PRIVILEGE IN THE UNIFORM RULES OF EVIDENCE

RALPH C. BARNHART*

The Uniform Rules of Evidence present a remarkable accomplishment in bringing the law of evidence within the compass of a set of simple statements of general rules. The object of writing these rules to constitute a coherent whole was a grand one. The law of evidence did not develop as a coherent body of law. Much of it probably developed as much by accident as by design, and its welter of inconsistencies and disunity has justly been called a conglomeration or worse. While the work of reducing conglomeration to order was sorely needed, simplification is never easy. One area of evidence law which is, perhaps, less susceptible of being brought into coherent statement with other parts of the law is the area dealing with privilege. The amalgamation of privilege with the other areas of evidence into a single consistent whole was a formidable task.

When lawyers talk and write about privilege, they think of it in somewhat different ways than they do in the case of other rules of evidence. Rules having to do with the exclusion and admission of some types of hearsay, or rules requiring that in order to be usable evidence must have a greater or lesser degree of logical probity, or rules requiring that objections be stated in such a way that the court and opposing counsel have some notion of the ground of the objection seem to be a natural part of the belligerent business characterized generally as the adversary process. If we accept Morgan's thesis that rules of evidence exist because of this adversary method of trying lawsuits, rather than the Thayer-Wigmore view that rules of evidence are necessary because of the institution of the jury, the distinction between classes of evidence seems clearer.[1] The exclusionary rules are logical weapons of litigious combat. They enable alert and conscientious counsel to avoid having a case built against their clients out of unreliable, misleading or improperly prejudicial evidence, and they can guide intelligent and orderly preparation and presentation on behalf of counsel's own clients. Correctly applied, they do not operate unfairly. Each side has the obligation of presenting his own case according to the rules and each side is entitled to insist that the other do the same. Each may protect himself by timely and proper appeal to the trial judge. Properly used, these rules help the factfinding process and avoid useless expenditure of time. For a long time critical

* Dean and Professor of Law, University of Arkansas School of Law.

[1] Morgan, "The Jury and the Exclusionary Rules of Evidence," 4 U. Chi. L. Rev. 247 (1936).

commentary has pointed out that our rules of evidence do not constitute a consistent whole, that some are contradictory even within a single rule, that it is questionable whether some of them really serve the purpose for which they were presumably formulated, and that some may keep out as much good evidence as bad.[2] These faults can be corrected; the adoption of the Uniform Rules of Evidence would go a long way toward elimination of the more obvious faults, but even the faults do not obscure the thoroughly good purpose served by the rules of evidence in getting at the facts in the circumstances in which litigation is carried on. The suggestion from time to time that the law of evidence is so involved that it would be best to get rid of it altogether has never on sober thought been seriously considered. Improve it we must, but we do not want to face the serious task of trying our clients' cases without the protection that the rules give against the sort of evidence that unscrupulous or unprincipled adversaries might use. Much has been done to clean up the process of factfinding through the simplification of pleading, the easing of the technical rules of variance and amendment, and the development of pre-trial discovery. We continue to depend upon an adversary system while slowly refining it of its crudities. We believe that the rules of evidence and our pre-trial procedures serve the cause of truth, or at least the cause of expeditious trial of lawsuits.

When we come to the rules by which witnesses are privileged not to testify or by which relevant, non-misleading, non-prejudicial evidence may be barred on the basis of a right on the part of someone to keep the witness from the stand or to keep the evidence from being disclosed in court, we are dealing with something different. Rules which keep an accused from the stand, or bar testimony of a spouse, or render illegally obtained evidence inadmissible are not strictly tools of adversary proceedings. Often the person who benefits from the exercise of the rule is not a party to the litigation. One of the adversaries may be pleased by the exercise of the privilege or disappointed if the privilege is not claimed, but in either event he seems to have received or been denied a windfall having nothing to do with winning or losing or even with his care or lack of care in preparation of the case. As often as not the privilege helps the wrong person. This does not seem to comport with the notion of fair combat. Advantage may go without regard to the skill or diligence of counsel. The case of the party who is helped or hurt has no relation to the basis of the

[2] E. G. Cleary, "What's Wrong With the Law of Evidence," 15 Ark. L. Rev. 11 (1960). Important here, of course, is Morgan, The Law of Evidence—Some Proposals for Its Reform (1927).

privilege. Hence Wigmore's famous Titus-Flavious complaint of reversing Titus' conviction to teach Flavious not to violate the constitution.[3] The great Wigmore thought that this embodied a mechanical idea of justice.

