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Ignorance of the Rules of Omission: An Essay on Privilege Law

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INTRODUCTION

Alton Logan spent twenty-six years in prison for a murder he did not commit, sleeping with a homemade metal shank under his pillow for protection.[1] Meanwhile, attorney Dale Coventry kept the evidence that would ultimately exonerate Logan—another man's confession—in a box beneath his bed.[2] Coventry kept the confession secret for a quarter century because he believed that it was protected by attorney-client privilege and that his duty of confidentiality to his client mattered more than decades of Mr. Logan's life.[3]

How could it happen that a legal rule ostensibly forged from humanistic concern for honor and ethics—passed along to us through the ages, from early Elizabethan cases that talked of gentlemen and

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1. Alton Logan & Berl Falbaum, *I Served 26 Years for Murder Even Though the Killer Confessed*, MARSHALL PROJECT (Oct. 19, 2017, 10:00 PM), https://www.themarshallproject.org/2017/10/19/i-served-26-years-for-murder-even-though-the-killer-confessed [https://perma.cc/Q8TC-7SB5].

2. *Id.*

3. *See id.* (mentioning the disclosure of the client's confession to Mr. Logan's lawyer soon after the client's death, indicating knowledge by the client's lawyers of Mr. Logan's incarceration).

morality, of avoiding treachery and betrayal[4]—could cause such a tragedy?

Moreover, how could it be that such a tragedy would not invite further questions: What *other* privilege rules exist? By what mechanisms have these rules developed and why do they persist? More importantly, what injustices do they perpetuate? Which groups and communities disproportionately bear their costs? Are their benefits worth their harms?

Evidentiary privileges—that is, rules that empower people to withhold evidence from legal proceedings—are one thread in a mesh of secrecy powers that control the flow of information in society. They are part and parcel of the laws, rules, norms, and practicalities that determine who can conceal and who can compel, that allocate power based on access to knowledge and its opposite. Despite the significance of privileges and of the harms that they produce, our understanding of this body of law has profound gaps.[5] The questions posed above turn out to be more challenging than they might at first appear. Notwithstanding the hard work of privilege law scholars who have shed important light on these issues, we lack clear answers to them. In short, as this Essay will show, we do not know precisely what privileges are, where they come from, what harms they produce and for whom, or whether they are justified.

What should we make of this second-order ignorance of the rules of omission?[6] History and philosophy of science offer a particularly incisive way of thinking about ignorance that is useful for contemplating the gaps in our knowledge of privilege law.[7] Philosophers have devoted an entire field of epistemology to the question of how we come to know what we think we know.[8] But its corollary, the study of

4. Edward J. Imwinkelried, *The Historical Cycle in the Law of Evidentiary Privileges: Will Instrumentalism Come into Conflict with the Modern Humanistic Theories?*, 55 ARK. L. REV. 241, 246–47 (2002).

5. Privilege law is not alone in this respect. We also have knowledge gaps about the underlying assumptions behind character and expert testimony, jury decisionmaking, and other areas of evidence law. *See, e.g.*, Julia Simon-Kerr, *Credibility by Proxy*, 85 GEO. WASH. L. REV. 152 (2017); Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254 (2013).

6. By second order, I mean ignorance about ignorance. Privileges create first-order ignorance by suppressing relevant evidence during litigation.

7. *See, e.g.*, AGNOTOLOGY: THE MAKING AND UNMAKING OF IGNORANCE (Robert N. Proctor & Londa Schiebinger eds., 2008) (suggesting that ignorance can be culturally induced). Political scientists, too, have argued that latent violence can fester in studied erasure. In her critique of "colorblind racism," Naomi Murakawa writes that "[i]gnorance is not absence of knowledge; it is, rather, the cultivation of institutions, ideologies, and rhetorical mazes that unwitness racism . . . ." Naomi Murakawa, *Racial Innocence: Law, Social Science, and the Unknowing of Racism in the US Carceral State*, 15 ANN. REV. L. & SOC. SCI. 473, 475 (2019).

8. *See, e.g.*, Lorraine Daston & Peter Galison, *The Image of Objectivity*, REPRESENTATIONS, Fall 1992, at 81, 81 (exploring the "moralization of objectivity" vis-à-vis scientific imaging); Sandra

how we come to *not* know, has proven more scattered and elusive. Recognizing this gap three decades ago, historian of science Robert Proctor popularized the term "agnotology" to describe the study of ignorance.[9] Key among Proctor's insights—inspired by his personal experiences testifying against large tobacco companies that sought "to manufacture doubt about the hazards of smoking"[10]—is that ignorance is not merely the primordial state of knowledge yet to be received. On the contrary, ignorance can be actively produced. It can be "virtuous" (as in John Rawls's "veil of ignorance") or deplorable.[11] It can be a resource, a strategy, or a calculated amnesia.[12] The insight that social forces create our knowledge landscape, including its lapses, leads to the following question: to what extent, if any, has our ignorance of privilege law been actively produced?[13]

It seems pertinent, agnotologically, to root this Essay on evidentiary privileges, written in honor of the fiftieth anniversary of the Federal Rules of Evidence ("FRE"), in the observation that privileges are missing from the FRE and that their absence did not occur by chance. In fact, such an absence was not originally intended. The early 1970s draft of the FRE devoted a full Article to privileges, detailing which secrets among families, clergy, and government officials, and which covert surveillance techniques, confidential informants, and military operations could be hidden from the courts and how.[14] It must not have seemed exceedingly controversial to the drafters. The Field Code, the Model Code of Evidence, the Uniform Rules, and multiple states[15] had already paved the way to codifying privilege law, surfacing and clarifying the rules of stealth for all to see.

Harding, *Rethinking Standpoint Epistemology: What Is "Strong Objectivity?"*, 36 CENTENNIAL REV. 437, 438 (1992) (arguing that "the socially situated . . . subjects of standpoint epistemologies . . . generate stronger standards for objectivity than do [other epistemologies]").

9. Robert N. Proctor, *Agnotology: A Missing Term to Describe the Cultural Production of Ignorance (and Its Study)*, *in* AGNOTOLOGY: THE MAKING AND UNMAKING OF IGNORANCE, *supra* note 7, at 1, 27–28.

10. *Id.* at 11.

11. *Id.* at 24.

12. *Id.* at 24–26.

13. Some scholars turn to science epistemology to rationalize the Rules of Evidence. *See, e.g.*, Cheng, *supra* note 5 (reconceptualizing the preponderance standard as a comparative probability ratio instead of an absolute threshold). While valuable, that is not my project here. My focus instead is on the production of ignorance about the Rules of Evidence.

14. *See* 24–26A KENNETH W. GRAHAM, JR. & ANN MURPHY, FEDERAL PRACTICE & PROCEDURE §§ 5451-5757 (1st ed.) (detailing rejected Rules 502–513).

