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Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence

by

KENNETH S. BROUN*

The testimonial privilege rules in the Proposed Rules of Evidence submitted to Congress by the United States Supreme Court in 1972 almost doomed the total project. The presence of those rules became a rallying point for general opposition to the entire proposal and a symbol for all that was perceived to be wrong with the rules as a whole.¹ Not only was the substance of the proposed privilege rules vigorously attacked by scholars, practitioners, judges and members of Congress, the idea that the federal law of privilege should be codified was rejected by many.² Many academics and practicing lawyers preferred an uncodified federal law of privilege, and, in particular, one that relied upon state privilege law.³ There was especially widespread criticism of a federal law of privilege insofar as it would govern diversity cases.⁴

In the fallout that followed the submission of the Proposed Rules, what emerged was a set of evidence rules that included no codification of rules on testimonial privilege. Indeed, the reaction of Congress to the attempt to codify those rules led to an enactment of a

* Henry Brandis Professor of Law, University of North Carolina School of Law. The author is a former member of the Advisory Committee on the Federal Rules of Evidence and is presently a consultant to that committee with regard to the possible adoption of new Federal Rules of Evidence governing privilege. I would like to thank Louis D. Bilionis, Robert G. Byrd, Daniel J. Capra, John M. Conley, the Honorable J. Dickson Phillips, Eileen A. Scallen, the Honorable Milton Shadur, and all of the participants in the faculty workshop at the University of North Carolina School of Law for their helpful comments on drafts of this article.

1. See infra Part I.
2. See infra text accompanying notes 34-60.
3. See infra especially text accompanying notes 48-51.
4. See infra text accompanying notes 48-50.
statute, 28 U.S.C. § 2074(b), that divested the judiciary of any authority to make rules on the subject.\(^5\)

In place of specific rules on privilege, Congress enacted Federal Rule of Evidence 501, a rule that leaves the recognition of testimonial privileges in the hands of the courts, to be developed as part of the federal common law. A federal law of privilege, reflecting this common-law approach, is to govern federal-question and federal criminal cases. State rules of privilege are to control all federal cases governed by state law.\(^6\)

One could argue that Congress, in adopting Rule 501 and § 2074(b), has settled the matter. Arguably, the idea of codification of privileges for the federal courts is dead as a result of a failed and perhaps ill-conceived attempt to treat privilege as simply another branch of the law of evidence.

Congress opted for case by case development of the law of privilege largely because of its negative reaction to controversial proposals.\(^7\) But the solution arrived at is certainly a time-honored one. Privilege rules are to evolve in traditional common-law fashion—to be tailored through the judicial process to meet fact situations as they arise. Such an approach has its benefits, especially where so many important social policies may conflict. The law can evolve as needed, without the risk of being frozen at the drafting stage. Judges are free from the political pressures coming from a public increasingly fearful of crime as well as interest groups concerned about the special interests of their professions.

Despite recognizing the strength of such arguments, this article will take the position that such considerations do not outweigh the benefits that can be achieved by a codified set of privilege rules. The demise of the proposed federal privilege rules in 1974 and the substitution of a common-law approach simply laid the foundation for a new and better conceived attempt at codification—one that reflects both better policy and the political reality of what Congress is likely to do.

\(^{5}\) See infra text accompanying notes 61-62.

\(^{6}\) Federal Rule of Evidence 501 provides:

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

\(^{7}\) See, e.g., H.R. REP. NO. 93-650, at 8-9 (1973). See also infra Part I.
In order to be successful, a new attempt at codification must recognize the objections made to the proposed rules as well as credit crucial decisions made by Congress at the time of the rejection of the proposed rules. Although Congress decided that it would not enact a codification of privilege rules, it did make two critical policy decisions relating to those rules. First, there would be a federal law of privilege, albeit not one codified in the same manner as the bulk of the law of evidence, that would govern in federal-question and federal criminal cases. Second, where state law supplies the rule of decision, state law of privilege is to govern.

The time has come for a codification of the privilege rules that builds on these two congressional decisions. This codification, unlike the first attempt, should be one that recognizes the strong policies behind the various privileges in all of the states as well as the need for opportunities for judicial creation of additional privileges. It now being established that there is a separate federal law of privilege, the primary justification for codification of those rules is the same as it was for all of the evidence rules—a desire for clarification, uniformity and ease of administration. A more generally satisfactory set of rules could be promulgated governing privilege in cases involving federal law than that developed by the courts on a circuit-by-circuit, district-by-district, case-by-case basis. Such rules would not and could not consider all potential problems. But if drafted with sufficient care and input from the public, the bar and the judiciary, the codification can be a significant improvement over the set of rules that have developed in the federal courts under Rule 501.

Regardless of whether it could have chosen otherwise, Congress decided that state law is to apply in diversity cases. That congressional decision clearly satisfies the rule in Erie Railroad Co. v. Tompkins and this article does not propose that the decision be reversed.

9. 304 U.S. 64 (1938).
10. At the time of the submission of the Proposed Federal Rules of Evidence and their ultimate passage by Congress, there was much debate about what law of privilege should apply in diversity cases. Some authors strongly supported the Advisory Committee and Supreme Court decision to apply federal privilege rules to all federal litigation, including diversity actions. See James W. Moore & Helen I. Bendix, Congress, Evidence and Rulemaking, 84 YALE L.J. 9 (1974). Others just as passionately urged the application of state law, at least in diversity cases, whether or not Erie Railroad required such a dissection. See John Hart Ely, The Irrepressible Myth of Erie, 87 HARV. L. REV. 693 (1974). See generally infra note 48 and accompanying text. This article does not seek to reopen that debate, but rather assumes that the decision of Congress to apply state law to cases in which that law supplies the rule of decision is irreversible, for political if not policy reasons. However, the interests of the federal system "in the just and efficient
Part I of this article traces the legislative history of the privilege rules promulgated as part of the proposed Federal Rules of Evidence. Part II discusses the current state of the federal law of privilege. Part III discusses the pros and cons of codification. Part IV suggests the general contours of a codified federal law of privilege. Part V supports the work of the Advisory Committee on the Federal Rules in seeking to promulgate privilege rules and suggests that the work of that committee be submitted by the Judicial Conference to the Supreme Court and ultimately suggested to Congress for enactment under the provisions of §2074(b).

I. Rejection of the Proposed Federal Rules of Evidence Governing Privilege

As originally drafted in 1969, revised in 1971 and sent to Congress by the United States Supreme Court in 1972, the Proposed Federal Rules of Evidence contained nine rules governing specific privileges, all of which had existed at common law. Another rule precluded common-law development of privileges by limiting privileges to those required by the Constitution, Act of Congress, or rules of court. Other rules governed questions of voluntary disclosure, protection of privileged matter disclosed under compulsion or without opportunity to claim privilege and prohibition of adverse comment or inference regarding the assertion of a privilege. The rules were to govern all federal cases, criminal and civil, including both federal-question and diversity cases.

The specific privileges included in the proposed rules were privileges for required reports, communications between lawyer and client, communications between psychotherapist and patient, administration of cases brought into the federal courts, as expressed by Professors Moore and Bendix, supra at 25, are taken into account in some of the discussion, especially in dealing with the issue of the applicable law in cases containing both federal and state claims. See infra text accompanying note 279.

17. Proposed Rule of Evidence 513.
spousal testimony,\textsuperscript{22} communications to clergymen,\textsuperscript{23} political vote,\textsuperscript{24} trade secrets,\textsuperscript{25} secrets of state\textsuperscript{26} and identity of an informer.\textsuperscript{27} Glaringly absent from the rules was a privilege for marital communications, a privilege that was well established in federal case law.\textsuperscript{28} Also noticeably missing was a privilege, existing in many states\textsuperscript{29} although not in federal case law,\textsuperscript{30} generally protecting communications between physician and patient. Other privileges found less commonly in state and federal law were excluded from the submitted rules, including privileges for journalists\textsuperscript{31} and accountants.\textsuperscript{22}

Although some scholars not involved in the drafting of the rules strongly supported the Advisory Committee and ultimately the Supreme Court draft of the privilege rules,\textsuperscript{32} most of the academic

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\item 21. Proposed Rule of Evidence 504.
\item 22. Proposed Rule of Evidence 505.
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\item 24. Proposed Rule of Evidence 507.
\item 25. Proposed Rule of Evidence 508.
\item 26. Proposed Rule of Evidence 509.
\item 27. Proposed Rule of Evidence 510.
\item 28. See, e.g., Blau v. United States, 340 U.S. 332 (1951); Wolfe v. United States, 291 U.S. 7 (1934). The marital communication privilege, protecting confidential communications between husband and wife, must be distinguished from the spousal testimony privilege, which was included in Proposed Rule 505 and gave the accused in a criminal case a privilege to prevent his or her spouse from testifying. Ironically, the spousal testimony privilege was severely curtailed by the United States Supreme Court a few years after the proposed privilege rules were rejected in an opinion that expressly recognized the continuing validity of the marital communications privilege. Trammel v. United States, 445 U.S. 40 (1980).
\item 29. See 1 JOHN W. STRONG, ET AL., MCCORMICK, EVIDENCE ch. 11, at 397-421 (5th ed. 1999); 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 209, at 450 (2d ed. 1994 & Supp. 2000). See also note 238 and accompanying text, infra.
\item 30. Whalen v. Roe, 429 U.S. 589, 602 n. 28 (1977); United States v. Harper, 450 F.2d 1032 (5th Cir. 1971).
\item 31. See discussion in CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5426 (1980). See also infra text accompanying notes 245-49.
\item 32. Id. at § 2427. See also infra text accompanying notes 250-54.
\item 33. In Paul F. Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 GEO. L.J. 125 (1973), the author supported the general concept of federal privileges, even in diversity cases, although he suggested the addition of a spousal communications and general physician-patient privilege, as well as other modifications to the privilege rules as proposed. Moore & Bendix, supra note 10, found the privilege rules a more sensible approach to privileges than is found in the evidence law of many states; see also Testimony of Prof. James William Moore, Rules of Evidence, 1974: Hearings Before the Comm. on the Judiciary, United States Senate, on Fed. Rules of Evidence H.R. 5463, 93d Cong. 29-32 (1974) [hereinafter Senate Hearings].
\end{itemize}
comment was adamant in its opposition to the rules as drafted. So was the testimony before Congress. Representative William L. Hungate, chair of the subcommittee that held hearings on the Supreme Court rules, commented that “50 percent of the complaints in our committee related to the section on privileges.” The Senate Report on the rules called the content of the proposed privilege provisions “extremely controversial.” Although some of the opposition was simply part of a general objection to an evidence code, the arguments against the privilege rules were more frequent and more vehement.

Current and former members of the judiciary chimed in with opposition to the rules in general and to the privilege rules in particular. Chief Judge Henry J. Friendly of the Second Circuit harshly condemned of the concept of evidence rules, and expressed special passion in criticizing the rules on privilege. Former Supreme Court Justice Arthur J. Goldberg condemned the privilege rules as rulemaking incursions into substantive matters. Goldberg commented that even many of those who believed the Court should approve a code of evidence (and he did not count himself in that number) “nonetheless doubt that its authority extends to rules of privilege.”

Groups including the Association of Trial Lawyers of America, the American College of Trial Lawyers, the Washington Council of Lawyers, New York Trial Lawyers Committee, the Project on

35. Senate Hearings, supra note 33, at 6.
38. House Hearings, supra note 37, at 263-64.
39. House Hearings, supra note 37, at 156.
40. Senate Hearings, supra note 33, at 82.
41. Senate Hearings, supra note 33, at 96.
42. House Hearings, supra note 37, at 158-91.
43. House Hearings, supra note 37, at 203-05.
Corporate Responsibility, and Ralph Nader's Public Citizen, Inc. opposed the privilege rules.

These groups and others had made similar protests before the Advisory Committee, both with regard to the rules as originally promulgated in 1969 and prior to the 1971 revision. In its 1971 revision, the Committee took steps to better articulate the rationale for codifying a federal law of privilege governing both federal-question and diversity cases, but left the content of the privilege rules substantially intact.