Nevertheless the privileges were developed as part of the law of evidence as it was hammered out by judges and lawyers as they tried lawsuits by the adversary method. These privileges and the policies which sustain them are, in general, judge-made and judge-declared. They may now be embodied in constitutional and statutory provisions, but they were not so created. They were not imposed by legislative enactment upon a reluctant bench and bar.[4] They came about as part of the process of litigation and factfinding. They must have developed out of a somewhat different spirit than they have encountered in more recent times or it would seem that they would not have developed at all. Now the sentiment of the writers is to say that whereas the rules of exclusion were designed to facilitate the ascertainment of the facts by guarding against unreliable or prejudicial or misleading evidence, the rules of privilege have no such purpose. "They do not in any wise aid the ascertainment of truth," says McCormick, "but rather they shut out the light."[5] "Every such privilege given legal sanction closes the door to sources of reliable evidence, hampers the legal investigatory process and increases the margin of error in factfinding results."[6] Wigmore begins his treatment of the subject of privilege by asserting that there is a positive duty to give testimony:

> When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule. . . . It follows . . . that *all privileges of exemption from this duty are exceptional*, and are therefore to be discountenanced. . . . They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.[7]

Professor Morgan in the Foreword of the Model Code says:

If a privilege to suppress the truth is to be recognized at all, its

[3] 8 Wigmore, Evidence § 2184a n.1 (McNaughton rev. 1961) [hereinafter cited as Wigmore].

[4] The physician-patient privilege is of course an exception. Uniform Rule of Evidence 27 (comment).

[5] McCormick, Evidence § 72 (1954) [hereinafter cited as McCormick].

[6] Gard, "Kansas Law and the New Uniform Rules of Evidence," 2 Kan. L. Rev. 332, 351 (1954).

[7] 8 Wigmore § 2192.

> limits should be sharply determined so as to coincide with the limits of the benefits it creates. . . . In many decisions this principle is disregarded, sentiment serves for judgment, and rhetoric is substituted for reason.

There is appellate judicial opinion expressing the same attitude. McCormick quotes Learned Hand:

> The suppression of truth is a grievous necessity at best, more especially when as here the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme.[8]

Again, what is supreme may depend upon the point of view. One or the other of the parties to a dispute may see little or no benefit to be derived from a stray witness's claim of privilege while the witness may feel that his privilege is paramount and fail to appreciate the importance of the lawsuit itself.

Despite these reservations concerning testimonial privileges in our law of evidence, not much has been accomplished in the way of eliminating them. If anything the house of privilege is extending itself, or at least there is pressure to increase the area or extent of privilege, resistence to which calls forth judicial and other expressions such as those quoted.

The Uniform Rules of Evidence, promulgated in 1953, began its statement of the rules of privilege with Rule 7: *General Abolition of Disqualifications and Privileges of Witnesses, and of Exclusionary Rules.* According to the comment this rule "wipes the slate clean of all disqualifications of witnesses, privileges and limitations on the admissibility of relevant evidence. Then harmony and uniformity are achieved by writing back on the slate the limitations and exceptions desired." When the draftsmen got through writing the privileges back onto the slate they remained much as they were before the slate had been wiped clean. The Rules retained the privilege against self-incrimination (Rules 23, 24 and 25), the lawyer-client privilege (Rule 26), the physician-patient privilege (Rule 27), the marital privilege for confidential communications (Rule 28), the priest-penitent privilege (Rule 29), a privilege for refusing to disclose religious belief (Rule 30), a privilege not to disclose one's political vote (Rule 31), the privilege protecting trade secrets (Rule 33), the rule protecting official information from disclosure (Rule 34), the privilege to refuse

---

[8] McMann v. Securities and Exchange Commission, 87 F.2d 377, 378 (2d Cir. 1937), quoted in McCormick § 74, n.3.

For a view sympathetic to the privileges, see Louisell, "Confidentiality, Conformity and Confusion: Privileges in Federal Court Today," 31 Tul. L. Rev. 101 (1956).

to disclose communications made to a grand jury (Rule 35), and the privilege of refusing to disclose the identity of an informer (Rule 36).

