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Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope

Ralph Slovenko*

Psychiatrists as well as other related professionals have been led to believe that a shield statute would protect the communications made to them by their patients or clients against a demand for disclosure by tribunals and agencies of the state. The holes that have been carved in the shield, however, make it quite apparent now that the proponents for adoption of privilege were false prophets. The hope in privilege was misguided.

The claim to a psychotherapy privilege is based on the idea that a person will not seek therapy or that the therapeutic effort will be frustrated if not accorded privacy. The privilege is urged in order to protect the unique human situation in which a person, through a relationship with another, can explore the meaning and experiential realities of his life without intrusion. Freud said that "The whole undertaking becomes lost labour if a single concession is made to secrecy."¹

Tending to frustrate privilege, however, are concerns about the dangers in secrecy, whether or not it has a lawful basis, dealing with individual autonomy or representative government. There can be no mention of secrecy nowadays without some reference to Watergate. Secrecy there laid the cover for dirty tricks. Considering that disclosure is salutary in the political arena in order to maintain representative or accountable government, it is deemed appropriate to question the justification of a shield in other areas. Justice prevails, this thesis runs, when lanterns blaze on the antics of all. Justice Brandeis once observed, "Sunlight is the best of disinfectants."

Exceptions, purportedly designed to achieve balance, have been carved into the psychotherapy privilege, where it exists, leaving little or no shield cover—very much resembling a payroll statement where most or all of the pay has been deducted at the source. These exceptions or deductions in the privilege law originated in response to the general feeling that privilege may work an injustice. The privilege appears too available to those who

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1. 2 S. FREUD, COLLECTED PAPERS 356 (1959 ed.).

would defraud an adversary or insurance company about the extent of an alleged injury or mislead the state about character or competence.

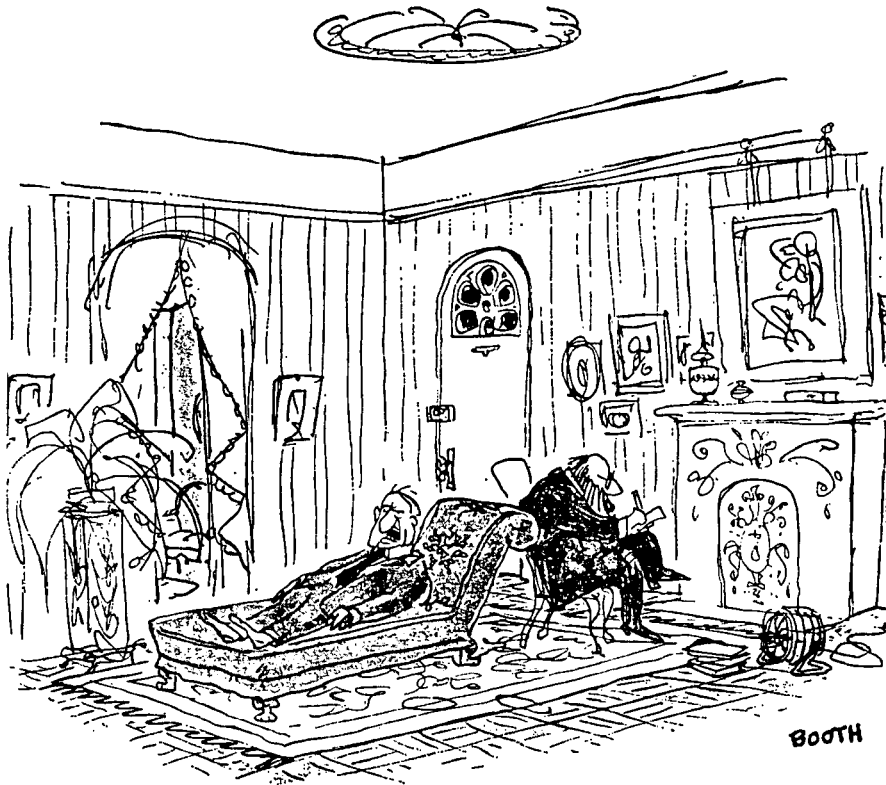
Moreover, the assertion by psychiatry that a testimonial privilege, which would be available only for hearings, is essential for the practice of psychotherapy has never really been substantiated as far as the legal world is concerned.² A subpoena or court order for information worries psychiatrists most, but the demand that affects them and their patients most frequently comes in the non-courtroom situation, which as stated is not the concern of privilege—the request for information from an insurance company which pays for a good part of the psychiatric treatment; from the employer, who may be paying for the treatment, and who is responsible for the acts of his employees; from parents or other members of the family who are concerned about the patient; from the state in such areas as drug use and child abuse; and from researchers and investigators, who are concerned with the adequacy of treatment.

At one time court actions involving psychotherapists were so rare, or so little publicized, that few psychotherapists or their patients ever thought about the need for the legal recognition of a "privileged communication." Increasingly, however, evidence is sought of psychiatrists in personal injury litigation and disability claims under insurance programs. The increase in the number of court actions involving psychiatrists, and recently the White House-ordered burglary of the office of Daniel Ellsberg's former psychiatrist, has turned the subject of psychiatric testimony and records into a matter of public interest.

Fear of disclosure is now said to be widespread. The risk of unwelcome publicity is said to be deterring psychiatric visitation or inhibiting communication. People visiting a psychiatrist are said to be thinking, "I won't say anything which may later be used against me."³ According to a number of psychiatrists, many patients are asking about confidentiality, inquiring whether the fact of their visit or its content will be revealed. As in any relationship, people interact comfortably only after they begin to trust one another. Confidentiality is said to be an issue that increasingly has to be worked through. In today's world, many psychiatrists attempt to reassure patients by advising them, "I keep no records; and I will reveal nothing without your permission."

2. To some extent, the plea of privilege may be prompted by the fear that exposure may threaten or question the therapist's practices, his secrets—not the patient's. See Modlin, *How Private Is Privacy?* PSYCHIATRY DIGEST, Feb. 1969, at 13.

3. See, e.g., Fishein, *The Hazards of Consulting a Psychiatrist*, Medical World News, Dec. 28, 1973, at 52.



"Today, I'm not going to talk about my goddam mother. I'm going to talk about my goddam insurance company."

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Not keeping records or much of a record apparently has always been the practice. Psychiatry is unlike the legal or medical professions. In the courtroom a stenographer is expected to record every word spoken by any participant. Without such a record, an appellate system would lose much of its validity. In medicine too there is emphasis on records which note somatic therapies and instructions to aides. Medical records constitute an integral and vitally important part of the medical care process, transmitting information as well as facilitating memory. Perhaps this need and determination to record prompted the belief that extensive records are also kept in psychotherapy, widely considered simply a specialized branch of medical practice.

The idea that extensive records are kept in mental hospitals and even in private office practice is widespread. The order to search the office of Ellsberg's psychiatrist—"we want the medical files"—reveals the prevailing but unwarranted identification of psychiatry with medicine. Popular cartoons portray the psychoanalyst with a writing pad. I.F. Stone urged a close study

of the records of Soviet psychiatric institutions which have become available recently, in order to determine whether individuals were being committed for political reasons.⁴ Those who burglarized the office of Ellsberg's psychiatrist apparently thought they would find there a gold mine of information. Ellsberg says that the White House knew about his personal life (from his girl friends) but it wanted to know something only his psychiatrist knew in order to blackmail him. Howard Hunt justified the break-in as an attempt to find out whether Ellsberg "might be a controlled agent of the Soviets."⁵ With wry humor, Gore Vidal fantasizes Ellsberg saying to his psychiatrist, "I have these terrible headaches. They started just after I met my control Ivan and he said, 'Well, boychick, it's been five years now since you signed on as a controlled agent. Now I guess you know that if there's one thing we Sovs hate it's a non-producer so . . .' Doc, I hope you're writing all this down and not just staring out the window like last time."⁶ The burglary, as might have been expected, produced no psychiatric or other material; the files were empty (and the billing records were at home).

