THE PREDOMINANT OR PRIMARY PURPOSE TEST FOR DETERMINING WHETHER A COMMUNICATION IS SUFFICIENTLY INCIDENT TO A PROTECTED RELATIONSHIP TO BE PRIVILEGED: THE DANGER OF RELYING ON VAGUE LABELS THAT MISS THE MARK OF THE UNDERLYING INSTRUMENTAL RATIONALE FOR PRIVILEGES

EDWARD J. IMWINKELRIED*

"The predominant purpose test . . . 'does not require a showing that obtaining or providing legal advice was the *sole* purpose . . . or that the communications at issue would not have been made but for the fact that legal advice was sought.'"

—*Cuomo v. Office of the New York State Attorney General*[1]

* Edward L. Barrett, Jr. Professor of Law Emeritus, University of California, Davis; coauthor, EDWARD J. IMWINKELRIED & G. ALEX NUNN, THE NEW WIGMORE: A TREATISE ON EVIDENCE. Evidentiary Privileges (Richard D. Friedman ed., 4th ed. 2022); former chair, Evidence Section, American Association of Law Schools.

1. Cuomo v. Off. of N.Y. State Att'y Gen., 754 F. Supp. 3d 334, 363 (E.D.N.Y. 2024) (quoting *In re* Gen. Motors LLC Ignition Switch Litig., 80 F. Supp. 3d 521, 530 (S.D.N.Y. 2015)).

Privilege doctrine is arguably the "most important" area of Evidence law.[2] When Congress was deliberating over whether to approve of the Federal Rules of Evidence, former Supreme Court Justice Arthur Goldberg appeared as a witness.[3] Most areas of Evidence law are mainly of interest to judges and attorneys; they relate to the courts' institutional concerns, notably the reliability of the evidence submitted to the trier of fact.[4] However, during his testimony, Justice Goldberg stated that in contrast,

> [privilege law] is the concern of the public at large. . . . [Privileges] involve the relations between husband and wife. As the Supreme Court suggested in *Griswold v. Connecticut*[, 381 U.S. 479 (1965),] the marital privilege constitutes the basis of the family relation and antedates even the adoption of our Constitution. [Privileges] involve the relations between lawyer and client, a privilege that long antedates the adoption of our Constitution. . . . They relate to the fundamental rights of citizens.[5]

In the final House report on the proposed Rules, Representative Elizabeth Holtzman underscored the same point. She asserted that "unlike most evidentiary rules, privileges protect interpersonal relationships outside of the courtroom."[6]

The privilege provisions certainly loomed large during the Congressional deliberations over the proposed Evidence Rules. The Supreme Court's submission of the draft Rules to Congress precipitated a veritable "crisis" in the rule-making process.[7] Previously, Congress had permitted the Supreme Court's drafts of the Federal Rules of Civil and Criminal Procedure to take effect without change.[8] However, Congress' reaction to the

---

2. *See generally* Comm. on Fed. Cts., *Revisiting the Codification of Privileges Under the Federal Rules of Evidence*, 55 REC. ASS'N BAR CITY N.Y. 148, 151-52 (2000) ("[T]he rules governing privileges were justifiably viewed as the most important in the [Federal Rules of Evidence ('FRE')] because, unlike other provisions that chiefly affect conduct in the courtroom, privilege rules have a pervasive effect on the substantive behavior of citizens outside of court.").

3. *See generally Rules of Evidence: Hearings Before the Spec. Subcomm. on Reform of Fed. Crim. L of the H. Comm. on the Judiciary on Proposed Rules of Evidence*, 93d Cong. (1973) [hereinafter *Hearings*] (testimony of Hon. Arthur H. Goldberg), *reprinted in* 3 JAMES F. BAILEY, III & OSCAR M. TRELLES, II, THE FEDERAL RULES OF EVIDENCE AND LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 142-44 (1980).

4. RONALD L. CARLSON, EDWARD J. IMWINKELRIED, CORTNEY E. LOLLAR & JULIE SEAMAN, EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 755 (9th ed. 2023).

5. *HEARINGS*, *supra* note 3, at 143-44 (testimony of Hon. Arthur H. Goldberg).

6. COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, H.R. REP. NO. 93-650, at 28 (1973) (statement of Hon. Elizabeth Holtzman).

7. *See generally* Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 682-85 (1975).

8. *See* 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 4.2.2, at 266 (4th ed. 2021).

draft Federal Rules of Evidence was both swift and "violent."[9] Within two days of the draft Rules' submission in 1973, the Senate approved a resolution blocking the adoption of the Rules.[10] The House quickly followed suit to block the Rules.[11] The most vociferous objections were to Article V of the draft Rules, the article devoted to evidentiary privileges.[12] The provisions of Article V appeared to expand government privileges while curtailing personal privileges such as the privilege for marital communications.[13] The proposed privilege provisions were not well received in Congress; the Supreme Court submitted the draft Rules to the Congress that had been battling President Nixon during the Watergate controversy over claims of presidential privilege.[14] The privilege provisions generated such a "firestorm"[15] that they "almost doomed the total project"[16] of promulgating a set of Federal Rules of Evidence.[17] Congress deliberated over the Rules for two years before finally allowing the Rules, including a radically revamped version of Article V, to take effect in 1975.[18]

Nor has the importance of privilege doctrine diminished since the Rules' adoption. The Supreme Court's docket is illustrative. To be sure, there have been important decisions by the Court in such areas as expert testimony[19] and hearsay.[20] Nevertheless, the Court has handed down more decisions relating to privilege law than concerning any other part of the Federal Rules.[21]

Although there has been a fundamental shift from a federal common law of Evidence to a statutory form of evidentiary doctrine, the dominant

---

9. *See* 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 509[02], at 509-14 (Joseph M. McLaughlin & Joseph Fogel eds., Supp. 1996).

10. *Rules of Evidence: Hearings Before the S. Comm. on the Judiciary on H.R. 5463*, 93d Cong. 129 (1974) (statement of Richard H. Keatinge and John T. Blanchard).

11. *See generally id.* at 82 (statement of James E. Schaeffer & Joe A. Moore).

12. *See* IMWINKELRIED, *supra* note 8, § 4.2.2, at 269-70; Comm. on Fed. Cts., *supra* note 2, at 149-50.

13. IMWINKELRIED, *supra* note 8, § 4.2.2, at 268-70.

14. CARLSON ET AL., *supra* note 4, at 16.

15. *See* Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 881 (1990).

16. *See* Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 769 (2002).

17. Most of the objections to the proposed Federal Rules related to Article V; those objections were so strenuous that there was a realistic possibility that Congress would react by rejecting the entire draft of the Rules, including the articles that were not the target of such strong objections.

18. *See generally* CARLSON ET AL., *supra* note 4, at 16-17.

19. *See generally* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) (changing the standards for admitting expert testimony in federal court).

20. *See generally* Bourjaily v. United States, 483 U.S. 171 (1987) (ending a controversy over the standard for admitting co-conspirator hearsay statements).

21. IMWINKELRIED, *supra* note 8, § 1.1, at 5-6.

pre-Federal Rules policy rationale for recognizing privileges has remained the same.[22] Early common law tended to stress ethical bases for privilege. For example, the early Elizabethan cases[23] rested the legal privilege on the code of the gentleperson[24] and the lawyer's sense of honor.[25] However, Jeremy Bentham, the great British utilitarian philosopher, later dismissed those notions as "rubbish"[26] lacking empirical support and ferociously attacked privileges that obstructed the search for truth.[27] Bentham argued that the most important objective of the judicial system was "rectitude of decision—accurate decision-making."[28] Privileges hindered attaining that objective because they excluded relevant, often reliable, evidence.

