Reflections on the Law of Privileged Communications--The Psychotherapist-Patient Privilege in Perspective

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LEGAL RECOGNITION of privileged communications constitutes an exception to the doctrine that individuals must give testimony on all matters at issue in a court of justice. While the various evidentiary privileges thus stand as apparent impediments to the fact-finding process, they represent the only effective means by which the legal system is able to protect and foster certain relationships of paramount importance to all of society. As one of the prominent relationships singled out by several state legislatures for evidentiary privileges, the psychotherapist-patient relationship has ever increasing importance in the modern world; the rapidly growing number of patients mirrors the multiplying tensions of today's society.

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1. 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. ed. 1961).


European legal thought seems to regard at least certain privileges as consistent with the goal of accurate fact finding because they held avoid perjury. See notes 143-50 infra and accompanying text.

Just as the practice of psychotherapy has expanded most rapidly in recent years, the legal parameters of the privilege accorded to this relationship are subject to continuing development. The California supreme court's recent decision in In re Lifschutz refined and clarified the law concerning this state's psychotherapist-patient privilege. This case presents a prime opportunity for reflection on the ultimate value of the doctrine of privileged communications because the court fully evaluated the possible constitutional basis for the privilege and presented its own analysis of the purposes and limits of the rule. By putting this decision into the full context of privilege law, a meaningful evaluation of the privilege for communications between psychotherapists and patients can be made. The starting point for this inquiry should be the physician-patient privilege, which is perhaps something of a grand or foster parent, in that it preceded and suggests norms for interpretation of the newer psychotherapist-patient privilege.

I

HISTORY AND SCOPE OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

At early common law there appears to have been a broad principle of confidentiality not limited to specific professional and spousal communications. It apparently was based on deference to the concept of "honor among gentlemen." Although this personal privilege did not prevail in the evolution of Anglo-American law, the courts continued to recognize a privilege of confidentiality for communications arising out of lawyer-client and husband-wife relationships. But as common law developed, no evidentiary privilege attached to communications between a patient and his doctor. Lord Mansfield was able to rule unqualifiedly that a physician is bound to give any confidential information he possesses to a court upon request, even though revelation of the confidence might be a breach of honor if made in the absence of court compulsion.

A. The Growth of Protection Through the Physician-Patient Privilege

In 1828, the New York Legislature enacted a statute creating a physician-patient privilege for information obtained in a professional context. The statute was intended to protect the confidentiality of communications between a patient and his doctor.
capacity and which was necessary to permit treatment. The rationale given for creation of the new privilege was that the possibility of forced disclosure of the patient's communications deters communication of information needed for proper treatment. If this result follows, the community in general is denied the full benefit of the physician-patient relationship, and public health problems might arise.

Subsequent to passage of the groundbreaking New York statute, at least 32 states and the District of Columbia have enacted physician-patient privilege statutes. These statutes make no specific reference to psychotherapists. However, communications to psychiatrists are presumably protected by these general physician-patient laws because psychiatrists are simply physicians who specialize in the treatment of mental and emotional disorders. Psychologists, as non-physicians, would not be included under this reading of physician-patient privilege statutes.

In the absence of a medical privilege statute, the courts will not recognize a privilege protecting a patient's confidential communications to his physician. In the jurisdictions without a medical privilege law, the patient is protected only by the weakly worded ethical canons


No person duly authorised to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.

10. The Commissioners on Revision of the Statutes of New York said that “unless such consultations are privileged men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art . . . .” III N.Y. Rev. Stats. 737 (2d ed. 1836). See also Metropolitan Life Ins. Co. v. Ryan, 237 Mo. App. 464, 470, 172 S.W.2d 269, 272 (1943).


13. See note 31 infra.
of the medical profession, the Hippocratic Oath, and basic professional integrity. The degree of protection afforded a patient by these non-privilege doctrines is necessarily scanty; the moral and legal sanctions for unauthorized disclosure are weak and ineffective. It is true that such ethical violations may give rise to a cause of action for libel or invasion of privacy, but reported cases of damage suits for breach of confidence are extremely rare. And while a number of states provide that wilful disclosure of a professional confidence is unprofessional conduct warranting suspension or revocation of a physician's medical certificate, there is no record of a single revocation. Thus, a medical privilege statute provides the only firm assurance that confidential communications will not be disclosed.

The patient must meet strict requirements in order to gain the protection of the physician-patient privilege. First, it must be shown that the person consulted is actually a physician. Thus, in the absence of a special provision, psychologists are excluded along with medical students, chiropractors, pharmacists, dentists and veterinarians. Furthermore, the patient's reasonable, good faith belief that his confidant was licensed to practice medicine was insufficient grounds for invoking the privilege where the actual facts proved otherwise.

Second, the patient must have consulted the physician either for

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14. "A physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community." American Medical Association, Principles of Medical Ethics § 9, 1957, reprinted in D. Sharpe & M. Head, Problems in Forensic Medicine 372 (1966).

15. In the oath, still administered to graduating classes of most colleges of medicine, the physician pledges that "whatsoever I shall see or hear in the course of my profession as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets." See Slovenko, Psychiatry and a Second Look at the Medical Privilege, 6 Wayne L. Rev. 175 (1960).


17. Cf. id.


21. See Herbert, supra note 19.

22. See, e.g., Uniform Rule of Evidence § 27, Comment.

23. § 8, Wigmore, supra note 1, § 2382.

24. See generally C. McCormick, supra note 2, § 102.
treatment or for a diagnosis in order to facilitate treatment; statements made to the physician outside of his professional capacity are not protected—even doctors employed by the court, prosecutor, opposing party, or life insurance company will be forced to testify on the theory that an individual does not go to their offices seeking treatment. Even where the patient sought treatment from the physician, his statements are privileged only to the extent that they were necessary to enable the doctor to treat the patient.

Third, the communication must have been received by the physician in confidence. While the statutes creating the physician-patient privilege do not expressly limit its applicability to confidential communications, confidentiality is ordinarily required by the courts. Thus, the presence of third parties is taken as signifying that confidentiality is unimportant and that a privilege is unnecessary since the information has already been spread to an outsider; however, the presence of a third party who is necessary to the relationship, as a nurse or secretary might be, is generally not enough to destroy the privilege.

B. California's Scheme of Protection

In the 1872 revision of the California codes, a provision for the physician-patient privilege was added. This section, which has been widely copied, provided that a licensed physician or surgeon could not, without consent from the patient, give testimony in any civil action about information acquired while attending the patient and which was necessary for proper treatment. This statute granted to psychiatrists, as physicians, a privilege to withhold confidential information in civil cases only. Testimony in criminal actions was thus not protected, and clients of psychologists could not claim the privilege in any case.

