

# Seattle University School of Law Digital Commons

---

Faculty Articles

Faculty Scholarship

---

1973

## Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege

Mark Reutlinger

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/faculty>



Part of the [Courts Commons](#)

---

### Recommended Citation

Mark Reutlinger, Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege, 61 *CALIF. L. REV.* 1353 (1973).

<https://digitalcommons.law.seattleu.edu/faculty/412>

This Article is brought to you for free and open access by the Faculty Scholarship at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Articles by an authorized administrator of Seattle University School of Law Digital Commons.

# Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege

Mark Reutlinger\*

## INTRODUCTION

In late 1972, the United States Supreme Court approved and sent to Congress the Federal Rules of Evidence for United States Courts and Magistrates,<sup>1</sup> as proposed by the Advisory Committee appointed by the Chief Justice.<sup>2</sup> There was only one dissenter, Justice Douglas, who questioned both the legal foundation for the Court's submission of evidentiary rules to Congress, and the wisdom of the Court's approval of rules whose merits it had not examined. Justice Douglas suggested that the Court, "so far removed from the trial arena," had little institutional competence to assess the merits of evi-

---

\* A.B., 1965, J.D., 1968, University of California, Berkeley. Mr. Reutlinger is a member of the California Bar, a former law professor and the author of a casebook on the law of Evidence.

1. The Supreme Court's order is set forth in issue No. 5 of the advance pamphlets for Volume 34 of the United States Supreme Court Reports, Lawyers' Edition (1973) at iv. The text of the Proposed Rules follows. Hereinafter reference to the Proposed Rules shall be to the number of the Rule and its page location in that advance sheet, to avoid confusion with the pagination of the cases in 34 L. Ed. 2d. For a brief history of the Rules, see Schwartz, *The Proposed Federal Rules of Evidence: An Introduction and Critique*, 38 U. CIN. L. REV. 449, 449-52 (1969); Spangenberg, *The Federal Rules of Evidence—An Attempt at Uniformity in Federal Courts*, 15 WAYNE L. REV. 1061, 1061-70 (1969).

2. The Advisory Committee was composed of the following judges, scholars and practitioners: Professors Thomas F. Green, Jr. (University of Georgia), Edward W. Cleary (Arizona State University), and Dean Charles W. Joiner (Wayne State University); Judges Simon E. Sobeloff (Maryland), Joe E. Estes (Texas), Robert Van Pelt (Nebraska), and Jack B. Weinstein (New York); attorneys Albert E. Jenner, Jr. (Chicago), David Berger (Philadelphia), Hicks Epton (Wewoka, Oklahoma), Egbert Haywood (Durham, North Carolina), Frank Raichle (Buffalo), Herman Selvin (Los Angeles), Craig Spangenberg (Cleveland), Edward Bennett Williams (Washington, D.C.); and Robert S. Erdahl of the Department of Justice. The Committee was assisted by Professors James W. Moore (Yale University) and Charles Alan Wright (University of Texas), and The Hon. Albert B. Maris, Chairman of the Standing Committee On Rules of Practice and Procedure of the United States Judicial Conference. Professor Cleary was the Committee's Reporter, and Mr. Jenner was its Chairman.

dentiary rules.<sup>3</sup> Said the Justice, who seldom shies from a confrontation with a difficult or controversial issue, the Court is "merely the conduit to Congress. Yet the public assumes that our imprimatur is on the Rules, as of course it is."<sup>4</sup>

Imprimatur or not, Congress proved to be no mere conduit to the people, and no rubber stamp for the Supreme Court.<sup>5</sup> Instead Congress decreed that the Rules, originally scheduled to go into effect on July 1, 1973, "shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress."<sup>6</sup> Clearly what most concerned Congress, not a little motivated by current events, was Article V on privileges. For reasons which will be discussed in detail below, privileges are an extremely sensitive area of the law. The privilege provisions which had the greatest political impact upon Congress were, not surprisingly, those protecting newsmen's sources (omitted entirely by the Rules) and "official information" (a late addition to the final draft of the Rules).<sup>7</sup> But concern focused as well on other areas of privilege—on the Rules' elimination of the privilege for doctor-patient communications and their near-abolition of marital privilege. Indeed, it was questioned whether privileges were proper subjects of Supreme Court rule-making at all.<sup>8</sup>

---

3. 34 L. Ed. 2d, No. 5 at v (1973).

4. *Id.*

5. This was the role that Congress strove to avoid by halting the Rules' progress until it could examine and act on them in some positive fashion, having seen itself in the "default" role too often. As William Hungate, Chairman of the House Judiciary Committee, stated during debate on the bill suspending the Rules:

. . . I believe we felt we were breaking new ground on the proposed evidence code when compared to prior handling of the bankruptcy rules, the Federal rules of civil procedure, the Federal criminal rules, all coming into effect without congressional action. We were hesitant to do that.

119 CONG. REC. 1725 (daily ed. March 14, 1973).

6. 87 Stat. 9 (1973). The original Senate Bill, S.583, introduced by Senator Ervin, would have delayed the effective date of the Rules from July 1, 1973 to the end of the present (1973) session of Congress. The House, considering congressional action necessary and seeking to avoid enactment by default, amended the bill to suspend the Rules pending affirmative action by Congress. The Senate ultimately concurred in that amendment.

7. *See, e.g.*, the debates on S.583 in the House, 119 CONG. REC. 1721-30 (daily ed. March 14, 1973). *See also* note 11 *infra*. To illustrate the political implications of these two decisions by the Advisory Committee, the "official information" privilege would prevent disclosure (under most circumstances) of intra-governmental files, memoranda and other information in government possession, while the lack of a newsmen's privilege would facilitate identification and prosecution of those responsible for "leaking" such information to the public.

8. *See* 119 CONG. REC. 1721-30 (daily ed. Mar. 14, 1973); 119 CONG. REC. 5002-09 (daily ed. Mar. 19, 1973); S. REP. NO. 14, 93d Cong., 1st Sess. (1973); H.R. REP. NO. 52, 93d Cong., 1st Sess. (1973).

Congress was by no means first in questioning the proposed Rules. Numerous lawyers' groups and commentators, including some members of the Advisory Commit-

This article will touch on all of these aspects of the Rules, but its primary thrust will be a detailed examination of marital privilege and the effect its treatment by the Rules will have on the privilege as it exists today in states such as California. Because the Advisory Committee's approach to marital privilege is typical of its attitude toward privileges in general, and because California's codification represents one of the most recent legislative formulations of the privilege, it is hoped that an inquiry centered upon this relatively apolitical area of the law of privilege will provide some insight into the more general questions raised by Article V.

My initial discussion will concern the overall approach to privileges taken by the Rules, and some of the criticism it has provoked. After a brief glimpse at the history of marital privilege at common law and in California, I will set out the privilege as it presently exists

---

tee itself, had already expressed everything from friendly concern to outright alarm at the course the Rules had taken or were taking. *E.g.*, AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT OF COMMITTEE TO STUDY THE PROPOSED RULES OF EVIDENCE FOR UNITED STATES DISTRICT COURTS AND MAGISTRATES (1970) [hereinafter cited as ACTL REPORT]; NEW YORK TRIAL LAWYERS PROJECT ON THE PROPOSED FEDERAL RULES OF EVIDENCE, RECOMMENDATION AND STUDY RELATING TO THE ADVISORY COMMITTEE'S PRELIMINARY DRAFT OF THE PROPOSED FEDERAL RULES OF EVIDENCE (1970) [hereinafter cited as N.Y. TR. LAW. PROJECT]; 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2402 (1971) [hereinafter cited as WRIGHT & MILLER]; Dunham, *Testimonial Privileges in State and Federal Courts: A Suggested Approach*, 9 WILLAMETTE L.J. 26 (1973); McNichols, *Some Random Thoughts on the Proposed Federal Rules of Evidence*, 7 IDAHO L.R. 187 (1970); Schwartz, *supra* note 1; Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 351 (1969); *A Discussion of the Proposed Federal Rules of Evidence before the Annual Judicial Conference, Second Judicial Circuit of the United States*, 48 F.R.D. 39 (1969) [hereinafter cited as *Second Circuit Conference*] (especially the remarks of Messrs. Berger and Korn); Comment, *Federal Rules of Evidence and the Law of Privileges*, 15 WAYNE L. REV. 1287 (1969).

See also Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275 (1962); Joiner, *Uniform Rules of Evidence for the Federal Courts*, 20 F.R.D. 429 (1957); 119 CONG. REC. 5004-06 (daily ed. Mar. 19, 1973) (statement of Henry J. Friendly).

Messrs. Weinstein, Joiner and Berger are members of the Advisory Committee, as is Professor Green, cited below.

Of course, not all comment has been critical. See, *e.g.*, Green, *Highlights of the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 1 (1969); Ladd, *Privileges*, 1969 LAW & SOC. ORDER 555. Dean Ladd's remarks are a part of a symposium of distinguished commentators, some critical and others complimentary of the proposed Rules, in 1969 LAW & SOC. ORDER 509.

Many of the Rules aroused little or no opposition, and these will likely be approved as they stand while Congress deliberates on the more controversial proposals. See 119 CONG. REC. 1729 (daily ed. Mar. 14, 1973).

It is interesting to note that Professor Degnan correctly predicted the precise course of events which ensued when he warned the drafters of the federal evidence rules that they should concentrate on less controversial and more pressing reforms and avoid privileges entirely in state law cases, for "common prudence should tell the rule makers that reaching for too much may cost them everything." *Supra* at 301.

in California's state and federal courts, the changes which would be wrought by adoption of the Proposed Rules as they now stand, a critique of those changes and their effects on state law and policy, and some suggested courses of action. I will not attempt to discuss in any detail two issues that are extremely important but beyond the limited scope of the present article: the extent to which the Constitution forbids the abolition of the marital (or perhaps any) privilege by the federal courts;<sup>9</sup> and whether the Supreme Court in fact possesses the power to promulgate either rules of evidence in general or rules of privilege in particular.<sup>10</sup> However, the advisability—opposed to the legality—of the latter course will be a major theme of the discussion which follows.

One more caveat is in order: This article will not attempt to justify the concepts of evidentiary privileges or of marital privilege, although their justification will necessarily be discussed. This is not a brief for a new departure in the law, but a defense of a body of law boasting several centuries of judicial and social acceptance in virtually every western nation and every American state. Under such circumstances, while duration alone has not foreclosed change, it seems that the burden should be on those who would abolish a privilege to justify their actions, rather than on the privilege's proponents.<sup>11</sup> Thus this Article will concentrate on the reasons advanced by the Advisory Committee

---

9. The possibility that the Constitution prohibits abolition of the marital communication privilege might be inferred from a reading of *Griswold v. Connecticut*, 381 U.S. 479 (1965). Furthermore, if the *Erie* doctrine is constitutionally based, and if privileges are substantive law, the Constitution requires that all state privileges be retained in diversity litigation. See note 34 *infra*. See generally Green, *Drafting Uniform Federal Rules of Evidence*, 52 CORNELL L.Q. 177, 204 n.198 (1967); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 541 (1958).

10. Most commentators who have examined the Court's power to adopt rules of evidence in general have concluded that such power exists. See e.g., Degnan, *supra* note 8; Green, *supra* note 8, at 2-17; Joiner, *supra* note 8, at 433-35; Ladd, *Uniform Evidence Rules in the Federal Courts*, 49 VA. L. REV. 692 (1963); Schwartz, *supra* note 1; Weinstein, *supra* note 8. Several other authorities are set out in Judge Weinstein's article, *supra* note 8, at 355 n.12.

11. Cf. Morgan, *Foreword to MODEL CODE OF EVIDENCE* at 24 (1942); Hawkins v. United States, 358 U.S. 74, 79 (1958). Apparently the Advisory Committee does not share this view of the proper burden of persuasion, and in many instances seems to have placed it on proponents instead of critics of privileges, with at least one glaring exception: With respect to the privilege for state secrets and official information, the drafters acted with unseemly haste and undue secrecy in adopting new and far-reaching protection for every manner of governmental information. The background of how this expanded privilege, sponsored by the Justice Department, almost "slipped in the back door" emerges in the Congressional testimony on S.583. 119 CONG. REC. 1727-28 (daily ed. Mar. 14, 1973). The substance of the last-minute changes can be seen by a comparison of the Preliminary Draft of Rule 509, 46 F.R.D. at 272-74, and the interim Revised Draft of the Rule, 51 F.R.D. at 375-76, with the final version in 34 L. Ed. 2d, No. 5 at 54-55 (1973).

for abolition of martial and other state-created privileges, and a detailed examination of the soundness of those reasons.

## I

### THE RULES' APPROACH TO STATE-CREATED PRIVILEGES

The Proposed Federal Rules begin Article V by limiting the privileges available in federal court to those established by the Rules themselves (or an Act of Congress) and those compelled by the Constitution.<sup>12</sup> In other words, the rules or privilege created by and existing within a particular state are to be of no force or effect in federal proceedings, at least to the extent they do not have the explicit support of Congress, the Constitution, or the Advisory Committee. Conspicuously missing from the Rules' favored privileges are those for newsmen's sources, for communications between physicians and their patients, for anti-marital testimony in civil cases, and for marital communications.

