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Secrets Clutched in a Dead Hand: Rethinking Posthumous Psychotherapist-Patient Privilege in the Light of Reason and Experience with Other Evidentiary Privileges

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SECRETS CLUTCHED IN A DEAD HAND: RETHINKING POSTHUMOUS PSYCHOTHERAPIST-PATIENT PRIVILEGE IN THE LIGHT OF REASON AND EXPERIENCE WITH OTHER EVIDENTIARY PRIVILEGES

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ABSTRACT. Attorney-client privilege was held by the Supreme Court to extend beyond death in 1996, albeit only ratifying centuries of accepted practice in the lower courts and England before them. But with the lawyer's client dead, the natural outcome of such a rule is that privilege—the legal enforcement of secrecy—will persist forever, for only the dead client could ever have waived and thus end it. Perpetuity is not traditionally favored by the law for good reason, and yet a long and broad line of precedent endorses its application to privilege. The recent emergence of a novel species of privilege for psychotherapy, however, affords an opportunity to take a fresh look at the long-tolerated enigma of eternity and the imprudence of thoughtlessly importing it to the newest addition to the family of privileges. Frankly, humanity has always deserved better than legalisms arrogating to the inscrutability of the infinite.

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> And I give unto them eternal life; and they shall never perish, neither shall any man pluck them out of my hand.[1]
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> The tight grip of a long dead hand is hard to break. More than one summer may pass before that grip is broken and the effect of its clasp on the present completely undone.[2]

I. INTRODUCTION: THE DEAD HAND OF PRIVILEGE

Like Beowulf venturing into the lair of Grendel, every aspiring law student makes the acquaintance of the dreaded Rule Against Perpetuities in their first-year class on property with all the awestruck trepidation due such a monstrosity[3]—one feared and respected only because it appears on the bar exam.[4] The classic statement of the rule is by John Chipman Gray: "'No interest is good,' Gray postulated, 'unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.'"[5] The rationale for the Rule is often given as preventing the "dead hand" of a long-ago testator from controlling property for decades or centuries after his passing.[6] Modern scholars have wondered at and highlighted the extent to which America permits such a testator to meddle for decades, unto more than a century after his demise, under this

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[1] *John* 10:28 (King James).

[2] Mississippi Freedom Democratic Party v. Democratic Party of State of Miss., 362 F.2d 60, 63 (5th Cir. 1966).

[3] Peter A. Appel, *The Embarrassing Rule Against Perpetuities*, 54 J. LEGAL EDUC. 264, 264 (2004). ("Students share the bad medicine view of the rule. Ask students what subject within property they hated most, and most will answer that it was the Rule Against Perpetuities. Indeed, it might rank as the most-hated doctrine studied in the first year of law school (although the *Erie* doctrine might give it a run for its money). Arcane in origin, difficult to understand and apply, unintuitive, and seemingly random in its effect, the rule brings together many of the difficulties that students have in adjusting to the rigors of legal study. Students joke about it, have nightmares about it, . . .").

[4] *Id.* at 265 ("Most property teachers gear their teaching of the rule to its basic mechanics, simply to get their students through the material, prepare them for the questions that they might face on the bar exam, and thus help them avoid embarrassment. Because of its complexity, the rule has generated its own set of specialized secondary study materials simply to explain how the rule works. Students can use CALl exercises or buy supplemental texts, workbooks, flashcards, outlines, or sample problems, to help them through these rough waters, all in an effort to avoid embarrassment on the final exam or on the bar exam.") (citation omitted).

[5] *Id.* at 269. Appel provides a helpful elucidation of Gray's famously baroque phrasing: "An interest in property is good if it necessarily vests in interest to a known person or entity within the allowable period. A conditional interest in property is good if the condition must either necessarily happen or necessarily not happen within the allowable period. If an interest does not meet the foregoing requirements, it is void. The allowable period consists of a life in being at the time that the interests are created plus twenty-one years." *Id.*

[6] *See* Kellee Clark, *The Rule Against Perpetuities*, 11 OTAGO L. REV. 495, 500-01 (2007) (citing Simes for the origin of the term "dead hand"); *see generally* Lewis M. Simes, *Public Policy and the Dead Hand,* 54 MICH. L. REV. 580 (1956).

ostensibly limiting Rule:[7] "dead hand control," they call it,[8] despite the Rule that should, in theory. force the fingers of that hand. At the same time, jurists have railed since the Rule's origins hundreds of years ago against its inscrutability to even the brightest minds of each legal generation,[9] presaging its eventual evolution in the twenty-first century into an ornery atavism of a supposedly bygone age, inflicted upon aspiring professional attorneys more as an exercise in hazing than practical jurisprudence.[10] States who condemn it have sought to trim its reach by statute.[11] Yet it perseveres in the common law—the law of protracted reason and experience[12]—and one must wonder why the Rule and its esoteric grip on bequests is still a principle tolerated and propagated amongst the children of English law,[13] even whilst being chided and downplayed by professors as alien to modern mores.[14] And yet, all the same, diligent lawyers in active practice prudently insert clauses deferring to the Rule.[15]

By way of caricature, Charles Dickens adroitly painted nearer in time to the Rule's

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[7] *See* sources cited *infra* note 3 & 6.

[8] Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1771 (2014).

[9] *See* Symphony Space v. Pergola, 669 N.E.2d 799, 803 (N.Y. 1996) ("Widely criticized as unduly complex and restrictive, the statutory period [of the Rule Against Perpetuities] was revised in 1958 and 1960, restoring the common-law period of lives in being plus 21 years."); *see also* Producers Oil Co. v. Gore, 437 F. Supp. 737, 742-43 (D. Wyo. 1977) ("The court is of the strong view that the rule against perpetuities should not apply to oil and gas operating agreements. From its inception in 1682, this court-made rule of law, the genius of English judges, was designed to further alienability and to prevent the tying up of property within the family line for generation on generation. It could not have been intended to apply, it should not apply and no worthwhile social or economic purpose is served by applying it to this common, frequent and useful type of oil and gas transaction.").

[10] Appel, *supra* note 3, at 264-65 ("In sum, students cannot understand why they have to endure the rule except as some kind of horrible historical accident of which they are the most recent victims. They certainly cannot explain what the rule means or does not mean from a jurisprudential standpoint.").

[11] *E.g.*, *Symphony Space*, 669 N.E.2d at 803 ("In New York, the rules regarding suspension of the power of alienation and remoteness in vesting — the Rule against Perpetuities — have been statutory since 1830. Prior to 1958, the perpetuities period was two lives in being plus actual periods of minority (*see*, Real Property Law former § 42).").

[12] *See* Funk v. United States, 290 U.S. 371, 381 (1933) ("The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.").

[13] Appel, *supra* note 3, at 266 ("[N]o major school of jurisprudence can comprehensively explain the origins of the rule, why such a complicated rule continues to persist, why the rule does not appear in jurisdictions other than those with an English common law heritage but why it does not appear in all of those.").

[14] *See id.* at 264 ("The modern pedagogical approach to the rule treats it as an embarrassment—the difficult family problem that is not discussed in public. Teachers see it as bad medicine that must be dispensed and swallowed quickly, and different teachers vary on how much of the rule's technicalities they think the student should master (or at least endure).").

[15] *See, e.g.*, Brooks Barnes, *DeSantis's Allies Discover Disney Evaded Florida's Move to Rein It In*, N.Y. TIMES, Mar. 30, 2023, at B5 ("The agreement is effective for perpetuity. It uses contractual language known as a 'royal lives' clause: 'Shall continue in effect until twenty one (21) years after the death of the last survivor of the descendants of King Charles III, King of England living as of the date of this declaration.'").

origin the prevailing visceral odium of the never-ending protraction of probate contests in *Bleak House*'s depiction in 1853 of the immortal case of *Jarndyce & Jarndyce*:

> Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.[16]

Exported from Britain at a mature age into nascent sixteenth-century colonial America, the Rule is still firmly embedded here, inscribed into many state constitutions: "Perpetuities . . . are contrary to the genius of a free state and shall never be allowed," says that of the original state North Carolina.[17] One author delved into the mystery of how so many states came to employ this curious terminology of genius and utter forbiddance, concluding that the early settlers brought with them from England a very personal repugnance to a fixture of law arrogating to eternity: the Rule was not merely a lawyer's legalism, it was the legal expression of the people's way of life.[18] Beyond constitutions, nearly every state's legislature has banned perpetuities, not only those impelled by their framers' mandate: it has proven a broadly American notion.[19] Courts are no less zealous, holding that the Rule "expresses one of the cardinal and basic principles of our system of

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[16] CHARLES DICKENS, BLEAK HOUSE 16-17 (Penguin Classics 1996) (1853).

[17] N.C. CONST. art. I, § 34; *accord* ARK. CONST. art. II, § 19 ("republic" instead of "free state"); OKLA. CONST. art. II, § 32; TENN. CONST. art. I, § 22; TEX. CONST. art. I, § 26 ("government" instead of "state"); WYO. CONST. art. I, § 30; *see* Les Raatz, *State Constitution Perpetuities Provisions: Derivation, Meaning, and Application*, 48 ARIZ. ST. L.J. 803, 805-808, n.3 (2016) (identifying and discussing nine states with constitutional clauses proscribing perpetuities). Lest the reader be left in ignorance, the ellipsis in the quote of North Carolina's constitution bans monopolies as well, and is reflected in many of the other cited charters as an equally evil twin to perpetuities. This author has written amply elsewhere of the American project of what is now called antitrust law reifying America's storied disfavor of such economic ossification. *See, e.g.,* Jared S. Sunshine, *Observations at the Quinceañero of Intel Corp. v. AMD, Inc. on International Comity in Domestic Discovery for Foreign Antitrust Matters*, 69 DRAKE L. REV. 295, 298-314 (2021).

[18] Joshua C. Tate, *Perpetuities and the Genius of a Free State*, 67 VAND. L. REV. 1823, 1825-35 (2014).

[19] *See id.* n.2; Lynn Foster, *Fifty-One Flowers - Current Perpetuities Law in the States*, 22 PROB. & PROP. 30, 32 (2008) (listing only five states as not recognizing the common law rule: New Jersey, Pennsylvania, Rhode Island, South Dakota, and Wisconsin).

government" and so is to be "relentlessly enforced,"[20] serving the supreme mandate "to avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation, which is regarded at common law as a public evil."[21]

Privilege is not, to be sure, a restraint upon alienation of property. But it is a creature of the law, and does operate as a restraint, but upon the freedom of speech, a right that can be considered no less a cardinal principle of American governance.[22] Were the First Amendment and privilege to collide, the result is hardly certain.[23] Privilege walls off the secrets commended from commerce in the marketplace of ideas. This is not to postulate that the common law of evidentiary privilege offends the right to free speech in the First Amendment—far from it. Privilege is little less hallowed than free speech, even if it does not figure explicitly in the Constitution, and a restraint freely assumed by the attorney eliciting the speech does not create any conflict with free speech protections.[24] Indeed, at least by judicial hypothesis, the privilege *encourages* rather than *restrains* speech in the complete calculus, by permitting the attorney to credibly offer the state's assurance that his lips cannot be forced and thus facilitate uninhibited communication with clients.[25]

But for all that, privilege remains a restraint, and the Rule implies that impediments of the law are strongly disfavored should they be perpetuated into an eternal mandate. There is strong logic to this disfavor: whatever benefit the restraint serves must attenuate as time stretches into infinity, whilst the burden of the law's imprimatur weighs no less heavily over the ages. The law's effect is constant, but its rationale wanes. At some point in time, however near or distant, the balance must shift, and the interests of the present win out over those of the past; eventually, the living will prevail over the dead. Nevertheless, the privilege as we know it is broadly construed as eternal, undying and unimpeachable. Illustrious scholar of privilege Edna Selan Epstein wrote in the most recent edition of her treatise: "The duration of the client's privilege, once it attaches, persists until the privilege is waived by the client. Upon the client's death, no release is possible. Hence, death should seal the attorney's lips forever."[26]

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[20] Brooker v. Brooker, 106 S.W.2d 247, 254 (Tex. 1937).

[21] Weber v. Tex. Co., 83 F.2d 807, 808 (5th Cir. 1936).

[22] U.S. CONST. amend. I.

[23] *See* Jared S. Sunshine, *A Head-On Collision Between Attorney-Client Privilege and the Free Press as the Clash of Truth, Justice, and the American Way*, 45 N.C. CENT. L. REV. 33 (2023) [hereinafter Sunshine, *Collision*].

[24] *See generally id*.

[25] *See* Swidler & Berlin v. United States, 524 U.S. 399, 408 (1998) ("[T]he loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place."); Jaffee v. Redmond, 518 U.S. 1, 12 (1996); Upjohn Co. v. United States, 449 U. S. 383, 389-90 (1981); Fisher v. United States, 425 U.S. 391, 403 (1976) ("The purpose of the privilege is to encourage clients to make full disclosure to their attorneys.").

[26] 1 EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 983 (Am. Bar Assoc. 6th ed. 2017).

In Part II, the Article interrogates that syllogism,[27] tracing insights into the attorney-client privilege's temporal extent from early American jurisprudence through the definitional 1998 Supreme Court decision in *Swidler & Berlin v. United States*,[28] sampling both case law and scholarly exegesis along the way and through the present. Parts III to V take up the the justifications and surprisingly uniform presumption of persistence postmortem—with different nuances—attributed to the other communicational privileges recognized throughout legal history: priest-penitent, physician-patient, and marital. Part VI then introduces the parvenu to the party, psychotherapist-patient privilege, narrating its genesis, adoption by the Supreme Court in 1996 case *Jaffee v. Redmond*,[29] and subsequent exploration of its metes and bounds in the lower courts. With all the players on stage, Part VII turns to the quintessential question: what to make of the perpetuity so often attending privilege, at least with reference to the brash psychotherapist arrivistes where precedent remains plastic and there is perhaps hope for the future. The concluding Part VIII recurs to the lessons and leitmotif of the Rule Against Perpetuities by way of Dante and Dickens, pondering the imponderable significance, and terrible weight, of eternity.

II. ATTORNEYS ETERNAL

> *It is not sufficient to say, the cause is at an end; the mouth of such a person is shut for ever.*[30]

Maybe it would be narratively satisfying to say that the notion of the counselor's privilege eternal appeared complete and fully-formed in the Supreme Court's 1998 decision in *Swidler & Berlin*. But in truth the idea had been conceived long before—indeed, very long before.

A. Early Statements of the Rule

In the antediluvian origins of attorney-client privilege in Rome, a litigant's advocate was flatly incompetent to testify against his client, and as the disability was one deriving from his close personal affection rather than affiliation with his employer, it had no discernible terminus, nor did historical sources identify any[31]—indeed, the surviving hints suggest that classical lawyers were not only barred from bearing witness in the cause at hand, but also that their records were inadmissible in succeeding matters as well.[32]

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[27] *Cf. infra* note 217 as to the function of a syllogism and how it might be attacked.

[28] Swidler & Berlin v. United States, 524 U.S. 399 (1998).

[29] Jaffee v. Redmond, 518 U.S. 1 (1996).

[30] For the full quotation and citation, see *infra* note 35. Due credit ought be given to Malcolm Gladwell, whose rhetorical usage inspired the idea of introducing the principal sections of the Article with headings including a pithy quote illustrating the thesis, a compelling flourish that Gladwell has often employed to great effect. *See, e.g.*, MALCOLM GLADWELL, OUTLIERS: THE STORY OF SUCCESS (2008).

[31] *See* Jared S. Sunshine, *The Parthenogenesis of Wigmore: A Humble History of How a Confidentiality Requirement Arose Ex Nihilo to Become the Sine Qua Non of Attorney-Client Privilege*, 54 UIC J. MARSHALL L. REV. 429, 435-38 (2021); *see also* Potter v. Inhabitants of Ware, 55 Mass. 519, 520, 1848 WL 4273 (1848) (describing the basis of Roman law of privilege).

[32] *See* ABEL HENDY JONES GREENIDGE, THE LEGAL PROCEDURE OF CICERO'S TIME 484 (Clarendon Press 1901) ("The relationship of client and patron [as lawyers were then known], in the loose form in which it

Advancing from antiquity to premodern times, however, the many American nineteenth-century treatises on evidence incontrovertibly contemplated a privilege without end, despite a wholesale transformation in the theoretical bases for privilege in the interim.[33] The first such text in time and perhaps in eminence,[34] that of Samuel March Phillipps, said exactly that as early as 1814, quoting the bench of Great Britain:

> Confidential communications between attorney and client are not to be revealed at any period of time—not in an action between third persons—nor after the proceeding, to which they referred, is at an end—nor after the dismissal of the attorney. The privilege of not being examined to such points, as were communicated to the attorney while engaged in his professional capacity, is the privilege of the client, not of the attorney; and it never ceases. "It is not sufficient to say, the cause is at an end; the mouth of such a person is shut forever."[35]

William Oldnall Russell in his sixth edition of 1896 unabashedly parroted Phillipps's treatment,[36] just as he had in his earlier editions dating back to 1819,[37] but many in the interim had concurred less slavishly. In midcentury, John Pitt Taylor declared that the "seal of the law, once fixed upon the communications, remains for ever," terminated "not even by the death of the client,"[38] and admitting of no exception but cases arising from testamentary intent.[39] In doing so, he followed the recently published treatise of Simon

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prevailed in Cicero's time, was a bar to compulsory testimony. . . . somewhat later (122 B.C.) and in connexion with a different *quaestio*, it appears in the form that such evidence could not be enforced.").

[33] *See* Sunshine, *supra* note 31, at 439-448 (narrating sea changes in the rationale for privilege); *id.* at 448-451 (introducing major nineteenth century authors).

[34] *See* 3 WILLIAM OLDNALL RUSSELL, HORACE SMITH & ALBERT PERCIVAL PERCEVAL KEEP, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 581 n.(a) (London, Stevens & Son 6th ed. 1896) (1819) [hereinafter RUSSELL 6TH] (calling Phillips a "very eminent writer on the Law of Evidence").

[35] SAMUEL PHILLIPS MARCH, A TREATISE ON THE LAW OF EVIDENCE 108 (London, A. Strahan 3d British ed. 1817) (1814) [hereinafter PHILLIPS BR. 3D] (citation omitted).

[36] RUSSELL 6TH, *supra* note 34, at 578-79, nn.(b)-(e) ("The law attaches so sacred an inviolability to communications between a client and his legal advisers, that it will neither oblige nor suffer persons so employed to reveal any facts confidentially disclosed to them at any period of time, neither after their employment has ceased by dismissal or otherwise, nor after the cause in which they were engaged is entirely concluded. The privilege of not being examined on such subjects is the privilege of the client, and not of the solicitor or counsel ; and it never ceases. 'It is not sufficient,' said Buller, J., 'to say that the cause is at an end; the mouth of such a person is shut for ever.'") (citations omitted).

[37] *E.g.*, 2 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 610, nn.(r)-(t) (London, Jos. Butterworth & Son 2d ed. 1828) (1819) [hereinafter RUSSELL 2D] (reciting same formulation).

[38] 1 JOHN PITT TAYLOR, A TREATISE ON THE LAW OF EVIDENCE AS ADMINISTERED IN ENGLAND AND IRELAND § 849, at 745-746 (London, W. Maxwell 2d ed. 1855) (1848) [hereinafter TAYLOR 2D] ("The protection does not cease with the termination of the suit, or other litigation or business, in which the communications were made; nor is it affected by the party's ceasing to employ the attorney, and retaining another, nor by any other change of relation between them, nor by the attorney's being struck off the rolls, nor by his becoming personally interested in the property, to the title of which the communications related, nor even by the death of the client. The seal of the law, once fixed upon the communications, remains for ever, unless it be removed either by the party himself, in whose favour it was placed, or perhaps, in the event of his death, by his personal representatives.").

[39] *Id.* § 850 at 746 ("In stating that the privilege does not terminate with the death of the client, care must be taken to distinguish between cases where disputes arise between the client's representatives and strangers,

Greenleaf,[40] an author whose renown soon grew to rival even Phillipps.[41] As the century waned, the great legal historian Edward Weeks offered his own wording: "The rule, therefore, is perpetual in its operation. It extends to prohibiting the attorney from disclosing the privileged communications, not merely during the continuance of his relation to his client, but forever after."[42] By the turn of the twentieth century, American cases had arisen to supplement the common law of Great Britain, and so the 1904 treatise of Elliott & Elliott could quote the Supreme Judicial Court of Massachusetts for the proposition that "the law has considered it the wisest policy to encourage and sustain [*orig.* sanction] this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed."[43]

The twentieth century also heralded the unrivaled paragon of American privilege law, John Henry Wigmore.[44] Theretofore some ambiguities had suppurated, as when Weeks explained that the divulgence of at least testamentary communications was not precluded postmortem because the privilege "simply meant to protect the living in their business relations," and thus "the very foundation of the rule seems to be wanting."[45] Wigmore put an end to such vagaries, reaffirming the original rule expressed by Phillipps in contemporary form: "It has therefore never been questioned, since the domination of the modern theory, that the privilege continues even after the end of the litigation or other occasion for legal advice, and even after the death of the client."[46] At the same time,

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and those in which both the litigating parties claim under the client. In the former class of cases no doubt the protection will survive for the benefit of those who represent the client; but in the latter, it would be obviously unjust to determine that the privilege shall belong to the one claimant rather than to the other. The rule, therefore, has no application in cases of testamentary dispositions, and as between parties claiming under the testator.").

[40] SIMON GREENLEAF & ISAAC A. REDFIELD, A TREATISE ON THE LAW OF EVIDENCE § 240, at 271-72 n.7 (Boston, Little, Brown & Co. 12th ed. 1866) (1842) [hereinafter GREENLEAF 12TH] ("The protection given by the law to such communications does not cease with the termination of the suit, or other litigation or business, in which they were made ; nor is it affected by the party's ceasing to employ the attorney, and retaining another; nor by any other change of relations between them ; nor by the death of the client. The seal of the law, once fixed upon them, remains for ever; unless removed by the party himself, in whose favor it was there placed. It is not removed without the client's consent, even though the interests of criminal justice may seem to require the production of the evidence.").

[41] David Drysdale, *Requirement of Confidentiality and Its Premise*, in PAUL R. RICE ET AL., ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 6:3 n.13 (Thomson Reuters ed. 2019).

[42] EDWARD P. WEEKS & CHARLES THEODORE BOONE, A TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW § 174 at 369 (San Francisco, Bancroft-Whitney Co. 2d ed. 1892) (1878) [hereinafter WEEKS].

[43] 1 BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, A TREATISE ON THE LAW OF EVIDENCE § 624 at 735 (Bobbs-Merrill Co. 1904) (quoting Barnes v. Harris, 61 Mass. 576, 577-78 (1851)). Elliott & Elliott apparently mistranscribed "sanction" as "sustain" in quoting from *Barnes*, as noted in the main text.

[44] *See generally* Sunshine, *supra* note 31 (treating Wigmore's provenance and contributions at length).

[45] WEEKS, supra note 42, § 165 at 355; *see id* at 356 ("A waiver under such circumstances has been presumed as much a waiver as if the client had expressly enjoined it upon the attorney to give this testimony when ever the truth of his testamentary declaration should be challenged by any of those to whom it related."). Weeks also wrote problematically that "privilege is said to cease after the death of the client, where the solicitor is made executor and residuary legatee." *Id.* § 174 at 369 n.6. (citing Crosby v. Berger, 4 Edw. Ch. 254, 1843 WL 4400 (N.Y. Ch. 1843), *aff'd*, 1844 WL 4777 (N.Y. Ch. 1844)).

[46] 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2323 at 3249-3250 (Boston, Little, Brown & Co. 1905) ("The subjective freedom of the client, which it is the purpose of the privilege to secure (ante, § 2291), could not be attained if the client understood that, when the

Wigmore confirmed the permissibility of postmortem testamentary disclosure as a narrow exception to the general rule, given any secrecy attending one's final will is inherently temporary and intended to expire at death.[47] Indeed, if the attorney is made the executor too, then as the deceased client's representative the privilege is within his prerogative to waive.[48]

This testamentary exception was the subject of the Supreme Court's decision *Glover v. Patten* in 1897.[49] One Anastasia Patten had been both widow and administratrix to her husband, who as an intestate left his estate to her and their children in equal parts under state law.[50] Patten, however, failed to keep clear records of how the funds were used by her in her respective statuses as heir and as guardian to her minor children legatees, and following her own death, disputes arose among her five daughters-coexecutrices as to who was entitled to what under Patten's own will.[51] In resolving the question, the Court considered communications that Patten had with her legal advisor Curtis Hillyer regarding the settlement of her accounts before death.[52] Citing several English cases, the Court reaffirmed that although "such communications might be privileged if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin."[53] The Court thought it would unfair to enforce the testatrix's surviving privilege in preference of one heir over another,[54] and moreover, as Wigmore would soon adopt as rationale, it could only be viewed as the testatrix's will (literally) that the privilege be waived and her wishes be made known after death.[55] Of course, the necessary implication was that Patten's privilege survived her death in the first place.

Moreover, by the turn of the new century, the Massachusetts high court did not

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relation ended, or even after the client's death, the attorney could be compelled to disclose the confidences ; for there is no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate.") (citations omitted).

[47] WIGMORE, *supra* note 46, § 2314 at 3239.

[48] *Id.* § 2329 at 3254-55 ("It is further generally agreed that in testamentary contests the privilege is divisible, and may be waived by the executor, the administrator, the heir, the next of kin, or the legatee.").

[49] Glover v. Patten, 165 U.S. 394 (1897).

[50] *Id.* at 395.

[51] *Id.* at 396-99.

[52] *Id.* at 406.

[53] *Id.* at 406-08 (discussing Greenough v. Gaskell, 1 Mylne & K. 98; Russell v. Jackson, 9 Hare, 387,; and Blackburn v. Crawfords Lessee, 70 U.S. (3 Wall.) 175, 193 (1865)).