To be sure, there is some variation in the practice of record-keeping. Training programs demand extensive write-ups, but the practice thereafter is different. It is customary to keep records of appointments and billings, but most psychoanalysts and analytically oriented psychotherapists make no records or notes of patient communications.⁷ Some may doodle in order

4. I.F. Stone, *Betrayal by Psychiatry*, New York Review of Books, Feb. 10, 1972, at 7. See Chodoff, *Involuntary Hospitalization of Political Dissenters in the Soviet Union*, PSYCHIATRIC OPINION, Feb. 1974, at 5; Rogers, *Psychiatric Hospitalization of Political Dissenters*, PSYCHIATRIC OPINION, Feb. 1974, at 20.

5. N.Y. Times, Dec. 10, 1973, at 30; TIME, Aug. 27, 1973, at 18.

6. Vidal, *The Art and Arts of E. Howard Hunt*, New York Review of Books, Dec. 13, 1973, at 6.

7. Hollender, *Privileged Communication and Confidentiality*, 26 DIS. NERV. SYST. 169 (1965); Tanay (Ltr.), *Ellsberg Case: What Files?* N.Y. Times, Aug. 7, 1973, at 34.

No useful purpose in psychotherapy would be served by records. Keep in mind that in intensive psychotherapy there are rarely more than twelve patients treated by one psychotherapist; there is no problem in remembering. Besides, how could an intense emotional relationship be developed if one of the participants would be sitting and scribbling notes? Once you have those notes, what would you do with them?

Letter from Dr. Emanuel Tanay to the author, Dec. 24, 1973.

A distinction is to be drawn between psychotherapy and other forms of psychiatric treatment, particularly institutional care, where somatic therapy is usually involved. Even here, many hospitals, because of the increasing (non-judicial) demand for photostatic copies of records—which are released because of the patient's signed consent (usually obtained without explanation) or coercion out of need for insurance benefits—there is a tendency to record very little or to carefully censor what is put down. A hospital, though, must have some records if it wishes to keep its accreditation. A number of hospitals have lost their accreditation because their records were deemed inadequate. Now with the Professional Standards Review Organization program on the horizon (the 1972 PSRO law mandates peer review of Medicaid and Medicare hospital treatment by 1976), and insurance companies and government programs demanding

to keep awake. Some may keep notes for clinical studies, or for teaching resources. Dr. Sandor Rado, for example, never took notes except for dreams; he had a particular interest in dreams. Some write down in order to aid in decoding; the psychiatrist's role is, among other things, that of a translator and interpreter of a foreign language, so to speak. For example, a person reports a dream about birds coming through the window attacking him/her; the dream and the interpretation—"You want to kill your baby"—may be recorded.

Assuming there is a record, it would not pass muster under the business records exception to the hearsay rule, which allows the admission of records only when they have a high degree of accuracy and are customarily checked as to correctness.⁸ There may be "truth in lending" but there is no "truth" in entertainment or psychotherapy. Psychotherapy is concerned with man's struggle to cope with internally or externally induced stresses. The law is concerned with the outside world, *i.e.*, with objective facts, that which is called truth. The psychotherapist, on the other hand, is not engaged in a fact-finding process; he acts as a guide in a "corrective emotional experience." He "sets the stage," so to speak, so that the patient confronts and integrates what has been previously too painful and unacceptable.

Actually, where a psychiatrist is subpoenaed, the attorney does not await his testimony or records with bated breath. The records, if any, are illegible or cryptic; and many psychiatrists say that since records are rarely kept they could destroy theirs without arousing suspicion. In lieu of records, if called as a witness, the psychiatrist is not apt to be a friendly one.

The primary purpose of the attorney issuing the subpoena, in effect, is not to investigate but rather to intimidate the opposing party into foregoing or settling the case. Privilege offers no protection against such blackmail. Since the privilege covers only the content of a communication and not the fact of a relationship, the identity of a treating psychiatrist can be elicited under a discovery demand. Pressure then can be brought to bear which

justification for the hospitalization, or length of stay, hospitals are demanding that their staffs maintain records in sufficient detail to justify both. Senator Eagleton was done in by a hospital record, revealing hospital admission and electroshock therapy for depression, though psychodynamics or psychiatric history did not come to light. Thus, while the files of a hospital may be brief, the very fact of a hospital record results in ignominy.

8. See *In re Herron*, 212 N.W.2d 474 (Iowa 1973). The law generally takes words literally, but in psychotherapy as in lovemaking, decoding is part of the process. The word "stop," for example, in therapy or love may mean stop or it may mean "please go on," but a stop sign in law means only stop. Esther Vilar, who claims that women have trained men to become their slaves, decodes the expression, "I love him," as meaning, "He is an excellent workhorse." E. VILAR, *THE MANIPULATED MAN* 49 (1974) See Szasz, *Scientific Method and Social Role in Medicine and Psychiatry*, 101 A.M.A. ARCHIVES OF INTERNAL MED. 228 (1958).

frightens the patient, notwithstanding assurances from his attorney, into thinking that all his statements made in psychotherapy will be revealed in open court. It is impossible to estimate the number of cases which patients have dropped or feared to initiate because of the apprehension of disclosure.⁹ Many persons feel that they will become objects of stigma, censure and ridicule if even disclosure of the relationship is made. "If one thing was made perfectly clear in this first slow, polite day of Senate Committee hearings on the nomination of Representative Gerald R. Ford to be Vice-President," wrote the *New York Times*, "it is that consulting a psychiatrist or psychotherapist is still an unforgivable sin for an American politician."¹⁰

Two developments have come to pass. One development, that within the legal system, is the idea that psychiatric testimony or records has special value or relevancy, although in general we offer only "a penny for your thoughts." (In the Old Testament, Joseph was made the most powerful man in Pharaoh's kingdom because of his ability to interpret dreams.) The other development, that in the psychiatric field, is the idea that a shield law would protect against a demand for information in court.

Approximately thirty-six states have a physician-patient privilege; but while psychiatrists are licensed in the practice of medicine, they have come to find that the medical privilege is so riddled with qualifications and exceptions that it does not adequately meet the needs of patients in psychotherapy.¹¹ In 1959 Georgia enacted a specific "privilege for communication between psychiatrist and patient."¹² That statute says nothing more; it is more in the nature of a commandment or injunction than a law, and probably would receive a grade of failure if submitted in a law class on legal draftsmanship, yet it is probably respected more than the detailed statutes—demonstrating that it is not the statute but the spirit about the issue that is determinative.

The Group for the Advancement of Psychiatry (GAP), in 1960, urged the enactment of legislation granting the same privilege to psychiatrist-patient communications as exists between attorney and client. Professor Joseph

9. Letter from Dr. Maurice Grossman, Chairman of American Psychiatric Association Task Force on Confidentiality, to the author.

10. Dr. Arnold A. Hutschnecker, whose name has been so associated with President Nixon, is writing a book to be called "The Drive for Power," asking why politicians, if they need help, should not avail themselves of the services of a therapist, and describing the drive for power that sometimes may lead to violent behavior on the part of statesmen. Hutschnecker, *The Stigma of Seeing a Psychiatrist*, N.Y. Times, Nov. 20, 1973, at 39.

11. The legislative and jurisprudential restrictions on the medical privilege are enumerated in R. SLOVENKO & G. USDIN, *PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATION* (1966).

12. GA. CODE ANN. § 38-418 (Supp. 1960).

Goldstein and Dr. Jay Katz of Yale University pointed out the difficulties which would arise from legislation by mere reference to the attorney-client privilege,¹³ whereupon GAP revised its proposal and urged the enactment of a long and detailed psychotherapist-patient privilege similar to that embodied in a 1961 Connecticut statute.¹⁴ (Goldstein and Katz were members of the committee that prepared the Connecticut bill.) The Connecticut law is the model of a number of recently enacted statutes.

The proposed Federal Rules of Evidence omit a medical privilege but recommend a psychotherapist-patient privilege (Rule 504), also modeled on the Connecticut law. This proposed rule, along with several others, evoked considerable criticism. Two committees of the American Bar Association recommended to the A.B.A. House of Delegates "the complete abolition of any and all privilege in the physician-patient area including the proposed 'psychotherapist-patient privilege.'" The Committee on the Judiciary of the House of Representatives, after extensive hearings, recommended and the House approved (Feb. 6, 1974) the scrapping of all the proposed rules on privileges and left the federal law of privileges unchanged, to wit, that the federal courts are to apply the state's privilege law in actions founded upon a state-created right or defense, while in other civil cases and in criminal cases the principles of the common law, as interpreted by the federal courts in the light of reason and experience, would be applied.