15. *See, e.g.*, PROPOSED FED. R. EVID. 508 advisory committee's note, 56 F.R.D. 183, 250–51 (1972) (citing prior codifications of the proposed trade secret privilege in California, Kansas, and New Jersey).

Yet, as prior scholars have described,[16] when the draft of the FRE reached the U.S. Congress, the naming and elaboration of privileges provoked a "swift and violent" response.[17] Allegations that the personal privileges served lobbyists and special interests,[18] mixed with anxieties about abuse of government secrecy powers,[19] incited a furor that threatened the entire codification enterprise. Ultimately, Congress ducked the controversy by deleting the Article codifying privileges from the FRE, leaving their evolution in the federal courts (largely) to the exploitable confusion of the common law whence they came.[20]

What far fewer people realize today is that the FRE also quietly retained Congress's authority to enact privileges by statute. Although the Advisory Committee's Notes say nothing about it, Rule 501 asserts that the common law governs privilege "unless" a federal statute "provides otherwise."[21] And, indeed, in the intervening years since the FRE's adoption, Congress has enacted a wealth of statutory privileges[22] and the Supreme Court has repeatedly upheld its authority to do so.[23] Deleting the privilege Article from the FRE, then, did not insulate federal privilege law from the influence that lobbyists and special interests wield over legislatures. On the contrary, it scattered statutory

16. For excellent and detailed histories of the political debates surrounding the proposed but never enacted privilege rules for the Federal Rules of Evidence, see GRAHAM & MURPHY, *supra* note 14 (summarizing core debates in the statutory development of privilege rules), and Edward J. Imwinkelried, *Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted: The Strength of the Ingroup Loyalty of the Federal Judiciary*, 58 ALA. L. REV. 41, 44–59 (2006) (detailing Congress's treatment of draft Article V).

17. Imwinkelried, *supra* note 16, at 48.

18. *Id.* at 46.

19. *See* Margaret A. Berger, *How the Privilege for Governmental Information Met Its Watergate*, 25 CASE W. RSRV. L. REV. 747, 775 (1975) (explaining that "the question of executive privilege was assuming ever greater importance because of the Watergate affair").

20. *See* FED. R. EVID. 501 (stating that the common law governs a claim of privilege unless otherwise prescribed by the Constitution, federal statute, or the Supreme Court). Scholars have debated whether Congress should take a second stab at codifying privileges. *See* Kenneth W. Graham, Jr., *Government Privilege: A Cautionary Tale for Codifiers*, 38 LOY. L.A. L. REV. 861 (2004) (arguing that converting common-law privileges into a statutory form poses risks given the vast number of privileges held by the government itself); Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769 (2002) (arguing that the benefits achieved by a codified set of privilege rules outweigh the cons).

21. FED. R. EVID. 501.

22. *See, e.g.*, Rebecca Wexler, *Privacy as Privilege: The Stored Communications Act and Internet Evidence*, 134 HARV. L. REV. 2721, 2753 (2021) (arguing that courts have read the Stored Communications Act as "impliedly creating an unqualified evidentiary privilege").

23. *See, e.g.*, Pierce County v. Guillen, 537 U.S. 129 (2003) (upholding Congress's authority under the Commerce Clause to statutorily privilege information collected as part of a federal highway safety program); Baldrige v. Shapiro, 455 U.S. 345 (1982) (holding that, under the provisions of the Freedom of Information Act and the Census Act, addresses collected by the Census Bureau are privileged).

privileges across the U.S. code, where they are arguably easier for special interests to manipulate and harder for the general public to discern and scrutinize.

Congress's act of occlusion in removing privileges from the FRE was not unique. Privilege law survives and flourishes in far broader and recurring environments of studied inattention. This Essay is not about the many individual examples of privilege that permeate our substantive laws, often distorting their intent by obstructing accurate enforcement. Rather, it examines and proposes some areas of redress for our ignorance of the way that privilege law, as a whole, has been manifested, historically and in practice, to mystify the full scope of its influence. Sometimes, as with the erasure from the FRE, the mystification of privilege law has been purposeful. Other times, it is a byproduct of archival limitations or disciplinary happenstance. Regardless, the unknowns and ambiguities of privilege law are not innocent omissions. The haze that they cast offers cover, allowing some to manipulate privilege law at the expense of others.

Recognizing a privilege means choosing to pursue a selective and differential ignorance. It means that some win and some suffer. When, how, and why do we, as a society, make this choice? We should know the answers to these questions. Troublingly, we do not. Fifty years after the FRE, here is an area of law that requires our renewed attention.

I. THE STORIES WE TELL

Let us start with the stories. Alton Logan's story, with which this Essay began, has been canonized, lionized. 60 Minutes kicked off its run in the national media.[24] It is taught in law school courses and debated by legal ethics scholars.[25]

Certainly, this attention is warranted. Mr. Logan's ordeal casts in spectacular relief how the clash between the maintenance of privilege and the pursuit of truth is no mere abstraction; it plays out in the horror of very real and mangled lives. Nor is his story an isolated one. Bill

24. *26-Year Secret Kept Innocent Man in Prison*, CBS NEWS (Mar. 6, 2008, 2:26 PM), https://www.cbsnews.com/news/26-year-secret-kept-innocent-man-in-prison/ [https://perma.cc/7XDX-YRJM]; Logan & Falbaum, *supra* note 1.

25. *See, e.g.*, Colin Miller, *Ordeal by Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391 (2008) (highlighting Mr. Logan's story).

Macumber,[26] Lee Wayne Hunt,[27] Jose Morales, and Ruben Montalvo[28] all spent years or decades in prison while attorneys—or in the case of Morales and Montalvo, a Roman Catholic priest—kept silent that other people had confessed to the crimes for which they were convicted. Not telling these stories or pretending they did not happen would seem unfeeling and cruel.

Yet, there are also risks in their regular retelling. As scholars of spectacular violence have long argued, concentrating on extremes can blind us to the mundane harms of daily toil. Susan Sontag, writing on photographs of the victims of war, tells us that "the pity and disgust that [these pictures] inspire should not distract you from asking what pictures, whose cruelties, whose deaths are *not* being shown."[29] Rob Nixon writing on environmental calamities warns of "slow violence," or "a violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space, an attritional violence that is typically not viewed as violence at all."[30] Laura Wexler has identified a kind of under-spectacle of "tender violence," whereby imperialism and racism are sold to the public by disguising their grotesqueness in superficially palatable domestic representations.[31] The lesson from these scholars and others like them is clear: the unshown, the bureaucratic banal, the unremarked and unremarkable injuries also demand our critical attention.