The Uniform Rules were built upon the Model Code of Evidence and Rule 7 was the adoption of the same device as was utilized by the Model Code draftsmen in Code Rule 9, which its draftsmen said "clears the ground by abolishing all disqualifications of witnesses, all privileges to refuse to testify and to refuse to disclose evidential material and all rules which exclude relevant evidence."[9] This common pattern of "clearing the ground" or "wiping the slate clean" of all obstructions to admissibility of relevant evidence by way of disqualification of witnesses, privileges, or of exclusionary rules, sought to adopt Thayer's approach to the law of evidence that basically all relevant evidence is prima facie admissible and that obstructions to the admission of relevant evidence are therefore exceptional. The draftsmen of the Model Code of Evidence, the record shows,[10] had considerable doubts about a great deal of the law of privilege and would have preferred to eliminate much of it, but when the final draft was approved, most of it had been kept. As summed up by the reporter, Professor Edmond M. Morgan, "The common-law and statutory privileges have been carefully re-examined and have in great measure been retained in the Code with important modifications."[11]

The privilege for illegally obtained evidence, however, was not included. The draftsman has stated that this privilege, as well as the privilege against self-incrimination which was included, is a constitutional privilege and constitutional construction rather than legislative or judicial rule will have to be the guide for defining it.[12] Under recent decisions of the United States Supreme Court,[13] the same can also be said of the limitations on the admissibility of confessions, treated in the Uniform Rules under the orthodox classification of exceptions to the hearsay rule.

It was probably unfortunate that this somewhat unsympathetic approach of the Model Code to the evidentiary privileges was ostensibly adopted by the Uniform Rules. It proved to be an unacceptable approach to the majority of the membership of the American Law

[9] Model Code of Evidence rule 9 (comment) (1942).

[10] 19 ALI Proceedings 187 (1941-1942).

[11] Model Code of Evidence 7 (Foreword by Professor Morgan).

[12] Gard, "Why Oregon Lawyers Should Be Interested in the Uniform Rules of Evidence," 37 Ore. L. Rev. 287, 290 (1958).

[13] Among the latest are Rogers v. Richmond, 265 U.S. 534 (1961); Culombe v. Connecticut, 367 U.S. 568 (1961); Payne v. Arkansas, 356 U.S. 560 (1958); and Spano v. New York, 360 U.S. 315 (1959). These cases lend support to the view expressed by McCormick (§ 75) that the rules as to confessions fall into the class of privilege.

Institute at the time of the drafting of the Model Code and it gained no additional acceptance in the years before the Uniform Rules were drafted. The latter included all of the common-law privileges included in the former and retreated somewhat in the matter of comment.[14] The experience of writing these two statements of rules, with the accompanying study and comment, has demonstrated that the privileges are hardy plants. Despite scholarly criticism the battle has apparently become one, not of eliminating the old privileges, but of keeping new ones from coming into the law. The privileges have thus survived two winnowings of the law by eminent scholars and jurists who were inclined to treat the privileges in general as "obstructions to truth."

It is fairly clear that the privileges represent in the minds of most people something of great importance. The privileges are too closely related to rights of privacy and security—rights considered essential to happiness and freedom—to be given up in the interests of improving trial procedure. Dean Griswold[15] quotes Pierce Butler:

> It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs.[16]

This process of first eliminating the privileges and then putting them back in again is interestingly illustrated with respect to the Model Code and the Uniform Rules in the instance of the physician-

---

[14] Uniform Rule of Evidence 39.

[15] Griswold, The Fifth Amendment Today 28 (1955).

[16] Sinclair v. United States, 279 U.S. 263, 292 (1929). That this desire for protection of personal privacy is not a mere sentimental hangover from an earlier day, see the additional statement of Edgerton, Circuit Judge, in Mullen v. United States, 263 F.2d 275, 281 (D.C. Cir. 1958):

> I think a communication made in reasonable confidence that it will not be disclosed, and in such circumstances that disclosure is shocking to the moral sense of the community, should not be disclosed in a judicial proceeding, whether the trusted person is or is not a wife, husband, doctor, lawyer, or minister. As Mr. Justice Holmes said of wire-tapping, "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." Olmstead v. United States, 277 U.S. 438, 470, 48 S. Ct. 564, 575, 72 L. Ed. 944 (dissenting opinion).