The proposed rule ran into difficulty because it had become enmeshed with related politically hot issues of news media privilege and presidential privilege. Another of the controversial elements entering into the discussion on privilege, other than these claims for privilege, was instigated by Dr. Ernest B. Howard, Executive Vice President of the American Medical Association. He advocated the deletion of Rule 504, which he viewed as being a replacement for the old physician-patient privilege. He wrote to the chairmen of the House and Senate Judiciary Committees decrying the absence of a physician-patient privilege and sought the reintroduction of the proposed physician-patient privilege found in the Uniform Rules of Evidence of 1953, although this rule, as carried out in various states, is so full of exceptions that it offers little or no shield.

The observation of Judge Spencer A. Gard (chairman of the special committee of the Commissioners on Uniform State Laws that drafted the Uniform Rules of Evidence) about the physician-patient privilege enacted in 1959 in Illinois is also applicable to the Uniform Rule proposal:

13. Goldstein & Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 118 AM. J. OF PSYCHIATRY 733 (1962).

14. CONN. STAT. ANN. § 52-146d (1974).

[T]he exceptions contained in the act are so comprehensive that . . . there is scarcely any room left for the privilege to operate, which leads to the conjecture that the statute is a legislative sanction of professional ethics in the interest of the medical profession rather than a response to a demand of public interest for the curtailment of judicial inquiry.¹⁵

History has a way of repeating itself. The psychotherapist-patient privilege, like the medical privilege, offers a shield that is pierceable. It is, as stated, a form of a zero-sum game. Like the Roman god Janus, the law on privilege faces in opposite directions at the same time—what it gives with one hand it takes away with the other. Virtually nothing is shielded by the shield. In every jurisdiction, the exceptions and implied waivers are so many and so broad that it is difficult to imagine a case in which the privilege applies. The most common form of forfeiture is the one in which a patient is said to waive the privilege by injecting his condition into litigation, as when his condition is an element of claim or defense. In this vein, one provision in no-fault automobile insurance legislation expressly and completely eliminates the statutory physician-patient privilege.¹⁶ In another exception, involving proceedings for hospitalization, the interests of both patient and public are said to call for a departure from confidentiality. Another exception is made in child-custody cases out of regard for the best interests of the child.

The commentator on privilege is thus in a position analogous to that of the history professor who was invited to give a lecture on the private life of Catherine of Russia. He began his lecture: "Gentlemen, I am to lecture on the private life of Catherine of Russia. Gentlemen, Catherine of Russia had no private life."

California's psychotherapist-patient privilege, enacted in 1965, was tested five years later in the much publicized case involving Dr. Joseph E. Lifschutz.¹⁷ The case was featured on the Law page of *Time*,¹⁸ and was reported at numerous meetings of psychiatric societies and in psychiatric and

15. S. GARD, ILLINOIS EVIDENCE MANUAL 549 (1963). Moreover, the physician-patient privilege as a practical matter is eliminated in diversity cases in federal courts under Rule 35 of the Federal Rules of Civil Procedure, which became effective in 1938. Under that rule, a party physically examined pursuant to court order, by requesting and obtaining a copy of the report or by taking the deposition of the examiner, waives any privilege regarding the testimony of every other person who has examined him in respect of the same condition. While waiver under Rule 35 may be avoided by neither requesting the report nor taking the examiner's deposition, the price is one which most litigant-patients are probably not prepared to pay. PROPOSED FEDERAL RULES OF EVIDENCE, rule 501, Advisory Comm. Note.

16. See, e.g., Mich. Act 294, Public Acts of 1972, §§ 3158-59.

17. *In re Lifschutz*, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

18. *TIME*, April 27, 1970, at 60.

psychoanalytic bulletins and news letters. To cover legal expenses, the Northern California Psychiatric Society made a nationwide appeal to psychiatrists for contributions. The American Psychoanalytic Association and the National Association for Mental Health filed amicus curiae briefs. Although great effort was exerted on behalf of privilege, the case illustrates the irrelevancy of privilege law (as well as the irrelevancy of much psychiatric testimony).

Joseph F. Housek, a high school teacher, brought a \$175,000 damage suit against John Arabian, a student, alleging an assault which caused "physical injuries, pain, suffering, and severe mental and emotional distress." During a deposition taken by defense counsel, Housek stated that he had received psychiatric treatment ten years earlier from Dr. Lifschutz over a six month period. The defendant then subpoenaed Dr. Lifschutz and Housek's psychiatric records. Dr. Lifschutz not only refused to produce any of his records, assuming there were any, but declined to disclose whether or not Housek had consulted him or had been his patient.

Upon the psychiatrist's refusal to cooperate, defendant Arabian sought a court order compelling Dr. Lifschutz to answer questions on deposition and to produce the subpoenaed records. The court determined that the plaintiff had put his mental and emotional condition in issue by instituting the pending litigation, and the statutory psychotherapist-patient privilege did not apply. The privilege, belonging to the patient—not to the physician—is waivable by the patient in the act of bringing suit.

Statements made by a patient to a physician or a psychiatrist as to the symptoms and effects of his injury or malady are admissible in evidence on his behalf as an exception to the hearsay rule. Under the sporting theory of justice it is deemed only fair that the defendant also have the benefit of these statements when they are favorable to him. Since the privilege is intended as a shield and not a sword, it is considered dissolved or waived by the patient when he makes a legal issue of his physical or mental condition. Thus, when plaintiff Housek claimed that he had suffered "emotional distress" as a result of the injuries he had suffered, the privileged status of his communications with his psychiatrist was waived.

The permissible scope of inquiry, in *Lifschutz* as well as other cases, depends upon the nature of the injuries which the plaintiff-litigant himself has brought before the court. The crucial test is one of relevancy or materiality: disclosure is compelled only with respect to the mental condition put in issue; disclosure of other aspects of the patient-litigant's personality is not compelled. Thus, in *Lifschutz*, for example, the defendant would not be authorized to demand examination of plaintiff's psychotherapeutic commu-

nications to determine if he had ever exhibited aggressive tendencies or other such personal attributes. The plaintiff had not put in issue such elements of his mental condition merely by instituting an action for damages resulting from assault. However, if the issue had been "who started the affray?" rather than "did the damages result from the assault?" then evidence of character, that is, whether or not the patient had ever exhibited aggressive tendencies, would have been relevant and material. The logic would be: "Quarrelsome men are more likely than others to commit assaults. Mr. X is quarrelsome; Mr. Y is peaceable. In an affray between the two, it is more likely that Mr. X was the aggressor."

As a theoretical principle, with relevancy or materiality as the guideline, the burden rests upon the patient to show that a given communication is not directly related to the issue he has tendered to the court.¹⁹ Only the patient knows both the nature of the injury for which recovery is sought and the general content of the psychotherapeutic communications. He may either have to delimit his assertion of "mental or emotional distress" or explain the object of the psychotherapy in order to convince the court that the psychotherapeutic communications sought are not directly relevant to the mental condition that he has placed in issue. With a little bit of luck, from the patient's viewpoint, the court as a matter of course, without any showing, will rule that psychotherapeutic communications are irrelevant and immaterial, or that other, less prejudicial evidence is available. Psychiatric evidence may say, for example, that Mr. Y is so inhibited that he would not likely be an aggressor, but classmates may be readily available to testify that he would be reluctant even to return a volleyball serve.

In any event, the statutory privilege as a guideline is "much sound and fury signifying nothing." The privilege is a venture that gains nothing. The practice in states where there is no physician-patient privilege or psychotherapist-patient privilege is the same as in states where there is a privilege. Moreover, in states which have enacted a privilege, the practice is generally found to be the same thereafter as it was before enactment.²⁰ The harm

19. In some situations the pleadings may clearly demonstrate that the patient is placing his entire mental condition in issue and that history of past psychotherapy will be relevant. This was illustrated when a mental patient in a prison hospital sought release, contending that he was not a dangerous or violent individual as the state mental health officials asserted. When the patient's medical records were offered to substantiate the state's position, he claimed such records were privileged. The court, analogizing the facts before it to those of the patient-litigant exception to the medical privilege, found that "petitioner himself caused his mental condition to be put in issue by his application for habeas corpus and averments of his brief." *In re Cathey*, 55 Cal. 2d 679, 361 P.2d 426, 12 Cal. Rptr. 762 (1961).