The rationale behind this virtual abolition (in federal proceedings) of many state-created privileges was first expressed—perhaps a little too candidly, as it developed—in the Notes to the Preliminary Draft of the Proposed Rules which appeared in 1969.<sup>13</sup> There the Advisory Committee stated what it considered to be the arguments in favor of recognition of state privileges, and its responses thereto.<sup>14</sup> The arguments given in favor of recognition were as follows:

[A] state privilege is an essential characteristic of a relationship or status created by state law; state policy ought not to be frustrated by the accident of diversity; the allowance or denial of a privilege is so likely to affect the outcome of litigation as to encourage forum selection on that basis, not a proper function of diversity jurisdiction.<sup>15</sup>

The Note to Proposed Rule 5-01 then submitted the following "persuasive answers" to these arguments:

*The essential characteristic of a privilege is the suppression of information in judicial or administrative proceedings. No state can have a deep interest in the suppression of information except on a constitutional basis, such as self-incrimination, or in a situation where confidentiality is a necessary adjunct to the obtaining of information needed by the state, such as accident reports or the iden-*

---

12. Proposed FED. R. EVID. 501, 34 L. Ed. 2d, No. 5 at 37 (1973).

13. Preliminary Draft of Proposed Rules of Evidence for the United States Districts Courts and Magistrates, 46 F.R.D. 161, 243-48 (1969) [hereinafter cited as Prelim. Draft].

14. *Id.* at 247-48.

15. *Id.* at 247.

tity of an informer. . . . Moreover, in any event, *a privilege created by state law can never be perfect* in affording complete security *and so must in a sense be illusory*, since it will always be subject to possible disclosure in a federal criminal proceeding, federal question litigation, or bankruptcy. Nor is there any wrong in allowing selection of a court because of the superiority of its procedure for developing the facts, *as long as the substantive law applied is the same.*<sup>16</sup>

These answers proved to be "persuasive" to very few groups or individuals. The language that especially provoked heated reaction was that which dismissed state-created privileges as a means of "suppressing information," a practice in which "no state can have a deep interest." In so phrasing its answer, the Advisory Committee demonstrated a surprising insensitivity to the true nature of privileges, state or federal. Bar groups<sup>17</sup> and commentators<sup>18</sup> were quick to point out what most authorities have recognized for centuries: Privileges are not mere exclusionary rules like those excluding hearsay or certain character evidence; they are substantive laws created to foster or affect the conduct and/or status of individuals outside of court. While privileges do exclude certain evidence from a judicial proceeding, this exclusion is merely a means of effecting a state policy considered more important; it is never an end in itself. Thus privileged testimony is not excluded because of a defect such as unreliability or irrelevance, but because, regardless of its probative value or the effect of its exclusion on the adjudicatory process, extrinsic social policies require that it not be compelled or permitted.<sup>19</sup>

The true "essential characteristic" of privileges is well illustrated by an examination of the privilege which is the principal subject of this article—the marital privilege. There are two distinct privileges which fall under this general designation: the privilege protecting marital communications and the privilege as to testimony against a spouse. As is true of any of the communication privileges, that protecting against involuntary disclosure of confidential marital commu-

16. *Id.* [emphasis added].

17. *See, e.g.*, N.Y. TR. LAW PROJECT at iii, 33 ("classic oversimplification"), 118-19; ACTL REPORT at 6-7 & u.11 (denouncing the pejorative flavor of the Advisory Committee's characterization).

18. *See, e.g.*, Dunham, *supra* note 8, at 29-36; McNichols, *supra* note 8, at 192; Schwartz, *supra* note 1, at 470-71. *But cf.* Ladd, *supra* note 8, at 572.

19. *E.g.*, C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 72 (2d ed. 1972) [hereinafter cited as McCORMICK]; 9 WRIGHT & MILLER § 2408, at 334; Korn, *Second Circuit Conference*, *supra* note 8, at 74-77; Ladd, *supra* note 10, at 714; Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110-15 (1956). Many courts have made the same point. *E.g.*, Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555 n.2 (2d Cir. 1967); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).

nications is intended primarily to encourage such communication and thereby to preserve and foster an intimate relationship between spouses.<sup>20</sup> In fact, this rationale was specifically included as a part of the original codification of the privilege in California.<sup>21</sup>

Dean Wigmore formulated four requirements which he considered to justify creation of a communication privilege: the communication must originate in confidence; confidentiality must be essential to the relationship between the communicants; the relationship must be, in the opinion of the community, a proper object of encouragement by the law; and the injury to that relationship which would result from disclosure of confidential communications must outweigh the benefits of disclosure to "the correct disposal of litigation."<sup>22</sup> Applying these four criteria to marital communications, Wigmore found that all were satisfied<sup>23</sup> and the privilege amply justified.

The rationale for the testimonial privilege is similar—protection of the marital relationship—but with the emphasis on avoiding dissension rather than on fostering confidence. Although the writings of Coke, Blackstone, and others advanced what may seem totally spurious arguments in support of the privilege,<sup>24</sup> modern views generally point to one of two major policies behind its continued existence: prevention of dissension between spouses which might result from the

20. See, e.g., 8 WIGMORE, EVIDENCE § 2332 (McNaughten rev. 1961) [hereinafter cited as WIGMORE]; Louisell, *supra* note 19; Comment, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 NW. U.L. REV. 208, 210 (1961). Cf. McCORMICK § 86, at 173.

This is not to say that there are not other, secondary policies behind the communication privilege, similar to those behind the testimonial privilege discussed below. See text accompanying notes 24-27 and 75-82 *infra*.

21. The former CAL. CODE CIV. PROC. § 1881 (West 1955), superseded since 1967 by CAL. EVID. CODE § 980, stated in its introductory paragraph:

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: . . . .

Other states' codifications often contain a similar expression of policy. See, e.g., GA. CODE ANN. § 38-418 (1970).

22. 8 WIGMORE § 2285, at 527.

23. 8 WIGMORE § 2332. As to the last condition, Wigmore acknowledged the existence of an argument that the effect of disclosure on the marital relationship would in fact be minimal or non-existent. [See text accompanying notes 73-121 *infra*, for an analysis of this position.] But he also recognized, "Whether this argument is well founded is not, and probably cannot be, known"; and he considered the other three conditions "so fully satisfied" that the chance of impairment of the marital relationship warranted recognition of the privilege. *Id.* at 642-43.

24. See 8 WIGMORE §§ 2227-28. Lord Coke, for example, based the privilege in part on the unity of husband and wife, whereas Blackstone related it to the privilege against self-incrimination. However, Coke himself also presented the more modern rationale of the preservation of marital harmony. Not all modern writers agree that the "unity of the spouses" rationale is totally lacking in factual foundation. See, e.g., Note, 15 U. PITT. L. REV. 318, 320 n.19 (1954).

testimony of one against the other,<sup>25</sup> and society's "natural repugnance" at condemning a person on the compelled testimony of his or her spouse.<sup>26</sup> It is the first of these that the California Law Revision Commission considered to be the rationale for the privilege in its state,<sup>27</sup> but both illustrate the public policy unrelated to the need for full factual investigation which underlies the testimonial privilege.

In each instance of the creation or continuation of a privilege, a legislative judgment has been made by the state or other jurisdiction that some social policy (*e.g.*, the right of privacy, marital harmony, marital confidence, respect for the judicial system, doctor-patient confidence. etc.), which it believes is furthered by the privilege, outweighs whatever gain in the adjudicative process that full disclosure might entail. If the investigation and ascertainment of truth at the Bar is somewhat curtailed—and not all agree that this is necessarily the result of nondisclosure<sup>28</sup>—then truth and candor are thought to be increased beyond the courtroom, as in the lawyer's office or in the home.<sup>29</sup> The point is not whether an individual state's legislative judgment is correct, but only that it has been made. This legislative judgment, and not a desire to "suppress information," is the "essential characteristic" of a privilege, and is an expression by a state of its "deep interest" in the particular policy it seeks to promote. This is especially so in that the various relationships involved in the usual privileges—marriage, attorney-client, physician-patient—are themselves created and regulated by the states; privileges merely represent one aspect of the overall state interest in these underlying relationships.<sup>30</sup> In effect, then, the Advisory Committee did not re-

25. *E.g.*, 8 WIGMORE § 2228 at 216-17; *Hawkins v. United States*, 358 U.S. 74, 77-79 (1958).

26. 8 WIGMORE § 2228, at 217-18; N.Y. TR. LAW. PROJECT 42; Comment, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 NW. U.L. REV. 208 (1961).

Both the "dissent" and the "repugnancy" arguments are applicable to the communication privilege as well, although they are advanced less often in that cause. See text accompanying notes 75-82 *infra*. It should be noted that Wigmore did not consider the retention of the marital *testimonial* privilege to be justified. 8 WIGMORE § 2228. In this he was not alone. See text accompanying notes 149-51 *infra*.

27. California Law Rev. Comm'n, Comment to CAL. EVID. CODE § 970 (West 1966).

28. Some maintain, for example, that a privilege promotes truth by preventing the likelihood of perjured testimony. See Louisell, *supra* note 19, at 109-10; Comment, *The Husband-Wife Privilege of Testimonial Non-Disclosure*, 56 NW. U.L. REV. 208, 210 (1961).

29. "A decision that privileges foster truth in the doctor's or lawyer's office, and that such truth is a more desirable goal than truth in the courtroom is better left with the states." N.Y. TR. LAW. PROJECT 119. Cf. Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 572-73 (1967).

30. See N.Y. TR. LAW. PROJECT 33.

ject the "suppression of information," but simply imposed its view as to what information should be "suppressed" on the states by restricting privileges in federal courts to those it sanctioned.

Several commentators have attacked the Advisory Committee's "answers" to the other arguments for state privileges by pointing out, for example, that even if the protection of confidences is not perfect (because in some federal cases state privileges would not apply), this does not justify rendering that protection even less certain or nonexistent.<sup>31</sup> If lack of the total protection of federal-state conformity does render a privilege "illusory," the answer is not to adopt federal rules which will render state privileges even more illusory, but to adopt all state privileges in federal courts, thus assuring conformity and meaningful, non-illusory rules.<sup>32</sup> As for the argument that forum-shopping is a benign process,<sup>33</sup> this presupposes that the Committee's premise is correct that only "procedure" and not "substantive law" is at stake—a highly suspect supposition. Unfortunately, the Advisory Committee's reaction to such criticism was not to change its recommendations as to state privileges, but only to change the language it used to defend those recommendations. The new language, based as it is on the same premises, is no more convincing than the old.<sup>34</sup>

---

31. *E.g.*, N.Y. TR. LAW. PROJECT 33; Dunham, *supra* note 8, at 33; Schwartz, *supra* note 1, at 471. The premise that there are already many cases in which federal courts do not apply state privileges is perhaps less valid in the Ninth Circuit than in other jurisdictions. *See Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). *See* text accompanying notes 67-70 *infra*.

32. The Advisory Committee obviously expected that, as often the case with the Federal Rules of Civil Procedure, state legislatures would ultimately adopt the federal standards, resulting in federal law uniformity and federal-state conformity. *Cf.* Ladd, *supra* note 8, at 573-74. However, the very first instance of state adoption of the Proposed Federal Rules should illustrate the futility of this expectation: the State of Nevada adopted the first draft of the Federal Rules, 46 F.R.D. 161, so that many of the provisions which on further consideration were changed in the final draft became frozen in the Nevada statute. *See, e.g.*, NEV. REV. STAT. §§ 49.035-49.115 (1971) (attorney-client privilege). Yet in all their haste, and despite almost verbatim adoption of privileges such as attorney-client, the Nevada Legislature paid absolutely no heed to the Advisory Committee's views cutting back marital privilege, newsmen's privilege, or any other privileges which in their judgment were necessary to effectuate their own policy decisions. Both the testimonial and communication marital privileges were adopted in broad form, in addition to comprehensive privileges for physician-patient (including dentists) and accountant-client communications, and newsmen's sources. NEV. REV. STAT. §§ 49.125-49.275 (1971). The reaction of the states' representatives in Congress is another indication of this trend, and is apparent throughout the debates and reports concerning S. 583. Certainly the California Legislature is unlikely at this stage to abolish either marital privilege or those for physician-patient communications and newsmen's sources, simply because the Proposed Federal Rules do so. If anything, these privileges, and especially the latter one, have gained more support of late than ever.

33. *Compare* the testimony of Judge Friendly, 119 CONG. REC. 5005 (daily ed. March 19, 1973).

34. A reading of the more lengthy explanation in the final draft of the Rules

## II

## MARITAL PRIVILEGE—BACKGROUND

## A. Common Law Origin

## 1. The Testimonial Privilege and Spousal Incompetency

There are three aspects to marital privilege, only two of which

---

demonstrates that although the Committee removed the most offending language, it did not really alter its views nor its inadequate explanation for its decision. The Committee still argues in its Note to Rule 501 that the "real impact [of a privilege] is on the method of proof in the case, and by comparison any substantive aspect appears tenuous." 34 L. Ed. 2d, No. 5 at 39 (1973). See text accompanying note 156 *infra*.