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26. See generally C. MCCORMICK, supra note 2, § 103.

27. Id. § 104.

28. See generally id.


30. CAL. EVID. CODE § 998 (West 1966).

31. Since the medical privilege does not protect disclosures to a clinical psychologist, a few states have explicitly articulated a privilege for communications between a certified or registered psychologist and his patients. See, e.g., CAL. EVID. CODE §§ 1010-26 West 1966). However, only six states have any laws specifically granting to the psychiatric relationship any special protection, over and above that given to medical communications generally. Slawson, Patient-Litigant Exception: Hazard to Psycho-
In 1957 the Legislature enacted section 2904 of the Business and Professions Code, which extended operation of an evidentiary privilege to confidential relationships between psychologist and patient "on the same basis" as the attorney-client privilege. This was a broader charter than that which psychiatrists had under the physician-patient privilege, because the attorney-client privilege extends in California to "any communication made by the client to him, or his advice given thereon in the course of professional employment . . . ." It protects, furthermore, communications to anyone reasonably believed to be an attorney, and applies in criminal as well as civil proceedings. Perhaps recognizing that the psychologist-patient relationship was receiving greater evidentiary protection than the psychiatrist-patient relationship, the legislature in 1965 reworded section 2904 to include psychiatrists and their patients. The resulting patchwork of protections designed for the traditional physician-patient and lawyer-client relationships was applied without explanation to psychotherapists and their patients. This illogical dual system was replaced in the 1966 Evidence Code by a carefully articulated system which protects the relationship of a patient with any psychotherapist. The code defines "psychotherapist" to include anyone certified as a psychologist under the Business and Professions Code and anyone who is, or whom the patient reasonably believes to be, a psychiatrist licensed to practice medicine in any state or nation. Thus, while a reasonable, but mistaken, belief that the therapist...
is a psychiatrist authorized to practice medicine will not prevent the privilege from attaching, disclosures made in the mistaken belief, however reasonable, that a psychologist is in fact certified are made at the patient's risk.  

The definition of "patient" includes those seeking personal help and extends to persons submitting to mental and emotional examinations for research purposes. This definition is broader than that used for purposes of the physician-patient privilege and was adopted in order to encourage participation in scientific research by guaranteeing the confidentiality of any disclosures made in this context.

The code carefully describes the nature of the confidential communications which are privileged:

> Information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or examination or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose of the consultation or examination and includes advice given by the psychotherapist in the course of that relationship.

If the patient, or someone else authorized or required to do so, claims the privilege as to information made in the circumstances described above, the psychotherapist will be privileged, and indeed obliged, to withhold the information.

Contrary to the prior law, the psychotherapist-patient privilege applies in criminal as well as civil suits; neither the previous nor the

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39. The justification for this distinction is unclear, as is the status of communications with psychologists licensed in another state. The code does not appear to protect communications with foreign psychologists because it specifically extends coverage to physicians licensed "in any state or nation" but contains no similar language when describing psychologists under the privilege's shield. It is possible, of course, that a privilege statute in the state licensing the psychologist might protect communications made there or made with one party there as, for example, in a long-distance phone conversation.

40. CAL. EVID. CODE § 1011 (West 1966).
41. See id. § 991.
42. Id. § 1014, Comment 1.
43. Id. § 1012.
44. Id. §§ 1014, 1015. The phrase, "so far as the patient is aware," precludes the old eavesdropper exception to the privilege. Also, the opponent of the claim of privilege has the burden of proving the absence of confidentiality since information possibly subject to an evidentiary privilege is "presumed to have been made in confidence." Id. § 917.
45. See text accompanying note 30 supra.
46. See generally CAL. EVID. CODE § 1014 (West 1966).
present physician-patient privilege has such broad application. The
privilege may be claimed by the “holder,”47 who is defined as the pa-
tient, his guardian or conservator, or his authorized representative if he
is deceased.48 If the psychotherapist is present at the time of at-
tended disclosure, he is required to claim the privilege on behalf of the
patient49 unless there is no holder of the privilege in existence or the
psychotherapist has been otherwise instructed by a person authorized
to permit disclosure.50

The code establishes eleven exceptions to the operation of the
privilege. These may be reduced to four basic situations in which it
does not apply: First, where the patient himself raises the issue of his
mental or emotional condition in a lawsuit;51 second, where operation
of the privilege would conceal information which should be revealed
for reasons of overriding social importance;52 third, where the patient
is deceased and the communication is relevant to a property claim or a
suit wherein all parties claim rights through the patient;53 and finally,
where the information sought is such that either the patient or psy-
chotherapist was under a duty to report it to a public employee or
make a public record, if the report or record is open to public inspec-
tion.54

In addition to these exceptions, the right to suppress confidential
communications may be lost by waiver under the section of the code
which applies to all statutory privileges.55 The most common wai-
ver circumstances are prior contractual waiver, failure to assert the priv-
ilege in timely fashion, presence of unnecessary parties when the com-
munication was made, and voluntary disclosure to such a third party.56
There are, however, three situations in which the code provides that a
privilege is not waived where it otherwise would have been. First,
where two or more persons are joint holders of the privilege, waiver

47. Id.
48. Id. § 1013(c).
49. Id. § 1015.
50. Id. § 1014(c).
51. Id. §§ 1016 (condition of patient at issue), 1017 (West Supp. 1971) (court-
    appointed psychotherapist), 1023 (sanity proceedings), 1025 (proceedings to establish
    competence).
52. Id. §§ 1018 (services sought to aid in crime or tort), 1020 (communication
    important in determining whether psychotherapist has breached his duty to the pa-
    tient), 1024 (disclosure necessary to prevent patient from causing harm to himself or
    the person or property of others).
53. Id. §§ 1019 (common claims to estate of deceased patient), 1021 (intention
    of deceased patient as to a writing affecting property interests), 1022 (validity of a
    writing executed by deceased patient).
54. Id. § 1026 (for example, welfare or unemployment application data).
55. Id. § 912(a).
by one holder does not preclude its assertion by the other. Second, a privilege is not waived by a disclosure to a third party if the disclosure is itself privileged. Third, a disclosure in confidence to third persons, when reasonably necessary for accomplishment of the purpose of the original communication, does not waive the privilege.

The comprehensive treatment of the psychotherapist-patient privilege outlined above represents the extensively considered judgment of the California Legislature that the relationship between psychothera-

57. CAL. EVID. CODE § 912(b) (West 1966). The psychotherapist, of course, is not a holder of the privilege. See notes 47, 48 supra and accompanying text.