[54] *Id,* at 407; *see also supra* note 39 (propounding in a treatise the same rationale for testamentary privilege in the mid-1800s).

[55] *Glover*, 165 U.S. at 407-08 ("'The client may waive the protection of the rule. The waiver may be expressed or implied. We think it as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its objects, and in direct conflict with the reason upon which it is founded.'") (quoting *Blackburn*, 70 U.S. at 193).

stand alone in addressing privilege postmortem.[56] A Michigan justice adopted the Bay State's enunciation in 1903, albeit without citation and in dissent;[57] whilst in 1887, the Louisiana Supreme Court had announced in its syllabus of the case that the privilege persists after death almost as a truism of the law.[58] Although such a syllabus is at best dicta, proper holdings followed soon enough.[59] In 1931, for example, the Connecticut Supreme Court of Errors considered in *Doyle v. Reeves* an attorney who had been made to testify over his objections about communications with the decedent regarding the drafting of a will that had never been executed.[60] Deeming such inchoate deliberations beyond the exception afforded to a consummated testament, the court ruled that privilege continued to protect the decedent's conversations and that the court below had erred in compelling the attorney's breach; a new trial was ordered.[61] The Georgia Supreme Court reached the same

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[56] *See* Barnes v. Harris, 61 Mass. 576, 577-78 (1851) (quoted *supra* text accompanying note 43); Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 421 (1834) ("By this rule, it is well established, that all confidential communications between attorney and client, are not to be revealed at any period of time, nor in any action or proceeding between other persons; nor after the relation of attorney and client has ceased. This privilege is that of the client and not of the attorney, and never ceases, unless voluntarily waived by the client."); Foster v. Hall, 29 Mass. (12 Pick.) 89, 94 (1831) ("It seems also well established, that the matter thus disclosed in professional confidence cannot be disclosed at any future time, nor can it be given in evidence in another suit, although the client, from whom the communication came, is no party and has no interest in it.").

[57] People v. Pratt, 94 N.W. 752, 756 (Mich. 1903) (Grant, J., dissenting) ("This principle we take to be this: That so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed. To the rule as thus stated we are still inclined to adhere.").

[58] Morris v. Cain's Ex'rs, 1 So. 797, 797 (La. 1887) ("The law does not permit an attorney at law to give in evidence anything that has been confided to him by his client, without his client's consent. The privilege is not that of the attorney, but of the client. Such testimony is incompetent. It does not matter that the relations of client and counsel have ceased, or that the client be dead."). In doing so, Louisiana followed the row it had hoped a half century earlier, when it sustained the objection to an attorney's being compelled to testify about his dead client's words: "nor do we understand why the courts should feel themselves authorized to supply the consent of a client who has died without giving it." Hart v. Thompson's Ex'r & Legatees, 15 La. 88, 93, 1840 WL 1128 (La. 1840).

[59] In 1829, the Vermont Supreme Court had observed that "the mouth of his counsel should be forever sealed against the disclosure of things necessarily communicated to him for the better conducting his cause, *pendente lite*," but had qualified that the privilege was "strictly confined to the period in which the suit has been pending, and to the party of record, or in interest; and where the substance of the communication was such that it became necessary for the attorney to know it in order to manage the suit." Dixon v. Parmelee, 2 Vt. 185, 188, 1829 WL 1091 (1829). This reflected the then-confused state of the law in which some conceived of the privilege as limited to litigation itself, and thus the Vermont holding is probably best left alone as a relic of a bygone era. *See* Sunshine, *supra* note 31, at 445-48 (discussing the "doctrinal turbidity" of the early nineteenth century and its ultimate resolution).

[60] Doyle v. Reeves, 152 A. 882, 883 (Conn. 1931).

[61] *Id.* at 884 ("We conclude, therefore, that both the consultations between Cole and Reeves preliminary to the preparation of the new draft. Exhibit E, and the instrument itself were within the protection of the privileged communication rule, when invoked in behalf of the decedent's executor and representative.").

conclusion three decades later upon *Doyle*'s authority,[62] citing also intervening decisions "in which the attorney's testimony was held inadmissible in like situations" from Oregon, New Jersey, Wisconsin, Missouri, and Nebraska.[63]

B. Judicial Consensus in the Latter Twentieth Century

The second half of the twentieth century saw an efflorescence of consensus amongst state supreme courts that privilege survived the client's death, as states were typically where privilege was legislated and probate matters adjudicated.[64] The high courts of Arizona, Connecticut, Indiana, Iowa, Massachusetts, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, and Washington all said so, albeit usually in passing or dictum,[65] and intermediate appellate courts followed suit in California, Missouri

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[62] De Loach v. Myers, 109 S.E.2d 777, 781 (Ga. 1959) ("For these reasons we are of the opinion that, under the mandate of Code, § 38-1605, the trial court erred in allowing the decedent's attorney to testify as to confidential communications arising out of the preparation of an unexecuted will for her, in this action for specific performance of an alleged oral contract to make a will, brought against her administrator and adverse to the interests of her estate.").

[63] *Id.* (citing *Doyle*, 152 A. 882; Booher v. Brown, 146 P.2d 71 (Or. 1944); Ehling v. Diebert, 15 A.2d 655 (N.J. Ch. 1940); *In re* Smith's Estate, 57 N.W.2d 727 (Wis. 1953); Runnels v. Allen's Adm'r, 169 S.W.2d 73 (Mo. App. 1943); Anderson v. Searles, 107 A. 429 (N.J. 1919); and Lennox v. Anderson, 1 N.W.2d 912 (Neb. 1942)).

[64] *See* EPSTEIN, supra note 26, at 990 ("Not only do most states recognize a judicially crafted testamentary exception to the privilege, but approximately half of the states have codified the testamentary exception.").

[65] Mayberry v. State, 670 N.E.2d 1262, 1268 n.5 (Ind. 1996) ("Further, the attorney-client privilege survives the client's death and accrues to his or her representative.") (citing Buuck v. Kruckeberg, 95 N.E.2d 304, 308 (Ind. App. 1950)); Clark v. Second Jud. Dist. Ct., 692 P.2d 512, 514 (Nev. 1985) ("The general rule is that such privilege survives the termination of the relationship, and even the death of the client."); Cooper v. State, 661 P.2d 905, 907 (Okla. Crim. App. 1983) ("Appellant's suggestion that the privilege could not be invoked due to the death of the client is without merit. The privilege may be claimed by 'the personal representative of a deceased client', and the attorney or attorney's representative 'is presumed to have authority to claim the privilege' on behalf of the client."); State v. Doster, 284 S.E.2d 218, 219 (S.C. 1981) ("The privilege belongs to the client and, unless waived by him, survives even his death.") (citing S.C. State Highway Dep't v. Booker, 195 S.E.2d 615, 620 (S.C. 1973) ("The attorney-client privilege is owned by the client and survives his death, but it can be waived by him.")); Mehus v. Thompson, 266 N.W.2d 920, 923 (N.D. 1978) ("While it is true that there is a general rule that confidential communications between an attorney and his [deceased, in the instant case] client are privileged, this rule is not without exceptions."); State v. Macumber, 544 P.2d 1084, 1086 (Ariz. 1976) ("The privilege does not terminate with death. It has been commonly suspended only in cases where the communication would be logically thought to further the interests of the deceased such as a will.") (citations omitted); Stevens v. Thurston, 289 A.2d 398, 399 (N.H. 1972) ("We have also held that the privilege continues after the death of the client in actions against the estate and may be waived by the representatives of the decedent.") (citing Scott v. Grinnell, 161 A.2d 179 (N.H. 1960)); Bailey v. Chi., Burlington & Quincy R.R. Co., 179 N.W.2d 560, 564 (Iowa 1970) ("Additionally, the protective shield provided by Code section 622.10, quoted above, generally survives the client's death, termination of the relationship, or dismissal of a case in litigation. . . . We now expressly adopt the foregoing principle as it relates to the ordinary attorney-client relationship."); Taylor v. Sheldon, 173 N.E.2d 892, 895 (Ohio 1961) ("It must be pointed out that the law of Ohio is definite as to the duration of the attorney-client privilege. Under our decisions it has be[e]n definitely established that such privilege survives the client, that it does not disappear at the death of the client.") (citing Swetland v. Miles, 130 N.E. 22 (Ohio 1920)); Martin v. Shaen, 156 P.2d 681, 684 (Wash. 1945) ("Moreover, the privilege does not terminate with the cessation of the protected relationship, but continues thereafter, even after the death of the person to whom the privilege is accorded . . ."); Peyton v. Werhane, 11 A.2d 800, 803 (Conn. 1940) ("The general rule of the common law is well settled that an attorney may not disclose matters communicated to him by his client under the

and New York.[66] Even more tribunals presumed as much without saying so.[67] The uniform accord went hand in hand with most states' codifying the attorney-client privilege as persisting postmortem, subject only to the narrow testamentary exception.[68] "Under these statutes," wrote Epstein, "the decedent's attorney can assert the privilege on behalf of the client apparently without temporal limit."[69] For once, the exception truly did prove the rule:[70] the lone statutory outlier in California, where privilege expires after probate concludes,[71] only highlights the uniformity elsewhere.[72]

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confidence arising from the professional relation, in an action brought against his client's estate by a third party."). Massachusetts almost goes without saying at this point, but see *infra* notes 73-95 for discussion of a holding decidedly not in passing nor dictum.

[66] People v. Modzelewski, 203 A.D.2d 594, 594, 611 N.Y.S.2d 22, 22 (N.Y. App. Div. 1994) (finding no error when the court "refused to allow the attorney to take the stand, on the basis that any communication in this vein was protected by the 'attorney-client privilege', belonging solely to the coperpetrator, and the right to waive such privilege had ceased upon the coperpetrator's death"), *app. denied*, 639 N.E.2d 762 (N.Y. 1994); People v. Pena, 198 Cal. Rptr. 819, 828 (Cal. Ct. App. 1984 ("By statute, the personal representative of a deceased client is a 'holder of the privilege.' Ambrosio, Sr., was therefore clearly entitled to assert the lawyer-client privilege.") (citation omitted); McCaffrey v. Brennan's Est., 533 S.W.2d 264, 267 (Mo. App. 1976) ("The attorney-client relationship with respect to the attorney's preparation of a will survives the death of the client and bars testimony of the attorney where, as here, one of the parties asserts a claim adverse to the interests of the client's estate. The privilege may be claimed by the personal representative of a deceased client.") (citation omitted).

[67] Paul A. Gordon, *Evidence/Professional Responsibility - Life After Death: The Attorney-Client Privilege*, 72 TEMP. L. REV. 493, 518-19 n.218 (1999) (citing twenty-six states as having "held the attorney-client privilege survives the death of the client"); *see, e.g.*, Fox v. Spears, 93 S.W. 560, 562 (Ark. 1906) (affirming attorney-client privilege asserted on behalf of deceased client without stating such a rule or reasoning and cited by Gordon).

[68] *See* Gordon, *supra* note 67, at 519 n.219 (collecting statutes of twenty-six states allowing decedent's representative to assert the privilege). *But see also In re* Estate of Covington (Edmonds v. Hammett), 450 F.3d 917, 925-26 (9th Cir. 2006) (finding a lack of statutory or common law testamentary exception to the privilege's survival in Washington, as discussed *infra* notes 101-105).

[69] EPSTEIN, *supra* note 26, at 990.

[70] *Cf.* Jared S. Sunshine, *The "Rarely Discussed and More Rarely Applied" Antitrust Implications of Contractual Releases of Antitrust Liability, with a Modest Proposal*, 48 OHIO N.U. L. REV. 239, 322 n.575 (2022) (citing NIGEL WARBURTON, THINKING FROM A TO Z 66 (2007) as to "how the adage in fact refers to the unusual example that *tests* or *challenges* the general rule rather than corroborates it, as it is commonly misinterpreted")

[71] Cal. Evid. Code §§ 954, 957; *see* HLC Properties, Ltd. v. Superior Ct., 4 Cal. Rptr. 3d 898, 902 (Cal. Ct. App.) ("Notwithstanding that the California Evidence Code does not explicitly provide for the termination of the privilege, MCA points out that the California Law Revision Commission that helped draft the Evidence Code said that under that Code, the personal representative becomes the holder of the individual's privilege only for the purpose of furthering the estate's interests during its administration, and that when the administration of the estate is complete and the personal representative is discharged, the privilege terminates."), *review granted and opinion superseded sub nom.* HLC Properties, Ltd. v. Superior Ct., 81 P.3d 223 (Cal. 2003), *rev'd on other grounds*, 105 P.3d 560 (Cal. 2005).

[72] EPSTEIN, *supra* note 26, at 991 ("California's testamentary privilege statute is exceptional. It allows the attorney to assert the privilege only so long as the holder of privilege (the estate's personal representative) exists, suggesting the privilege terminates when the estate is wound up. . . . But no other state has followed California's lead in this regard."). *Contra* Richard C. Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 KY. L.J. 1165, 1183 (1999) ("[T]he plain meaning of the evidence rules in twenty-five states, exemplified by K.R.E. 503, suggests that when the deceased client's estate closes, and the personal representative is discharged, the privilege ends because there is nobody left to claim it. But what about the

Fittingly, the most notorious exaltation of the privilege eternal arose again in the Supreme Judicial Court of Massachusetts, in *In re John Doe Grand Jury Investigation*.[73] Charles Stuart was the surviving victim in a grisly case in Boston in which his pregnant wife and prematurely born child were slain; although Stuart initially blamed an unknown gunman, his brother later implicated him, and shortly after a two-hour consultation with his lawyer John Dawley, Stuart leapt to his death from the Tobin Bridge.[74] Following the suicide, a grand jury was convened to investigate the murder, and prosecutors sought to compel Dawley's testimony, arguing that the "interests of justice" demanded the privilege be breached.[75] The lower court certified the question to the appellate division, whereupon the Supreme Judicial Court extraordinarily *sua sponte* appropriated the matter to itself, announcing that the "administration of justice would be best served by our answering the reported question" notwithstanding any hypertechnical procedural defects.[76]

Thus legally (if irregularly) seized of the question, the high court was quick with its answer: "No. In the circumstances shown by the record, the attorney-client privilege should not be overridden."[77] The court considered a mountain of precedent from Massachusetts to the Supreme Court affirming one and all that the benefit to the justice system afforded by the privilege outweighs the loss of probative testimony.[78] Nor did death terminate or waive the privilege:[79]

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lawyer? Shouldn't the lawyer still be able to claim the privilege? The answer ought to be 'no.'" The evidence rules in all twenty-five states make clear that the lawyer can claim the privilege only on behalf of the client. While the client is alive, the lawyer's ability to claim the privilege is derived from the client. After the client dies, the lawyer's ability is derived from the personal representative; when the personal representative ceases to exist, the lawyer's ability to claim the privilege should also cease to exist.").

[73] *In re* John Doe Grand Jury Investigation, 562 N.E.2d 69 (Mass. 1990).

[74] Fox Butterworth & Constance L. Hays, *Motive Remains a Mystery in Deaths That Haunt a City*, N.Y. TIMES, Jan. 15, 1990, at A1.

[75] *John Doe*, 562 N.E.2d at 69; *see* Fox Butterworth, *Dispute Emerges in Boston Murder*, N.Y. TIMES, Apr. 5, 1990, at A20 ("Paul K. Leary, the First Assistant District Attorney for Suffolk County, said Mr. Stuart's talk with Mr. Dawley 'could be the crucial evidence' in the case. 'It's baffling to us why the Stuart family doesn't want this to be told, unless they are protecting somebody,'' Mr. Leary said in an interview today. Prosecutors from the District Attorney's office are to present a motion in Suffolk County Superior Court on Thursday arguing that the confidentiality of talks between a lawyer and his client, a principle that has so far protected Mr. Stuart's conversation with Mr. Dawley, lapsed with his death.").

[76] *John Doe*, 562 N.E.2d at 69 ("Purporting to act under Mass.R.Crim.P. 34, 378 Mass. 842, 905-06 (1979), a judge reported to the Appeals Court the question whether, in the circumstances of this case, the attorney-client privilege should be overridden. We transferred the matter to this court on our own initiative. We pass any question concerning the propriety of the report. None of the parties challenges the report on procedural grounds, and we are satisfied that efficiency in the administration of justice would be best served by our answering the reported question regardless of whether, as a technical matter, it is properly before us.").

[77] *Id.* at 70.

[78] *Id.* ("But that is the price that society must pay for the availability of justice to every citizen, which is the value that the privilege is designed to secure. The 'social good derived from the proper performance of the functions of lawyers acting for their clients ... outweigh[s] the harm that may come from the suppression of the evidence.'") (quoting Commonwealth v. Goldman, 480 N.E.2d 1023 (Mass. 1985), *cert. denied*, 474 U.S. 906 (1985)).

[79] *Id.* ("The privilege of insisting that the attorney keep confidential the client's disclosures made to the attorney in his or her professional capacity belongs only to the client, and therefore can be waived only by

> It is important to note that the attorney-client privilege survives the client's death. Survival of the privilege is the clear implication of this court's early pronouncements that communications subject to the attorney-client privilege "cannot be disclosed at any future time," and that "the mouth of the attorney shall be forever sealed." Also, survival of the privilege is necessarily implied from our cases dealing with the power of executors and administrators to waive the privilege which had belonged to the deceased client. If the privilege were to end upon the death of the client, there would be nothing for the executor or administrator to waive.[80]

Wisely, the commonwealth did not claim so much, instead having urged that the privilege should be overridden because Stuart, being dead, was beyond suffering any harm from disclosure, whereas society could benefit greatly in closing the unsolved case.[81] The court was unimpressed, locating but a single scrap of precedent to support the proposition, whilst discarding another proffered case as illustrating only the well-established testamentary exception.[82] The frail scrap was the Pennsylvania trial court opinion in *Cohen v. Jenkintown Cab Co.* with "clear factual distinctions," even absent which the court declared primly that it would not blithely follow an iconoclastic *hapax legomenon*.[83] Such an allowance would gut the privilege: "A rule that would permit or require an attorney to disclose information given to him or her by a client in confidence, even though such disclosure might be limited to the period after the client's death, would in many instances, we fear, so deter the client from 'telling all.'"[84] Charles Stuart could take his secrets to the grave, as the ensuing pull quote in the *New York Times* screamed in reportorial dudgeon: "Questions in a bizarre case may go unanswered."[85]

Judicial harmony was not quite unmarred, as the solo dissent in *John Doe* well

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the client, or, in some instances at least, by the executor or administrator of the client's estate. There has been no waiver in the present case.") (citations omitted).

[80] *Id.* (quoting Hatton v. Robinson, 31 Mass. (14 Pick.) 416, 421 (1834) and then Foster v. Hall, 29 Mass. (12 Pick.) 89, 94 (1831) (both quoted *supra* notes 56)).

[81] *Id.* at 70-71 ("The Commonwealth does not contend that Charles Stuart's death terminated any preexisting attorney-client privilege. Rather, the Commonwealth's position is that Charles Stuart, having died, no longer can be harmed by the disclosure of his communications to his attorney, and therefore, in this case, the privilege should be 'overridden' because society's interest in ascertaining the truth concerning the deaths of Carol DiMaiti Stuart and Christopher Stuart and in identifying the parties responsible therefor outweighs the value sought to be promoted by means of the attorney-client privilege.").

[82] *Id.* at 71.

[83] *Id.* at 71-72 ("There are clear factual distinctions between the *Cohen* case and the present matter, which we do not pause to identify, because, even if there were not such distinctions, we would not follow *Cohen*. As we have indicated, extraordinarily high value must be placed on the right of every citizen to obtain the thoughtful advice of a fully informed attorney concerning legal matters.") (discussing Cohen v. Jenkintown Cab Co., 357 A.2d 689 (Pa. Super. Ct. 1976)).

[84] *Id.* ("We think that that potential is inconsistent with the traditional value our society has assigned, in the interests of justice, to the right to counsel and to an effective attorney-client relationship. Therefore, except where mandated by constitutional considerations, which are not a factor in this case, we conclude that the attorney-client privilege should not yield either before or after the client's death to society's interest, as legitimate as we recognize that interest is, in obtaining every man's evidence.") (citation omitted).

[85] *Ruling May Block Prosecutors in Boston Slaying*, N.Y. TIMES, Nov. 6, 1990, at A16.

limned.[86] Justice Joseph Nolan wrote that the privilege may be "hallowed" but is "not absolute," pointing to a handful of exceptions.[87] As the privilege was justified by its benefit to the system of justice, the selfsame "administration of justice" ought to accommodate disclosure that would, in the balance, serve the greater good.[88] Departing from the majority,[89] Nolan cited an 1838 decision of the Pennsylvania Supreme Court as contemplating the compromise of privilege where no interest of the client was at stake,[90] as later illustrated in *Cohen*.[91] Indeed, he believed the Nebraska Supreme Court had since endorsed the proposition as well.[92] Accordingly, he embraced *Cohen*'s tripartite test, which would weigh any disclosure's societal benefits against its "impact on the client's daily affairs," any potential liability to the estate, and whether it might "blacken the memory" of the deceased.[93] Application to the instant case clearly favored disclosure, for a murderer was possibly at large, whilst the client was dead, the estate was worthless, and "given the present reputation of Charles Stuart, it is difficult to conceive of any revelation which could further deface his memory."[94] Absent a balancing-test mechanism "in the interests of justice," Nolan fretted that the privilege had no "safety valve" to allow for such

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[86] John Doe, *supra* note 70, at 72-73 (Nolan, J., dissenting).

[87] *Id.* at 72 (citing cases for the crime-fraud, testamentary, and joint client exceptions).

[88] *Id.* ("It has been noted that the rationale of the privilege is that 'the detriment to justice from a power to shut off inquiry to pertinent facts in court, will be outweighed by the benefits to justice (*not to the client*) from a franker disclosure in the lawyer's office' (emphasis added). McCormick, Evidence § 87, at 175 (2d ed. 1972). Accordingly, the court should adopt a limited exception to the privilege in those cases where the interests of the client are so insignificant and the interests of justice in obtaining the information so compelling, that the administration of justice is better served through waiver.").

[89] The majority could not find "any case subsequently decided by the Pennsylvania Superior Court or the Pennsylvania Supreme Court in which the court has followed the *Cohen* holding." *Id.* at 71 (majority).

[90] *Id.* at 72 (Nolan, J., dissenting) (discussing Hamilton v. Neel, 7 Watts 517, 521-22 (Pa. 1838)).

[91] The majority had described the circumstances in *Cohen* concisely: "In that case, the plaintiff brought an action against the employer of a taxicab driver to recover for injuries the plaintiff had sustained in a motor vehicle accident. There was a question as to the identity of the offending driver, especially as to whether the driver was an employee of the defendant. The taxicab driver had revealed to his attorney that he had been the driver, and then the driver died. In determining the admissibility of that revelation in the case against the taxi company, the Pennsylvania Superior Court weighed the interests of the deceased driver and his estate in the nondisclosure of the driver's communication to his attorney against the plaintiff's interest in disclosure, and decided that, 'in the interests of justice,' the statement should have been admitted at trial." *Id.* at 71 (majority).

[92] *Id.* at 72 (Nolan, J. dissenting) (citing League v. Vanice, 374 N.W.2d 849 (Neb. 1985)).

[93] *Id.* at 73 (quoting Cohen v. Jenkintown Cab Co., 357 A.2d 689 (Pa. Super. Ct. 1976)) ("[O]nce the judge knows the substance of the disclosure, he or she would reapply the *Cohen* factors. If the judge is satisfied that the harm to the client's interests is minimal, the judge should then proceed to step three, a balancing of the competing societal interests. The judge must balance the interests of society in being able to utilize the information against its interest in maintaining the public confidence in the attorney-client privilege. Only if the judge finds that the impact on the public's confidence would be slight compared to the public harm caused by the absence of disclosure, should the judge override the privilege.")).

[94] *Id.* ("When the above analysis is applied to the instant case, it becomes apparent that a lower court judge would have been warranted in ordering at least an in camera disclosure of the substance of the attorney-client conversation. . . . I would acknowledge that simply gaining information for the sole purpose of obtaining a conviction is not, in most instances, sufficient to override the privilege. However, a situation where a murderer is still at large and likely to strike again, would be a compelling example of a case in which the societal interest in preserving the privilege would yield to disclosure.")

exigencies.[95] He was not the only one.[96]

Far afield from Massachusetts and Pennsylvania, the Ninth Circuit has indulged some modest excersus anent privilege after death, despite stating the precept crisply in 1942.[97] In 1977, it confronted an appeal to an order granting enforcement of an IRS summons on attorney Harvey Osborn over objections of privilege.[98] Although the district court had "incorrectly found that the privilege could never be applicable" postmortem,[99] rather than decide the question, the panel held only that the testamentary exception did not apply, and remanded to so that the circumstances of Osborn's communications could be scrutinized.[100] The posture in 2006's *Edmonds v. Hammett* was far weirder—a probate contest tried in federal court because the testatrix was Native American.[101] The decedent's attorneys were subpoenaed by the Department of the Interior to produce materials related to the will, and successfully moved to quash; the government appealed.[102] Concluding that state law controlled, the Ninth Circuit asked whether Washington jurisprudence recognized the testamentary exception to the attorney-client privilege after death.[103] Faced with a dearth of clear precedent, the court declined the government's suggestion to certify the question to the state high court, instead concluding that the dearth itself meant no such exception was "generally accepted," and therefore the customary shield of attorney-client privilege prevailed, thus tacitly recognizing the privilege's survival.[104] The disputed papers would remain secret—forever, presumably.[105]

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[95] *Id.* ("Under the court's analysis, there is no "safety valve," no mechanism by which the attorney-client privilege may ever be overridden by the court in the interests of justice.")