It should be emphasized here that the "substantive" aspect of privileges—their character as substantive policy decisions of the states—may or may not render them "substantive" within the meaning of the *Erie* doctrine (as set forth in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) and its progeny). This question has been the subject of a vast amount of comment, covering the full spectrum of legal opinion. For this reason, the question will not be examined in detail at this point, except to emphasize that most authorities have concluded that, at least in diversity cases, *Erie* compels application of state-created privileges, on the theory that they are substantive law. The Advisory Committee, while acknowledging that "substantial authority" is against it, finds the question to be one of "choice rather than necessity," and proceeds to choose to deny state privileges. Advisory Committee's Note to Proposed FED. R. of EVID. 501, 34 L. Ed. 2d No. 5 at 39 (1973). The Advisory Committee bases its reasoning on *Hanna v. Plumer*, 380 U.S. 460 (1965). However, *Hanna* concerned what the Court termed "housekeeping rules" for federal courts, specifically the procedure for service of process. Therefore the *Hanna* reasoning may not be applicable to privileges. "It is no longer the federal courthouse that is being kept when a federal rule obliterates state created privileges especially in cases arising under state law." N.Y. TR. LAW. PROJECT 32. See also WRIGHT & MILLER, § 2408. Interestingly enough, Professor Wright would insist that state rules of privilege be followed in state law cases simply because he believes the Rules are procedural under *Hanna*, as it would be "quite indefensible" to allow a federal procedural rule to defeat a substantive state policy; *supra* note 29, at 573. *Contra*, Green, *supra* note 8, at 10; Ladd, *supra* note 8, at 570.

A few of the analyses of the *Erie* problem with respect to privileges are listed below. While these writers differ on whether *Erie* compels recognition of state privileges in state-law cases, all but Ladd and Green conclude that such recognition is either necessary or desirable for policy reasons. Degnan, *supra* note 8, at 299-301; Dunham, *supra* note 8; Green, *supra* note 8; Korn, *Second Circuit Conference*, 48 F.R.D. at 65-77; Ladd, *supra* note 8, at 559-74; Louisell, *supra* note 19; McNichols, *supra* note 8, at 192-93; Pugh, *Rule 43(a) and the Communication Privileged Under State Law*, 7 VAND. L. REV. 556, 567-70 (1954); Weinstein, *supra* note 8; Wright, *supra* note 29; Comment, *Evidentiary Privileges in the Federal Courts*, 52 CALIF. L. REV. 640 (1964); Comment, *Privilege in Federal Diversity Cases*, 10 NAT. RES. J. 861 (1970); Note, 44 CALIF. L. REV. 949 (1956). See also N.Y. TR. LAW. PROJECT 30-32. *But cf.* Ladd, *supra* note 10, at 714.

Whether the Committee's position as to *Erie* is correct is a battle to be fought on another ground. Further discussion of *Erie* in relation to the marital privilege in federal courts can be found in the text accompanying notes 67-71 and 154-58 *infra*. For the purposes of the remaining discussion, I will assume that the matter is indeed one of choice, and will concentrate on the question of the *wisdom* of the choice made by the Advisory Committee in dealing with the marital privilege.

are properly denominated "privileges" and survive as such today. The privilege not to testify against one's spouse (or to prevent adverse testimony by a spouse) probably antedated by at least half a century the more sweeping incompetency of a witness spouse to testify at all, for or against his or her partner.<sup>35</sup> Although the two concepts are often combined or confused, they are, in fact, different in both policy and effect.<sup>36</sup> Under the marital disqualification, as in any rule of incompetency, testimony was not a matter of choice by either witness or party spouse; it was simply forbidden, as would be that of a person incapable of expressing himself or of understanding the duty to tell the truth.<sup>37</sup> The testimonial privilege, on the other hand, which first appeared in 1580,<sup>38</sup> could be waived by the party spouse and was subject to certain exceptions, primarily in criminal prosecutions for a crime against the spouse.<sup>39</sup>

The rationale for the testimonial privilege has been discussed,<sup>40</sup> that for incompetency was similar. To the extent that it prevented testimony for the spouse, husband and wife were seen as "one being,"<sup>41</sup> since their interests were one, a spouse, like the litigant himself, was not sufficiently impartial to testify.<sup>42</sup> To the extent the disqualification extended to adverse testimony, the rationale was the danger to marital harmony which such testimony would create.<sup>43</sup>

Today the incompetency of spouses has generally been abolished in common law jurisdictions, including the United States,<sup>44</sup> and with a few exceptions only the privilege with respect to testimony against

---

35. 8 WIGMORE § 2227. Wigmore refers to the testimonial privilege as the "anti-marital" privilege, or privilege for anti-marital facts, probably to emphasize the "against" aspect so often misunderstood.

36. *Id.*

37. See, e.g., CAL. EVID. CODE § 701 (West 1966).

38. Bent v. Allot, 21 Eng. Rep. 50 (Ch. 1580).

39. E.g., Lord Audley's Case, 123 Eng. Rep. 1140 (C.P. 1631), 3 How. St. Tr. 401, 402, 414 (1631); 1 W. BLACKSTONE, COMMENTARIES \*443. Although Wigmore separates the incompetency to testify for a spouse from the privilege not to testify against a spouse, it is unclear whether the latter might not in fact have been an absolute disqualification as well. See Shenton v. Tyler [1939] 1 Ch. 620 (C.A.); Comment, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390 (1931); Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend*, 38 VA. L. REV. 359, 360 (1952).

40. See text accompanying notes 24-26 *supra*.

41. "For they are two souls in one flesh" ("*quia sunt duae animae in carne una*"). COKE, COMMENTARY UPON LITTLETON 6b (1628).

42. 1 W. BLACKSTONE, COMMENTARIES \*443. This was also sometimes characterized as a bias of affection. 2 WIGMORE § 601.

43. E.g., Stapleton v. Crofts, 118 Eng. Rep. 137, 138 (Q.B. 1852); 2 KENT, COMMENTARY \*180.

44. See 2 WIGMORE § 602.

a spouse remains.<sup>45</sup>

## 2. *The Communication Privilege*

The privilege not to disclose (or to prevent disclosure of) confidential marital communications is more obscure in its origins than the testimonial privilege. Wigmore<sup>46</sup> believed the privilege was recognized as early as 1684, although it was not explicitly stated until the Evidence Amendment Act of 1853; other authorities, however, including the English Court of Appeal, have denied the existence of any common law origin of the privilege.<sup>47</sup> Wigmore offers as a probable explanation for this confusion the great extent to which the communication privilege overlaps the testimonial privilege and spousal incompetency, so that—especially when incompetency still prevailed—it was seldom necessary to invoke the communication privilege.<sup>48</sup> Today, however, there are many instances in which the communication privilege would be applicable but the testimonial privilege would not, as when neither spouse is a party to the proceeding, or when the marriage has ended at the time of trial, or when a third person has intercepted the communication.

### B. *California Origins*

#### I. *The Testimonial Privilege and Spousal Incompetency*<sup>49</sup>

In 1851 California codified the common law incompetency of

45. 8 WIGMORE § 2245. See the discussion in *Hawkins v. United States*, 358 U.S. 74, 77-78 (1958). Many of the statutory reforms are set out in Note, *The Marital "For and Against" Privilege in California*, 8 STAN. L. REV. 420, 423-25 (1956).

46. 8 WIGMORE § 2333.

47. *Shenton v. Tyler* [1939] 1 Ch. 620 (C.A.). The court recognized but did not follow contrary authority including Wigmore.

In Great Britain this provision of the Evidence Amendment Act of 1853 was abolished for civil proceedings by passage of the Civil Evidence Act of 1968, whereby communication privilege was left to the discretion of the judge, a not uncommon approach in England. An apt criticism is found in 31 MOD. L. REV. 668, 672-73 (1968):

The exercise of a judicial discretion in this area may well prove a satisfactory solution though some may feel that retention of the privilege would accord more with contemporary social ethics and would represent what most spouses would imagine to be the legal position in communicating to his or her spouse.

It appears that the British criminal law may follow the same course, if somewhat reluctantly. See CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT, Cmnd. 4991, at 106 (1972).

Both the civil and criminal law reforms maintain or strengthen the testimonial privilege. *Id.* at 92-98; Civil Evidence Act 1968 § 14(1)(b) (privilege against self-incrimination includes incrimination of spouse).

48. 8 WIGMORE § 2333.

49. See generally, e.g., CALIFORNIA LAW REVISION COMM'N, RECOMMENDATION AND STUDY RELATING TO THE MARITAL "FOR AND AGAINST" TESTIMONIAL PRIVILEGE, 1

spouses to testify for or against each other.<sup>50</sup> The incompetency was removed by statute in 1863;<sup>51</sup> although this enactment was subsequently held inapplicable to criminal proceedings,<sup>52</sup> in 1866 spouses were made competent "for or against" each other in criminal actions if both consented or in cases of personal violence by one against the other.<sup>53</sup> Thus, contrary to the common law sequence, what began as an incompetency became a privilege held by both spouses.

The codifications of 1872 enacted the testimonial privilege for both civil<sup>54</sup> and criminal<sup>55</sup> actions, and as to testimony both for and against a spouse. The civil privilege was held by the party spouse; the criminal privilege by both. These were superseded by the 1965 enactment of California's Evidence Code, one of the few successful attempts to date at complete codification of the law of evidence.<sup>56</sup> Section 970 thereof states:

Except as otherwise provided by statute, a married person has a privilege not to testify against his spouse in any proceeding.<sup>57</sup>

Several significant changes in the privilege were made by the new code. The privilege is now held by the witness spouse only, and applies only to testimony against the other. Additionally, by section 971, a person may refuse even to be called as a witness in any pro-

CAL. LAW REV. COMM'N REPORTS, RECOMMENDATION AND STUDIES F-1, F-10 & F-11 (1957) [hereinafter cited as CAL. LAW REV. COMM'N STUDY]; Comment, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390, 391-92 (1931); Note, *The Marital "For and Against" Privilege in California*, 8 STAN. L. REV. 420, 426-27 (1956).

50. Ch. 5, § 395 [1851] Cal. Stats. 114. The statute contained the common law "necessity" exception for actions between spouses. In *Dawley v. Ayers*, 23 Cal. 108 (1863), it was held that an 1861 enactment allowing all parties to an action to testify (ch. 467, § 1, [1861] Cal. Stats. 521) did not remove this incompetency.

51. Ch. 528, § 1 [1863] Cal. Stats. 771. Divorce actions were not included until 1870, and even then corroboration was required. Ch. 188, § 2, [1869-70] Cal. Stats. 291.

52. *People v. McFlynn*, 1 Cal. Unrep. 234 (1865).

53. Ch. 64, § 1 [1865-66] Cal. Stats. 46.

54. CAL. CODE CIV. PROC. § 1881(1) (repealed 1967). An exception was made for civil actions between spouses. Further exceptions were added by amendment in 1907 and 1933.

55. CAL. PEN. CODE § 1322 (repealed 1965). An exception was made for crimes by one spouse against the other, and other exceptions were added in subsequent years.

56. The influence of the California Evidence Code is apparent, and often specifically acknowledged, throughout the Proposed Federal Rules of Evidence. It is unfortunate no such example was taken with respect to marital privilege.

57. CAL. EVID. CODE § 970 (West 1966). A definitional equivalence of masculine and feminine terminology [CAL. EVID. CODE § 9] obviates the need to repeat, as did prior codifications, each provision in terms of "husband" and of "wife." Note, however, that commentators almost invariably equate "witness" with "wife" and "accused" (or "party") with "husband," perhaps more from convenience or experience than chivalry.

ceeding in which his or her spouse is a party.<sup>58</sup> Subsequent sections contain various exceptions<sup>59</sup> and provisions for waiver.<sup>60</sup>

## 2. *The Communication Privilege*

The same statute which abolished the testimonial incompetency of spouses in 1863 retained the absolute disqualification as to marital communications.<sup>61</sup> This became a privilege by the codifications of 1872,<sup>62</sup> applicable to both civil and criminal actions.<sup>63</sup> The privilege was apparently held by only the non-witness spouse, although this is not entirely clear.<sup>64</sup>

When the California Evidence Code was enacted, the communication privilege was adopted as section 980:

Subject to Section 912 and except as otherwise provided in this article, a spouse (or his guardian or conservator when he has a guardian or conservator), whether or not a party, has a privilege during the marital relationship and afterwards to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife.

Again several significant changes were made. Principally, the privilege is given to both spouses, and it is made applicable to third persons, such as eavesdroppers and those to whom the non-claimant spouse might have disclosed the communication. Previously, neither such person could be prevented from testifying as to the content of the communication.<sup>65</sup> Although the Evidence Code, unlike the prior statute, specifically requires that the communication be made "in confidence," a statutory presumption of confidentiality applicable to all communication privileges<sup>66</sup> makes satisfaction of this requirement relatively easy.

---

58. CAL. EVID. CODE § 971 (West 1966). This section is analogous to the privilege of a criminal defendant to refuse to be called as a witness [CAL. EVID. CODE § 930], and, like that provision, is intended to avoid the prejudicial effect of an objection to testimony made in open court. Note that this privilege applies only where the spouse is a party, whereas the general testimonial privilege applies to adverse testimony in any proceeding.

59. CAL. EVID. CODE § 972 (West 1966).

60. CAL. EVID. CODE § 973 (West 1966).

61. Ch. 528, § 1, [1863] Cal. Stats. 771.

62. CAL. CODE CIV. PROC. § 1881(1) (repealed 1967).

63. See *People v. Mullings*, 83 Cal. 138, 23 P. 229 (1890).

64. See Calif. Law Rev. Comm'n, Comment to CAL. EVID. CODE § 980 (West 1966).

65. *Id.* See Comment, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390, 404 (1931). Under prior law the disclosure by one spouse was a waiver as to both.