See also the dissent of Frankfurter, J., in Sibbach v. Wilson & Co., 312 U.S. 1, 17 (1940), referring to the "inviolability of a person" as resting on "considerations akin to what is familiarly known . . . as the liberties of the subject." The *Sibbach* case was dealing not with evidentiary privilege, however, but with the problem of compelling a party to submit to a physical examination.

patient privilege. In the first drafts the Model Code did not include the privilege, but the membership of the American Law Institute in the 1942 meeting voted to include it.[17] The vote came after a vigorous plea from a representative of the medical profession to the meeting and after a strong protest from the Code reporter.[18] From the discussions it is evident that the lawyers were a little embarrassed about rejecting a privilege for doctors and their patients while at the same time keeping one for themselves in their professional relationships. Of course the lawyers have reasons the doctors do not have, but it was the lawyers who were doing the voting. They were reminded by the reporter that if the doctors were doing the voting it would be pretty certain that they would set up a physician-patient privilege and vote out the lawyer-client privilege. The lawyers simply did not have the temerity to vote the doctors out of the privilege and keep one for themselves, particularly while the doctors were watching.

The draftsmen for the Uniform Rules went through a similar pattern of action. First the physician-patient privilege was excluded and then later voted in by the membership of the Conference on Uniform State Laws.[19] Maybe the doctors were not invited to state their views this time for the draftsmen of the Uniform Rules placed Rule 27 in brackets as a kind of take-it-or-leave-it posture. This suggests the wisdom of the first decision to leave it out.

The Model Code further exemplified its basic unfriendliness to many of the privileges by Rule 233: "If a privilege to refuse to disclose, or a privilege to prevent another from disclosing, a matter is claimed and allowed, the judge and counsel may comment thereon, and the trier of fact may draw all reasonable inferences thereon." As noted in the Comment to Rule 233, this problem is one on which there is sharp conflict in the authorities. The tenor of the Comment, however, is that the lessening of the value of the privilege by allowing judge and counsel to comment upon the claim of privilege and the trier to draw inferences therefrom is comparatively slight. This reasoning contrasts with most of the argument, judicial and otherwise, that comment ought to be allowed in order to weaken the effect of the claim of privilege, or that comment ought not to be allowed because to do so is to deny the protection of the privilege.[20] It seems fair to conclude that Rule 233 reflected disapproval of the claim and allowance of privilege. One commentator suggested that the draftsmen of the

[17] 19 ALI Proceedings 183.

[18] 19 ALI Proceedings 211.

[19] Uniform Rule of Evidence 27 (comment).

[20] See McCormick § 80.

Model Code were basically unsympathetic with the privilege against self-incrimination but felt that it was not expedient to attempt its outright abrogation, proposing instead "a more devious attack upon the privilege, by lessening its significance and perhaps pointing the way to its ultimate destruction."[21] The Uniform Rules retreated from this position of the Model Code by restoring the rule followed by most American jurisdictions barring comment upon the exercise of a privilege[22] save in the case of the privilege against self-incrimination.[23] As to the privilege against self-incrimination, the allowance of comment is restricted to comment by counsel, not the judge, and is coupled with a bar to showing the criminal record of one who has taken the stand in his own defense.

The device of Rule 9 of the Model Code and of Rule 7 of the Uniform Rules of placing the law of privilege and witness disqualification into a common category with the exclusionary rules (principally hearsay) of exceptions to the admissibility of relevant evidence ignores the basic difference in the nature of privilege and the concept of relevancy. As already noted, much of the law of privilege lies in recognition of those rights which have come to be considered as basic to the existence of a society of free men. These surely include the right to inviolability of the person, the right to personal privacy, the right to have confidences kept free from compelled disclosure, the right not to be required by governmental process to incriminate one's self, and the right to security of one's person, houses, papers and effects. The law of evidence is thought to be largely procedural, attuned to practical ends and to getting on with the case directly and expeditiously. Much of it is. But the law of privilege, at least in the area of personal rights, has substantive aspects which are too pervasive, too much bound up in the enforcement of those rights, to permit them to be dealt with as mere procedural aids or handicaps to the resolution of private litigation. This is, of course, just what the Uniform Rules attempt to do. For example, Rule 25(c) of the Uniform Rules reads: "No person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis. . . ." The rule is taken from Rule 205(b) of the Model Code and both the Uniform Rules and Model Code comments state that what is dealt with is only the privilege against self-incrimination. Both attempt to leave open the question of whether resistance to forceable extraction of bodily substances is justified