[96] *See, e.g.*, Frances M. Jewels, Comment, *Attorney-Client Privilege Survives Client's Death - In re* John Doe Grand Jury Investigation, 25 SUFFOLK U. L. REV. 1260, 1260-61 (1991).

[97] Baldwin v. Comm'r of Internal Revenue, 125 F.2d 812, 814 (9th Cir. 1942) ("The privilege does not terminate by the death of the client.").

[98] United States v. Osborn, 561 F.2d 1334, 1336 (9th Cir. 1977).

[99] *Id.* at 1340.

[100] *Id.* ("The present case involves no such contest over the validity or construction of Mrs. Johnson's will. Therefore, the attorney-client privilege may apply, depending upon the circumstances under which the communications between Mrs. Johnson and her attorney were made. . . . In the absence of a factual record showing the circumstances under which the communications were made, such an examination and determination of the applicability of the privilege should be made, in the first instance by the district court.").

[101] Edmonds v. Hammet (*In re* Estate of Covington), 450 F.3d 917, 918 (9th Cir. 2006) ("Rarely does a probate matter find its way into federal court. Here we are presented with a will contest involving a member of an Indian tribe in a Department of the Interior probate proceeding where we must decide whether state or federal law of evidence applies.").

[102] *Id.* at 919.

[103] *Id.* at 925.

[104] *Id.* at 925-26 ("The parties have not provided a single Washington case or statute recognizing the testamentary exception; we therefore conclude that the testamentary exception is not 'generally accepted' in Washington, whatever its merits or the likelihood that it would be adopted in the future. In contrast, it is clear that under Washington law, the attorney-client privilege is 'generally accepted.' *See* Wash. Rev. Code § 5.60.060(2)(a)."). Washington precedent, moreover, was clear that attorney-client privilege survived death as a general rule. *See* Martin v. Shaen, 156 P.2d 681, 684 (Wash. 1945) (quoted *supra* note 65).

[105] *Id.* at 926. Epstein takes great umbrage with the resolution in *Edmonds*, writing: "This decision runs so counter to the general proposition that when the law of a state is silent, the federal court is free to and will

C. In the Light of Reason and Experience: *Swidler & Berlin*

1. *Fin de Siècle* Precursors

In 1992, then-law-clerk Simon J. Frankel published a well-reasoned apologia for the incumbent practice of the privilege everlasting in the *Georgetown Journal of Legal Ethics*.[106] After painting a lurid picture of the recent *John Doe* case of Charles Stuart and others of its ilk by way of introduction, Frankel raised the question of whether the privilege should be breached in such cases only to answer in the negative,[107] much as had the *John Doe* court.[108] Embracing the reasoning of the *John Doe* majority, he thought that critics underestimated the degree to which the living would be deterred from full and free colloquy with their counsel by the prospect of their secrets being revealed after death—even if it was impossible to quantify the precise degree.[109] The balancing approach "in the interests of justice" invoked by *Cohen* and its supporters could employ only the most "vague standards" under which expectations of privilege might or might not be upset, dispelling the surety that fosters open communications.[110] To those who protested that with the client dead, vital or even exonerative revelations might be lost forever, Frankel rejoined that absent the privilege, disclosure to the attorney likely would not have happened at all, and so nothing is really lost.[111] Properly understood, a dead client has *already* taken his secrets to the grave.[112]

Nineteen ninety-four saw the same journal return to the same fecund subject, with Brian R. Hood arguing the other side.[113] Hood evenhandedly surveyed both Frankel's view

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apply federal common law of privilege, that it is nothing short of astounding, difficult to reconcile with existing law or understand." EPSTEIN, *supra* note 26, at 989 n.20.

[106] Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 GEO. J. LEGAL ETHICS 45 (1992).

[107] *Id.* at 45-47.

[108] *See supra* notes 75-77 and accompanying text.

[109] Frankel, *supra* note 106, at 59-61 ("While it seems likely that many clients would be concerned as to whether the privilege would continue to protect their communications, one would like to know the degree to which the prospect of disclosure after death would actually deter clients from coming to and confiding fully in attorneys. Unfortunately, the limited empirical evidence which is available is not particularly helpful in revealing the degree to which the privilege affects client behavior.").

[110] *Id.* at 64-70 ("This *ex ante* certainty lies at the heart of the privilege. . . Moreover, any balancing approach to the privilege after the client has died is indeed likely to result in 'vague standards.'"); *id.* at 78 ("An *ad hoc* approach to the privilege after the clients' death will not provide clients with the necessary certainty and will discourage them from confiding completely in attorneys in many situations where they may most require legal assistance.").

[111] *Id.* at 71-73 ("Recognizing that, for the most part, the privilege 'keeps from the court only sources of information that would not exist without the privilege' leads to the conclusion that the 'evidentiary costs' of continuing the privilege beyond the client's death are significantly less than often asserted."); *id.* at 78 ("Critics of the continuation of the privilege point to the loss of information allegedly caused by the privilege as a justification for its abrogation. However, much of this 'lost' evidence might not in fact have come to exist if the certain protection of the privilege did not foster its communication from client to attorney.").

[112] *Id.*

[113] Brian R. Hood, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client*, 7 GEO. J. LEGAL ETHICS 741, 779 (1994).

in favor as well as hornbooks that took a dimmer view,[114] but took particular issue with the legal fiction that the loss of exonerative evidence is occasioned by the client's death, not the privilege: "this argument ignores the fact that an exculpatory communication *has* taken place that is available to the court."[115] In the balance, Hood thought that "society probably places a higher value on exonerating an innocent defendant than on maintaining client confidentiality, even when the price of the higher value would be implicating the deceased client and thus blackening the client's memory."[116] For once tendering hard empirical evidence, Hood cited a 1989 study finding that fourth-fifths of respondents—lawyers and laymen alike—would favor disclosure in such a case.[117] Hood accordingly proposed to amend Rule 1.6 of the Model Rules of Professional Conduct to allow breach of privilege "to potentially exculpate a criminal defendant whom the lawyer has reason to believe is innocent based upon information the lawyer knows about a client who has subsequently died,"[118] in the expectation that evidentiary rules would follow apace in adopting such an allowance.[119]

Four years later, *Swidler & Berlin* arrived on the Supreme Court's docket, which may seem very late in the day for so well-heeled a tradition.[120] Its background was fit to march right alongside Frankel's introductory parade of horribles: In the midst of a fraught investigation of potential presidential misconduct led ultimately by independent counsel Kenneth Starr, deputy White House counsel Vincent Foster retained the well-known D.C. law firm Swidler & Berlin, divulged *something* occupying three pages of handwritten notes, and nine days later committed suicide.[121] Against the backdrop of frenetic public scrutiny and demands for answers,[122] the independent counsel's office issued subpoenas, the district court quashed—and a divided panel of the D.C. Circuit reversed, finding that

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[114] *Id.* at 766-68.

[115] *Id.* at 773 ("Some argue that, as to access to 'every man's evidence,' maintaining the attorney-client privilege after the client's death puts the adversary in no worse position than if the communication had never taken place. Evidence is 'lost forever,' so the argument goes, not because of the privilege, but because of the client's death.") (citing Frankel, *supra* note 106, at 71-72, n.143).

[116] *Id.* at 774-78.

[117] *Id.* at 776-77, n.230 ("A limited but highly suggestive empirical study further indicates the societal consensus: Denise should have disclosed the information from her deceased client.") (citing Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 379-96 (1989)).

[118] *Id.* at 779.

[119] *Id.* at 780 ("Because of the close relationship between the evidentiary privilege and the ethical duty of confidentiality, this Note has suggested that the catalyst to induce modification of the evidentiary privilege to permit disclosure of a deceased client's confidences is reformation of the ethical rules governing confidentiality.")

[120] Swidler & Berlin v. United States, 524 U.S. 399 (1998).

[121] *Id.* at 401-02 ("This dispute arises out of an investigation conducted by the Office of the Independent Counsel into whether various individuals made false statements, obstructed justice, or committed other crimes during investigations of the 1993 dismissal of employees from the White House Travel Office. Vincent W. Foster, Jr., was Deputy White House Counsel when the firings occurred. In July 1993, Foster met with petitioner Hamilton, an attorney at petitioner Swidler & Berlin, to seek legal representation concerning possible congressional or other investigations of the firings. During a 2–hour meeting, Hamilton took three pages of handwritten notes. One of the first entries in the notes is the word "Privileged." Nine days later, Foster committed suicide.").

[122] *See, e.g.*, William Safire, Op-Ed, *Weighing On Foster's Mind*, N.Y. TIMES, Aug. 16, 1993, at A17.

confined to the criminal context, a postmortem exception to privilege balancing the importance of disclosure against secrecy would have little chilling effect *ex ante*.[123]

Rehearing *en banc* was denied over the dissents of Judges David Tatel and Douglas Ginsburg, who decried the blithe abandonment of an ancient common law rule, remonstrating that in the face of twenty states' codifying the survival of privilege postmortem, *Cohen* was literally the only recorded instance of abrogating it in all of American jurisprudence before the D.C. Circuit's novel holding.[124] To the independent counsel's contention that there was no evidence that such disclosure would chill attorney-client relations, Judge Tatel retorted that there was no evidence it would not, and the law had long presumed it would.[125] In sum, he ruled that the "court's new holdings—one chilling client disclosure, the other chilling lawyer note-taking—will damage the quality of legal representation without producing any corresponding benefits to the fact-finding process," for rational lawyers could only respond by deflecting frank confessions and eschewing written notes.[126] Four months later, the Supreme Court granted certiorari.[127]

A couple of articles had actually responded to the D.C. Circuit opinion installing a posthumous exception to privilege but before *Swidler & Berlin* issued, affording a fascinating glimpse into an alternate universe in which the Supreme Court did not take up the case and reverse.[128] Whilst Casey Nix castigated the new exception in no uncertain terms,[129] Erick S. Ottoson was prepared to accept that *some* postmortem compromise of privilege could be made, but complained that the D.C. Circuit had not tailored narrowly enough.[130] The court had deemed the reputational and vicarious "residual interests" of a dead client minimal and unlikely to be at issue amidst "'the sort of high adrenaline situation likely to provoke consultation with counsel'"; by contrast, a defendant might have no

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[123] *Swidler & Berlin* 524 U.S. at 402-03.

[124] *In re* Sealed Case, 129 F.3d 637, 637-39 (D.C. Cir. 1997) (Tatel, J., dissenting from denial of rehearing *en banc*).

[125] *Id.* at 638 ("According to the Independent Counsel, empirical support is 'nonexistent' for the proposition that abrogating the attorney-client privilege after the client's death will chill client communication. But because the Independent Counsel himself urges overturning the common law rule, and because that rule rests on the proposition that preserving the attorney-client privilege after the client's death is necessary to promote client disclosure, the Independent Counsel bears the responsibility of producing evidence to the contrary. . . Without convincing evidence that abrogating the privilege will do no harm to client communications, this court should not abandon centuries of common law.") (citations omitted).

[126] *Id.* at 639. Beyond endorsing the postmortem exception to attorney-client privilege, the D.C. Circuit had also found the notes enjoyed no work product protection.

[127] Swidler, *supra* note 117.

[128] Casey Nix, *In re* Sealed Case: *The Attorney-Client Privilege-Till Death Do Us Part?*, 43 VILL. L. REV. 285 (1998); Erich S. Ottoson, *Dead Man Talking: A New Approach to the Post-Modern Attorney-Client Privilege*, 82 MINN. L. REV. 1329 (1997).

[129] Nix, *supra* note 128, at 287-88.

[130] Ottoson, *supra* note 128, at 1330-31 ("Despite the court's attempt to narrowly circumscribe the scope of its holding,'" the decision in *Sealed Case* has the potential to significantly diminish the scope of postmortem privilege, and thereby to affect the flow of information between clients and attorneys. This Comment argues that the court in *Sealed Case* correctly concluded that certain circumstances justify departure from the strictures of the common law rule, but failed in its decision to adequately safeguard the interests protected by the privilege.").

recourse but the attorney with a percipient witness dead.[131] Ottoson was sympathetic to this calculus, but thought the court undervalued clients' mindfulness of posthumous reputational harms—or at least, the scope of deterrence was unknowable.[132] The D.C. Circuit's test therefore imperiled very real confidences that a client might care deeply about, and the limitation that the secrets "bear on a significant aspect of the crimes at issue" was no limit at all *ex ante*, for only an oracle could prophesy what future penal interests might arise.[133] Ottoson would exempt from privilege only proof of a criminal conspiracy involving the dead client necessary to an ongoing investigation, providing some certainty to the living as to the privilege's scope and helpfully mirroring the freestanding crime-fraud exception.[134] Although concededly no "panacea," his refinement might have helped draw some venom from the D.C. Circuit's unprecedented ruling.[135]

2. The Triumph of Privilege over Penal Interests

Back in our space-time continuum, Chief Justice William O. Rehnquist wrote the opinion for a 6-3 majority reversing the D.C. Circuit. Confirming the privilege as "one of the oldest recognized," he noted first that the courts were to interpret such privileges based on the "'principles of the common law . . . in the light of reason and experience.'"[136] Introducing the independent counsel's contention that the privilege should not survive death where information is relevant to a criminal proceeding, the Court found only *Cohen* and the court of appeals judgment below supporting that view: "other than these two decisions, cases addressing the existence of the privilege after death—most involving the testamentary exception—uniformly presume the privilege survives, even if they do not so hold."[137] Given the "great body of this case law," the Court agreed with Judge Tatel that it was incumbent on the independent counsel to demonstrate that "reason and experience" warranted a departure.[138]

This burden of proof went unmet, for Starr had argued mainly that the same reasoning that supposedly underpinned the testamentary exception—that the efficient settlement of estates outweighed the privilege's survival—should be extended to recognize

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[131] *Id.* at 1346-47 (quoting *In re* Sealed Case, *supra* note 121, *rev'd sub nom.* Swidler, *supra* note 117).

[132] *Id.* at 1347-49 ("The court recognized that disclosure of clients' confidences might, in addition to raising issues of criminal and civil liability, implicate reputational concerns. Its hasty dismissal of those concerns lies at the core of the court's errant formulation of its balancing test.")

[133] *Id.* at 1351-52 ("By failing to specify what it meant by 'significant,' the court invited varying interpretations of the term, and decreased the probability that clients will be able to predict with any certainty the circumstances in which the exception will apply.").

[134] *Id.* at 1353-55.

[135] *Id.* at 1355 ("Confining the exception to communications made by conspirators is not a panacea. Under the utilitarian rationale, the need for a well-grounded expectation of confidentiality applies with equal force to criminal conspirators as it does to innocent third parties. However, this limitation would allow clients to predict with much greater certainty whether their communications were likely to become the subject of a request for disclosure. The vast, law-abiding majority of clients could consult with their attorneys free from the threat of disclosure. Conversely, potential conspirators would be on notice of the risk that their criminal compatriots' communications might be used against them.").

[136] Swidler, *supra* note 117 at 403 (quoting Fed. R. Evid. 501).

[137] *Id.* at 403-04.

[138] *Id.* at 405-06.

that the needs of a criminal case preponderate as well.[139] But the Court thought the minor premise faulty: the testamentary exception did not value probate over privilege, but rather viewed the testator as having intended that privilege be waived to effect his will.[140] By contrast to probate, "[t]here is no reason to suppose as a general matter," wrote Rehnquist, "that grand jury testimony about confidential communications furthers the client's intent."[141] Most centrally, despite scholarly (and the independent counsel's) conjecture to the contrary, the Court thought that much attorney-client discourse would be chilled by the possibility of postmortem revelation:[142]

> Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime. . . . Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability. Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. The same is true of owners of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged.[143]

The privilege presupposes that the matters confided to the attorney would not have been disclosed absent the privilege's impenetrability, which Chief Justice Rehnquist thought included its survival after death, a consideration that he thought particularly likely in the instant case of a client contemplating his imminent demise.[144] The balancing test

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[139] *Id.* at 406 ("He further argues that the exception reflects a policy judgment that the interest in settling estates outweighs any posthumous interest in confidentiality. He then reasons by analogy that in criminal proceedings, the interest in determining whether a crime has been committed should trump client confidentiality, particularly since the financial interests of the estate are not at stake.")

[140] *Id.* ("But the Independent Counsel's interpretation simply does not square with the case law's implicit acceptance of the privilege's survival and with the treatment of testamentary disclosure as an 'exception' or an implied 'waiver.' And the premise of his analogy is incorrect, since cases consistently recognize that the rationale for the testamentary exception is that it furthers the client's intent, *see*, e.g., Glover, *supra* note 46).

[141] *Id.*

[142] *Id.* at 407.

[143] *Id.* at 407-08.

[144] *Id.* at 408 ("In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place. This is true of disclosure before and after the client's death. Without assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real. In the case at hand, it seems quite plausible that Foster, perhaps already contemplating suicide, may not have sought legal advice from Hamilton if he had not been assured the conversation was privileged.") (citing Jaffee v. Redmond, 518 U.S. 1, 12 (1996), and Fisher v. United States, 425 U.S. 391, 403 (1976)).

adopted below of *a posteriori* significance to penal interests would inject uncertainty into the privilege *a priori* which would undermine that supposition, just as the Court had already rejected in *Upjohn v. United States*.[145] And the fact that a few circumscribed exceptions already marred the privilege's absoluteness did not recommend adding more that strayed further from its central purpose: "A 'no harm in one more exception' rationale could contribute to the general erosion of the privilege, without reference to common-law principles or 'reason and experience.'"[146] With only speculation and scant empirical evidence that clients would *not* be deterred by postmortem breach of the privilege, the Court refused to deviate from well over a century of nigh-universally accepted jurisprudence.[147]

Three justices dissented.[148] Writing for the minority, Justice Sandra Day O'Connor opened with the usual catechism of pieties about the search for truth being paramount whilst privileges obstruct that inquiry and are thus disfavored and construed narrowly.[149] Conceding that a "deceased client may retain a personal, reputational, and economic interest in confidentiality," she thought that the interest was necessarily "greatly diminished" by death, and must be compared to the benefit that disclosure can yield in criminal cases once a client is beyond the mortal reach of immunized compulsion to testify.[150] Given the countervailing injury to an innocent defendant who might be exonerated by a dead man's secrets, Justice O'Connor would have recognized a posthumous exception for otherwise unavailable facts in the possession of counsel.[151] As

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[145] *Id.* at 409 ("In any event, a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance. Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege.") (citing Upjohn v. United States, 449 U.S. 383, 393 (1981) and Jaffee v. Redmond, 518 U.S. 1, 17-18 (1996)).

[146] *Id.* at 410.

[147] *Id.* ("It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this. While the arguments against the survival of the privilege are by no means frivolous, they are based in large part on speculation—thoughtful speculation, but speculation nonetheless—as to whether posthumous termination of the privilege would diminish a client's willingness to confide in an attorney. In an area where empirical information would be useful, it is scant and inconclusive.").

[148] Notably, though Justices Sandra Day O'Connor and Antonin Scalia have since left the Court, the final member of the trio, Justice Clarence Thomas, remains as of 2023, a quarter century later.

[149] *Id.* at 411-12 (O'Connor, J., dissenting) ("We have long recognized that "[t]he fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth." In light of the heavy burden that they place on the search for truth, "[e]videntiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." Consequently, we construe the scope of privileges narrowly. We are reluctant to recognize a privilege or read an existing one expansively . . . .") (citations omitted).

[150] *Id.* at 412-13.

[151] *Id.* at 413-14 ("In my view, the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidences. . . . Given that the complete exclusion of relevant evidence from a criminal trial or investigation may distort the record, mislead the factfinder, and undermine the central truth-seeking function of the courts, I do not believe that the attorney-client privilege should act as an absolute bar to the disclosure of a deceased client's communications. When the privilege is asserted in the criminal context, and a showing is made that the

further basis, she thought the testamentary exception opened a far wider doctrinal hole than the majority credited, as did the other well-established exceptions beyond which public policy demanded the privilege halt, regardless of the client's interests.[152] And she perceived great variation and vacillation in the supposedly "monolithic body of precedent," which was largely built upon presumptions and inferences, with holdings squarely on point "relatively rare."[153] Viewed in that light, *Cohen* and the California statute terminating of privilege after probate (not to mention the nattering hornbook authors) loomed larger as persuasive authority.[154] "Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake," the dissent perorated, "the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication."[155]

D. Posthumous Privilege in the Second Millennium

As is typical of Supreme Court opinions, especially those with so ardent a dissent—even those regarding the ubiquitous subject of privilege[156]—academia figuratively felled forests of trees in micro-analyzing the new decision.[157] Many pages were devoted to

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communications at issue contain necessary factual information not otherwise available, courts should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the privilege.").

[152] *Id.* at 414 ("This testamentary exception, moreover, may be invoked in some cases where the decedent would not have chosen to waive the privilege. For example, 'a decedent might want to provide for an illegitimate child but at the same time much prefer that the relationship go undisclosed.' . . . Nor are other existing exceptions to the privilege—for example, the crime-fraud exception or the exceptions for claims relating to attorney competence or compensation—necessarily consistent with 'encouraging full and frank communication' or 'protecting the client's interests.' Rather, those exceptions reflect the understanding that, in certain circumstances, the privilege 'ceases to operate' as a safeguard on 'the proper functioning of our adversary system.'") (citations omitted).

[153] *Id.* at 414-15.

[154] *Id.* at 415.

[155] *Id.* at 416.

[156] *Compare* Jared S. Sunshine, *Observations at the Quinceañero of* Intel Corp. v. AMD, Inc. *on International Comity in Domestic Discovery for Foreign Antitrust Matters*, 69 DRAKE L. REV. 295, 337 (2021) ("The Supreme Court notoriously accepts few antitrust cases, and thus the proclamation from the mount of a new rule relevant to competition law inspires much hullabaloo amongst the scholarly set. . . . And with the Court divided, the rumpus could only be louder.") (citation omitted), *with* EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE § 1.1 (4th ed. 2022) ("It is no secret that in selecting cases to decide, the Supreme Court tends to choose cases that potentially have a significant social impact. Since World War II, privilege cases have had a prominent place on the Court's docket."); *see, e.g.*, Swidler & Berlin v. United States, 524 U.S. 399 (1998); Jaffee v. Redmond, 518 U.S. 1 (1996); Upjohn Co. v. United States, 449 U. S. 383 (1981); Trammel v. United States, 445 U.S. 40 (1980); Fisher v. United States, 425 U.S. 391, 403 (1976); United States v. Nixon, 418 U.S. 683 (1974); Hawkins v. United States, 358 U. S. 74 (1958).

[157] *E.g.*, Jason Greenberg, Comment, Swidler & Berlin v. United States - *And Justice for All*, 80 B.U. L. REV. 939 (2000); Aquanetta A. Knight, Note, Swidler & Berlin v. United States: *The Derogation of the Attorney-Client Privilege*, 43 HOWARD L.J. 243 (2000); Rob Shumaker, *Failing to Recognize the Need for An Exception to the Attorney-Client Privilege: The Supreme Court's Decision in* Swindler & Berlin, 24 S. ILL. U. L.J. 645 (2000); James F. Glunt, *Evidence - Attorney-Client Privilege - Survival of the Privilege After the Client's Death*, 37 DUQ. L. REV. 385 (1999); Gordon, *supra* note 67; Clint Langer, *Evidence - The Attorney-Client Privilege: Nearly Breached* - Swidler & Berlin v. United States, 34 LAND & WATER L. REV. 479 (1999); Kenneth K. Lee, Note, *Attorney-Client Privilege-Dead or Alive?: A Postmortem Analysis of* Swidler & Berlin v. United States, *118 S. Ct. 2081 (1998)*, 22 HARV. J. L. & PUB. POL'Y 735 (1999); Michael Stokes

detailing the sordid details of the independent counsel's investigation and Foster's grim resolution for quietus in far more detail than has this Article,[158] but considerably more directed themselves with welcome punctiliousness to the legal ramifications of the Court's reasoning.

1. Cavils, Quibbles, and Kudos from the Commentariat

The most central complaint was that the majority, although efficiently demolishing every argument against a posthumous privilege and seemingly embracing it, had nonetheless left open some undefined possibility of an exception in more extraordinary circumstances than the Foster case presented.[159] (The offending language appeared in a footnote noting the petitioner's concession that *some* exigency *someday* might warrant an exception, but not yet,[160] perhaps alluding to St. Augustine's much-quoted prayer.[161]) Aquanetta A. Knight was surely the most trenchant, "wholeheartedly disagree[ing]" with the Court's failure to grapple with whether such an exigency could ever arise and condemning the omission as nothing less than "judicial error."[162] Knight believed the Court merely shied from following its own reasoning to the logical conclusion to hold "that there are *no* circumstances that would justify a new posthumous exception to the privilege."[163] Knight did take some small comfort, perversely, in that the dissent clearly (and with dismay) recognized the necessary implication of the majority's argument.[164]

Yet it is no small thing to accuse the Supreme Court of judicial malpractice, and other commentators were more measured in their observations that an opportunity to more

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Paulsen, *Dead Man's Privilege: Vince Foster and the Demise of Legal Ethics*, 68 FORDHAM L. REV. 807 (1999); Wydick, *supra* note 72; Julie Peters Zamacona, Note, *Evidence and Ethics - Letting the Client Rest in Peace: Attorney-Client Privilege Survives the Death of the Client*, 21 U. ARK. LITTLE ROCK L. REV. 277 (1999).

[158] *See, e.g.*, Knight, *supra* note 157, at 245-47; Glunt, *supra* note 157, at 385-87; Gordon, *supra* note 67, at 494-96; Lee, *supra* note 157, at 736-8; Paulsen, *supra* note 157, at 807-28 (presenting a thorough examination of Foster's life and mental state in his final days); Zamacona, *supra* note 157, at 278.

[159] *See, e.g.*, Knight, *supra* note 157, at 260-68; Gordon, *supra* note 67, at 524-27.