66. CAL. EVID. CODE § 917 (West 1966).

### C. . Marital Privilege in Federal Court

As noted earlier, there is still controversy over whether rules of privilege are substantive or procedural for *Erie* purposes, and whether they are applicable in diversity and other state-law federal proceedings; most courts and commentators agree that they are substantive under *Erie*.<sup>67</sup> In federal question cases, a majority of federal courts holds that state privilege law does not apply.<sup>68</sup> In fact, the refusal of federal courts to recognize state privileges in federal criminal prosecutions led to one of the Advisory Committee's chief arguments against retaining state privileges—what is already partially eroded is too “illusory” to be worth preserving.<sup>69</sup> However, whatever the validity of this rationale in other jurisdictions or with regard to other privileges, it is less than convincing as applied to California and to the marital privilege. The Ninth Circuit apparently has not accepted the conventional wisdom with respect to *Erie*, and has indicated that so strong are the substantive policies behind state-created privileges, their application is “required” even in federal question cases.<sup>70</sup> Furthermore, even in cases in which federal courts purport to apply federal privilege rules in federal question litigation, they generally recognize a comprehensive federal marital privilege.<sup>71</sup> Thus the effect of excluding the greater

---

67. *E.g.*, Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555 n.2 (2d Cir. 1967); Krizak v. W.C. Brooks & Sons, Inc., 320 F.2d 37, 43 (4th Cir. 1963); Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463 (2d Cir. 1962); Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); Palmer v. Fisher, 228 F.2d 603 (7th Cir. 1955), *cert. denied*, 351 U.S. 965 (1956); Hardy v. Riser, 309 F. Supp. 1234 (N.D. Miss. 1970); Berdon v. McDuff, 15 F.R.D. 29 (E.D. Mich. 1953).

*See also* authorities cited in note 34 *supra*.

68. *E.g.*, Wolfle v. United States, 291 U.S. 7 (1934); Garner v. Wolfenbarger, 430 F.2d 1093 (5th Cir. 1970) and cases cited therein; Colton v. United States, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1962); United States v. Brunner, 200 F.2d 276 (6th Cir. 1952). *But cf.* Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); United States v. Becton Dickinson & Co., 212 F. Supp. 92 (D.N.J. 1962).

Note that in the great majority of these cases the federal government is a party, a situation in which there is the strongest argument for application of a federal standard. By no means all “federal question” cases fall into this category.

69. Advisory Committee's Note to Proposed FED. R. EVID. 501, 34 L. Ed. 2d, No. 5 at 39 (1973). *See* text accompanying notes 31-32 *supra*.

70. Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) (income tax violation). The Circuit's position on criminal cases is unsettled. *See* United States v. Friedman, 445 F.2d 1076, 1085 (9th Cir. 1971), *cert. denied*, 404 U.S. 958 (1971).

71. *E.g.*, United States v. Harper, 450 F.2d 1032, 1045 (5th Cir. 1971); Peek v. United States, 321 F.2d 934, 943 (9th Cir. 1963); United States v. Walker, 176 F.2d 564 (2d Cir. 1949), *cert. denied*, 338 U.S. 891 (1949).

*See generally*, N.Y. TR. LAW. PROJECT 36; Weinstein, *supra* note 8, at 372 & n.82; Comment, *Evidentiary Privileges in the Federal Courts*, 52 CALIF. L. REV. 640, 649-56 (1964); Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend*, 38 VA. L. REV. 359 (1952).

part of California's marital privilege from federal proceedings is far more than "illusory." It is, in fact, a significant dilution of the effectiveness of the privilege in achieving whatever policies the California legislature intended when enacting and re-enacting it.

This dilution of state policy is heightened because privileges, as distinguished from other evidentiary rules, are meant primarily to affect and protect out-of-court conduct unrelated to litigation. To broaden that protection, privileges are expressly made applicable to *any* proceeding—whether before a court, a grand jury, an administrative body, or any other person or tribunal before whom testimony can be compelled, even if other rules of evidence are specifically rendered inapplicable thereto.<sup>72</sup> The policy of encouraging free and unfettered communication between spouses (or between attorney and client, doctor and patient, and so forth) would indeed be somewhat "illusory" if the privilege protected only against disclosure in formal court proceedings—there being so many other tribunals before which the communicants might in the future appear or their confidences might be in issue. The more tribunals there are which deny the privilege, the weaker its assurance of future protection. Thus the sudden removal of the entire federal system from those protected forums, where before most and arguably all federal proceedings were included, cannot help but adversely affect—if not wholly defeat—the intent of and the policy behind the marital privilege in California.

### III

#### MARITAL PRIVILEGE UNDER THE PROPOSED FEDERAL RULES

Marital privilege does not fare well under the proposed Federal Rules of Evidence; in fact, all that remains is a watered-down version of the testimonial privilege. I have already discussed the Advisory Committee's general approach toward state-created privileges and its effect on the decision whether to adopt or reject certain of those privileges. In the remaining sections I shall deal specifically with the Advisory Committee's recommendations regarding marital privilege and—to the extent they are expressed—its reasons therefor. In the course of and following that examination, I will attempt to respond to those reasons and put forward my own view as to how the Rules should treat marital privilege—and to some extent, by analogy, all privileges.

---

72. See, e.g., CAL. EVID. CODE §§ 900-01, 910 (West 1966); PROPOSED FED. R. EVID. 1101, 34 L. Ed. 2d, No. 5 at 132 (1973).

### A. *The Advisory Committee and Marital Communications*

As indicated earlier,<sup>73</sup> the marital communication privilege adequately meets Wigmore's four criteria, at least in the view of Dean Wigmore himself and many state legislatures. Nevertheless, the Advisory Committee rejects the communication privilege with a five-sentence "explanation" and the citation of a single direct authority. After setting out the Advisory Committee's rationale verbatim, I will analyze in some detail both that rationale and its supposed authority. While the arguments respecting state-created privileges in general provide a defense for retention of the marital communication privilege, here we encounter and must respond to the specific attack on that privilege which apparently convinced the Advisory Committee to abolish it entirely.

The Advisory Committee's Note respecting marital communication privilege is as follows:

[Rule 505] recognizes no privilege for confidential communications. The traditional justifications for privileges not to testify against a spouse and not to be testified against by one's spouse have been the prevention of marital dissension and the repugnancy of requiring a person to condemn or be condemned by his spouse. 8 Wigmore §§ 2228, 2241 (McNaughton Rev. 1961). These considerations bear no relevancy to marital communications. Nor can it be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware. The other communication privileges, by way of contrast, have as one party a professional person who can be expected to inform the other of the existence of the privilege. Moreover, the relationships from which those privileges arise are essentially and almost exclusively verbal in nature, quite unlike marriage. See Hutchins and Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675 (1929). Cf. McCormick § 90; 8 Wigmore § 2337 (McNaughton Rev. 1961).<sup>74</sup>

Let us take each argument in turn, although not necessarily in order of importance.

#### 1. *"Dissension" and "Repugnancy"*

It is true that the traditional rationale for the communication privilege has not been "the prevention of marital dissension and the repugnancy of requiring a person to condemn or be condemned by

73. See text accompanying notes 22-23 *supra*.

74. Advisory Committee's Note to Proposed FED. R. EVID. 505, 34 L. Ed. 2d, No. 5 at 49-50 (1973).

his spouse"—at least not in those terms. However, to state flatly that "these considerations bear no relevancy to marital communications" is simply not a realistic view of the privilege. As discussed previously, the traditional rationale for the communication privilege has been the protection and encouragement of marital confidences and of the marital relationship itself,<sup>75</sup> whereas "prevention of dissension" and "repugnancy" have generally been given as the rationale for the testimonial privilege.<sup>76</sup> Yet one easily can argue that these latter factors are even more relevant to marital communications than to the general testimonial privilege.

McCormick, in deprecating the encouragement-of-confidences rationale for the communication privilege, concludes that the "real source" of the privilege is the "feeling of indelicacy and want of decorum in prying into the secrets of husband and wife."<sup>77</sup> While this conclusion may or may not be accurate, it is less a condemnation than a strong argument in support of the privilege, although it might not have seemed so in 1954 when Professor McCormick first penned his remarks. Surely the compelled revelation of confidences entrusted in the privacy of the marital relationship would be just as "repugnant" to the public and the judiciary and would create at least as much "dissension" in the home as would any other adverse spousal testimony covered by the testimonial privilege. And it is scarcely more "delicate" to convict a defendant on the basis of intimate marital communications where those communications are revealed by an eavesdropper—a practice which Rule 505 does not protect against and may in fact encourage—than where they are revealed by the spouse. Moreover, as illustrated by cases such as *Griswold v. Connecticut*<sup>78</sup> and *Parrish v. Civil Service Commission*,<sup>79</sup> there is more than just sentiment to the repugnance we feel at prying into marital confidences. What is at stake is no less than a right to privacy in that area of life in which privacy is most cherished and to which privacy is perhaps most important.<sup>80</sup> What a man says to his wife, what secrets

---

75. See text accompanying notes 20-23 *supra*.

76. See text accompanying notes 24-27 *supra*.

77. MCCORMICK § 86, at 173.

78. 381 U.S. 479 (1965). Several aspects of the case are discussed in *Symposium on the Griswold Case and the Right of Privacy*, 64 MICH. L. REV. 197-288 (1965).

79. 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967). *Parrish* concerned "midnight raids" on recipients of welfare aid to determine whether mothers of dependent children were living with "unauthorized males." The California Supreme Court upheld a case worker's right to refuse to participate in such raids and declared them unconstitutional, noting the similarity to the invasion of marital privacy in *Griswold*.

80. See N.Y. TR. LAW. PROJECT 42; Louisell, *supra* note 19, at 110. Cf. *North v. Superior Court*, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972), in which the court cited California's marital communication privilege as demonstrating a legis-

he reveals and what hopes and fears he expresses, are simply not society's concern. Not only is "utter freedom of marital communication from all government supervision, constraint, control or observation" a "psychological necessity" to successful marriage;<sup>81</sup> it is a fundamental human right, the impairment of which a social order based on the family unit should not and will not lightly countenance.<sup>82</sup>

## 2. *Lack of Awareness*

The next, and perhaps most persistent, argument voiced by the Advisory Committee against the communication privilege is that marital conduct (and in particular marital communication) is not affected by the absence of a privilege because "in all likelihood" the parties to the communication are "unaware" of the privilege's existence. I will analyze this argument in some detail because it has been a primary basis for condemnation of the marital communication privilege, and a continuing source of comfort for its critics, ever since the argument was advanced, apparently for the first time, in 1929.<sup>83</sup> Having been accepted for half a century, this premise is badly in need of a thorough airing and examination. Furthermore, I contend that whether this premise is true or false, it is an insufficient reason for abolition of the communication privilege.

It is logical, at least, to contend that if the existence of a privilege to prevent disclosure of marital communications is primarily justified as fostering the freedom of such communications unfettered by fear of later revelation, then the absence of any awareness of the existence of the privilege by those it is intended to protect will tend to negate the privilege's utility.<sup>84</sup> Thus the Advisory Committee seems

---

lative intention to include such communications within those requiring special protection against invasions of privacy (in the context of an overheard prison conversation).

81. Louisell, *supra* note 19, at 113. The full quotation is set out in the text accompanying note 120 *infra*. Cf. Comment, *The Husband-Wife Privilege of Testimonial Non-Disclosure*, 56 NW. U.L. REV. 208, 218, 231 (1961). Compare the personal observations of attorney David Berger and the remarks of Professor Charles Black during the Second Circuit Judicial Conference, 48 F.R.D. 39, 48-49, 51 (1969).

82. The value and necessity of complete confidence, candor, and freedom in marital communications, even were there no scientific authority to support it, would be obvious to any married person. Yet many scientific studies are available to confirm this common observation, should it be considered open to doubt. See, e.g., Folsoin, *Communication in Marriage and Marriage Counseling*, 20 MARR. & FAM. LIV. 113 (1958); Harper, *Communication Problems in Marriage and Marriage Counseling*, 20 MARR. & FAM. LIV. 107 (1958); (discussing in particular "safety of expression"); Hobard & Klausner, *Some Social Interactional Correlates of Marital Role Disagreement and Marital Adjustment*, 21 MARR. & FAM. LIV. 256 (1959); Navran, *Communication and Adjustment in Marriage*, 6 FAMILY PROCESS 173 (1967).

83. Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675 (1929).

84. As will be seen below, however [see text accompanying notes 114-18 *infra*],

to raise a legitimate issue when it considers whether anyone really knows that a marital privilege exists. Unfortunately, like so many other commentators, the Committee accepts an "easy" answer to the question with far too little critical consideration.

*a. The Hutchins & Slesinger Premise*

The sole direct authority cited by the Advisory Committee for its conclusion that the marital privilege exists in a vacuum of ignorance is an article written in 1929 by Dean Robert Hutchins and Donald Slesinger.<sup>85</sup> Hutchins and Slesinger discuss several serious deficiencies in then (1929) contemporary concepts of marital privilege. The majority of criticisms raised by the authors, such as the problem of what constitutes a "communication," or what to do about the eavesdropper, while legitimate in their day and still so in some jurisdictions, have since been corrected (if they ever existed) by at least the more recent legislative or judicial revisions of the law of privilege, and in particular by the California Evidence Code.<sup>86</sup> In addition, the authors' feeling that marital privilege is an ineffective attempt to "stem the tide" of the modern breakdown of the family unit<sup>87</sup> is refuted best by their own admission that the high rate of divorce, the low birth rate, and the loss of intrafamily economic dependence may actually indicate a greater-than-ever emphasis on spousal intimacy and compatibility.<sup>88</sup> If the authors are correct that the "only remaining binding ties are sexual and affectional,"<sup>89</sup> it follows that now more than ever we must respect and preserve the privacy and intimacy which are at the heart of those ties.<sup>90</sup>

---

ignorance of the privilege's existence may make for much freer communication than would knowledge of its nonexistence.