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26. Bill Macumber spent thirty-seven years in prison despite attorney Thomas O'Toole's revelation that his own client had confessed; the Supreme Court of Arizona held that the attorney-client privilege barred O'Toole from testifying on Macumber's behalf, even though O'Toole's client had since passed away. State v. Macumber, 544 P.2d 1084 (Ariz. 1976); *see also* Richard Zitrin, *Viewpoint: When Can a Lawyer Break Privilege?*, RECORDER (Mar. 1, 2013), https://www.law.com/therecorder/almID/1202590159180/ [https://perma.cc/Z7K7-FEVW] (describing the political fallout of the Macumber case).

27. Lee Wayne Hunt spent nineteen years in prison before attorney Staples Hughes revealed that his since-deceased client had confessed and insisted Hunt was innocent. Rather than release Hunt, the court disciplined the attorney for "professional misconduct" and left Hunt incarcerated for another decade until he died, alone and a prisoner. *See* Adam Liptak, *When Law Prevents Righting a Wrong*, N.Y. TIMES (May 4, 2008), https://www.nytimes.com/2008/05/04/weekinreview/04liptak.html [https://perma.cc/HY4C-8JZS] (describing Hughes' testimony, which ultimately failed to exonerate Hunt); Martha Waggoner, *Confession Failed to Free NC Man, Who Has Died as a Prisoner*, ABC 13 NEWS (Apr. 10, 2019, 5:37 AM), https://wlos.com/news/local/confession-failed-to-free-nc-man-who-has-died-as-a-prisoner [https://perma.cc/3649-XNKE] (reporting that Hunt died while incarcerated).

28. Jose Morales and Ruben Montalvo spent thirteen years in prison even though their friend—a teenager who watched them get wrongfully convicted of a murder that he had committed—confessed to a priest. Morales v. Portuondo, 154 F. Supp. 2d 706, 709–10 (S.D.N.Y. 2001). It took the friend's own death before the priest revealed his confession and Morales and Montalvo were released. *Id.* at 714, 734.

29. SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 13–14 (2003).

30. ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 2 (2011).

31. *See* LAURA WEXLER, TENDER VIOLENCE: DOMESTIC VISIONS IN AN AGE OF U.S. IMPERIALISM (2000).

Perhaps something similar occurs with privilege law, and perhaps a similar admonishment is in order. Our collective fascination with Mr. Logan's horrific story, and others like it, risks inoculating us, such that we fail to see or react to the harms of more everyday privileged secrets. It is not actually that these other privilege claims are more mundane—it is that their applications are so universal and ordinary that we fail to register their ills. But buried beneath the sometimes-boring minutia of privilege definitions and procedures, claims and defenses, objections and overrulings, lie real people whose injuries have gone unaddressed and whose collective experiences have been rendered unrecognizable. Stories of tragedy punctuate, disguise, and therefore enable this more monotonous violence.[32] Perhaps, in other words, the spectacular stories that we tell about evidentiary privileges feed our ignorance about what privileges are and do.

II. WHAT PRIVILEGES ARE

Privileges have achieved relative obscurity in part because we lack a clear definition of precisely what qualifies as a privilege and what does not.[33] This definitional ambiguity, strategic or not, enables some to gain the benefits of privilege—to claim immunities from compulsory legal process—without triggering the doctrinal rules that have evolved to cabin privilege claims.[34] For instance, perhaps the most repeated judicial statement on privilege law is the Supreme Court's assertion in *United States v. Nixon* that "privileges against forced disclosure [are] established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."[35] The Court has since elaborated, providing balancing rules to ensure that new privileges "promote[ ] sufficiently important interests to outweigh the need for probative evidence . . . ."[36] Claiming a privilege without naming it as such, however, expands secrecy and propagates its harms without triggering the Court's narrow construction mandate or balancing rules. The unnaming evades the limiting function of privilege doctrine.

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32. *See* Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RSCH. 167 (1969) (coining term "structural violence").

33. *See, e.g.*, David P. Leonard, *Introduction*, 38 LOY. L.A. L. REV. 515, 522–23 (2004).

34. Wexler, *supra* note 22.

35. United States v. Nixon, 418 U.S. 683, 709–10 (1974).

36. *See* Jaffee v. Redmond, 518 U.S. 1, 8–12 (1996) (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)). This balancing test concerning whether to recognize a privilege at all should be distinguished from case-by-case balancing, which determines whether to uphold a privilege in any given case.

To be sure, aspects of privileges are clear. For one thing, they are unapologetically anti-accuracy; they reflect a judgment that certain values—be they personal privacy, commercial innovation, or military espionage—matter more than exposing truth in the courts.[37] We also know that privileges are especially costly to accuracy because they apply to all stages of judicial proceedings.[38] Most evidence rules solely control the flow of information to factfinders at trial, leaving the parties and judge free to inspect and probe. Privileges, in contrast, conceal information throughout *all* judicial proceedings, from pre-trial discovery to post-conviction proceedings to the trial court's own admissibility hearings on preliminary questions.[39] They thereby block disclosures not merely to the factfinder but also to the parties and judge, neither of whom may know what is missing or that anything is missing at all.[40] Privilege law even limits whether and when courts can view allegedly privileged information to determine the validity of a privilege.[41] In other words, privileges can use secrecy to bootstrap their own legitimacy.

Nonetheless, what does and does not qualify as a privilege remains surprisingly opaque in practice. Diving far down into the weeds, privileges can exist de facto, as in the unspoken judicial reticence to enforce contempt judgments against the disobedient press.[42] Or consider that courts have allowed mere duties of

37. *See, e.g.*, Alex Stein, *The New Doctrinalism: Implications for Evidence Theory*, 163 U. PA. L. REV. 2085, 2094 & n.47 (2015) (noting that privileges "suppress evidence for purposes unrelated to factfinding"). For a discussion of the instrumentalist argument that privileges, in aggregate, impose minimal costs to accuracy because they conceal solely evidence that would not otherwise exist, see *infra* Part IV.

38. FED. R. EVID. 1101(c).

39. *Id.*

40. *See id.*

41. In some jurisdictions, though not the federal courts, privileges apply in full force to judicial determinations of whether a privilege exists, meaning the court is not permitted to rely on allegedly privileged information to decide its privileged status. *E.g.*, CAL. EVID. CODE § 915(a) (West 2023). While the Federal Rules do not go quite that far, the Supreme Court has imposed heightened burdens before judges may view privileged information *in camera* to determine the validity of the privilege claim. *See* United States v. Zolin, 491 U.S. 554, 572 (1989) (requiring a threshold showing of a factual basis that *in camera* review "may reveal evidence to establish . . . that . . . [an] exception applies"); United States v. Reynolds, 345 U.S. 1, 10 (1953) (requiring that if circumstantial evidence shows "a reasonable danger that compulsion of the evidence will expose military matters . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers"); *see also* McGlothlin v. Astrowsky, 532 P.3d 1185, 1193–95 (Ariz. Ct. App. 2023) (explaining that "*in camera* review is limited, not automatic," and detailing steps required before a court may undertake it to resolve a privilege dispute).

