# Privacy and Privilege in Civil Family Law Disputes

Edward J. Imwinkelried*

In the courtroom, evidentiary privileges are one of the most important methods of safeguarding the privacy of confidential communications. Like other American attorneys, civil family law practitioners are accustomed to thinking of the evidentiary privileges protecting such relationships as marriage and attorney-client as absolute in character. On the one hand, there are limitations to the scope of the privileges, such as the injured spouse exception to the spousal privilege[1] and the crime-fraud exception to the attorney-client privilege.[2] On the other hand, in most jurisdictions the spousal and attorney-client privileges are absolute in the sense that the opponent cannot defeat the privilege by a case-specific, ad hoc showing of compelling need for the privileged information.[3] If a privilege attaches and the opponent cannot demonstrate the applicability of an exception, the judge may not permit discovery of the information even when the suppression of the information could lead to a miscarriage of substantive justice.

However, the picture painted by the preceding paragraph is incomplete. A criminal accused sometimes has a constitutional right to surmount an otherwise absolute common-law or statutory evidentiary privilege. In criminal cases, the Supreme Court and the lower courts have long recognized that an accused has a Sixth Amendment constitutional right to present critical, demon-

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* Edward J. Imwinkelried is a professor of law at the University of California, Davis. This article is based in part on Imwinkelried, *The Blockbuster* Adams *Decision,* TRIAL, Oct. 1998, and Imwinkelried, *The Case for Recognizing a New Constitutional Entitlement: The Right to Present Favorable Evidence in Civil Cases*, 1990 UTAH L. REV. Reprinted with the kind permission of TRIAL magazine and UTAH LAW REVIEW.

1 CAL. EVID. CODE § 985 (2001).

2 United States v. Zolin, 491 U.S. 554 (1989).

3 Admiral Ins. Co. v. United States Dist. Court. for the Dist. of Ariz., 881 F.2d 1486 (9th Cir. 1989); United States v. Grice, 37 F. Supp.2d 428, 431 n. 13 (D.S.C. 1998).

strably reliable evidence. The courts have frequently invoked that right to override statutory and common-law barriers to the discovery and introduction of relevant exculpatory evidence.[4] Even barriers in the form of privileges have fallen before the onslaught of the accused's constitutional right.[5]

In contrast, until very recently, the picture was an accurate reflection of the state of the law in civil cases such as family law disputes. The traditional view has confined the constitutional right to introduce evidence to criminal cases. The criminal cases have derived the right from the Sixth Amendment confrontation and compulsory process guarantees, and by their terms those guarantees are expressly limited to prosecutions. However, within the past handful of years there have been dramatic developments, extending the constitutional right to civil litigants. In March 1998, the Kansas Supreme Court extended the right in *Adams v. St. Francis Regional Medical Center.*[6] That case involved invalidating a statutory privilege; the court addressed the question of whether the application of the statutory privilege to suppress critical evidence was unconstitutional. In its reasoning, the court recognized a civil litigant's constitutional right to introduce crucial, demonstrably reliable evidence. In early 2000, the Mississippi Supreme Court reached a similar conclusion in *Baptist Memorial Hospital, Union County v. Johnson.*[7]

The purpose of this brief article is to familiarize family law practitioners with this new development. The first part of this article describes Dean Wigmore's still dominant view that evidentiary privileges should be absolute in character. The second part traces the cases initially recognizing a criminal accused's constitutional right to introduce evidence and later applying the right to override evidentiary privileges. The third part explains the policy argument for according civil litigants a parallel constitutional right. The fourth section of the article reviews the two recent decisions, *Adams* and *Johnson*, applying the right to defeat privileges claims in civil actions. The fifth and final section

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[4] *See generally* NORMAN M. GARLAND & EDWARD J. IMWINKELRIED, EXCULPATORY EVIDENCE: THE ACCUSED'S CONSTITUTIONAL RIGHT TO INTRODUCE FAVORABLE EVIDENCE (2d ed. 1996 & Supp. 2002).

[5] *Id* at Ch. 10.

[6] 264 Kan. 144, 955 P.2d 1169 (1998).

[7] 754 So.2d 1165 (Miss. 2000).

speculates about the impact of this development in family law disputes.

## I. The Traditional, Wigmore View That Privileges Should Be Classified as Absolute in Character

The received orthodoxy is that evidentiary privileges for interpersonal relations ought to be absolute in nature. That view reflects the continuing influence of Dean Wigmore. Wigmore thought that to withstand scrutiny, the rationale for privileges had to have an empirical basis. Wigmore was a common-sense empiricist.[8] He dismissed humanistic arguments for privileges as mere "sentiment"[9] and "feeling."[10] To put privilege doctrine on a sounder, empirical footing, Dean Wigmore proposed the following criteria for deciding whether to create a privilege:

> Looking 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 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 communications must be greater than the benefit thereby gained for the correct disposal of litigation. 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 . . . .[11]

Although Wigmore announced this set of criteria decades ago, the courts,[12] including the United States Supreme Court,[13] still rely on these criteria.