20. Dr. Jonas R. Rapoport of Maryland, however, says that in his experience prior to 1965 (when Maryland enacted a privilege) attorneys quite frequently used the lack

done, though, by privilege law is that the privilege gives an undue sense of importance to communications in psychotherapy. The privilege concept tends to invest them with an aura or sense of relevancy and materiality to issues on trial.

Because the real test is one of relevancy or materiality (which arises regarding all evidence in every trial) we must ask: "what are the material issues," and "what is relevant or competent to establish them?" In other words, does the item of evidence tend to prove that precise contention or fact which is sought to be proved? In every case where the testimony or records of a physician or psychotherapist have been required by a court, it was because the evidence was deemed relevant or material to an issue in the case. As a consequence, in the last analysis, the confidentiality of a physician-patient or psychotherapist-patient communication is protected from disclosure in a courtroom only by a showing that the communication would have no relevance or materiality to the issues in the case.²¹

What about criminal cases, which involve a court-ordered examination? Here, the law on self-incrimination and coerced confession, rather than privilege, governs the scope of admissible psychiatric testimony. What happens is that testimony is permitted with the caution to the jury that "the psychiatrist's testimony is only to be used in determining defendant's sanity and not his guilt." The shield law has been phased out of criminal cases on the

of privilege as the basis for going on "fishing expeditions" through psychiatrists' records. He states that since the law has been passed there has been a cessation in Maryland of such "fishing trips," although in law the exceptions to privilege would allow the same fishing as would prevail under a situation of no privilege. He observes:

While I recognize that the crucial test is one of relevancy and materiality, I still believe that certain patients or at least their psychiatrist need to feel secure in a privilege statute when asking for or receiving reassurance that communications essentially are privileged. While this may not in itself be as necessary for the type of very intensive relationship that occurs in a psychoanalytic practice, I do believe that in the practice of psychotherapy at lesser levels of intensity when strong transference neuroses do not develop that such reassurances are indicated and, in fact, very necessary for the smooth operation of a treatment program.

Letter from Dr. Jonas R. Rapoport to the author, March 4, 1974.

21. A motion to quash a subpoena is in order when other evidence more relevant and material is available, or would be less onerous to obtain. Such a procedure might even protect a patient from having to state in discovery processes whether or not he ever saw a psychiatrist. Even under the patient-litigant exception, the judge ought to determine whether or not there are other available sources from which to obtain the information; and if not, to propound the questions that need clarification to resolve the issue at hand, and limit testimony to those factors. It may be noted that a bill to protect newsmen, who have more relevant and material evidence to offer than a treating psychotherapist, would require disclosure only if the party seeking the information satisfied the court that the information was indispensable to the prosecution or defense of the case, could not be obtained from any other source, and that there was a compelling public interest in disclosure. *N.Y. Times*, Jan. 4, 1974, at 41.

theory that it is applicable, at best, only to a treating psychiatrist and not to an examining one, where the relationship is likely to be one entered into at arm's length.²²

The various rules which have been developed to restrict the role of an examining psychiatrist are rooted in constitutional principles against self-incrimination and coerced confession. Michigan, for example, provides that a psychiatrist who conducts a competency-to-stand-trial examination may not be called in to testify in the criminal trial if there is an objection to the admission of such testimony by the defendant.²³ A Massachusetts statute grants a privileged status to a confession of crime made to a psychiatrist who examines the defendant while in custody under a mandatory examination statute (the so-called Briggs law).²⁴

It is interesting to speculate how the privilege would affect a treating psychiatrist whose patient is an accused criminal. DeWitt, in his comprehensive book, *Privileged Communications Between Physician and Patient*, says that "It may safely be assumed, we believe, that the privilege under proper circumstances, extends to all criminal actions and proceedings in [twenty-

22. See, e.g., *People v. Schrantz*, 213 N.W.2d 257 (Mich. 1973); *Massey v. State*, 226 Ga. 703, 177 S.E.2d 79 (1970), cert. denied, 401 U.S. 964 (1971); Note, *Patient-Psychiatrist Privilege Does Not Apply to Mental Examination by a Court-Appointed Psychiatrist*, 21 J. PUB. L. 251 (1972).

23. *People v. Martin*, 386 Mich. 407, 192 N.W.2d 215 (1972); *People v. Garland*, 44 Mich. App. 243, 205 N.W.2d 195 (1972), citing MICH. COMP. LAWS ANN. § 767.27a(4) (1968), which provides: "The diagnostic report and recommendations shall be admissible as evidence in the hearing [on competency to stand trial], but not for any other purpose in the pending criminal proceeding." See also *State v. Fontana*, 152 N.W.2d 503 (Minn. 1967).

24. Apart from special rules, these situations would seem to be covered by constitutional limitations on admissibility of evidence. A. MOENSSENS, R. MOSES & F. INBAU, *SCIENTIFIC EVIDENCE IN CRIMINAL CASES* 87 (1973); Note, 15 STAN. L. REV. 538 (1963). The prevailing practice is that a defendant who asserts a defense of insanity cannot claim possible self-incrimination if ordered to be examined by a court psychiatrist; and if he persists in that claim, he is deemed to have waived his insanity defense. However, the defendant's waiver permits the psychiatrist to testify only as to the facts which form the basis of his opinion on the question of sanity.

It is not permissible to use the psychiatric examination as a source of evidence which would be relevant on the issue of guilt. Thus, admissions to the crime cannot be considered in determining whether the defendant committed the acts constituting the crime charged, but they can apparently be used insofar as they relate to the defendant's mental state. *Lee v. County Court of Erie County*, 27 N.Y.2d 432, 267 N.E.2d 452 (1969), cert. denied, 404 U.S. 823 (1971).

In any event, it is to be noted that what is not achieved directly is often achieved indirectly. As no opinion is value-free, a confession to the psychiatrist by a person charged with, say, public drunkenness, that he has recently cut a person's throat will color the psychiatrist's report on competency to stand trial, or on criminal responsibility. When this type of information is made known to the psychiatrist, he is likely to report that the defendant is incompetent to stand trial, which usually results in a long or indeterminate confinement.

two] jurisdictions.”²⁵ However, the protection of a shield law is more a product of belief than fact. Many of the medical privilege statutes in the jurisdictions enumerated by DeWitt are made inapplicable to homicide prosecutions where the disclosure relates directly to the fact or immediate circumstances of the homicide. The Illinois psychiatrist-patient privilege, enacted in 1963, four years after passage of a physician-patient privilege, expressly states that it does not extend to criminal proceedings in which the patient introduces his mental condition as an element of defense. California and most other states except all criminal proceedings.

As a matter of practice in all states, however, a prosecutor is not likely to call a treating psychiatrist as a witness against his patient. It would likely boomerang. The case of a man whom we shall call John Voyeur, a man of vision, comes to mind. Mr. Voyeur engaged in the practice of breaking into homes when no one was there in order to drill a hole in the bathroom wall which would permit a good view from the outside. On one occasion, unhappily for him, he was apprehended while breaking and entering. As in this case, the fact that a defendant has been seeing a psychiatrist is not advanced by the prosecutor; in the event of trial, a prosecutor would establish the commission of the act or *mens rea* independently of the treating psychiatrist. The fact of treatment is, instead, brought up by defense counsel, as a show of rehabilitation, in plea bargaining or obtaining a dismissal of the charge.

But suppose Mr. Voyeur is picked up and charged with writing bad checks. Evidence of voyeuristic tendencies would be legally immaterial, impermissible evidence of character. To allow such evidence would smack of the ludicrous proceeding in Woody Allen's *Bananas*. In this film, Woody Allen traveled to St. Garbage, South America, and became involved with a rebel group. In a trial for treason, an F.B.I. agent testified that he was dangerous, inferred from the fact that he was a New York Jew and had marched in protest parades. In an effort to impeach the witness, Woody Allen serving as his own attorney on cross-examination asked the witness, "Have you ever had sex with a girl with a big breast?" "Yes," replied the witness. "And how was it?" "Exotic," the witness replied. Woody Allen was just checking, he said, but the testimony on direct and cross-examination does illustrate the significance or lack of significance, or absurdity, that "evidence" may reach.