Bentham's disciple was John Henry Wigmore, the most celebrated American Evidence scholar.[29] While Bentham called for the drastic step of abolishing most privileges, Wigmore adopted a subtler, more nuanced strategy. He advanced a set of instrumental criteria that made it difficult for a court to justify recognizing or enforcing a privilege.[30] He acknowledged that society believed that certain relations such as attorney-client ought to be "sedulously *fostered*."[31] He conceived of privileges as instruments or means for fostering such relationships. However, since privileges made it more difficult to achieve rectitude of decision, a privilege should be applied only if the element of confidentiality was truly "*essential* to the full and satisfactory maintenance of the relation between the parties."[32] The assumption was that the layperson consulting the attorney was so fearful of subsequent, judicially compelled disclosure of his or her confidences that they would not consult and divulge without the assurance provided by an evidentiary privilege; without an absolute privilege, the layperson would "hold back."[33] Wigmore had assumed responsibility for

---

22. *See generally id.* § 4.2.4, 331-43.

23. *See* Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1070 (1978).

24. *See* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286, at 530 (John T. McNaughton ed., rev. ed. 1961).

25. *See In re* Colton, 201 F. Supp. 13, 15 (S.D.N.Y. 1961), *aff'd*, 306 F.2d 633 (2d Cir. 1962).

26. 4 JEREMY BENTHAM, *On Exclusion of Evidence*, *in* RATIONALE OF JUDICIAL EVIDENCE 479 (London, Hunt & Clark 1827).

27. *See* IMWINKELRIED, *supra* note 8, § 2.5, at 199.

28. *Id.* § 2.5, at 201.

29. *See id.* § 3.1, at 205.

30. *See id.* § 3.2.3, at 218.

31. WIGMORE, *supra* note 24, § 2285, at 527-28.

32. *Id.*

33. I.H. DENNIS, THE LAW OF EVIDENCE 307 (1999). The privileges were absolute in the technical sense that they could not be defeated by an ad hoc, case-specific showing of need for the allegedly privileged information. The privileges could still be waived, and their scope could be subject to exceptions that were announced beforehand. IMWINKELRIED, *supra* note 8, § 3.2.4, at

Simon Greenleaf's earlier treatise, and Greenleaf had written that "[i]f such communications were not protected, no man . . . would dare to consult a professional adviser."[34] As we shall see in Part I of this article, at the time of the adoption of the Federal Rules, Wigmore's instrumental rationale was and today still is the dominant theory for rationalizing the recognition and application of evidentiary privileges.

Although Wigmore's instrumental rationale furnished the grand theory for evidentiary privileges, to implement the rationale the courts had to identify the foundational facts that condition the application of a privilege in a given case. As Part II of this article notes, at the doctrinal level the courts have developed the generalization that to be protected, the information must amount to a confidential[35] communication[36] that occurred between properly related persons[37] and was incident to the privileged relationship.[38] The communication and confidentiality requirements define *what* was shared by the layperson and the confidant. The requirement for a proper relation specifies the *who*, that is, the type of confidant. Finally, the incidence requirement addresses *why* the persons communicated. For example, did the layperson consult the person for advice because the person was an attorney or rather because the attorney was the layperson's sibling whom the layperson loved and trusted?

The application of the incidence requirement becomes challenging when, as in the preceding hypothetical, there are multiple plausible motivations for the layperson's consultation. Is the corporation's president conferring with the person because the person is in-house legal counsel or because the person is a trusted advisor on business matters? Over the years the courts have phrased the dispositive test for the incidence requirement in various ways, inter alia: the sole motivation;[39] a significant or substantial motivation;[40] or the predominant, primary, or principal purpose.[41] In a 2023 case from the Ninth Circuit, *In re Grand Jury*, the Supreme Court had an opportunity to resolve this apparent split of

---

228-29. If the exception had been established beforehand, the layperson could factor the exception into his or her decision whether to consult and confide. *See id.* § 3.2.3, at 222-24.

34. 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 238, at 273 (Boston, Charles C. Little & James Brown 1842).

35. *See generally* IMWINKELRIED, *supra* note 8, § 6.8.

36. *See generally id.* § 6.7.

37. *See generally id.* §§ 6.9–.10.

38. *See generally id.* § 6.11.

39. *Id.* § 6.11.2, at 1242.

40. *Id.* § 6.11.2, at 1253.

41. *Id.* § 6.11.2, at 1246-47.

authority.[42] Unfortunately, the Court ultimately declined to do so and dismissed the certiorari petition in the case as improvidently granted.[43]

The thesis of this article is that none of these labels is satisfactory. These labels both miss the mark and confuse the issue. Reliance on these labels can lead to the confusion evident in the passage from the 2024 *Cuomo* decision quoted at the outset. The opinion invokes Wigmorean reasoning but includes the remarkable statement that the privilege can attach to a communication even if a desire for legal advice was not a but for cause of the communication. To develop this thesis, the article proceeds in four parts. Part I traces the evolution of the rationale for privileges in Anglo-American law. Part I concludes that modernly, Wigmore's instrumental theory is clearly dominant. Part II turns to the lower, doctrinal level and explains how the incidence requirement is intimately tied to Wigmore's rationale. Part III surveys the current split of authority over the application of the incidence requirement in fact situations in which the layperson may have multiple motivations for the communication.

While Parts I-III are primarily descriptive, Part IV is evaluative. Part IV demonstrates that the use of such labels as "sole," "significant," and "primary" has led the courts astray. Part IV contends that the courts should eschew these labels and instead directly inquire whether the layperson's motivation pertinent to the protected relationship was a but for cause of the communication. Part IV establishes that the latter inquiry is simpler, more predictable, and more consistent with the dominant instrumental rationale than the labels that most courts use. To be frank, there is a distinct possibility that the use of the but for inquiry will decrease the number of cases in which courts sustain privilege claims. However, that result would probably please Dean Wigmore who described privileges as "obstacle[s] to the administration of justice" and urged that privileges "be recognized only within the narrowest limits."[44]

---

42. *See generally* 13 F.4th 710 (9th Cir. 2021), *cert. dismissed as improvidently granted*, 598 U.S. 15 (2023).

43. Elise Bernlohr Maizel, *The Case for Downsizing the Corporate Attorney-Client Privilege*, 75 U.C. L.J. 373, 395 (2024).

44. *See* WIGMORE, *supra* note 24, § 2192, at 73.

I. THE THEORETICAL BACKGROUND: THE EMERGENCE AND ASCENDANCE OF THE INSTRUMENTAL POLICY RATIONALE FOR RECOGNIZING EVIDENTIARY PRIVILEGES

In a debate over a bill to grant immunity to witnesses in a criminal prosecution, Lord Chancellor Hardwicke made the celebrated remark that the judicial system "has a right to every man's evidence."[45] Nevertheless, the earliest stage of the common law rendered many classes of persons incompetent to serve as witnesses.[46] Those rules tended to moot privilege issues. The incompetency rules altogether barred certain classes of person from taking the witness stand. If the person could not take the stand at all, it was unnecessary to reach the question whether, as a witness, he or she could divulge a specific confidence that had been entrusted to them. However, when society eventually decided that it could no longer tolerate the exclusion of valuable evidence from so many types of witnesses, the broad incompetency rules waned; and privilege issues emerged.[47]

As the Introduction indicated, many of the initial decisions recognizing privileges relied on humanistic policy justifications. In rationalizing the new legal privilege, the English courts asserted that an attorney's unauthorized disclosure of a client's confidence would amount to an immoral act of betrayal[48] and treachery.[49] In the nineteenth century, a leading commentator, Edward Livingston, declared that the revelation would shock "[e]very feeling of justice, honor, and humanity."[50] During this stage of the evolution of the privilege, the attorney was the holder of the privilege; the privilege enabled the lawyer to comply with the attorney's code of honor and professional ethics.[51] Likewise, the courts invoked humanistic concerns to justify the recognition of spousal privileges. The courts stated that they felt "a *natural repugnance*" at compelling one

---

45. IMWINKELRIED, *supra* note 8, § 2.1, at 175-76 (quoting 12 T. HANSARD, PARLIAMENTARY HISTORY OF ENGLAND 675, 693 (1812)).