It is interesting that in many other areas of the law, we presume knowledge and judge actions accordingly. Thus a criminal offender is presumed to know the criminal law, and a hearsay declarant is often presumed to know that a statement is against his proprietary, pecuniary, or legal interests; and where knowledge can neither be presumed nor demonstrated, rights generally cannot be waived or lost.

85. Hutchins & Slesinger, *supra* note 83.

86. See text accompanying notes 65-66 *supra*.

87. Hutchins & Slesinger, *supra* note 83, at 677-79.

88. *Id.* at 679-80. Cf. Louisell, *supra* note 19, at 123 n.103.

89. Hutchins & Slesinger, *supra* note 83, at 677-79.

90. See authorities cited in note 82 *supra*. Hutchins and Slesinger also state that there is a "growing tendency toward revelation of intimacies where the end in view seems to justify it." *Id.* at 682. However, the instances which they cite—revelation to a psychiatrist, or to scientific researchers—are examples of voluntary disclosure at the free option of the person involved. This is certainly no argument for compulsory revelation in a courtroom, any more than the fact that some married couples choose to reveal their most intimate secrets to the reading public or to researchers like Masters and Johnson is any indication that the public in general no longer considers such details of married life private or in need of protection.

One of the many arguments advanced by Hutchins and Slesinger, however, has outlived all the others:

Very few people ever get into court,<sup>91</sup> and *practically no one outside the legal profession knows anything about the rules regarding privileged communications between the spouses.*<sup>92</sup>

Significantly, the authors cite *no authority whatsoever* for this declaration of fact. Those who have in later years repeated this proposition have cited either the quotation just set out,<sup>93</sup> nothing at all,<sup>94</sup> or, in the best tradition of a self-perpetuating proposition the commentators eventually began to cite each other.<sup>95</sup> Thus an impressive-appearing body of authority was created from whole cloth, as it were, with little or no support.

Having concluded that people are unaware of the privilege, Hutchins and Slesinger seem then to assert that awareness itself is not significant:

As far as the writers are aware (though research might lead to another conclusion) marital harmony among lawyers who know about privileged communications is not vastly superior to that of other professional groups.<sup>96</sup>

Whether or not "research might lead to another conclusion," marital harmony among attorneys is probably irrelevant, since many factors peculiar

---

91. The authors note [at note 39] that recent unpublished research had revealed that "almost two-thirds of the cases put on the court calendar are withdrawn or discontinued before reaching judgment." However, as will be seen, such a statistic has no bearing on the effect of the privilege.

92. Hutchins & Slesinger, *supra* note 83, at 682 [emphasis added].

93. *E.g.*, Wright, *supra* note 29, at 573; Comment, *Marital Privilege and the Right to Testify*, 34 U. CHI. L. REV. 196, 200 (1966).

94. *E.g.*, Comment, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390, 413 (1931).

95. Perhaps the most striking example of this phenomenon is the following sequence: Hutchins & Slesinger cited no authority; the student author of the Comment noted *supra* note 94 likewise cited no authority; McCormick, in his original edition, cited these latter two authorities (McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 90 nn. 1 & 2 (1st ed. 1954)); the Advisory Committee's Note to Rule 505, *supra* note 74, cited Hutchins & Slesinger (with a "*cf.*" to the original edition of McCormick); and now the 1972 edition of McCormick, *supra* note 19, at § 86, comes full circle and cites and quotes from the Advisory Committee Note which, of course, cites Hutchins & Slesinger. Similarly, Professor Green, *supra* note 8, at 11, cites Professor Wright and Hutchins & Slesinger; whereas Professor Wright, *supra* note 29, at 573, merely cites the latter. See also Comment, *Husband-Wife Evidentiary Privileges: The Power of the Federal Courts to Seek a Rational Solution*, 17 ST. L.U.L.J. 107, 122 (1972).

For his part, Professor Wright states, "Of course there is very little evidence that people consult the local law of privilege before making, or refraining from making, confidential communications. Indeed *such evidence as exists* [Hutchins & Slesinger] indicates that they do not." Wright, *supra* note 29, at 573 [emphasis added]. If this is "evidence," it can only be classified as nonexpert opinion lacking sufficient foundation for admission.

96. Hutchins & Slesinger, *supra* note 83, at 682.

to that profession may contribute to marital strain not experienced by other professionals. Nevertheless, I suspect that such research would indicate greater freedom of communication to spouses, physicians, and others in protected relationships by those cognizant of the relevant privileges. If awareness of a privilege has, in fact, no effect on freedom of communication, then no communication privilege can be justified, including attorney-client, because all are based on the opposite premise.<sup>97</sup> And if the authors meant to say that privacy and freedom of communication have no effect on marital harmony, I simply reject their conclusion for reasons stated elsewhere.<sup>98</sup>

*b. The Validity of the "Awareness" Premise*

While research on the marital harmony of attorneys would be of doubtful value, what would be useful is meaningful research on the actual degree to which persons unschooled in the law are aware that some form of marital privilege exists.<sup>99</sup> I would be greatly surprised if such awareness were not more extensive than many critics have assumed. Perhaps we were not so litigious a people in 1929 as we are today; in 1972, over thirteen million lawsuits were filed in California state courts alone.<sup>100</sup> This figure does not include the vast number of persons who appear in some capacity each year before administrative agencies, grand juries, and other tribunals, or the countless others who anticipate litigation which does not materialize. In addition, the media, especially television, lead to increased public awareness of legal concepts such as privileges. Never have so many persons been so cognizant of, and so ready to assert, their right to a "day in court," and increasing awareness most certainly has its effect on their conduct with respect to potentially litigious situations. No one contends that all persons are aware of their evidentiary privileges, any more than all are aware of their civil rights; nor would all alter their conduct in accordance with such awareness. But it should be sufficient that a substantial number fall within the areas of awareness and effect contemplated by the marital communication privilege.<sup>101</sup>

97. See text accompanying notes 20-23 *supra*.

98. See note 82 *supra* and text accompanying note 120 *infra*.

99. Professor Louisell has also expressed a desire for further research in the area of marital privilege. Louisell, *supra* note 19, at 101.

100. [1973] JUDICIAL COUNCIL OF CALIFORNIA ANN. REP., pt. 2, ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS, Pt. II, at 187, 219, 229 (1973). The statistics are for the fiscal year 1971-72 and represent a 56 per cent increase over 1961-62.

101. It should be kept in mind that, although the existence or nonexistence of a communication privilege affects the lives and actions of those who never enter a courtroom as well as those who do, the latter category is far greater in number than the total of civil litigants and criminal defendants. Privileges protect not only parties to a proceeding, but also witnesses totally removed from any interest in the outcome, and even

It is noteworthy that no other conduct-oriented right or exclusionary rule seems to elicit such skepticism as to the public's awareness. One of our most precious rights is the right of privacy. Whether or not the privacy of marital communications is protected under the same penumbra of constitutional imperatives as the privacy of birth control decisions,<sup>102</sup> we do not measure the existence of that right of privacy by the number of persons who are aware of its legal ramifications. Yet one important reason for enforcing the right of privacy is to encourage freedom of thought and communication.<sup>103</sup> In addition, there are numerous other evidentiary rules, not usually classified as "privileges," which take for granted some form of knowledge on the part of those whose conduct is supposedly governed by their existence, such as the rules regarding evidence of post-accident repairs,<sup>104</sup> gratuitous offers of aid (the "Good Samaritan" problem),<sup>105</sup> and offers of compromise,<sup>106</sup> all of which withhold arguably relevant evidence of conduct in order not to discourage such conduct by others.<sup>107</sup>

One can readily suppose that as many married couples are aware that they have a marital privilege as know of the privileges for communications to psychotherapists and clergymen, both of which are retained in full by the Proposed Rules.<sup>108</sup> The Advisory Committee justifies its abolition of the marital privilege in part by comparing it to these "other communication privileges" which "have as one

---

those who, although not themselves witnesses, wish to protect a confidential communication to or from a witness. We are thus speaking of a large number of "directly" involved individuals. That few cases reach judgment—as pointed out by Hutchins & Slesinger—is irrelevant.

102. See, e.g. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

103. See King, *Wire Tapping and Electronic Surveillance: A Neglected Constitutional Consideration*, 66 DICK. L. REV. 17 (1961). Cf. Comment, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 YALE L. J. 1084 (1961).

104. See, e.g., CAL. EVID. CODE § 1151 (West 1966).

105. See, e.g., CAL. EVID. CODE § 1152 (West 1966).

106. See, e.g., *Id.*

107. Of course, this evidence might sometimes be considered irrelevant: for example, by the time post-accident repairs are made circumstances have changed respecting reasonable notice of the condition. Nevertheless, the usual rationale for such rules is the public policy against discouraging such conduct. See, e.g., *Westbrooks v. Gordon H. Ball, Inc.*, 248 Cal. App. 2d 209, 56 Cal. Rptr. 422 (1967); *Oldenberg v. Sears, Roebuck & Co.*, 152 Cal. App. 2d 733, 314 P.2d 33 (1957); *McCORMICK* § 74. *McCormick* argued that some of these rules should properly be classified as privileges. *McCORMICK* §§ 74-78 (1st ed. 1954). His successors did not agree. *Id.* § 74 (2d ed. 1972).

108. Proposed FED. R. EVID. 504, 34 L. Ed. 2d, No. 5 at 45 (1973) (psychotherapist-patient privilege); Proposed FED. R. EVID. 506, 34 L. Ed. 2d, No. 5 at 50 (1973) (communications to clergymen).

party a professional person *who can be expected to inform the other of the existence of the privilege.*"<sup>109</sup> But how many clergymen or psychotherapists know about their particular privilege; and of those who know, how many actually inform their communicants of its existence unless specifically asked?<sup>110</sup> Surely we cannot say there is a sufficient difference in "awareness" between these and the marital communication privilege to draw a rigid line that accepts one totally and abolishes the other out of hand.<sup>111</sup>

Perhaps one explanation for this seeming inconsistency is that, at least with respect to the clergyman's privilege, the Advisory Committee succumbed to that which it dismissed in relation to marital privilege: a regard for the "indelicacy" or "unseemliness" of compelling a priest, minister or rabbi to reveal a confession made to him by one who trusted in his discretion.<sup>112</sup>

### c. *Accepting the "Unawareness" Premise*

I have indicated some reasons why I disagree with the Advisory Committee's acceptance of the premise that married persons are unlikely to be aware of the communication privilege. Even if we assume for sake of argument that this premise is correct, it still does not in any way warrant abolition of the privilege in federal courts.

i. *Litigation-Connected Effects.* Whatever the effect lack of awareness might have on the rationale that the communication privilege encourages confidence and freedom of expression, it has no effect whatsoever on the efficacy of the privilege in actually preventing disclosure of marital confidences in court, and thereby (1) preventing dissension in the particular marriage concerned; (2) avoiding the unseemly spectre of trial by invasion of privacy; and (3) eliminating a deterrent to free communication by others in the future—all secondary but vital policies behind the privilege.<sup>113</sup>

---

109. Advisory Committee's Note to Proposed FED. R. EVID. 505, 34 L. Ed. 2d, No. 5 at 49 (1973) [emphasis added].

110. I omit here the question of awareness by attorneys of the attorney-client privilege. There are no doubt many attorneys who, although they remember to assert the privilege at trial or discovery, neglect to inform their clients of it in advance, and thus lose some degree of candor they might otherwise expect.

111. The Advisory Committee is not helpful in explaining its decision. The Note to Rule 506 declares, "The considerations which dictate the recognition of privileges generally seem strongly to favor a privilege for confidential communications to clergymen." 34 L. Ed. 2d, No. 5 at 51 (1973). I do not disagree with this conclusion in the least, but it applies equally well to the marital communication privilege.

112. This would not be a novel situation. The Irish courts were enforcing a sacerdotal privilege when the English courts were not, and not because Irish citizens were necessarily more knowledgeable in the law than the English. See *Cook v. Carroll* [1945] I. R. 515.

113. One writer takes the argument a step further by suggesting that jurors will turn against such testimony and against the party who introduces it, and the public

ii. *Informing the People.* If, in fact, people generally are ignorant of those rights and privileges which have the potential to affect their personal lives and everyday activities, the legal community could attempt to inform them instead of simply taking those privileges away. This is, of course, only one aspect of a general failing of our educational system and the organized Bar adequately to inform and educate members of the public as to the laws under which they live, with the result that people may be punished for infractions of laws of which they are only vaguely aware, and many more never enjoy the benefits of rights and privileges of which they are unaware. Many Bar and lay groups are now attempting to create increased awareness in people of their rights and duties; it is not far-fetched to suggest that such education include the fundamentals of evidentiary privileges—marital, medical, sacerdotal, and attorney-client.

iii. *Awareness by the Litigant.* Again assuming that the average person is unaware of the existence of a marital communication privilege, what of litigants who, upon first becoming involved in a lawsuit or criminal proceeding, consult their attorneys as to their rights and legal position? Very likely they will learn of their privileges as well, and from then on (for what could be a matter of months or years in some cases) they will be fully aware of whether they can speak freely before their attorneys, their spouses, or any other individuals. Thus for those who do get to the courtroom, any ignorance of the law of privilege may be a temporary state of mind. While the marital privilege was not created only for the litigants of the world, they are the ones who encounter it in its most stark and meaningful terms.

iv. *If We Didn't Know It Existed, We Will Surely Know It's Gone.* The marital privilege is, like all privileges, a negative concept which prevents revelation of certain information (even in the sanctity of the judge's chambers),<sup>114</sup> and so prevents the issue of its existence or nonexistence from coming to public attention.<sup>115</sup> If in fact the privilege or its application remains somewhat obscure, perhaps it is because it has commanded little public notice and created little consternation until now.<sup>116</sup> However, once the privilege is abolished this may well change. The publicity attending the present Congressional debates has already greatly increased public awareness of evidentiary privileges; and the news of their ultimate abolition would not remain a sec-

---

may ultimately turn against a judicial system that permits it. Comment, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 NW. U.L. REV. 208, 231 (1961).