21 Falknor, "The American Law Institute's Model Code of Evidence," 18 Wash. L. Rev. 228, 232 (1943).

22 Uniform Rule of Evidence 39.

23 Uniform Rule of Evidence 23(4).

under any other rule of law. "The rule does not attempt to solve that constitutional question, but limits its application strictly to the privilege against self-incrimination" says the comment to Uniform Rule 25(c). This attempt to separate the privilege from self-incrimination from the constitutional immunity seems but an attempt to separate the privilege from the policy which supports it. Prior to the case of *Mapp v. Ohio*[24] and particularly in the light of *Wolf v. Colorado*,[25] the views of the draftsmen of the Uniform Rules that exclusion was actually no part of the privilege had support in many cases. Mr. Justice Cardozo's blundering constable[26] lived on though he had become a pretty skilled electronic wiretapper and eavesdropper. The opinion in *Mapp*, however, leaves little room for further separation of privilege and exclusionary rule in the area of constitutional immunities. While the *Mapp* case concerned the right to privacy from unlawful searches and seizures, the Court makes it clear that the exclusion doctrine is an essential part of the privilege: "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."[27] The majority opinion takes pains to point up the significance of the decision in related areas, including that of coerced confessions:

> Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as "basic to a free society." This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. And nothing could be more certain than that when a coerced confession is involved, "the relevant rules of evidence" are overridden without regard to "the incidence of such conduct by the police," slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.? We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty [secured] . . . only after years of struggle." They express

---

24 367 U.S. 643 (1961).

25 338 U.S. 25 (1949).

26 "The criminal is to go free because the constable has blundered." Cardozo, J., in People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

27 Mapp v. Ohio, *supra* note 24, at 656.

> "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence. [Citations omitted].[28]

The concurring opinions point out the significance of the ruling for cases such as *Rochin v. California*.[29] It seems clear, therefore, that in the realm of constitutional privilege the exclusionary rule is an essential ingredient of the privilege and can no longer be considered apart from it. This development was not entirely unanticipated by cases decided between the time the Uniform Rules were written and the decision in *Mapp*, but it does make the relevancy approach of the Model Code and the Uniform Rules particularly inappropriate as a theoretical basis for workable rules in this area. It seems inappropriate in areas other than those involving constitutional privilege also, for they too have as their justification considerations other than relevancy. With respect to these privileges there has been no suggestion that the privilege could exist separately from the rule which excluded the evidence. The problem with respect to these privileges seems to be the manner of administration by the courts, whether granted freely in accordance with the policy which supports them, or administered with a niggardly hand.

However viewed, these privileges are ill-suited tools for the carrying on of adversary litigation and the interests of private litigants cannot be depended upon to protect them or to secure their observance. They are, however, a necessary part of trial procedure for it is usually under the duress of trial that the rights protected by the privileges come into jeopardy. The law of evidence cannot escape them by assuming that it would be better off without them.

The Model Code of Evidence did not fulfill the hopes of its sponsors as a code for it was never enacted by any legislature as a code or adopted by a court as rules of practice. The Uniform Rules, now almost ten years old, are succeeding only a little better through partial adoption in one state and through recommendations by committees in other states.

---

[28] *Id.* at 656-657.

[29] 342 U.S. 165 (1952).

The overruling of Wolf v. Colorado by Mapp v. Ohio is acutely discussed in Allen, "Federalism and the Fourth Amendment: A Requiem for Wolf" in Kurland, Supreme Court Review 1961; Broeder, "The Decline and Fall of Wolf v. Colorado," 41 Neb. L. Rev. 185 (1961).

The rule of the *Weeks* case,[30] rejected by both the Model Code and the Uniform Rules as illogical and grossly sentimental,[31] has apparently become the capstone of constitutional privilege. This may not be an unmixed misfortune for the cause of the Uniform Rules; it may actually be a blessing in disguise. The concern, expressed in some of the commentary following the promulgation of the Uniform Rules, that alteration of rules of privilege involved weighing of policy of the kind usually considered to be a legislative function, can probably be set at rest.[32] As far as the constitutional privileges are concerned, courts can hardly be said to be exceeding their proper judicial function in adopting rules of court which give effect to the decisions of the United States Supreme Court holding that observance of the constitutional privileges is required by the Fourteenth Amendment. Instead of attempting to ignore constitutional problems involved, the Uniform Rules can now embody Fourteenth Amendment rights without doing violence to the proper separation of legislative and judicial functions. No state supreme court could very well be said to be "legislating" beyond its power from now on if it declares as rules of court the exclusionary rules imposed by the United States Supreme Court as essential ingredients of constitutional privilege. Paradoxically, the emphasis of the *Mapp* decision and others on the substantive aspects of the privileges should then ease the acceptance of the Uniform Rules, though the original design was to keep them procedural by the device of specifically excluding constitutional problems.