There were several prongs to the arguments made in opposition to the privilege rules. First, there was strong displeasure expressed at an attempt to codify federal privilege rules in a way that ignored state privileges, especially in diversity cases. Even assuming that the rules were arguably procedural, so as to satisfy Hanna v. Plumer, scholars, practitioners and judges argued that the strong policies behind the law of a state giving rise to a privileged relationship should be considered, especially in dealing with marital privileges. Many opined that such policies were strong enough to call for adherence to a state privilege not only in diversity cases, but also in federal-

44. House Hearings, supra note 37, at 392.
45. House Hearings, supra note 37, at 420.
46. See Statement of Edward W. Cleary, Reporter to the Advisory Committee, House Hearings, supra note 37, at 554.
48. See David W. Louisell, Confidentiality, Conformity and Confusion: Privileges in Federal Court Today, 31 Tul. L. Rev. 101 (1956) (there is a constitutional duty in diversity cases to follow the state law of privilege); Ronan E. Degnan, The Law of Federal Evidence Reform, 76 Harv. L. Rev. 275, 300 (1962) (where the author, although no advocate of privilege and a strong proponent of federal rules of evidence applicable in all cases, states that state law should govern privilege—even those like physician-patient—that were an "instrument of fraud" adding that "it is a substantial affront to strive for a juster justice than the state wishes to provide."); Ely, supra note 10, at 740 (even if there is no compulsion under Hanna to follow state privilege law or even if adopted by Congress there is Congressional power to adopt privilege rules, "it will ignore a view of federalism that admittedly is not the Constitution's, but has nonetheless throughout our history been imposed on the allocation of lawmaking authority in connection with the diversity jurisdiction").
question cases where a failure to recognize the existence of a privilege could have an adverse impact on a relationship privileged under state policy and law.51

Second, objections were raised in the academic community52 and by others in testimony before Congress53 to the elimination of the ability of courts to formulate new privileges if the circumstances warranted. Judge Friendly expressed concern that the proposed rules would “freeze the law of evidence.”54

Finally, the specific decisions made by the drafters with regard to individual privileges were questioned in the strongest terms. The exclusion of spousal communications from the marital privileges55 and the narrowing of the physician-patient privilege to one involving psychotherapists only were the most frequent targets of attack.56 The absence of a journalist’s privilege was also an object of concern for many.57 On the other side of the coin, the juxtaposition of the

51. See Louisell, supra note 48. See also Dunham, supra note 34 (urging recognition of State interests in choosing what privilege law to apply); Weinberg, supra note 34 (arguing against the rules of evidence in their entirety, preferring reference to forum state evidentiary law); Olin Guy Wellborn III, The Federal Rules of Evidence and the Application of State Law in the Federal Courts, 55 TEX. L. REV. 371 (1977) (noting that even determination of relevancy may involve determination of state substantive law); Letter from Mark Reutlinger, House Hearings Supp., supra note 50, at 242-44 (arguing that, as a matter of policy, federal courts should defer to state law). But see Proposed Rule 501 advisory committee’s note, 56 F.R.D. 183, 230 (1972); Testimony of Edward W. Cleary, House Hearings, supra note 37, at 94.

52. Krattenmaker, supra note 34.


54. House Hearings, supra note 37, at 248.


56. See the criticism of the elimination of marital and physician privileges in Black, supra note 34; Ely, supra note 10 (expressing concern for the elimination of both the marital communications and general physician-patient privilege in light of the strong policy reflected in the existence of such privileges in most states); Friedenthal, supra note 34 (criticizing not only the elimination of marital communications privilege and the drafting of the state secrets privilege, but also the Advisory Committee work generally); Krattenmaker, supra note 34, at 69-70; Testimony of Charles R. Halpern and George T. Frampton, Jr. on behalf of the Washington Council of Lawyers, House Hearings, supra note 37, at 158, 160; Testimony of George S. Leisure on behalf of the New York Trial Lawyers Committee, House Hearings, supra note 37, at 203-04.

57. Testimony of Charles R. Halpern and George T. Frampton, Jr. on behalf of the Washington Council of lawyers, House Hearings, supra note 37, at 160, 164; Letter from Corydon B. Dunham on behalf of the National Broadcasting Co., House Hearings, supra note 37, at 544; Testimony of Hon. Bertram L. Podell, House Hearings, supra note 37, at 7;
consideration of the rules with the events surrounding Watergate focused a storm of protest against the broad scope of the proposed privileges for secrets of state and official information.58

Rather than dealing with the specific and substantive criticisms of the proposed privilege rules head-on, Congress sidestepped the issue. There would be a substantial codification of much of the law of evidence including topics such as presumptions, relevancy and hearsay, but there would be no codification of the law of privilege. There was to be a federal law of privilege, but it would be governed by the "principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."59

The controversy over the Proposed Federal Rules of Evidence was not only a controversy over the merits of the proposals, but also about process. Many of the opponents of the privilege rules expressed concern that the policy issues inherent in the recognition or nonrecognition of privileges were ill-suited to the Court initiated rulemaking process.60 Ultimately, the Federal Rules of Evidence were enacted by Congress, rather than approved under the process provided by the Rules Enabling Act.61 Congress then returned the

Testimony of Jack C. Landau on behalf of the Reporters Committee for Freedom of the Press, House Hearings, supra note 37, at 372.

58. Testimony of Hon. Bertram L. Podell, House Hearings, supra note 37, at 6; Testimony of Jack C. Landau on behalf of the Reporters Committee for Freedom of the Press, House Hearings, supra note 37, at 369; Testimony of Arthur J. Goldberg, House Hearings, supra note 37, at 157; Letter from Hon. James Abourezk, House Hearings, supra note 37, at 388; Testimony of Terry F. Lenzner and Joseph D. Gebhardt on behalf of the Project on Corporate Responsibility, House Hearings, supra note 37, at 393; Testimony of Alan B. Morrison on behalf of Public Citizen, Inc., House Hearings, supra note 37, at 424; Testimony of Henry J. Friendly, Chief Judge, United States Court of Appeals for the Second Circuit, House Hearings, supra note 37, at 264. But see the testimony in favor of the state secrets provisions of the proposed rule from Robert Warren, Attorney General of Wisconsin on behalf of the National Association of Attorneys General, House Hearings, supra note 37, at 338-42.

59. FED. R. EVID. 501.

60. Under the Rules Enabling Act, the Supreme Court has the power to prescribe general rules of practice, procedure and evidence for the federal courts. 28 U.S.C. § 2072. With regard to rules others than those involving evidentiary privilege, the Supreme Court transmits a proposed rule to the Congress not later than May 1. If there is no congressional action, the rule takes effect on December 1 of the year submitted to Congress. 28 U.S.C. § 2074(a). For criticism of the concept of an evidence code adopted under the Rules Enabling Act, see, e.g., Testimony of Henry J. Friendly, House Hearings, supra note 37, at 246-65; Testimony of Arthur J. Goldberg, House Hearings, supra note 37, at 142-58. Congress adopted most of the rules as submitted by the Supreme Court. However, it did significantly amend several rules and, as noted, totally abolished the Proposed Rules' attempt to codify privileges. See H.R. REP. No. 93-650, at 8-9 (1973); S. REP. No. 93-1277, at 6-7 (1974); H. CONF. REP. No. 93-1597, at 23-24 (1974).

rulemaking function to the judiciary with regard to future additions, deletions and amendments—except with regard to rules governing privilege. Congress kept the prerogative for creation of privilege rules for itself. The judiciary, including the United States Supreme Court, may suggest new privilege rules, but any such rule would have to be adopted by Congress rather than simply allowed to come into existence as is the case with other rules of evidence.\textsuperscript{62} Otherwise, the law of privilege was to develop in the federal courts in common-law fashion—case-by-case and fact situation by fact situation.

There are several significant lessons to be learned from this legislative history regarding a possible future codification of the privilege rules. First, Congress likes privileges, better than do the courts. Courts, recognizing that privileges may well deprive them of relevant, indeed crucial evidence, often reject new privileges and even more often narrowly construe existing ones.\textsuperscript{63} Congress, fulfilling its political function, listens to public comment supporting specific privileges, especially those protecting valued relationships, even when such comment emanates from interest groups which see a particular privilege as protecting their self-interests.\textsuperscript{64} Congress also respects the decisions of its state counterparts in this area, where state-created relationships are often the focus of the law. As expressed in Rule 501, our national legislature has protected those state expressed policies, at least to the extent of requiring their recognition in cases where state law provides the rule of decision. By rejecting a set of rules that would have eliminated the marital communications and general physician-patient privilege, Congress left the door open for judicial recognition of such privileges in federal-question and criminal cases.\textsuperscript{65} Despite its concern for the interests of the states in protecting relationships created or fostered by them, Congress is willing to see and has called upon the courts to create a federal law of privilege applicable where state substantive law is not controlling. In light of the legislative history, the direction of Rule 501 for the courts to be guided by the principles of the common law should be read as a

\textsuperscript{62} Any "rule creating, abolishing, or modifying an evidentiary privilege" must be approved by an Act of Congress. 28 U.S.C. 2074(b).


\textsuperscript{64} For a discussion of the susceptibility of the legislative branch to such lobbying, see Raymond F. Miller, Comment, Creating Evidentiary Privileges: An Argument for the Judicial Approach, 31 CONN. L. REV. 771 (1999). See also the discussion of the policy of the physician-patient privilege in WRIGHT & GRAHAM, supra note 31, § 5522 (1989).

\textsuperscript{65} Federal courts continued their recognition of the marital communications privilege (see infra notes 79-80 and accompanying text) and their rejection of a general physician-patient privilege (see infra note 93 and accompanying text).
dictate not to stray too far from the established privilege norms existing in most states. Nevertheless, there is a clear opportunity for development of a federal law of privilege within those broad parameters. Such a federal law of privilege is now maturing in our courts. The question is whether now is the time for its codification.

II. The Development of a Federal Law of Privilege Under Rule 501

A. The Current State of the Federal Law of Privilege

There is a federal law of privilege that is as alive and vibrant as in any of the other court systems in the nation. Except in diversity cases, the federal courts have not hesitated to adopt and give shape to most of the privileges that existed at common law, without deferring to the law of any state. Although a number of privileges proposed by litigants have been rejected in the federal courts, the courts, including the Supreme Court of the United States, have recognized new privileges.

Despite the seemingly monumental task of deciding what Congress meant by the "principles of the common law" interpreted "in light of reason and experience," the courts have developed

66. The United States Supreme Court paid significant heed to the existence of a psychotherapist-patient privilege in all states in recognizing such a privilege in the federal system. Jaffee v. Redmond, 518 U.S. 1 (1996). See discussion infra in text accompanying notes 102-03.

67. Instances of the development of the federal law of privilege are referred to throughout this article. See infra particularly cases involving the attorney-client privilege cited in notes 73-77. However, there have been occasions in which lower federal courts have deferred to the privilege law of the state in nondiversity cases. E.g., In re Hampers, 651 F.2d 19, 23 (1st Cir. 1981) (state privilege against disclosure of tax return information); Sabree v. United Bhd. of Carpenters & Joiners of Am., Local No. 33, 126 F.R.D. 422, 424-25 (D. Mass. 1989) (state psychotherapist-patient privilege).

68. See infra text accompanying notes 86-91.

69. See, e.g., Jaffee v. Redmond, 518 U.S. 1 (1996), and cases recognizing a journalist's privileges, infra note 82.

70. The model for Rule 501, was Federal Rule of Criminal Procedure 26, which in turn was based on Funk v. United States, 290 U.S. 371 (1933) and Wolfe v. United States, 291 U.S. 7 (1934) where the Court relied upon common-law principles to guide it in the formulation of the law of privilege. See Earl C. Dudley, Jr., Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law, 82 GEO.L.J.1781, 1788-94 (1994). Congressman William L. Hungate, chair of the House committee that had dealt with the Rules, commented in his testimony before the Senate Committee: "It has been the effort of the committee to draw this bill so that the law of privileges is left where we found it." Senate Hearings, supra note 33, at 6. The Senate report on the rules noted: "[O]ur action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis." S. REP. NO. 93-1277, at 13 (1974).
models for the creation and treatment of privilege that are at least workable. As a leading text notes, "Congress intended to leave privilege law where it had found it, but not to freeze the evolution of the federal common law with respect to the creation, modification, or repeal of specific privileges." And the courts have, with characteristic caution, moved the law forward—slowly. However, given the reality of acting only on a case-by-case basis, whether they have moved the law with sufficient completeness, alacrity or certainty is another question.

Questions involving evidentiary privileges have been frequently litigated since the enactment of Rule 501. The federal law of attorney-client privilege has evolved in hundreds of cases at all federal court levels, led by the Supreme Court of the United States in four cases since 1976. In those cases, the Court has made significant pronouncements with regard to procedural aspects of the privilege, its relationship to the Fifth Amendment, its application in the corporate setting, and its survival beyond the death of the client. A spousal testimony privilege has been recognized, although limited to invocation by the testifying spouse. The Supreme Court has, by dictum, recognized the existence of a marital communications privilege and lower court cases have frequently applied the privilege. Although the Supreme Court did not find that the United States Constitution compels recognition of a journalist's privilege, a limited form of that privilege exists under the case law of most

72. See generally Miller, supra note 64, where the authors note that federal courts have now confirmed all nine privileges contained in the Proposed Rules. See also 2 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL §§ 501.01-03 (8th ed. 2002).
79. Id. at 51.
circuits. The federal courts have also confirmed other privileges proposed in the Supreme Court draft, including the clergy-communicant privilege, a qualified trade secrets privilege, and a state secrets privilege.

Other privileges have been rejected by the federal courts. The Supreme Court has rejected a privilege for academic peer review and one for state legislators. Lower courts have consistently rejected accountants' privileges, parent-child privileges, a general physician-patient privilege, and others.

Jaffee v. Redmond is in many ways the most significant case dealing with the federal law of privilege. The United States Supreme Court's opinion in Jaffee provides a foundation for analysis of the usefulness of any codification of federal rules governing privilege as well as some guidance as to what those rules ought to look like.