42. *See* Christina Koningisor, *The De Facto Reporter's Privilege*, 127 YALE L.J. 1176, 1205–43 (2018) ("[J]udges . . . have long sought to protect reporters in ways short of conferring an express privilege.").

confidentiality to morph into a privilege shield against subpoenas.[43] Meanwhile, the "state secrets" privilege for diplomatic and national security secrets has swollen into an immunity power that permits government officials and their private contractors to kick mass tort actions out of court.[44] The list of obscurities goes on. Testimonial privileges, which authorize potential witnesses to refuse to take the stand, blur with competency rules, which bar witnesses from testifying whether they want to or not.[45] Commentators sometimes describe the specialized relevance rules, which block the admission of evidence based on both accuracy and extrinsic policy rationales, as "quasi-privileges," even though they do not separately bar pretrial discovery.[46] Despite the FRE's general relegation of privilege development to federal common law, Congress continues to legislate privileges outside the scope of the FRE, and yet it is unclear quite what statutory language suffices to create a privilege that blocks compulsory legal process.[47] Further ambiguities surround Congress's power to legislate privileges that bind state courts.[48]

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43. Federal and state courts alike have, I submit, misconstrued confidentiality statutes as blocking compulsory legal process even though the statutes do not expressly state that they are creating a privilege. *See* Wexler, *supra* note 22.

44. Edward J. Imwinkelried, *The Effect of the Successful Assertion of the State Secrets Privilege in a Civil Lawsuit in Which the Government Is Not a Party: When, If Ever, Should the Defendant Shoulder the Burden of the Government's Successful Privilege Claim?*, 16 WYO. L. REV. 1, 25–26 (2016).

45. For instance, the adverse spousal testimony privilege evolved out of a competency rule that barred spouses from testifying for or against one another. *E.g.*, Trammel v. United States, 445 U.S. 40, 43–44 (1980); Hawkins v. United States, 358 U.S. 74, 75–76 (1958). For contested histories of party and racial competency rules, compare George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575 (1997) (arguing that southern states eliminated party incompetency rules due to white supremacist concerns) with KELLEN FUNK, LAW'S MACHINERY, Ch. 7 (manuscript on file with author) (challenging Fisher's historical account).

46. *See* Edward J. Imwinkelried, *The Federal Evidence Quasi-Privilege Provisions, Rules 407–10 and 412, Resting on Extrinsic Social Policies: The Propriety of Using Protective Orders to Safeguard Those Policies During the Most Important Litigation Phase, Pretrial Discovery*, 44 AM. J. TRIAL ADVOC. 253, 259 (2021) (arguing that quasi-privileges *should* be protected during pre-trial discovery); *see also* Kiel Brennan-Marquez, *Beware of Giant Tech Companies Bearing Jurisprudential Gifts*, 134 HARV. L. REV. F. 434, 437 & n.15 (2021) (discussing the extension of specialized relevance rules to access along with admissibility by certain courts).

47. Wexler, *supra* note 22.

48. Natalie Ram, Jorge L. Contreras, Laura M. Beskow & Leslie E. Wolf, *Constitutional Confidentiality*, 80 WASH. & LEE L. REV. (forthcoming fall 2023); *see also* Mila Sohoni, *The Power to Privilege*, 163 U. PA. L. REV. 487 (2015) (discussing Congress giving regulatory agencies authority to create privileges that would bind state courts); Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 244 (2006) (discussing the constitutionality of giving agencies authority to create privileges that would bind state courts); Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59 (2002) (arguing for Congress to adopt a federal privilege statute that applies to all states).

Soaring up to a high level of abstraction brings more questions than clarity. Seen from a broad vantage, "privilege" is an expansive term. In common usage it sometimes refers to "the unearned benefits afforded a group of people,"[49] as in whiteness[50] and wealth.[51] That usage may well be apt for evidentiary privileges, the benefits of which can be both unearned and unfairly distributed. Those wealthy enough to hire attorneys and psychiatrists can shield their confidences from compulsory legal process; those who can afford to confide solely in friends and family generally cannot.[52] At the same time, privileges are zero-sum; gains to one mean losses to another. For one illustrative example among many, if military contractors can benefit from the government's "state secrets" privilege,[53] then plaintiffs victimized by those contractors' torts bear the loss.[54] The benefits of privileges may track special interest lobbying, but what about the harms? Do they spread diffusely across the population or concentrate disproportionately on groups and communities that have historically lacked influence over legislatures and courts? Who bears the brunt? More pointedly, how do evidentiary privileges relate to and entrench other forms of privilege? What demarcates the boundary between one type of privilege and another?

Taken together, these observations and questions indicate that the failure to define privileges, either in the weedy doctrinal sense or in the most obvious common meaning of the term, precludes a full examination of how these evidence rules operate as a form of societal power.

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49. Parul Sehgal, *How 'Privilege' Became a Provocation*, N.Y. TIMES MAG. (July 14, 2015), https://www.nytimes.com/2015/07/19/magazine/how-privilege-became-a-provocation.html [https://perma.cc/PG7C-9HYZ].

50. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

51. Khiara M. Bridges, *Excavating Race-Based Disadvantage Among Class-Privileged People of Color*, 53 HARV. C.R.-C.L. L. REV. 65, 70 (2018) (exploring "the disadvantage within the[] privilege" of wealthier minorities).

52. For an exemplary argument that privilege law favors the wealthy, see Richard Delgado, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 CALIF. L. REV. 1050, 1061–67 (1973) (developing an equal protection argument that privileging communications with psychiatrists but not social workers discriminates against the poor).

53. Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 88 (2010) (identifying a new kind of graymail whereby "companies deeply embedded in the state may threaten to air legally or politically damaging information" unless the government "support[s] the corporation's state secrets claim").

54. Edward Imwinkelried has criticized this default allocation of loss for tort litigation that implicates state secret evidence. He argues that "when the civil defendant has a more direct relationship to the government than to the plaintiff, the court should require the defendant to bear the burden of lost evidence." Imwinkelried, *supra* note 44, at 6. Nevertheless, as a descriptive matter under current law, it is plaintiffs who lose. *Id.* at 5–6.

