody confesses their weaknesses in mediations. Why should they? If the other side already knows, there’s no reason to confess anything. If the other side does not know, it would be downright stupid. Why disclose, voluntarily, something that will weaken your bargaining position?

Kichaven, *supra* note 231, at 130.

In the case of California's mysterious mediation privilege, it would be best if the California legislature could understand and implement the distinction between relational and informational privileges. For the reasons above, I suggest that the mediation privilege be reassigned to Division 8 of the California Evidence Code, dealing with privileges, and be redrafted as a qualified informational privilege. That would mean that the legislature entrusts the California courts with the ability to balance the interest in protecting that information (here, the incentive to mediate in private to reduce the burden on public courts) with other litigants' need for the information. Understanding that the mediation privilege shields informational interests rather than relational interests should make it easier to return that power to the courts, which routinely make these kinds of balancing decisions. Moreover, it would require the legislature to explicitly state, as it does for other privileges, the applicable exceptions, if any, and conditions of waiver. In short, recognizing the mediation privilege as a qualified informational privilege would require both the legislature and the courts to do their respective jobs.

V. CONCLUSION

In these days when personal privacy is threatened, it is not fashionable to argue for more thoughtful and limited approaches to evidentiary privileges, especially in the popular context of alternative dispute resolution. Nonetheless, a nuanced approach that analyzes the rationales for privileges in light of the different relational and informational interests they protect, rather than as a single unitary concept, can help to balance both the desire to protect certain information or to enhance particular relationships and the need for credible, relevant evidence.

This approach to evidentiary privileges, however, can only succeed if the government actors responsible for creating and interpreting privileges work in tandem to identify the interests at stake and apply their separate institutional strengths. Evidentiary privileges in most jurisdictions are created by legislatures. This is not surprising, given the conflicting social policies embodied by each type of privilege. Legislatures provide an open forum for airing these conflicts, for debating their relative merits, and for reaching

political compromise and resolution. Yet when particular courts confront privilege issues, they are faced with excluding evidence that can be crucial to the fair resolution of disputes—both the immediate dispute and long-range disputes. The increasingly secret world of alternative dispute resolution magnifies this problem. The tension is mounting and the pendulum that has swung wildly to the side of privacy and efficiency is just beginning to swing back to openness and the larger public interests protected by the public adversarial process. The mysterious case of the mediation privilege demonstrates that there is a middle ground if one is willing to accept that the opposing positions each have limitations and that courts can be trusted to mediate a fair resolution somewhere in between.