Like the Proposed Rules of Evidence, the federal courts have consistently refused to recognize a general physician-patient privilege. However, as did the proposed Rules of Evidence, the

85. E.g. In re under Seal, 945 F.2d 1285 (4th Cir. 1991). In addition to these judicially recognized privileges, as provided by the language of Rule 501, there are many federal statutes that recognize a right to withhold information — privileges of a sort. See the examples given by 2 MUELLER & KIRKPATRICK, supra note 29 at § 220, including Cotton Statistics and Estimates Act, 7 U.S.C. § 472; Census Act, 13 U.S.C § 9; Internal Revenue Code, 26 U.S.C. § 6103; Longshoremens' and Harbor Workers Compensation Act, 33 U.S.C. 930(c); Safety Appliance Act, 45 U.S.C. 41; Federal Aviation Act, 49 U.S.C. 1504. See also Daniel J. Capra, The Federal Law of Privileges, 16 Litig. 32 (1989).
88. E.g., United States v. Frederick, 182 F.3d 496, 500 (7th Cir. 1999); In re Int'l Horizons, Inc. 689 F.2d 996, 1004 (11th Cir. 1982). Those cases after the adoption of the Federal Rules are consistent with federal law prior to 1975, see Couch v. United States, 409 U.S. 322 (1973). See also United States v. Arthur Young & Co., 465 U.S. 805 (1984) (no privilege for tax accrual workpapers prepared by corporation's independent public accountant). Congress has now provided for a privilege of the same dimensions as the attorney-client privilege with regard to communications between a taxpayer and "any federally authorized tax practitioner." 26 U.S.C. § 7525(a)(1).
89. E.g., In re Grand Jury, 103 F.3d 1140 (3d Cir. 1997).
90. E.g., Hancock v. Dodson, 958 F.2d 1367 (6th Cir. 1992); United States v. Moore, 970 F.2d 48 (5th Cir.1992); United States v. Bercier, 848 F.2d 917 (8th Cir. 1988).
91. E.g., In re Sealed Case, 148 F.3d 1073 (D.C.Cir. 1998) (protective function privilege for secret service).
93. See cases cited supra note 90. Although there is no federal general physician-patient privilege, Congress has enacted statutes protecting certain kinds of medical
Court in *Jaffee* recognized a psychotherapist-patient privilege. In so ruling, the Court looked first to the language of Rule 501, finding itself authorized to define new privileges. The Court recognized, citing both legislative history and prior Supreme Court cases that the rule directed federal courts to continue the evolutionary development of testimonial privileges. In deciding whether to recognize a psychotherapist-patient privilege, the court applied a utilitarian test: whether a privilege protecting confidential communications between a psychotherapist and her patient "promotes sufficiently important interests to outweigh the need for probative evidence." The Court stated "that reason and experience" persuade it that it does.

Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

The court found that a psychotherapist privilege would serve the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The Court found the likely evidentiary benefit that would result from the denial of the privilege to be modest. Without a privilege, much of the desirable evidence would be unlikely to come into being—there would be no confidential conversations.

Of particular interest in considering the relationship between federal and state law was the Court’s consideration of state

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information. E.g. 42 U.S.C. § 290dd-2(a) (protection for confidential information obtained in drug abuse prevention program).


97. The utilitarian justification for testimonial privileges is discussed *infra* in the text accompanying notes 161-72.


99. *Id.* at 10 (citation omitted).

100. *Id.* at 11.

101. *Id.* at 11-12.
psychotherapist privileges. The court noted that all fifty states and the District of Columbia have some form of psychotherapist privilege, either by statute or judicial decision. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications. The Court also looked to the inclusion of a psychotherapist privilege in the Proposed Rules of Evidence and to the statement of the Senate Judiciary committee that its action in rejecting the proposed rules “should not be understood as disapproving any recognition of a psychiatrist-patient... privilege contained in the [proposed] rules.”

In defining the privilege, the Supreme Court parted ways with the Court of Appeals, which had recognized only a qualified psychotherapist-patient privilege.

Making the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in Upjohn, if the purpose of the privilege is to be served, the participants in the confidential conversation “must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purposes to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”

Jaffee confirmed some things we thought we already knew. First, there is a federal law of privilege. Second, that law was not frozen at any particular time—either at some imaginary point in the evolution of the common law or at the time of the promulgation of the Federal Rules of Evidence—but could develop in a way that recognized new privileges. Despite the protestations of the dissenters in Jaffee, that

102. Id. at 12-13.
103. Id. at 13.
104. Id. at 14-15 (citing S. REP. NO. 93-1277 at 13). The fact that the Court attached some significance to the existence of a proposed federal rule establishing a psychotherapist-patient privilege (Proposed Rule 504) is consistent with language in some lower court cases, but inconsistent with that in other cases. See Capra, supra note 85. The conclusion one might reasonably draw is that the presence of a proposed rule was helpful to the court, although the absence of such a rule is not fatal. See, e.g., Trammel v. United States, 445 U.S. 40 (1980) and other cases recognizing a marital communications privilege cited supra note 80. Moreover, the Court, by applying the privilege to social workers in Jaffee, created a privilege significantly broader than that contained in Proposed Rule 504.


106. Justice Scalia dissented in Jaffee, castigating the majority for its creation of a “new, vast, and ill defined” privilege. Id. at 20. He expressed particular opposition to the extension of such a privilege to social workers. Id. at 27-36. He was joined in this latter aspect of the dissent by Chief Justice Rehnquist.
recognition could occur judicially rather than through act of Congress.

In addition, the Court's reasoning in *Jaffee* also provides the basis for predicting the approach the Court would take to the entire question of privilege. First, the Court used a utilitarian or instrumental analysis—the privilege serves a function in society by promoting the free flow of information between psychotherapist and patient. Although not precluding other considerations, such as the role that considerations of privacy may play in the recognition of privileges, it is clear that a strong utilitarian argument may be persuasive. Second, the Court is greatly influenced by the prevailing view in the states—the denial of the federal privilege would frustrate the purposes of state legislation. Lastly, whether or not it would require all recognized privileges to be absolute, the Court strongly and persuasively argues for certainty and clarity.

*Jaffee* demonstrates that the law of federal privileges may develop within a common-law framework. New privileges are not precluded, although an analysis of other cases would support a view that their recognition will not be a common occurrence. But the Court's decision and its struggle with both the existence and scope of the privilege also may illustrate the value of a carefully drafted set of privilege rules that bring certainty to the area and take into account both existing federal policy and prevailing state interests.

B. Federal Leadership in the Law of Privilege

Federal privilege law is not radical either in its recognition of privileges or in its definition of them. Certainly, the law of privilege, as is true of virtually all areas of law, differs from jurisdiction to jurisdiction and the federal law is every bit as unique as that of each individual state. An examination of the general statements of the law will, however, reveal differences at the edges but a common core of agreed upon principles. Furthermore, as might be expected, federal cases defining privileges have become important benchmarks for state courts in defining their own law of privilege—particularly with regard to the attorney-client privilege. Landmark Supreme Court decisions with regard to the lawyer-client privilege and the

107. The Court's distinction between the psychotherapist-patient and a general physician-patient privilege on utilitarian grounds is discussed *infra* in the text accompanying note 244.


109. A comparison of the law as expressed in texts dealing with federal evidence, *e.g.*, 2 SALTZBURG, MARTIN & CAPRA, *supra* note 72, with statements of the general law of privilege, *e.g.*, 1 MCCORMICK, *supra* note 29, chs. 8-11, will reveal few remarkable or basic differences.
reaction of the state courts to those decisions serve as an example of the leadership role of the federal courts. The state courts are not bound to accept the Supreme Court’s guidance in the area of privilege except to the extent that the Court bases its decision on the United States Constitution. Yet, decisions of the Court in cases such as Swidler & Berlin v. United States, United States v. Zolin, Upjohn Co v. United States, and Fisher v. United States have become a point of departure for the state courts in dealing with the attorney-client privilege. The Upjohn case has been particularly significant in the state court system. In that case, the Court, while declining to formulate a definitive rule, rejected the control group test with regard to communications in the corporate context. Not all state courts have accepted the Upjohn approach but many have. What is perhaps more significant is that the state courts have often looked to federal cases such as Upjohn as a point of departure in considering the issues. Upjohn has been cited in 43 states since the date of the opinion in 1981. Whether or not states have adopted its rationale, the fact that the case has been so carefully considered by the state courts is an indication of the force of federal precedent in the state courts.

C. Uncertainty in the Federal Law of Privilege

The development of the law of privilege since the enactment of Rule 501 has resolved many significant issues regarding recognized privileges. There is little disagreement among the circuits on a number of important questions. Such resolution has been achieved

117. See, e.g., Samaritan Found. v. Goodfarb, 862 P.2d 870 (Ariz. 1993) where the court carefully considered the Upjohn analysis, compared it to the control group test, and developed a test of its own. The Arizona legislature later overturned the Goodfarb test and went to a test based more closely on Upjohn. Ariz. Rev. Stat. § 12-2234 (West 2001).
118. This number was obtained in September, 2001, through Westlaw’s Keycite service.
119. Similarly, by September 2001, the Fisher case has been cited by the courts of 42 states; Zolin by the courts of 24 states and, since its promulgation in 1998, Swidler & Berlin has been cited by the courts of 11 states according to Westlaw’s Keycite service.
either through relatively consistent application of agreed upon principles or by a Supreme Court decision, as in Upjohn.  

But, not surprisingly, there are other questions and discrepancies that remain unresolved. No codification will resolve all problems existing in the common law. Yet, good, thoughtful drafting can eliminate many of the most troublesome areas and at least suggest a generalized approach for dealing with others. In the case of the law of testimonial privilege, such problems are significant enough that remediying them through codification should be seriously considered. Although it would not be useful to attempt to catalog all uncertainties, a few examples illustrate the kinds of questions that might be resolved through a new set of carefully drafted rules governing privilege.

Because it is the privilege most commonly invoked in the federal courts, most of the unresolved issues involve the attorney-client privilege. For example, questions arise concerning the ability of a corporation or its officers to assert the attorney-client privilege with regard to communications between corporate officers and corporate counsel in an action brought against it or on its behalf by its shareholders. The leading case is from the Fifth Circuit, Garner v. Wolfinbarger, where the court set out criteria for the abrogation of the privilege in such a situation. Although no court of appeals has completely rejected Garner, a few district courts have done so. Some federal courts, in addition to recognizing the existence of limitations in a derivative action, have applied the Garner criteria to actions brought by shareholders in their own right. Others have held that the privilege must apply and that the Garner criteria are inapplicable where the action is not derivative. Commentators have seriously questioned the wisdom of the Garner test, particularly

120. See 2 SALTZBURG, MARTIN & CAPRA, supra note 72; 2 MUELLER & KIRKPATRICK, supra note 29, §§ 169-231.


122. 430 F.2d 1093 (5th Cir. 1970).

123. See, e.g., Shirvani v. Capital Investing Corp., Inc., 112 F.R.D. 389, 390-91 (D. Conn. 1986); Milroy v. Hanson, 875 F. Supp. 646, 651-52 (D. Neb. 1995). Other, more recent, district court cases have embraced the Garner doctrine, even without approval from the Court of Appeals in the Circuit, see, e.g, In re Gen. Instrument Corp. Sec. Litig., 190 F.R.D. 527 (N.D. Ill. 2000).

124. Fausek v. White, 965 F.2d 126, 130-31 (6th Cir. 1992); Ward v. Succession of Freeman, 854 F.2d 780, 786 (5th Cir. 1988); In re Occidental Petroleum Corp., 217 F.3d 293, 298 (5th Cir. 2000).

125. Weil v. Inv/Indicators, Research & Mgmt., Inc., 647 F.2d 18, 23 (9th Cir. 1981).

outside the context of a derivative action. Questions also arise concerning the application of the Garner principles outside the context of shareholder suits—for example, in other cases in which the party had a fiduciary obligation to the opposing party.

There is a virtually universally accepted exception to the attorney-client privilege that abrogates the privilege if the services of the lawyer were used to enable the client to commit a crime or fraud. Does the crime-fraud exception apply to statements made in furtherance of intentional torts other than fraud? Several federal cases that have looked at the issue have expanded the exception to include intentional torts. However, virtually all are district court opinions. The District of Columbia Circuit uses language that includes other types "of misconduct fundamentally inconsistent with the basic premises of the adversary system." However, the District of Columbia Circuit decisions using this language have always involved criminal or fraudulent activities. The Tenth Circuit has expressly rejected an expansion of the exception beyond crime or fraud.