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[8] William Twining, Theories of Evidence: Bentham and Wigmore 52, 117, 125 (1985).

[9] 8 J. Wigmore, Evidence § 2228, at 217 (McNaughton rev., 1961).

[10] *Id.*

[11] *Id* at { 2285, at 527-28.

[12] Allred v. State, 554 P.2d 411 (Alaska 1976); Beth Israel Hospital v. Dist. Court, 683 P.2d 343, 345 (Colo. 1984); Berst v. Chipman, 232 Kan. 180, 653

The criteria were designed to maximize the benefit and minimize the cost of recognizing evidentiary privileges. The third criterion promoted the benefit by limiting privileges to the protection of important social relations "which in the opinion of the community ought to be sedulously fostered."[14] For its part, the second criterion was calculated to minimize the cost of recognizing a privilege. If it rigorously applied the second criterion, a court would apply a privilege only to relationships in which an assurance of confidentiality was truly "essential to the full and satisfactory maintenance of the relation . . . ."[15] The underlying behavioral assumption is that, but for the assurance of confidentiality furnished by the privilege, the client would either forego consulting the attorney or refrain from making vital revelations to the attorney. In this conception, the creation of the privilege must be a necessary incentive to consultation and divulgence.[16] So limited, the privilege comes virtually cost free. As Justice Stevens stated in his 1996 opinion in *Jaffee v. Redmond*[17],

> Without a privilege, much of the desirable evidence to which litigants . . . seek access–for example, admissions . . . 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[18].

Again, in 1998 in *Swidler & Berlin v. United States*[19], the Chief Justice echoed Wigmore when he asserted that the loss of evidence entailed in recognizing a privilege "is more apparent than real,"[20] since "without the privilege the client may not have made [the] communication[ ] in the first place."[21]

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P.2d 107 (1982); Senear v. Daily Journal-American, 97 Wash.2d 148, 641 P.2d 1180 (1982); Steven R. Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV.1, 46 (1980).

13 Swidler & Berlin v. United States, 524 U.S. 399 (1998); Jaffee v. Redmond, 518 U.S. 1 (1996).

14 8 J. WIGMORE, EVIDENCE § 2285, at 527-28 (McNaughton rev., 1961).

15 *Id.*

16 KENNETH W. GRAHAM JR. & CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5680, at 141 (1992).

17 Jaffee v. Redmond, 518 U.S. 1 (1996).

18 *Id* at 11-12.

19 *Id.*

20 Swidler & Berlin v. United States, 524 U.S. 399 (1998).

21 *Id*.

Wigmore reasoned that to achieve these desired results, evidentiary privileges had to have certain traits, most notably an absolute character. At a systemic level, in deciding in the first instance whether to recognize a privilege, the court could balance the policy considerations embodied in the four criteria.[22] However, once that threshold decision has been made, the privilege had to be categorized as absolute; the trial judge could not override the privilege in an ad hoc fashion by a finding that a compelling, case-specific need for the privileged information trumped the policies inspiring the privilege.[23] The privilege can provide the necessary assurance of confidentiality only if, at the very time of the communication, the spouse, client, or patient can reasonably predict whether a privilege will attach. The communicating party cannot make that forecast if the privilege can be defeated by a later showing of a compelling need for the privileged information. By the same token, any exceptions to the scope of the privilege must be both stated in advance and phrased in clear, bright line terms.[24] In 1981 in its decision in *Upjohn Co. v. United States*, the Supreme Court observed that the participants in confidential conversations "must be able to predict with some degree of certainty whether particular conversations will be protected. An uncertain privilege . . . is little better than no privilege at all."[25] The Court reiterated that view in both *Jaffee*[26] involving the psychotherapist-patient privilege and *Swidler & Berlin*[27] dealing with the attorney-client privilege. Predictably, in both cases, the Court refused to classify the privilege as qualified or conditional. In each case, the lower court had proposed categorizing the privilege as qualified, capable of being defeated by a countervailing need for the information. In both cases, though,

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22 Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 998 (1999).

23 Admiral Ins. Co. v. United States Dist. Court for the Dist. of Ariz., 881 F.2d 1486 (9th Cir. 1989); United States v. Grice, 37 F. Supp.2d 428, 431 n. 13 (D.S.C. 1998).