On the issue of the applicability of the privilege to group therapy, see Note, Group Therapy and Privileged Communication, 43 IND. L.J. 93 (1967). An amendment to the California Evidence Code, providing for inclusion of group therapy within the privilege, was passed by the legislature on June 18, 1969, but was vetoed by the governor on July 3 of that year. S. 103, Cal. Reg. Sess. (1969).

58. CAL. EVID. CODE § 912(c) (West 1966); see id., Comment. An example of this would be the patient's disclosure to his lawyer of what he told his psychotherapist.

59. For example, a doctor's description of the patient's ailment to a pharmacist in connection with prescribing and dispensing drugs to the patient. Id. § 912(d).

60. The proposed Rules of Evidence for the United States District Courts and Magistrates would establish a similar psychotherapist-patient privilege in the federal courts. Rule 5-04 states:

Psychotherapist-Patient Privilege

(a) Definitions.

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist for purposes of diagnosis or treatment of his mental or emotional condition.

(2) A "psychotherapist" is (i) a person authorized to practice medicine in any state or nation, who devotes a substantial portion of his time to the practice of psychiatry, or is reasonably believed by the patient so to be, or (ii) a person licensed or certified as a psychologist under the laws of any state or nation, who devotes a substantial portion of his time to the practice of clinical psychology.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient. His authority to do so is presumed in the absence of evidence to the contrary.

(d) Exceptions.

(1) Proceedings for Hospitalization. There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) Examination by Order of Judge. If the judge orders an examina-
pists and patients is important enough to warrant special protection from invasion by the courts through compelled disclosure of confidential communications.

II

LIFSCHUTZ AND THE PHILOSOPHY OF EVIDENTIARY PRIVILEGES

The California system of protection for the confidentiality of communications made in the psychotherapist-patient relationship is fairly extensive. But the basic philosophy of providing evidentiary protections for certain relationships is not evident upon reading the code provisions alone. The ultimate purposes of the privilege were discussed, however, by the California supreme court in In re Lifschutz. 61

Lifschutz grew out of an unexceptional civil suit. The plaintiff brought an action in June of 1968 for damages resulting from an alleged assault. He claimed “physical injuries, pain, suffering and severe mental and emotional distress.” 62 During a deposition by the defendant, the plaintiff stated that he had received psychiatric treatment from Dr. Lifschutz over a six-month period approximately ten years before the alleged assault. Nothing in the record indicates that the nature or contents of any communication with Dr. Lifschutz was revealed by plaintiff at the deposition. 63

The defendant thereafter subpoenaed Dr. Lifschutz for deposition and requested production of his medical records relating to treatment of the plaintiff. Dr. Lifschutz appeared for the deposition but refused to produce any of his medical records or to answer any questions about his treatment of patients, including whether or not plaintiff had ever consulted him or had been his patient. 64

62. Id. at 420, 467 P.2d at 559, 85 Cal. Rptr. at 831.
63. Id.
64. Id.
Though notified in due course, neither the plaintiff nor his attorney was present at the deposition or any of the subsequent proceedings. Plaintiff neither expressly claimed nor expressly waived a psychotherapist-patient privilege in regard to Dr. Lifschutz' testimony.\textsuperscript{65} In December 1968, defendant obtained an order from superior court based on the patient-litigant exception\textsuperscript{66} to the privilege statutes directing Dr. Lifschutz to answer the questions posed during deposition. Dr. Lifschutz subsequently refused to comply with the order and a year's time passed during which he unsuccessfully sought a writ of prohibition to restrain the superior court from enforcing its order.\textsuperscript{67}

In December 1969, Dr. Lifschutz again refused to comply with the order, whereupon the court adjudged him in contempt and confined him to the county jail in San Mateo. After the court of appeal denied his petition for a writ of habeas corpus, the supreme court agreed to hear the case and ordered petitioner released on his own recognizance pending its own determination of the case.\textsuperscript{68}

\textbf{A. The Psychotherapist's Assertion of His Patient's Privilege}

\textit{1. Waiver of the Privilege}

Speaking for a unanimous court, Justice Tobriner stated that the evidentiary privilege established for the psychotherapist-patient relationship "is a privilege of the patient, not of the psychotherapist."\textsuperscript{69} Thus, while the psychotherapist in certain circumstances must assert the privilege,\textsuperscript{70} he is then exercising rights of the patient, just as a guardian or conservator would do.\textsuperscript{71} The psychotherapist may not assert the patient's privilege, however, if the privilege has been waived

\begin{footnotes}
\item 65. Id.
\begin{itemize}
  \item There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:
  \begin{itemize}
    \item (a) The patient;
    \item (b) Any party claiming through or under the patient;
    \item (c) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or
    \item (d) The plaintiff in an action brought under Section 37 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.
  \end{itemize}
\end{itemize}
\item 67. 2 Cal. 3d at 421, 467 P.2d at 359-60, 85 Cal. Rptr. at 831-32.
\item 68. Id.
\item 69. Id. at 429 n.11, 467 P.2d at 557 n.11, 85 Cal. Rptr. at 836 n.11; \textit{Cal. Evid. Code} § 1013 (West 1966); cf. \textit{City & County of San Francisco v. Superior Court}, 37 Cal. 2d 227, 233, 231 P.2d 26, 29 (1951) (physician-patient privilege belongs to patient).
\item 70. \textit{Cal. Evid. Code} § 1015 (West 1966); see text accompanying notes 40-46 \textit{supra}.
\end{footnotes}
or if the particular communication in question falls within one of the exceptions to the privilege specified in the code.\textsuperscript{72} In \textit{Lifschutz}, the plaintiff had revealed at the first deposition that he had received psychiatric treatment from Dr. Lifschutz during a specified period. By this disclosure, he waived his privilege to the confidentiality of the fact that he had indeed been treated by the psychotherapist at that time.\textsuperscript{73}

While Dr. Lifschutz could not, therefore, assert the patient's privilege as to the fact of treatment, the patient's privilege had not been waived as to the nature of the treatment, the psychotherapist's diagnosis, or the content of any specific communication.\textsuperscript{74} Section 912 of the Evidence Code states that waiver occurs only with respect to a particular communication covered by a statutory privilege if "a significant part" of it is disclosed out of confidence.\textsuperscript{75} Thus, disclosure of the fact of treatment could not constitute revelation of a significant part of specific communications between patient and psychotherapist.