Another area of significant federal court uncertainty concerns the effect of an inadvertent disclosure of matter covered by the attorney-client or another privilege. Some federal courts have held that there is a waiver regardless of the circumstances of the disclosure, including situations in which no blame can be attached to either the attorney or her client. Other courts have looked to the circumstances and have held that an inadvertent disclosure does not necessarily result in waiver. There are a significant number of cases dealing with the issue as well on the distinct but related issue of

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128. See 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 8:23 (West 1999).
129. See UNIF. R. EVID. 502; 1 MCCORMICK, *supra* note 29, § 95, at 380-83.
131. *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985); *In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982).
132. Motley v. Marathon Oil Co., 71 F.3d 1547, 1551 (10th Cir. 1995).
133. See *In re Sealed Case*, 877 F.2d 976 (attorney-client) (D.C. Cir. 1989); *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672 (D.C. Cir. 1979) (attorney-client); Texaco P.R., Inc. v. Dept. of Consumer Affairs, 60 F.3d 867 (1st Cir. 1995) (attorney-client).
134. E.g., Alldread v. City of Grenada, 988 F.2d 1425 (5th Cir. 1993); Redland Soccer Club v. Dept. of the Army, 55 F. 3d 827 (3d Cir. 1995).
whether, under some circumstances, there can be a selective waiver of a privilege.\textsuperscript{136}

There is even a split of authority in the federal courts as to the extent that communications from an attorney to her client are privileged. Under the broader view, such communications are privileged regardless of whether the lawyer's communications reveal confidences from the client.\textsuperscript{137} Under the narrower view, the attorney-client privilege is held not to protect a communication by an attorney to her client where the communication does not reveal a client confidence.\textsuperscript{138}

Similar problems exist with regard to other privileges recognized under the federal common law. For example, the federal circuits take different approaches in looking at the question of whether the marital communications privilege applies where the parties have acted jointly in the commission of a crime. Some cases articulate a pure joint participant privilege: the communication is not privileged if it had to do with the commission of a crime in which both spouses were participants.\textsuperscript{139} Another case describes the exception as applying where statements are made in \textit{furtherance} of criminal activity.\textsuperscript{140} Others require that the communications involved "patently illegal activity."\textsuperscript{141} In addition, the various federal circuits take different approaches to how the viability of an existing marriage affects the application of the marital communication privilege. Some apply a test that says that the privilege does not exist where the couple has separated and the marriage is irreconcilable.\textsuperscript{142} Others look simply to the question of whether the couple has permanently separated.\textsuperscript{143}

Like all other common-law rules, the courts will no doubt eventually work through all of these questions and the countless others that still exist in the federal law. The common-law tradition would leave the development of the law to such a case-by-case determination. However, even recognizing that not all potential problems can or should be resolved in any codification of any rule of law, it would be much simpler and much more certain for all concerned if there were a federal rule guiding the courts through the

\textsuperscript{136} Compare Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) with Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414 (3d Cir. 1991). \textit{See also} 2 SALTZBURG, MARTIN & CAPRA, supra note 72, \S 501.02[b][k][iii] at 501-48 to 501-50.

\textsuperscript{137} \textit{E.g.}, Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1370-71 (10th Cir. 1997).

\textsuperscript{138} \textit{E.g.}, Potts v. Allis-Chalmers Corp., 118 F.R.D. 597, 603 (N.D. Ind. 1987).

\textsuperscript{139} \textit{E.g.}, United States v. Hill, 967 F.2d 902, 911-12 (3d Cir. 1992).

\textsuperscript{140} United States v. Marashi, 913 F.2d 724, 730-31 (9th Cir. 1990).

\textsuperscript{141} United States v. Evans, 966 F.2d 398, 401 (8th Cir. 1992); United States v. Sims, 755 F.2d 1239 (6th Cir. 1985).

\textsuperscript{142} United States v. Murphy, 65 F.3d 758, 761 (9th Cir. 1995).

\textsuperscript{143} United States v. Porter, 986 F.2d 1014, 1018-19 (6th Cir. 1993).
more predictable and important issues. The question remains whether there are such adverse consequences from codification in this area of the law as to militate against such a fix.

III. The Value of Codification

A. Codification in General

Codification lends itself to uniform, consistent application in ways that common-law development cannot do. In its Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States noted: "Rules of court used to regulate the admissibility of evidence and the competency of witnesses have many of the advantages displayed by other rules of court governing procedure. The principles, precedents, and procedures can be organized, clarified, simplified, and abbreviated."144

Although the privilege rules he proposed were rejected and many of the other evidence rules he drafted changed significantly, the genius of the Advisory Committee's reporter, Edward Cleary has never been doubted. Cleary expressed the justification for the codification of the law of evidence generally as based on five principles:

(1) Evidence, more than any other field of law, calls for making decisions on the run. An effective law of evidence thus must be an accessible law of evidence.

(2) Literature on evidence is complex and of tremendous volume.

(3) Uncertainties inevitably plague the trial lawyer and judge.

(4) Making law by decision is an accidental and fragmentary process.

(5) Precedent may be misleading as a reflection of investigation and experience.145

Although the Federal Rules of Evidence adopted by Congress are often criticized on their individual merit,146 the rules have clearly served to provide a uniform, relatively easy to understand set of guidelines for federal judges. The value of the codified federal rules

has been recognized by the thirty-nine states which have adopted rules based upon them.\footnote{147. UNIF. R. EVID., Table of Jurisdictions Wherein Rules Have Been Adopted (West 2001). Thirty-nine states and Puerto Rico are listed as having adopted the Uniform Rules of Evidence, which, at the time of their adoption by these jurisdictions, were very closely based on the Federal Rules.}

B. Why Codify the Law of Privilege?  

The principal distinction between privilege and other admissibility rules, i.e., that privileges are based on policy considerations external to the litigation at hand rather than facilitating rational determination of that litigation, does not diminish the need for organized, clarified, and simplified rules. Moreover, if, as will be discussed, the rationale of privilege is to protect the privacy of individuals, there is a strong reason to provide a set of consistent, easily understood principles so as to readily determine the limits of that privacy.

In 1962, Professor Ronan Degnan foresaw the eventual development of a fairly sophisticated federal law of evidence through the case law. However he opined that that law would not be created without the constant intervention of the courts of appeals and Supreme Court of the United States—and that it would still not be uniform.\footnote{148. Degnan, supra note 48.} Most of the federal law of evidence has not been left to this case-by-case development. The law of privilege has been, and it has developed in exactly the way that Professor Degnan predicted—there is a reasonably sophisticated federal law of privilege, but it has been created and continues to be redefined through intervention by the higher courts. And it is still not uniform.

Professor James William Moore, in his testimony before the Senate committee considering the house amendment that eventually became Federal Rule 501, believed that such a rule—providing essentially for common-law development of the law of privilege—was necessarily "provisional in nature.\footnote{149. Senate Hearings, supra note 33, at 32.} He found that the proposed Rule 501 had merit, but only as an interim statement. He was concerned about cases in which federal and nonfederal issues were intertwined\footnote{150. See infra discussion in text accompanying notes 263-80.} and, more importantly for the question of future codification, he was convinced that "structured and adequate rules on privilege will be slow in emerging.\footnote{151. Senate Hearings, supra note 33, at 33.} Professor Moore was right to be concerned on his second ground. In the more than twenty-five years since the promulgation of Rule 501, federal privilege rules have...
emerged, but, as previously discussed, they have been slow in coming and the court decisions with regard to them are filled with inconsistencies and inadequate guidance for the judicial system, counsel, and ordinary citizens.

But are codified rules the answer? In order to decide whether to codify, it is useful to look to see what exactly might be codified.

(1) What Do We Mean by Privileges?

There are rules that are based at least in part on policy considerations external to the litigation, such as rules governing the admission of evidence of subsequent repairs or of settlement negotiations, that some would classify as privileges. Such rules are already part of the Federal Rules of Evidence. However, such rules are also based in part on considerations of relevancy and are directed only to the question of admissibility of evidence in the proceedings between the parties to the litigation—not to the question of whether someone, a party or a nonparty to the litigation, can be compelled in discovery, before a grand jury or in another setting to disclose information. A better analysis separates such rules from true privileges. Rules of privilege exempt someone from the general duty to provide information to a tribunal and are enforced to prevent the introduction of evidence even though the witness invoking the rule has no connection to the litigation at hand.

The rules we ought to talk about codifying are the kinds of rules that were contained in the rejected Article V of the Proposed Federal Rules of Evidence—privileges such as those governing

152. See supra Part II.
153. FED. R. EVID. 407.
154. FED. R. EVID. 408.
156. In addition to Rules 407 and 408, see also FED. R. EVID. 409, Payment of Medical and Similar Expenses; FED. R. EVID. 410, Inadmissibility of Pleas, Plea Discussions, and Related Statements.
157. 2 MCCORMICK, supra note 29, §§ 266, 267; WRIGHT & GRAHAM, supra note 31, §5422 at 668.
158. FED. R. EVID. 606(b), which prohibits a juror from testifying as to matters occurring during the course of the jury's deliberations, is another example of an evidence rule that is not based even in part on considerations of relevancy. The rule is based on considerations unique to the jury system. It is intended to encourage freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. See FED. R. EVID. 606(b), Advisory Committee's Note. Testimonial privileges of the kind contained in rejected Article V of the Proposed Federal Rules of Evidence are based on considerations that are so different that it is not useful to consider Rule 606(b) in connection with them.
159. WRIGHT & GRAHAM, supra note 31, § 5422, at 668 (1980).
160. 1 MCCORMICK, supra note 29, § 72.1.
communications between attorney and client, psychotherapist and patient, penitent and clergy member, and husband and wife.

(2) **Why Should We Protect Privileged Communications from Disclosure?**

In separating true privilege rules from hybrids such as the rule limiting evidence of subsequent repairs, the vulnerability of privilege rules in general is exposed. True privilege rules do nothing to assist the truth-finding function in the case being adjudicated. Rather, they detract from it.

The traditional justification for this departure from the usual and ideal quest for a rational determination in a litigated matter was utilitarian or instrumental.\(^{161}\) Although privileges may hinder the truth-seeking process by withholding information from the parties and, most significantly, the trier of fact, proponents have sought to justify the rules on the ground that they serve to protect some relationship or other societal goal.\(^{162}\)

Dean Wigmore provided the most frequently quoted statement of the conditions necessary to the establishment of a privilege under the utilitarian analysis:

1. The communications must originate in a *confidence* that they will not be disclosed;
2. This element of *confidentiality* must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The *relation* must be one which in the opinion of the community ought to be sedulously fostered; and
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.\(^{163}\)

Whether Wigmore's final criterion is satisfied with regard to existing privileges has not been without debate even when applied to the most enduring of all evidentiary privileges—that protecting communications between attorney and client. More than a century

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\(^{161}\) I use the terms "utilitarian" and "instrumental" interchangeably to refer to the theory that the privilege rules are justified as useful in protecting a relationship or other societal goal. Some authors use the term "utilitarian" in reference to such a rationale, see 1 MCCORMICK, *supra* note 29, § 72; others use the term "instrumental" to refer to the same policy, see WRIGHT & GRAHAM, *supra* note 31, § 5422.

\(^{162}\) See Louisell, *supra* note 48, at 102. Professor Louisell noted:

> I believe that the historic privileges of confidential communications protect significant human values in the interest of the holders of the privileges, and that the fact that the existence of these guarantees sometimes result in the exclusion from a trial of probative evidence is merely a secondary and incidental feature of the privileges' vitality.

Professor Louisell also cites the wide acceptance of privilege in other legal systems based upon a similar rationale. *Id.*

\(^{163}\) 8 WIGMORE, *EVIDENCE* § 2285, at 531 (1940).
ago, Jeremy Bentham argued that the attorney-client privilege protected only the guilty; the innocent did not need it.\(^{164}\) Wigmore responded by agreeing that Bentham was right in some cases, but that the lines between right and wrong were not as clearly defined as Bentham would have us believe.\(^{165}\) The privilege at least gives more freedom to the client to consult with a lawyer, and to the lawyer to determine the legal implications of information received.\(^{166}\)

In essence, the existence of the privilege lets the client feel free to pass on information so that the lawyer can judge for herself whether or not it is of significance in the matter about which the client has consulted. Yet, despite his defense of the privilege, Wigmore had mixed emotions about it, describing its benefits as “indirect and speculative” and its obstruction as “plain and concrete,” and warning that “it ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.”\(^{167}\)

There is little empirical evidence on the value of evidentiary privileges in promoting the free flow of information in the cases of protected relationships.\(^{168}\) Perhaps the best that can be said is that there is little evidence that the privileges are not effective in providing such protection. Intuitively, Wigmore’s utilitarian justification works fairly well in the case of the lawyer-client privilege. One could certainly envision situations in which the absence of a privilege would make a lawyer much less aggressive in seeking information and that such inhibition would adversely affect her representation of her client.\(^{169}\) Similarly, as the Court noted in \textit{Jaffee}, the absence of a privilege could chill communications between psychotherapist and patient.\(^{170}\) As will be noted later, despite the Court’s dictum in \textit{Jaffee},

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165. \textit{8 Wigmore, Evidence supra} note 163, § 2291, at 555.

166. \textit{Id.} at 556. Wigmore also had modestly more faith in lawyers to avoid “treachery” than did Bentham. \textit{Id.} at 556-57.


168. There have been a few limited empirical studies of the effectiveness of privileges but little conclusive can be gained from them. \textit{E.g.} Daniel W. Shuman & Myron S. Weiner, \textit{The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege}, 60 N.C. L. Rev. 893 (1982); Note, \textit{Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine}, 71 Yale L.J. 1226 (1962). In Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998), the Court referred to empirical information with regard to the likely effect of the posthumous termination of the attorney-client privilege as “scant and inconclusive.” The same might easily be said about privileges generally.