24 Steven R. Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 48 (1989).

25 Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

26 Jaffee v. Redmond, 518 U.S. 1 (1996).

27 Swidler & Berlin v. United States, 524 U.S. 399 (1998).

true to the Wigmorean tradition, the Court forcefully insisted on classifying the privilege as absolute in character.

## II. The Invocation of an Accused's Constitutional Rights to Override Otherwise Absolute Common-law and Statutory Privileges

The Supreme Court is not alone in its continued adherence to the Wigmorean tradition. In almost all jurisdictions, the vast majority of common-law and statutory privileges for interpersonal relationships are categorized as absolute. However, in the American legal hierarchy, constitutional rights prevail in a conflict with common-law or statutory norms. As we shall now see, in criminal cases it is well settled that the accused has a constitutional right to introduce vital, demonstrably trustworthy evidence. On many occasions, the courts have ruled that that a seemingly absolute common-law or statutory privilege must yield to the right.

### A. *The Existence of the Accused's Constitutional Right to Introduce Critical, Demonstrably Reliable Evidence*

The Supreme Court first announced the constitutional right to present evidence in 1967 in *Washington v. Texas*.[28] On trial for murder, Jackie Washington attempted to call Charles Fuller as a defense witness to give certain exculpatory testimony. The defense made an offer of proof that Fuller would testify that Washington had attempted to prevent Fuller from shooting. Fuller had already been convicted of the same murder. The trial judge barred Fuller's testimony on the basis of two Texas statutes that prohibited a person from testifying as a defense witness if the person had been "charged or convicted as [a co-participant] in the same crime."[29]

Chief Justice Earl Warren wrote the majority opinion reversing Washington's conviction. Warren held initially that the Fourteenth Amendment Due Process Clause incorporates the Sixth Amendment's compulsory process guarantee. He then concluded that the Texas statutes in question violated the compulsory pro-

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28 388 U.S. 14 (1967).
29 *Id* at 16.

cess guarantee, since they rested on an arbitrary, *a priori* assumption that any co-participant in the charged crime would be willing to lie for the accused. Warren rejected that assumption and proclaimed that a criminal accused has an implied "right to put on the stand a witness who [would be] physically and mentally capable of testifying to events that he ha[s] personally observed, and whose testimony [is] relevant and material to the defense."[30] In the Chief Justice's mind, the existence of that implied right was a necessary implication from the express Compulsory Process Clause; it would be absurd to think that the Founding Fathers intended to give an accused a hollow, meaningless right to subpoena a witness whom the accused could not put on the stand. The Chief Justice refused to believe that the drafters contemplated that the accused was entitled to perform only the "futile" act of subpoenaing a potential witness who could be completely barred from testifying.

*Washington* established that the accused sometimes has a constitutional right to surmount broad incompetency rules that altogether bar testimony by defense witnesses. The case conferred constitutional status on the accused's right to present evidence. However, the question remained: Did the right spend its force by putting the witness on the stand? Or did the right also entitle the accused to attack regulations of the content of the witness's testimony such as the hearsay and privilege doctrines?

The Court confronted that question in 1973. In that year, the Court reaffirmed–and extended—the *Washington* doctrine in *Chambers v. Mississippi.*[31] Like Washington, Leon Chambers was charged with murder. The prosecution alleged Chambers shot a police officer named Liberty. The defense asserted the real killer was Gable McDonald, who had told three acquaintances that he shot Liberty.

At trial, the defense attempted to elicit the acquaintances' testimony about McDonald's statements. The prosecutor objected on hearsay grounds. In response, the defense counsel argued that McDonald's statements qualified as declarations against interest. The prosecutor countered that Mississippi followed the hoary, common-law view, limiting declarations against

[30] *Id* at 23.
[31] 410 U.S. 284 (1973).

interest to statements disserving pecuniary and proprietary interest—not penal interest. The trial judge concurred with the prosecutor and sustained the hearsay objection.