2. \textit{The Patient-Litigant Exception}

The defendant contended, however, that the privilege had been lost with respect to all communications between the plaintiff and Dr. Lifschutz. Arguing that filing a personal injury action claiming damages for mental and emotional distress necessarily put all aspects of the treatment into issue, defendant relied on the patient-litigant exception to the psychotherapist-patient privilege.\textsuperscript{76}

Treating separately Dr. Lifschutz' claim that he has a constitutional right to assert the privilege on his own behalf regardless of waiver or suit by the patient,\textsuperscript{77} the court gave extended and illuminating discussion to the dimensions and implications of the patient-litigant exception to the privilege.\textsuperscript{78} Though no previous case had arisen under this exception to the psychotherapist-patient privilege,\textsuperscript{79} ample material was available from the cognate context of the physician-patient privilege and from reference to the purposes of the psychotherapist-patient privilege itself.

The court began by emphasizing that the patient's interest in preserving the confidentiality of his relationship with the psychotherapist

\textsuperscript{72} See text accompanying notes 50-54 supra.
\textsuperscript{73} 2 Cal. 3d at 430, 467 P.2d at 566, 85 Cal. Rptr. at 838; see \textit{CAL. EVID. CODE} § 912(a) (West 1966).
\textsuperscript{74} 2 Cal. 3d at 430, 467 P.2d at 566, 85 Cal. Rptr. at 838.
\textsuperscript{75} \textit{CAL. EVID. CODE} § 912 (West 1966).
\textsuperscript{76} See note 66 supra.
\textsuperscript{77} See text accompanying notes 102-27 infra.
\textsuperscript{78} 2 Cal. 3d at 431-37, 467 P.2d at 567-72, 85 Cal. Rptr. at 839-44.
\textsuperscript{79} \textit{Id.} at 433, 467 P.2d at 568-69, 85 Cal. Rptr. at 840-41.
rests on more than the statutory rights accorded him by the Evidence Code. The patient's right has its basis in the constitutional right to "zones of privacy" articulated by the United States Supreme Court in *Griswold v. Connecticut*.\(^80\) According to the California supreme court, "the confidentiality of the psychotherapeutic session falls within one such zone."\(^81\)

But recognition of a constitutional element in the patient's right to confidentiality does not insulate the privilege from all possible limitations. Basic to our system of justice is the right to compel testimony in order to permit courts to ascertain the truth.\(^82\) The patient-litigant exception to the privilege is a narrow one which is tailored to advance this traditional social interest in gathering all relevant evidence in legal proceedings.\(^83\) The danger of intrusion into the patient's privacy, present in most potential disclosure contexts, is not a problem in the patient-litigant context; the patient causes and sets the limits of the disclosure by putting a given issue into controversy in a lawsuit.\(^84\) The patient exposes a specific condition and thus the prevention of the humiliation of disclosure is no longer a concern.\(^85\) Further, to grant a privilege for matters the patient subjects to scrutiny in litigation would be unfair. He would then be able to establish his claim and foreclose inquiry into its veracity.\(^86\) Thus, in *City & County of San Francisco v. Superior Court*\(^87\) the court said:

The whole purpose of the [physician-patient] privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. When the patient himself discloses those ailments by bringing an action in which they are in issue, there is no longer any

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80. 381 U.S. 479, 484 (1965).
81. 2 Cal. 3d at 431-32, 467 P.2d at 567, 85 Cal. Rptr. at 839.
85. 4 J. Wigmore, supra note 1, § 2389, at 3360: "Clearly a patient should not be permitted to describe, at length to the jury in a crowded courtroom the details of his supposed ailment, and then neatly suppress the available proof of his falsities by wielding a weapon, nominally termed a privilege."
86. Koump v. Smith, 25 N.Y.2d 287, 294, 250 N.E.2d 857, 861, 303 N.Y.S.2d 858, 864 (1969): "A party should not be permitted to assert a mental or physical condition in seeking damages or in seeking to absolve himself from liability and at the same time assert the privilege in order to prevent the other party from ascertaining the truth of the claim and the nature and extent of the injury or condition." Cf. Schlagenhaus v. Holder, 379 U.S. 104, 126 (1964) (Douglas, J., dissenting).
reason for the privilege. The patient-litigant exception precludes one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause him humiliation. He cannot have his cake and eat it too.88

In Lifschutz, the defendant maintained that this language requires a complete waiver of the privilege whenever a patient tenders the issue of his mental or emotional condition in a lawsuit.89 The court did not agree, finding nothing in the quoted language or subsequent decisions warranting such a broad view of the patient-litigant exception.90 Indeed, the Evidence Code's careful expansion of the privilege suggests that exceptions should be narrowly construed so as to preserve the goals of the protection.91

In the process of construing section 1016 as a limited waiver provision, the court indicated the manner in which the patient-litigant exception to the code will operate. Relying on precedent from the more familiar physician-patient privilege, the court held that disclosure may be compelled "only with respect to those mental conditions the patient-litigant has 'disclose[d]' . . . by bringing an action in which they are in issue' . . . ."92 Thus, communications not relevant to

88. Id. at 232, 231 P.2d at 29.
89. 2 Cal. 3d at 434, 467 P.2d at 569, 85 Cal. Rptr. at 841.
90. Id.
91. If the . . . [exceptions] had as broad an effect as is suggested by petitioner, it might effectively deter many psychotherapeutic patients from instituting any general claim for mental suffering and damage out of fear of opening up all past communications to discovery. This result would clearly be an intolerable and overbroad intrusion into the patient's privacy, not sufficiently limited to the legitimate state interest embodied in the provision and would create opportunities for harassment and blackmail.

Id. at 435, 467 P.2d at 570, 85 Cal. Rptr. at 842. The court emphasized its conception of a proper interpretation of this exception to the privilege by noting:
The draftsmen of two separate versions of "model" legislation in this field each suggested that only a "conditional" patient-litigant exception be adopted; under this suggestion, disclosure would be compelled only upon a finding of the court that it would be in "the best interests of justice." [citations omitted.] Similar protection can be afforded under the California statutory scheme through a sensitive exercise of the trial court's discretionary authority.