\end{footnotesize}
there may also be similar utilitarian justifications for a general physician-patient privilege. 171

The rationale is somewhat less compelling in the case of the marital communication privilege and others such as the clergy privilege. Arguably, a spouse is less likely than, say, an attorney or physician, to be aware of the existence of a legal privilege and the maintenance of legal confidentiality is thus perhaps an insignificant factor in fostering communications between husbands and wives. 172 Even in the absence of a legal privilege, the compulsion of one’s religion might be sufficient to encourage full communications with a member of the clergy.

But there are other justifications for the law of privilege that can be more readily applied to communications with clergy and between spouses. Those same justifications also give added weight to the privileges that may have primarily a utilitarian basis.

Many modern day writers justify the creation and continued existence of privilege on the protection they give to individual privacy. A person has a right, inherent in our society if not constitutionally based, 173 to consult with various people without fear that the government, through its court system, will compel that the subject matter of that consultation be disclosed without the speaker’s consent. 174 As one writer, Professor Thomas Krattenmaker, puts it privacy is the “voluntary and secure control one possesses over communication of information about oneself. . . . [R]ejection of a claim of privilege destroys the claimant’s control over the breadth of the audience receiving personal information as well as his control over the timing and conditions of its release.” 175 He adds that recognizing a claim of personal privilege embodies the fundamental respect which society does, and should hold for the right of privacy. 176

171. See infra text accompanying notes 241-44.
173. See discussion in Dudley, supra note 70, at 1818-21. The journalist’s privilege has been viewed as rooted in the First Amendment even if not required by it. See Branzburg v. Hayes, 408 U.S. 665 (1972); Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981); Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993). See also infra text accompanying notes 245-49.
174. See Black, supra note 34, emphasizing privacy and the need to assess privilege in the context of a particular case.
175. Thomas G. Krattenmaker, Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach, 64 GEO. L. J. 613, 649 (1976). Krattenmaker also argues: “By providing individuals with a tool to control the limits of the dissemination of personal information they choose to disclose, testimonial privileges serve as important protectors of the right of privacy.” Id. at 651-52.
176. Id. at 654. Krattenmaker adds:

Recognition of a particular confidant’s claim of privilege also upholds and reinforces that person’s right of privacy. Finally, since society cannot protect against all abridgements of that right it becomes more, not less, imperative that
Closely related to this generalized privacy concept, is the argument of Professors Wright and Graham, that "in a society with equalitarian pretensions," individuals must be free to resist the power of the state to compel information in certain instances.\footnote{177}

privacy be preserved whenever possible. Although society cannot guarantee the inviolability of every man's every attempt to strike his own balance between secrecy and participation, this is no reason to unleash judges to compel divulgence of every confidence they can discover. For these reasons, societal approval of an invoked testimonial privilege enhances everyone's security and privacy.


177. \textsc{Wright & Graham, supra} note 31, § 5422, at 675-76.

Given the political nature of privileges, it is not surprising that in most states the allocation of these exemptions tends to follow the distribution of political power in contemporary society. Powerful institutions—such as the church, government, and corporations—and professions that primarily serve a monied clientele (and are therefore thought prestigious)—doctors, lawyers, and psychiatrists—are given privileges to preserve their secrets and those of their clients. But professions and institutions that serve analogous functions for working class people are denied such protection; compare, for example, the treatment of communications to tax lawyers with those to storefront tax preparers.

\textit{Id.} at 675-76 (footnotes omitted). Wright and Graham's treatment of the question engendered a lively debate between them and the Harvard students authoring the Note, \textit{supra} note 169. The Harvard student note seeks to reconcile the traditional instrumental justification with the privacy rationale, providing a "full utilitarian framework." \textit{98 HARV. L. REV.} at 1484.

In sum, when deciding whether to create a new privilege or to abolish an existing one, decisionmakers should weigh both the beneficial behavioral effects of privileges and the immediate benefits of protecting confidentiality against the cost of privileges to the correct disposal of litigation. Generally, the beneficial behavioral effects involve the systemic encouragement of communication, and the immediate benefits include the protection of privacy. But privileges can have both immediate benefits beyond the protection of privacy and systemic benefits apart from the encouragement of communications. All of these benefits merit consideration in a full utilitarian justification of privilege law.

\textit{Id.} at 1486. The Harvard note authors reject the power analysis put forth in Wright and Graham and see legitimate choice making by legislatures in formulating privilege rules. \textit{Id.} at 1496-97. Wright and Graham vigorously defend their use of the power argument. See \textsc{Wright & Graham, supra} note 31, § 5422.1 (Supp. 2000).

We can happily endorse the statement of the [Harvard note] authors that in advancing the interests of the powerful at the expense of the majority "privilege law is no different from \(*\ast\ast\ast\) most law in a democratic society." It is precisely because we reject the debased notion of democracy that animates this statement that we believe that those who have a more egalitarian and less procedural view of politics can profitably labor in the relative obscurity of evidence law. We leave it to those who care little about distributive justice to comfort themselves with the knowledge that "our existing system of privilege is legitimate" because it well "expresses the overall balance of power in society."

\textit{Id} at 409-10 (footnotes to Harvard note omitted).
Another nonutilitarian rationale for privilege is that it gives recognition to the duty of loyalty owed by the recipient of information to the person confiding in her. Ethics rules make confidentiality a duty of the professional.78 A failure to protect such communications via a testimonial privilege would adversely affect the professional in the performance of her duties.79 In the marital communications context, the abrogation of a privilege may force breaches in spousal loyalty.

The best arguments for the maintenance of privilege are those that are based on both instrumental considerations and those arising from considerations of privacy, human dignity and loyalty.80 Lawyer-client communications should be protected because the free flow of information between them may be enhanced by the existence of the privilege. In addition, an individual ought to have someone to advise her on matters of legal urgency without the fear that her communicated thoughts will be exposed by subpoena. The power of the state ought not extend to interference with the relationship between client and counsel. Similar arguments can be made with regard to other privileges. For example, the psychotherapist or the physician, like the attorney, relies upon a free flow of information. Even if such communications are enhanced only a little by the existence of the privilege, the protection may be justified when one also considers that public exposure of most such communications, even when needed to resolve a legal dispute, would be repugnant to most of society.

If the only excuse for evidentiary privileges is that they are instruments created to protect certain relationships, a strong argument can and has been made that the law of the jurisdiction having the closest connection to those relationships should be

178. See, e.g., MODEL RULE OF PROF'L CONDUCT R. 1.6 (1983). With regard to the application of similar principles to the clergy, see Comment, Should Clergy Hold the Priest-Penitent Privilege?, 82 MARQ. L. REV. 171, 186 (1998).


180. WRIGHT & GRAHAM, supra note 31, at 673, note that the value of such non-instrumental arguments is that they are not subject to disproof by evidence, although they require agreement on values. The authors further note instrumental arguments are better suited to defending governmental and corporate privileges, where questions of human dignity are not as readily apparent.
controlling. Under this analysis, state policy protecting the relationships it created should govern even in federal court and even in federal-question cases. On the other hand, the alternative rationales for the creation of a privilege (the recognition of privacy of individuals, human autonomy and the loyalty of the recipient of information to the speaker) transcend the power of those who create or supervise the relationship. The need for confidentiality based on these considerations must be weighed against the need for truth in the tribunal before which evidence is sought to be excluded. The court system in which the trial occurs has a right and obligation to determine whether the suppression of relevant evidence is justified. The decision of that court system should be made without regard to who created the relationship.  

Rule 501 preserves the ability of the federal courts to make these kinds of decisions. Except in cases in which the federal courts serve simply as the forum in which state disputes are resolved in diversity of citizenship cases, there is to be a federal law of privilege implementing federal policy. The next question is whether the recognition of nonutilitarian rationales also supports the codification of privileges as opposed to their development in the common-law process envisioned by the current federal rule. 

Arguments can be constructed that a common-law approach, in which the application of the law of privilege is determined on a case-by-case basis, is better suited to the protection of privacy rights and other considerations. The courts can tailor and adjust the law of privilege to meet special circumstances. The law can develop to meet modern circumstances in a flexible, common sense manner, unfettered by political considerations that necessarily go into the legislative process that would be involved the creation of a privilege code. 

There are persuasive counterweights to such arguments. Fairness and freedom from external political pressures have certainly not been universally present in our judicial rulemaking. For example, judges are as vulnerable as legislators to a “let’s get tough on crime” mood in the nation. More importantly, if there is to be a federal law of privilege and a significant justification for such a law is the

181. See Krattenmaker, supra note 175; Dudley, supra note 70.

182. Even those who generally advocate following state rules of privilege recognize that there are instances in which federal policy is so strong that federal law ought to govern even in the presence of a contrary state rule. See, e.g., Dudley, supra note 70, at 1826-28 (where the author agrees that the federal courts appropriately rejected a state privilege for legislative acts in United States v. Gillock, 445 U.S. 360 (1980)).

183. See Barbara C. Salken, To Codify or Not to Codify—That is the Question: A Study of New York’s Efforts to Enact an Evidence Code, 58 BROOK. L. REV. 641, 694 (1992). See also notes 210-12 and accompanying text.
protection of confidentiality needed to preserve privacy or a duty of loyalty, such a societal goal is likely to be better served by codified rules rather than by the slower and less certain process of court decision. The more predictable one's entitlement to privacy is, the more secure one can feel in exercising that privacy. If the case law is muddled and rights unclear, one's willingness to exercise a right to privacy may be effectively restrained. 184 There is no freedom to communicate with the intent to keep a matter confidential if there is doubt as to whether that confidence will in fact be respected. To be sure, not all confidences, even those involving persons who may have privileges under some circumstances, will be honored under either a common-law or code approach. The value of an individual's interest in any given situation must always be weighed against the judicial system's interests in having access to "every man's evidence." 185 However, under a code approach, more certainty can be added to the protections that are to be given. If there are limitations on privacy, let those limits be clearly set forth so that the communicants can know where they stand. Where judicial judgments need to be made as in the case of privileges that are less than absolute, let the standards be articulated in a clear and accessible manner. Moreover, the parties and the courts whose access to evidence is restricted by privileges are also entitled to firm and understandable rules governing what is admissible. Such rules now exist for most of the law of evidence. The addition of codified rules of privilege could bring greater clarity to another important area of evidence law.

C. Federal Rules as Models

State court systems have traditionally turned to federal codifications as models, or as one writer put it, the federal rules are "leadership rules." 186 This has been true of the Federal Rules of Civil Procedure, and despite some predictions to the contrary, 187 of the Rules of Evidence. Even the controversial and rejected federal rules of privilege have served, at least in some measure, as models for half

184. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Upjohn v. United States, 449 U.S. 383, 393 (1981). See also Jaffee v. Redmond, 518 U.S. 1, 17-18 (1996).


186. See Charles L. Black, Jr., supra note 34, at 48: "Federal Rules are leadership rules and ought to lead in the right direction, which to me would be in the direction of greater rather than less protection of personal privacy. . . ."

187. See Weinberg, supra note 34.
the states.\textsuperscript{188} As discussed above, state courts are using federal cases to help them define their law of privilege.\textsuperscript{189}

An argument can be made that there is no need for a federal model for privilege rules; the Uniform Rules of Evidence can serve as that guide. Indeed, it is probably inaccurate to say that the states have adopted the Federal Rules of Evidence. Most have in fact adopted the Uniform Rules. The Uniform Rules are based on the Federal Rules—including privilege rules that adopt in large measure Article V of the Proposed Rules of Evidence rejected by Congress.\textsuperscript{190} However, unlike the Proposed Federal Rules, the Uniform Rules contain a marital communications privilege\textsuperscript{9} and provide for an optional general physician-patient privilege.\textsuperscript{32} Given the existence of these provisions, the Uniform Rules accurately reflect principles common to most states. Nevertheless, based on past history, it is safe to predict that a new codification of the federal law of privilege would make greater inroads on state law than have the Uniform Rules. A new set of federal privilege rules should be attractive both to those states that have rejected the original proposed privilege rules, as incorporated into the Uniform Rules, and, as a model for amendment, to the states that have adopted those rules. Assuming that some national uniformity of laws of privilege is a good thing, a federal codification seems likely to lead us closer to that goal.\textsuperscript{193}

D. Why Not Codify?

At or near the time of congressional consideration of the Federal Rules of Evidence, some commentators made cogent arguments against any codification of evidence rules at all.\textsuperscript{194} Those arguments

\textsuperscript{188} Twenty-four states have adopted at least some of the proposed federal privilege rules. ALA. R. EVID. 501 to 512A; ALASKA R. EVID. 501 to 512; ARK. R. EVID. 501 to 512; COLORADO R. EVID. 501; DEL. R. EVID. 501 to 513; FLA. STAT. ANN. §§ 90.501-90.510 (West 2001); HAW. R. EVID. 501 to 513; IDAHO R. EVID. 501 to 520; IND. R. EVID. 501; KENTUCKY R. EVID. 501 to 511; MARYLAND R. EVID. 501 to 513; MISS. R. EVID. 501 to 505; MONTANA R. EVID. 501 to 505; NEBRASKA REV. STAT. §§ 27-501 to 27-508 (2001); NEVADA REV. STAT. §§ 49.015 to 49.405 (2001); NEW MEXICO R. EVID. 11-501 to 11-514; NORTH DAKOTA R. EVID. 501 to 512; OKLAHOMA STAT. ANN. tit. 12, §§ 2501 to 2513 (West 2001); SOUTH DAKOTA CODIFIED LAWS §§ 19-13-1 to -19-13-32 (Michie 2001); TENNESSEE R. EVID. 501; TEXAS R. EVID. 501 to 513; UTAH R. EVID. 501 to 508; VERMONT R. EVID. 501 to 512; WISCONSIN STAT. §§ 905.01 to 905.15 (2001).