114. E.g., CAL. EVID. CODE § 915 (West 1966).

115. It is improper to comment in court upon the exercise of a privilege. E.g., CAL. EVID. CODE § 913 (West 1966).

116. Cf. Louisell, *supra* note 19, at 113, citing comments of Professors Morgan and McCormick with respect to the relatively uncontroversial nature of the privilege.

ret for long. In the future, as the negative privilege to be silent becomes the positive compulsion to testify, the public will doubtless begin to learn of defendants who are condemned by revelation in open court of their private marital acts and communications, or of spouses who are imprisoned for contempt of court for refusing to so testify. And it may well be that even persons who, in ignorance of the marital privilege, did not formerly hesitate to confide in their spouses because they took confidentiality for granted,<sup>117</sup> will choose their words more carefully in the new-found knowledge that the privilege and its protection do not exist.<sup>118</sup>

### 3. *The "Non-Verbal" Marital Relation*

The final argument presented by the Advisory Committee is that "quite unlike marriage," the relationships whose privileges are retained "are essentially and almost exclusively verbal in nature."<sup>119</sup> I do not dispute the "essentially verbal" nature of the psychotherapist-patient or clergyman-penitent relationship, nor would I contend that the average marriage is "almost exclusively" a verbal relationship. However, the conclusion that verbal communication in complete freedom, confidence, and privacy is anything but an absolute necessity in a marriage is, at the very least, beyond the competence of the Advisory Committee, and in fact would likely be rejected out-of-hand by the very psychotherapists and clergymen referred to above. As expressed by Professor Louisell,

A marriage without the right of complete privacy of communication would necessarily be an imperfect union. Utter freedom of marital communication from all government supervision, constraint, control or observation, save only when the communications are for

---

117. By definition a "confidential" communication is not intended *or expected* to be revealed, in court or otherwise. For the person who believes that the loyalty and discretion of his or her spouse will be sufficient to assure confidentiality, if nothing else abolition of the privilege will prove a rude shock to prior expectations.

118. But if the communications privilege were now to be abolished, publicity about the change might reach large segments of the population of a state.

One might then expect a decrease in communication between spouses which could lead to marital disharmony.

Comment, *Marital Privileges and the Right to Testify*, 34 U. CHI. L. REV. 196, 200 n. 25 (1966). See also N.Y. TR. LAW. PROJECT 142; Comment, *Posthumous Privilege in California*, 8 U.C.L.A. L. REV. 606, 609 (1961).

On the other hand, if the privilege is abolished, every effort should be made to insure that the word does spread. If it is important that people be informed of the rights they do have, it may be even more vital that they be informed of those they have lost, so that individuals who were aware of their privileges (or took confidentiality for granted) previously will be disabused of their now-incorrect assumptions prior to acting upon them to their prejudice. Unfortunately, however, abolition presumably would be retroactive to expose communications made while a privilege still existed.

119. Advisory Committee's Note to Proposed FED. R. EVID. 505, 34 L. Ed. 2d, No. 5 at 49-50 (1973).

an illegal purpose, is a psychological necessity for the perfect fulfillment of marriage. Recognition by the state that spouses possess such right of confidential communication by reason of the nature of their relationship, promotes the public policy of furthering and safeguarding the objectives of marriage just as other institutions in the area of domestic relations or family law promote it.<sup>120</sup>

It will come as no surprise to any married person that experts in the field have reached conclusions similar to that of Professor Louisell.<sup>121</sup>

### B. *General Criticism of the Communication Privilege*

There are other criticisms which have been made of the marital communication privilege—and indeed of communication privileges in general—which the Advisory Committee did not expressly recognize, but which no doubt colored some of its attitudes and merit brief discussion.

One pervasive theme in attacks on communication privileges is that they are merely the result of the successful lobbying efforts of various pressure groups to inflate the status or prestige of particular professions.<sup>122</sup> With respect to marital privileges, or course, this argument is patently absurd unless there is some powerful “married couples’ lobby” of which I am unaware. Furthermore, reality seems to belie this premise. It is unlikely, for example, that accountants have a more powerful lobby than doctors; yet in some states the former enjoy a privilege while the latter do not.<sup>123</sup> Moreover, the very fact that every state in the Union and every western nation has recognized most or all of the privileges in question for several centuries would seem to indicate that if there is some pressure group behind each privilege it has been very persuasive.

A second common complaint (applicable primarily, I assume, to criminal cases) is that the privilege only protects the confidences of a wrongdoer.<sup>124</sup> This is the same argument that in the past has been so often raised to deny the civil rights of criminal suspects, and it displays the same flaws in the context of marital privilege. It re-

---

120. Louisell, *supra*, n.19, at 113.

121. See n.82 *supra*.

122. A good example of this argument is found in Ladd, *supra* note 8, at 556, 572. See also McCORMICK § 77, at 159. At least one commentator sees this as a clear, if unexpressed, motivation for the Advisory Committee’s abolition of state privileges. Dunham, *supra* n.8, at 30.

123. *E.g.*, GA. CODE ANN. § 84-216 (1970); see Collins v. Howard, 156 F. Supp. 322, 324 (S.D. Ga. 1957).

124. *E.g.*, “The marriage relation of criminals deserves no encouragement serving to protect them in the perpetration of their crimes.” Comment, *Privileged Testimony of Husband and Wife in California*, 19 CALIF. L. REV. 390, 412 (1931).

verses the presumption of innocence and proceeds on the assumption that he who is suspect is most likely guilty, and if he is not he has nothing to hide. This is not the place to respond generally to this form of argument, or to attempt to illustrate that the innocent are the true beneficiaries of scrupulous protection of suspects' rights. Adequate response by others, however, is not lacking.<sup>125</sup> Suffice it to say that, at least as regards marital privilege, the argument has no validity. It is the innocent spouse as well as the guilty one who suffers the effect of compelled betrayal. The betrayal need not be of "wrongdoing," for the party spouse may be innocent; and the communication revealed may be one made by the witness, not the party spouse. Furthermore, spousal condemnation of a defendant, if repugnant to society, is equally so whether the final verdict is conviction or acquittal. But most importantly the privilege exists to protect or foster the *extra-judicial* conduct of one who may never be a suspect or a defendant. To focus only on the ultimate wrongdoer who "goes free" is an old tactic, and, I trust, a thoroughly discredited one.

There is one aspect of the above criticism of the communication privilege, especially that criticism relied on by the Advisory Committee, which seems to have been overlooked by those seeking justification for its abolition: Even the most vehement critics of the privilege do not recommend its *abolition*, but only its *restriction*; it is to be entrusted to the discretion of the trial judge in individual cases. Thus Hutchins and Slesinger, having completed their oft-cited attack on marital privilege, conclude that it might "be restricted, with the understanding that it is automatically waived wherever crucial evidence can be obtained in no other way."<sup>126</sup> And McCormick, having put forth essentially the same argument against the privilege, and having added his own view that "emotion and sentiment" are the real source of the privilege, offers his solution:

[We should] recognize . . . that the privilege is not an absolute but a *qualified* one, which must yield if the trial judge finds that the evidence of the communication is required in the due administration of justice.<sup>127</sup>

125. For example, Justice Douglas, dissenting in *Draper v. United States*, points out:

[t]he rule we fashion is for the innocent and guilty alike. If the word of the informer on which the present arrest was made is sufficient to make the arrest legal, his word would also protect the police who, acting on it, hauled the innocent citizen off to jail.

358 U.S. 307, 314-15 (Douglas, J., dissenting). *Cf., e.g.,* *Miranda v. Arizona*, 384 U.S. 486 (1966).

126. Hutchins & Slesinger, *supra* note 83, at 686.

127. McCormick § 86, at 174 [emphasis added]. Professor McCormick goes on to suggest what standards the judge should apply:

Whether or not a discretionary privilege is the "solution" will be discussed below.<sup>128</sup> At this point it should simply be noted that even some of the most ardent critics of the communication privilege, including the only two cited by the Advisory Committee, do not believe that their criticism warrants its total abolition.

### C. *The Advisory Committee and the Testimonial Privilege*

The only aspect of marital privilege retained by the Proposed Rules is that relating to testimony against a spouse—what has been referred to as the testimonial privilege. Rule 505 (a) provides:

An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

Rule 505(b) allows the witness spouse to claim the privilege in the accused's behalf if he is absent; and Rule 505(c) sets out various exceptions to the privilege, which will not be dealt with here.<sup>129</sup> What the Rules leave left, then, is a testimonial privilege applicable only in criminal cases, held only by the accused spouse. Here the Advisory Committee has inexplicably opted for precisely the reverse of what sound policy (and most authorities, even those most critical of marital privilege) would seem to dictate: they have adopted the wrong form of the wrong privilege, and have given it to the wrong spouse.

#### 1. *The Wrong Privilege*

As between the marital testimony privilege, which the Advisory Committee adopted, and the communication privilege, which they rejected, it is the former which has generally received more criticism. Wigmore, although he denounced the "anti-marital" (testimonial) privilege as "illogical and unfounded," and an "indefensible obstruction to truth,"<sup>130</sup> nevertheless considered the criteria for retention of the communication privilege to be fully satisfied.<sup>131</sup> Bernard

---

The judge could then protect the marital confidence when it should be protected, namely, when the material fact sought to be established by the communication is not substantially controverted and may be proven with reasonable convenience by other evidence.

*Id.* A similar discretionary solution is suggested for other privileges. *Id.* at § 77. See also McCormick, *Law and the Future: Evidence*, 51 NW. U. L. REV. 218, 220-21 (1956); Dunham, *supra* note 8, at 36. This has been the approach in England. See note 47 *supra*.

128. See text accompanying note 168 *infra*.

129. Proposed FED. R. EVID. 505, 34 L. ED. 2d, No. 5 at 48-49 (1973). For a detailed criticism of these exceptions see Comment, *Federal Rules of Evidence and the Law of Privilege*, 15 WAYNE L. REV. 1287, 1338-40 (1969).

130. 8 WIGMORE § 2228, at 218, 221.

131. *Id.* at § 2332.

Witkin states in his work on California Evidence that although "[m]any authorities consider the theory [of the testimonial privilege] unsound and the privilege undesirable,"<sup>132</sup> nonetheless "[m]ost of the critics of the [testimonial] privilege are satisfied that the social considerations which support the communications privilege are substantial and that it should be retained."<sup>133</sup> Similar sentiments have been expressed in other quarters. In a personal injury action in California the petitioner sought a mandamus ruling which would have added a further exception to the "generally disfavored" testimonial privilege. Both the petitioner and the court took pains to point out that no inroad was intended on the communication privilege:

Petitioner is not attempting to do away with the privilege provided by the section concerning communications between spouses. Our discussion throughout this opinion will have no reference to that type of privilege *as it is universally agreed that such limited privilege is desirable*.<sup>134</sup>

And in recent years many states and several "uniform" codification proposals have made just this choice—abolition or weakening of the testimonial privilege and retention of the communication privilege.<sup>135</sup>

It is evident, therefore, that the Advisory Committee adopts the privilege most often criticized and rejects the one most often supported, thus putting the new Federal Rules immediately at odds with the weight of authority, the trend of state legislation, and any hopes of ultimate federal-state uniformity.

## 2. *The Wrong Form*

Rule 505 is restricted to criminal proceedings; in federal civil ac-

132. B. Witkin, CALIFORNIA EVIDENCE § 828, at 774 (1966).

133. *Id.* § 838, at 782.

134. *Stein v. Superior Court*, 174 Cal. App. 2d 21, 23 n.\*, 344 P.2d 406, 407 n.1 (1959) [emphasis added]. See also, e.g., Orfield, *The Husband-Wife Privileges in Federal Criminal Procedure*, 24 OHIO ST. L.J. 144, 164-65, 171 (1963); Comment, 2 CALIF. L. REV. 148, 149 (1913); Note, 33 TUL. L. REV. 884, 887 (1959).

It is interesting, considering that the Proposed Federal Rules are promulgated in the name of the Supreme Court, that in *Stein* the court refused to recognize the proposed new exceptions, no matter how desirable, insisting that "If [the privilege] is to be changed, it must be done by the Legislature and not by the courts." *Id.* at 24, 344 P.2d at 407. Cf. Louisell & Crippen, *Evidentiary Privileges*, 40 MINN. L. REV. 413, 414 (1956).