The crusade and the hullabaloo over privilege in civil or criminal cases, as mentioned, insinuates that the content of a psychotherapy session may

25. C. DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 238 (1958).

be relevant or material in litigation. Out of a sense of pride a person may fear disclosure of the confidences he makes about his sexual life, his dependency, his insecurity, his struggle in interpersonal relations, all interspersed with fantasy. But these subjects have little or no significance in legal proceedings. The dialectic of one's right of privacy versus the danger that secrecy will allow truth to go undetected is not here the contest. One individual, when in analysis with Dr. Karl Menninger, told about relating one of his dreams to his wife. Dr. Menninger said tersely, "Your unconscious is none of your wife's business." Nor should it be the court's as it can only confuse and complicate matters. The sunlight advocated by Justice Brandeis would not come from disclosure of psychotherapy sessions, even if they were tape recorded.²⁶

It is widely considered that a treating psychiatrist, seeing the patient over a period of time without apparent motive to deceive, has more to offer the court than an examining psychiatrist, and somehow, from childhood on, the value of information seems to increase in direct proportion to its prior secrecy. In fact, though, a psychiatrist appointed to carry out an examination usually obtains in one hour more information related to the legal issues without a promise of confidentiality, than a treating psychiatrist who may have seen the patient over a period of years. An examiner conducts an interview with the legal issue directly in mind, whereas in therapy the subject may never come up or if it does it may be diluted with fantasy and association. The issue, to repeat, is not privilege but rather the relevancy or materiality of the communication; in some cases, where the psychiatrist is an agent of the state, the issue may be the constitutional limitations on its use.

Apart from the foregoing considerations dealing with the substance of a

26. In *Kilarjian v. Horwath*, 379 F.2d 547 (2d Cir. 1967), an action for personal injuries and property damage sustained in a collision between plaintiff's automobile and defendant's truck, medical experts testified on behalf of the plaintiff that the shock of the collision produced a nerve root irritation which affected plaintiff's left arm. The defendant asserted that the condition was not caused by the accident, and further asserted that plaintiff was actually suffering from a "conversion reaction" stemming from his anxieties about his one and one-half year separation from his wife and children, and his frustrated desire to marry his secretary with whom he had been living. The trial judge refused to admit into evidence the portions of the psychiatric report of a neurological examination of plaintiff which stated that the plaintiff had been living with his secretary and intended to marry her. In affirming judgment for the plaintiff, the appellate court noted the established principle that it is within the discretion of the trial judge to exclude evidence, though otherwise admissible, when he is convinced that it will create a danger of prejudice which outweighs its probative value. The case law recognizes that certain circumstances call for the exclusion of evidence, even when of unquestioned relevance, if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." PROPOSED FEDERAL RULES OF EVIDENCE, rule 403.

communication, the way of privilege is not the route to take to protect communications in psychotherapy. A privilege is a *privata lex*, a special law intended for or restricted to the use of a particular person or class of persons. If the privilege route is taken, the definition of the parties to the shielded relationship needs to be reevaluated in light of new therapy techniques which question the medical model of mental illness.

Traditional privilege posits a dyadic relationship, a one-to-one relationship, which was commonplace in a simpler day. But today psychotherapy may take place in community centers or clinics, where many people may have contact with the patient. Group therapy is another innovation which casts doubt on a privilege based on a dyadic relationship. Some predict that the day is near when almost all therapy will take place in groups; this may be an overstatement but it is indicative of the trend. Revelations in such sessions would not be covered by traditional privilege statutes by virtue of an interpretation which holds that third parties pollute confidentiality.²⁷

In arriving at a determination of which healers should be covered under privilege, the Group for the Advancement of Psychiatry, being composed of psychiatrists, sought in its proposal of 1960 to cover the "psychiatrist-patient" relationship. The proposal recommended no coverage for psychologists, social workers, counselors, or other psychotherapists. Through lobbying in some states, psychologists and social workers have obtained a privilege as part of the licensing or certification law. In general, though, the trend is to move for a "psychotherapist-patient" privilege as part of the code of evidence. The proposed but House-rejected Federal Rules of Evidence, like the new laws adopted in some states, define a "psychotherapist" as a medical doctor who devotes all or part of his time to the practice of psychiatry, and a licensed or certified psychologist who devotes all or part of his time to the practice of clinical psychology. The privilege extends to communications made to pretenders who are reasonably believed by their patients to be medical doctors, as well as general practitioners doing part time counseling whether or not they have special qualifications.²⁸ Unlicensed therapists

27. Be that as it may, group members begin to see that the whole group effectiveness is built on mutual trust, and they lose all concern, perhaps without warrant, about the possibility that a member of the group may tell an outsider about something that has been said in the group meetings. As people begin to treat one another and feel more secure, they lose all concern about the possibility of disclosure of what has been said.

28. PROPOSED FEDERAL RULES OF EVIDENCE, rule 504(a)(2) sought to cover "a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, *while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction*" (italics added). Professor Krattenmaker illustrates:

If the family doctor inquires, "How did you sprain your ankle?" and the re-

and counselors of all kinds, including psychologists, however, can be required to reveal the confidences of those whom they have counseled, even if the patients thought what they were saying was privileged and believed the therapists to be licensed. The Advisory Committee had said that the distinction made between unlicensed persons thought to be medical doctors and unlicensed persons doing psychotherapy "is believed to be justified by the number of persons, other than psychiatrists, purporting to render psychotherapeutic aid and the variety of their theories."

Psychiatric social workers, among others, were not included in that proposed rule nor are they recognized by other evidence codes. Can the omission be justified? Social workers, the mainstay of staffs of most public health facilities, are called the "poor man's psychiatrist." Their clients are referred to as "patients." Since it is the therapeutic function, rather than any particular group, that the law on privilege is theoretically designed to protect, there is little justification for extending privileged status to one group and denying it to another that is functionally accomplishing the same thing.²⁹

Moreover, to draw a distinction between various types of therapists is hard to justify since there is no evidence that one type of psychotherapy produces better results than another. For that matter, very little has been done in evaluation of the effectiveness of psychotherapy, be it in general psychiatry or psychoanalysis. (One might add incidentally that this is true of our en-

sponse is, "While walking my mistress home from a date," the response is not privileged. If the family doctor asks, "Why are you depressed?" and the patient says, "Because I just murdered my mistress," the patient's statement is privileged

Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 70 (1973).

Ivan Illich, a leading advocate of the view that professionals do not pursue aims in society's best interests, observes:

Most curable sickness can now be diagnosed and treated by laymen. People find it so difficult to accept this statement because the complexity of medical ritual has hidden from them the simplicity of its basic procedures. It took the example of the barefoot doctor in China to show how modern practice by simple workers in their spare time could, in three years, catapult health care in China to previously unparalleled levels. In most other countries health care by laymen is considered a crime.

I. ILLICH, *The Professions as a Form of Imperialism*, NEW SOCIETY, Sept. 13, 1973 at 634, in *TOOLS FOR CONVIVIALITY* (1973).