Writing for the majority, Justice Lewis Powell found that the trial judge's ruling violated the Compulsory Process guarantee as construed in *Washington.* He pointed out that the surrounding circumstances furnished "considerable assurance" that McDonald's hearsay statements to his acquaintances were trustworthy. There was some evidence corroborating McDonald's statements, the statements were "unquestionably" contrary to McDonald's self-interest, and "[t]he sheer number of independent confessions" strengthened the inherent reliability for each individual confession. In Justice Powell's words, the trial judge had applied the hearsay rule "mechanistically to defeat the ends of justice."[32] He concluded the judge had violated Chambers' constitutional right "to present witnesses in his own defense" and emphasized that "[f]ew rights are more fundamental."[33]

The following year the Supreme Court rendered its decision in *Davis v. Alaska*,[34] completing the trilogy of key cases upholding the criminal accused's right to present evidence. While Chief Justice Warren authored the seminal opinion in *Washington*, Chief Justice Burger authored *Davis.*

Davis was charged with the burglary of a bar in Anchorage. The burglars removed the safe from the bar. The star prosecution witness was Richard Green. Green was prepared to testify that he had seen the defendant near the place where the police found the safe. Green had previously been adjudicated a juvenile delinquent for committing a burglary, and he was still on juvenile court probation at the time of the defendant's trial. The prosecution suspected that at trial, the defense would attempt to use the juvenile adjudication to impeach Green's credibility. However, an Alaska statute and a similar court rule cloaked juvenile court proceedings with confidentiality. Based on the statute and court rule, the prosecution moved for a protective order. The defense resisted the motion. The defense disclaimed any intent to generally impeach Green's credibility as a truthful person. Rather, the defense argued that the facts gave rise to a powerful,

32 *Id* at 302.
33 *Id*.
34 415 U.S. 308 (1974).

two-fold inference of bias. To begin with, since Green had earlier committed a burglary and admitted being in the vicinity where the safe was found, he needed to point a finger of guilt at someone else "to shift suspicion away from himself . . . ."[35] Moreover, since Green was still on probation, he had a motive to curry the favor of the authorities. He might "fear . . . possible probation revocation."[36] Nevertheless, the trial judge granted the prosecution's motion.

On these facts, Chief Justice Burger found a Sixth Amendment violation of the Confrontation Clause. The Chief Justice conceded that the policies underlying the state statute and court rule were important as well as legitimate. Yet, he concluded that "in these circumstances" the evidence was so highly probative on Green's credibility that the trial judge's ruling amounted to constitutional error. In the Chief Justice's words, "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."[37]

For the most part, the Supreme Court has vigorously protected a criminal accused's constitutional right to present evidence.[38] On two occasions, the Court has upheld the right even though doing so required overriding an evidentiary rule that was then a majority view in the United States.[39] It is understandable that the Court has protected this right so solicitously; the exclu-

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[35] *Id* at 311.

[36] *Id.*

[37] *Id* at 320

[38] One of the deviations from the norm was the Court's recent decision in United States v. Scheffer, 523 U.S. 303 (1998). There, the Court upheld Military Rule of Evidence 707, a blanket ban on polygraph testimony. However, the Court did not overrule the prior cases but affirmed those decisions and applied them. Justice Clarence Thomas's lead opinion noted that "scientific field studies suggest the accuracy rate of the 'control question technique' polygraph is 'little better than could be obtained by the toss of a coin, that is, 50 percent." *Id* at 310. Further, in distinguishing *Washington* and *Chambers,* the justice stressed that those cases involved essentially "factual" testimony while *Scheffer* concerned opinion evidence. *Id* at 315-17 & n. 13.

[39] When the Court decided *Chambers v. Mississippi*, 410 U.S. 284 (1973), the prevailing view was that declarations against penal interest were inadmissible under the hearsay rule. Later, when the Court handed down its decision in *Rock v. Arkansas,* 483 U.S. 44 (1987), it was evidently the majority view in *Frye* jurisdictions that hypnotic enhancement of memory was not generally accepted.

sion of critical, reliable exculpatory evidence creates a genuine risk of the wrongful conviction of the innocent.

### B. *Conflicts Between the Accused's Right and Absolute Evidentiary Privileges*

The accused's constitutional right has sometimes collided with a common-law or statutory privilege. In most cases, the courts have upheld the privilege claim.[40] However, in a significant number of cases, the lower state and federal courts have overridden absolute evidentiary privileges, including the attorney-client privilege, marriage counselor privilege, medical privilege, psychotherapist privilege, rape counselor privilege, and spousal privilege.[41]

In light of *Davis v. Alaska,* the result was expected. In *Washington* and *Chambers*, the Court invalidated the application of evidentiary rules designed to bar the introduction of unreliable testimony. In *Davis*, though, Chief Justice Burger noted that the Alaska statute and court rule were inspired by the legitimate extrinsic social policy of promoting the rehabilitation of juvenile offenders by maintaining the secrecy of juvenile court proceedings.[42] Like the statute and court rule at issue in *Davis*, privileges rest on "extrinsic [social] policy."[43] Thus, the conflict between a privilege and the need for evidence presents the same type of policy choice as the Court faced in *Davis.* The *Davis* Court's resolution of that question in the accused's favor made it a virtually foregone conclusion that ultimately, at least in extreme cases in which the accused had an acute need for the privileged information, the courts would hold that a common-law or statutory privilege must yield to the right.