III. WHENCE PRIVILEGES COME

Adding to the weight of our ignorance, even privilege histories are murky. They are full of manipulable and uncontested origin stories. To be sure, this particular murk has seemingly innocuous explanations. It can be difficult to identify traces of historical privileges that are buried in hard-to-find trial court documents.[55] Courts' inconsistent use of privilege terminology[56] and penchant for blurring privilege with rulings of immateriality[57] add to the confusion. The result, for instance, has caused Kenneth W. Graham, Jr. and Ann Murphy to bemoan the blending of "investigative files and deliberative process privileges into an indigest[i]ble stew."[58]

Yet, regardless of why privilege histories are uncertain, the murk has consequences. On the one hand, negative spaces in the historical record enable people to presume a venerable pedigree for what may in fact be quite novel privileges, or novel applications of a privilege. A venerable pedigree can in turn lend legitimacy to new privilege claims, quell doubts, and defuse potential challenges. This is what happened with the recognition of a civil "trade secret" privilege and its later expansion into criminal cases.[59] This privilege, once itself very much contested, became legitimized in part through legislative histories that claimed an unearned confidence as to the venerability of its past.[60] For instance, as I discovered while researching the use of the "trade secret" privilege to block criminal defendants from full review of the evidence against them,[61] a 1917 opinion by Justice Oliver Wendell Holmes has been cited repeatedly as an early precedent for that privilege.[62] Yet, his opinion did not, in fact, recognize a privilege for trade secrets. It recognized nothing more than a protective order enjoining the defendant from sharing trade secrets with expert

55. Donohue, *supra* note 53, at 84–85.

56. *See* GRAHAM & MURPHY, *supra* note 14, § 5662 ("[C]ourts follow no standardized nomenclature for the various governmental privileges.").

57. *See, e.g.*, United States v. Hoeffener, 950 F.3d 1037, 1043 (8th Cir. 2020) (finding requested evidence to be immaterial without addressing a prior determination that the evidence was protected by the law enforcement privilege).

58. GRAHAM & MURPHY, *supra* note 14, § 5676 n.17.

59. Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343 (2018).

60. *Id.* at 1385–88.

61. *Id.*

62. *See, e.g.*, Memorandum from Ken Broun, Consultant, to Advisory Comm. on Evidence Rules (Apr. 12, 2013), *in* Advisory Committee on Evidence Rules 229, 239 (May 2013) ("The Advisory Committee Note traces the qualified privilege [for trade secrets] at least to *E.I. DuPont De Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917).").

witnesses for purposes of developing a particular claim.[63] In other words, the case is cited as precedent for a privilege that was not there. Nonetheless, once the privilege became entrenched in civil cases, its extension to the criminal context went largely unquestioned.[64]

On the other hand, lapses and recesses in privilege histories can tempt people to overestimate the novelty of privileges that actually do have longstanding precursors, and as a result, to understate their importance or intransigence. For example, Laura Donohue has identified (and contested) "the proliferation of an Athena-like theory of state secrets: in 1953 [the 'state secrets' privilege] sprung from Zeus's forehead, with little or no previous articulation."[65] That theory, she insists, "is wrong."[66] Stunted histories interfere with our ability to fully analyze the legal, constitutional, and policy bases for privilege.[67] Underestimating the vintage of a privilege can also undermine support for it, raise doubts, and invite challenges.

Part of the reason for such aporia is undoubtedly that archival limitations constrain what can be discerned and conveyed. This is especially so for research on government privileges, as pertinent documents are often heavily redacted.[68] But archival failings are not the whole picture. It is also the case that the politicization of privileges invites a strategic forgetting. For example, commentators writing about the flagship narrative of abuse of the "state secrets" privilege sometimes tell a partial story.[69] They describe the case of *United States v. Reynolds*—a negligence suit brought by the widows of three civilian engineers who died in the crash of an Air Force test flight—and explain that the government refused to hand over the crash report, claiming it

63. E.I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100, 102–03 (1917).

64. *See* Wexler, *supra* note 59, at 1358–60 (discussing the spread of the use of the "trade secret" privilege in criminal cases across the country).

65. Donohue, *supra* note 53, at 83.

66. *Id.*

67. *Id.*

68. *Id.* at 84–85.

69. *See, e.g.*, Robert Chesney, *No Appetite for Change: The Supreme Court Buttresses the State Secrets Privilege, Twice*, 136 HARV. L. REV. 170, 177 (2022) [hereinafter Chesney, *No Appetite*] (discussing recent developments in "state secrets" privilege doctrine); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1288–89 (2007) [hereinafter Chesney, *State Secrets*] (discussing the "state secrets" privilege and its use for national security post-9/11); Nicole Hallett, *Protecting National Security or Covering Up Malfeasance: The Modern State Secrets Privilege and Its Alternatives*, 117 YALE L.J. POCKET PART 82 (2007), https://www.yalelawjournal.org/forum/protecting-national-security-or-covering-up-malfeasance-the-modern-state-secrets-privilege-and-its-alternatives [https://perma.cc/7EWP-G3FX] (arguing that the "state secrets" privilege needs to be reevaluated by the courts post-9/11); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 167–68 (2006) (discussing how courts have been reluctant to question government secrecy claims).

contained military secrets.[70] Commentators then recount that decades later, the crash report was declassified and appeared to have contained nothing of the sort, suggesting that the government abused the privilege to conceal its negligence and flex its secrecy powers.[71]

What commentators sometimes omit is that the widows subsequently sued for fraud on the court . . . and lost.[72] Four federal judges agreed that, considered in historical context, the government could have had a good faith belief that disclosing the crash report would reveal military secrets.[73] To be sure, the results of the fraud suit are inconclusive as to whether fraud occurred; what happened in the world and what one can prove in court are different things. But the selective retelling of the *Reynolds* story without mention of the failed fraud suit insulates the narrative of abuse in greater certainty than it deserves.

I do not mean to suggest here that a pure or objective history is attainable, whether for privilege law or any other. I simply mean to draw attention to the oversights and exclusions, willful or not. For it is within those unobserved spaces that privilege histories can offer cover for the creation and expansion of novel secrecy powers or provoke and concentrate anxieties about secrecy abuse. Inside those cracks and crevices, privilege histories elide debate and entice complacency.

IV. WHETHER PRIVILEGES ARE JUSTIFIED

One might reasonably assume that centering privilege history rather than marginalizing it would alter the balance of known to unknown antecedents. There have, in fact, been longstanding and ongoing debates about the framework that we should use to determine which privileges are justified, or whether any are justified at all. But here, what has attracted attention has further compounded privilege unknowns.

In the nineteenth century, Jeremy Bentham famously argued that personal privileges should (mostly) not exist. He reasoned that the privilege against self-incrimination substitutes "inferior evidence" for direct testimony from the accused;[74] that the attorney-client privilege helps the guilty to evade punishment while providing no benefit to the

70. 345 U.S. 1 (1953).

71. *See* Chesney, *No Appetite*, *supra* note 69, at 177; Chesney, *State Secrets*, *supra* note 69, at 1288–89; Hallett, *supra* note 69; Fuchs, *supra* note 69, at 167–68.