Id. at 438 n.26, 467 P.2d at 572-73 n.26, 85 Cal. Rptr. at 844-45 n.26.
92. Id. at 435, 467 P.2d at 570, 85 Cal. Rptr. at 842 (emphasis in original) citing City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951). The court also stated:

Our reliance on precedents rendered in the context of the physician-patient privilege is not intended to suggest that authorities involving the physician-patient privilege will always be helpful in resolving issues concerning the psychotherapist-patient privilege. In the past the physician-patient privilege has been the subject of rather severe criticism [citations omitted] and in response the application of the privilege has been limited in a variety of circumstances (see, e.g., Evid. Code §§ 998, 999, 1007). The psychotherapist-patient privilege, on the other hand, won legislative recognition in the face of legal antipathy toward privileges generally [citations omitted], the legislature acknowledged that the unique nature of psychotherapeutic treatment required and justified a greater degree of confidentiality than was legally afforded
the specific conditions disclosed by the plaintiff-patient remain privileged. As an example, the court indicated that in the instant case the defendant would not be authorized to inquire into confidential communications with Dr. Lifschutz relating to possible aggressive tendencies or other personal attributes conceivably related to an assault merely because the patient tendered the issue of “mental and emotional distress” in his suit.93

This approach, which parallels that employed in the physician-patient context,94 demands more than vaguely defined relevance before a communication must be disclosed. In order to preclude legal protection for a given aspect of the relationship’s privacy, that specific topic must have been put into controversy by the patient. The court noted that in certain unusual situations the patient’s suit may necessitate evaluation of his entire medical history and present condition,95 but in most cases a careful evaluation of the issues raised by a suit must be undertaken in order to determine the scope of permissible inquiry.

The characteristic interdependence of factors in a patient’s history might seem to raise the possibility that a therapist’s testimony would necessarily reveal a tremendous quantity of facts and communications. However, the vigilance of the patient’s attorney and the strong reluctance of psychotherapists to divulge any information should mitigate this problem. Of course, the burden of proof in making an initial showing that a particular confidential communication is not relevant to an issue tendered to the court rests on the patient. He alone knows both the nature of the condition for which recovery is sought and the general content of the confidential psychotherapeutic communications.96 To achieve such a showing, of course, the patient may well have to limit the scope of his mental distress claims, or per-

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93. 2 Cal. 3d at 435 n.21, 467 P.2d at 570 n.21, 85 Cal. Rptr. at 842 n.21.
95. 2 Cal. 3d at 435-36, 467 P.2d at 570-71, 85 Cal. Rptr. at 842-43, citing In re Cathey, 55 Cal. 2d 679, 361 P.2d 426, 12 Cal. Rptr. 762 (1961) (mental patient in prison hospital seeking release because no longer dangerous or violent; privilege discussed by analogy).
96. 2 Cal. 3d at 436, 467 P.2d at 571, 85 Cal. Rptr. at 843; cf. CAL. EVID. CODE § 404 (West 1966) (claimant of privilege against self incrimination has burden of showing that evidence offered might tend to incriminate him).
haps explain in general terms the object of the psychotherapy in order to show its irrelevancy. To some extent, this requirement collides with the policy expressed in the Evidence Code that a person should not be forced to disclose privileged information in order to claim the privilege. Some disclosure appears unavoidable, however, in order for the trial judge to rule on the claim of irrelevancy. This difficulty may perhaps be mitigated by, for example, an ex parte hearing in the judge's chambers where the witness could make the required disclosures out of the presence of all third parties.

The court stressed that in determining whether or not a particular communication was so integrally related to the mental or emotional condition at issue as to require disclosure, great weight should be given to the basic privacy interests which the privilege protects, and that "in general the statutory psychotherapist-patient privilege [is to] be liberally construed in favor of the patient." Thus, the court emphasized that even when it appears that the confidential communication is directly relevant to a mental condition tendered by the patient, and is therefore properly excluded from privilege, there are numerous safeguards available which should be utilized to protect the patient's privacy. The issuance of protective orders during discovery will obviate much unnecessary exploration of the patient's private communications. At trial the judge may, of course, "exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice."

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97. 2 Cal. 3d at 436-37, 467 P.2d at 571, 85 Cal. Rptr. at 843.
98. CAL. EVID. CODE § 915(a) (West 1966).
99. Cf. CAL. EVID. CODE § 915(b) (West 1966). To be avoided, if possible, is the battle of experts over the relevance of a given set of data.
100. 2 Cal. 3d at 437, 467 P.2d at 571-72, 85 Cal. Rptr. at 843-48.
103. 2 Cal. 3d at 437, 467 P.2d at 572, 85 Cal. Rptr. at 844.
104. The court noted that in the area of oral depositions, for example, CAL. CODE CIV. PRO. § 2019(b) (West 1968) enumerates a series of protective orders potentially valuable in the patient-litigant context. Thus, the court may direct that:

[1] certain matters shall not be inquired into or [2] that the scope of the examination shall be limited to certain matters, books, [or] documents . . . or [3] that the examination shall be held with no one present except the parties to the action and their . . . counsel or [4] that after being sealed the deposition shall be opened only by order of the court . . . .

2 Cal. 3d at 437, 467 P.2d at 572, 85 Cal. Rptr. at 844 (bracketed numbers added).
105. CAL. EVID. CODE § 352 (West 1966). The court in Lifschutz concluded:

In this area, the careful exercise of this discretion is necessary to provide substantial protection for the patient's legitimate interests; without this ele-
The relevancy standard may be a delicate one to administer in the patient-litigant area, but it alone promises adequately to protect the patient's rights. The burden it poses for judges should not be great. Today's courts are accustomed to receiving and evaluating psychiatric testimony in a wide variety of contexts and circumstances. Therefore, this particular test, especially in light of the supreme court's carefully articulated guidelines, should prove quite workable.

B. Constitutional Arguments for a Psychotherapist's Privilege

Dr. Lifschutz raised numerous grounds for an absolute privilege of the psychotherapist, independent of the patient's privilege, to withhold information obtained in confidence. No doubt the most novel of these, and in some respects the most enlightening, were his arguments for the proposition that the United States Constitution required such a privilege. In rejecting each of these arguments the court made clearer the policies which underlie evidentiary privileges.

The first argument advanced in support of an absolute privilege for psychotherapists was that such protection is required under the right to privacy recognized in Griswold v. Connecticut. In Griswold, the United States Supreme Court struck down a state criminal law prohibiting the use of contraceptives as an unconstitutional abridgment of a husband and wife's right to marital privacy. While the California supreme court reads Griswold very broadly on the role of privacy and the importance of active constitutional protection of it, the court found that case unpersuasive in the context of the psy-
chotherapist's independent rights. The court noted\(^\text{109}\) the language in *Griswold* itself which emphasized that the patient's rights were the basis of the holding:

We think that appellants have standing to raise the constitutional rights of the married people . . . .

\[\ldots\]

[The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.\(^\text{110}\)

Thus, the state supreme court held that the depth and intimacy of the patient's revelations may cause concern that compelled disclosure will be detrimental, but that the psychotherapist, even though deeply involved in the communicative treatment, cannot find in *Griswold* any basis for constitutional privacy rights independent of those of the patient.\(^\text{111}\) The court's conclusion here is in accord with the traditional role played by evidentiary privileges. Historically, the privileges have been for the protection of the lay person whose interests are bound up in litigation, and not the professional man, be he attorney, physician, or whatever, whose fortune is not at stake in the suit. From a pragmatic viewpoint, the focus on the patient's rights makes much more sense in constitutional adjudication as well. The physician or psychotherapist is pursuing his business when these communications are made, not his private life. While the patient's revelations may pertain to his innermost problems, the psychotherapist exposes no aspect of his own life. Therefore, the complex of constitutional goals behind the right to privacy, while of prime importance and tremendous application, militate only for protection of the patient.