135. Many of the statutes are collected in Comment, *Marital Privileges and the Right to Testify*, 34 U. CHI. L. REV. 196, 199 n.19 (1966); and Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend*, 38 VA. L. REV. 359, 365 (1952). This choice was made by both the MODEL CODE OF EVIDENCE rule 215 (1942) and the UNIFORM RULES OF EVIDENCE rule 23(2) (1953). Contrast the recent reform of English law, note 47 *supra*.

tions the testimonial privilege will not apply. Yet an examination of the many authorities who have inveighed against the testimonial privilege reveals that their criticism was directed to the availability of the privilege either in *criminal* proceedings only,<sup>136</sup> or in both civil and criminal.<sup>137</sup> I have found no instance of approval of the privilege in criminal proceedings only. The only reason given for the Advisory Committee's decision is its conclusion that "[i]t is believed to represent the one aspect of marital privilege the continuation of which is warranted."<sup>138</sup> The Note to Section 505 also states that "[a]bout 30 jurisdictions recognize" a testimonial privilege held by an accused.<sup>139</sup> However, there is no mention of whether these (or other) jurisdictions, like California, also recognize a privilege in civil cases. In any event, this would be a strange place for the Advisory Committee to bow to state authority, since it openly rejects such precedent in abolishing the marital communication and other privileges. Thus what in fact prompted its "belief" that retention of this much-maligned privilege was justified only in criminal proceedings remains obscured behind the Committee's less-than-informative Note.<sup>140</sup>

It would seem that one either accepts or rejects the premises on which the testimonial privilege is based; if accepted as valid for criminal proceedings, they remain valid for civil proceedings.<sup>141</sup> Even assuming that there could be found a difference in degree between the "dissension" or "repugnance" created by one and the other—and this distinction has yet to be demonstrated—it seems doubtful that there would be a sufficient difference to justify adoption of the privilege in one form of proceeding and its total rejection in all others, thereby severely curtailing the intended policy effect of the former.

---

136. For example, Jeremy Bentham, at his most colorful, railed at turning a man's house not just into his castle, but into a "den of thieves." 5 RATIONALE OF JUDICIAL EVIDENCE 332, 339-45 (1827), quoted in 8 WIGMORE § 2228, at 218.

137. See generally 8 WIGMORE § 2228. Cf. Comment, *The Marital "For and Against" Privilege in California*, 8 STAN. L. REV. 420, 436-37 (1956), urging that whatever treatment is accorded the testimonial privilege, it be uniformly applied to civil and criminal cases.

138. Advisory Committee's Note to Proposed FED. R. EVID. 505, 34 L. Ed. 2d, No. 5, at 49 (1973). There is also a citation to *Hawkins v. United States*, 358 U.S. 74 (1958). Note, however, that the actual holding of *Hawkins*, a Mann Act case, is rejected by the specific language of Rule 505(c).

139. 34 L. Ed. 2d, No. 5, at 45 (1973).

140. Certainly the content and clarity of the Advisory Committee's Notes often leave much to be desired. Cf. Comment, *Federal Rules of Evidence and the Law of Privileges*, 15 WAYNE L. REV. 1287, 1337 (1969).

141. Cf. *Louisell*, *supra* note 19, at 122.

Moreover, whatever arguments might be made for favoring the testimonial privilege in only criminal cases also support abolition of its criminal application first. Thus if it be said there is a greater "repugnancy" in denying a man his life or liberty on the strength of his spouse's condemnation than is felt when only his property is at stake, it can also be argued that the least defensible and most "repugnant" aspect of the privilege is that which allows thieves and murderers to go free for such reasons of "sentiment." If it be contended that condemnation by a spouse in a criminal case will cause greater marital dissension than in a civil case, it can be countered that a marriage broken by a criminal conviction and a long prison sentence will not likely survive in any event and, even if it does, it is less worthy of saving than that of a law-abiding citizen guilty only of negligence or commercial misfeasance.<sup>142</sup> While I agree with neither position because I believe that the privilege is warranted in both civil and criminal proceedings, I consider the choice made by the Advisory Committee to be arbitrary, standing as it does naked and unexplained in circumstances calling for the most careful evaluation and explicit justification before state prerogatives and policies are ignored or undermined.

### 3. *The Wrong Spouse*

The testimonial privilege retained by the Proposed Rules is held only by the accused spouse. Again, the only explanation given is that more states give the privilege to the accused than give it to the witness spouse.<sup>143</sup> As indicated above, deference to state practice is an unlikely motivation considering the Advisory Committee's general attitude toward state precedent. More importantly, the choice seems to be ill-advised on the merits, as many of the more recent statutory formulations have recognized. If the rationale for the privilege is one of avoiding marital dissension, then the only spouse able to make a decision to testify on the basis of whether the marriage is worth saving is the *witness* spouse; the accused is understandably unlikely to be able to put aside his or her strong personal interest in suppressing adverse testimony, and would be likely to invoke the privilege regardless of marital considerations. If "repugnancy" is the rationale, it applies primarily to the spectre of compelling a spouse to condemn his or her mate on pain of contempt; however, if the witness spouse chooses voluntarily to testify, whether out of a sense of

---

142. See note 124 *supra*.

143. Advisory Committee's Note to Proposed FED. R. EVID. 505, 34 L. Ed. 2d, No. 5, at 49 (1973).

duty to tell the truth or out of ill feeling toward the accused, society will less likely be offended.<sup>144</sup> Moreover, giving the privilege only to the witness spouse vitiates several of the criticisms most often leveled at the testimonial privilege, particularly the criticism that a marriage in which one spouse will voluntarily condemn the other is not worth saving,<sup>145</sup> and that the accused should not be "consulted in determining whether justice shall have its course against him."<sup>146</sup>

This formulation is not, however, without its possible drawbacks. It has been pointed out that, as the sole holder of the testimonial privilege, a spouse would be tempted to blackmail or otherwise coerce the accused by use of this "weapon" of testimony.<sup>147</sup> Perhaps a witness spouse might be subjected to coercion by the prosecution to compel his or her testimony,<sup>148</sup> or the witness might be coerced by the accused *not* to testify. All of these fears no doubt have some foundation, but they seem far too remote to justify granting the privilege to the party spouse. A truly vindictive spouse could find other ways to coerce the accused, including a threat to cooperate fully (short of testimony) with the prosecution, and there has always been the problem of coerced statements (especially confessions) or coerced silence of a witness, both of which can be and are regularly dealt with by proper judicial awareness and supervision.

#### D. General Criticism of the Testimonial Privilege

Although the Advisory Committee did not discuss them specifically, there is no dearth of critical comments directed against the testimonial privilege, ranging from Bentham<sup>149</sup> to McCormick ("an ar-

144. See generally CAL. L. REV. COMM'N STUDY, *supra* note 49, at F-16 & F-17. *But cf.* United States v. Walker, 176 F.2d 564, 568 (2d Cir. 1949) (L. Hand, J.). Of course, this argument does not apply to the communication privilege, which must at least belong to the communicating spouse, party or witness, if it is to foster the freedom to speak without fear of disclosure by those privy to the conversation. An interesting variation is suggested in Comment, *Federal Rules of Evidence and the Law of Privileges*, 15 WAYNE L. REV. 1287, 1336 (1969), in which the author attempts to provide for the seemingly remote situation in which the party spouse desires the witness spouse to testify, but the latter wishes to remain silent—a situation the author believes does not warrant allowance of a privilege—by requiring that *both* spouses invoke the privilege before it will be recognized.

145. *E.g.*, MCCORMICK § 66, at 145.

146. 8 WIGMORE § 2228, at 216-17. See also Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend*, 38 VA. L. REV. 359, 375 (1952).

147. Comment, *The Marital "For and Against" Privilege in California*, 8 STAN. L. REV. 420, 437-38 (1956).

148. N.Y. TR. LAW. PROJECT 145, citing allegations made in *Hawkins v. United States*, 358 U.S. 74 (1953).

149. See note 136 *supra*.

chaic survival of a mystical religious dogma")<sup>150</sup> to Wigmore ("illogical and unfounded").<sup>151</sup> In general, the thrust of these criticisms is that (a) the "dissension" caused by adverse testimony is minimal or non-existent; (b) the "repugnance" at spousal condemnation is "mere sentiment" unworthy of judicial recognition; and (c) whatever the validity of (a) and (b), neither policy is sufficiently important to justify interference with the fact-finding process. Whether or not one agrees with the latter conclusion, the decision as to which policy should prevail should be a legislative judgment the states make individually, and not one the Advisory Committee or the Federal Rules preempt. Thus, while I welcome the fact that the Proposed Rules retain at least this limited privilege, it would be far better if the Rules simply directed recognition of the states' privileges, so that those which did not desire to sacrifice the fact-finding process to a controversial public policy would not have that choice forced upon them in their federal courts.

It is also interesting to note that most of the above criticisms of the testimonial privilege were made in the context of assumed retention of the often-overlapping communication privilege.<sup>152</sup> Whether in the context of total abolition of marital privilege those criticisms of the testimonial aspect would be so impassioned is a matter for speculation. It seems certain only that, as indicated earlier, these authorities would scarcely have countenanced the total reversal in precedent—adoption of testimonial and abolition of communication privilege—contained in the Proposed Rules.

#### IV

##### CONCLUSIONS AND RECOMMENDATIONS

###### A. *Provision for Application of State Privileges*

A number of suggestions have been made as to how the Federal Rules should deal with privileges, and certainly all have some merit. The basic options are three: (1) adopt state privileges expressly; (2) leave privileges entirely out of the Rules to be dealt with, as at present, by the courts on a case-by-case basis; or (3) abolish state-created privileges in favor of new federal ones. Within these alternatives are many variations: apply state privileges only in diversity cases, or in all federal proceedings; abolish only those state privileges more (or less) restrictive than their new federal counterparts;

150. MCCORMICK § 66, at 145.

151. 8 WIGMORE § 2228, at 218. See the authorities collected in *Id.* at 218-21, and those cited in notes 134-35 *supra*.

152. *Id.*

and so forth. The Advisory Committee opted for choice (3), which choice I would reject for reasons heretofore discussed. As between choices (1) and (2), the second is especially appealing to those who feel the courts are already doing an adequate job of applying state privileges when required by *Erie* or when otherwise thought necessary or desirable.<sup>153</sup> The first, however, offers the greater certainty and predictability which is so necessary when dealing with rules intended to have an effect on pre-litigation, out-of-court conduct. It provides one standard—the state's—for the courts to apply, and one rule—the state's—for the individual to follow. A particular communication would either be privileged in all proceedings within a state or in none, thus ensuring a degree of predictability calculated to create expectations upon which conduct rationally can be based. In the area of privileges, uniformity between the federal court sitting in San Francisco and the state court across the street seems of far greater practical import than uniformity between the federal court in San Francisco and those in Denver, Pittsburgh, and Minneapolis.

### B. Diversity and Federal Question Cases

Most authorities have agreed since the distinction between diversity and federal question jurisdiction first became significant, that state-created privileges should or must be recognized in diversity cases because the federal interest in the litigation is minimal where the state supplies the law of decision. However, almost as many authorities seem to agree that in federal question cases, the federal interest in the litigation is sufficient to outweigh the state policy behind the creation of the privilege.<sup>154</sup> The first proposition is difficult to deny. In an attempt to do so, the Advisory Committee first offended the legal community by deprecating state privileges as mere devices for the "suppression of information."<sup>155</sup> The Committee then asserted that a question of privilege arises generally "quite by accident," so that "the litigation involves something *substantively devoid of relation to the privilege.*"<sup>156</sup> One wonders whether the Committee would make the same assertion if each state law which a federal court was called upon to apply carried with it the proviso: "provided, however, that this statute shall be of no force or effect

153. See, e.g., the views of Judge Friendly, 119 CONG. REC. 5004 (daily ed. March 19, 1973), who is unconvinced that there is a need for any federal evidentiary rules. Cf. N.Y. TR. LAW. PROJECT 35 (favoring omission altogether of the subject of privileges from the Federal Rules).

154. See authorities cited in notes 34 and 67-68 *supra*.

155. See text accompanying notes 16-30 *supra*.

156. Advisory Committee's Note to Proposed FED. R. EVID. 501, 34 L. Ed. 2d, No. 5, at 39 (1973) [emphasis added]. See also note 34 *supra*.

whenever its enforcement would require violation of an evidentiary privilege." Yet that is precisely the thrust of a state-created privilege, which is in effect a decision that if enforcement of any state law (except those specifically singled out for special treatment as an exception to some privilege) requires violation of an evidentiary privilege, the policy behind the privilege outweighs that behind the particular law in question and the former must prevail. States could, of course, write such clauses into their statute books; that they should have to do so to avoid a federal court's overzealous enforcement of their own state law is absurd.<sup>157</sup> The conviction is inescapable that "[t]o fail to recognize a state-created privilege in a suit on a state-created claim that is in federal court only because of the accident of diversity of citizenship [is] quite indefensible."<sup>158</sup>

Those who argue further against application of state privileges in diversity cases because there would be a dual system to contend with and "even-handed justice" requires uniformity between diversity and federal question cases,<sup>159</sup> in fact make out the primary argument for adoption of state privileges in *all* federal proceedings, since complete uniformity—state and federal—can *only* be achieved in this way.<sup>160</sup> Nevertheless, when it comes to federal question cases one must concede a substantial federal interest in the enforcement of federal laws. Even so, I question the blanket decision that that interest necessarily and in all instances outweighs the state's interest in maintaining a privilege in force within its borders. Certainly there are instances in which the balance can tip either way. For example, the difference between a state crime and a federal crime may be the difference between the holdup of a corner grocery store or of the federal bank next door. The state's interest in dealing with such crime is essentially the same in either case—protection of the life and property of its citizens, and deterrence of further crime. Both the teller and the grocer, the shopper and the bank patron, would be likely to be local citizens. The same police officers would respond

---

157. Compare the remarks of Professor Korn:

[I]t does not lie in the mouths of the federal judiciary to say to the state, We will provide a "juster justice" by sacrificing one of your substantive policies (i.e., that underlying the privilege) in order to effectuate others (i.e., those underlying the state law governing the merits of the controversy.)