72. Chesney, *State Secrets*, *supra* note 69, at 1288–89; Hallett, *supra* note 69; Fuchs, *supra* note 69, at 167–68.

73. Herring v. United States, 424 F.3d 384, 392 (3d Cir. 2005).

74. 7 JEREMY BENTHAM, *Rationale of Judicial Evidence Specially Applied to English Practice*, *in* THE WORKS OF JEREMY BENTHAM 1, 451 (Russell & Russell, Inc. 1962) (John Bowring ed., 1843).

innocent;[75] and that the spousal privilege "secures, to every man, one safe and unquestionable and ever-ready accomplice for every imaginable crime."[76] Bentham did not manage to eliminate any privileges during his lifetime, but his qualms about them have been conveyed forward in time and continue to feed ongoing doubts. Just four years ago, the New Mexico Supreme Court suddenly abolished the "spousal communications" privilege, announcing that it had "outlived its useful life."[77] Then, just as suddenly, it reinstated the privilege one year later.[78]

The New Mexico Supreme Court's about-face stoked debate over two plausible justifications for privileges, or at least for the personal variety. The first, which has been widely adopted in the federal courts[79] and cited repeatedly by the Supreme Court,[80] originates in the twentieth century. John Henry Wigmore stated in his influential 1904 treatise on evidence that he believed privileges are justified if: (1) the communications "originate in a confidence that they will not be disclosed"; (2) confidentiality is "essential" to the relationship between the communicants; (3) the relationship is one that "ought to be sedulously fostered"; and (4) the harm to the relationship from compelling disclosure outweighs the benefit to accurate fact-finding in the courts.[81] Commentators have characterized Wigmore's test as "utilitarian" or "instrumentalist" in the sense that Wigmore assumed justified privileges were necessary for their protected communications to occur in the first place.[82] If one believes that to be so, then the recognition of privileges over time should cost the legal system little in

75. *Id.* at 473–79.

76. *Id.* at 483.

77. State v. Gutierrez, 2021-NMSC-008, 482 P.3d 700, 703 (N.M. 2019), *aff'd on other grounds on reh'g*, State v. Gutierrez (*Gutierrez II*), 482 P.3d 700, 725 (N.M. 2020) (affirming the defendant's conviction but reinstating the spousal communications privilege).

78. *Gutierrez II*, 482 P.3d at 725.

79. *See* 1 EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 3.2.3., at 131–33 (2002) (collecting cases).

80. *See*, *e.g.*, Swidler & Berlin v. United States, 524 U.S. 399, 406 (1998); Jaffee v. Redmond, 518 U.S. 1, 9 (1996); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

81. WIGMORE ON EVIDENCE § 2285 (4th ed. Supp., Wolters Kluwer 2021).

82. *See, e.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, 81–82 (2023) (explaining that Wigmore saw privileges as protecting communication that would not have existed absent the protection); Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 49 (2000) (noting Wigmore's view that the privilege should "go . . . no further than is necessary to secure the client's subjective freedom of consultation"); John E. Sexton, *A Post*-Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 480 (1982) (noting that, hypothetically, privileges only shield information that would not have existed absent the privilege).

the way of truth seeking.[83] The evidence lost from privilege in any given case would not, without privilege, have come into existence, or so the theory goes.

One problem with the Wigmorean justification is that it assumes people know and care about courtroom privilege protections when they decide what to disclose to their confidants. As a result, Wigmore's theory demands that privileges offer absolute, maximally costly secrecy so that people can predict in advance that their confidences will be maintained.[84] As prior commentators have identified, while the assumption of knowledge might be plausible in a professional relationship where an attorney or doctor can inform their client or patient about privilege law, the assumption strains credibility in the spousal context.[85] Maybe lawyers married to lawyers converse in the shadow of evidentiary rules, but one would hope that other marriages do not follow. What is more, scholars and commentators, beginning with Wigmore himself, have questioned whether the utilitarian or instrumental rationale holds even for professional privileges.[86] Prominently, Edward Imwinkelried has recently called attention to a series of empirical studies questioning whether the attorney-client privilege is truly essential for the effective provision of legal advice, particularly in corporate contexts.[87] He observes that, if the studies are correct, "the world does not revolve around the legal system to the extent that the most ardent proponents of the instrumental theory believe."[88]

What, then, justifies privilege law? Imwinkelried has offered an alternative, humanistic rationale for communications privileges.[89] He grounds these privileges in rights to privacy, including the common law privacy torts of unreasonable intrusion, breach of confidence, false light, and public disclosure of private facts.[90] He argues that privileges help

83. *See, e.g.*, Imwinkelried, *supra* note 82, at 81–82 (noting that, in Wigmore's view, privileges pose no costs to the legal system); Leslie, *supra* note 82, at 31 (asserting that, in a perfect world, privileges create the communication they protect); Sexton, *supra* note 82, at 480 ("An ideal privilege would generate no costs because all protected information would be undisclosed absent the privilege.").

84. *See* Edward J. Imwinkelried, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315, 319–20 (2003).

85. *See, e.g.*, State v. Gutierrez, 2021-NMSC-008, 482 P.3d 700, 710 (N.M. 2019) (asserting that the accepted justifications for evidentiary privilege do not apply to spousal privilege).

86. *See* Imwinkelried, *supra* note 82, at 83–89 (making the case for why an instrumental or utilitarian justification leaves both medical and attorney-client privileges on weak empirical and normative grounds).

87. *Id.* at 88.

88. *Id.*

89. Imwinkelried, *supra* note 84, at 327–30; Imwinkelried, *supra* note 4, at 252.

90. Imwinkelried, *supra* note 82, at 90.

to protect individuals' decisional autonomy over important life choices, including those in the family sphere that the Supreme Court has declared to be constitutionally protected.[91] In Imwinkelried's view, a privilege offers incentives for an individual to disclose fully and for a consultant to think freely in providing advice.[92]

While the Bentham-Wigmore-Imwinkelried debate is both thorough and well-known, substantial questions about the justification for privilege law remain unstated and unstudied. Setting aside the issue of what interests warrant privilege protections, what precisely are the harms that privileges produce? At least in individual cases where privileges suppress evidence that already exists, we know they are "in derogation of the search for truth."[93] But do we know, or could we know, exactly what truthful findings they preclude? Which judicial decisions do they render inaccurate or unavailable, and how often? Could we quantify the damage from secrets not revealed? How many privilege claims have suppressed evidence that would have changed the outcome in criminal cases, mass tort litigation, or civil rights lawsuits? How many privilege claims have concealed negligence, wrongdoing, or illegal conduct?

A concentrated and fulsome scrutiny of privilege harms might also consider distribution. Why do claimants get to assert privileges cost-free? Under current law, privileges are often a winner-take-all proposition. Successful claimants get to withhold relevant evidence without penalty of any kind. Why slice and dice the equities that way? Why not try to distribute the costs to accuracy and make claimants put some skin in the game? Cost sharing could help to reduce overclaiming of privileges and ensure that the party asserting secrecy values it for reasons other than litigation advantage.