Second, Dr. Lifschutz argued that unless psychotherapists are accorded a privilege to withhold confidential communications, their ability to practice their profession is limited to an extent amounting to a taking of property without compensation in violation of the fourteenth amendment.\(^\text{112}\) The court's rejection of this claim was on firm ground. The regulation of economic interests appears unsailable if done in furtherance of a legitimate state interest.\(^\text{113}\) Compelled disclosure of business records is an established practice\(^\text{114}\) and has been upheld even where it may interfere with an individual's

\(^{109}\) *Id.* at 424, 467 P.2d at 562, 85 Cal. Rptr. at 834.

\(^{110}\) 381 U.S. at 481.

\(^{111}\) 2 Cal. 3d at 424, 467 P.2d at 562, 85 Cal. Rptr. at 834.

\(^{112}\) *Id.* at 425, 467 P.2d at 563, 85 Cal. Rptr. at 835.


\(^{114}\) *See*, e.g., Shapiro v. United States, 335 U.S. 1, 32-33 (1948); Hickman v. Taylor, 329 U.S. 495, 511-13 (1947).
performance of his work.\textsuperscript{115} This practice reflects the clear need for compulsory testimony to facilitate the fair administration of justice in the fact-finding portion of the judicial process.\textsuperscript{116} In addition, the court noted that since the patient-litigant exception to the privilege only applies in the special case where a patient puts his mental and emotional condition into issue, the impact of compelled disclosure on the practice of psychiatry would not be extensive.\textsuperscript{117}

Dr. Lifschutz alleged that compelling disclosure of his confidential communications with his patients would make the practice of psychotherapy impossible.\textsuperscript{118} He argued that because of the unique nature of the psychotherapeutic process, necessarily probing a patient's most personal thoughts and emotions, total trust in the confidentiality of the relationship is essential to successful treatment. Petitioner argued that patients will be deterred from full participation in psychotherapy by the fear of subsequent compelled disclosure.

The court ultimately ruled that any balancing between the danger of constricting medicine on one hand and the state interest in ascertaining truth on the other is the province of the legislature.\textsuperscript{119} But it also noted two factors which lessen the impact of the psychotherapists' claim in this regard. In the first place, the practice of psychotherapy has survived and expanded in a non-privilege context. Only six states have laws specifically according a privilege to psychotherapy beyond that granted to the physician-patient relationship generally,\textsuperscript{120} and no state has created the absolute privilege which Dr. Lifschutz argued was constitutionally required. It is not clear whether the patients' ignorance of the threat of future disclosure has been a factor in permitting psychotherapy such rapid development; psychotherapists have known of it for some time.\textsuperscript{121} But, in the second place, Dr. Lifschutz' argument as to the danger of disclosure overlooks the minimal burden on the psychotherapeutic relationship occasioned by the patient-litigant exception. Patients will not fear exposure because in cases where this exception to the privilege arises, the patient himself has chosen to reveal certain information. Section 1016 of the Evidence Code compels disclosure of only those matters

\textsuperscript{115} E.g., Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 394, 364 P.2d 266, 287, 15 Cal. Rptr. 90, 111 (1961).
\textsuperscript{116} See, e.g., Blair v. United States, 250 U.S. 273, 279-82 (1919); Wilson v. United States, 221 U.S. 361 (1911).
\textsuperscript{117} 2 Cal. 3d at 425-26, 467 P.2d at 563, 85 Cal. Rptr. at 835.
\textsuperscript{118} Id. at 426, 467 P.2d at 564-64, 85 Cal. Rptr. at 835-36.
\textsuperscript{119} Id. at 427, 467 P.2d at 564, 85 Cal. Rptr. at 836.
\textsuperscript{120} Slauson, supra note 31, at 348-49.
put in issue by the litigation, and thus, the patient has control over any possible future disclosure.

Third, Dr. Lifschutz argued that the presence of a legislatively created absolute privilege for the clergyman-penitent relationship, which the clergyman may independently assert on his own behalf,\textsuperscript{122} denies to psychotherapists the equal protection of the laws.\textsuperscript{123} The traditional test for determining whether a state statute violates equal protection of the laws under the fourteenth amendment is whether the legislature had a rational basis for concluding that the statutory classification has a reasonable relationship to a legitimate governmental goal.\textsuperscript{124} Under the prevailing view, therefore, the complainant asserting a denial of equal protection has the burden of showing that the classification has no reasonable relationship to a legitimate goal and is essentially arbitrary and capricious.\textsuperscript{125}

We believe the independent clergyman's privilege to be both superfluous and unwise,\textsuperscript{126} but the rational basis test is not a demand-

\begin{itemize}
\item \textsuperscript{122} CAL. EVID. CODE  § 1034 (West 1966); see id. Comment.
\item \textsuperscript{123} 2 Cal. 3d at 427-28, 467 P.2d at 564-65, 85 Cal. Rptr. at 836-37.
\item \textsuperscript{125} Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).
\item \textsuperscript{126} The underlying premise of the state legislature and the court in this area—that the clergyman is subject to a duty of confidentiality under church law regardless of the wishes of the penitent—is incorrect. This false assumption is typified by the California Law Revision Commission's Comment accompanying the clergyman's privilege statute:
\begin{quote}
The extent to which a clergyman should keep secret or reveal penitential communications is not an appropriate subject for legislation; the matter is better left to the discretion of the individual clergyman involved and the discipline of the religious body of which he is a member.
\end{quote}
\end{itemize}
ing one, and the court found that special treatment for clergymen was constitutional. It rejected the claim that the similarity between confession and psychotherapy made special treatment for the former unconstitutional. Dr. Lifschutz had argued that, in the modern context, the purpose of protecting the confidentiality of the clergyman-penitent relationship with an evidentiary privilege is to foster a "sanctuary for the disclosure of emotional distress." As the court noted, when the goal of the clergyman-penitent privilege is characterized in this way the roles of clergyman and psychotherapists do appear quite similar. However, the court pointed out that this view of the purpose of the clergyman-penitent privilege identifies only one aspect of the important interests it serves; it observed that "[r]ealistically, the statutory privilege must be recognized as basically an explicit accommodation by the secular state to strongly held religious [tenets] of a large segment of its citizenry." This analysis is probably sufficient for equal protection purposes; it is difficult to argue that there is no reasonable relation between the privilege and a valid state goal.