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40 Steven G. Churchwell, *The Constitutional Right to Present Evidence: Progeny of Chambers v. Mississippi*, 19 Crim. L. Bull. 131, 140 (1983); Jon J. Kramer, Note, *Dead Men's Lawyers Tell No Tales: The Attorney-Client Privilege Survives Death–Swidler & Berlin v. United States*, 118 S.Ct. 2081 (1998), 89 J. Crim. L. & Criminology 941, 969-71 (1999).

41 Garland & Imwinkelried, *supra* note 4, at ch. 10 (collecting cases).

42 Davis v. Alaska, 415 U.S. 308, 320-21 (1974).

43 8 J. Wigmore, Evidence § 2285, at 527-28 (McNaughton rev., 1961).

## III. The Recognition of a Civil Litigant's Parallel Constitutional Right to Introduce Critical, Demonstrably Reliable Evidence

In the past, in civil cases the courts routinely enforced the same evidentiary rules that they sometimes overrode in criminal cases on the basis of the accused's constitutional right to present evidence. It was rarely even suggested that the courts should accord civil litigants a constitutional right analogous to the constitutional right recognized in *Washington*, *Chambers*, and *Davis.*

However, in principle, there is a strong case for granting civil litigants an analogous constitutional right to present evidence. The most likely basis for the case is the Due Process guarantee in the Fifth and Fourteenth Amendments. The guarantee ensures the government may not deprive citizens of property interests without affording them due process. Civil judicial proceedings are indisputably government actions, and civil judgments can result in deprivation of property rights. For purposes of due process analysis, the concept of property includes all the traditional forms of real and personal property[44] and causes of action.[45] The only remaining question is whether the right to present evidence is one of the procedures constitutionally "due" citizens in civil actions.

The current Supreme Court justices differ over the proper approach to determining the constitutionally mandated procedures in civil cases.[46] The majority conceive the procedural Due Process guarantee in a utilitarian or instrumental fashion – as a means to an end, namely, enhancing the accuracy of fact finding in civil proceedings. As former Chief Justice Warren Burger once wrote, the mission of the procedural Due Process guarantee "is to minimize the risk of erroneous decisions."[47] Through legislatures and courts, society makes policy choices embodied in substantive rules of law. Affording participants in civil cases

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[44] *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.9(b), at 571-76 (5th ed. 1995).

[45] Opdyke Inv. Co. v. City of Detroit, 883 F.2d 1265, 1274 (6th Cir. 1989).

[46] *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§10-12,10-13 (2d ed. 1988).

[47] Greenholtz v. Inmates of Neb. Penal & Correction Complex, 442 U.S. 1, 13 (1979).

procedural due process helps ensure that those choices are enforced accurately.

In contrast, a minority of the justices advocate a conception of procedural due process, in which the active participation of citizens in civil proceedings has intrinsic value.[48] In a democratic society, citizens should participate actively in civil proceedings that impact their interests. Citizen participation affirms an individual's dignity as a human being and enables individuals to assert their rights and exercise some control over government proceedings. An individual is more likely to view the ultimate decision as fair if the individual is permitted active involvement in the decision-making process. Furthermore, knowing that the individual exercised control over presentation of the evidence should make society as a whole more inclined to accept the decision as legitimate.

Viewed from the perspective of either approach, the right to present evidence ought to be deemed an essential element of procedural Due Process in civil actions. Under the utilitarian approach, the essential question is whether the proposed procedure will advance the accuracy of fact-finding. Recognizing the right to present evidence certainly would do so, since this is the most basic means available to a party to prevent the trier of fact from committing factual errors. If a party fears an erroneous finding, the party presents evidence contradicting that finding. Further, one party's right to present evidence creates a disincentive for the other party to offer misleading evidence. The latter party realizes that even if the judge admits the misleading evidence, the former party can introduce contradictory evidence that will not only specifically rebut the misleading evidence but will generally lower the later party's credibility.

The right to present evidence should also be considered essential under the intrinsic approach. It is an axiom of procedural due process that as a person possessed of human dignity, a citizen has a right to be heard before a governmental tribunal deprives that person of a property right.[49] That right is meaningless unless the citizen has a right to speak actively. First and foremost, adju-

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[48] *See* Tribe, *supra* note 46, §§10-7,10-12.