29. See Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 CALIF. L. REV. 1050 (1973). The American Psychiatric Association's Council on Emerging Issues recently appointed a task force to draft a position paper on the topic, "What Is a Psychiatrist—What is Mental Illness?" *Psychiatric News*, Nov. 21, 1973, at 13, col. 3. Should a patrolman or parole officer have some measure of privilege when he is acting in the role of counselor? Only a small percentage of citizens' requests for service from the police department relate to crime. The Police Department of Kansas City, Mo., for example, receives about 1,300 calls per day, and of these calls only 91, or 7% relate to crime in any way. 93% of the calls relate to emergency service, conflict resolution, and

ture educational enterprise.³⁰) The major determinants of outcome in psychotherapy, it seems, are not therapeutic procedures per se, or what is said. Rather, personal qualities of therapist and patient and the concordance between the patient's belief as to his needs and the therapeutic method employed are more apt to affect the result. The source to which the patient attributes his symptoms, which is a function of his education and cultural status, and the views of the therapist he happens to encounter, determine whether the relationship will be successful.³¹

The other party to the relationship is usually called a "patient," which may be used for lack of a better term. "Sufferee" sounds like women's liberation; "client" sounds too commercial; "counselee," "student," or "pupil" are associated with schools. In ordinary conversation the term "patient" has medical connotations: a patient is a sick individual under the care and treatment of a physician or surgeon—a client for medical services. But "patient" as an adjective also refers to one who bears pains or trials calmly or uncomplainingly, one who is not hasty—and considering the length of psychotherapy, it is an apt term. "Patient" is defined in the Proposed Federal Rules of Evidence as "a person who consults or is examined or interviewed by a psychotherapist for purposes of diagnosis or treatment of his mental or emotional condition."

Privileged status dependent on the professional designation is not warranted. What difference does it make whether a person achieves a "corrective emotional experience" by talking with a psychiatrist, psychologist, social worker, preacher, or a good friend? Some people may have only a pet,

miscellaneous requests. Letter from James R. Newman, Assistant Chief of Police, Kansas City, Mo. to the author, Nov. 20, 1973. A parole officer likewise has the task of being both law enforcement officer and social worker. Wicker, *The Lessons of Parole*, N.Y. Times, March 8, 1974, at 33, col. 5. Some say that the hairdresser is the closest confidant of women. John Steinbeck observed:

When women go to a hairdresser, something happens to them. They feel safe, they relax. The hairdresser knows what their skin is like under the makeup; he knows their age; they don't have to keep up any kind of pretense. Women tell a hairdresser things they wouldn't dare confess to a priest, and they are open about matters they'd try to conceal from a doctor.

J. STEINBECK, *TRAVELS WITH CHARLEY: IN SEARCH OF AMERICA* (1962). While it may be argued that talking is not the essence of hairdressing, as it is of psychoanalysis, the modern girl may really let her hair down while at the hairdresser. The average American woman between the ages of eighteen and eighty spends approximately two and one-half hours per week in the beauty salon, and the hairdresser provides whatever service she needs—lover, baby-sitter, psychiatrist, physician, father confessor, marriage counselor, marriage wrecker—all for the price of a shampoo and set. N. LOUPOS, *THE HAPPY HAIRDRESSER* (1973).

30. See Wallerstein & Freedman, *The Future of Analysis—A Rebuttal and a Rejoinder*, *Psychiatric News*, Nov. 7, 1973, at 6-7.

31. Frank, *Psychotherapy: The Restoration of Morale*, 131 *AM. J. PSYCHIATRY* 271 (1974).

purebred or mongrel, two-legged or four-legged, to turn to. Little Orphan Annie seems to talk only to Sandy, her dog. A pet lover who fashions a pet into a confidant may wonder whether communications to the pet are privileged and if not, why not, or why there is no owner-pet shield. After all, the law shields the lawyer-client, husband-wife, and priest-penitent relationships. Using Dean John Wigmore's oft-cited criteria for privilege, it may be said that the law inadequately protects owner-pet communications: it can be demonstrated that a communication between owner and pet is made in confidence, that violation of the confidence is detrimental to the purpose of the relationship, that the relationship is one that should be fostered, and that the injury to the relationship through public disclosure of the communication is greater than the benefit to justice to be derived therefrom.

There is an intense relationship between man/woman and his/her pet; they form a unity.³² Senator George Vest, in his famous eulogy to the dog delivered in 1870, said: "The one absolutely unselfish friend that a man can have in this selfish world, the one that never deserts him and the one that never proves ungrateful or treacherous is his dog." A pet is sometimes regarded as a child or marital partner, and the pet's name is even signed on everything—for example, "Best wishes from Judy and Seymour" (Seymour is the dog).³³ The relationship is so close that some psychiatrists conduct "pet therapy," in which the patient is seen along with his pet. The practitioner of this type of therapy appreciates the fact that a patient can best be understood or can best work out his problems through his experiences with his pet. The pet is not an allowable tax exemption or deduction like a medical expense but nonetheless it may represent the deepest and highest aspirations in the life of the owner. People choose pets resembling not only their outer image (Elizabeth Taylor tinted her hair the same color

32. There are many common sayings about dogs and people. "You can't teach an old dog new tricks" is often used to describe a person who refuses to change his ways, or to learn a new way of doing something. "Barking dogs never bite" describes people who sound more dangerous than they really are. "Barking up the wrong tree" means to look for something in the wrong place. "Let sleeping dogs lie" means to leave a situation undisturbed. "Tail wagging the dog" means, among other things, that an unimportant member of the group is actually directing everyone's activities. "Every dog has his day" is an expression used when something pleasant happens to a person, especially one who has been having bad luck.

33. A man tends to call his wife or girl friend "Pet" when they are on good terms. One observer notes that children away at school who get the most homesick are those who have pets awaiting them at home. E. Reed, *Off the Record* (syndicated cartoon), Feb. 4, 1974. Konrad Lorenz, a specialist on animal behavior, observes: "Amongst passionate lovers of animals, particularly dog lovers, there is a special category of unhappy people who, through bitter experience, have lost faith in mankind and seek refuge with animals." K. LORENZ, *MAN MEETS DOG* 67 (1954). At the Boston Hills Pet Memorial Park, gravestones carry such inscriptions as "Tootsie, Our Precious Baby. She Gave Us The True Meaning of Love." *N.Y. Times*, Feb. 20, 1974, at 21.

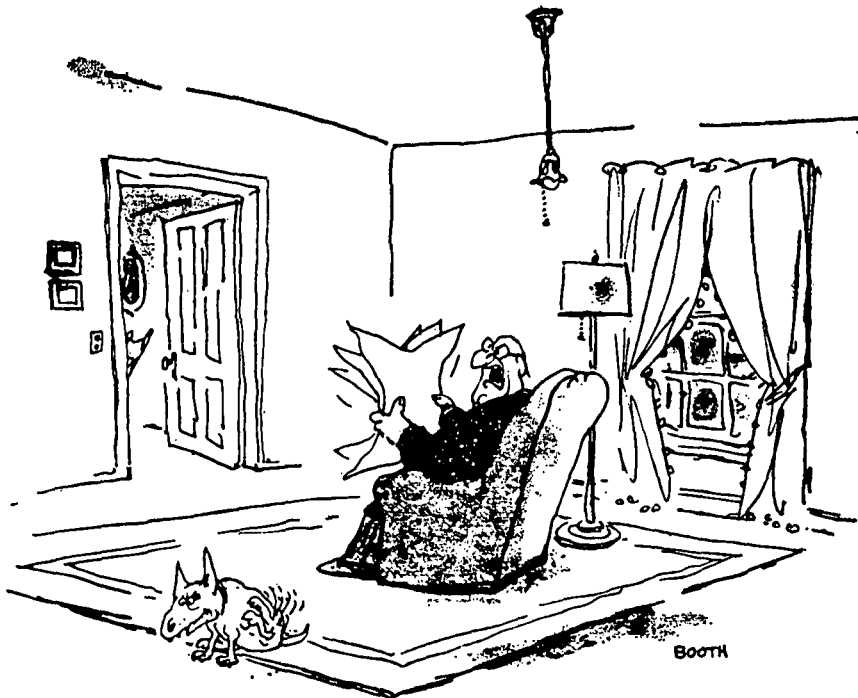
as her cat's) but also their inner characteristics. An owner may unconsciously train his pet to be what he would like to be himself—obedient or defiant, aggressive or quiet—and then identify with the pet. The pet is a direct descendant of a totem animal utilized by man in his development and civilization. Totemism was a device used by primitive man to control and conceal sexual and aggressive drives; the pet serves the same purpose for civilized man as the totem animal did for the primitive.³⁴

Alert to this history, one entrepreneur has opened an establishment called "Dogs for Neurotics." Those dogs that have some training are given a degree called "Psychodog." These dogs offer emotional support, comparable to the crutch that the blind derive from a seeing-eye dog. While it is generally considered racist to classify people, a score is given to every dog (and to psychiatrists within the professional circle) according to their quality. The selected virtues and faults receive marks in accordance with their rarity and importance to the purpose.³⁵

34. Heiman, *Man and His Pet*, in *MOTIVATIONS IN PLAY, GAMES AND SPORTS* 329 (R. Slovenko & J. Knight eds. 1967). Current studies cast light on the age-old effect of pet birds on the mental health of pensioners living alone. In treating schizophrenia, it has been found that dogs can be used successfully even where human therapists have failed. Dr. Samuel A. Corson of Ohio State University uses so-called "feeling heart" dogs, chosen for their warmth and friendliness, to treat patients who did not respond to conventional therapy. In one case, for example, a young lady, diagnosed as a catatonic schizophrenic, was brought to the university hospital screaming and disoriented. She did not respond to drugs or twenty-five sessions of electroshock and instead became withdrawn, frozen and almost mute. She was given one of the dogs as her constant companion and gradually recovered enough to be discharged from the hospital. With the dogs, Dr. Corson reports, the patients become "different people." *N.Y. Times*, March 25, 1974, at 1, col. 2; *NEWSWEEK*, April 22, 1974, at 80.