46. 1 ROBERT P. MOSTELLAR ET AL., MCCORMICK ON EVIDENCE § 61, at 541-42 (9th ed. 2025).

47. *See* IMWINKELRIED, *supra* note 8, § 2.1, at 175-82.

48. MICHAEL R. T. MCNAIR, THE LAW OF PROOF IN EARLY MODERN EQUITY 227 (1999).

49. *See generally* WIGMORE, *supra* note 24, § 2290, at 543-44.

50. 1 SALMON P. CHASE, THE COMPLETE WORKS OF EDWARD LIVINGSTON: CRIMINAL JURISPRUDENCE 461 (1873).

51. Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 48 (2000).

spouse to testify against "his [or her] intimate life partner."[52] Like an attorney's unauthorized divulgence, a spouse's unauthorized revelation would constitute a betrayal.[53]

However, a shift developed away from an exclusively humanistic rationale. The shift began in the marital privilege cases. In the early privilege cases, the focus had been on the immorality of the act of unauthorized divulgence.[54] Gradually, though, the courts began to focus on the effect of such divulgence. For example, in 1736, Lord Hardwicke—the very same judge who had forcefully proclaimed the law's right to every person's evidence—stated that the real rationale for spousal privilege was the need to "preserve the peace of families."[55] In these cases, the courts began making policy arguments based on empirical assumptions about the effect of the lack of privilege on the behavior of persons standing in certain important social relations.[56]

A. BENTHAM

The shift set the stage for Jeremy Bentham's writings about the law of evidence, notably privilege. Bentham wrote in an intellectual environment in which empiricism was becoming dominant.[57] That philosophy was "the common property of the entire literate community of England."[58] Bentham released his monumental five-volume treatise, *Rationale of Judicial Evidence*, in 1827.[59] Bentham supported the repeal of the sweeping incompetency rules, but he was distressed by an "increasing emphasis on exclusionary rules of evidence,"[60] including, and especially, privileges.

Bentham favored a "natural" system of evidence, fostering a judicial system that prioritized rectitude of decision and was relatively free of technical exclusionary rules. Rectitude of decision was the end objective of the judicial system,[61] and a natural scheme of evidence was a necessary

---

52. WIGMORE, *supra* note 24, § 2228, at 217.

53. *See generally* Richard O. Lempert, *A Right to Every Woman's Evidence*, 66 IOWA L. REV. 725, 726-31 (1981) (referencing English cases).

54. *See generally* IMWINKELRIED, *supra* note 8, §§ 2.3-.4.

55. Barker v. Dixie (1736) 95 Eng. Rep. 171 (KB).

56. IMWINKELRIED, *supra* note 8, § 2.4, at 195-96.

57. *See* BARBARA J. SHAPIRO, A CULTURE OF FACT: ENGLAND, 1550-1720, at 1-2, 30, 111, 188 (2000).

58. BARBARA J. SHAPIRO, PROBABILITY AND CERTAINTY IN SEVENTEENTH-CENTURY ENGLAND: A STUDY OF THE RELATIONSHIPS BETWEEN NATURAL SCIENCE, RELIGION, HISTORY, LAW, AND LITERATURE 167, 182 (1983).

59. *See generally* BENTHAM, *supra* note 26.

60. C.J.W. ALLEN, THE LAW OF EVIDENCE IN VICTORIAN ENGLAND 18 (1997).

61. BENTHAM, *supra* note 26, at 477.

means to achieve that end.[62] While Bentham agreed that a judge should exclude absolutely irrelevant evidence, he disdained most exclusionary rules as "rubbish"[63] because their stated justifications lacked adequate empirical verification.[64] In his mind, worse still many privileges shielded anti-social conduct. He wrote that spousal privileges "grant to every man a license to commit all sorts of wickedness, in the presence and with the assistance of his wife"; the privileges could convert a family's "castle" into "a den of thieves."[65] He was equally critical of the attorney-client privilege. He reasoned that when the client is innocent, "by the supposition there is nothing to betray: let the law adviser say every thing he has heard, every thing he can have heard from his client, the client cannot have anything to fear from it."[66]

To be sure, at one time Bentham wielded "immense influence" in English intellectual and academic circles.[67] Moreover, during his lifetime Parliament would radically relax or repeal many incompetency rules.[68] However, Bentham failed to halt the judicial trend to expand evidentiary privileges.[69] Bentham's frontal assault on privileges was a conspicuous failure.

B. WIGMORE

On this side of the Atlantic, Dean Wigmore took up Bentham's campaign against privileges. Wigmore sympathized with many of Bentham's views. Wigmore was disappointed that the courts had not gone farther in endorsing Bentham's reasoning.[70] Like Bentham, Wigmore was an empiricist who was skeptical of humanistic rationales.[71] In Wigmore's view, those rationales were "a mere cloak for sentimentality."[72] Similarly, like Bentham, Wigmore assigned the highest priority to rectitude of decision in adjudication.[73] Again, like Bentham, Wigmore was at the very least

---

62. *Id.* at 477-78.
63. *Id.* at 479.
64. *Id.* at 506, 520, 543, 552.
65. *See* 5 JEREMY BENTHAM, *On Exclusion of Evidence*, *in* RATIONALE OF JUDICIAL EVIDENCE 332, 339-45 (London, Hunt & Clark 1827).
66. *Id.* at 304; *see also* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 189-90 (1988).
67. ALLEN, *supra* note 60, at 4.
68. *Id.* at 56, 95, 123, 144.
69. IMWINKELRIED, *supra* note 8, § 2.5, at 203.
70. *See generally* WIGMORE, *supra* note 24, § 2332, at 643-44.
71. *See generally* IMWINKELRIED, *supra* note 8, § 3.1, at 207.
72. WIGMORE, *supra* note 24, § 2332, at 643-44.
73. IMWINKELRIED, *supra* note 8, § 3.1, at 207.

opposed to the expansion of privileges that could obstruct the search for truth.[74] Wigmore was emphatic that privileges "should be recognized only with the narrowest limits."[75] Mere sentiments were an inadequate justification for exceeding those limits and impeding the search for truth.[76]

Although Wigmore agreed with Bentham's theoretical critique of privileges, Wigmore was realistic enough to realize that privileges had survived "the thunders of Bentham."[77] Bentham had failed to persuade the English courts to outright abolish most privileges. Wigmore therefore adopted a more modest strategy to advance the objective of rectitude of decision in the United States.[78] He not only urged the courts to adopt a strict constructionist approach to interpreting any privilege statutes.[79] Even more importantly in the long term, he formulated a set of criteria for recognizing privileges, which, as a practical matter, would make it difficult for courts to create and enforce privileges. He set the criteria out in Section 2285 in the eighth volume of his treatise:

> [l]ooking back upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception, four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:
>
> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
>
> (4) The *injury* that would inure to the relation by the disclosure of the communication must be *greater than the benefit* thereby gained by the correct disposal of litigation.