[49] Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969); *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Tribe, *supra* note 46, §§10-7, 10-8,10-12,10-15,10-19.

dicatory proceedings conducted by judicial tribunals are evidentiary hearings. If the citizen is to have a meaningful right to speak actively to the tribunal and participate in its hearing, that right must subsume the opportunity to present evidence.[50]

## IV. The Recent Civil Cases Invoking the Constitutional Right to Surmount Absolute Privileges

Although the theoretical case for recognizing the constitutional right in civil suits is strong, until recently there was no precedent endorsing the theory. However, the legal landscape has dramatically in the past four years.[51] Those years witnessed the noteworthy decisions in the *Adams* and *Johnson* cases.

### A. *The Adams Case*

In *Adams v. St. Francis Regional Medical Center*[52], a 1998 decision, the plaintiffs alleged that the negligence of the hospital's employees caused their daughter's death. In particular, they contended that a nurse had negligently failed to recognize the seriousness of their daughter's condition and failed to alert a physician to her need for immediate attention.

The incident had been investigated by the Kansas State Board of Nursing. The hospital prepared documents and submitted them to the board, the board generated additional documents, and still other documents reflected investigations of earlier, similar alleged acts of incompetence by the nurse. During discovery, like the prosecutor in *Davis*, the defendant hospital sought protective orders to preclude the plaintiffs from inspecting these documents.

The lower court granted the protective orders because it concluded that the documents were protected by the Kansas stat-

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50 Stephan Landsman, Readings on Adversarial Justice: The American Approach to Adjudication 3 (1988), *see also* Padberg v. McGrath-McKechnie, 203 F. Supp.2d 261, 280 (E.D.N.Y. 2002); Brown v. City of Los Angeles, 102 Cal. App.4th 155, 125 Cal. Rptr.2d 474, 488 (2002).

51 Norman C. Garland & Edward J. Imwinkelried, Exculpatory Evidence: The Accused's Constitutional Right to Introduce Favorable Evidence Ch. 2A (2002 Cum. Supp.).

52 Adams, 264 Kan. 144, 955 P.2d 1169,1183.

utory medical peer review privilege. The plaintiffs filed a motion challenging the constitutionality of the statute as applied, but the lower court denied that motion.

The plaintiffs appealed to the Kansas Supreme Court. The court agreed with the trial judge that at least some of the documents were cloaked by the statutory privilege. The court concluded that five documents sought by plaintiffs "are protected by a literal reading of the peer review privilege set out in K.S.A. 1997 Supp. 654915(b) and (d)."[53]

That conclusion, though, did not end the court's analysis. The next question was whether, as applied, the statutory privilege was unconstitutional. In the court's view, there was a constitutional violation. To justify its finding, the court cited both precedent and policy.

One precedent, the United States Supreme Court's 1972 decision in *Branzburg v. Hayes,*[54] was treated as authority that a "civil litigant [has a] procedural due process right to evidence."[55] The court read another Supreme Court decision, *United States v. Nixon,*[56] broadly as recognizing that even the constitutionally based presidential privilege must "yield to the specific need for evidence in a pending case."[57]

In addition, the court marshaled state precedent. The court noted that in a 1982 child custody dispute, *M. v. K.*,[58] the New Jersey court overrode a marriage counselor privilege. The child's mother had attempted to invoke the privilege, but the New Jersey court declared that in a child custody dispute, a litigant has a constitutional right to "material evidence relevant to a determination of what custodial arrangement is in her best interests."[59] The New Jersey court concluded that that right was paramount to the privilege.

The Kansas court also pointed to a 1981 Montana opinion that impliedly held a provision of the Montana Medical Malpractice Panel Act unconstitutional because it conflicted with a liti-

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53 *Id* at 1183.
54 408 U.S. 665 (1972).
55 Adams, 955 P.2d at 1184.
56 418 U.S. 683 (1974).
57 Adams, 955 P.2d at 1187.
58 186 N.J. Super. 363, 452 A.2d 704 (Ch. Div. 1982).
59 452 A.2d at 709.

gant's right to fully cross-examine and impeach opposing witnesses.[60] The court also relied on a 1987 Wyoming decision which went to the brink of explicitly announcing the existence of a constitutional right in civil cases.[61] Given the medical malpractice plaintiff's acute need for "access to information concerning a doctor's performance," the Wyoming court refused to "construe the privilege statute as . . . prohibiting the discovery of this category of negligence actions."[62]

After marshaling these precedents, the Kansas court advanced a forceful policy argument for invalidating the statutory privilege. The court asserted that at least when "[t]he information sought" goes "to the 'heart' of the issue in the case," "the substantive interest in preserving the confidentiality of the information 'must give way to assure all the facts will be available for a fair determination of the issues.'"[63] The court proclaimed that as a corollary of "due process," plaintiffs have a "fundamental right . . . to have access to all the relevant facts."[64] The court then directed the trial judge "to conduct an in camera inspection and craft a protective order which will permit the plaintiffs access to the relevant facts."[65]

The *Adams* decision is of tremendous importance. It is a major breakthrough, extending the constitutional right to introduce crucial, demonstrably reliable evidence to civil actions. Although on its facts *Adams* involved a statutory privilege, the court's reasoning sweeps far more broadly. The right can certainly be invoked to surmount common-law privileges as well.