"rights" and "duties." Suppose, although it would be a rare case, the penitent wants the clergyman to reveal the confession. May the latter still insist upon his independent privilege? Certainly the clergyman's waiver of his independent privilege should not be permitted to militate in any way against the penitent's full retention of his. It is true that some statutes have provided not only that the clergyman no be compelled, but that he not be allowed, to testify to the secret confession. See C. Stokes, Church & State in the United States 555-56 (1964). But this would seem to be a stronger formula for protecting the penitent's privilege rather than creating an independent privilege in the clergyman; it should be clearly be waivable by the penitent.

The clergyman's independent privilege is thus a dangerous neoplasm. But it does relate to the exercise of religious freedom by penitent individuals, and it therefore appears constitutional under prevailing legal doctrine.

127. 2 Cal. 3d at 428, 467 at 565, 85 Cal. Rptr. at 837; see J. Wigmore, supra note 6, § 2396, at 878: "Does the penitential relation deserve recognition and countenance? In a state where toleration of religion exists by law, and where a substantial part of the community professes a religion practising a confessional system, this question must be answered in the affirmative." Cf. id. §§ 2394-96.

128. 2 Cal. 3d at 428, 467 P.2d at 565, 85 Cal. Rptr. at 837.

129. Id.

130. Id. at 428, 467 P.2d at 563, 85 Cal. Rptr. at 835. The court refused to rule on whether the statute's "accommodation of religion" purpose constitutes an unconstitutional establishment of religion. It noted that Dr. Lifschutz lacked standing to assert this claim since he was not seeking to compel disclosure of a penitential communication, but acknowledged that if properly presented the issue would be a difficult constitutional question. Id. at 429, 467 P.2d at 566, 85 Cal. Rptr. at 838. See generally Stoyles, The Dilemma of the Constitutionality of the Priest-Penitent Privilege, 29 U. Priit. L. Rev. 27 (1967).

131. There is, of course, an interesting, and perhaps most plausible, equal protection problem in the difference between these two privileges: the litigation exception applies to communications with psychotherapists and not to communications with clergymen. Thus a patient might argue that he is denied equal protection simply because he chooses to confide in the therapist and not his religious advisor. This issue, however, was not raised by Dr. Lifschutz and would not have been properly before the court on his appeal.
Thus, none of the constitutional arguments raised in Lifschutz prevailed. Accordingly, no independent privileges for psychotherapists were found by the court.

C. The Psychotherapist-Patient Privilege: 
Criticism and Defense

As with any privilege, we must ask whether that for the psychotherapist's patient truly represents a felt social need for confidentiality in a relationship which is increasingly common and of growing importance. Such an inquiry is essential because maintenance of a spurious privilege, neither logically required nor compelled by the realities of a particular relationship, would tend to weaken the support for well-justified privileges as well as the offending rule. After analysis, it is clear that the protection of confidentiality in the patient-psychotherapist relationship cannot seriously be labeled a mere outgrowth of the desire of psychotherapists for professional aggrandizement. There is a demonstrable need and a sound rationale for confidentiality in the communications between patient and psychotherapist. Further, the California Legislature and supreme court have fashioned a scheme of protection which carefully protects the fact finding process while providing much needed insulation for a delicate and important relationship. Nevertheless, it is important to consider criticisms of the evidentiary privileges generally in order to evaluate the psychotherapist-patient privilege in perspective.

Wigmore criticized the physician-patient privilege on several grounds.\(^{132}\) He found the physician-patient relationship undeserving of protection because the information communicated is only rarely confidential, possible court disclosure would not deter anyone from seeking medical aid, and the injury which disclosure causes to the relationship is outweighed by the injury to the administration of justice occasioned by use of the privilege.\(^{133}\) Wigmore concluded that the only support for the physician-patient privilege is the medical world's jealousy for the honor of its profession and misplaced reliance on an analogy to the attorney-client privilege.\(^{134}\) These views have met with considerable agreement.\(^{135}\)

None of these criticisms, of course, were aimed at the psychothera-

\(^{132}\) See 8 J. WIGMORE, supra note 1, § 2380(a).
\(^{133}\) Id. § 2285.
\(^{134}\) Id. § 2380(a).
\(^{135}\) See, e.g., Chafee, Privileged Communications, 52 YALE L.J. 607 (1943); Morgan, Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence, 10 U. CHI. L. REV. 285 (1943).
pist-patient privilege, and, on reflection, this relationship seems squarely to meet Wigmore's four criteria. First, it is clear that communications to a psychotherapist are almost always of the utmost confidential nature. Psychotherapy by its nature requires exploration of the patient's innermost fears and fantasies which are not normally revealed even to family or closest friends. Second, the preservation of confidentiality is essential to the purpose of the relationship. More than treatment by a general physician, psychotherapy depends on the patient's trust in the therapist built up slowly in a secure context. In the absence of a strong feeling of security, the patient will not even be able to recall past experiences, much less respond fully to treatment. In addition, unhesitating disclosure is essential to such techniques as free association. Confidentiality is also necessary to encourage commencement of psychotherapy in the first place, which is desirable for social safety and happiness of the patient. Without confidentiality, many persons would probably hesitate to seek treatment out of fear that disclosure would expose them to the societal stigma of mental illness.

136. 8 J. Wigmore, supra note 2, § 2285:
1) The communications must originate in a confidence that they will not be disclosed.
2) The 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.


In regard to mental patients, the policy behind such a statute [patient-physician privilege] is particularly clear and strong. Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand."