---

74. *See id.* § 3.2.2, at 212-17.
75. WIGMORE, *supra* note 24, § 2192, at 73.
76. *See id.* § 2264, at 379.
77. *Id.* § 2218, at 170.
78. IMWINKELRIED, *supra* note 8, § 3.2.2, at 213.
79. *Id.*

> Only if these four conditions are present should a privilege be recognized. . . . These four conditions must serve as the foundation of policy for determining all privileges, whether claimed or established.[80]

This is the most cited passage in Wigmore's celebrated treatise.[81]

Condition (3) embodies one of the essential limitations on the scope of privilege doctrine.[82] The judge had to be convinced that society viewed the relation in question—for instance, attorney and client or spousal—as one that "the community" viewed as important enough to warrant privilege protection.[83] Wigmore's choice of the adverb "sedulously" signaled his belief that only exceptional relationships could qualify. The relationship not only had to be special in the sense that the community ascribed a good deal of importance to it. The relationship also had to be one in which, under condition (2), the maintenance of confidentiality was truly "essential." The privilege claimant had to convince the court that without a privilege, the typical similarly situated layperson would be deterred from consulting the third party or making necessary disclosures.[84] The existence of the privilege had to be a necessary incentive to encourage the layperson contemplating consultation.[85] But for the existence of the privilege, the layperson would be so afraid of subsequent, judicially compelled disclosure of their revelation that they would not consult or confide.[86]

Wigmore's proposal of these criteria was a brilliant means of reconciling the recognition of privileges with the priority on rectitude of decision that he shared with Bentham. There is no net loss[87] to the judicial system from the recognition of the privilege because, but for the privilege, the communication would never have occurred.[88] If the judge enforces the privilege only when the fact situation satisfies Wigmore's

---

80. WIGMORE, *supra* note 24, § 2285, at 527-28 (footnote omitted).

81. Kit Kinports, *The "Privilege" in the Privilege Doctrine: A Feminist Analysis of the Evidentiary Privileges for Confidential Communications*, *in* FEMINIST PERSPECTIVES ON EVIDENCE 79, 82 n.22 (Mary Childs & Louise Ellison eds., 2000).

82. *See generally* IMWINKELRIED, *supra* note 8, § 3.2.3, at 221-27 (discussing condition (3)).

83. *See id.* at 221.

84. WIGMORE, *supra* note 24, § 2291, at 552.

85. *See, e.g.*, 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5680, at 141 (1992).

86. *See generally* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, § 503.03[1], at 503-11 (Mark S. Brodin, ed., Matthew Bender 2d ed. 2025) (providing rationale for privilege).

87. *See* WRIGHT & GRAHAM, *supra* note 85, § 5612, at 87; *id.* § 5613, at 109.

88. *See* Steven R. Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 36-37 (1980) (explaining the privilege causes the communication to come into existence).

instrumental criteria, the recognition of the privilege comes cost free to the judicial system. As Professor Melanie Leslie has aptly written,

> [i]n a perfect [Wigmorean] world, . . . the privilege would shield no evidence. Privilege generates the communication that the privilege protects. Eliminate the privilege, and the communication disappears or is rendered unreliable. . . . [T]he privilege would protect only reliable statements that would not otherwise have been made. . . . [T]he privilege is not a but-for cause of all [privileged] communications.[89]

Wigmore conceded that the adoption of his criteria would make it difficult for courts to uphold privilege claims.[90] He deliberately chose the criteria with that intended effect in mind.[91] For example, he challenged the wisdom of recognizing a medical privilege. It struck him as "ludicrous" that a seriously ill patient would withhold information from his or her physician out of fear of subsequent compelled disclosure in a lawsuit that might never be filed.[92] He also questioned the need for a spousal privilege. Many spouses are unaware of the privilege, and in any event they do not rely on the formal privilege in their daily interactions.[93] Wigmore remarked that "[t]he correct tendency would . . . be to cut down the scope of the existing privileges, instead of to create new ones."[94]

Wigmore's instrumental theory has unquestionably become the dominant rationale in American privilege law. For its part, the Supreme Court has not only repeatedly cited the privilege sections of the Wigmore treatise; the Court has also consistently relied on Wigmorean reasoning in its privilege decisions. In 1976 in *Fisher v. United States*, the Court observed that the attorney-client privilege is intended to "protect[] only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege."[95] In its 1981 decision in *Upjohn Co. v. United States*, dealing with the corporate attorney-client privilege, the Court stressed that at the time of the communication, the client "must be able to predict with some degree of certainty whether particular

---

89. Leslie, *supra* note 51, at 31 (footnote omitted).

90. *See* IMWINKELRIED, *supra* note 8, § 3.1, at 207-08.

91. *See id.*

92. WIGMORE, *supra* note 24, § 2380a, at 830.

93. *See id.* § 2332, at 643-44; *see also* State v. Gutierrez, 2021-NMSC-008, ¶¶ 30-34, 482 P.3d 700, 710, *rev'd on reh'g*; Edward J. Imwinkelried, State v. Gutierrez *Abolishing the Spousal Communications Privilege: An Opinion Raising Profound Questions About the Future of Evidentiary Privileges in the United States*, 53 N.M. L. REV. 71, 82-83 (2023)(discussing the majority opinion in *Gutierrez*).

94. WIGMORE, *supra* note 24, § 2286, at 536.

95. *See* 425 U.S. 391, 403 (1976).

discussions will be protected. An uncertain privilege . . . is little better than no privilege at all."[96]

The Court reiterated that statement in its 1996 opinion, *Jaffee v. Redmond*, recognizing a psychotherapy privilege.[97] The lower court had recognized the privilege but characterized it as qualified, that is, capable of being overcome by an ad hoc showing of compelling need for the information.[98] The Supreme Court rejected that characterization; in the Court's view, the privilege had to be absolute—subject only to waiver and exceptions announced beforehand—in order to surmount the patient's fear of later, judicially compelled disclosure of his or her confidences.[99] The Court asserted that:

> the likely evidentiary benefit that would result from the denial of the [psychotherapy] privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled . . . . Without a privilege, much of the desirable evidence to which litigants such as [plaintiff] seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken "evidence" [would] therefore serve no greater truth-seeking function than if it had been spoken and privileged.[100]

In 1998 in *Swidler & Berlin v. United States*, involving a decedent's attorney-client privilege, the Court came to a similar conclusion.[101] As in *Jaffee,* in *Swidler* the lower court had classified the privilege but treated it as qualified.[102] Once again, invoking classic Wigmorean reasoning, the Supreme Court disagreed.[103] The majority asserted that "uncertain privileges are disfavored."[104] Chief Justice William H. Rehnquist stated that "without the privilege, the client may not have made such communications in the first place."[105] Consequently, "the loss of evidence is more apparent than real."[106]

Understandably, given the Supreme Court's firm endorsement of Wigmore's instrumental theory, in the United States lower federal

---

96. *See* 449 U.S. 383, 393 (1981).
97. *See* 518 U.S. 1, 18 (1996).
98. *See* IMWINKELRIED, *supra* note 8, § 4.2.4, at 340-43, § 5.4.4, at 602.
99. *See id.*
100. *Jaffee*, 518 U.S. at 11-12.
101. *See* 524 U.S. 399 (1998).
102. *See generally* IMWINKELRIED, *supra* note 8, § 4.2.4, at 331-35, § 5.4.4, at 602-03.
103. *See generally id.*
104. *Swidler & Berlin*, 524 U.S. at 402 (citing *Jaffee*, 518 U.S. at 17-18).
105. *Id.* at 408.
106. *Id.*

courts[107] and state courts[108] have embraced the theory. Indeed, Wigmore's instrumental criteria "have been widely accepted by the courts, and have largely conditioned the developing of thinking about privileges" throughout the common-law world.[109] In its notes to the original draft of Article V of the then proposed Federal Rules of Evidence, the Advisory Committee approvingly referred to "Wigmore's four conditions needed to justify the existence of a privilege."[110]

II. THE DOCTRINAL BACKGROUND: THE CENTRAL IMPORTANCE OF THE INCIDENCE REQUIREMENT UNDER THE INSTRUMENTAL RATIONALE FOR PRIVILEGES

Of course, courts need more than abstract policy rationales to adjudicate specific privilege disputes. At the macro level, the rationale can answer the question whether there should be a privilege for a certain type of information. But high-level theories need to be converted into micro-level doctrines in order to enable the courts to decide concrete disputes. There are topical privileges such as the one for military and state secrets, which protect certain types of facts.[111] However, this article instead focuses on communications privileges. In the case of evidentiary privileges for confidential communications, the essence of the doctrine is that the holder of the privilege has certain rights with respect to confidential communications that occurred both between properly related parties and incident to the protected relationship.[112]

A. COMMUNICATION

Wigmore viewed privileges as instruments or means for promoting certain vital social relations. As a general proposition, the persons standing in such relations need to be able to communicate for the relationship to achieve its essential purpose. For example, in the attorney-client relationship, the attorney serves as a legal advisor to the client. The client wants

---

107. *See* IMWINKELRIED, *supra* note 8, § 3.2.3, at 226 (citing Witten v. A.H. Smith & Co., 100 F.R.D. 446 (D. Md. 1984), *aff'd*, 785 F.2d 306 (4th Cir. 1986)).