[160] Swidler & Berlin v. United States, 524 U.S. 399, 409 n.3 (1998) ("Petitioners, while opposing wholesale abrogation of the privilege in criminal cases, concede that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege. We do not, however, need to reach this issue, since such exceptional circumstances clearly are not presented here."); *see* Knight, *supra* note 157, at 245 n.10 (discussing the footnote); Gordon, *supra* note 67, at 524 n.251 (same).

[161] *See* Richard W. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795, 829 n.116 (2002) ("I had prayed to you for chastity and said 'Give me chastity and continence, but not yet.'") (quoting St. Augustine, CONFESSIONS bk. VIII, at 169 (R.S. Pine-Coffin trans., Penguin Books 1961)).

[162] Knight, *supra* note 157, at 245 n.10 ("The Independent Counsel based his argument not on the premise that one of the existing exceptions to the privilege applied to the facts of this case, but that the facts of this case justified further derogation of the privilege by way of a new exception to the rule. This Note stands for the proposition that the issue of exceptional circumstances stands at the heart of the Independent Counsel's argument and the Court committed judicial error by its failure to address this issue head on.")

[163] Knight, *supra* note 157, at 266 (emphasis added).

[164] *Id.* at 266-7 ("These statements by the dissenting Justices are clear indicia that the majority's reasoning addresses and rejects any argument suggesting that the posthumous application of the privilege should be determined by the circumstances of a particular case.").

expressly settle the question had been pretermitted.[165] In fairness, Paul A. Gordon suggested in the *Temple Law Review* that what the Court should have added was not the immutable decree that Knight advocated but rather a more clear allowance for disclosure by a lawyer of specifically exculpatory testimony whose exclusion would trammel the constitutional rights of a criminal defendant to liberty, fair trial, compulsory process, or due process.[166] And still others falling somewhere in the middle of the warring views wondered at Rehnquist's choice to pronounce so broad a repudiation of the proposed exception rather than confine himself more conservatively to the case at hand.[167]

The very fact that so many words were being spilled was evidence of another complaint: that the new pronouncement and ambiguity as to its application to future circumstances fomented undesirable uncertainty in the privilege.[168] Indeed, the concept of privilege as it stands (notwithstanding its status postmortem) is somewhat uncertain already, afflicted with exceptions and subject to future adjudication that leave its enjoyment uncertain *a priori*.[169] And yet all of these abstruse convolutions discernable only by learned

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[165] *E.g.*, Gordon, *supra* note 67, at 494 ("By refusing to address this issue, the Court left open a question that has been debated by legal commentators for decades and most certainly will need to be decided in the future."); Langer, *supra* note 157, at 494 ("The Court's holding is limited to finding the independent counsel did not prove a case compelling enough to make an exception to the attorney-client privilege. . . . In doing so, the Court made the proper decision to refuse to upset the privilege. . . . but left the door open to hear a case which addresses the criminal constitutional rights issue. For now, the attorney-client privilege remains safe from intrusions that may occur after the client's death.").

[166] Gordon, *supra* note 67, at 526 ("A narrow posthumous exception to the attorney-client privilege, which would protect the rights of third-party criminal defendants, should have been suggested by the *Swidler* Court . . . . [*viz.*] the attorney-client privilege and ethical duty of confidentiality do not apply to client confidences that could 'potentially exculpate a criminal defendant whom the lawyer has reason to believe is innocent based upon information the lawyer knows about a client who has subsequently died.'") (quoting Hood, *supra* note 113, at 779).

[167] Glunt, *supra* note 157, at 405 ("If anything is surprising about *Swidler & Berlin*, it is the rather broad nature of Chief Justice Rehnquist's opinion, considering the narrow factual events giving rise to the legal issue. Perhaps it would have been more appropriate for the Court to expressly limit its holding to situations in which a grand jury is seeking relevant but allegedly privileged information to determine whether a criminal prosecution should go forward and the holder of the privilege is dead.")

[168] Knight, *supra* note 157, at 271 ("First, the existence of the recognized exceptions is justified because the policies that form the basis for the rule itself also form the basis for the existing exceptions. The new exception could in no way be based on protecting the best interests of the client. Second, the existing exceptions can be articulated in such a way that the client will know when they could be invoked. This type of exception to the privilege would always be uncertain in its application because neither the client nor the attorney could foresee when exceptional circumstances would require the disclosure of confidential communications.").

[169] Greenberg, *supra* note 157, at 961 ("[T]he findings do not differ significantly from the effects of the proposed posthumous exception to the privilege because in all of the circumstances, the client does not know whether his voluntary communications will be disclosed at a later date."); Lee, *supra* note 157, at 745-46 ("Finally, there are already numerous exceptions to the attorney-client privilege, yet they do not seem to have deterred candor."); Paulsen, *supra* note 157, at 833 ("Of course, the fact that uncertainty already exists does not justify creation of a rule that would increase uncertainty. It seems obvious, however, that almost all of the uncertainties set forth in the previous paragraphs would be of far more relevance to a client contemplating the degree to which he safely can be forthcoming to his lawyer, than would be the question of whether attorney-client privilege will survive the client's death in the event the communications become relevant to a criminal investigation.").

counsel have not appreciably deterred consultations as yet—if clients thought about them at all.[170] Indeed, other authors credited the Court for avoiding any further doctrinal confusion by reaffirming the traditional justification for privilege in maintaining free and frank discourse with counsel rather than commingling the more newfangled personal "privacy" justification advocated of late,[171] and praised the Court's attempt at confirming a familiar and cogent rule.[172]

Some legal authors also made note of the problems with contemplating a new exception to legal privilege without concomitant changes to the ethical duty of confidentiality.[173] (The more thoughtful critics advised that both be modified in concert if at all.[174]) But setting *Swidler & Berlin* aside, the ethical opinions issued by bar associations have already brought confidentiality and privilege into conflict in posthumous cases, evidently due to the bar's institutional inclination towards more protective standards.[175] Ethical duties and legal rules of evidence can inform each other, but have never perfectly coincided as to posthumous privilege.[176] And ethical standards self-adopted by the profession are not and cannot be the *de jure* justification for proscriptive evidentiary rules,[177] even if the reality is that courts often look to ethics as *de facto* persuasive

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[170] Greenberg, *supra* note 157, at 961 ("Nevertheless, these limited exceptions do not appear to have discouraged open communications between attorneys and their clients."); Lee, *supra* note 157, at 746 ("These exceptions have not apparently chilled client communication because clients may not place as high a premium on the privilege as lawyers do.").

[171] Langer, *supra* note 157, at 494 ("While the privilege may be subject to future attacks from a criminal defendant, the Court reinforced the position that the privilege has in our legal system by stressing the utilitarian justification and the benefits the privilege produces for society. By choosing the utilitarian justification rather than the privacy rationale, the Court has enabled itself to avoid the balancing of competing individual rights in future cases.").

[172] Gordon, *supra* note 67, at 406 ("Undoubtedly, the majority desired to articulate a bold, clear rule in order to promote certainty in a lawyer's explanation of the attorney-client privilege to a client. This certainty allows both attorneys and clients to confidently rely on the evidentiary attorney-client privilege.")

[173] Knight, *supra* note 157, at 270-71 ("A new posthumous exception could necessitate the repeal, or at the very least the major revision and modification, of the professional code of ethics governing the actions of attorneys."); *see* Zamacona, *supra* note 157, at 282-83 ("Ideally, there should be no conflict between the evidentiary and ethical rules governing confidentiality."); *see also* Hood, *supra* note 113, at 774 ("Because of the close relationship between the evidentiary privilege and the attorney's ethical duty of confidentiality, revising the ethical rules to permit disclosure may provide the catalyst necessary to force courts to create a comparable interest of justice evidentiary exception").

[174] *See, e.g.*, Gordon, *supra* note 67, at 526 (quoted *supra* note 166).

[175] Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 367, 398-99, nn.108-11 (1995) ("Like legislatures, bar committees tend to confuse the terms 'privilege' and 'confidentiality' in their opinions. Yet they ordinarily do so in a way that expands lawyers' rights and obligations to keep secrets. For example, the San Diego County Bar Association Legal Ethics and Unlawful Practices Committee, perhaps unthinkingly, has recently applied the principle that attorney-client privilege survives the client's death to the attorney-client confidentiality context. The committee's opinion did not take into consideration confidentiality's broader scope nor the fact that attorney-client privilege is limited by exceptions inapplicable to confidentiality.").

[176] Wydick, *supra* note 72, at 1177-80.

[177] *See* Glunt, *supra* note 157, at 391-92 ("Two distinct legal concepts are involved in a discussion of this confidentiality; these are the court's evidentiary rules concerning communications from client to attorney and the attorney's ethical duty to keep client information confidential. The ethical duty is typically expressed in

authority.[178] As a result, unavoidable discrepancies were nothing new, as there had always been some awkward incongruity between the attorney's professional duty to the client and the client's own privilege.[179]

Others drew critical attention to the Court's reliance on a double negative: the *absence* of evidence that the attorney-client privilege did *not* matter that much to encouraging client confidences.[180] "While any erosion to the confidential communications privilege has been temporarily halted," explained Julie Peters Zamacona, "the lack of conclusive data on the effects of confidentiality suggests it has been halted by default only,"[181] and might resume upon a more rigorous showing.[182] Yet the historical dearth of data evinces the difficulty of assessing client views and behaviors with reference to the privilege,[183] and at least one author despaired of ever having the truth: "The answer to all of this, as an empirical matter, is probably unknowable."[184] In the early 1990s, Frankel too had lamented the evidentiary lacuna anent privilege before *Swidler & Berlin* was even a twinkle in Rehnquist's eye,[185] even as Hood claimed to locate some credible indicators,

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the form of rules for professional conduct and, therefore, is not a factor in judicial opinions."); Hood, *supra* note 113, at 746 ("Notwithstanding their official status, ethical rules are usually subservient to other statutory law or judicially established rules of evidence. Because of this distinction, ethical duties should not, in theory, provide a basis for judicial decision making.").

[178] Hood, *supra* note 113, at 746 ("However, courts occasionally use the two concepts interchangeably, thus suggesting the de facto if not de jure influence of ethical rules."); *id.* at n.20 ("One should note, however, that the bar's ethical rules sometimes take on the effect of legislation when they are adopted by courts.") (citing Geoffrey C. Hazard Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1065 n.14 (1978)).

[179] Zamacona, *supra* note 157, at 282-83 ("The reality of the relationship between the [ethical and evidentiary] privileges is less than ideal. . .. Yet an attorney can only truly guarantee his client as much protection as is spelled out by the limited evidentiary privilege.").

[180] *See* Lee, *supra* note 157, at 742-43 ("Yet the Court insists that clients' speech may be chilled and they may not speak candidly if the law allows the attorney-client privilege to expire upon death of the client in criminal cases. But is that really true as an empirical matter? To paraphrase the Courts opinion, this is speculation, maybe plausible speculation, but speculation nonetheless."); Zamacona, *supra* note 157, at 286-87.

[181] Zamacona, *supra* note 157, at 278.

[182] *Id.* at 297, n.144 ("In *Swidler*, the Court concluded that the time had not come for another exception to the attorney-client privilege. This does not mean, however, that such a time will never come. . . . Indeed, the privilege may be more successfully attacked in the future if further studies are performed and prove confidentiality has a minimal effect on client behavior.").

[183] Langer, *supra* note 157, at 491 ("Faced with this lack of empirical evidence on the effectiveness of the privilege, the Court was forced to rely on tradition and reason to uphold the privilege in this case."); Paulsen, *supra* note 157, at 833 ("Good empirical work does not exist to answer the question of how uncertainties concerning privilege and confidentiality affect clients' willingness to disclose damaging or embarrassing information to their lawyers."); Wydick, *supra* note 72, at 1171-72; Zamacona, *supra* note 157, at 286-87. *But see* Gordon, *supra* note 67, at 521 ("Empirical evidence, while limited to a handful of studies, suggests that a substantial number of clients and attorneys feel the attorney-client privilege encourages full and frank communication between attorney and client. While none of these studies tests the effect potential posthumous disclosure of client confidences would have on client candor, common sense suggests that the protection against posthumous disclosure serves the same end in many cases.") (citation omitted).

[184] Paulsen, *supra* note 157, at 836.

[185] Frankel, *supra* note 106, at 61.

presaging the differential interpretation of studies based on viewpoint.[186] The Court's instinct to maintain the status quo absent indisputable evidence to the contrary is understandable, even prudent.[187] Nevertheless, there was at least one proof point, albeit much debated too as to its significance: The very fact that Foster, a skilled practicing attorney also contemplating his own demise, had confided in his own attorney despite the unsettled state of pre-*Swidler* jurisprudence, implied at least that absolute surety was no sine qua non for confession.[188]

2. Critiques of a More Fundamental Nature

Setting aside cavils, one intrepid author sought to answer the "significant issue that the Court did not decide—how long after the client's death should the attorney-client privilege remain alive?"[189] Richard C. Wydick acknowledged the lack of empirical evidence for posthumous privilege before suggesting that none was needed, for privilege was defensible on the basis of personal autonomy rather than as a utilitarian adjunct to the justice system.[190] Eliding over Rehnquist's seemingly deliberate omission of that theory,[191] he opined that apprehension about one's posthumous reputation and surviving loved ones "is an important interest that the law ought to protect. Even without empirical evidence that the lack of a privilege might deter the client from making the communication, conferring privilege protection is consistent with the positive theory of freedom."[192] This left the crucial question of duration, however, and given *Swidler & Berlin* had rejected the life of the client as a suitable extent, Wydick identified the only other coherent options as (1) eternity, (2) some arbitrary number of years, or (3) the close of probate.[193]

A decade before, Frankel had mulled a fixed but arbitrary trailing period of secrecy

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[186] *See* Hood, *supra* note 113, at 749 ("Utilitarian arguments for strict confidentiality of client information are criticized as having dubious empirical support. Evidence exists that many clients do not understand or even know of the attorney's ethical duty of confidentiality. This same evidence suggests that many clients would reveal secrets to their attorneys even without assurances of total confidentiality. Others argue that, in many instances, effectiveness of counsel is not harmed by clients' failure to reveal all confidences to their attorneys.") (citations omitted).

[187] Lee, *supra* note 157, at 742 ("[A]lthough the Court overstates the chilling effect, at least logically and intuitively, actual empirical evidence is sparse and does not conclusively support either side. In light of this ambiguity, the Court was correct in maintaining the long-standing tradition of a relatively absolute attorney-client privilege until more definitive empirical evidence becomes available."); *id.* at 749 ("It seems imprudent to overturn several hundred years of legal precedent without having any substantial, conclusive empirical evidence to the contrary.").

[188] *Compare* Paulsen, *supra* note 157, at 835 ("Thus, the example of Foster himself is at odds with the Court's analysis: uncertainty about posthumous application of the privilege does not invariably chill clients—even very sophisticated ones, and even potentially suicidal ones—from confiding in their attorneys."); *with* Gordon, *supra* note 67, at 523 (noting "the strong possibility that Foster was contemplating suicide indicates that Vince Foster would not have consulted Hamilton if the attorney-client privilege had not applied to his disclosures"); *and* Lee, *supra* note 157, at 747 ("If the attorney-client privilege did not extend beyond death for Vince Foster, he may have never even spoken to his attorney.").

[189] Wydick, *supra* note 72, at 1167.

[190] *Id.* at 1173-6.

[191] *See* Langer, *supra* note 154 at 494.

[192] Wydick, *supra* note 72, at 1176.

[193] *Id.* at 1181-83.

after death that would still vindicate a Pharaonic[194] client's yen for an unblemished legacy, but rejected such a quantification as "more trouble than it would be worth," and Wydick could find no legislature that had since opted for an expiration-date-certain postmortem, recommending against the option.[195] Averse also to the indefinitude of eternity as purportedly contrary to precedent,[196] Wydick endorsed California's statutory rule[197] as faithfully reflecting the philosophical progenitor of many other state laws in urging that the privilege perish alongside the decedent's estate,[198] thereby comporting with the intuition that any interests of the client that survive death would diminish rapidly with time and handily aligning too with the handful of years it would take to probate an estate in the ordinary case.[199] "At present in the United States, geography makes a substantial difference," Wydick concluded: "In some states, the privilege lasts only for a few years, while in others it lasts forever."[200] The Supreme Court, however, had offered no terminus in its own ratiocination, leaving in place durational indefinitude and haphazardness.

Inevitably, there were those who felt that the Court simply got it wrong fundamentally rather than durationally.[201] Many such arguments largely tracked those raised explicitly or implicitly in Justice O'Connor's dissent: how could public policy endorse a testamentary exception for "who gets Blackacre" whilst eschewing one for "who gets convicted"[202]; how can posthumous reputation outweigh a living defendant's

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[194] *Cf.* source cited *infra* note 219.

[195] Wydick, *supra* note 72, at 1182 ("Simon Frankel suggested this idea but rejected it as more trouble than it would be worth. My research has not discovered any jurisdiction that has implemented this alternative.") (citing Frankel, *supra* note 106, at 72-73 n.151).

[196] *Id.* at 1181 ("This choice reflects the position of the English common law and some of the twenty-four states in the United States that have not adopted a modern privilege rule. When the client dies, the privilege goes on and on, like the Energizer bunny. Moreover, nobody needs to claim the privilege, because in these states the privilege applies automatically, unless the client waived it or authorized somebody to waive it for him") (citations omitted).

[197] *See supra* note 71 and accompanying text.

[198] Wydick, *supra* note 69 at 1185-88 ("Thus, the legislative background of Model Code of Evidence section 209—the great-grandfather of the attorney-client privilege rules in the twenty-five states in question—pretty clearly indicates that the privilege was intended to end at the closing of the deceased client's estate.").

[199] *Id.* at 1188-90 ("If the Supreme Court majority was correct in *Swidler & Berlin* that at least some clients are very concerned about what happens to their reputations, their families, and their friends after they die, then we ought to care whether the privilege lasts for eternity or only for a few years until the client's estate closes.").

[200] *Id.* at 1188.

[201] *E.g.*, Greenberg, *supra* note 157, at 943 ("This Case Comment argues that the Supreme Court in *Swidler & Berlin* incorrectly adopted a *per se* rule that the attorney-client privilege always survives the client's death."); Shumaker, *supra* note 157, at 646 ("[T]he Supreme Court ruled incorrectly with regard to the importance of relevant evidence from a deceased client to criminal proceedings and should have followed the insightful argument of Justice O'Connor."); Paulsen, *supra* note 157, at 841 ("The Court was right, I believe, in sensing the overbreadth of the D.C. Circuit's exception. But the Court was wrong in not seeing the possibility of a narrower exception (though it did not receive much help from the lower court or the Office of Independent Counsel in this regard).").

[202] Shumaker, *supra* note 157, at 654; *see* Lee, *supra* note 157, at 745 ("For example, the testamentary exception to the attorney-client privilege could potentially allow posthumous disclosure of embarrassing information like a provision in a will for an illegitimate child or a mistress.").

liberty;[203] how much uncertainty did an exception postmortem really introduce into the calculus of a client's disclosure;[204] and how much would anyone with legal problems care anyway?[205] Remorseful clients, after all, might have approved of their secrets being used virtuously to save a wrongfully accused man from prison, affording perhaps some manner of *post facto* absolution.[206] Irrespective of the dead client's intent, moreover, critics proposed that a "safety valve" was needed to vindicate innocent (and *living*) defendants, even if the *dead* clients suffered reputational harm from their counsel admitting their guilt: the dead were beyond the reach of human justice.[207] The unaddressed question that Knight had assailed so fiercely[208] thereby became a preserved opportunity for the Court to revisit more extraordinary circumstances and correct its mistake.[209] Second chances aside, the breadth of Rehnquist's opinion still rankled some:[210] for an august tribunal that proclaimed itself "a court of review, not first view,"[211] Rob Shumaker griped in the *Southern Illinois University Law Journal* that the chief justice had preempted the percolation of a worthy

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[203] Greenberg, *supra* note 157, at 962-64 ("Consequently, it seems imperative that the attorney-client privilege give way to the fundamental interest of protecting an innocent man from conviction."); Shumaker, *supra* note 157, at 655 ("Although a client may have concerns about reputation, the innocent defendant whose life is at stake surely should outweigh any concerns relating to reputation of a deceased client."); *id.* at 658.

[204] *See* Shumaker, *supra* note 157, at 656 ("This is where the need for an adequate standard should be developed so that when the situation arises, a court can invoke a posthumous exception while keeping in mind the interests of the client, the possible innocent defendant, and the public. Several standards have been articulated to create a limited exception."); Paulsen, *supra* note 157, at 832 ("Not only might a client not know in advance whether, after his death, his communications to an attorney might be relevant to a criminal rather than a civil proceeding, but the client might also not know in advance—and likely would care a great deal more—whether his communications will be privileged at all, even during his lifetime.").

[205] Greenberg, *supra* note 157, at 962-64 ("Although personal and family reputation and civil liability could conceivably motivate a client's nondisclosure, unless he is gravely ill or threatened with death at the time he communicates to the attorney, a client probably will not be influenced by fears of post-death disclosure. The vast majority of clients have more immediate concerns . . ."); Lee, *supra* note 157, at 744 ("The thought that some personal but noncriminal information may be revealed possibly decades later when the client dies is likely to be an ancillary concern."); Paulsen, *supra* note 157, at 832 ("A client, for example, might not know a lot of things about application of the privilege in some as-yet-uncommenced (or even commenced) legal proceeding, and his lawyer might not be able to tell him with any degree of objective certainty.").

[206] Greenberg, *supra* note 157, at 965 ("In circumstances where the proposed posthumous exception would apply and because the possibility of criminal sanctions has ceased after a client's death, perhaps the client would want his attorney to reveal the communications in order to prevent an innocent person from going to jail.")

[207] *Id.* at 958-59 ("[T]he majority of the Supreme Court in *Swidler & Berlin* should have adopted a 'safety-valve' to the attorney-client privilege in order to allow disclosure of the necessary evidence to exculpate innocent defendants."); *see also In re* John Doe Grand Jury Investigation, 562 N.E.2d 69, 73 (Mass. 1990) (Nolan, J., dissenting) (quoted *supra* note 95).

[208] *See* Knight, *supra* note 162-164 and accompanying text.

[209] Shumaker, *supra* note 157, at 657 ("The Court did leave open the possibility that an exception could be warranted in the most limited circumstances not presented in this case. . . Thus, although the Court failed to create an exception in this case, the Court did recognize the importance of the constitutional rights of defendants in criminal cases which could lead to a possible change to the privilege in the future.").

[210] *See* Gordon, *supra* note 67, at 406 (discussed and quoted *supra* note 172).

[211] Cutter v. Wilkinson, 544 U.S. 709, 733 n.7 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.") (citing F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 175 (2004), and United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 494 (2001)).

inquiry in the lower courts with untoward hastiness.[212]

Taking a disturbingly different tack, Michael Stokes Paulsen preferred the shocking yet uncomfortably persuasive argument that the *Swidler & Berlin* rule may perversely encourage those harboring guilty secrets to contemplate suicide as an answer to their problems,[213] proposing his own refinement that posthumous privilege be denied to suicides as a prophylactic measure.[214] To imagine that the intricacies of the law might play a decisive role in someone's self-annihilation is deeply unsettling, and Paulsen undoubtedly meant it to be so even if he phrased the act of self-destruction in studiously clinical terms.[215] Although he defended his proposal also with the justification that none ought to be able to destroy evidence (*viz.* oneself) without some cognizance of the law,[216] he must surely have been aware that when he treated suicides as mere lost modalities of evidence denied to the living, he was both undercutting his major premise in favor of preserving human life and liberty, as well as his minor premise that a moral system of justice should serve to accomplish those goals.[217] All the same, Paulsen's hypothesis is horrifying enough, and

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[212] Shumaker, *supra* note 157, at 659 ("[T]he Court acted too quickly in resolving this attorney-client privilege issue. If the Court was not going to create an exception here, then maybe it should have allowed the lower courts and legal scholars a chance to develop a workable standard that best protects the interests of all sides.").

[213] Paulsen, *supra* note 157, at 835-39 ("The opposite rule—that is, the rule the Court announced in *Swidler & Berlin*—could have the perverse effect of encouraging a client's suicide by assuring that conversations with one's attorney will always remain sealed.").

[214] *Id.* at 841-44 ("I propose an alternative rule, that focuses more crisply on the critical features of the Vince Foster case: (1) the client's voluntary act; (2) of suicide; (3) causing the knowing and voluntary destruction of evidence that otherwise could have been obtained had the client lived.").

[215] *Id.* at 839 ("While it has been decriminalized in many American jurisdictions (chiefly for purposes of not stigmatizing the deceased), it is still a law crime in some and is treated as a wrongful or strongly disfavored act by the law in a great many. It is not at all clear why, especially where the client was himself either involved in probable unlawful activity or possessed (while alive) an affirmative legal obligation to disclose his knowledge of such unlawful activity, the attorney-client privilege should not be deemed forfeited (much as is the case with the crime-fraud exception to the privilege) as to underlying factual information in the attorney's possession concerning the client's knowledge of underlying events.").

[216] *Id.* at 838-39 ("Neither the majority opinion, nor the dissent, nor the Court of Appeals, nor the briefs of the parties, consider whether the privilege should survive the death of the client where the client's suicide destroys access to valuable information, in the form of the deceased's own testimony, that the government otherwise would have been able to obtain in a criminal investigation—especially where that suicide may have been intended (in part) to destroy such evidence.")