140. See Slovenko, Psychiatry and a Second Look at the Medical Privilege, 6 Wayne L. Rev. 175, 187-88 (1960).

141. See M. Guttman & H. Weihofen, supra note 138, at 271. It does not appear that people are more reluctant to seek medical care in states having no phy-
Third, the great need for effective psychotherapy in the tense modern world\textsuperscript{142} eliminates doubt that the potential injury from disclosure outweighs the impediment to the fact finding process the privilege might cause. It is important to note that the danger of fraud discussed by McCormick is not a real threat in this context. McCormick suggests\textsuperscript{143} that the physician-patient privilege promotes fraud by the patient because he can "tell on the witness stand a story of his ailment, injury or state of health, without contradiction from his physician . . . ."\textsuperscript{144} For fraud to be a danger, the patient must be involved in the litigation. Therefore, the patient-litigant exception to the code\textsuperscript{145} ameliorates this danger by dissolving the barrier of privilege surrounding the particular confidential communications relevant to the mental or emotional conditions tendered in the lawsuit.

It may well be that Wigmore, despite his monumental contribution to the law of evidentiary privileges, has contributed to the scholarly antipathy toward privileges\textsuperscript{146} by his emphasis on strictly utilitarian criteria of validity.\textsuperscript{147} The resultant emphasis in Anglo-American analysis of the privileges has been on the threat posed by the privileges to the ascertainment of truth in litigation and not on the fundamental values they serve.

To begin with, the view that evidentiary privileges are mere exclusionary rules is to prejudge the issue. It is the historic evaluation of the common law, and apparently of European thinking as well, that whatever handicap the privileges place upon the adjudicatory process is not too high a price to pay for preserving inviolate the privacy of certain essential relationships. The privileges, therefore, should not be viewed solely as exclusionary rules. Indeed, only the chance development of litigation makes them so. More fundamentally, they stand as legislative recognition of the concept that in the balance of human liberty, more is achieved by safeguarding certain relationships from

\textsuperscript{142} See In re Lifschultz, 2 Cal. 3d 415, 421-22, 467 P.2d 557, 560-61, 85 Cal. Rptr. 829, 832-33 (1970). One may speculate on a diminishing role for psychotherapy as progress is made on treatment of psychoses by chemical means. (Probably nowhere else in the western world, save possibly England, has psychotherapy achieved the significance and prestige it claims in the United States.) In any event, presumably the various neuroses would remain as its legitimate area; and the law's immediate concern is with today's needs.

\textsuperscript{143} C. McCormick, supra note 2, § 108.

\textsuperscript{144} Id. § 108, at 222-23.

\textsuperscript{145} See text accompanying notes 72-101 supra.

\textsuperscript{146} See note 2 supra.

\textsuperscript{147} See note 130 supra.
state molestation than is lost through the resulting impediment to the fact finding process.

The constitutional underpinnings of the privacy rights protected by the privileges have been stressed. The court in *Lifschutz* said:

[C]oncern for valued aspects of individual privacy may ultimately aid in protecting man from the dehumanization of an ever-encroaching technological environment. The retention of a degree of intimacy in interpersonal relations and communications lies at the heart of the broad rationale of *Griswold* . . .

The privileges, therefore, protect the right to be let alone in certain carefully limited relationships, and to be free from the coercive or supervisory power of the state.

The fully articulated psychotherapist-patient privilege established by California would no doubt be attacked by those eminent evidence scholars whose distaste for the privileges stems from a focus on the social importance of accurate fact finding in litigation and from the conviction that confidentiality in virtually all relationships must give way to compulsory testimony. It seems, however, that such stress on the undeniable value of accurate fact finding and full disclosure of relevant information has led certain modern commentators to ignore the significance for human freedom of well-considered privileges for confidential communication.

Moreover, the necessity for compelled disclosure of confidential communications is no longer great, if it ever was. Often the com-

148. 2 Cal. 3d at 431-32, 467 P.2d at 567-68, 85 Cal. Rptr. at 839-40; see text accompanying notes 76-77 *supra*. The court continued:

The breadth of the principles of privacy and individual freedom recognized in *Griswold* is illustrated by the variety of the cases which have subsequently embraced that decision's conclusions.


149. 2 Cal. 3d at 431, 467 P.2d at 567, 85 Cal. Rptr. at 839.

150. See note 2 *supra*.

151. One of us has previously noted:

[When it is the state which may be the opponent of the claimant to privilege, as in criminal cases, there is no sound reason automatically to foreclose the issue against such claimant. Such a foreclosure seems to this writer to be the function of a philosophy which deems state processes *per se* valuable and significant and individual interests *per se* subordinate, a philosophy whose devastating effects on human freedom often have been demonstrated by history anicent and recent, and are being demonstrated today. *Louisell*, *supra* note 31, at 750; cf. E. *GRISWOLD*, THE FIFTH AMENDMENT TODAY 75-76 (1955); Connery, *The Right to Silence*, 39 MARQ. L. REV. 180 (1956).
munication pertains to an objective fact, the ascertainment of which, if actually of import in deciding an issue, is feasible through analysis of sources extrinsic to the confidential communication.\textsuperscript{152} Given the tremendous development in the availability and utilization of discovery proceedings, the need for forced disclosure of confidential communications is even less compelling.

Even where the communication pertains not to extrinsically verifiable facts but to subjective mental states, forced disclosure is undesirable in many circumstances. The disastrous impact which wholesale disclosures would have on psychotherapy has already been stressed.\textsuperscript{153} In addition, subtler problems arise even where the communication is the only source of information needed for a full exploration of the issues in litigation. It is precisely the situations where no other evidence exists which occasion the gravest temptation to perjury by the holder of the secret. This appears to be the factor which has led many European nations to refrain from coercing witnesses in matters of conscience.\textsuperscript{154} Such coercion puts the witness in the position of being asked to violate his own concepts of loyalty and duty. The possibility of perjury, which aids none of the parties seeking disclosure, and the intolerable conflict of conscience which results from such governmental compulsion militate for recognition of the value of confidentiality in certain important relationships.

In the final analysis, resolution of the conflict between the social and moral importance to human freedom of any confidential communication privilege and the need to ascertain facts may require comparison of value judgments which are not commensurable. Nevertheless, it is clear that the California supreme court has struck a highly desirable balance between the protection of important communications and the flow of information needed to make the litigation fair and accurate. And while advancement of the former is necessarily at some expense to the latter, it seems indisputable that all of us, including the litigant who is precluded from determining certain facts because of a privilege, partake of numerous relationships in which confidentiality promotes a free and unguarded communication which is basic to full enjoyment of the human potential.

\textsuperscript{152} The observation made in respect to the privilege against self-incrimination often seems to apposite to confidential communication privileges: "It is far pleasanter to sit comfortably in the shade [in India] rubbing red pepper into a poor devil's eyes than to go about in the sun hunting evidence." \textsuperscript{\textsuperscript{8}} J. Wigmore \textit{supra} note 2, § 2251, at 315.

\textsuperscript{153} See text accompanying notes 133-37 \textit{supra}.