108. *See id.* (citing decisions).

109. MOSTELLAR ET AL., *supra* note 46, § 72, at 609.

110. 25 WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE, EVIDENCE ch. 6 (1st ed. 2025) advisory committee's note to Rejected Rule 504.

111. *See generally* 2 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES 1855 (4th ed. 2021) (Chapter 8 is titled "Absolute Topical Privilege for Military and State Secrets"); *id.* (stating previous chapters on communications privileges "deal with privileges that protect communications rather than facts").

112. CARLSON ET AL., *supra* note 4, at 762.

to know how the law applies to the peculiar facts of his or her case. The nature of the relationship necessitates that the client be able to ask questions and communicate facts to the attorney and that in turn, the attorney be able to ask questions and communicate advice to the client. If the parties to the relation could not interact in this fashion, the relation would not succeed. It is true that in the case of some privileges, such as the medical privilege, many jurisdictions expand the scope of the privilege to include information other than conventional communications, such as test results.[113] However, even in those settings, the parties must also be able to share conventional communications; for the relationship to succeed, the patient has to be able to ask questions about the significance of test results, and the physician must be able to provide oral or written advice based on the test results as well as normal communications from the patient.[114] In any event, the notion of a communication is the starting point for dissecting the core doctrinal concept.

B. CONFIDENTIAL COMMUNICATION

This doctrinal element reflects Wigmore's criterion (2) for determining whether to recognize a privilege in the first instance.[115] If the alleged holder of the privilege such as the client did not intend to keep the communication confidential, there is no policy justification for invoking a privilege to suppress evidence of the communication.

The courts emphasize two factors in deciding whether the layperson possessed and manifested the requisite intent to maintain confidentiality.[116] First, the courts consider whether there was physical privacy at the time of the original communication between the parties.[117] If the layperson was willing to speak freely in public within the hearing of third parties,[118] the layperson is obviously not concerned about confidentiality. The layperson does not feel any need for privilege protection. Second, the courts weigh whether the layperson manifested an intent to maintain confidentiality in the future after the original communication.[119] If the client instructs the attorney to later convey the substance of the communication

---

113. *See* IMWINKELRIED, *supra* note 8, § 6.7.3, at 960-65.

114. *See id.* § 6.7.3, at 964.

115. WIGMORE, *supra* note 24, § 2285, at 527-28.

116. *See generally* IMWINKELRIED, *supra* note 8, §§ 6.8-6.8.2, at 960-65.

117. *See id.* § 6.8, at 977, § 6.8.1.

118. *See* United States v. Schwartz, 698 Fed. Appx. 799, 800 (6th Cir. 2017) (a public diner and a parking lot); State v. MacKinnon, 1998 MT 78, ¶ 28, 288 Mont. 329, 957 P.2d 23 (a public restaurant).

119. *See* IMWINKELRIED, *supra* note 8, § 6.8, at 977, § 6.8.2.

to a third party outside the circle of confidence, the instruction negates the required intent to maintain confidentiality.[120] The client would have spoken even without the benefit of privilege protection.

C. CONFIDENTIAL COMMUNICATION BETWEEN PROPERLY RELATED PARTIES

Wigmore believed that only certain special social relationships deserved the protection of a privilege.[121] His criterion (3) restricted privileges to relations "which in the opinion of the community, ought to be sedulously fostered."[122] Moreover, under criterion (2), the nature of the relationship had to be such that "confidentiality [is] essential to the full and satisfactory maintenance of the relation between the parties."[123] In his mind, it was justifiable to impinge on the paramount value of rectitude of decision only if the relation fell within the small category of relationships that passed muster under both criteria.

D. CONFIDENTIAL COMMUNICATION BOTH BETWEEN PROPERLY RELATED PERSONS AND INCIDENT TO THE PROTECTED RELATION

Again, Wigmore conceived of communications privileges as a means or instrument to promote the exceptional social relationships that deserved to be "sedulously fostered."[124] As a logical corollary, he believed that the courts should apply a privilege to a particular communication only if the communication was somehow related to or incident to that relationship.[125] At the macro theoretical level, the instrumental rationale answered the question why there should be a general privilege protecting communications between persons standing in a certain relationship. At the micro level, the incidence requirement helps answer the question whether a judge should apply that privilege to a particular communication.[126] The answer to that question turns on why the layperson made the

---

120. *See generally* People v. Layne, 286 Ill. App. 3d 981, 990 (1997) ("[I]t was clearly done in contemplation that such information would be transmitted to a third person."); Matthews v. State, 89 Md. App. 488, 502 (Md. Ct. Spec. App. 1961) ("If the communication is made with the contemplation or expectation that a third party will learn of it, the confidentiality communication privilege does not apply.").

121. *See* IMWINKELRIED, *supra* note 8, § 3.2.3, at 221-27.

122. WIGMORE, *supra* note 24, § 2285, at 527 (emphasis omitted).

123. *Id.* (emphasis omitted).

124. *See id.* (emphasis omitted).

125. *See generally* IMWINKELRIED, *supra* note 8, § 6.11.

126. *See generally id.* § 6.11.1.

specific communication. In what capacity is the layperson consulting the other person?[127] Is the layperson consulting the attorney *qua* lawyer?[128]

Even when one conversant is an attorney and the other is a potential client, it would be ridiculous to apply the attorney-client privilege to their communications if their conversation had nothing to do with the law. The conversants might be speaking at a high school class reunion about their shared memories as members of the football team. To be protected, the substance of the communication must have some relevance to the nature of the attorney-client relationship.[129] The crucial question is how closely tied the content of the particular communication must be to the relationship.[130] As Part III explains, the courts are divided over that question. Part III identifies the leading positions that courts have staked out on the incidence issue. Again, to prioritize rectitude of decision, Wigmore advocated restricting privileges to the "narrowest limits required by principle."[131] However, as Part III will make clear, despite the ascendance of Wigmore's instrumental rationale, when it comes to the incidence limitation, many courts have departed significantly from Wigmore's position.

III. THE SPLIT OF JUDICIAL AUTHORITY OVER THE NECESSARY DEGREE OF INCIDENCE BETWEEN THE PARTICULAR ALLEGEDLY PRIVILEGED COMMUNICATION AND THE NATURE OF THE PROTECTED RELATIONSHIP

Over the years, a wide array of views has been proposed on the question of the necessary degree of incidence between the protected relationship and the particular communication claimed to be privileged. There are at least six possible views, listed below in order of increasing strictness.

In the Supreme Court oral argument for the 2023 Ninth Circuit case, *In re Grand Jury,* the privilege claimants urged the Court to hold that the incidence requirement is satisfied whenever the communication has any connection to a "legitimate legal purpose."[132] That position may constitute the most liberal view ever proposed on the issue. That view would extend privilege protection to a very broad universe of communications.[133] It is

---

127. *Id.* § 6.11, at 1201.

128. *Id.*

129. *See generally id.* § 6.11.1.

130. *See generally id.*

131. WIGMORE, *supra* note 24, § 2192, at 73.

132. *See generally* Transcript of Oral Argument at 6, *In re* Grand Jury, 598 U.S. 15 (2023) (No. 21-1397).