[217] In a syllogism, the major premise declares a rule, and the minor premise declares a statement that applies some object to that rule: thus in the classic syllogism premised on "All men are mortal" and "Socrates is a man," the former is the major premise and the latter the minor, and the logical implication of the syllogism is "Socrates is mortal." *See In re* Russell, 293 B.R. 34, 40 (Bankr. D. Ariz. 2003) ("The syllogism, of the classic form—All men are mortal; Socrates is a man; hence Socrates is mortal—is one of the two forms of reasoning. The other is induction, drawing implications or inferences from examples. According to Aristotle, these are the only two methods of reasoning, or persuasion by proof."). Paulsen postulated that justice conserves human life, and that a valid system of justice should serve that goal, and therefore that the present system of justice specifying posthumous preservation of privilege is not valid, accordingly proposing an alternative. But his enunciation of a secondary rationale by which a system of justice may be judged in terms of avoiding the intentional destruction of evidence undercuts his premises and the desired conclusion, perhaps straying towards an attempt at inductive persuasion to distract from the lack of empirical support that many other counsellors, not least of which was Chief Justice Rehnquist, could not help but observe. *See supra* note

the anecdotal evidence suggestive enough, in the persons of Charles Stuart and Vernon Foster, *inter alios*, that Paulsen's moral dilemma and proposed solution must be taken seriously.

3. Modern Restatements of the Rule

Some of these outright detractors sought safety in the numbers of secondary authorities that have proposed some sort of posthumous end to privilege.[218] At base, most treatise authors doubted that clients cared so deeply about their reputational interests, as Wright & Graham's oft-quoted bon mot goes: "One would have to attribute a Pharoah-like [*sic*] concern for immortality to suppose that the typical client has much concern for how posterity may view his communications."[219] Professor Charles W. Wolfram of Cornell has called the notion "mythic" in its lack of foundation.[220] Accordingly, Mueller & Kirkpatrick argued in the 1990s that "if a deceased client has confessed to criminal acts that are later charged to another, surely the latter's need for evidence sometimes outweighs the interest in preserving the confidences."[221]

Some such authorities have begrudgingly adapted to the Court's ruling, without quite confessing error. McCormick once advocated forcefully for compromise of privilege posthumously,[222] but has since accepted that the rule is "fixed more firmly" than ever and "is now entrenched."[223] True to its roots, however, McCormick still wonders whether exceptions should and will be made, suggesting it is "difficult to imagine that the privilege would survive" in a case presenting "a deceased client's confession to a crime with which another is now charged."[224] So too the Restatement once militated for loosening lips after death,[225] but now states flatly that "privilege survives the death of the client" and the lawyer

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183. Even Paulsen admits in the end that developing evidence for or against a utilitarian (which is to say, inductive) defense of privilege and supporting or refuting his otherwise legitimate fear of facilitating suicide is probably impossible. *See supra* note 184 and accompanying text.

[218] Greenberg, *supra* note 157, at 957 ("Despite the *Swidler & Berlin* opinion, a growing number of authorities have adopted or proposed rules under which a deceased client's communications may be revealed in circumstances other than those involving testamentary disputes.").

[219] 24 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5498, at 484 (1986); *see* Greenberg, *supra* note 157, at 959 (quoting and calling it "a statement often quoted by courts and other commentators").

[220] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.3.4, at 256 (1986); *see* Hood, *supra* note 113, at 767, n.155 ("Whether clients' concern for their posthumous reputation significantly affects their degree of disclosure to attorneys remains a questionable proposition. It is important to note that, once a deceased's estate has been settled, reputation is the underlying motivation behind any specific concern regarding post-death disclosures. This is obviously so because, once dead, the client himself is beyond both direct physical and financial harm. Professor Charles Wolfram doubts that 'client communication to lawyers will be chilled by mythic thoughts of . . . post death disclosures . . . about nontestamentary matters.'") (quoting Wolfram).

[221] 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 199, at 380-81 (2d ed. 1994) (cited in Greenberg, *supra* note 157, at 957 n.139).

[222] 1 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 94, at 348 (4th ed. 1992) (cited in Greenberg, *supra* note 157 at 940 n.2).

[223] 1 MCCORMICK ON EVIDENCE § 94 (Robert P. Mosteller ed., 8th ed. suppl. 2022).

[224] *Id.*

[225] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127, cmt. d (Proposed Final Draft No. 1, 1996) (cited in Greenberg, *supra* note 157, at 940 n.2).

is obliged to assert it,[226] even as it hews to its instincts in discerning a "possible, unstated intimation . . . that the privilege perhaps lapses after the estate is wound up."[227] Indeed, the Restatement *still* insists that an exception "would be desirable" postmortem in cases of "need and hardship," listing many reasons why, even whilst admitting that "no court or legislature has adopted it."[228] The Restatement, withal, is aspirational by nature, and cannot always be considered a true restatement of law as it is practiced.[229]

But the Supreme Court had expressly considered—and rejected—such well-respected experts' advice in *Swidler & Berlin*.[230] Federal courts were now bound to follow.[231] And for all the typical academic backseat-driving, second-guessing, and nitpicking, even state courts have broadly taken *Swidler & Berlin* as the final word on the subject, whatever its sins and omissions.[232] Manifestly persuaded by the Supreme Court's decision, the twenty-first century has seen the laggardly high courts of Colorado, Kentucky, Maryland, Rhode Island, North Carolina, and Wyoming, who had not previously recognized expressly the permanence of the privilege, join the chorus unreservedly.[233]

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[226] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 77, cmt. c (2000).

[227] *Id.* at Reporter's Note cmt. c.

[228] *Id.* cmt. d ("It would be desirable that a tribunal be empowered to withhold the privilege of a person then deceased as to a communication that bears on a litigated issue of pivotal significance. The tribunal could balance the interest in confidentiality against any exceptional need for the communication. The tribunal also could consider limiting the proof or sealing the record to limit disclosure. Permitting such disclosure would do little to inhibit clients from confiding in their lawyers. The fortuity of death prevents waiver of the privilege by the client. Appointing a personal representative to consider waiving the privilege simply transforms the issue into one before a probate court. It would be more direct to permit the judge in the proceeding in which the evidence is offered to make a determination based on the relevant factors.").

[229] *See* Kansas v. Nebraska, 574 U.S. 1045, 1064 (2015) (Scalia, J., dissenting) ("I write separately to note that modern Restatements . . . are of questionable value, and must be used with caution . . . . And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law.").

[230] Swidler & Berlin v. United States, 524 U.S. 399, 406-07 (1998) (noting Mueller & Kirkpatrick, McCormick, and the Restatement).

[231] *See, e.g.*, United States v. Yielding, 657 F.3d 688, 707-08 (8th Cir. 2011).

[232] *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

[233] *E.g.*, Davidson-Eaton v. Iversen, 519 P.3d 626, 637 (Wyo. 2022) ("The attorney-client privilege, which prevents an attorney from testifying, survives the death of the client, and the personal representative can assert the privilege on behalf of the decedent.") (citing Wyoming law and *Swidler & Berlin*); Turner v. Commonwealth, 544 S.W.3d 610, 623 (Ky. 2018) ("[T]he obligations of counsel under SCR 3.130(1.9) survive the death of the client. Although this Court has never clearly addressed the matter, it is generally accepted throughout the country that the attorney-client privilege survives the client's death except in certain special circumstances pertaining to testamentary matters.") (discussing *Swidler & Berlin*); Zook v. Pesce, 91 A.3d 1114, 1119 (Md. 2014) ("The privilege survives even after the client's death [because of] the purpose of fostering free communication between attorney and client, the Supreme Court has explained . . . Thus, even though the client may be deceased, the communication remains privileged.") (quotation omitted); *In re* Miller, 584 S.E.2d 772, 779 (N.C. 2003) ("While this Court has never specifically addressed this issue, this Court has presumed that the attorney-client privilege extends after a client's death by acknowledging the existence of the 'testamentary exception' to the privilege. . . . The United States Supreme Court has also recognized the testamentary exception and has assumed that, based upon this exception, the attorney-client privilege continues after a client's death. . . . Consistent with these authorities and *In re* Will of Kemp, we hold that the attorney-client privilege does survive the death of the client."); Wesp v. Everson, 33 P.3d 191,

Lower courts did too: the Connecticut Superior Court aligned itself with all of her neighboring states in recognizing that an executor could waive the privilege after death after an exhaustive review going back to Wigmore.[234] And after recognizing the rule of *Swidler & Berlin*, Tennessee's Court of Criminal Appeals expressed doubt as to the propriety of an executrix having waived the decedent's privilege to allow for testimony inculpating a criminal defendant, given it did not obviously serve the dead man's reputational interests, whilst noting it was an issue of first impression.[235] Rather than wade into that moral morass,[236] however, the court parsimoniously relied instead upon the defendant's lack of standing to reject the claim.[237]

In New York, where the high court stayed silent as to the "unique issue, unprecedented under New York statute and case law," the county court's thorough opinion in *People v. Vespucci* identified five possible approaches of postmortem privilege taken by contemporary authorities nationwide.[238] First, there was the legatee theory under which the privilege could be passed down like a parcel of property to one's heirs at law, popular in Midwestern states[239] (though not, apparently, Tennessee[240]). Second was the "West Coast" approach under which privilege expired following probation of the estate.[241] Third was the simple answer that privilege dies with the client, admittedly "the extreme minority viewpoint" that "usually makes its appearance in dissenting opinions."[242] Fourth, there was the opposite absolutist theory that privilege persists forever, utterly impregnable after

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200 (Colo. 2001) ("The precedents uniformly hold or presume that the attorney-client privilege ordinarily survives the death of the client. The Supreme Court has noted that the very existence of the testamentary exception, discussed in greater detail below, presumes that the privilege must survive the death of the client. . . . These considerations led the *Swidler* Court to hold that the privilege survives death. We find this reasoning to be persuasive. Therefore, we hold that any privileged communications between Frank Brewer and his attorneys remain privileged after his death.") (citations omitted); Curato v. Brain, 715 A.2d 631, 636 (R.I. 1998) ("The attorney-client privilege generally will survive the death of the client except in very limited circumstances where the information sought concerns conversations that relate to the drafting of a will.") (citing *Swidler & Berlin*).

[234] Est. of Putnam v. State, No. CV095010669, 2009 WL 5698137 (Conn. Super. Ct. Dec. 29, 2009).

[235] State v. Leonard, No. M2001-00368-CCA-R3CD, 2002 WL 1987963, at *8 (Tenn. Crim. App. Aug. 28, 2002) ("Although an issue of first impression in Tennessee, other jurisdictions have adopted the common law provision that the attorney-client privilege may be waived by the client, his guardian or conservator, the personal representative of the deceased client . . . 'After the death of a client, the privilege protecting communications between him and his attorney may be waived, under certain circumstances, by the executor . . . of the client's estate, especially when the waiver benefits the client, his estate, or persons claiming under him, and does not damage his reputation.'") (citations omitted).

[236] *See* United States v. Yielding, 657 F.3d 688, 707 (8th Cir. 2011) ("A personal representative of a deceased client generally may waive the client's attorney-client privilege, however, only when the waiver is in the interest of the client's estate and would not damage the client's reputation.").

[237] *Leonard*, 2002 WL 1987963, at *8 ("It is not necessary in this case, however, to determine whether the executor of an estate may waive the attorney-client privilege on behalf of the decedent for the purposes of prosecuting the accused killer.").

[238] People v. Vespucci, 192 Misc. 2d 685, 689, 745 N.Y.S.2d 391, 394 (N.Y. Co. Ct. Nassau Cty. 2002).

[239] *Id.* at 690 (citing Buuck v. Kruckeberg, 95 N.E.2d 304 (Ind. App. 1950): State v. McDermott, 607 N.E.2d 1164 (Ohio 1992); and Mayberry v. Indiana 670 N.E.2d 1262 (Ind. 1996)).

[240] *See supra* note 237 and accompanying text.

[241] *Vespucci*, 192 Misc. 2d at 690.

[242] *Id.*

death, into which camp *Vespucci* placed the Court's holding in *Swidler & Berlin*.[243] The country court, however, was leery of reflexively following so severe a rule, being free to hesitate as a state rather than federal tribunal.[244] As a fifth possibility, the court raised the balancing test as proposed by the overruled D.C. Circuit and the opinion in *Cohen*, the latter of which it dubbed rather indulgently a "landmark decision."[245]

With no controlling Court of Appeals precedent, the county court weighed its options.[246] The first three approaches had never been essayed in New York, but the Supreme Court's absolutist rule had enjoyed some support in the surrogate (i.e., probate) courts, and one "had gone so far as to rule that the power to waive the attorney-client privilege ends at the death of the client and is thereafter irrevocable."[247] Whatever its wisdom, "it is apparent from the available cases that the absolute privilege is a theory that is viable in New York."[248] There was some sparse precedent intimating the balancing approach as well, however, and the court entertained the question of how the *Cohen* factors might apply.[249] Satisfied that the balancing test would not favor disclosure, the court saw no need to decide between the absolute and balancing approaches to hold that posthumous privilege prevailed.[250] Better, perhaps the county court thought, to allow the New York Court of Appeals to have its say in its own good time. Time, after all, was no barrier to a privilege everlasting.

III. PRIESTS PERDURABLE

> *Whatever is declared in confession, can never be discovered, but must remain an eternal secret between God and the penitent soul.*[251]

No evidentiary privilege is remotely so ancient as that of attorney and client, none is remotely so hallowed, and none is remotely so frequently litigated.[252] The puzzle of

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[243] *Id.* at 691.

[244] *Id.* ("While the absolute privilege of *Swidler and* [*sic*] *Berlin* continued in Federal Court, State Courts are still open to their own interpretation. The absolute privilege approach can produce what some may view as harsh results."

[245] *Id.* at 692.

[246] *Id.* ("[A]s there is no controlling New York Court of Appeals ruling on this subject, this Court must select and evaluate which appropriate viewpoints are useful to evaluate this case.").

[247] *Id.* at 692-93 (citing Matter of Alexander, 205 Misc. 894, 130 N.Y.S.2d 648 (1954)).

[248] *Id.* at 693.

[249] *Id.* at 693-94 (citing People v. Belge 50 A.D.2d 1088, 376 N.Y.S.2d 771 (N.Y. App. 4th Dept. 1975)).

[250] *Id.* at 695 ("Upon review of the appropriate case law and statutes, this Court concludes that the potential testimony of attorney Edward Galison and his notes concerning statements made to him by the late Dennis Carney are privileged and will not be made available for discovery, either under the 'Absolute Privilege' or 'Balancing Test' doctrine.").

[251] For the full quotation and citation, see *infra* note 303.

[252] *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Jonathan Baumoel, *The Beginning of the End for the Psychotherapist-Patient Privilege*, 60 U. CIN. L. REV. 797, 799 (1992) ("Because the attorney-client privilege is considered the oldest and most established of the interpersonal communication privileges, the current issue is not whether the privilege should exist, but whether it should be limited."); Franklin D. Cleckley, *A Modest Proposal: A Psychotherapist-Patient Privilege for West Virginia*, 93 W. VA. L. REV. 1,

perpetuity has therefore arisen more rarely and obliquely with the secondary (not to say inferior) privileges. The answer, however, is uniform: the privilege will persevere death untrammeled. "Under the early Christian Emperors" of the Roman Empire, we are told, "priests were not allowed to exercise the functions of advocates,"[253] so no analogy could lie with lawyers. At early common law, and all the more so subsequent to the English Restoration, a definite statement of the priest-penitent privilege remained elusive.[254] Although its provenance has been much doubted and debated, "in light of this historical controversy, perhaps the most accurate conclusion one can draw is that whether the privilege existed under English common law 'has never been solemnly decided.'"[255] Jeremy Bentham, otherwise the most fervent detractor of privileges, nonetheless reluctantly accepted the necessity of some protection of priest and penitent from sectarian persecution in a tolerant society, as he hoped England was.[256]

Wigmore noted as much even as he subjected to the privilege to his own four-factor

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10 (1990) ("The attorney-client privilege is generally recognized as the first English common law privilege.").

[253] WEEKS, *supra* note 42, § 6 at 9 ("Justinian strictly prohibited any one in holy orders from pleading in the courts, whether interested or not, or even where their churches or monasteries were interested or not. But after wards [*sic*] the custom varied in different churches. In those of Rome and Spain the prohibition seems to have continued in force.").

[254] WIGMORE, *supra* note 46, § 2394 at 3362-63 ("It is perhaps open to argument whether a privilege for confessions to priests was recognized in common-law courts during the period before the Restoration. . . . But since the Restoration, and for more than two centuries of English practice, the almost unanimous expression of judicial opinion (including at least two decisive rulings) has denied the existence of a privilege. . . . [T]he privilege cannot be said to have been recognized by the common law, either in England or in the United States."); D.W. Elliott, *An Evidential Privilege for Priest-Penitent Communications*, 3 ECCLESIASTICAL L.J. 272, 273-74 (1995) ("[T]here is a paucity of clear authority on the matter, but such as there is is against the existence of any privilege, as is the almost unanimous opinion of text writers and official reports. A cogent argument against the existence of any common law privilege respecting Catholic priests is that of Stephen, who makes the point that whatever may have been the position before the English Reformation, evidence law did not exist at that time, and the later era when it grew up was one in which it was most unlikely that the privilege would be granted.").

[255] Michael J. Mazza, *Should the Clergy Hold the Priest-Penitent Privilege?*, 82 MARQ. L. REV. 171, 177 (1988); *id.* at 175-77, nn.27-41 (discussing and citing the various historical analyses); *see* Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 96-104 (1983) (same in even more depth).

[256] 4 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE SPECIFICALLY APPLIED TO ENGLISH PRACTICE 588 (bk. IX, pt. II, ch. VI) (London, Hunt & Clarke 1827) ("I set out with the supposition, that, in the country in question, the catholic religion was meant to be tolerated. But with any idea of toleration, a coercion of this nature is altogether inconsistent and incompatible. In the character of penitents, the people would be pressed with the whole weight of the penal branch of the law ; inhibited from the exercise of this essential and indispensable article of their religion ; prohibited, on pain of death, from the confession of all such misdeeds as, if judicially disclosed, would have the effect of drawing down upon them that punishment ; and so, in the case of inferior misdeeds, combated by inferior punishments. Such would be the consequences to penitents ; to confessors, the consequences would be at least equally oppressive. To them, it would be a downright persecution, if any hardship, inflicted on a man on a religious account, be susceptible of that, now happily odious, name. To all individuals of that profession, it would be an order to violate what by them is numbered amongst the most sacred of religious duties.")

test for validity.[257] In finding it passed muster,[258] Wigmore not only relied on Bentham but remarked on his own druthers that "it may be assumed that a permanent secrecy, subject only to an optional variation by the priest, is an essential of any real confessional system as now maintained."[259] But really the metaphysical rationale was beside the point; by Wigmore's writing in 1904, the majority of the American states had recognized the priest-penitent privilege via statute,[260] and by the end of the twentieth century, all did—not to mention the District of Columbia, and many other previous constituencies of English common law from Australia to Canada.[261]

A. A Protection for Priest or Penitent?

The privilege obviously derives from the Roman Catholic Church's sacrament of confession.[262] Dogmatically, the practice of secrecy in the confessional was formalized in the Fourth Lateran Council of 1215;[263] the redoubtable historian Jacob M. Yellin notes the subsequent canon promulgated in Oxford in 1222.[264] The seal of the confessional was held to be of the highest import.[265] Canon law expected the priest to suffer death rather than reveal a confession, and prescribed automatic excommunication as the penalty for any wayward confessor, which penalty could be lifted by the clemency of the Apostolic See alone.[266] Not even the penitent himself could waive the privilege, which was therefore both

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[257] WIGMORE, *supra* note 46, § 2396 at 3364-66 ("Even by Bentham, the greatest opponent of privileges, this privilege has, in the following argument, been conceded, to justify recognition.") (quoting Bentham).

[258] *Id.* § 2285 at 3185 (quoted *infra* note 791) (Wigmore's test for privilege).

[259] *Id.* § 2396 at 3365; *id.* at 3366 ("Would the injury to the penitential relation by compulsory disclosure be greater than the benefit to justice ? Apparently it would. The injury is plain ; it has been forcibly set forth by Bentham. The benefit would be doubtful.").

[260] *Id.* § 2395 at 3363-64 n.1; *see* Walter J. Walsh, *The Priest-Penitent Privilege: An Hibernocentric Essay in Postcolonial Jurisprudence*, 80 IND. L.J. 1037, 1057 (2005) ("Through its New York codification, Philips prompted the nationwide statutory adoption of the clergy privilege over the next century and a half. It tipped off a domino effect that ultimately rippled through all the state legislatures. Today, the clergy privilege is recognized in every state, in the federal courts, and in many foreign jurisdictions.")

[261] Elliott, *supra* note 254, at 289 ("To date, when legislatures have been moved to interfere in this area, they have created a legal privilege. All fifty states of the United States, the provinces of Newfoundland and Quebec in Canada, and the states of New South Wales, Victoria and Tasmania, and the Northern Territory, in Australia, have provisions, of varying width, of this sort."); Mazza, *supra* note 255, at 182 n.75 (citing all fifty states); Michael James Callahan & Richard Mills, *Historical Inquiry into the Priest-Penitent Privilege*, 81 U. DET. MERCY L. REV. 705, 707, n.11 (2004) ("Every state in the union and the District of Columbia has adopted a version of the priest-penitent privilege. These versions of the privilege vary considerably.").

[262] Mazza, *supra* note 255, at 186 ("First, the foundations of the priest-penitent privilege are uniquely religious in nature, resting historically on the canon law of the Catholic Church.") (citing *id.* at 174-175); Yellin, *supra* note 255, at 97 ("The roots of the minister's privilege can be traced to the dictates of the early Christian Church which required that parishioners regularly confess their misdeeds to a priest.").

[263] *In re* Soeder's Estate, 220 N.E.2d 547, 568 (Ohio Ct. App. 1966) ("The seal of confession, *sacramentale sigillum*, was recognized by the Roman Catholic Church in the 4th Lateran Council, 1215."); Mazza, *supra* note 255, at 174; Yellin, *supra* note 255, at 98.

[264] Yellin, *supra* note 255, at 98.

[265] Renae Mabey, *The Priest-Penitent Privilege in Australia and Its Consequences*, 13 ELAW J. 51, 66 (2006) ("The secrecy of the confessional is paramount to the modern rite of penance or confession for Catholics.")

[266] *Id.* ("A priest who deliberately reveals what is said to him is automatically excommunicated. Excommunication can only be lifted by the Apostolic See (the Pope)"); Lennard K. Whittaker, *The Priest-*

permanent and impenetrable.[267] But the Anglican communion of the Church evolved to be somewhat less protective of the practice of confession,[268] allowing that a priest could violate the seal if faced with death as the only alternative,[269] or where misprision of the offense confessed was itself a crime.[270] Moreover, the penitent could consent to the priest's divulgence if desired—waive the privilege, in legal terms.[271]

Given the stance of the Church of England, it is hardly surprising that many of the early American statutes allowed for the penitent to waive the privilege, a prerogative in conflict with Roman Catholic canon law. Of the twenty-seven surveyed by Wigmore, over two-thirds of states allowed waiver by the penitent,[272] whilst only eight secured a wholly absolute privilege, with their courts forbidden to receive such testimony regardless of a confessant's willingness.[273] In its earliest mention, antedating Wigmore, the Supreme Court perhaps conceived more of a uniquely categorical bar to the admission of confessional secrets,[274] but its twentieth-century dicta on the subject situated the privilege by analogy to the other communicational privileges.[275] This unsettling of its foundations in canon law suggested that the privilege might not be so absolute—or so permanent—after all, the possibility of waiver by a penitent makes termination in some other fashion more

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Penitent Privilege: Its Constitutionality and Doctrine, 13 REGENT U. L. REV. 145, 146 n.11 (2000); Mazza, *supra* note 255, at 175.

[267] Mabey, *supra* note 265, at 66 ("Even if the penitent gives the priest permission to reveal what was said the priest is unable to do so under Canon law.").

[268] Yellin, *supra* note 255, at 101-02 ("During the fifteenth century a shift in England occurred between the predominant Roman Catholic faith and the still nascent but fast growing Anglican Church. . . The importance of the confession in the Anglican Church gradually began to diminish. . .. As the Anglican Church rose in prominence and became, after the Reformation, the pre-eminent church in England, the rite of confession became diminished in importance.").

[269] Mabey, *supra* note 265, at 67 ("The first difference is that canon 113 states that the canon does not apply 'under the pain of death'. If the priest may be killed for not revealing what was told to them in confession they may reveal it without the penitent's consent. . . In theory this exception may apply in circumstances where the priest is threatened by individuals or groups outside of the law.")

[270] Yellin, *supra* note 255, at 102, n.32.

[271] Mabey, *supra* note 265, at 67 ("The second difference is that the canon concerning confession, canon 1989, allows priests to reveal what is said to them in confession if the penitent gives their consent.").

[272] WIGMORE, *supra* note 46, § 2395 at 3363-64 n.1 (noting Alaska, Arizona, California, Colorado, Hawaii, Idaho, Iowa, Kansas, Kentucky, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wisconsin).

[273] *Id.* (noting Arkansas, Indiana, Michigan, Missouri, New York, Ohio, Vermont, and Wyoming).

[274] Totten v. United States, 92 U.S. 105, 107 (1875) ("[S]uits cannot be maintained which could require a disclosure of the confidence of the confessional.").

[275] United States v. Trammel, 445 U.S. 40, 51 (1980) ("The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment."); United States v. Nixon, 418 U.S. 683, 709 (1974) ("Generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence.").

thinkable as well, though no such exemptions to the privilege ever arose in practice.[276] Still, state laws differ widely on the effect of the confessant's consent and the priest's own prerogative,[277] and legal boffins have mused provocatively about how a priest desirous of evading his strictures might do so.[278]

Many of the cases nonetheless focus on the privilege as protecting the priest rather than the penitent,[279] in whose hands the privilege ostensibly rests given the possibility of waiver.[280] The Ninth Circuit confronted a direct clash of interests in the relatively recent *Mockaitis v. Harcleroad*.[281] The Rev. Timothy Mockaitis was a Catholic priest who made a practice of offering the sacrament of confession to inmates at a county jail in Portland, Oregon.[282] Unbeknownst to Mockaitis, his conversation with the inmate Conan Wayne Hale was surveilled and recorded by the police.[283] When the existence of the recording became public, the archdiocese demanded its destruction and an assurance of no further

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[276] *Cf.* Mazza, *supra* note 255, at 186 ("First, the foundations of the priest-penitent privilege are uniquely religious in nature, resting historically on the canon law of the Catholic Church. Second, the priest-penitent privilege has generally been considered absolute, prohibiting any revelation of the protected communication, unlike the other evidentiary privileges with their numerous exceptions.").