Some revision of the Uniform rules to include the exclusion of illegally obtained evidence would seem to be desirable. Bringing the Uniform Rules into line with *Rochin* and *Mapp* and *Rogers* would erase the nearly impossible attempt to divide the indivisible and should place the Uniform Rules into more acceptable posture for adoption as the rules of evidence for the federal courts.[33]

---

[30] Weeks v. United States, 232 U.S. 383 (1914). For a leading state decision supporting the *Weeks* rule, see People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).

[31] Gard, "The Uniform Rules," 31 Tul. L. Rev. 19, 26 (1936). The author states:

> We take the view that the rule of *Weeks v. United States*, even in its somewhat modified application in federal practice, is illogical, grossly sentimental and a device for the administration of justice by indirection—sometimes doubtful justice at that. Naturally our omission of such a rule will not prevent the courts from continuing to exclude such evidence if the fallacy of extending the Fourth Amendment to that extreme is adhered to.

[32] Louisell and Crippin, "Evidentiary Privileges," 40 Minn. L. Rev. 413, 436 (1956).

[33] See Rules of Evidence: "A Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts," Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (1962).

The problem of policy change by court rule as it concerns the personal privileges should no longer present insurmountable difficulties to adoption by court rule of the Uniform Rules. We no longer consider procedure and substance as separable categories and there is developing support for restoring to courts the historic function of control over the administration of justice.[34]

As pointed out above, the development of the law of privilege was the determination of policy by the courts and it should not be said that the law in this area has now lost its ability to change with the changing affairs of men.

The notion that the cause of truth is served if all the relevant evidence is brought to bear upon the factual issues between disputing litigants but is somehow harmed when testimony is barred in the interests of preserving an individual's right to privacy or in preserving his confidences from forced and unwanted disclosure, or in the interest of refusing to require an accused to incriminate himself, is not a meritorious one. It places too slight a regard upon the values which the privileges sustain. The rationale of any of our evidential privileges is subject to re-examination. Careful consideration may modify or bring a privilege into discard, but it ought to be done on the basis that the privilege has outlived its service to humankind and not on the ground that "it suppresses the truth."

Moreover, the mental processes by which a ruling is made on admissibility is necessarily different from those by which a claim of privilege is sustained or denied. Admissibility or inadmissibility is based upon the logic of presentation of a case to the trier. The ruling is made upon the value of the offered evidence *as evidence*. The ruling has to be made upon a determination of whether the proffered evidence would move the case forward or have the effect of leading the inquiry into side issues or clouding the important issues with matters of irrelevancy or prejudice. Here the problems are ones of logic and clear reasoning aided by the craftsmanship and skill with which counsel present the case. A claim of privilege, however, calls for reasoning of a different order on the part of the judge. The first considerations are not those of the trial itself, or should not be if the privilege invoked is to serve the policy which sustains it. This policy must be taken into account and the logic of the single trial must give way to the logic of the whole of society. The architecture of the case

[34] Levin and Amsterdam, "Legislative Control Over Judicial Rule-Making," 107 U. Pa. L. Rev. 1, 22 (1958); Clapp, "Privilege Against Self-Incrimination," 10 Rutgers L. Rev. 511, 562-73 (1956). For an historical treatment of judicial rule-making power, see Sunderland, "The Exercise of the Rule-Making Power," 12 A.B.A.J. 548 (1926).

may have to be altered in order that the architecture of the social order is not impaired.

The attitudes incumbent upon a judge presented with a privilege ruling are appreciative rather than coldly logical, sympathetic with the purposes to be fulfilled by his judgment rather than a grudging reluctance to permit a litigant's case to be impeded.[35] A positive distaste for crude and calloused methods in the administration of law would seem to be necessary judicial equipment.

Privileges ought to be accorded freely or not at all. This grudging attitude in allowing what the law says should be freely given breeds a kind of schizophrenia in our administration of justice. Sound policy ought not to be served with a niggardly hand; unsound policy ought to be discarded. Our law ought not to make the eavesdropper a benefactor.[36] If the Uniform Rules of Evidence will bend to the newer attitudes, they will succeed where the Model Code has not.

---

[35] For an example of such judicial attitude, see the statement of Edgerton, J., *supra* note 16.

[36] Uniform Rule of Evidence 26 has eliminated the eavesdropper as a factor to be considered in case of the lawyer-client privilege. Apparently he must still be considered in the case of marital communications.