133. *Id.*

difficult to find any judicial support for that view. The Supreme Court did not adopt that view. The Court did not pass on the merits of that view because the Court eventually dismissed the petition in that case as improvidently granted.[134]

A somewhat narrower, albeit still liberal, view is the position taken by some federal District Courts in the Ninth Circuit.[135] These courts have embraced a "because of" test.[136] Without endorsing that position, the Court of Appeals for the Ninth Circuit has stated:

> the "because of" test—which typically applies in the work-product context—"does not consider whether litigation was a primary or secondary motive behind the creation of a document." It instead "considers the totality of the circumstances and affords protection when it can fairly be said that the document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of litigation." It is a broader test than the [majority] "primary purpose" test because it looks only at causal connection, and not a "primary" reason. In the attorney-client context, the "because of" test might thus ask whether a dual-purpose communication was made "because of" the need to give or receive legal advice.[137]

As the Court of Appeals pointed out, the "because of" test is the most popular standard for work-product immunity.[138] Many courts applying that standard have expressly acknowledged that the standard is more liberal than the "primary purpose" test typically applied for the attorney-client privilege.[139] It is expectable that some courts would apply a more relaxed standard under the immunity. As previously stated, true privileges such as attorney-client are absolute in character; although the opponent may defeat the privilege claim by establishing a waiver by the holder or the applicability of an exception announced beforehand, the opponent cannot overcome the privilege by proving a compelling, ad hoc need for the privileged information.[140] In sharp contrast, "ordinary" or "fact" work product protection is qualified and can be trumped by a showing of a

---

134. *See In re* Grand Jury, 13 F.4th 710 (9th Cir. 2021), *cert. dismissed as improvidently granted*, 598 U.S. 15 (2023).

135. *Id.* at 714.

136. *Id.*

137. *Id.* (citations omitted).

138. *See id.* at 716.

139. IMWINKELRIED, *supra* note 8, § 1.3.11, at 139-142 nn.422-25 (referencing federal cases).

140. *See generally id*. § 3.2.4.

strong, case-specific need for the information.[141] For that matter, while most courts confer heightened protection on "opinion" or "core" work product material, they stop short of treating even that branch of work product immunity as an absolute privilege,[142] thereby leaving open the possibility that even that type of immunity could yield to an extraordinary showing of need. The upshot is that work product immunity poses less of a threat to rectitude of decision, and it is therefore tolerable to have a laxer incidence standard than under the absolute attorney-client privilege.

In cases involving dual purpose documents and communications, some courts have developed a third formula. These courts find that the incidence requirement is satisfied and the privilege attaches if the layperson's motivation incident to the nature of the relationship was "significant"[143] or substantial factor in the layperson's decision to disclose to the alleged confidant. This phrasing is more restrictive than that of the prior two standards and, on its face, more liberal than the fourth view.

Although the three views described above have scattered followings, by a wide margin the most popular standard is a fourth test, the seemingly more conservative predominant, primary, principal, or dominant purpose test.[144] According to this view, it is not enough that the motivation related to the nature of the protected relation was a factor in the decision–even a significant factor. In the case of multi-purpose oral and written communications, that motivation must be the primary one.[145] This version of the incidence requirement is "the prevailing framework,"[146] supported by a widespread consensus among federal and state courts.[147]

Even the above views do not exhaust the possibilities. A fifth, distinct minority view is seemingly based squarely on the criteria under Wigmore's instrumental theory. That view is the position that the incidence requirement is satisfied only when the judge finds that the existence of the privilege is a "but for" cause of the occurrence of the particular communication claimed to be privileged.[148] As Part I noted, Wigmore favored

---

141. *See generally id.* § 1.3.11, 151-53 (discussing the wording of FED. R. CIV. P. 26(b)(3)(A)(ii)).

142. *See id.* § 1.3.11, 147-50.

143. IMWINKELRIED, *supra* note 8, § 6.11.2, at 1253-54; *see also* Maizel, *supra* note 43, at 396; Mark C. Van Deusen, Note, *The Attorney-Client Privilege for In-House Counsel When Negotiating Contracts: A Response to Georgia Pacific Corp. v. GAF Roofing Manufacturing Corp.,* 39 WM. & MARY L. REV. 1397, 1436 (1998).

144. *See* IMWINKELRIED, *supra* note 8, § 6.11.2, at 1246-53.

145. *See id.*

146. *See* Maizel, *supra* note 43, at 396.

147. *See generally, e.g.*, Johnson v. Dep't of Transp., 109 Cal. App. 5th 917, 330 Cal. Rptr. 3d 811 (2025); Harrington v. Freedom of Info. Comm'n, 144 A.3d 405 (Conn. 2016).

148. *See* United States v. ISS Marine Servs., 905 F. Supp. 2d 121, 128 (D.D.C. 2012).

recognizing and applying privileges only when the existence of a privilege was truly essential to effectively maintain the protected relation.[149] These courts seem to believe that their position is the most faithful to Wigmore's view that privileges ought to be strictly construed and confined within the narrowest possible limits.[150] The courts' position is similar to Wigmore's and view that privileges ought to be strictly construed and confined within the narrowest possible limits.

Although the proponents of the fifth view contend that that view is the most consistent with Wigmore's position that privileges should be confined to the narrowest possible limits, in fact there is a sixth position that in some instances defines the incidence requirement even more narrowly. That view is the position once taken by the Australian courts that the motivation pertinent to the nature of the protected relation had to be the "sole" motivation for the layperson's decision to consult and confide.[151] This position is subsumed by the but for test: If the person has in fact consulted the alleged confidant and the motivation pertinent to the nature of the relation is the sole cause, that motivation is necessarily a but for cause of the layperson's decision to consult. According to the earlier Australian authorities, when there were multiple reasons for creating a document, the privilege attached only if "all of them fall within the protected group of purposes namely submission to legal advisers"[152]—in effect, a sole motivation with several legal facets. The sole cause view was overturned by the Evidence Act of 1995 of the Commonwealth, which prescribed the dominant purpose test.[153] As previously stated, the latter test is the most popular standard in the United States in both federal and state court.

The court's choice of a position on this issue is salient. If the privilege claimant cannot satisfy the incidence requirement, the judge must reject the privilege claim. The Ninth Circuit's 2021 decision in *In re Grand Jury* discussed the division of authority at some length.[154] The Ninth Circuit opted for the majority primary purpose test.[155] When the Supreme Court granted a petition in the case, there was hope that the Court would address

---

149. *See* text accompanying notes 77-86.

150. *ISS Marine Servs.*, 905 F. Supp. 2d at 128, 131.

151. *See* Grant v. Downs (1976)153 CLR 674, 687 (Austl.); ANDREW LIGERTWOOD, AUSTRALIAN EVIDENCE §§ 5.19-.20 (2d ed. 1993).

152. SUZANNE B. MCNICOL, LAW OF PRIVILEGE 74 (Mark Webster ed. 1992) (citation modified).

153. *See* Caryl Ben Basat & Julian D. Nihill, *Corporate Counsel*, 31 INT'L LAW 245, 248-49 (1997).

154. *See* 13 F.4th 710 (9th Cir. 2021).

155. *Id.* at 712.

and definitively resolve the issue at least in federal practice.[156] Since business documents often serve several purposes, the case naturally attracted the attention of both the legal and business communities.[157] The interest in the case reached a pitch when the Court heard oral argument in which the parties devoted a good deal of their time to debating the merits of the various standards.[158] Again, though, the Court ultimately dismissed the petition as improvidently granted.[159] Thus, despite the importance of the issue and the myriad of differing views among the courts, the issue remains unresolved.

IV. A CRITICAL EVALUATION OF THE ISSUE OF THE NECESSARY DEGREE OF INCIDENCE BETWEEN THE PARTICULAR ALLEGEDLY PRIVILEGED COMMUNICATION AND THE NATURE OF THE PROTECTED RELATIONSHIP

A. THE POLICY CASE FOR THE BUT FOR TEST

As previously stated, the but for test subsumes the sole cause test. Consequently, Part IV focuses on the policy choice between the but for test and the four other candidates for an incidence standard, notably the primary purpose test. The thesis of this article is that the but for test is superior in several respects.