[277] *See* Callahan & Mills, *supra* note 261, at 712 ("State priest-penitent privilege statutes differ considerably on the issue of whether the priest should be a holder of the privilege. In many states the priest can be compelled to testify if the penitent waives his or her right to the privilege. In other states the priest is explicitly given the right to claim the privilege for him or herself."); Julie Ann Sippel, *Priest-Penitent Privilege Statutes: Dual Protection in the Confessional*, 43 CATH. U. L. REV. 1127, 1128-29, nn.6 & 9 & 12 (1994) (describing states adhering to three different broad approaches); Mazza, *supra* note 255, at 185-90 (considering the holder of the privilege in each state).

[278] *See, e.g.*, Broad v. Pitt, (1828) 2 Car. & P. 518 ("I for one will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them I shall receive them in evidence") (quoted in Elliott, *supra* note 254, at 277); Elliott, *supra* note 254, at 276 n.29 ("However, since no hearsay would be involved if X himself gave evidence, he could be asked if he had not made such a confession to a priest. There would no question of protecting X from answering by discretion; the need to place no barriers in the way of evidence which materially helps to avoid an unjust conviction, which is strong enough to override even established privileges, would be decisive in favour of the defence.") (citations omitted).

[279] Callahan & Mills, *supra* note 261, at 711 ("Only a very few cases dealing with priest-penitent privilege have focused on the penitent.") (discussing *Martin infra* note 292).

[280] *See* Sippel, *supra* note 277, at 1142-43 ("Thirty-eight statutes grant the right to invoke the priest-penitent privilege to the communicant. . .. Even if church policy forbids a priest from disclosing information regarding certain communications, a priest still may be required by state law to reveal confidences if the penitent does not assert the privilege."); Mazza, *supra* note 255, at 186 ("The holder of an evidentiary privilege has the power to invoke or waive it, either refusing or allowing courts to gain access to confidential communications.").

[281] Mockaitis v. Harcleroad, 104 F.3d 1522 (9th Cir. 1997), *overruled on other grounds by* City of Boerne v. Flores, 521 U.S. 507 (1997), *as recognized in* United States v. Antoine, 318 F.3d 919, 923 (9th Cir. 2003); *see* Callahan & Mills, *supra* note 261, at 712-13 (discussing case).

[282] *Id.* at 1524.

[283] *Id.* at 1525 ("Unmentioned in the affidavit were the following facts disclosed in this case: The jail monitored about 90% of Hale's conversations, except conversations with his counsel. . . . Father Mockaitis did not know that his encounter with Hale was being recorded nor did he have reason to believe that it would be recorded. Hale was not a Catholic. He was a baptized Christian. In Catholic belief all baptized persons are eligible to participate in the Sacrament of Penance.").

surveillance of sacramental confessions.[284] The state court, however, refused to even consider the request, and instead ordered that the tape be preserved for trial.[285] The archdiocese sued for an injunction under the federal Religious Freedom Restoration Act (RFRA) and the First and Fourth Amendments, even as Hale sought to waive his privilege in order that the tape be admissible in his legal defense.[286] Despite expressing due outrage at the police's violation, the district court exercised prudential abstention in order to avoid obstructing an ongoing prosecution and dismissed, and the archdiocese appealed.[287]

The Ninth Circuit found it error to have abstained given the religious interests asserted, and turned to the merits.[288] Though the RFRA arguments that would soon be abrogated by *City of Boerne v. Flores* may be elided,[289] the court of appeals also considered the privilege under the rubric of the Fourth Amendment.[290] Noting the Supreme Court's dicta and protective laws in all fifty states (including Oregon), the panel thought the priest's expectation of strict privacy well-founded, locating "no case in the United States in which a court has given approval to the invasion of the Catholic rite of confession by an agency of government."[291] But the penitent's waiver required some accommodation as well: "There is no reason to protect Hale's confession from publication when he desires it. There is reason to protect Father Mockaitis's expectation of privacy in hearing confessions."[292] The Ninth Circuit thus split the baby and remanded for the entry of an order granting only a declaratory judgement that the recording had been unconstitutional when made and enjoining any *future* surveillance of confessional visits to the jail.[293] Yet this was a relatively mild compromise: courts can and have held priests in contempt for refusing to violate the privilege after the penitent has waived its application.[294]

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[284] *Id.* at 1526.

[285] *Id.* (narrating that the judge had stated to the archdiocese that "except upon further motion of one or both of the parties, or upon directive of some higher court, this Court will not consider, under any circumstances, the action which your clients desire" and ordered that "who may come into possession of a tape recording and transcript thereof of a conversation between Defendant and the Rev. Timothy Mockaitis which occurred on or about April 22, 1996 at the Lane County Jail are to preserve those items as evidence").

[286] *Id.* at 1526-27 (Hale wrote: "I want the tape to be preserved and for my attorneys to be able to use it as evidence in my defense, because people may not believe what I say about it. Lots of people think that I confessed to killing the victims, because of the news reports about the tape, but I didn't confess to that because I didn't do it.").

[287] *Id.* at 1527 ("The court began by observing that the plaintiffs were 'justifiably outraged' by Harcleroad's actions. The court added: 'Harcleroad himself admits that the taping was wrong: "There are somethings which are legal and ethical but are simply not right. I have concluded that tape recording confidential clergy-penitent communications falls within the zone of societally unacceptable conduct."' The court agreed with Harcleroad that the taping had been wrong.").

[288] *Id.* at 1528.

[289] *See* Antoine, 318 F.3d 9 at 923 (recognizing the abrogation of *Mockaitis* in regard of RFRA by *City of Boerne*).

[290] *Mockaitis*, 104 F.3d at 1531-33.

[291] *Id.* at 1533.

[292] *Id.*

[293] *Id.* at 1534.

[294] *See, e.g.*, Commonwealth v. Kane, 445 N.E.2d 598, 603 (Mass. 1983) ("In the absence of the jury, the judge found Father Costello in contempt of court, and imposed a nominal fine against him. The judge then told the jury of his action and explained the reasons for his action. He said that '[i]n accordance with the law,

B. An Eternal Secret Beyond Death

When the penitent is dead, the priesthood's interests are naturally more visibly ascendant. In *Martin v. Bowdern*, the Supreme Court of Missouri confronted a priest accused of exerting undue influence over the final will of his now-deceased parishioner.[295] Apparently oblivious to the irony, the heirs contested the bequest of some $4000 to the Church for the prayer of masses for his family's souls, demanding that the decedent's final exchange with the Reverend Patrick Bradley be divulged to illuminate the transaction, but the court upheld its exclusion: "What passed between Rev. Bradley and the testator in confession are privileged communications, and neither a court nor a jury have any right to predicate a decision of a case upon such undisclosed and incompetent matters."[296] A century later, so too a minister was permitted to testify that his deceased parishioner had loved her children and been "a frugal lady" but also to invoke the privilege as to any pastoral communications he had with her whilst alive.[297]

As this last holding indicated, privilege only protected communications of a penitential or at least ministerial character.[298] Where a priest had merely examined a dying woman to determine if she had the capacity to make her final confession—but had not taken it—his assessment of her mental state was admissible.[299] Likewise, when a rector visited an ailing congregant to collect two pledged donations and learned in casual conversation that the woman had prepared no will, the dialogue was not held protected after her death.[300] And an Ohio court of appeals overruled privilege accorded a priest who had elicited information about the decedent's marital status solely in his capacity as a

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the defendant granted his consent to have [the conversation in question] repeated or testified to.'") (alterations original).

[295] Martin v. Bowdern, 59 S.W. 227 (Mo. 1900).

[296] *Id.* at 231.

[297] Smith v. Smith, 102 S.W.3d 648, 652 (Tenn. Ct. App. 2002); *id.* at 654 (affirming for lack of an offer of proof of the excluded testimony).

[298] *See In re* Fuhrer, 100 Misc. 2d 315, 320, 419 N.Y.S.2d 426, 431 (N.Y. Sup. Ct. 1979) ("The Court is persuaded that to come within the protection of the statutory clergyman-penitent privilege, the communication in question must have been made with the purpose of seeking religious counsel, advice, solace, absolution or ministration.").

[299] Estate of Toomes, 54 Cal. 509, 515–16 (1880) ("The objection that the inquiry invaded the secrecy of the confessional is not, in our opinion, well taken. It is not pretended that the testatrix ever made a confession, and the matter upon which the witness was interrogated did not come within the letter or spirit of § 1881 of the Code of Civil Procedure. . . . The examination of the priest was confined to facts which were brought to his knowledge on a preliminary examination, and with a view to learn whether Mrs. Toomes was in a proper condition of mind to make a confession, and nothing more.").

[300] *In re* McGrogan's Will, 26 Pa. D. & C.2d 37, 40–41 (Pa. Orph. 1962) ("No question exists as to the validity of the gift, the only question being as to whether decedent's declaration that she had no will was privileged as being a secret and confidential disclosure. Such a privilege 'cannot be said to have been recognized as a rule of the common law either in England or in the United States.' Privilege between attorney and client is predicated upon the necessity of disclosures in order to be properly advised; privilege between physician and patient is predicated upon the necessity for such disclosures in order to be properly treated; by analogy, privilege between priest and penitent is properly predicated upon the necessity for such disclosures in order either to conform to church discipline or to be afforded spiritual advice. This court concludes that the statement alleged to have been made by decedent to Father Faunce was not one made secretly and in confidence as contemplated by the statute with which we are concerned.").

parochial census-taker, even whilst cautioning that in cases of legitimate confessions, the "benefit of preserving this confidence inviolate overbalances the possible benefit of permitting litigation to prosper at the expense of the spiritual rehabilitation of the penitent."[301]

Primacy of the penitent or priest aside, what all these cases demonstrate amply is that the fact that the penitent was dead made no more difference to secular law than ecclesiastical; under either rubric, the seal of the confessional survives the demise of the confessant. The syzygy of the two canons was well enunciated in the "earliest and most influential" case upholding the privilege,[302] as narrated by the Second Circuit over a century and a half later with vim:

> The emergence of a cleric-congregant privilege in New York antedates its adoption of the privilege by statute in 1828. In *People v. Phillips*, a grand jury indicted Daniel Phillips for receiving stolen goods. Phillips, a Roman Catholic, confessed his crime to one Reverend Anthony Kohlmann, whom the State subpoenaed. Kohlmann declined to testify, citing "the law of God and his church [that] *whatever is declared in confession, can never be discovered," but must "remain an eternal secret between God and the penitent soul*—of which the confessor cannot, even to save his own life, make any use at all to the penitent's discredit, disadvantage, or any other grievance whatsoever." Notwithstanding the "general rule, that every man when legally called upon to testify as a witness, must relate all he knows," the court concluded that "the mild and just principles of the common law" could not be construed to place Kohlmann "in such a horrible dilemma, between perjury and false swearing: If he tells the truth he violates his ecclesiastical oath—If he prevaricates, he violates his judicial oath—Whether he lies or whether he testifies he is wicked, and it is impossible for him to act without acting against the laws of rectitude and the light of conscience."[303]

This was exactly the reasoning of Bentham,[304] of Wigmore,[305] and of many more philosophers after them:[306] If religion dictates that men are oft sinners, and that a sinner is

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[301] *In re* Soeder's Est., 220 N.E.2d 547, 568 (Ohio Ct. App. 1966).

[302] Mazza, *supra* note 255, at 180.

[303] Cox v. Miller, 296 F.3d 89, 102-03 (2d Cir. 2002) (emphasis added and original block quotation set inline for legibility); *see also* Callahan & Mills, *supra* note 261, at 714-15 (discussing *Phillips*); Mazza, *supra* note 255, at 180-81 (same).

[304] BENTHAM, supra note 256, at 588-89 (quoted *supra* note 256).

[305] WIGMORE, supra note 46, § 2396 at 3366 ("Does the penitential relation deserve recognition and countenance? In a State where toleration of religions exists by law, and where a substantial part of the community professes a religion practicing a confessional system, this question must be answered in the affirmative. Historically, the failure to recognize the privilege during three centuries in England has probably been due to a reluctance to concede this affirmative answer.").

[306] *E.g.*, Elliott, *supra* note 254, at 283-84 ("It cannot be supposed (and is certainly not demonstrated by particular instances), that anyone is deterred from adhering to a particular religion or observing its practices by the absence of the claimed privilege; or even that any clergyman will fail in his duty of confidentiality merely because he is ordered to breach that duty by a judge. Indeed it is often said by church representatives that no clergyman would obey such an order. . .. The reality is that a penitent is obliged by his faith to confess to one who is obliged to reveal his confession to the state; and a priest is coerced by the state to do something

obliged to confess, and that his confessor is obliged to maintain the seal of confession forever, then failure to respect the inviolability of such a privilege serves only to criminalize religion. Other modern scholars have considered whether such an imposition can or should be sustained under American law.[307] But unlike other privileges, the only exception ever contemplated (and only then controversially as a matter of sectarian schism between the originating Roman Catholic Church and courts following the Anglicans in the schism) to the seal is voluntary waiver by the confessant, and with death such a waiver becomes impossible, eternally.[308] It suffices for this Article's purposes to recapitulate that by its very nature, and from its very origins, the priest-penitent privilege was intended and held to be interminable, even by death—maybe *especially* by death.

IV. PHYSICIANS FOREVER

> *Although by death he loses the patient, his lips must remain closed.*[309]

Far more so than the priest-penitent privilege, the physician-patient privilege has achieved its present widespread acceptance via statute rather than the common law.[310] Akin to the priest-penitent privilege with ecclesiastical law, however, the physician-patient variety finds its origins in another ancient doctrinal canon: the Hippocratic oath and its explicit dogma of secrecy.[311] Professional doctors thus accorded confidentiality as a

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which will expose him to the censure of both the church of which he is a member and of his own conscience.").

[307] *E.g.*, Whittaker, *supra* note 266, at 152-68; Sippel, *supra* note 277, at 1141-55; Mazza, *supra* note 255, at 191-204.

[308] Mazza, *supra* note 255, at 186 ("[T]he priest-penitent privilege has generally been considered absolute, prohibiting any revelation of the protected communication, unlike the other evidentiary privileges with their numerous exceptions.") (citing 26 CHARLES ALAN WRIGHT & KENNETH A. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5612 at 71 (1992)).

[309] For the full quotation and citation, see *infra* note 343.

[310] *E.g.*, Abdullah M. Azkalany, *A Comparative Examination of the Doctor-Patient Privilege in State and Federal Courts in Iowa*, 67 DRAKE L. REV. 495, 505 (2019) ("As with most other state jurisdictions, the physician-patient privilege in Iowa is a creature of statute."); Leslie J. Schiff, Comment, *The Doctor-Patient Privilege in Civil Cases in Louisiana*, 20 LA. L. REV. 418, 418-9 (1959) ("Although the physician-patient privilege did not exist at common law, various states have adopted it by statute. Louisiana has provided for the privilege in criminal proceedings by a provision in the Code of Criminal Procedure. There is no specific legislation dealing with the privilege in civil cases.") (citations omitted); *see* Daniel W. Shuman, *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 SW. L.J. 661, 677 (1985) ("Following the enactment of the New York statute a successful campaign of legislative advocacy ensued. Currently, forty states and the District of Columbia have a physician-patient privilege statute . . . . Similarly, other countries with a common law heritage, including New Zealand, Victoria (Australia), Israel, Tasmania (Australia), Newfoundland, and Honduras, have enacted physician-patient privileges.") (citations omitted).

[311] Jerome R. Morse & Anna L. Casemore, *Doctor-Patient Confidentiality: To Disclose or Not to Disclose*, 22 ADVOC. Q. 312, 315 (2000) ("Patients have a prima facie right to confidentiality. This is reflected in the duty that arises from the doctor-patient relationship, and has been recognized at common law for centuries. Hippocrates put it this way: 'And 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.'") (citations omitted); Judith C. Ensor, *Doctor-Patient Confidentiality Versus Duty to Warn in the Context of AIDS Patients and Their Partners*, 47 MD. L. REV.

concomitant from an early age.[312] There, however, the similarity ends, for the law of England never even arguably admitted of a physician-patient privilege in the centuries before American independence,[313] and professional practice, however storied, does not imply legal recognition.[314] Chirurgeons of the era were not generally considered learned men whose practice might expect heightened solicitude (like barristers or the clergy), but rather workaday tradesmen.[315] The Supreme Court has thus called the physician-patient privilege "unknown to the common law" as recently as the 1970s, and observed that even where it had been codified in positive law, such promulgations came with myriad exceptions and qualifications.[316]

A. An Uncertain and Unwelcome Aegis

Wigmore predicted that this rejection of the privilege "would probably have been acknowledged as a common-law principle in every American court," but for New York's institution in 1828 of the privilege by law, which proved so persuasive that half the states followed suit in the remainder of the ensuing century.[317] Palpably skeptical of if not vexed by New York's innovation, Wigmore invoked "the fundamental canons which must be satisfied by every privilege for communications," and found the privilege wanting on three

675, 675 n.3 (1988) (quoting the Hippocratic Oath: "Whatsoever things I see or hear concerning the life of man, in attendance on the sick or even apart therefrom which ought not to be noised about, I will keep silent thereon, counting such things to be personal secrets."); Schiff, *supra* note 310, at 424 ("In favor of the privilege is the desirability of protecting the relationship between the physician and his patients. There is also the Hippocratic Oath, which says: 'Whatsoever things I see or hear concerning the life of men, in my attendance on the sick or even part therefrom, which ought not to be noised abroad, I will keep silence thereon, counting such things to be as sacred secrets.'"). The many discrepancies arise from translation from the original Koine Greek, which read: "ἃ δ' ἂν ἐνθεραπείῃ ἴδω ἢ ἀκούσω, ἢ καὶ ἄνευ θεραπείης κατὰ βίον ἀνθρώπων, ἃ μὴ χρή ποτε ἐκλαλεῖσθαι ἔξω, σιγήσομαι, ἄρρητα ἡγεύμενος εἶναι τὰ τοιαῦτα." Hippocrates of Cos, *The Oath*, *in* 147 LOEB CLASSICAL LIBRARY 298–9 (1923); *see* WILLIAM HENRY SAMUEL JONES, THE DOCTOR'S OATH: AN ESSAY IN THE HISTORY OF MEDICINE 8, 10 (Ethelbert Page, W.H.D. Rouse & Edward Capps eds. 1924) (recording classic form); *see generally id.* (discussing at great length the evolution of the form of the oath, or Ορκος in the Greek).

[312] *See* Morse & Casemore, *supra* note 311, at 315.

[313] Schiff, *supra* note 310, at 418; WIGMORE, supra note 46, § 2380 at 3347-48, n.5.

[314] Morse & Casemore, *supra* note 311, at 316 ("[I]t is important to note that merely because a relationship is confidential in nature does not mean that privilege will necessarily attach to it. . .. The Supreme Court of Canada has clearly stated the general proposition that although the doctor-patient relationship is confidential in nature, no testimonial privilege attaches to it, even though society considers it valuable that patients feel free to consult their physicians without fear of disclosure."); *see id.* at 319-320 ("The basic rule is that a physician owes both a statutory and ethical duty of confidentiality to a patient. However, the jurisprudence only recognizes doctor-patient communications as being confidential in nature; they have traditionally not been accorded testimonial privilege") (citation omitted).

[315] Shuman, *supra* note 310, at 673 ("In the sixteenth and seventeenth century the practice of medicine in England was foremost a trade, not a profession of high calling. Practitioners of law thus would have been unlikely to accord deferential treatment to most practitioners of medicine in sixteenth and seventeenth century England either as a matter of class reciprocity or professional respect.") (citation omitted); *see generally* PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE (1984).

[316] Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977).

[317] WIGMORE, *supra* note 46, § 2380 at 3347-49, n.5 ("Missouri following next in 1835 ; until at the present day in one half of our jurisdictions the privilege is a settled part of the law.").

of the four prongs of his self-created test.[318] He dismissively deemed few medical diagnoses actually privy in any sense (save "venereal disease and criminal abortion"), that none ailing would be deterred from seeking treatment by the remote prospect of publicization, and that the harm of sealing a doctor's lips was substantial when medical testimony was so frequently called for by the courts.[319] In truth, Wigmore thought that one singular unworthy consideration had animated the anomaly: "medical men jealous of their profession" who covetously sought that "since the secrets of the legal profession are allowed to be inviolable, the secrets of the medical profession have at least an equal title."[320] After a bit more fulmination, Wigmore concluded that "there is nothing to be said in favor of the privilege, and a great deal to be said against it. The adoption of it in any other jurisdiction is earnestly to be deprecated."[321]

Wigmore is not alone in his qualms. Bentham, of course, was staunchly opposed to all privileges long before Wigmore,[322] but Daniel W. Shuman's modern history of physicians' practice corroborates its inexorable accumulation of untoward perquisites: "The climbing of the social ladder by the medical profession led to the profession's political importance and conferral of privileges upon its members by the ruling aristocracy."[323] Most theorists have agreed with Wigmore that patient decision-making is not truly affected by the presence or absence of the legal privilege, undercutting its utilitarian rational,[324] albeit hedging that courts are not well-suited to rule on such

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[318] *Id.* § 2380 at 3349-50 ("The questions must be asked : Does the communication originate in a confidence? Is the inviolability of that confidence vital to the due attainment of the purposes of the relation of physician and patient ? Is the relation one that should be fostered ? Is the expected injury to the relation, through disclosure, greater than the expected benefit to justice ? A negative answer to any one of these questions would leave the privilege without support. In truth , all of them, except the third , may justly be answered in the negative."); *see also id.* § 2285 at 3185 (quoted *infra* note 791) (Wigmore's test).

[319] *Id.* § 2380 at 3350-51.

[320] *Id.* § 2380 at 3351.

[321] *Id.* § 2380 at 3352.

[322] *See* 5 BENTHAM, *supra* note 256, at 306 ("To what end, with what consistency, can the law find out a man to receive with safety, and even under an obligation of concealment, that confidence, that pernicious confidence, which it punishes in every other man ? Another inconsistency. To confidents taken from other professions, neither the obligation nor the permission of secrecy, as against justice, extends. A physician, a surgeon, is compelled to disclose what may operate towards the conviction of his patient.").

[323] Shuman, *supra* note 310, at 679-80.

[324] Shuman, *supra* note 310, at 664-65 ("Few seriously contend that these assumptions accurately reflect patient decision-making behavior in the case of physical problems. Opponents of the patient-physician privilege claim that people are not so shy or embarrassed about their medical problems that they avoid needed medical care in the absence of a privilege. Nor, claim the opponents, does any evidence exist that patients know about privilege laws or receive more effective medical care following the enactment of a privilege. No empirical evidence concerning these assumptions has been presented by either the proponents or opponents of the physician-patient privilege.") (citations omitted, including Mark Siegler, *Confidentiality in Medicine—A Decrepit Concept*, 307 NEW ENG. J. MED. 1518, 1518-19 (1982)); Schiff, *supra* note 310, at 424-25 ("It is submitted that nonexistence of the privilege is not likely to cause any person in need of medical aid to forego such treatment because of possible disclosure in a court of law at a future date. In the opinion of the writer, the physician-patient privilege is unwarranted in Louisiana civil cases, and its presence would pose a threat to the administration of justice."). *But see* Ensor, *supra* note 311, at 690-91 ("Society also may suffer from such a breach. The public's confidence in the confidentiality of test results is of critical importance in

professional considerations.[325] Even from the deontological perspective, it is far from clear that shielding physician communications from scrutiny serves the welfare of patients, when scrutiny may be vital to improving outcomes and detecting and deterring quackery.[326] A modern author could conclude only that "the doctor-patient testimonial privilege itself is sufficiently hard to justify that it seems ill advised to attempt to expand it."[327] *A fortiori*, it is dubious that any needful patient would be dissuaded by uncertainty as to the persistence of privilege after death if the privilege during life is on such shaky footing.

Moreover, in contradistinction to the impenetrable seal of the confessional, the doctor-patient privilege is riven with sundry exceptions: suspected child abuse; professional sexual misconduct; gunshot wounds; conditions affecting vehicular motor control; and the general duty to inform third parties of potential harm from untreated infectious disease, psychiatric compulsion, or genetic predisposition.[328] This myriad of exceptions is nothing new, as Wigmore devoted much time a century ago to the multifarious waivers implied at law by conduct or claim.[329] Counterintuitively, even if

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encouraging individuals to be tested. . . . Maryland has provided for more strict adherence to the doctrine of confidentiality than has the medical profession itself.")

[325] Azkalany, supra note 310, at 505 ("However, courts in general should not be in the business of scrutinizing the relationships that exist between a physician and his or her patient in order to determine whether the object of the relationship can be successfully realized in the public eye or whether it would better function in confidence. And although the Court is correct that oftentimes treatment can be successfully accomplished without the need for the patient and the physician to communicate, this does not in turn mean that the physician-patient relationship is any less deserving of an absolute privilege."). *But see also* Lloyd R. Gould, *Implied Terms in Contracts between Professionals and Their Clients: The Doctor-Patient Exemplar*, 22 U.W. AUSTL. L. REV. 139, 150 (1992) ("The author notes that the 'fickleness' of statistics is a good reason to leave the courts with the broader standard of either above or below 50 per cent. Statistics are known to be very malleable in the hands of expert manipulators and the 'aetiology of medical conditions is notoriously complex and obscure'. It is doubtful that the practice of law or accountancy constitutes a field of endeavour where the reliability of statistics is greater than the norm.") (citations omitted).