### B. *The Johnson Decision*

The *Johnson* case is of even more recent vintage than *Adams.* The Mississippi Supreme Court handed down its decision in *Baptist Memorial Hospital-Union County v. Johnson*[66] in January 2000. In that case, the plaintiff mother gave birth to her child at

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60 Linder v. Smith, 193 Mont. 20, 629 P.2d 1187 (1981).

61 Greenwood v. Wierdsma, 741 P.2d 1079 (Wyo. 1987).

62 *Id* at 1088.

63 Adams, 955 P.2d at 1186 (*citing* Berst v. Chipman, 653 P.2d 107, 117 (Kan. 1982)).

64 955 P.2d at 1187.

65 *Id* at 1188.

66 754 So.2d 1165 (Miss. 2000).

the defendant hospital. A nurse in the hospital's employ negligently delivered the child to another woman to be nursed. The latter woman breast-fed the child. When the plaintiff and her husband later discovered the mix-up, they sued the hospital for negligence. In order to determine whether the breast-feeding might endanger their child's health, the plaintiffs sought to discover the other woman's identity and medical records. The hospital objected, asserting the state statutory physician-patient privilege on behalf of the unidentified patient.

On the preliminary matters, the court ruled in the defendant hospital's favor. For instance, the court held that the hospital could assert the privilege on the patient's behalf.[67] Moreover, on the merits of the privilege claim, the court concluded that the privilege applied to both the patient's identity and the information contained in the medical records. The court pointed to prior Mississippi precedents holding "a patient's identity to be unmistakably of a highly personal nature."[68]

However, in its next breath, the court declared that in a line of earlier decisions, it had held that in criminal cases, the "public policy" implicated in "investigating] and solving . . . crimes" sometimes outweighs the privacy rights underpinning evidentiary privileges.[69] When information is "crucial" in a prosecution, it cannot be suppressed even "under the guise of the physician-patient privilege."[70]

At this juncture in the argument, the defendant hospital urged the court to limit the line of authority to criminal cases. The court refused to do so. The court explained that just as there is a "compelling" public interest in accurately determining the guilt or innocence of the accused, the public interests at stake in a civil case can be weighty enough to override a privilege.[71] The court remarked that "[t]his especially holds true when the health and life of another are potentially at stake."[72] The court added that in some cases, the trial judge might need to conduct an in camera examination of the privileged information to make an in-

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67 *Id* at 1169.
68 *Id* at 1168.
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*

telligent determination whether the privileged information is so highly relevant to a linchpin issue in a civil case that the need for the information surmounts the privilege.[73] However, the court made it crystal clear that given the right facts, a purportedly absolute statutory privilege may have to yield in either a criminal or a civil case.[74]

## V. The Application of this New Constitutional Right in Civil Family Law Disputes

Could this newly announced right of civil litigants come into play in a family law dispute? In principle, the theory seems as applicable to a family law dispute as to the disputes involved in *Adams* and *Johnson.* Given the policy arguments advanced by *Adams* and *Johnson*, it would be illiberal to read the decisions in that narrow fashion. For that matter, the *Adams* court indicated that it thought that the new constitutional right reached that far. As previously stated, one of the authorities *Adams* relied on was *M. v. K.,*[75] a child custody dispute. There the New Jersey court ruled that a statutory marriage counselor privilege had to yield when the privileged communications were "material . . . to a determination of what custodial arrangement is in the child's best interests."[76] Interestingly enough, the courts in several other countries, including England,[77]Australia[78] and Canada,[79] have treated otherwise absolute privileges as qualified in child custody matters.

Assuming that the right can come into play in a family law dispute, what impact will the recognition of the right have? The

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73 *Id* at 1170.

74 *Id* at 1168.

75 186 N.J. Super. 363, 452 A.2d 704 (N.J. Super. Ct., Ch.Div. 1982).

76 452 A.2d at 709.

77 LAW SOCIETY GAZETTE, 16 Mar. 1994, vol. 91, no. 11, p. 19.

78 R. v. Bell, Ex parte Lees, 146 C.L.R. 141, 156 (1980)(Austrl.)(the mother allegedly hid her child); Peter Short, *Legal Professional Privilege*, 19 QUEENS LAW SOC. J. 125 (1989).