To begin with, the primary purpose test suffers from ambiguity. In the 2023 oral argument before the Supreme Court in *In re Grand Jury*, the government championed the primary purpose test and characterized it as the prevailing "status quo" test.[160] Despite the hundreds of prior cases in which courts purported to apply the standard, the government had difficulty articulating the meaning of the standard:

> [a]t oral argument, the justices and advocates alike struggled to articulate precisely how the ostensible current [primary purpose] test works . . . . The government urged that courts continue apply

156. *See* Maizel, *supra* note 43, at 394-96.

157. In the case, a grand jury served a subpoena on a business entity and its law firm. The government argued that the documents in question related to tax advice rather than legal advice. Given the targets of the subpoena and the subject matter of the documents, the case would naturally be of interest to both communities.

158. *Id.* at 395.

159. *Id.*

160. *Id.*

> the "primary purpose test" but struggled to quantify exactly what it would mean for a legal purpose to be "primary."[161]

The Chief Justice pressed the government as to "the percentage of a communication's purpose required to be considered 'primary.'"[162] In response to the questions, the government took inconsistent positions; during the argument the government initially took one position but then retracted it.[163] To compound the problem of defining "primary," while one would ordinarily think that there can be only one "primary purpose"—that is, "the" primary purpose—occasionally there are references to "[a] test that focuses on *a* primary purpose instead of *the* primary purpose."[164] The use of "a" implies that there can be multiple "primary" purposes. Thus, that language raises the ambiguity to the second power.

Next, the application of such ambiguous wording as "primary" to the specific subject of a layperson's state of mind magnifies the problem. As a general proposition, reconstructing a person's state of mind is a challenging task. To make matters worse, when the layperson has multiple motivations, the primary purpose test requires the judge to engage in a multistep analysis; the judge has to assess the strength of all the motivations and then compare and rank them. When the corporate executive consulted the inhouse counsel/business advisor, was the legal or financial concern foremost in the executive's mind? Which concern took priority? The fact that the priority can vary from person to person further complicates the judge's task. The vice-president who oversees the general counsel might be more concerned about the corporation's legal exposure while another vice-president overseeing shareholder relations could be more focused on the corporation's short term financial position.

In this respect, a but for standard is preferable. Judges are familiar with the but for standard. Judges frequently encounter but for causation issues in civil tort law[165] and substantive crimes law.[166] A judge is especially likely to feel comfortable addressing that inquiry in this context. In the civil law system, on graduation from law school some lawyers go straight to the judiciary. In the United States, the career pattern is very different. In the United States, judges are usually appointed or elected after years or decades of practice. During that period of time they have had

---

161. *Id.* (footnote omitted).

162. *Id.* at 395 n.120.

163. *See id.*

164. *In re* Grand Jury, 13 F.4th 710, 716 (9th Cir. 2021).

165. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 265 (5th ed. 1984).

166. *See* WAYNE R. LAFAVE, CRIMINAL LAW 439 (6th ed. 2017).

occasion to work with hundreds or thousands of clients. Those extensive interactions with clients give the judge a real-world sense of the types and magnitude of reasons that prompt laypersons to consult attorneys. Thus, an American judge should find it far easier to determine whether a consideration was strong enough to motivate a layperson to resort to an attorney than it would be for the judge to rate multiple motivations as primary, second, or tertiary.

Finally and most importantly, the standards other than but for are flawed in that they reflect a misunderstanding of the instrumental rationale. At the micro level, doctrinal elements such as the incidence requirement should help the courts implement the macro level rationale inspiring the doctrine. Part I underscored that Wigmore favored upholding privilege claims only when the existence of the privilege is a but for cause of the layperson's willingness to consult and confide.[167] When the layperson is that fearful of the subsequent, judicially compelled disclosure of their disclosure, the application of the privilege is a necessary means or instrument of enabling the layperson to have an effective relationship with an attorney.[168] At the very least Wigmore would be puzzled by the passage in *Cuomo* quoted at the beginning of this article. Earlier in the analysis of the applicability of attorney-client privilege in its opinion, the *Cuomo* court cites the Supreme Court decisions in *Upjohn* and *Fisher.*[169] As we have seen, those decisions rely on traditional Wigmorean reasoning under the instrumental theory.[170] Then, after endorsing the predominant purpose test, the *Cuomo* court asserts that that test does not necessitate a showing "that the communications at issue would not have been made but for the fact that legal advice was sought."[171] That statement would strike Wigmore as heresy, entirely missing the point of the instrumental theory. In Wigmore's mind, if the existence of the privilege was not a but for cause of the communication, the only defensible course of action for the judge is to reject the privilege claim.

---

167. *See supra* text accompanying notes 78-86.

168. IMWINKELRIED, *supra* note 8, § 3.2.3, at 219-21.

169. Cuomo v. Off. of N.Y. State Att'y Gen., 754 F. Supp. 3d 334, 358 (E.D.N.Y. 2024); *see also* cases cited *supra* notes 95-96 and accompanying text.

170. *See supra* text accompanying notes 88-96.

171. *Cuomo*, 754 F. Supp. 3d at 363.

B. HYPOTHETICAL APPLICATIONS OF THE BUT FOR TEST

Of course, a doctrinal standard should not only be theoretically sound; the standard should also be practically workable.[172] Consider how the application of a but for test would play out in four hypothetical situations.

1. *Two Sufficient Motives*

First, suppose that the judge found that: the layperson had two plausible motivations for consulting the person who happened to be an attorney; both motivations were strong enough to prompt a layperson to consult an attorney; and the motivation related to the nature of the protected attorney-client relationship was primary. By definition, the primary purpose test for incidence has been satisfied. The layperson consulted that person; and, as best the judge can divine, the legal reason for the consultation was the weightier concern in the layperson's mind. However, under the instrumental rationale, the judge should deny the privilege claim. In this situation, the judge found as a matter of fact that both motivations were strong enough to lead the layperson to consult the person. The legal concern was not a but for cause of the consultation; even absent the legal concern, the layperson would have decided to consult. This hypothetical illustrates the basic weakness of the primary purpose test; although the courts claim to be applying the instrumental theory when they use the primary purpose test, it exceeds the limits of the theory and impinges on rectitude of decision to invoke the privilege here.

2. *A Sufficient Non-Legal Motive and an Insufficient Legal Motive*

Second, assume that the judge finds that: the layperson again had two plausible motivations; the non-legal motivation was strong enough to prompt the layperson to consult the person; and although the layperson was somewhat curious about the legal dimensions of the subject matter, standing alone that legal interest probably would not have been sufficient to cause the layperson to seek advice from the person. Here the primary purpose and but for tests yield the same result. Under the prevailing majority view, the court would reject the privilege claim because the non-legal concern was paramount. The application of the but for test to these facts would produce the same outcome. The judge has found that the

---

172. *See* Maizel, *supra* note 43, at 394-95.

existence of the privilege did not cause the consultation, and consequently but for causation is lacking. In both the first and second hypotheticals, a court adhering to the but for cause would reject the privilege claim.

3. *A Sufficient Legal Motive and an Insufficient Non-Legal Motive*

Now, turn to a third hypothetical—the converse of the second. Here suppose that the judge finds that: the layperson had two possible motivations; the legal motivation was strong enough to prompt the layperson to consult the attorney; and although the layperson was mildly interested in the non-legal aspects of the subject matter, without more that modest interest would not have led the layperson to knock on the attorney's door. The proper outcome here is a mirror image of the result in the second hypothetical. As in the second hypothetical, judges applying the but for and primary purpose tests would reach the same conclusion. On these facts, the incidence requirement is satisfied under both the primary purpose and but for tests. The former test is met because the judge found that the legal motivation was the stronger of the two, and the but for test is satisfied because without that motivation the consultation probably would not have occurred. Unlike the facts in the first two hypotheticals, the facts here should lead a judge applying the but for test to rule in favor of the privilege claim.