\textsuperscript{189} See text accompanying notes 109-119, supra.

\textsuperscript{190} See UNIF. R. EVID. 501 et seq. Uniform Rules based on the Proposed Federal Rules were first drafted in 1974 and were amended in 1986 and 1999.

\textsuperscript{191} UNIF. R. EVID. 504.

\textsuperscript{192} UNIF. R. EVID. 503.

\textsuperscript{193} See Degnan, supra note 48, at 301. No advocate of privileges, Degnan nonetheless wrote: "Thoughtfully formulated privilege rules in nondiversity cases may influence the states to re-examine their own approaches to confidences." Id.

\textsuperscript{194} See text accompanying notes 37-39, supra.
may have been plausible when they were set forth, but the development of the law since the adoption of current rule 501 has refuted most of them.\footnote{195}

Professor Louise Weinberg believed that trial lawyers were more concerned about uniformity of evidence law between state and federal courts than about uniformity within the federal courts.\footnote{196} She predicted, based upon the failure of a significant number of states to adopt either the original Uniform Rules of Evidence\footnote{197} or the earlier Model Code of Evidence,\footnote{198} that the Federal Rules would not develop into a significant trend.\footnote{199} Although her argument was reasonable, she turned out to be wrong. The Federal Rules of Evidence have become the standard. New lawyers must demonstrate their knowledge of those rules in virtually every state through the Multi-State Bar Examination.\footnote{200}

The idea that each federal court should mold its privilege rules to meet state law is no longer a viable option—the development of a federal law of privilege under Rule 501 has put that possibility to rest. The confusion of parallel evidence systems has not proven to be a problem—the federal system has dominated and will continue to dominate the law of evidence in general and the law of privilege in particular.

Professor Weinberg also argued that the Federal Rules would fail as a model at least in part because they failed to simplify the common law.\footnote{201} Whether or not the Federal Rules simplify the common law is a matter of debate. But whatever the answer to that question, the rules were satisfactory enough to the states that a substantial majority have adopted them almost verbatim as their own.\footnote{202} Professor Weinberg simply underestimated the persuasive influence of the federal system on the states.

Like Professor Weinberg, but writing to support the general desirability of federal rules of evidence, Professor, now Judge, Jack Weinstein recognized the pressures for conforming federal law to the

\footnotesize{195. Not all the commentary in favor of judicial development of the law of privilege has been limited to the time of the rejection of the proposed rules. See Miller, supra note 64.}

\footnotesize{196. Weinberg, supra note 34.}

\footnotesize{197. The first Uniform Rules of Evidence were approved by the National Conference and the American Bar Association in 1953. They were superseded by the rules based upon the Federal Rules of Evidence in 1974. See note 190, supra.}

\footnotesize{198. The Model Code of Evidence was promulgated by the American Law Institute in 1942.}

\footnotesize{199. Weinberg, supra note 34, at 613.}


\footnotesize{201. Weinberg, supra note 34, at 607-14.}

\footnotesize{202. See supra note 147.}
law of the state.\textsuperscript{203} He noted that the bar is a state bar, the bulk of litigation takes place in state courts, training for the bar is in state oriented law schools, judges and lawyers are more familiar with state than federal practice and much of the substantive law, even in the federal courts, is within the state sphere.\textsuperscript{204} A uniform federal system diverging from the state system requires familiarity with two sets of procedural rules.\textsuperscript{205} Judge Weinstein then proceeded to refute his own straw arguments:

Nevertheless, looked at from the vantage point of Washington, the pressure towards uniform rules of evidence in the federal courts is great. It would make it easier to move judges from state to state to meet temporary litigation pressures and thus would accommodate the strong administrative tendency towards a more integrated and efficient federal judicial system. It gives recognition to a growing national bar practicing in the federal courts and the desirability of making it easier for both lawyers and their national clients to find an equal grade of justice administered by familiar procedure in any federal court in the country. Where federal substantive policies are being enforced, a more uniform policy is fairer and more predictable and is likely to strengthen and bind the nation together. And, finally, much of the state law of evidence is simply unsatisfactory.\textsuperscript{206}

Judge Weinstein’s comments are even more apt when applied to the situation as it exists more than thirty years later. National litigation is common—indeed, it virtually dominates the civil dockets of many federal districts. The growing national bar described by Judge Weinstein has grown exponentially. If his comments were and are convincing in connection with the law of evidence generally, most of them are also applicable to the law of privilege. The only comment whose applicability to privilege is debatable is that state law is "unsatisfactory."

Other arguments that have been made against the codification of the law of evidence generally can be applied to the law of privilege. Perhaps the most politically effective arguments against an evidence code have been made in New York, where the state has resisted adopting such a code for more than a hundred years. Some of the arguments made in opposition to a New York evidence code are particularly apt when applied to privileges. Opponents have argued, for example, that an evidence code would freeze the law of evidence and make it inflexible.\textsuperscript{207} Others opined that codification would

\begin{footnotesize}
\begin{itemize}
  \item 204. \textit{Id.} at 358.
  \item 205. \textit{Id.}
  \item 206. \textit{Id.} at 359.
  \item 207. Salken, \textit{supra} note 183, at 684-87.
\end{itemize}
\end{footnotesize}
politicize the law of evidence. This last argument has been made with particular vehemence by the criminal defense bar based upon a fear that anticrime sentiment would favor a code that leaned toward admissibility of more evidence harmful to the accused.\footnote{208}

Such arguments have been largely negated by experience under the Federal Rules and state versions of them. The law of evidence has not been frozen, but has moved with the times.\footnote{209} As noted above,\footnote{210} judges, as well as legislators, are susceptible to the public mood of fear of crime.\footnote{211} Moreover, the influence of special interest groups is not confined to legislative actions. Such groups may inject themselves into the judicial process through amicus briefs filed in cases likely to have an impact on them.\footnote{212} Nevertheless, the concerns expressed about codification must be taken into account in the drafting of any code. There must be flexibility and there must be vigilance on the part of the drafters to maintain fairness, especially in the criminal justice system.

In addition to these arguments against codification, there are also the policy arguments referred to above\footnote{213} in favor of federal recognition of state privileges, as opposed to the existence of a separate and potentially conflicting federal rule. These are the strongly stated and well-articulated opinions that, because state law creates and supervises most of the relationships subject to privileges, federal courts should defer to state privilege laws, except in matters where there is strong, countervailing federal policy.\footnote{214} Such arguments can be made whether or not the privilege rules are codified.

Response to such arguments can be at two levels. First, there is the equally good argument that general considerations of protection of the privacy of individuals cut across any state interests in the protection of particular relationships. As stated above, the federal system ought to be able to decide whether to deprive itself of relevant

\footnote{208. \textit{Id.} at 696-703.}
\footnote{209. \textit{Id.} at 687-90. Examples of the fluidity of the law of evidence under the Federal Rules can be found in several areas, especially concerning expert testimony, \textit{see}, e.g., Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), or in the admission in evidence of modern communications such as e-mail, \textit{see}, e.g., United States v. Siddiqui, 235 F.3d 1318 (11th Cir. 2000). \textit{See also} Mark D. Rosen, \textit{What Has Happened to the Common Law?—Recent American Codifications, and their Impact on Judicial Practice and the Law’s Subsequent Development}, 1994 Wisc. L. REV. 1119.}
\footnote{210. \textit{Id.} at 687-90. Examples of the fluidity of the law of evidence under the Federal Rules can be found in several areas, especially concerning expert testimony, \textit{see}, e.g., Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), or in the admission in evidence of modern communications such as e-mail, \textit{see}, e.g., United States v. Siddiqui, 235 F.3d 1318 (11th Cir. 2000). \textit{See also} Mark D. Rosen, \textit{What Has Happened to the Common Law?—Recent American Codifications, and their Impact on Judicial Practice and the Law’s Subsequent Development}, 1994 Wisc. L. REV. 1119.}
\footnote{211. \textit{Id.} at 687-90. Examples of the fluidity of the law of evidence under the Federal Rules can be found in several areas, especially concerning expert testimony, \textit{see}, e.g., Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), or in the admission in evidence of modern communications such as e-mail, \textit{see}, e.g., United States v. Siddiqui, 235 F.3d 1318 (11th Cir. 2000). \textit{See also} Mark D. Rosen, \textit{What Has Happened to the Common Law?—Recent American Codifications, and their Impact on Judicial Practice and the Law’s Subsequent Development}, 1994 Wisc. L. REV. 1119.}
\footnote{212. \textit{Id.} at 687-90. Examples of the fluidity of the law of evidence under the Federal Rules can be found in several areas, especially concerning expert testimony, \textit{see}, e.g., Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), or in the admission in evidence of modern communications such as e-mail, \textit{see}, e.g., United States v. Siddiqui, 235 F.3d 1318 (11th Cir. 2000). \textit{See also} Mark D. Rosen, \textit{What Has Happened to the Common Law?—Recent American Codifications, and their Impact on Judicial Practice and the Law’s Subsequent Development}, 1994 Wisc. L. REV. 1119.}
\footnote{213. \textit{Id.} at 687-90. Examples of the fluidity of the law of evidence under the Federal Rules can be found in several areas, especially concerning expert testimony, \textit{see}, e.g., Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), or in the admission in evidence of modern communications such as e-mail, \textit{see}, e.g., United States v. Siddiqui, 235 F.3d 1318 (11th Cir. 2000). \textit{See also} Mark D. Rosen, \textit{What Has Happened to the Common Law?—Recent American Codifications, and their Impact on Judicial Practice and the Law’s Subsequent Development}, 1994 Wisc. L. REV. 1119.}
\footnote{214. \textit{Id.} at 687-90. Examples of the fluidity of the law of evidence under the Federal Rules can be found in several areas, especially concerning expert testimony, \textit{see}, e.g., Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), or in the admission in evidence of modern communications such as e-mail, \textit{see}, e.g., United States v. Siddiqui, 235 F.3d 1318 (11th Cir. 2000). \textit{See also} Mark D. Rosen, \textit{What Has Happened to the Common Law?—Recent American Codifications, and their Impact on Judicial Practice and the Law’s Subsequent Development}, 1994 Wisc. L. REV. 1119.
evidence based upon principles that weigh the need for the evidence against the principles of human rights and dignity that are reflected in the creation of the privilege.  

Second, the decision to substitute the judgment of the federal system for that of the states has already been made by Congress. There is a federal law of privilege. Except in diversity cases, deference is not to be given to the privilege laws of the states. The only question is whether we can make the federal law of privilege better than it has been.

IV. The Nature of Codification

It is not the function of this article to draft particular privilege rules or to advocate for or against particular privileges or applications of privileges. However, there are some basic policy determinations that should guide the drafting of any such rules. Following is an attempt to identify some of such considerations.

A. The Need and Justification for Rules that Permit the Creation of New Privileges

If codification is in fact a useful thing to do, what kind of codification should there be? Specifically, should there be an attempt to codify all privileges, as in California, or rather an attempt to codify some and leave the possibility of the creation of others to the courts, as in some other states? The rejected federal privilege rules purported to close the door on judicial development of new privileges. Such a limitation would stifle protections that may be fully justified. The need for such protection may arise in situations that cannot now be foreseen, especially if the law of privilege is based upon nonutilitarian rationales. The courts should have a role, much like that exercised by the Supreme Court in Jaffe, to develop privileges. The residual exception to the hearsay rule has left that

215. See text accompanying note 182, supra.
216. In a few non-diversity cases, federal courts have felt obliged to consider state policy in determining the existence of a privilege, even though ultimate decision had to be a federal one under FED. R. EVID. 501. See, e.g., In re Hampers, 651 F.2d 19 (1st Cir. 1981); Sabree v. United Bhd. Of Carpenters & Joiners of Am., Local No. 33, 126 F.R.D. 422 (D. Mass. 1989). The approach of those courts need not change under a codified scheme of the kind envisioned in this article. State policy may still be considered by the federal courts in determining whether a non-codified federal privilege should be recognized.
rule open to case-by-case development.\textsuperscript{221} Although one might disagree with the decisions of individual courts in the case of the residual hearsay exceptions\textsuperscript{222} such a dynamic development of the law is, in principle, worthwhile.\textsuperscript{223}

The codification of privileges with a provision that would permit the judicial development of new privileges would also prevent the resurrection of a notion that arose after the adoption of existing Rule 501. There was a school of thought that suggested that the congressional action in adopting Rule 501 put a bridle on the creation of privileges, at least with regard to privileges that did not exist in judicial opinions at the time of the adoption of the rule.\textsuperscript{224} The strong preference expressed throughout the Federal Rules of Evidence in favor of the admissibility of evidence seemed to give some fuel to the imposition of such a limitation.\textsuperscript{225} To some extent, the \textit{Jaffee} case put to rest that thinking. However, \textit{Jaffee} involved a privilege that had been included in the Proposed Federal Rules.\textsuperscript{226} The Court in \textit{Jaffee} noted the existence of the proposed rule in support of its argument that the psychotherapist-patient privilege should be recognized.\textsuperscript{227} In light of \textit{Jaffee} and the Federal Rules' expressed preference for the admissibility of evidence, it would be prudent to include in any codification of the privilege rules a specific provision permitting their judicial expansion.