There are precedents for a cost-sharing approach to privilege law.[94] In criminal cases, if a government witness testifies for the prosecution on direct and then asserts the Fifth Amendment privilege to preclude cross-examination by the defense, courts sometimes strike

91. *Id.* at 91–97.

92. *Id.* at 97.

93. United States v. Nixon, 418 U.S. 683, 710 (1974).

94. *See, e.g.*, PROPOSED FED. R. EVID. 509(e), *reprinted in* Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 252 (1972) ("If a claim of privilege is sustained in a proceeding to which the government is a party and it appears that another party is thereby deprived of material evidence, the judge shall make any further orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action."); Graham, *supra* note 20, at 893 & n.153 (discussing proposed Federal Rule of Evidence 509(e)).

the initial testimony from the record.[95] When the prosecution asserts privilege to shield official information or the identity of an informer, courts sometimes order the jury to draw an adverse inference from the missing information.[96] At the extremes, prosecutors may be forced to withdraw criminal charges and accept dismissal as a condition of maintaining privilege.[97]

Why not have a more gradated array of penalties accompany more types of privilege assertions, in both criminal and civil proceedings? Those penalties could be monetary, as in fee-shifting provisions, or they could come in the form of counterweight litigation benefits for the party denied access to privileged information. Perhaps, for instance, parties denied discovery due to privilege should receive extra time or pages for their briefing as something of a consolation prize. Alternately, courts could simply instruct juries that certain evidence was sought and withheld,[98] without requiring that jurors draw any specific inference from the absence.[99] In other words, perhaps there could be a menu of privilege payment plans.[100] In such a world, the framework for justifying privileges would be willingness to pay the penalty.

I do not presume here to either pick amongst or reject the array of possible approaches to justifying privileges. What I do mean to assert is that the centuries-long state of debate over whether and when privileges are justified itself should give us pause. We have a body of law that runs unmistakably counter to truth and yet no clear consensus about why it exists.

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95. *Cf.* Douglas v. Alabama, 380 U.S. 415, 419 (1965) (holding that a witness's incriminating confession violated the Confrontation Clause when the witness invoked the Fifth Amendment to preclude cross-examination by the defense).

96. *E.g.*, CAL. EVID. CODE § 1042(a) (West 2023).

97. *See, e.g.*, Charles M. Bell, Note, *Surveillance Technology and Graymail in Domestic Criminal Prosecutions*, 16 GEO. J.L. & PUB. POL'Y 537 (2018) (discussing "disclose or dismiss" dilemmas).

98. Pre-FRE, some earlier authorities on evidence law authorized courts and counsel to tell the jury when evidence was suppressed due to privilege. *See* MODEL CODE EVID. 233 (AM. L. INST. 1942) ("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 therefrom.").

99. *Cf.* Daniel Richman, *Framing the Prosecution*, 87 S. CAL. L. REV. 673, 687–88 (2014) (describing other possible jury instructions concerning available and unavailable evidence).

100. John C. O'Brien has detailed an excellent overview of possible responses to privilege claims, including summary disposition, adverse inferences, protective orders, stays of discovery, orders establishing facts or precluding testimony, and dismissal without prejudice. *See* John C. O'Brien, *Judicial Responses When a Civil Litigant Exercises a Privilege: Seeking the Least Costly Remedy*, 31 ST. LOUIS U. L.J. 323 (1987).

V. THE GREAT UNIVERSE OF INFORMATION LAW

It may be that legal scholarship, too, has contributed to our ignorance of privilege law through disciplinary fracture. Studying privileges is inherently interdisciplinary. Privileges suppress relevant evidence from judicial proceedings for policy purposes that are extrinsic to the truth-seeking role of the courts.[101] As a result, privileges bridge evidence and other areas of information law. Indeed, Alex Stein has argued that privileges "are properly categorized as belonging to substantive law rather than the law of evidence."[102] The line dividing substance and procedure is famously hazy. Privileges live in the liminal space between the procedural rules of evidence and other substantive doctrines.

It should therefore come as no surprise that privilege scholarship appears across a series of related fields. Consider privacy law. Neil Richards and Daniel Solove identify privileges as "[a]mong the oldest legal protections of confidentiality"[103] and argue that confidentiality law forms the origin of a certain "conception of privacy—one based on the protection of relationships."[104] More recently, Anita Allen and Jennifer Rothman examine privileges as a form of "postmortem privacy," since privileges continue to shield sensitive information after their holder's death.[105] Meanwhile, Natalie Ram brings a privilege-law perspective to privacy protections for human biomedical research data.[106] I also have previously written about when courts should and should not construe privacy and confidentiality statutes as creating evidentiary privileges.[107]

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101. Privileges only ever exclude *relevant* evidence because irrelevant evidence is already inadmissible at trial. FED. R. EVID. 402 (prohibiting the admission of irrelevant evidence). Of course, there are arguments from an instrumentalist vantage that privileges are accuracy neutral because they solely suppress evidence that would otherwise have been chilled into nonexistence by the threat of judicial disclosure. *See* Imwinkelried, *supra* note 46, at 255 (describing Wigmore's theory that a court can enforce a privilege without impairing factfinding because the excluded relevant evidence would not have existed without the privilege). Yet, regardless of whether this theory is true (and there are good reasons to doubt that it is), all privileges suppress relevant evidence in the individual cases in which they are invoked.

102. Stein, *supra* note 37, at 2094 n.47. *But see* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 740 (1974) (arguing that a federal statute abolishing privileges in diversity cases "would be procedural").

103. Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 134 (2007); *see also* DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY LAW FUNDAMENTALS (6th ed. 2022).

104. Richards & Solove, *supra* note 103, at 127.

105. Anita L. Allen & Jennifer E. Rothman, *Postmortem Privacy* (manuscript on file with author 2023).

106. Ram et al., *supra* note 48.

107. Wexler, *supra* note 22.

Other fields contain similar scatterings. Christina Koningisor has written at the intersection of privilege and media law.[108] Eileen Scallen has written at the intersection of privilege and fiduciary law.[109] Scholarship on the "state secrets" privilege for military and diplomatic secrets spans evidence and national security law.[110] Issues of executive privilege bring together scholarship on secrecy[111] and separation of powers.[112] Intellectual property law birthed the "trade secret" privilege.[113] The "law enforcement" privilege implicates scholarship on policing.[114] Commentators have sought to clarify the relationship between privileges and the Fourth Amendment.[115] The examples go on.

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108. *See* Christina Koningisor, *Police Secrecy Exceptionalism*, 123 COLUM. L. REV. 615 (2023) (regarding uniquely strong secrecy protections for law enforcement); Koningisor, *supra* note 42 (regarding the existence of informal disclosure protections for reporters).