79 *"In the Courts:" Re S.A.S.* , (1977) 1 LEGAL MED. QUARTER.139 (Ont.H.C.)(the psychotherapist privilege sometimes yields in child custody disputes); Daniel W. Shuman, Myron V. Weiner & Gilbert Pinard, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 INT'L J. L. & PSYCHIATRY 393, 398, 401 (1986).

likelihood is that in the overwhelming majority of cases, as in criminal cases, the court will ultimately uphold the privilege claim. In the criminal cases applying the constitutional right, two of the primary factors which the courts consider are the importance of the issue the privileged information relates to[80] and the quantum of probative value on that issue.[81] The *Johnson* court indicated that trial judges should weigh the same two factors in applying the right in a civil setting.[82] Thus, given the stronger public interest in child custody disputes, a court might override a privilege in such a dispute but uphold the same privilege in a property controversy between two spouses terminating their marital relation. Alternatively, even in a child custody dispute, after examining the privileged information in camera,[83] the trial judge might conclude that the information has negligible probative value in the case. Having reached that conclusion, again the judge might decide to uphold the privilege claim.

If anything, a privilege claim is more likely to succeed in a civil case than in a criminal action. To win an acquittal, a criminal accused need only raise a reasonable doubt about his or her guilt. In a survey of several of his colleagues by federal District Court judge Jack Weinstein, the judge discovered that his colleagues typically interpreted proof beyond a reasonable doubt to mean a probability of guilt exceeding 85%.[84] Thus, an item of defense evidence could change the outcome of a criminal trial if it merely generated a 15% probability of innocence. In contrast, the judges interpreted the preponderance of the evidence standard to mean a probability of liability barely exceeding 50%.[85] Hence, a civil defendant might still be held liable even if an item of evidence of evidence created a 40 or 45% probability of non-liability. The same item of evidence that would trigger a criminal acquittal might fall far short of prompting a defense verdict in a

80 Norman M. Garland & Edward J. Imwinkelried, Exculpatory Evidence: The Accused's Constitutional Right to Introduce Favorable Evidence § 2-4a, at 54-55 (2d ed. 1996).

81 *Id* at § 2-4a, at 52-54.

82 Baptist Memorial Hospital-Union County v. Johnson, 754 So.2d 1165 (Miss 2000).

83 *Id* at 1170.

84 United States v. Fatico, 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

85 *Id.*

civil action. Hence, in this regard, it is easier for a criminal accused to demonstrate that an item of privileged information is vital in the sense that it is potentially outcome determinative. In short, while the recognition of this constitutional right is an important development, it will hardly revolutionize the law of evidence in civil actions.

## VI. Conclusion

The timing of the *Adams* and *Johnson* decisions is propitious. In the past, the civil courts have uncritically sustained claims of absolute privilege in order to secure privacy interests. However, both privacy and privilege are undergoing a critical reexamination. In his new book, *The Limits of Privacy*, Amitai Etzioni cautions that privacy should "not be regarded as something sacred and thus [absolutely] inviolable."[86] In some cases, an invasion of privacy is the lesser of two social evils.[87] Furthermore, there is a growing realization that the available empirical studies do not support the facile generalization that but for the existence of privileges, laypersons would not interact with their spouses, attorneys, and therapists.[88] If it were true that laypersons would refrain from consulting and divulging absent evidentiary privileges, the recognition of even absolute privileges would come relatively cost free, as the Supreme Court supposed in *Jaffee* and *Swidler & Berlin*; the evidence would not come into existence but for the assurance of confidentiality furnished by the privilege. However, the studies conducted to date call that behavioral assumption into question. Dean Wigmore and the courts may have dramatically overestimated the impact privilege doctrine has on behavior in the real world. If so, they may also have badly understated the cost of recognizing evidentiary privileges. It is therefore time to rethink the traditional regime of absolute evi-

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86 Jonathan Kirsch, *Privacy as Privilege*, CAL. LAWYER, Apr. 1999, at 67.

87 *Id. See also* Amitai Etzioni, *Rational Privacy Doctrine*, NAT'L L. J., May 17, 1999, at A21.

88 Richard C. Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 KY L.J. 1165, 1173-74 (1998-99)(discussing the attorney-client studies); Edward J. Imwinkelried, *The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court's Instrumental Reasoning in* Jaffee v. Redmond, 518 U.S. 1 (1996), 49 HASTINGS L.J. 969 (1998)(discussing the psychotherapist-patient studies).

dentiary privileges. The landmark Constitutional Law decisions in *Adams* and *Johnson* will force civil practitioners, including family law specialists, to confront the issue.