B. Adherence to Generally Accepted Principles of the Law of Privilege

There is no uniform view on any of the privileges as they exist in state or federal law. However, the drafters of any federal codification would do well to attempt to discover common principles that cut across state and federal privilege rules and to reflect those principles in their drafting. The recently amended Uniform Rules of Evidence\textsuperscript{228}

\begin{itemize}
\item \textsuperscript{221} FED. R. EVID. 807.
\item \textsuperscript{222} See, e.g., United States v. McHan, 101 F.3d 1027 (4th Cir. 1996); United States v. Earles, 113 F.3d 796 (8th Cir. 1997) (grand jury testimony admitted under residual hearsay exception, now FED. R. EVID. 807).
\item \textsuperscript{223} The existence of a rule that would permit the judicial development of new privileges resolves, at least in part, the concerns expressed in Miller, \textit{supra} note 64, that closed-ended privilege rules stifle the dynamic judicial process.
\item \textsuperscript{224} See, e.g., discussion in Imwinkelried, \textit{supra} note 176, at 524-29 and Capra, \textit{supra} note 85.
\item \textsuperscript{225} Imwinkelried, \textit{supra} note 176.
\item \textsuperscript{226} Proposed Federal Rule 504.
\item \textsuperscript{227} Jaffee v. Redmond, 518 U.S. 1, 14 (1996).
\item \textsuperscript{228} See UNIF. R. EVID. 501-511 (1999).
\end{itemize}
and the treatment of the attorney-client privilege in the Restatement of the Law Governing Lawyers are useful starting places.

Adherence to commonly agreed upon concepts in the law of evidence has made the other Federal Rules of Evidence largely acceptable to the states. Similarly, if federal rules of privilege are intended to lead, they should be sufficiently reflective of state policy so as to make themselves attractive to the states. If states adopt the federal privilege rules, as they accepted the Federal Rules of Civil Procedure and the current Federal Rules of Evidence, the differences in state and federal practice and policy will diminish, perhaps to the level of triviality.

This is not to say that federal rules of privilege need be a simple restatement or that significant federal policy concerns should be ignored. As eminent writers stated in connection with the rejected privilege rules: "That many rules of evidence are important and have a substantial effect in reaching an adjudication does not take them outside rulemaking. Rulemaking is not confined to the picayune." Rather, the hope would be that the federal rules would lead and the state systems would follow.

C. What Privileges to Include?

The political success or failure of any federal codification of the law of privilege may depend on the choices made as to what privileges are codified. Some of the harshest criticism of the rejected Federal Rules of Evidence dealing with privileges centered on the failure of those rules to include a general physician-patient privilege, which did not exist in federal law at the time, or a marital communications privilege, which did. The emphasis that the Supreme Court put on the universal state recognition of a psychotherapist-patient privilege

230. See Rothstein, supra note 33, at 130-31. Professor Rothstein argues for federal rules of privilege even in diversity cases:

Infringement of state policies, difficulties encountered by lawyers practicing in both state and federal courts, and forum shopping, can be minimized if the federal privilege rules are drawn in general accord with the policies behind prevailing state privileges where such policies seem at all justifiable. Moreover, divergence between state and federal law will diminish as states imitate federal rules.

Id.

232. See Whalen v. Roe, 429 U.S. 589 (1977); discussion supra in text accompanying notes 29-30, 56.
233. See Blau v. United States, 340 U.S. 332 (1951); discussion supra in text accompanying notes 28, 55.
is strong evidence that at least that Court places strong weight on issues of national conformity on the existence of a privilege. Congress’s rejection of the proposed federal rules on privilege, which failed to include privileges generally accepted by the states, is evidence that Congress is equally concerned with the same issue.

The inclusion of a marital communications privilege would seem essential both to political success of any codification in Congress and to the attractiveness of the code to the states. The existence of a marital communications privilege was recognized by the Supreme Court in the \textit{Trammel} case and its existence has been confirmed in a number of more recent lower court cases. The entrenchment of the marital communications privilege as part of the federal common law and its virtually universal adoption by the states make it an ideal candidate for inclusion in any codification.

On the other hand, the marital or spousal testimony privilege is a less obvious component of any new set of rules. The Supreme Court in \textit{Trammel} expressed a clear lack of enthusiasm for such a privilege, in part influenced by the far less than unanimous and eroding reception of that privilege in the states. Proposed Rule 505 contained a spousal testimony privilege but not a marital communications privilege. It would not be unreasonable for a new codification to take the opposite approach and include a marital communications privilege but not one for spousal testimony.

Although the recognition of a psychotherapist-patient privilege in \textit{Jaffee} makes such a privilege a likely part of any codification, the existence of a general physician-patient privilege is another story. Although the absence of such a privilege was the subject of massive criticism at the time of the Proposed Federal Rules, there is still no general physician-patient privilege in federal common law.

\begin{enumerate}
\item Jaffee v. Redmond, 518 U.S. 1, 12-13 (1996).
\item See discussion supra in Part I.
\item \textit{E.g.}, United States v. Bahe, 128 F.3d 1440 (10th Cir. 1997); United States v. Hill, 967 F.2d 902 (3d Cir. 1992); United States v. Evans, 966 F.2d 398 (8th Cir. 1992); United States v. Sims, 755 F.2d 1239 (6th Cir. 1985).
\item \textit{Trammel}, 445 U.S. at 48 n.9.
\item The Uniform Rules of Evidence promulgated in 1974 provided for a marital communications privilege, but not one for spousal testimony. \textit{See UNIF. R. EVID.} 2d 504. The Uniform Rules were amended in 1986 to add a marital testimony privilege that may be invoked by the spouse of an accused in a criminal case. \textit{UNIF. R. EVID.} 3d 504. The 1999 amendments to the rule maintain both privileges.
\item \textit{E.g.}, Hancock v. Dodson, 958 F.2d 1367 (6th Cir. 1992); United States v. Moore, 970 F.2d 48 (5th Cir. 1992); United States v. Bercier, 848 F.2d 917 (8th Cir. 1988). Wright and Graham agree that the federal courts have noted their rejection of a general physician-patient privilege, but question whether there truly is any "long tradition of
Furthermore, the Court in *Jaffee* implicitly rejected such a privilege, distinguishing physical examinations from mental ones based upon the physical examinations reliance on objective information.\(^{242}\)

The Court in *Jaffee* was greatly influenced by the fact that all fifty states and the District of Columbia have a psychotherapist privilege in one form or another. Forty states also have a general physician-patient privilege.\(^{243}\) Furthermore, the Court's distinction in *Jaffee* between physical and mental examination is questionable. Doctors examining patients for physical ailments often must rely upon subjective information, such as descriptions of pain.\(^{244}\)

If the federal rules are, at least to some extent, to be reflective of a general state of the law in the states, the argument for a general physician-patient privilege is strong. In addition, from a political perspective, the drafters of a privilege code would do well to remember the history of the rejection of the Proposed Federal Rules of Evidence dealing with privilege.

The absence of a journalist's privilege from the rejected Federal Rules was somewhat less controversial, but nevertheless provoked responses, especially and not surprisingly from representatives of the media.\(^{245}\) At least a majority of states have such a privilege either by

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\(^{243}\) See note 57, *supra*, and accompanying text. The pleas of the journalism profession did not go entirely unheeded in the congressional response. Congressman Hungate, the chair of the House Committee, commented:
Most federal courts looking at the issue have now adopted such a qualified journalist's privilege in one form or another.

The significant problem with the common-law development of a journalist's privilege in the federal courts is its unevenness. Not all circuits recognize even a qualified privilege, at least in connection with grand jury proceedings. In addition, there are a myriad of differences in the application of the privilege among the various circuit and district court decisions.

Nevertheless, despite the lack of uniformity and the uncertainties of application, the journalist's privilege is now engrained in both the general law of privilege in this country and in what has become the federal common law. Although inclusion of a newsperson's privilege in any code is not as politically compelling as the marital communications privilege or a general physician-patient privilege, the comments to Congress in the controversy over the proposed rules and the subsequent recognition of the privilege in the courts indicate that its inclusion in a new code could be an attractive addition.

Other, more novel privileges, should be left to common-law or subsequent statutory development. For example, less than one-third

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The Supreme Court's rules of evidence contained no rule of privilege for a newspaperperson. The language of rule 501 permits the courts to develop a privilege for newspaperpeople on a case-by-case basis. The language cannot be interpreted as a congressional expression in favor of having no such privilege, nor can the conference action be interpreted as denying to newspaperpeople any protection they may have from State newsperson's privilege laws.

120 Cong. Rec. 40891 (1974). See also WRIGHT & GRAHAM, supra note 31, § 5426, at 712. 246. Id. § 5426; 2 MUELLER & KIRKPATRICK, supra note 29, § 213 at 476 (citing L TRIBE, AMERICAN CONSTITUTIONAL LAW 975 and nn. 35-36 (2d ed. 1988)).

247. See, e.g., Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993); United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988).

248. In re Grand Jury Proceedings, 810 F.2d 580, 584-85 (6th Cir. 1987); In re Grand Jury Proceedings, 5 F.3d 397 (9th Cir. 1993).

249. The kind of problems include questions of who is a journalist qualifying for the privilege (see In re Madden, 151 F.3d 125 (3d Cir. 1998) (wrestling promoter not entitled to privilege); In re Cusumano, 162 F.3d 708 (1st Cir. 1998) (academic investigator entitled to privilege); Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993) (investigative author entitled to privilege); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) (documentary filmmaker entitled to privilege)), whether the information sought is confidential (see United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988) (information need not be confidential); United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980) (same); Gonzales v. Nat'l Broad. Co., Inc., 155 F.3d 618 (2d Cir. 1998) (no privilege for nonconfidential information); United States v. Smith, 135 F.3d 963 (5th Cir. 1998) (same)), and whether different rules apply in cases involving testimony before a grand jury (see In re Grand Jury Proceedings, 5 F.3d 397 (9th Cir. 1993) (no qualified privilege in criminal case); United States v. Burke, 700 F.2d 70 (2d Cir. 1983) (no need to distinguish between civil and criminal cases although the weight given to various factors may be different)).
of the states have an accountant-client privilege.\(^\text{250}\) No federal court has recognized it in a federal-question or criminal case.\(^\text{251}\) There are various strong arguments against the accountant-client privilege.\(^\text{252}\) Furthermore, it is not embedded into the general principles of common law in anywhere close to a majority of the states. Even those states that have enacted such a privilege have seldom had occasion to construe it.\(^\text{253}\) If there is to be such a privilege in the future, it should be left to separate common-law development.\(^\text{254}\)

The existence of several other privileges has been argued by litigants and witnesses. The Supreme Court has specifically rejected a privilege for academic peer review\(^\text{255}\) and a state legislator's privilege.\(^\text{256}\) Lower courts have rejected other privileges including those for communications between parents and children\(^\text{257}\) as well as a privilege based on the protective function of secret service agents.\(^\text{258}\) A wide variety of other privileges has been adopted by state legislatures\(^\text{259}\) and suggested in the literature.\(^\text{260}\) Some have been recognized in an occasional federal court opinion.\(^\text{261}\) None has achieved general acceptance as part of the federal common law of privilege.\(^\text{262}\)

\(^{250}\) See \textit{Wright \& Graham}, supra note 31, \$ 5427; See also Sears, Roebuck \& Co. v. Gussin, 714 A.2d 188, 192 (Md. 1998).

\(^{251}\) See \textit{Couch v. United States}, 409 U.S. 322 (1973); \textit{United States v. Frederick}, 182 F.3d 496 (7th Cir. 1999); \textit{In re International Horizons, Inc,} 689 F.2d 996 (11th Cir. 1982).

\(^{252}\) Often the information received by the accountant is of a kind intended to be made public. It almost invariably involves financial or business, rather than more personal issues. Accountants have responsibility to provide assurance to third parties or the public generally that transcends a duty of confidentiality to their clients. See \textit{United States v. Arthur Young \& Co.}, supra note 88; 2 \textit{Mueller \& Kirkpatrick, supra} note 29, \$ 214 (1994); \textit{Wright \& Graham, supra} note 31, \$ 5427.

\(^{253}\) \textit{Wright \& Graham, supra} note 31, \$ 5427, at 812.