4. *A Combination of Two Insufficient Motives*

Finally, consider a fourth hypothetical. Given the testimony in this hypothetical, the judge finds that: the layperson had two possible motivations, one a legal concern and the second a non-legal concern; standing alone, neither motivation was strong enough to prompt the layperson to resort to the alleged confidant; but the layperson did so because the combination of the two concerns provided sufficient motivation. The potential legal exposure could have been minor, and the business concern—the amount of money involved—might have been modest; but the judge concludes that together the motivations prompted the person to consult. On these facts, unless the judge found that the layperson's legal concern was stronger, the application of the primary purpose test would lead to a denial of the privilege claim, as in the second hypothetical. However, even positing that the non-legal concern was a weightier consideration in the layperson's mind, applying the but for test the judge should sustain the privilege claim. The legal concern is not the sole cause of the layperson's decision to consult and confide, but without the presence of that concern

in the layperson's mind he or she would not have sought advice from the attorney.

There are several takeaways from the analysis of these hypotheticals. To begin with, there is a significant difference between the but for test and the primary purpose test. As the first hypothetical illustrates, the tests will sometimes yield different rulings on a privilege claim. Indeed, in half of the above hypotheticals, the tests produce different outcomes. Thus, the difference between the two tests is not a mere matter of labels, phrasing, or semantics. Rather, the difference is substantive in nature.

Next, sometimes the primary purpose test will lead to sustaining a privilege claim even though doing so does not serve Wigmore's instrumental rationale. At first blush, compared to the phrasing of the "because of" or "significant purpose" tests, the wording of the primary purpose test might create the impression that it is a conservative standard consistent with Wigmore's objective of confining privileges to the narrowest possible limits. Yet, on closer scrutiny, in situations such as the first hypothetical, reliance on the primary purpose standard leads to sustaining a privilege claim even though the layperson would have been perfectly willing to confide absent a privilege—a result diametrically at odds with Wigmore's theory. In contrast, on similar facts, the use of the but for test should prompt the judge to deny the privilege claim. That outcome is much more in accord with Wigmore's instrumental rationale.

Finally, as all these hypotheticals illustrate, the straightforward application of the but for standard can be much more judicially manageable than the now ascendant primary purpose test. In each hypothetical, the application of the but for test produces a clearcut result, rejecting the privilege claim in the first two hypotheticals but upholding the claim in the second two. In all of these cases, the judge would apply the familiar notion of but for causation, a concept that judges regularly encounter in both civil and criminal law. Moreover, in all of the hypotheticals, the judge can draw on his or her extensive pre-judicial practice experience interacting with lay clients. That experience gives judges a practical sense of what prompts laypersons to consult and confide in attorneys. The judge can make those judgments with relatively little difficulty. Even more to the point, the judge can do so without having to speculate about the relative importance of concerns in a specific layperson's mind or wrestling with the thorny question of whether to label a particular motivation as primary, secondary, or tertiary.

V. CONCLUSION

Wigmore's instrumental rationale for communications privileges is not without its critics. Some have argued that as was previously the case in the very early years of shaping privilege law,[173] modernly courts ought to place more stress on humanistic considerations. These critics have suggested that in the future, the courts should look to the constitutional value of personal autonomy and the right to privacy as a foundation for expanding privilege protection.[174]

However, for the most part those suggestions have fallen on deaf judicial ears. In *State v. Gutierrez,* the New Mexico Supreme Court not only rigorously applied Wigmore's instrumental criteria to rationalize prospectively abolishing the spousal communications privilege in that jurisdiction.[175] The court also rejected a proposal for an alternative, humanistic rationale for privileges; the court dismissed the proposal as "little more than soaring rhetoric and legally irrelevant sentimentality."[176] In *In re Grand Jury*, the Court of Appeals for the Ninth Circuit relied on exclusively Wigmorean reasoning.[177] During the oral argument in that case, the Supreme Court Justices focused on the majority primary purpose test which they appeared to view as entirely consistent with Wigmore's instrumental criteria.[178] There does not appear to have been any suggestion during the argument that the Court would seriously consider abandoning the instrumental rationale for communications privileges, which the Court has subscribed to for decades. At the moment, the instrumental theory is ascendant; and realistically, it is likely to continue to enjoy that status for the foreseeable future.

One thing is clear: if the Wigmore theory is to remain dominant, intellectual honesty[179] demands its faithful application. The reliance of most

---

173. *See supra* notes 23-25, 46-53 and accompanying text.

174. IMWINKELRIED, *supra* note 8, § 5.3.3, at 482-484.

175. *See* State v. Gutierrez, 2021-NMSC-008, ¶ 20, 482 P.3d 700, 707 (2020). On clarification, the court reinstated the privilege to allow legislators and rule makers to address the issue. *Id.* ¶ 113, 482 P.3d at 725.

176. *Id.*

177. *See generally* 13 F.4th 710 (9th Cir. 2021).

178. Maizel, *supra* note 43, at 394-96.

179. 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS: AVOIDANCE AND REFORMATION, § 29.2 at 381 (rev. ed., Matthew Bender & Co., Inc. 2002) (1960). In some cases in which a judge believes that humanistic considerations warrant a privilege but the judge is unwilling to expressly reject the dominant instrumental rationale, he or she might strain Wigmore's criteria to uphold the claim. From a systemic perspective, that practice is unsatisfactory. The practice only heightens the uncertainty of privilege law and increases the unpredictability of future privilege rulings. Although Wigmore placed a special premium on certainty and predictability under the instrumental rationale, both transactional attorneys and litigators appreciate states of the law that are predictable enough to allow them to confidently advise their clients. Even if the judge with the hidden humanistic agenda issues

courts on labels such as "primary" or "predominant" in their micro level analysis has caused some courts to lose sight of the basic thrust of the macro level instrumental rationale. Since Wigmore believed that the judicial system should treat rectitude of decision as the preeminent value, he deliberately devised a "strict" set of instrumental criteria to make it difficult for the courts to expansively apply privileges.[180] He approved of the enforcement of a privilege "only" when all four criteria are present.[181] He underscored that confidentiality had to be "essential" to the interaction between the layperson and the alleged confidant.[182] Wigmore thought that it was intolerable to enforce a privilege and imperil rectitude of decision if the layperson was willing to communicate even absent a privilege. As Part IV demonstrated, reliance on the primary purpose test can lead to sustained privilege claims even when it is evident that the layperson would have confided absent privilege protection.

To be sure, Wigmore would probably have largely approved of the court's analysis in *Cuomo*; most of the analysis in the opinion is consistent with the positions he took in his treatise.[183] During the ongoing investigation into the allegations of sexual harassment by former New York Governor Andrew Cuomo, outside attorneys investigating the allegations sent sensitive memoranda to the New York State Attorney General, who had hired them. It came as no surprise that the court decided to extend privilege protection to the memoranda. However, Dean Wigmore would have taken issue with the suggestion in the court's opinion that it is justifiable to enforce a privilege even if the communication would have occurred absent the assurance of confidentiality furnished by a privilege.[184] If a court avows fidelity to the instrumental rationale at the macro level, logic dictates that the court employ the but for test in its analysis of the incidence requirement at the micro level. Rational consistency forbids a mismatch between a macro level policy rationale and a micro level doctrine that purports to implement that rationale.

---

a written opinion apparently explicating their privilege ruling, the reader of the opinion can be led astray if he or she takes the opinion at face value; the opinion does not forthrightly identify the considerations that actually drove the decision. As Karl Llewellyn cautioned decades ago, "covert tools . . . are never reliable tools." *Id.* (citation modified).

180. Smith, *supra* note 88, at 40-41.

181. WIGMORE, *supra* note 24, § 2285, at 527-28.

182. *Id.* § 2285, at 527.

183. Cuomo v. Off. of N.Y. State Att'y Gen., 754 F. Supp. 3d 334, 363 (E.D.N.Y. 2024).

184. *Id.*