109. Eileen A. Scallen, *Relational and Informational Privileges and the Case of the Mysterious Mediation Privilege*, 38 LOY. L.A. L. REV. 537, 571–72 (2004) (contending that personal communication "privileges merely minimize some of the consequences of breach of fiduciary duty by refusing to allow the disloyal fiduciary to compound the betrayal by testifying in court"); *see also* Imwinkelried, *supra* note 82, at 95–96 (contextualizing privilege law in the broader concerns of fiduciary law that individuals who must consult third parties to assist with important life decisions can lose autonomy in the process).

110. *See, e.g.*, Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991 (2018) (regarding varying approaches to managing information in national security cases); Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103, 113–18 (2017) (comparing the procedures that control general privileges, or "ordinary secrecy claims," to those that apply to national security privilege claims); Imwinkelried, *supra* note 44; Donohue, *supra* note 53 (analyzing cases from 2001 to 2009 to determine how the "state secrets" privilege functions across multiple areas of substantive law); Chesney, *State Secrets*, *supra* note 69 (surveying "state secrets" privilege decisions since 1953).

111. *See* Heidi Kitrosser, *Like "Nobody Has Ever Seen Before": Precedent and Privilege in the Trump Era*, 95 CHI.-KENT L. REV. 519 (2020) (regarding executive privilege and the extensive secrecy it has afforded).

112. *See* Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1 (2020) (examining executive privilege and presidential versus congressional power); Heidi Kitrosser, *Supremely Opaque?: Accountability, Transparency, and Presidential Supremacy*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 62 (2010) (enumerating and explaining arguments in support of presidential supremacist theories of separation of powers); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489 (2007).

113. Wexler, *supra* note 59, at 1381–88.

114. *See, e.g.*, Koningisor, *supra* note 108; Jonathan Manes, *Secrecy and Evasion in Police Surveillance Technology*, 34 BERKELEY TECH. L.J. 503 (2019); Bell, *supra* note 97; Stephen Wm. Smith, *Policing Hoover's Ghost: The Privilege for Law Enforcement Techniques*, 54 AM. CRIM. L. REV. 233 (2017). Notably, none other than John Edgar Hoover wrote one of the central defenses of the "law enforcement" privilege. *See* John Edgar Hoover, *The Confidential Nature of FBI Reports*, 8 SYRACUSE L. REV. 2, 6 (1956) (arguing that the contents of FBI files, including factual accounts, informant identity information, and "confidential investigative techniques" should be "protected by a screen of absolute confidence").

115. Privilege theorists have identified and worked to curtail doctrinal confusion between the Fourth Amendment's "reasonable expectations of privacy" test and the requirement of personal privileges that claimants must establish a "reasonable expectation of confidentiality" in allegedly privileged communications. *See* Edward J. Imwinkelried, *The Dangerous Trend Blurring the Distinction Between a Reasonable Expectation of Confidentiality in Privilege Law and a Reasonable Expectation of Privacy in Fourth Amendment Jurisprudence*, 57 LOY. L. REV. 1 (2011); Robert P.

Meanwhile, trans-substantive questions, such as what exceptions should defeat a privilege claim,[116] and when waiver should kill it,[117] can seem at times disciplinarily divorced from the substantive values they affect.

The takeaway is that privileges are judicial corollaries to secrecy doctrines that exist beyond the rules of evidence. They connect evidence law to an excitingly broad vista of policy issues. At the same time, that breadth dissipates privilege scholarship across the great universe of information law and makes it harder to see and understand privilege law as a whole.

CONCLUSION

This Essay has identified the existence and spaces of production of a second-order ignorance about evidentiary privilege law. It has argued that the stories we tell about privileges occlude as much as they enlighten. While we lack a clear doctrinal definition of privilege, we also ignore the most obvious meaning of the word: the unearned benefits of haves and elites. Our histories of privilege law contain strategic presumptions and omissions that can be marshalled to legitimize some secrecy powers or discredit others. Meanwhile, despite centuries-long debate, we have no clear consensus about when or whether privileges should exist at all. Finally, the inherently interdisciplinary project of studying privileges fractures and scatters privilege scholarship across a variety of substantive fields of law, dispersing its identity and force.

Mosteller & Kenneth S. Broun, *The Danger to Confidential Communications in the Mismatch Between the Fourth Amendment's "Reasonable Expectation of Privacy" and the Confidentiality of Evidentiary Privileges*, 32 CAMPBELL L. REV. 147 (2010); *see also* Mihailis E. Diamantis, *Privileging Privacy: Confidentiality as a Source of Fourth Amendment Protection*, 21 U. PA. J. CONST. L. 485 (2018) (drawing on privilege law's conception of confidentiality to propose a reform of the Fourth Amendment third-party doctrine).

116. Readers may be familiar with the recent ruling that the crime-fraud exception to the attorney-client privilege permitted prosecutors to compel testimony from Trump's lawyer about his mishandling of classified documents. Alan Feuer & Maggie Haberman, *Judge Rules Trump Lawyer Must Testify in Documents Inquiry*, N.Y. TIMES (Mar. 17, 2023), https://www.nytimes.com/2023/03/17/us/politics/trump-lawyer-testify-documents.html [https://perma.cc/P5H3-2ZYF].

117. Paul Rothstein has examined the scope of court-created exceptions to the attorney-client privilege that limit the reliability of privilege protections and proposed that perhaps attorneys should give Miranda-like warnings to their clients about communications or circumstances that might result in future disclosures. Paul F. Rothstein, *"Anything You Say May Be Used Against You": A Proposed Seminar on the Lawyer's Duty to Warn of Confidentiality's Limits in Today's Post-Enron World*, 76 FORDHAM L. REV. 1745 (2007). Ann Murphy has surveyed courts' responses to recent reforms in the Federal Rules of Evidence and Procedure dealing with inadvertent disclosure of privileged information and identified possible clashes with attorneys' ethical duties of confidentiality. Ann M. Murphy, *Federal Rule of Evidence 502: The "Get Out of Jail Free" Provision—or Is It?*, 41 N.M. L. REV. 193 (2011).

As a result, despite the pervasive pressure that privileges impose on litigation opportunities and outcomes, profound questions continue to exist about what privileges are, whence they come, whom they harm, and why we have them.

I have proposed that our ignorance of these facets of privilege law is not innocuous. On the contrary, privilege law's layered invisibility—invisibility both of evidence suppressed and of the rules that control its suppression—nourishes its accretional harms. While a few of the human tragedies, like those of Alton Logan and the *Reynolds* widows, have entered our collective conscience, many more remain unseen or unacknowledged. Leaving privilege law unplumbed enables the aggregate harms that privileges impose on truth seeking, fairness, and justice to proliferate and the beneficiaries of those harms to reap a quiet victory.