\(^{254}\) See similar arguments in \textit{Dudley, supra} note 70 and \textit{Wright \& Graham, supra} note 31, \$ 5427.


\(^{257}\) \textit{In re Grand Jury,} 103 F.3d 1140 (3d Cir. 1997).

\(^{258}\) \textit{In re Sealed Case,} 148 F.3d 1073 (D.C. Cir. 1998).

\(^{259}\) \textit{See 2 McCORMICK, supra} note 29, \$ 76.2.


\(^{262}\) See, e.g., \textit{S.W. Ctr. for Biological Diversity v. USDA,} 170 F. Supp. 2d 931 (D. Ariz. 2000) (no general scientific researcher privilege); \textit{Spencer Savings Bank v. Excell Mortg.}
Like the accountant's privileges, such innovations in the law should be left to common-law development, such as that which ultimately resulted in recognition of the psychotherapist-patient privilege in Jaffee. Alternatively, if nationwide consensus on the need for protection by other privileges emerges, Congress may see fit to add those privileges to the codification.


The time has also come to deal finally with what was predicted to be a thorny problem in the drafting of current Rule 501. Particularly in the Senate, great concern was expressed as to the law of privilege to be followed if there are both federal and state claims involved in the litigation. Rule 501, if read literally, could require the application of federal privilege law to federal claims and state privilege law to state claims in the same case.\(^2\) If one law permits introduction of the evidence, the policy of the other law would be frustrated.

After the House committee had rejected the Advisory Committee's proposed rules and substituted a rule in the form of present rule 501, the Senate substituted what it labeled a "technical amendment"\(^2\) that would have provided more clearly that state privilege law was to apply in diversity cases and federal privilege law in all other cases.\(^2\) The Senate Report also opined that in cases filed as diversity actions, but which contained a claim or defense in which federal law supplies the rule of decision, the "rule favoring reception of the evidence should be applied."\(^2\) The House conferees were unconvinced of the seriousness of the problem and the House provision ultimately won the day. The Conference Report, although

\(^{263}\) The second sentence of rule 501 provides for State law to apply whenever State law "supplies the rule of decision." Thus, on its face, the language of the rule applies whenever there is a state claim, regardless of whether there is also a federal claim in the same case.

\(^{264}\) S. REP. NO. 93-1277, at 6-7 (1974).

\(^{265}\) Under the Senate version of Rule 501, the second sentence would have read:

However, in civil actions and proceedings arising under 28 U.S.C. § 1332 or 28 U.S.C. § 1335, or between citizens of different States and removed under 28 U.S.C. § 1441(b) the privilege of a witness, person, government, state or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision.

\(^{266}\) S. REP. NO. 93-1277, at 12. n. 17.
seemingly recognizing that the language of the rule might call for
different privilege law to apply to different aspects of the case, states
that in "nondiversity jurisdiction civil cases, federal privilege law will
generally apply."267

Despite the concerns in Congress and by some commentators,268
the courts have had little trouble with the issue. The most frequently
cited case in which such an issue arose is a district court decision,
Perrignon v. Bergen Brunswig Corp.,269 where the court had before it
"primarily a federal-question case," with state claims.270 The question
was whether state or federal law or both should apply.271 The court in
Perrignon noted the practical problem: if the communication is
privileged under state law but not federal law, and admitted under
federal law, the "basic purpose of the privilege is
defeated."272 To
resolve the dilemma, the court applied the federal law of attorney-
client privilege, despite the existence of both state and federal claims.

Other federal courts, including many of the courts of appeals
have reached similar conclusions.273 In most cases reaching the issues,
the balance of federal and state claims is similar to that in
Perrignon—the case is essentially a federal-question case but contains
some supplemental state claims. In some other cases, the courts have
articulated the principles expressed in Perrignon, but found little need
to worry about the issue in light of the similarity of federal and state
privilege law on the issues raised.274

In some instances, courts determining that the federal law of
privilege should apply to supplemental state claims have done so
using an approach essentially hostile to privileges. They have
articulated a policy like that suggested in the Senate Report—the law
favoring admissibility should govern.275 However, not all courts

268. See discussions in Kaminsky, supra note 265; 2 SALTZBURG, MARTIN & CAPRA,
supra note 72, § 501.02[1], at 501-9 to 501-10.
269. 77 F.R.D. 455 (N.D. Cal. 1978).
270. Id. at 459.
271. Because of its resolution of the issue, the court never explores the question of what
effect the application of one law or the other would have on the issue in the case.
Presumably there would have been a difference or the parties would not have been
litigating the issue.
272. Id. at 458.
273. E.g., Mem'l Hosp. for McHenry County v. Shadur, 664 F.2d 1058 (7th Cir. 1981);
Hancock v. Dodson, 958 F.2d 1367 (6th Cir. 1992); von Bulow v. von Bulow, 811 F.2d 136
(2d Cir. 1987).
274. See, e.g., Sprague v. Thorn Americas, Inc., 129 F.3d 1355 (10th Cir. 1997); Motley
v. Marathon Oil Co., 71 F.3d 1547 (10th Cir. 1995); White v. Am. Airlines, Inc. 915 F.2d
1414 (10th Cir. 1990); Iron Workers Local Union No. 17 Ins. Fed. v. Philip Morris, 35 F.
Supp. 2d 582 (N.D. Ohio 1999).
275. See, e.g., Wm. T. Thompson Co. v. General Nutrition Corp. Inc. 671 F.2d 100 (3d
Cir. 1982); Hancock v. Dodson, 958 F.2d 1367 (6th Cir. 1992); Pearson v. Miller, 211 F.3d
reaching the conclusion that the federal law of privilege applies to supplemental claims have done so to avoid the application of a privilege. For example in Caver v. City of Trenton, the court chose to apply the broad federal law of psychotherapist privilege as set forth in the Jaffee case to a supplemental state claim despite existence of a more limited state court privilege.

Most courts considering the issue have applied federal privilege law to supplemental state claims, but there are lower court cases to the contrary. A few courts have held that there is no bright line rule and that, under the facts of the case, the predominance of state policy was such as to call for the application of state, rather than federal, privilege law. Some commentators have also argued for a policy that would recognize that a single privilege law should be applied in a case, but that there should be a balancing of interests and that the state privilege should be applied in a "case where the state privilege protects substantial state interests, and where the interests supporting the Federal rule are not especially serious or sensitive."

Although a balancing approach is attractive in the abstract, its application would likely prove difficult. A bright line test, favoring the federal law of privilege, would be far easier to apply and avoid the almost metaphysical question of what issues predominate. Moreover, there is an argument in favor of permitting the federal system to have the final say as to what evidence ought to be admissible in its courts, at least where doubt and confusion would otherwise exist. Furthermore, a uniform and codified federal law of privilege, adopted with due consideration of the general principles behind the law of privilege generally, would less likely be in fundamental conflict with state policy. The law as expressed in the vast majority of federal cases dealing with the situation should be adopted as part of a codification of the federal law of privilege: in cases with both federal and state issues, federal privilege law should apply.

278. 2 SALTZBURG, MARTIN & CAPRA, supra note 72, § 501.02(2), at 501-10.
279. See note 10 and accompanying text, supra.
280. Although there does not seem to be any case law on the question, the question may arise as to the applicable law of privilege with regard to a supplemental party, joined under 28 U.S.C. § 1367, where there are no federal claims applicable to that party. There would seem to be no good reason to apply state law in such a case when it would not be applied in other mixed state-federal claims cases. In addition to the arguments set forth in the text, the governing law of privilege is not dependent on the person to whom it is applicable. Non-parties claiming privilege are subject to the same law as parties. E.g., von
E. Some Federal Privilege Rules Should Govern All Cases, Even Those Involving State Law

Current Rule 501 states, as an absolute, that where state law supplies the rule of decision, the law of privilege is to be determined in accordance with state law. However, there are cases in which the federal interest in applying its privilege law is so strong that federal law should apply even in a diversity case.

In the case of the state secrets privilege, the courts in one circuit have applied federal privilege law in diversity cases, without regard to state law. In all instances, the court applied the federal state secrets privilege, based on the leading case of *United States v. Reynolds*, without a single reference to Rule 501 and the clear obligation to follow state privilege law in a case where state law supplied the rule of decision. Perhaps it seemed obvious to the court that the privilege was so deeply rooted in federal policy that Congress could not have intended the absence of a comparable state privilege to affect the government's ability to protect sensitive information.

The same considerations should also apply in cases involving other privileges that have as their purpose the protection of the workings of the federal government, including privileges for presidential deliberation, deliberative processes of governmental agencies and confidential law enforcement activity (such as the use of informants). Such privileges clearly exist for utilitarian purposes with strong federal policy underlying their existence. Indeed, the relationship of these privileges to federal policy is further illustrated by cases in which state courts have applied federal privileges, despite the seeming lack of legal compulsion to do so.

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Bulow v. von Bulow, 811 F.2d 136 (2d Cir. 1987) (federal law governed the existence of a non-party journalist's privilege where state claims joined with federal claims).

Another issue that might be addressed in a codification of federal privilege law is a choice of law rule for privileges in diversity cases. However, such a rule has not been supplied in other instances in which the Federal Rules of Evidence provide for state law to apply *(See, e.g., FED. R. EVID. 302 and 601)* and has not proved to be necessary in connection with those rules. It would seem equally unnecessary in connection with privilege rules. *See also* discussions in Dudley, *supra* note 70, at 1836-39; Margaret A. Berger, *Privileges, Presumptions and Competency of Witnesses in Federal Court: A Federal Choice-of-Law Rule*, 42 BROOK. L. REV. 417 (1976).

281. In re Under Seal, 945 F.2d 1285 (4th Cir. 1991); DTM Research, L.L.C. v. AT&T Corp., 245 F.3d 327 (4th Cir. 2001); Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236 (4th Cir. 1985); *See also* discussion in Dudley, *supra* note 70, at 1811-12.

282. 345 U.S. 1 (1953).


These privileges are likely to be invoked only rarely in diversity cases. However, when they are, they should be governed by federal law. Any newly drafted rules should at least provide for the application of such privileges in all federal court proceedings.

Conclusion

Since the adoption of the Federal Rules of Evidence, Congress has dabbled in the creation of evidence law. For example, it has enacted a tax practitioner privilege. It has recently also considered other privilege legislation such as a bill that would have created a parent-child privilege and a privilege relating to "study or research of academic, commercial, scientific, or technical issues." Despite such enactments and proposed enactments, the common-law approach contemplated by Rule 501 is the norm. This article advocates a change in that norm. The change should come from a cooperative effort between the judicial and legislative branches.

Congress has the ultimate drafting responsibility with regard to any rule governing privilege. However, there is a ready-made vehicle for providing judicial input into the drafting process. The Judicial Conference of the United States has standing committees set up to consider amendments to rules, including the Federal Rules of Evidence. Those committees are composed not only of federal judges, but of state court judges, practitioners and academics. The committees hold open deliberative sessions as well as public hearings on any proposed amendments to the rules. The Advisory Committee on the Federal Rules of Evidence has begun to consider the possibility of codification of the privilege rules.

Privilege rules should be drafted by the federal judiciary, through the Advisory Committees, and subjected to public scrutiny. When a set of rules, satisfactory to the Judicial Conference, is developed those

290. See text accompanying notes 61-62, supra.
292. In April, 1999, the Advisory Committee appointed a subcommittee to begin a project that might propose a codification of the law of privilege. Minutes of April, 1999 Meeting of the Advisory Committee on the Federal Rules of Evidence, available at http://www.uscourts.gov/rules/Minutes/499minEV.pdf. The subcommittee has met and reported to the Advisory Committee at each of the meetings since that date. There has been a tentative discussion of proposed rules, but no decision has yet been made on the suggestion of any rule to the Standing Committee on Practice and Procedure, to which the Advisory Committee reports. See http://www.uscourts.gov/rules/evdocket.pdf.
rules should be submitted to the Supreme Court. Once the Court has considered and approved the rules, they can be sent to Congress for further public hearing, debate and enactment pursuant to 28 U.S.C. §2074. Congress’ influence with regard to the rules of privilege would be more substantial than in the case of other procedural rules where the rules can be either accepted, by doing nothing, or rejected. Nevertheless, the drafting process and process of public debate would be much the same as with any other rules governing evidence or court procedure. The result should be a well-considered set of rules that would form the basis of a law of privilege that would adequately protect relationships worthy of such protection and help foster privacy protection for the public. The public would get the benefit both of the open legislative process and the wisdom of the judiciary charged with implementing the rules on a day-to-day basis.

The false starts of the late 1960s and early 1970s in drafting privilege laws should be a learning experience for both the judiciary and for Congress. We can have a workable law of evidentiary privileges just as in other areas of the law of evidence. Congress, by its own election, must be involved in the process. The path that a privilege code must follow has all of the potential pitfalls of any major piece of legislation. Given the history, those pitfalls may doom any attempt to failure. But the judicial system can start the process, get input from the bar and other interested persons, and develop a set of privilege rules that are both workable and represent prevailing societal interests. At least Congress will then have the opportunity to improve the administration of justice in the federal courts.
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