35. "We try to match the personalities of the dogs with the needs of specific patients," says Dr. Samuel Corson, quoted in *My Dog, The Therapist*, *NEWSWEEK*, April 22, 1974, at 80. Barbara Walters, on her television program, "Not For Women Only," National Broadcasting Co. (week of April 22, 1974), discussed the question, "What kinds of animals go with what kinds of people?" According to the evidence, it seems that the Chihuahua asks little but gives much in return—he is a compact bundle of love and sunshine—not a "yappy" dog, but a very inquiring and interested little creature. The Beagle is almost never vicious; he has a resilient personality, tolerating a great deal of pain or mistreatment without serious retaliation, and for this reason he can be trusted with children, who often hurt accidentally. The Dachshund, often caricatured for its short legs and long body, is an individualist, independent and often stubborn. The Manchester, that "smooth-coated" dog, is a little slow to place his confidence in anyone, but once he makes friends, it is a lasting friendship; he is pretty much a one-man dog. The Pomeranian is known for his acute hearing and alertness, is quick to sense the mood of his owner, and when sadness strikes, the sympathy and love of a Pomeranian makes itself felt. He creeps close, touches his pink tongue to his master's hand, and stays near. He never grows noisy or boisterous at such a time; his deep sense of "propriety" tells him that this is not the time for merriment.

Some other dogs may be mentioned, to wit, the Bulldog, bold and resolute; the Sheepdog, attentive; the Terrier, a bundle of energy; the Schnauzer, adaptable to any circumstances and climate; the Brittany Spaniel, possessed of keen intelligence and good judgment.



"I'd just like to know what in hell is happening, that's all! I'd like to know what in hell is happening! Do you know what in hell is happening?"

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Surely we must look askance at intrusions of this relationship when we consider some of the events that have occurred in court due to a lack of a shield. Some pets can speak, though only by rote (like the witness described as a "trained seal").³⁶ To attack one person's character his parrot was shown to say, "People are no damn good." Lawyers in New Orleans are still talking about District Attorney Jim Garrison's chief investigator's parakeet. The bird's vocabulary consists of two words: "Screw you!" The bird was a veritable "stool pigeon." Dr. Alex Comfort in his famous edited guide to love making, *The Joy of Sex*, in a chapter titled, "Birdsong at Morning," suggests that parrots and mynahs be kept out of the love chamber. They easily pick up what is said, and they cause bad social vibrations

36. In the belief that the language barrier between man and beast (including snakes and elephants) can be broken, one author presents overwhelming scientific evidence that man can communicate with the animals, for his own advantage. E. BORGESE, *THE LANGUAGE BARRIER: BEASTS AND MEN* (1968). Regarding talking to plants, about which there are a number of books, that is fine, though if the plants talk back, it is time—for the person—to see a psychiatrist. S. Baker (Ltr.), *TIME*, March 25, 1974, at 6.

when they repeat it. Dr. Comfort's book points out that what a person says in orgasm should never be quoted at him or her—it is the time when people are spiritually most naked. The wife of The Leopard in the novel used to yell out "Gesumaria!"³⁷

Not too long ago in Los Angeles a man was charged with smuggling a parrot from Mexico. He denied that his bird came from south of the border. In a proceeding that smacked of the Star Chamber, investigators listened to the bird. "Buenos dias, señor," the parrot said. Anyone who has a pet for a pal would call this self-incriminating evidence. Possibly learning of this case, thieves who broke into a home recently in Opelousas, Louisiana, and made off with some \$1,500 worth of goods apparently wanted no "stool pigeon" to squeal on them. They took the family's talking parrot along.³⁸

The essence of any privilege, of course, is that it may be waived by the person who enjoys it; if an owner-pet shield law would be enacted, the owner could waive it. In a recent case in Israel, Amos Meir complained to the police that he had found his parrot, which had escaped a few days earlier, at the home of another resident. The latter asserted, however, that the bird was his. Meir countered that a German children's poem which his parrot had been trained to recite would prove his ownership. A German-speaking constable, closeted with the parrot, waited patiently for several hours and then heard the parrot recite the poem. Justice won out. The would be parrot owner was convicted of making a false claim of ownership.

But you may say that a psychotherapist cannot be analogized to a dog or parrot, and you may say that a patient cannot be analogized to a pet owner. You may be right, but then again, you may be wrong. It is not a zoological error that Tevye, Sholem Aleichem's dairyman, often talked to his horse. Who else really listened to him, who else understood him? In Philip Roth's short story, "Whacking Off," the horse is replaced by the psychiatrist. Dr. Roy R. Grinker, Sr., who had an analysis with Freud, recalls that Freud had his dog in the room to assist him, a technique overlooked

37. *THE JOY OF SEX/A GOURMET GUIDE TO LOVE MAKING* 51 (A. Comfort ed. 1972).

38. Associated Press release, reported in *N.Y. Times*, Nov. 4, 1973, at 53. In a number of cases arising in Switzerland, where a house was broken into at night and the owner killed the intruder, the question arose as to whether or not his act was justifiable homicide, for he might have enticed the victim to enter and then murdered him. The defendant was allowed to establish his innocence by producing a dog, cat, or cockerel that lived with him and had witnessed the death of the burglar. The householder was required to declare his innocence under oath in the presence of the pet. If the pet did not contradict him, the court held that he had cleared himself. The legal theory was that Heaven would intervene to bestow the gift of speech upon the pet rather than allow a murderer to escape. G. CARSON, *MEN, BEASTS, AND GODS: A HISTORY OF CRUELTY AND KINDNESS TO ANIMALS* (1972).

by his disciples. Freud was known as "the silent one," but an analysand of his knew he was making progress, according to Dr. Grinker, when the dog got excited and jumped on the couch.³⁹

Persons may come to psychotherapy for relief of specific symptoms or disabilities, but the underlying reason for seeking help is demoralization, a state of mind that results from persistent failure to cope with internally or externally induced stresses. Dr. Jerome D. Frank, in his writings, states that all psychotherapeutic rationales and rituals perform the function of combating demoralization despite differences in content. Once psychotherapy is understood to be a form of education, a means of restoring morale, and not part of any medical system, a different view of the psychotherapeutic process, regarding its relevance or materiality as evidence, will ensue.

The forum, we may also remember, is a factor in the type of script employed by the parties. Though not codified as a rule of law, the manner and content of our conversation is tempered by where we talk. Speech like clothes must be appropriate to the occasion. In the nature of things, one speaks differently in a church than in a tavern. Funerals require a pale make up and solemn expression. The temple of justice, too, is traditionally a place of civility. Chief Justice Burger, for example, regards dress and decorum as seriously as he does the complex problems of the law and requires lawyers to wear "conservative business dress." In jurisdictions with or without privilege, a judge will look askance at the offer of data from psychotherapy sessions. The setting itself forms something of a barrier, and there are certain standards which people impose on themselves not because of any rule but because good taste or other honorable prompting requires it. While there is less reluctance to subpoena a psychiatrist than a priest, questions probing into psychotherapy are likely to be regarded as offside, to use football terminology. "Tut, tut," we hear the judge (though minutes earlier having ruled adversely on a claim of privilege) admonishing an attorney asking improprieties, "let's get on with the case."⁴⁰

39. The author's conversation with Dr. Grinker occurred at a meeting of the American Academy of Psychoanalysis in New York City, Dec. 6, 1973. Perhaps it is no coincidence that Clement Freud, grandson of Sigmund Freud, hawks dog food on television commercials. N.Y. Times, Feb. 12, 1974, at 29, col. 5.

40. THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE AMERICAN BAR ASSOCIATION provides: "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." EC 7-10. "Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings." EC 7-36. In *People v. Whalen*, 390 Mich. 672, 213 N.W.2d 116 (1973), the prosecutor was not allowed to impeach the defendant's alibi witnesses by questions implying a lesbian relationship between the alibi witnesses. The court cited the

Every situation has its own scripting. All the world's a stage, said Shakespeare. The script or an answer depends not only on the question asked but also on where the answer is made. Even so-called "free association" in psychoanalysis and the "spontaneous" behavior in "encounter groups" can be defined as learning the appropriate script for free association or spontaneous behavior. Those psychiatrists at universities who hold a joint appointment in law and psychiatry invariably see their patients at their medical school office—never at their law school office—recognizing that atmosphere evokes a certain posture and language. And that which takes place in one forum may not be translatable to another.⁴¹

A tribunal looks for legal artifacts, euphemistically called evidence. The law script has its language and its boundaries, designed to reach a decision that will balance conflicting interests in a way that is theoretically best for all.⁴² Proof-making in law is conditioned by the philosophy of jurispru-

State Code of Professional Responsibility, which provides that a lawyer shall not "ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person." Hence, while there may be no statutory privilege, or it is riddled with exceptions, the psychiatrist can assure his patients of confidentiality. All of life is based on probabilities, not certainties. Indeed, tax return services advertise over television that they promise confidentiality, and they do so although there is no statutory privilege.

41. In discussing the competency of psychiatric testimony in the courtroom, a leaf might be borrowed from the history of the test, and methods of proof, of criminal responsibility, which has involved the appointment of psychiatrists to examine the accused. The *Durham* rule on criminal responsibility was formulated, in the words of Chief Judge David L. Bazelon, its author, "to unfreeze what knowledge [examining] psychiatrists did have, to irrigate a field parched by lack of information." But *Durham* failed, the promise was unfulfilled, in the words of Judge Bazelon—this time spoken angrily—because "psychiatrists continued to use conclusory labels without explaining the origin, development, or manifestation of a disease [wow! (subjective editorial comment)] in terms meaningful to a jury It was as if to maintain an illusory elitism psychiatrists resorted to deliberate obscurantism." Speech at the American Psychiatric Association Divisional Meeting in Williamsburg, Va., reported in *Psychiatric News*, Nov. 7, 1973, at 1, col. 1. But what was really to be expected? To call for a psychiatric history in the courtroom is in the vein of a cartoon showing an elderly husband and wife at dinner, the husband saying, "This being our fifty-fifth anniversary, would you like me to summarize?" *NEW YORKER*, Dec. 10, 1973, at 190. Assuming there is the time—the late Dr. Winfred Overholser once advised Judge Bazelon that it would take fifty to one hundred hours to furnish the information he wanted—what information would be included? Is there anything that happened to the accused (or to his mother) that would not be relevant under the *Durham* test? Would the accused's masturbatory fantasies when he was a boy have an effect on his state of mind at the time of the offense? Judge Bazelon probably would have been more disappointed with a fifty to one hundred hour diagnostic report than with the conclusory labels that he got. A diagnostic effort has to be made in relation to the disposition; there is a saying, "Don't bite off more than you can chew." And while calling for clarity, Judge Bazelon talked about "disease," as though criminal behavior were due to an internal disorder or indwelling agent. It smacks of the old belief in demon possession. It is one thing to find and report an excess of protein in the blood and quite another to report on the dynamics of behavior.

42. See I. ILLICH, *TOOLS FOR CONVIVIALITY* 95 (1973); R. SLOVENKO, *PSYCHIATRY AND*

dence, the mechanisms of trial, and the rules of substantive and procedural law current at a given time. A few illustrations will suffice. Most people, practicing humility, avoid the use of any word or expression that imports a fixed opinion; but in the courtroom, where a two-value logic system prevails, a witness is expected to answer yes or no. Quite frequently the very language of testimony is identical from one case to another. The criminal law, moreover, says that the fact that a defendant has committed other crimes is not admissible for the purpose of showing that he is more likely to have perpetrated the crime charged. The criminal law functions without revealing to the fact finder the previous conviction of even murder, but in tort law, as in *Lifschutz*, disclosure was sought of psychotherapy which occurred ten years previously.⁴³

Conclusion

The concept of privilege, while it may offer a sense of security, should be abandoned as a means of determining whether disclosure of communications made in psychotherapy should be required. For one thing, privilege, an aristocratic idea, does not sit very well in the minds of many. But more

LAW 3 (1973). Weinstein describes the script in a law court thus:

That the parameters of the law mark out an artificial world is not necessarily a valid basis for objection, for somewhat the same reason that it is not a telling criticism of the artistic quality of a painting by Chagall that it distorts a scene; nor is it a proper objection to Sandburg's biography of Lincoln that not everything then known about Lincoln is in the book. The trier's as well as the artist's success in re-creating a world must be tested within the frame of reference being used. The law is not interested in the "whole truth" but only in the evidence on the propositions of fact it deems material Even were it theoretically possible to ascertain truth with a fair degree of certainty, it is doubtful whether the judicial system and rules of evidence would be designed to do so. Trials in our judicial system are intended to do more than merely determine what happened. Adjudication is a practical enterprise serving a variety of functions. Among the goals—in addition to truth finding—which the rules of procedure and evidence in this country have sought to satisfy are economizing of resources, inspiring confidence, supporting independent social policies, permitting ease in prediction and application, adding to the efficiency of the entire legal system, and tranquilizing disputants.

Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM. L. REV. 223, 240-41 (1966). See also McCarthy, *On Playing the Game of Expert Witness in a Two-Value Logic System*, 19 J. FOR. SCI. 130 (1974).

43. Evidence of other negligent conduct is usually ruled inadmissible in a tort case. For example, in *Florida East Coast Ry. v. Young*, 104 Fla. 541, 140 So. 467 (1932), a laborer had been struck by a train while he was pulling grass from between the railroad ties. Counsel for the plaintiff sought to ask the engineer whether or not he had killed anyone else in the operation of his engine, and if so, how many he had killed. (Apparently he had killed two other men prior to the instant occurrence.) The court held that it was highly improper to ask a question so manifestly prejudicial to the defendant, noting further that it in no way established any fact from which the existence of liability could properly have been adduced.

importantly, privilege is, in the case of psychotherapy, an unnecessary and misleading claim. Someone once said that in legal matters, when it is not necessary to do anything, it is necessary to do nothing. Other guidelines in the law of evidence—namely, relevancy and materiality—protect against intervention in the psychotherapist-patient relationship, at least to the extent that it would unfairly be a source of regret for patients.

It may be noted that the fictional archetype of the nineteenth century was the detective Sherlock Holmes, the glorification of the power of rational thinking, whereas the archetype of the twentieth century is Mickey Mouse. Mickey effigies appear, among other places, on watches and shirts. A contemporary birthday card makes a Mickey out of the erstwhile sleuth; it shows Holmes examining a marble column at close range with his magnifying glass, saying, "It's almost impossible to detect that you're one year older. Happy Birthday!"⁴⁴ Who would say that Holmes is looking in the right place to establish what he is claiming? Yet it is just about as absurd to look in a psychiatric office for evidence to be used in the courtroom.

In any event, the protection given to privacy is felt, rather than deduced from a rule of law. "The letter killeth, but the spirit giveth life."⁴⁵

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44. "Nothing reflects the times we live in like greeting cards," says the president of the nation's largest chain of greeting card shops. "Greeting cards deal in emotion, so the cards people buy tell you what their emotions are." *N.Y. Times*, Feb. 10, 1974 (*Magazine*), at 10, col. 2.

45. 2 *Corinthians* 3:6.