*Second Circuit Conference* 77. See also Degnan, *supra* note 8, at 300; McNichols, *supra* note 8, at 193.

158. Wright, *supra* note 29, at 573.

159. *E.g.*, Ladd, *supra* note 8, at 571, 573.

160. See note 32 *supra*. Consider that state conformity to federal privileges, even if theoretically feasible, would require agreement and affirmative action by fifty state legislatures, whereas federal conformity to state privileges can be achieved by the drafting and adoption of one federal rule.

to both alarms and ultimately investigate both crimes, with possible federal assistance in the case of the bank. If the state has weighed and determined that its enforcement of its criminal laws is not significantly hampered by application of, for example, its marital privilege in the grocery holdup case, need the federal policymakers really fear that the effect on federal criminal laws will be measurably different?<sup>161</sup> Moreover, should those policymakers ignore the clear state interest which is involved in enforcement of the federal criminal law? The same analysis might be made of state and federal antitrust laws: Should not identical policies, often with identical provisions,<sup>162</sup> be enforced within a given jurisdiction with at least comparable applications of privilege?

There are, nevertheless, federal questions—especially those directly involving interstate activities, nationwide conspiracies, or the states themselves, and those concerned with federal statutes having no state counterparts—for which there is a strong argument for application of federal privileges, not because of a lesser state interest in the policy behind the privilege, but because of a lesser state interest in enforcement of the law of decision. How can these instances be taken into account? I believe the most viable solution is a compromise, similar to that suggested by several critics of particular privileges:<sup>163</sup> provide for application of state privileges in all diversity and other cases in which state law provides the rule of decision, but give the court some discretion in federal question cases to apply a state privilege or not, according to the nature of the litigation and the exigencies of the case. Where the state interest in the decisional law is strong, the privilege should be applied; where it is not, and where the evidence is truly necessary to the adjudicative process and cannot otherwise be obtained (and where, of course, the Constitution does not compel its application), the privilege might be denied.<sup>164</sup> This is not a perfect solution but it provides the flexibility which is necessary whenever a conflict of policies is inevitable and no broad generalization seems adequate for all situations.<sup>165</sup>

---

161. Compare Louisell, *supra* note 19, at 123.

162. Compare, for example, the provisions of California's Cartwright Act, CAL. BUS. & PROF. CODE §§ 16,700 *et seq.* (West 1964) with those of the federal Sherman and Clayton Acts, 15 U.S.C. §§ 1 *et seq.*

163. See text accompanying notes 126-27 *supra*.

164. This is hardly a radical suggestion. For example, proposed Rule 508 would provide a qualified privilege for trade secrets, balancing protection and justice by the application of judicial discretion.

165. Compare the "interest analysis" approach suggested in Comment, *Evidentiary Privileges in the Federal Courts*, 52 CALIF. L. REV. 640, 649-56 (1964).

An alternative solution, less flexible but more certain, might be for individual federal statutes to provide expressly that state privileges shall not apply, where such a

### C. *A Federal Marital Privilege*

Thus far my conclusions and recommendations have applied generally to all privileges, on the theory that the best solution is a general one which will encompass marital and other privileges, thus obviating the need for Congress to debate and decide each separately, and preserving for the individual states their prerogative to make such decisions. However, failing a general solution, presumably there will be a body of federal privileges promulgated to apply either in all federal proceedings or in federal question cases only.<sup>166</sup> In such event, following are my views on marital privilege, most of which have already been set forth in the body of this article.

#### 1. *The Communication Privilege*

There are several principal reasons the marital communication privilege should be included in any federal codification:

(a) Like all communication privileges, this one is only as effective as the breadth of the forums in which it applies. To deny it in all federal proceedings is to deal a severe blow to the policy decisions of the individual states which have created or adopted the privilege. Especially in a diversity context, such a usurpation of state prerogative cannot be justified.

(b) Of all the aspects of marital privilege, this is the one which most states continue to support. Therefore any hope we might have of ultimate uniformity between state and federal courts in a given jurisdiction would be frustrated by a rule which at its adoption is opposed to virtually every modern statute and rule in America.

---

policy is thought desirable by the drafters of the legislation in question. This is already true of, for example, the Bankruptcy Act § 21a, 11 U.S.C. § 44a (1964).

According to at least one knowledgeable member of the Advisory Committee, federal courts already apply a discretionary approach to state privileges, especially in unreported decisions relying more on "reflexive responses" than on *stare decisis*. Weinstein, *supra* note 8, at 373 & n.82. As Judge Weinstein points out, the vast majority of decisions are of this type, and the federal courts almost instinctively apply state privileges unless a clear injustice would result. *Id.*

166. One other possible circumstance in which new federal privileges would be drafted is that suggested by Professor Wright, *supra* note 29, at 573: state privileges would be applied (in diversity cases) in addition to whatever other privileges were adopted for the federal courts. See also Koru, *Second Circuit Conference* 77. The only disadvantage to this approach (in addition to its omission of federal question cases, which could be remedied as suggested above) is the imposition on the states of privileges which might be more liberal than they have deemed consistent with state policy—arguably an interference with state policy that is no more justified than denial of a privilege the state would recognize. If the suggestion does have merit, it is primarily in federal question cases, where the state interest is the least and the federal interest the greatest. Note, however, that a privilege available only in federal court would have minimal effect on pre-litigation conduct.

(c) There is simply no sound evidence against the efficacy or policy of the privilege, and even those who have expressed their doubts about its soundness have hesitated to recommend its outright abolition. While it is this writer's opinion that what empirical evidence does exist—including our everyday experiences—supports the communication privilege and the policies behind it, even if the evidence is as yet inconclusive, the relationship which this privilege seeks to protect is too important to our society to jeopardize (or even fail to encourage) by hasty abolition on the basis of supposition, guesswork, and unsupported sociological surmise. Judge Weinstein understated the case when he said that abolition of a state-created privilege constitutes "a significant legislative judgment"<sup>167</sup> by the rulemakers. If the burden against it is not clearly carried, the privilege should prevail.

## 2. *The Testimonial Privilege*

The testimonial privilege is far more difficult than the communication privilege to evaluate. We are faced with two factors: the desirability of deference to state legislative decisions to protect relationships of primary state interest; and the cogent (if not entirely scientific) arguments against the merits of the privilege. If marital privilege is to be curtailed, fewer state policy decisions would be thwarted by abolition of the testimonial than by abolition of the communication privilege, since the testimonial privilege has found less support among the states than the communication privilege. And if the latter is retained, it will protect against at least the most repugnant instances of antisposal testimony. Nevertheless, abolition of the testimonial privilege will still interfere needlessly with the prerogatives of a great many states, and if a compromise is necessary, perhaps a better one would be a discretionary testimonial privilege, as recommended as a compromise for federal question litigation. That is, rather than abolish the testimonial privilege, I would merely leave it to the court's discretion to disallow it in exceptional circumstances where testimony is absolutely necessary in the interests of justice. This is a procedure which would be more workable for the testimonial privilege than for its communication counterpart, simply because the latter more strongly affects pre-litigation conduct and thus requires a higher degree of advance predictability. It is not sufficient, if a privilege is intended to encourage free communication, that that communication may *possibly* be protected in *some* future proceedings. The effect of the testimonial privilege, on the other hand, is primarily felt *at* or *after* the proceeding in which it is invoked, and no significant pre-litiga-

---

167. Weinstein, *supra* note 8, at 372.

tion conduct is predicated or dependent upon its existence. Thus, while I personally favor retention of all state privileges, and would retain both aspects of spousal privilege, I believe a discretionary compromise is at least a viable alternative for its controversial testimonial aspect. The probable effect would be that federal trial courts would take into consideration the existence (or nonexistence) of a state privilege in weighing whether to allow the federal counterpart, and thus the overall result would be little different than the present practice.<sup>168</sup>

## V

### A FINAL COMMENT

It is appropriate to point out, as others have done, that the great majority of the new Federal Rules appear to be sound, well-considered proposals reflecting the extremely high calibre of the scholars, practitioners, and judges who made up the Advisory Committee. Perhaps it is for just this reason that so many in the legal community are disappointed in the Committee's disposition of privileges and the justifications advanced for that disposition. Perhaps also it is because I write as an attorney biased by both academic and practical training in litigation that I tend to agree with many (though not all) of the reactions of the groups of trial attorneys who have criticized the Rules' treatment of the marital privilege. No doubt all have the same desire to "achieve justice" as any individual who helped to draft the Rules. However, it is a fundamental tenet of our judicial system that the ascertainment of truth is not necessarily the equivalent of justice; it is not and never has been the ultimate goal to be achieved always, at all costs. Compelled self-incrimination is just as distasteful—and as unjust—if conceded to be truthful as if presumed false.<sup>169</sup> Delayed trials are no less unjust if they reach the truth than if they do not.<sup>170</sup> And invasion of the marital chamber is no more acceptable when it brings out all the facts in litigation than when it enforces policies against birth control or abortion.<sup>171</sup> In a system of law, truth is a means toward justice, not necessarily an end in itself. Exactly what weight or effect should be accorded conflicting means or conflicting ends is a matter of policy

---

168. Cf. note 165 *supra*.

169. *Miranda v. Arizona*, 384 U.S. 436 (1966), certainly did not turn on the lack of technical trustworthiness of a coerced confession.

170. See *Strunk v. United States*, 93 S. Ct. 2260 (1973). In *Strunk* a violation of the defendant's right to a speedy trial required dismissal of the indictment against him, despite the sufficiency of the evidence produced at trial to establish his guilt.

171. See *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

whose resolution, in the context of our federal system (barring constitutional imperatives), might best be left to the individual states through their elected representatives. One thing is certain: Self-appointed commentators (like myself) and court-appointed advisors can examine, analyze, and recommend, but in areas of either state or federal interest, they should not usurp the policymaking function and take upon themselves the legislative duty and prerogative to make the final decision.

# California Law Review

VOL. 61

DECEMBER 1973

No. 6

## BOARD OF EDITORS

### *Editor in Chief*

CHRISTOPHER H. SCHROEDER

### *Executive Editor*

E. ELIZABETH SUMMERS

### *Managing Editor*

RANDALL IRA BARKAN

### *Articles & Book Reviews*

HOWARD ALAN LATIN  
PATRICIA D. DOUGLASS  
JULIE E. McDONALD  
GEORGE RUTHERGLEN  
ULRICH WAGNER

### *Notes & Comments*

ROBERT M. JENKINS, III  
WILLIAM A. CARDWELL  
RICHARD DELGADO  
ROBERT A. GOODIN  
JAMES E. HARTLEY  
SUSAN SAWYER  
ROBERT E. WILLETT  
THOMAS S. WILLIAMSON, JR.

### *Managing*

MARY M. LOGALBO

### *Research*

ELIOT S. JUBELIRER  
THOM GREENFIELD SEATON  
PATRICK W. WALSH

### *Associate Editors*

CHARLES FREDERICK ADAMS  
PHYLLIS ANDELIN  
JAMES A. ASKEW  
WILLIAM T. BARKER  
PAUL CLARK  
GARY JAY COHEN  
PHILIP R. DIAMOND  
JAMES WALTER ELLIS  
JOHN A. GLOGER

DOUGLAS L. HAMMER  
MARTIN WAYNE JOHNSON  
ROBERT L. LAWRENCE  
PETER LOMHOFF  
RANDALL R. MCCATHREN  
ALAN MITTMAN  
LISE A. PEARLMAN

LARRY PEITZMAN  
JOSEPH P. POWERS  
JAMES D. RICHMAN  
HENRY SHIELDS, JR.  
SCOTT SONNE  
NANCY E. SULLIVAN  
ANNE MCLEOD TREBILCOCK  
CATALINA VALENCIA  
DAVID L. WAGNER

JEFFREY S. ALLEN  
CAROL AMYX  
DOUGLAS W. BECK  
ANN BRICK  
BRUCE A. COHEN  
JOHN DANNER  
LANI LIU EWART  
ALAN M. FENNING  
FRANCIS E. FERNANDEZ  
JOSEPH FERRARA  
GARY GREENFIELD  
JOANNE B. GROSSMAN  
JANE W. HALL

LAWRENCE L. HOENIG  
PAMELA S. JUE  
ALAN M. KATZ  
MICHAEL J. LAWSON  
LAURA W. S. MACKLIN  
JOHN BARRETT MARKS  
BRUCE MAXIMOV  
PETER L. MCCORKELL  
THOMAS JOHN MILLS  
HOWARD M. MOFFETT  
PETER MUÑOZ  
ARTHUR LARRY PASSAR  
NORMAN PINE

DOROTHY ROBINSON  
PAUL M. ROSE  
FEDERICO CASTELAN SAYRE  
RAND C. SCHMIDT  
JAMES SEVERSON  
RALPH J. SHAPIRA  
EVELYN R. SINAIKO  
STEPHEN STUBLAREC  
RICHARD M. TRAVIS  
EARL J. WAITS  
H. LEE WATSON  
WILLIAM H. WEBSTER  
LOUIS S. WELLER

### *Administrative Assistant*

PATRICIA G. SMITH