[326] Shuman, *supra* note 310, at 664 ("The protection of the public from incompetent physicians, the prevention of harm that the patient has threatened to third persons or the correct adjudication of child custody questions all suggest considerations that may, even to the deontological proponents of a physician-patient privilege, outweigh privacy concerns in certain instances. How should this balance be struck? In part the answer to the question turns upon empirical considerations: Can physician incompetency be effectively policed without resort to privileged information; can physicians make accurate predictions of their patients' future dangerousness; how will the loss of privacy affect the accuracy of the child custody adjudication?"); *see* Roger B. Dworkin, *Getting What We Should from Doctors: Rethinking Patient Autonomy and the Doctor-Patient Relationship*, 13 HEALTH MATRIX 235, 291-92 (2003).

[327] Dworkin, *supra* note 326, at 288.

[328] *See* Rebecca Suarez, *Breaching Doctor-Patient Confidentiality: Confusion Among Physicians About Involuntary Disclosure of Genetic Information*, 21 S. CAL. INTERDISC. L.J. 491, 493-94 (2012); Dworkin, *supra* note 326, at 291 ("The duty to maintain patient confidences yields to the supervening public good. In addition to duties to report child abuse, gunshot wounds, etc., doctors are often held liable for failing to make reasonable efforts to warn or otherwise protect intended victims of their psychiatric patients, family members at risk for genetic diseases, persons exposed to contagious diseases, and even unknown future drivers on the highway") (citations omitted); *see* Morse & Casemore, *supra* note 311, at 315 ("For example, in Ontario, health care professionals and others are required to report incidences of suspected child abuse, the sexual abuse of patients by other practitioners, contagious diseases and persons who suffer from conditions which may make it dangerous for them to operate a motor vehicle.") (citations omitted).

[329] WIGMORE, supra note 46, §§ 2388-2391 at 3357-61.

statute does not include a duty to breach the privilege, the duty may nonetheless be implicit in the common law,[330] as was contemplated by the landmark *Tarasoff* in 1976.[331] One article from the 1980s occupied itself entirely with the fraught question of whether a physician was obliged to violate the privilege in order to warn a patient's intimates of HIV status, predicated on precedent with other dangerous diseases.[332] Another considered duties to relatives occasioned by the discovery of nocuous genetic predispositions.[333] And still another, even whilst admitting the long tradition of confidentiality within the profession, focused on the exceptions extracted by the common law and the complications introduced by the duty of physicians to warn third parties of potential injury, highlighting the very obvious tension.[334] Doctors themselves may not know when they are permitted or required to disclose[335]—and if so, how are patients to know?[336] An already ambiguous Swiss-cheese

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[330] *See* Morse & Casemore, *supra* note 311, at 327-28 ("Currently, there are no federal or Ontario statutes which either require or permit physicians to warn authorities and/or third parties regarding patients who threaten to seriously harm a third party although it is arguable that there is a common law duty to do so. . . . Although the common law recognizes such a public interest exception, its scope is unclear.").

[331] Tarasoff v. Regents of the University of California, 551 P.2d 334, 340 (Cal. 1976) (holding that the common law required the physician to "apprise the victim of the danger, to notify the policy, or take whatever other steps are reasonably necessary under the circumstances" if a patient poses a "serious danger of violence to another."); *see* Suarez, *supra* note 328, at 493-94 (discussing the case).

[332] Ensor, *supra* note 311; *see* Morse & Casemore, *supra* note 311, at 330-1 (discussing Pittman Est. v. Bain, (Ont. 1994), 19 C.C.L.T. (2d) 1, 112 D.L.R. (4th) 257, where a decedent's estate recovered for failure to warn where a wife was not informed of her husband's having contracted AIDS).

[333] Suarez, *supra* note 328, at 495 ("Despite the physician's prior warning about the importance of familial risk notification, the patient declines the recommendation that she should share her genetic test results with her sister. Instead, the patient requests that this information be kept confidential. Does this physician have a legal or ethical obligation to tell the patient's sister that she may have inherited these genetic predispositions? If the physician does not warn the sister, and the sister later develops breast cancer, does the sister have a valid claim that the physician had an obligation to contact her about her genetic risk?") (citations omitted); *id.* at 499-504 (discussing case law and ethical guidelines considering the physician's obligation).

[334] Morse & Casemore, *supra* note 311, at 312 ("Historically, patient confidentiality has been rigorously protected by the members of the medical profession. However, a physician's duty of confidentiality is not absolute; while the statutory exceptions are obvious, those at common law are not, and they continue to evolve. To complicate matters, the disciplinary body that governs physicians has recently introduced a standard of practice which establishes a physician's duty to warn a third party of a patient's impending threat to them. This is arguably inconsistent with certain aspects of the law.").

[335] *See* Suarez, *supra* note 328, at 508 ("The discrepancies in state case law, professional association recommendations, and genetic information antidiscrimination statutes, coupled with uncertainty about whether the inexact probability of a future genetic disease constitutes an imminent threat to a person or the public, have led to confusion over when it is appropriate for physicians to breach confidentiality. Physicians are confused about what actions, if any, are permissible or required for warning relatives about genetic risk.."); Morse & Casemore, *supra* note 311, at 332 ("Many physicians believe that the rules relating to doctor-patient confidentiality dictate that they not report such threats to any public authority or to a person whose life or well-being is being threatened. Others feel that they are facing a dilemma in that they may be at risk of being found legally or professionally liable if they fail to disclose such information, in spite of considering it prudent to do so.").

[336] Suarez, *supra* note 328, at 508 ("The numerous yet conflicting sources of authority pose a problem for physicians: 'The current absence of legal guidance in many areas of potential liability has created roadblocks to effective education and communication . . . between health professionals and patients.'") (quoting Lee Black, Jacques Simard & Bartha Maria Knoppers, *Genetic Testing, Physicians and the Law: Will the Tortoise Ever Catch up with the Hare?*, 19 ANNALS HEALTH L. 115, 120 (2010)).

privilege is not one that calls out for the certainty of postmortem preservation.[337]

B. Strong Signs of Life After Death

And yet despite all these contrary signs, and notwithstanding his own contumelies,[338] Wigmore briskly endorses the physician-patient privilege's persistence after death: "The object of the privilege is to secure subjectively the patient's freedom from apprehension of disclosure ; it is therefore to be preserved even after the death of the patient, — following the analogy of the other similar privileges."[339] There were no few cases on point even at Wigmore's writing in 1904, uniformly deriving from the life-insurance concerns resident in New York.[340] In the first, 1876's *Edington v. Mutual Life Insurance of New York*, the Court of Appeals sustained the exclusion of testimony by the decedent's physician sought by the life-insurance company, rejecting the contention that the privilege could not be asserted after death by the patient's representative,[341] or that death somehow altered the calculus because the patient could no longer be examined himself.[342] Four years later, the high court reaffirmed in *Grattan v. Metropolitan Life Insurance* the principle when a life insurance company sought to question the doctor who had examined the deceased upon her deathbed:

> It is urged, however, by the learned counsel for the appellant that no professional medical action is needed after death; that the event severs the relation of physician and patient; and that consequently information of the cause of death cannot be acquired to enable a physician "to prescribe" for a patient. The case before us is not one where the witness was called in for the first time after the death of the patient, but one where the lips of the physician were sealed during the life of the patient, and where, although by death he loses the patient, his lips must remain closed. It was held under the old law that the seal must remain until removed by the patient; and it is now so provided by statute: (Code of Civil Procedure, § 834.) The witness learned the cause of his patient's death while attending her in a professional capacity, and, as it must be inferred, from the symptoms caused by

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[337] *See* Morse & Casemore*, supra* note 311, at 318 ("In each circumstance, the primary consideration will be whether the public interest in the protection of the doctor-patient relationship outweighs the public interest in the administration of justice.")

[338] *See supra* notes 318-321.

[339] WIGMORE, *supra* note 46, § 2387 at 3357.

[340] *E.g.*, Beglin v. Metro. Life Ins. Co., 66 N.E. 102 (N.Y. 1903); Davis v. Supreme Lodge, Knights of Honor, 58 N.E. 891 (N.Y. 1900); Reinhan v. Dennin, 9 N.E. 320 (N.Y. 1886); Westover, Ex'r v. Aetna Life Ins. Co., 1 N.E. 104 (N.Y. 1885); Grattan v. Metro. Life Ins. Co., 80 N.Y. 281 (1880); Edington v. Mutual Life Ins. Co. of N.Y., 67 N.Y. 185 (1876).

[341] *Edington*, 67 N.Y. at 195-56 ("There is no ground for claiming that the right of objecting to the disclosure of a privileged communication is strictly personal to the party making it, or to his personal representatives, and that it cannot be available to a third party. No valid reason is shown why an assignee does not stand in the same position in this respect as the original party, and the decease of the latter cannot affect the right of the former to assert this privilege.").

[342] *Id.* at 196 (rejecting the contention "that section 390 of the Code, by virtue of which a party to an action may examine the adverse party as a witness in the same manner as other witnesses may be examined, abrogates the privilege; and as it would have been competent, if the applicant had been living, to have examined him as a witness no privilege can be interposed by reason of his death").

> the disease. The remaining, or fifth and sixth questions, were objectionable for the same reasons.[343]

In 1885, the Court of Appeals went further yet in a case brought by the still-extant insurance provider Aetna.[344] Observing that the physician-patient privilege was codified right alongside the attorney-client and priest-penitent, the court found all the privileges to be equally "absolute and unqualified," and absent the express waiver of the privilege's holder, "the seal of the law must forever remain until it is removed by the person confessing, or the patient, or the client," citing the earlier *Edington* and *Grattan*.[345] Drawing a new distinction, the court noted that *Edington* had approved only the representative of the decedent objecting to *assert* the privilege; the court now held that an executor had no power to *waive* the privilege.[346] Indeed, in service of the abiding seal of the law, the court thought that "any party to an action could make the objection, as the evidence in itself is objectionable, unless the objection be waived by the person for whose protection the statutes were enacted."[347] Once that person was dead, so too was the possibility of waiver, forever[348]—and other courts concurred as time passed,[349] though some wondered in the case of will contests where an heir sought waiver, implicating the testamentary exception.[350] Regardless, within a few decades, it was "well settled" that any surviving legal representative could object on the basis of the decedent's privilege, lest a confidence entrusted to the doctor "blacken his memory and bring disgrace on his loved ones."[351]

Back in 1900, the Court of Appeals had before it a fraternal organization, the

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[343] *Grattan*, 80 N.Y. at 298.

[344] Westover, Ex'r v. Aetna Life Ins. Co., 1 N.E. 104 (N.Y. 1885).

[345] *Id.* at 105.

[346] *Id.* at 106 ("An executor or administrator does not represent the deceased for the purpose of making such a waiver. He represents him simply in reference to rights of property, and not in reference to those rights which pertain to the person and character of the testator. If one representing the property of a patient can waive the seal of the statute because he represents the property, then the right to make the waiver would exist as well before death as after, and a general assignee of a patient, for the purpose of protecting the assigned estate, could make the waiver; and yet it has been held that an assignee in bankruptcy is not empowered to consent that the professional communications of his assignor shall be disclosed.").

[347] *Id.*

[348] *Id.*

[349] *In re* Flint's Estate, 100 Cal. 391, 395-96, 34 P. 863 (Cal. 1893) ("The courts of New York, under this clause of the statute, have uniformly held that the patient alone can waive the privilege, and when such patient is dead the matter is forever closed. The decisions of the appellate courts of Michigan, Missouri, and Indiana support respondent's position in this regard.") (citations omitted).

[350] *Id.* at 396 ("All of the courts concede the privilege does not lapse with death, hence it is coupled with the evidence when offered at the trial. Who has the power to waive it? Can the heir waive it, as against the objection of the devisee?").

[351] Novak v. Chicago Fraternal L. Ass'n, 16 P.2d 507, 509 (Kan. 1932) ("It is well settled that the objection may be raised by the person who made the communication, his personal representative or assignee. . . . The reason given for this rule is that the same reason existed why one about to confide in a physician should believe that any disgraceful secret he might divulge would, after his death, be kept safely in the breast of the physician rather than rise from the grave to blacken his memory and bring disgrace on his loved ones. This reason applies with equal force to a beneficiary.").

Knights of Honor, ironically resisting payment of a death benefit to the widow of one of its members.[352] The Knights sought to show that the health disclosures made to obtain the benefit had been false and incomplete, but evidence of the attending physicians as to the relatives' cause of death was excluded, under a "proposition too clear for argument" by that time: namely, that such statements were inadmissible whether made to the party's decedent or a third party.[353] "They are excluded," the court reminded, "not only for the purpose of protecting parties from the disclosure of information imparted in the confidence that must necessarily exist between physician and patient, but on grounds of public policy as well."[354] Ingeniously, the defendant argued that an "obscure provision" of the local city sanitary code prescribing the public maintenance of the proceedings of the board of health might be read to conflict with and abrogate the privilege, but the court dismissed this gambit handily, finding there was no true conflict when read properly, disinclined to imagine the tacit override of so strong a general public policy *sub silentio*.[355]

Cases both prior and subsequent were in full accord, refusing to allow minutiae like sanitary codes to excel professional privilege by happenstance or circumstance.[356] Yet the Court of Appeals was not blind to the misrule that the privilege could wreak in its usual milieu of will contests and disputes over death benefits:

> It is probably true that the statute, as we feel obliged to construe it, will work considerable mischief. In testamentary cases, where the contest relates to the competency of the testator, it will exclude evidence of physicians, which is

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[352] Davis v. Supreme Lodge, Knights of Honor, 58 N.E. 891 (N.Y. 1900). In those days, "benevolent" fraternal organizations were not the collegiate social clubs of today, but ubiquitous institutions providing camaraderie and mutual support in life and benefits to one's survivors after death. *See* Jared S. Sunshine, *A Lazarus Taxon in South Carolina: A Natural History of National Fraternities' Respondeat Superior Liability for Hazing*, 6 CHARLOTTE L. REV. 79, 81-85 (2014).

[353] *Davis,* 58 N.E. at 892, 892 ("That the proof offered and excluded was inadmissible, I may assume to be a proposition too clear for argument unless the prohibition contained in the section of the Code referred to has been repealed. This court has held that the statements of the attending physician, for the purpose of establishing the cause of death either of the insured himself or of his ancestors or their descendants, although not parties to nor beneficiaries under the contract, were not admissible.").

[354] *Id.* ("The disclosure by a physician, whether voluntary or involuntary, of the secrets acquired by him while attending upon a patient in his professional capacity, naturally shocks our sense of decency and propriety, and this is one reason why the law forbids it.").

[355] *Id.* at 893-94 ("This local statute, when reasonably and properly construed and understood, and limited to the purpose for which it was enacted, does not, in my opinion, abolish any part of the Code, or affect any general rule of evidence applicable throughout the state at the time of its enactment. This would seem to be very plain when we recall the well-settled rules for the construction of statutes in cases where it is claimed that a subsequent enactment operates to repeal or modify a prior one. These rules have all the more force in a case like this, where the contention is that a subsequent law, which is local and special, operates to repeal a prior law of general application. It is not claimed that there is any express repeal of the prohibition contained in the Code against the testimony of a physician based upon information acquired in his professional capacity. If that section of the Code is repealed or affected at all, it is by implication,—a view which is not favored."). The Supreme Court has often referred to this logic and principle in that legislators do not "hide elephants in mouseholes." Whitman v. Am. Trucking Assocs., Inc., 531 U.S. 457, 468 (2001) (citing prior cases).

[356] *See, e.g.*, Beglin v. Metro. Life Ins. Co., 66 N.E. 102, 102 (N.Y. 1903) (relying on *Davis*); Buffalo Loan, Trust & Safe-Deposit Co. v. Knights Templar & Masonic Mut. Aid Ass'n, 27 N.E. 942, 944 (N.Y. 1891) (cited in *Davis*).

> generally the most important and decisive. In actions upon policies of life insurance, where the inquiry relates to the health and physical condition of the insured, it will exclude the most reliable and vital evidence which is absolutely needed for the ends of justice. But the remedy is with the legislature, and not with the courts.[357]

In that case, *Reinhan v. Dennin*, the court had need to distinguish the earlier *Pierson v. People*, where it had allowed a physician to give testimony.[358] In *Pierson*, the challenged testimony detailed the doctor's examination of the deceased, a victim of poisoning, whilst it was the accused murderer who then objected.[359] The court simply would not allow such a "great mischief" to be wrought on criminal justice,[360] for the privilege's purpose was only "to enable a patient to make known his condition to his physician without the danger of any disclosure by him which would annoy the feelings, damage the character, or impair the standing of the patient while living, or disgrace his memory when dead."[361] As the trial judge had (rightly, as was affirmed) written, it would be utterly "contrary to and inconsistent with its spirit, which most clearly intended to protect the patient and not to shield one who is charged with his murder" to allow the privilege "to be used as a weapon of defense to the party so charged, instead of a protection to his victim."[362] All the same, the high court was loathe to carve out a general exception to the precious privilege in *Pierson*, offering a one-time allowance only.[363]

Modern practice has not strayed far from that of *fin de siècle* New York. Eventually, the bulk of other courts came to accept that certified copies of death records could be admitted as evidence without offending the privilege, finding the New York opinions to the contrary to be an unfounded overbreadth from another time.[364] In saying

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[357] Reinhan v. Dennin, 9 N.E. 320, 322 (N.Y. 1886).

[358] *Id.*

[359] Pierson v. People, 79 N.Y. 424, 432-33 (1880).

[360] *Id.* at 433 ("It may be so literally construed as to work great mischief, and yet its scope may be so limited by the courts as to subserve the beneficial ends designed without blocking the way of justice. It could not have been designed to shut out such evidence as was here received, and thus to protect the murderer rather than to shield the memory of his victim. If the construction of the statute contended for by the prisoner's counsel must prevail it will be extremely difficult, if not impossible, in most cases of murder by poisoning to convict the murderer.").

[361] *Id.* at 434.

[362] *Id.* ("Statutes are always to be so construed, if they can be, that they may have reasonable effect, agreeably to the intent of the Legislature; and it is always to be presumed that the Legislature has intended the most reasonable and beneficial construction of its acts. Such construction of a statute should be adopted as appears most reasonable and best suited to accomplish the objects of the statute; and where any particular construction would lead to an absurd consequence, it will be presumed that some exception or qualification was intended by the Legislature to avoid such consequence. A construction which will be necessarily productive of practical inconvenience to the community is to be rejected, unless the language of the law-giver is so plain as not to admit of a different construction.").

[363] *Id.* ("But we do not think it expedient, at this time, to endeavor to lay down any general rule applicable to all cases, limiting the apparent scope of this statute.").

[364] *See* Bozicevich v. Kenilworth Mercantile Co., 199 P. 406, 409–10 (Utah 1921) (after finding the "great weight of authority" to that effect, commenting of the New York dissenting view: "We confess our inability to grasp just what the writer of the opinion had in mind. The fact is that no reason whatever is stated why the

as much, however, the Utah Supreme Court reasoned that the privilege did not reach such a situation, and if it did, it would prevail:[365] "Be that as it may, however, there can be no doubt that the patient may still insist upon his privilege; and the physician may not, without the patient's consent, testify to information that may have been imparted to him by the patient" [366]—as opposed to observations from an autopsy after the patient's lips were shut forever.[367] So too other states came to accept that an accused murderer could not antisocially (in the purest sense of the word) assert the victim's privilege in his defense, as a stranger to the confidence protected—absent common law predicate, the privilege extended only as far as the statutory reason dictated.[368]

Yet the basic edict of *Edington* persisted: almost a century later, the Second Circuit looked to that long-ago case in upholding the decedent's privilege, which "we must remember, exists for the benefit of the patient during his lifetime and for the prevention of his disgrace after his death, and cannot be taken away because the physician failed to treat an illness disclosed to him by his patient."[369] To hold that a physician's lethal failing extinguishes the privilege because of the patient's death would be uncommonly

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Legislature did not mean what it said in plain and unambiguous language, namely, that certified copies of death certificates should be 'prima facie evidence in all courts and places.'")

[365] *Id.* at 408-10.

[366] *Id.* at 408 ("As we view the matter, however, there is no irreconcilable conflict, and both provisions may stand and be enforced. Be that as it may, however, there can be no doubt that the patient may still insist upon his privilege; and the physician may not, without the patient's consent, testify to information that may have been imparted to him by the patient or such information as the physician may have received in attending the patient, if such information was necessary to enable the physician to prescribe or act for the patient. When death has overtaken the patient, however, and it becomes necessary for the public good that the cause of his death be made known, and that a public record may be made thereof, then the privilege, to that extent, if it ever existed as against such a certificate, must yield to the public good.").

[367] *Id.*

[368] *E.g.*, Wimberley v. State, 228 S.W.2d 991, 991 (Ark. 1950) ("The doctrine of privileged communications only extends to the physician's patients and himself. A defendant in a prosecution for crime has no right to claim the protection."); Davenport v. State, 108 So. 433, 434 (Miss. 1926) ("The physicians testified to the physical facts discovered by them in their treatment of the decedent, and as to their course of treatment. We had never understood that the rule extended so far as is claimed by defendant. The testimony had no reference to him, and there was nothing for him to waive. The prohibitions of the section were not in his 'favor.' So far as we are aware, the provisions of the section have never been held to apply to cases of this kind. No authorities so holding are cited. Communications between patient and physician were not privileged at common law, but depend alone upon the statute. It is to be applied only as between them, and is for the protection of the patient."); *see* R.P. Davis, Annotation, 2 A.L.R.2d 645, 2 (1948 & suppl. 2021), *Right of One Against Whom Testimony Is Offered to Invoke Privilege of Communication Between Others* ("The weight of authority supports the view that the doctrine of privileged communications as between physician and patient, usually incorporated in statutory enactments, is intended for the benefit of the patient, and that the defendant in a criminal prosecution has no right to object to the testimony of a physician concerning communications made by the victim of the crime to such physician.").

[369] Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463, 468-69 (2d Cir. 1962). In 2019, the Southern District of New York cited *Edington* for the proposition that not only the words of the patient but those of any third parties attending him were within the privilege, and had been since the privilege was recognized long over a century before. Conti v. Doe, No. 17CIV9268VECRWL, 2019 WL 5198882, at *5 n.4 (S.D.N.Y. Oct. 1, 2019) ("Ever since recognizing the physician-patient privilege, New York courts have acknowledged that physicians may communicate with third parties to aid a patient's treatment and that such communications are protected by the physician-patient privilege unless it is waived.").

perverse.[370] Of course, not all agreed—the Oregon Supreme Court sitting *en banc* in 1963 rejected *Edington*'s effusiveness and embraced Wigmore's critique in sharply limiting its statutory privilege to civil cases.[371] But enough did to cement the rule.

V. HELPMATES EVERLASTING

> *It is true the husband was dead, but this does not weaken the principle.*[372]

In almost every respect, the marital privilege is the odd man out.[373] It lacks an extrinsic corpus of historical authority like the Church's canon law or the Æsculapian cultus with its Ορκος of Hippocrates.[374] It is therefore rooted wholly in the common law—and modern courts have perforce considered whether statutes meant to cabin preexisting doctrine, rather than how far they extended a rule created *ex nihilo*.[375] Historically, at least, it was not solely communicationally based, but had a highly confused dimension of total testimonial immunity or incompetency as well.[376] It is bilateral rather than unilateral: each spouse enjoys it with the other, rather than one communicant being the holder and the other being an interlocutor and relator only.[377] Unlike its more esoteric peers, it was quite often

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[370] *See Brei*, 311 F.2d at 469.

[371] State v. Betts, 384 P.2d 198, 204-05 (Or. en banc 1963) ("We conclude that the dubious benefit provided by throwing the veil of privilege over the patient-physician relationship is outweighed in criminal proceedings by the advantage to the public secured by the efficient administration of criminal justice which is obtained by permitting the introduction of competent and relevant evidence which the physician can give about his patient.").

[372] For the full quotation and citation, see *infra* note 408.

[373] *See* Heather Cave & Peter Sankoff, *What's Left of Marital Harmony in the Criminal Courts: The Marital Communications Privilege after the Demise of the Spousal Incompetence Rule*, 42 MAN. L.J. 1, 6 (2019) ("As this basic overview reveals, marital communications privilege has very little in common with the other class privileges in existence today.").

[374] *See supra* notes 262-271, 262-267 (priest-penitent privilege origins in canon law), 311 (physician-patient privilege origins in the Ορκος).

[375] *E.g.*, *Southwick*, 49 N.Y., at 513–14 ("But the courts, venerating the common-law rule which prevented married persons being witnesses for or against each other save in very exceptional cases, deemed it requisite that the legislature should, more explicitly than it had done in those sections, express an intention to abrogate that rule, before the judiciary should declare that it was broken. The decisions were put, not upon the lack of literal force in the statute, but in a reluctance to find in the words the intent to invade a rule so ancient and so thoroughly founded.").

[376] *See* Pamela A. Haun, *The Marital Privilege in the Twenty-First Century*, 32 U. MEM. L. REV. 137, 140 (2001) ("The marital privilege at common law could thus be viewed as these two distinct privileges: the privilege against adverse spousal testimony (also referred to as the testimonial privilege) and the confidential marital communications privilege."); Cleckley, *supra* note 252, at 15-16; Lee W. Borden, *In Defense of the Privilege for Confidential Marital Communications*, 39 ALA. LAW. 575, 575-76 (1978) ("The early courts seldom noted a distinction, for example, between incompetency and privilege or between the privilege for confidential communications and the privilege of one spouse not to testify against another."); Barbara Gregg Glenn, *The Deconstruction of the Marital Privilege*, 12 PEPP. L. REV. 723, 729-30 (1984); WIGMORE, supra note 46, § 2334 at 3259-60.

[377] David Farham, *The Marital Privilege*, 18 LITIG. 34, 36 (1992) ("But there is a key difference between the marital communications privilege and the others, at least in some jurisdictions: Federal courts have held that the marital communications privilege may be invoked by either spouse without regard to who made the

interposed and sustained.[378] And, of course, spouses do not enjoy the privilege based on the utilitarian needs of a particular vocation that promises confidentiality—it is not a "professional privilege" at all.[379] Really, the only thing it clearly *does* share with the other privileges (and not even all, at that[380]) is its vituperative condemnation by the ur-cynic Jeremy Bentham.[381]

But perhaps it is unfair to deny the marital privilege historical antecedent, though Wigmore consigns its origins to "tantalizing obscurity."[382] The gospels do instruct of man and wife that "they are no more twain, but one flesh" and "what therefore God hath joined together, let not man put asunder,"[383] amongst many other ancillary injunctions as to the inviolability of the marital estate.[384] Wigmore duly nods in the direction of ecclesiastical law as assimilated into the English courts of chancery,[385] but his discussion points more

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communication, but the doctor-patient and attorney-client privileges belong to—and can be waived by—the patient and the client, respectively."); *see also* Anne N. DePrez, *Pillow Talk, Grimgribbers and Connubial Bliss: The Marital Communication Privilege*, 56 IND. L.J. 121, 130 (1980) ("In accordance with the policy of encouraging marital communications, the privilege is often given to the communicating spouse. Some jurisdictions, however, have ignored the policy and granted the privilege to the communicatee or to both spouses.") (citations omitted).

[378] *See* cases cited *infra* note 394.

[379] *See* Borden, *supra* note 376, at 580 ("[T]he marital privilege differs from the other communications privileges, such as the attorney-client and the clergyman's privileges, because the marital privilege does not involve a professional who is likely to inform the other person of the privilege's existence."); DePrez, *supra* note 377, at 137 ("[U]nlike the professional communication privileges, the marital privilege is not complemented by a code of ethics requiring that the receiving spouse keep the information confidential. . . . The communication privileges, with the sole exception of the marital privilege, apply to professional relationships, which are almost entirely verbal."); Joseph A. Fawal, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 CUMB. L. REV. 307, 322 (1976) ("But there is one common thread which runs through all of the other confidentiality privileges which is noticeably absent in the marital privilege. In each of these other situations, the parties have entered into the relationship with the guarantee of confidentiality as an inducement: the client conversing with his attorney; the penitent confessing to his priest; or the patient conferring with his doctor.").

[380] *See supra* notes 256-257.

[381] BENTHAM, supra note 256, at 325-45; *see* Sunshine, *Collision*, *supra* note 23, at 68-72, nn.249-51 (discussing Bentham's views of the marital privilege).

[382] WIGMORE, *supra* note 46, § 2227 at 3034; *see id.* § 2333 at 3258 (noting confusion of the marital immunity from testimony and communicational privileges); Fawal, *supra* note 379, at 311 ("As has been noted, the history of marital privilege in general is somewhat obscure, and the origins of the privilege of confidential communications is no exception.").

[383] *Matthew* 19:6 (King James); *accord Mark* 10:8-9.

[384] *E.g.*, *Ephesians* 5:33 ("Nevertheless let every one of you in particular so love his wife even as himself; and the wife see that she reverence her husband."); *1 Corinthians* 7:3-4 ("Let the husband render unto the wife due benevolence: and likewise also the wife unto the husband. The wife hath not power of her own body, but the husband: and likewise also the husband hath not power of his own body, but the wife."); *id.* 14-16 ("For the unbelieving husband is sanctified by the wife, and the unbelieving wife is sanctified by the husband: else were your children unclean; but now are they holy. . . . For what knowest thou, O wife, whether thou shalt save thy husband? or how knowest thou, O man, whether thou shalt save thy wife?"); *Colossians* 3:18-19 ("Wives, submit yourselves unto your own husbands, as it is fit in the Lord. Husbands, love your wives, and be not bitter against them.").

[385] WIGMORE, supra note 46, § 2227 at 3035 ("Moreover, in the testimonial rules of the ecclesiastical law, which in general obtained in chancery, and might thus have been naturally drawn upon for analogies, the

closely to the testimonial disqualification of a defendant's entire household—spouse, children, servants, and all—found originally in the law of Rome.[386] Most likely, however, the communicational privilege and testimonial immunity that evolved alongside it arose from the "natural and strong repugnance" to turning the confidantes in the eldest of human affinities against one another, intimating an early deontology of connubial privacy.[387] If the marital privilege is immanent in and emanant from primordial unions within the philosophers' state of nature predating civil society,[388] then it is truly the uttermost prototype of them all.[389] In any event, there seems scant fruitful purpose in dissecting the muddled, variegated, and often farcical attempts to rationalize the primæval institution *ex post facto*.[390]

As with the others surveyed, the marital communicational privilege is everlasting. Wigmore again offers no protest to perpetuity *per se*.[391] "The privilege is intended to secure

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disqualifications of witnesses included not only a wife but also all members of the family, together with dependents and servants.").

[386] *See* Sunshine, *supra* note 31, at 436-37, n.45 (discussing disability of servants and household to testify at Roman law and citing, *inter alia*, Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 488 (1928); GREENIDGE, *supra* note 32, at 483; and JOHN THOMAS ABDY, HISTORICAL SKETCH OF CIVIL PROCEDURE AMONG THE ROMANS 127 (Cambridge, Macmillan & Co. 1857)); *see also* Fawal, *supra* note 379, at 310 ("The rationale which emerged during this period was partly based upon our English ancestors' natural repugnance for the idea of condemning a man through the testimony of members of his household.").

[387] *See* WIGMORE, supra note 46, § 2227 at 3035; *accord* Fawal, *supra* note 379, at 310 ("[R]epugnance against interspousal testimony was a strong force in the development of the privilege.").

[388] *See* 5 JOHN LOCKE, *Two Treatises of Government*, bk. II ("Of Civil Government"), ch. VII, § 77 *in* THE WORKS OF JOHN LOCKE 383 (London 1823) ("The first society was between man and wife . . . Conjugal society is made by a voluntary compact between man and woman; and though it consist chiefly in such a communion and right in one another's bodies as is necessary to its chief end, procreation; yet it draws with it mutual support and assistance, and a communion of interests too").

[389] *See* Cleckley, *supra* note 252, at 15 ("The marriage relationship of husband and wife, to say the least, is an ancient one.").

[390] WIGMORE, supra note 46, § 2228 at 3037 ("It is curious, because the variety of ingenuity displayed, in the invention of reasons *ex post facto*, for a rule so simple and so long accepted, could hardly have been believed, but for the recorded utterances. It is entertaining (if any error in the law can ever be entertaining), because of its exhibition of the subtle power of cant over reason, and of the solemn absurdity of explanations which do not explain and of justifications which do not justify, and because of the fantastic spectacle of a fundamental rule of evidence, which never had a good reason for existence, surviving none the less through two centuries upon the strength of certain artificial dogmas, — pronouncements wholly irreconcilable with each other, with the facts of life, and with the rule itself, and yet repeatedly invoked, with smug judicial positiveness, like magic formulas, to still the spectre of forensic doubt.").

[391] Wigmore earlier entertained argument why spouses ought to be immune from testimony against their departed spouse, before dismissing the question as irrelevant because "it is obvious that, since a deceased person cannot be a party, testimony concerning the deceased person can never be said to be testimony 'against' a spouse": "Can there be dissension with the *manes* of a departed ? Is there for married pairs a posthumous peace, capable of fracture by service of subpoena upon the survivor, and therefore fit to be forefended by the law ? If so, then the privilege should extend a *post mortem* protection. But unless we assume such a theory, the privilege ceases upon the death of a spouse. It is true that, among the varying reasons for the privilege, one of them does suggest a rational extension beyond the life of the parties, namely, that policy of fairness which aims to exempt husband and wife from the repugnancy of being the means of condemning the other (ante, § 2228, p. 15) ; for this repugnance must exist also, in some degree, to a

such a guarantee against apprehension of disclosure as will induce absolute freedom of communication ; and this can only be attained by continuing the protection in spite of the termination of the marital relation," Wigmore posited, concluding: "Hence, it has always been conceded that the death of the person communicating does not terminate the privilege."[392] In substance and effect, his maxim so aligned with the antebellum Georgia Supreme Court that he quoted its 1859 holding in *Lingo v. State* at length in his treatise:

> [T]his evidence was to be drawn from an illegal *source*, the *wife*, who was such when the declarations were made to her. The husband was dead, and so it is true that the relation had ceased when the testimony was offered; but communications between husband and wife are protected *forever*. This is necessary to the preservation of that perfect confidence and trust which should characterize and bless the relation of man and Wife. Each must feel that the other is a safe and sacred depository of all secrets. And the protection which the law holds over the dead, is the very source of greatest security to all the living.[393]

And it *was* always conceded, as Wigmore recorded: dozens of nineteenth-century cases did, in nearly every state of the nation.[394] Iowa clarified the privilege was unwaivable

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condemnation of the memory of the departed one." WIGMORE, supra note 46, § 2237 at 3053. Note should be taken of Wigmore's rhetorically deft trio of alliterations in the second sentence.

[392] WIGMORE, *supra* note 46, § 2341 at 3269-70.

[393] Lingo v. State, 29 Ga. 470, 483-84 (Ga. 1859).

[394] Besides *Lingo*, Wigmore cited over two dozen cases from California, D.C., Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New York, Pennsylvania, and Tennessee: Emmons v. Barton, 109 Cal. 662, 669-70, 42 P. 303 (Cal. 1895); Brooks v. Francis, 10 D.C. 109, 1877 WL 18409, at *3 (D.C. 1879); Farmers' Bank v. Cole, 5 Del. 418, 1853 WL 805 (Del. 1853) (per curiam); Jackson v. Jackson, 40 Ga. 150, 153, 1869 WL 1766 (Ga. 1869); 1895, Goelz v. Goelz, 41 N.E. 756, 758 (Ill. 1895) ("On grounds of public policy, and wholly independent of any question of interest or identity, neither husband nor wife could at common law testify to communications or conversations occurring between them during coverture; and this inability to testify continued, as to such communications and conversations, even after the marital relation was severed, either by divorce or by death."); Gillespie v. Gillespie, 42 N.E. 305, 306 (Ill. 1895) (finding a widow incompetent to testify as to "evidence of matters occurring during his lifetime"); Geer v. Goudy, 61 N.E. 623, 626 (Ill. 1898) ("This inability of the husband or wife to testify continues, as to the communications and conversations between them, after the marriage relation is severed, whether such severance be by divorce or by death."); Mercer v. Patterson, 41 Ind. 440, 443-44, 1872 WL 5469, at *2 (Ind. 1872) ("The law will not permit, even after the death of the husband, any disclosure by the wife, which seems to violate the confidence reposed in her as a wife, lest such permission might tend to impair the harmony of the marriage state, and to affect, injuriously, the interests of society dependent upon it. But where there is not even a seeming confidence, when the act done or declaration made by the husband, so far from being private or confidential, is designedly public at the time, and from its nature must have been intended to be, afterward, public, there is no interest of the marriage relation or of society which, in the absence of all interest of husband or wife, requires the latter to be precluded from testifying between other parties, such act or declaration not affecting the character or person of the husband."); Griffin v. Smith, 45 Ind. 366, 368 1873 WL 5442, at *2 (Ind. 1873); Shuman v. Supreme Lodge Knights of Honor, 81 N.W. 717, 718 (Ia. 1900); Hertrich v. Hertrich, 87 N.W. 689, 690 (Ia. 1901); McGuire v. Maloney, 40 (1 B. Mon.) Ky. 224, 225-226, 1841 WL 2844, at *2 (Ky. 1841) ("The law will not permit, even after the death of the husband, any disclosure by the wife, which seems to violate the confidence reposed in her as a wife, lest such permission might tend to impair the harmony of the marriage state, and to affect, injuriously, the interests of society dependent upon it."); Short v. Tinsley, 58 Ky. (1 Met.) 397, 401, 1858 WL 4949, at *3 (Ky. 1858); Commonwealth v. Sapp, 14 S.W. 834, 835 (Ky. 1890); Manhattan Life Ins. Co. v. Beard, 66

by either husband or wife alone, "for considerations of public policy and public welfare enter too largely into the sacred relation of husband and wife to permit a disclosure of communications at the will of either."[395] (Wigmore has harsh words for the "radical" idea that public policy could figure so strongly as to override the consent of the privilege holder, but admits that so the courts said.[396]) The occasional iconoclastic inferior court was dealt with swiftly in subsequent precedent,[397] the only caveat being the familiar testamentary

S.W. 35, 36 (Ky. 1902); N.Y. Life Ins. Co. v. Johnson's Adm'r, 72 S.W. 762, 762 (Ky. 1903); Walker v. Sanborn, 46 Me. 470, 472-473 1859 WL 2942, at *2 (Me. 1859) ("But there is another reason, which the law recognizes, and it arises from the intimate and confidential relations subsisting between the parties. It treats all confidential communications, and whatever has come to the knowledge of either by means of the confidence which the relation inspires, as sacred, and not to be divulged in testimony even after death. It regards such disclosures and such facts as sacred, and like communications from client to counsel, which cannot be divulged but by express consent of the other party."); Dexter v. Booth, 84 Mass. (2 All.) 559, 559, 1861 WL 4755, at *2 (Mass. 1861) ("It is admitted that, at common law, she is excluded on considerations of policy from testifying to confidential conversations between herself and her husband, and that the exclusion remains unaffected by his death."); Bradford v. Vinton, 26 N.W. 401, 407 (Mich. 1886); Newstrom v. St. Paul & D. R. Co., 63 N.W. 253, 254–55 (Minn. 1895) ("We have held that this prohibition is not confined to communications on subjects of a confidential nature, but extends to all communications, except, perhaps, those which from their very nature were evidently intended to be communicated to others. The fact that the husband is dead does not alter the rule.") (citation omitted); Buckingham v. Roar, 63 N.W. 398, 399 (Nebr. 1895); Babcock v. Booth, 2 Hill 181, 187 (N.Y. Sup. Ct. 1842) ("So long as the marriage continued, she clearly could not be called against her husband; and if she is allowed to speak after the marriage is at an end, either by divorce or death, it will tend to restrain that unlimited trust and confidence which ought always to exist between husband and wife."); Osterhout v. Shoemaker, 3 Hill 513, 519 (N.Y. Sup. Ct. 1842); Southwick v. Southwick, 49 N.Y. (4 Sickels) 510, 513–14, 1872 WL 9941 (N.Y. 1872); Cornell v. Vanartsdalen, 4 Pa. (4 Barr.) 364, 374, 1846 WL 5010, at *7 (Pa. 1846) ("And, neither is it material, in some cases, that this relation no longer exists. The great object of these rules being to secure domestic happiness by prohibiting *confidential communications* from being divulged, the rule is the same to that extent, even though the other party is no longer in being."); State *ex rel.* Barker v. McAuley, 51 Tenn. (4 Heisk.) 424, 433, 1871 WL 3682, at *4 (Tenn. 1871) ("No man would be willing to have his wife called on in a court of justice to detail the facts of which she gains a knowledge, by reason of the fact that she is the companion of his privacy, and has unlimited freedom of access to all the occurrences that transpire in his home and around the fireside; and the reasons for this rule are as strong, or nearly so, after the death of the husband as before.").

[395] *Hertrich*, 87 N.W. at 690 ("In the highest sense of the word, all communications of this class are privileged, because the law makes them so; but it is not a privilege which may be waived by either party alone, for considerations of public policy and public welfare enter too largely into the sacred relation of husband and wife to permit a disclosure of communications at the will of either. Nor does death remove the disability."); *see Sapp*, 14 S.W. at 835 ("Whether this rule may be relaxed so as to permit the wife to testify against the husband by his consent has been, to some extent, a mooted point; but in this country it has generally been denied. Its importance to the interests of society, protecting as it does the peace and harmony so vital to the most intimate of all relations, cannot be overestimated. Its disregard would throw open to the public gaze all that privacy of married life, which tends to cement the relation, and destroy, in great degree, if not altogether, that mutual confidence and dependence the one upon the other so necessary to its existence. Discord and misery would reign where peace and concord are necessary.").

[396] WIGMORE, supra note 46, § 2340 at 3269 ("Nevertheless, in a few Courts the doctrine of waiver appears to be ignored entirely. This confusion of a disqualification with a privilege has been already adverted to (ante, § 2334); it is entirely unjustifiable (except as required by the express words of some perversely-phrased statute), and is so radical an error of principle that no further argument would cure such a misapprehension.").

[397] *See, e.g.*, *Sapp*, 14 S.W. at 835 (distinguishing English's Adm'r v. Cropper, 71 Ky. 292, 293-94, 1871 WL 6628 (Ky. 1871) ("But this we conceive to be a misapplication of the rule relative to confidential communications between husband and wife; and we are of the opinion that neither the literal import of the language of the Code cited nor any principle of policy or propriety will exclude a surviving wife or husband

exception.[398] Some noted the obvious parallels to the professional privileges.[399] Many treated the privilege briefly as a self-evident truism, citing often to the already well-regarded 1850s treatise on evidence by Simon Greenleaf,[400] who held marital communications "inviolable," never to be "extracted from the bosom of the wife" even after the "death of the husband"—apparently incognizant of garrulous husbands surviving their wives.[401] Greenleaf's contemporaries, however, took a less inegalitarian view no less protective of the marital privilege,[402] and by the twentieth century Elliott & Elliott could formally state: "the death of one of the parties does not keep the communications made before death from being privileged."[403] More recent legal theorists remain in accord;[404] and such is the weight of authority that even those harboring doctrinal qualms succumbed to the mass of precedent.[405]

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from testifying to facts known by the witness from other means of information than such as result from the marriage relation, where, as in this case, the witness is not otherwise incompetent, although the testimony may relate to transactions of the deceased husband or wife.").

[398] *See* Murphy's Ex'r v. Murphy, 65 S.W. 165, 167 (Ky. 1901) ("The majority of the court are of the opinion—the writer not concurring therein—that the same rule is applicable to subsection 1 of section 606, and that that section does not apply to testimony of declarations of decedent in probate contests.")

[399] *Bradford*, 26 N.W. at 407 ("This, according to the statement of the witness, was a communication of the most confidential nature made by his wife to him during the marriage, and under circumstances which brought it within the prohibition of the statute. It was one which, after her death, he could never be permitted to testify to, because it could not then be done with the consent of both. In this respect it stands on the same plane as those communications which are made to a person's confidential adviser,—an attorney, priest, or physician,—who, after the death of the party, is not permitted to disclose such communications.").

[400] *E.g.*, *Sapp*, 14 S.W. at 835; Goelz v. Goelz, 41 N.E. 756, 758 (Ill. 1895); Jackson v. Jackson, 40 Ga. 150, 153, 1869 WL 1766 (Ga. 1869); Short v. Tinsley, 58 Ky. (1 Met.) 397, 401, 1858 WL 4949, at *3 (Ky. 1858).

[401] GREENLEAF 12TH, *supra* note 40, § 254 at 286 ("The happiness of the married state requires that there should be the most unlimited confidence between husband and wife ; and this confidence the law secures, by providing that it shall be kept for ever inviolable ; that nothing shall be extracted from the bosom of the wife, which was confided there by the husband. Therefore, after the parties are separated, whether it be by divorce or by the death of the husband, the wife is still precluded from disclosing any conversations with him.").

[402] *See, e.g.*, TAYLOR 2D, *supra* note 38, § 831 at 730 ("On the one hand, the statute speaks only of husbands and wives, and makes no reference either to widowers or widows, or to parties who have been divorced; but on the other hand, the old common law rule, which precluded husbands and wives from giving evidence for or against each other, has been construed by the Judges to mean, that whatever had come to the knowledge of either party by means of the hallowed confidence which marriage inspires, could not be afterwards divulged in testimony, even though the other party were no longer living.").

[403] ELLIOTT & ELLIOTT, *supra* note 43, § 630 at 733.

[404] *E.g.*, Cleckley, *supra* note 252, at 20 ("The communication privilege, however, applies in spite of divorce or death of a spouse."); Haun, *supra* note 376, at 142 (reaffirming Wigmore); Borden, *supra* note 376, at 580 ("For reasons similar to those surrounding divorce, the death of a spouse should have no effect on the privilege. Protection of the privacy of a marriage is no less crucial simply because one of the partners is no longer present."); DePrez, *supra* note 377, at 131 ("Nevertheless, once a communication has been made during a valid marriage, it will remain privileged despite the subsequent termination of the marriage by divorce or by the death of one of the spouses. This survival of the privilege is premised on the assumption that confidences will not be sufficiently encouraged unless the spouses are assured that their statements will never be subjected to forced disclosure.") (citations omitted).

[405] *E.g.*, R. H. Gollmar, *Marital Privilege*, 1945 WIS. L. REV. 232, 235 (1945) ("It is difficult to see why the privilege should be preserved after the death of one spouse, since the basis for the entire rule, *i.e.*, to preserve domestic tranquillity [*sic*], can no longer apply. Rule 214 follows the decisions in preserving the privilege after death.").

Even the Supreme Court concurred long ago, in 1839's *Stein v. Bowman*.[406] A certain Nicholas Stein, formerly of Hanover, immigrated to the United States and prospered, leaving upon his death a fortune of $25,000 and a paucity of heirs, spawning a rancorous probate contest.[407] One objection raised (of many) concerned the testimony of the widow Stuffle, offered to show that her late husband Francis had been bribed by one of the claimants to perjure himself, which the Court found to be inadmissible: "Confessions which, if ever made, were made under all the confidence that subsists between husband and wife. It is true the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule."[408] To allow such testimony would be to countenance the basest sort of posthumous spousal betrayal, where "the witness was called to discredit her husband; to prove, in fact, that he had committed perjury; and the establishment of the fact depended on his own confessions."[409] If ever privilege was to transcend the mortal coil, it ought to do so for the Stuffles—and so it did, the Court held, remanding for a new hearing without the widow's testimony.[410]

VI. THERAPISTS IMPERISHABLE

> *Creation of a mental health privilege necessitated enactment of a nearly absolute privilege, one without exception if the patient is deceased*.[411]

If marital privilege is the odd man out, then psychotherapist-patient privilege is the new kid on the block, a legal parvenu.[412] To be sure, since the days of Sigmund Freud, alienists had long been considered confidential counselors, even if their practices were imperfect,[413] and the law had afforded a privilege to psychiatrists possessed of a medical

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[406] Stein v. Bowman, 38 U.S. (13 Pet.) 209 (1839).

[407] *Id.* at 212-13.

[408] *Id.* at 223

[409] *Id.* ("Can the wife, under such circumstances, either voluntarily, be permitted, or by force of authority be compelled to state facts in evidence, which render infamous the character of her husband. We think, most clearly, that she cannot be. Public policy and established principles forbid it. This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence.").

[410] *Id.*

[411] For the full quotation and citation, see *infra* note 627.

[412] *See generally* David W. Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731 (1957).

[413] *See* Kerry Thomas-Anttila, *Confidentiality and Consent Issues in Psychotherapy Case Reports: The Wolf Man, Gloria And Jeremy*, 31 BRIT. J. PSYCHOTHERAPY 360 (2015) (surveying historical patient cases to observe that Freud had not always followed his own prescription of confidentiality); David J. Lynn & George E. Vaillant, *Anonymity, Neutrality, and Confidentiality in the Actual Methods of Sigmund Freud: A Review of 43 Cases*, 1907–39, 155 AM. J. PSYCHIATRY 163 (1998) (same).

degree or otherwise licensed by the state in their capacity as doctors.[414] One of the most celebrated (if problematic) decisions concerning physician-patient privilege already mentioned,[415] *Tarasoff v. Regents of the University of California*, concerned the duty of a practicing psychologist to breach the privilege to warn the target of his mentally disturbed patient's violent fantasies.[416] But psychotherapists *qua* therapists, and other less rarefied practitioners unpossessed of professional doctoral degrees, were often excluded or distinguished from the ranks of the (literally) privileged few.[417] The same ethics might bind all, but the law balked.[418] Some had always fretted about the wealthy having the means to "purchase privilege" by retaining professionals not for their skills but to serve as intimates who could operate with evidentiary impunity, but the prospect of the well-to-do enjoying legal privilege with credentialed Ivy-League doctors whilst the poor must make do with social workers who could be haled into court raised new hackles in the social ferment of the 1970s.[419]

A. The Twentieth-Century Advent of a New Class of Confidantes

Just as the physician-patient privilege went unrecognized by the common law,[420]

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[414] Barry K. Green, *The Psychotherapist-Patient Privilege in Texas*, 18 HOUS. L. REV. 137, 140 (1980) ("In many jurisdictions with a general physician-patient privilege, the communications between a psychiatrist and patient are protected by the fact that a psychiatrist is also a licensed physician."); *see* Louisell, *supra* note 412, at 741 (noting that "the patient-physician privilege statutes" generally "embrace psychiatrists as licensed physicians").

[415] *See supra* note 331.

[416] Tarasoff v. Regents of the University of California, 551 P.2d 334, 340-41 (Cal. 1976).

[417] Kathleen A. Hogan, *A Look at the Psychotherapist-Patient Privilege*, 14 FAM. ADVOC. 31, 31 (1991) ("States that limit the privilege to professionals meeting specific educational or licensing requirements, however, are not likely to apply the privilege to everyone purporting to be a counselor or therapist, regardless of any assurances of confidentiality that may have been given in the course of the relationship."); *see* Green, *supra* note 414, at 140 ("Some states, recognizing a need to protect confidential communications to non-physicians, have enacted a statutory privilege for communications to licensed psychologists. The use of two separate privileges—each with its own limitations and exceptions—often causes anomalous results.").

[418] *See* Hogan, *supra* note 417, at 31 ("In addition the types of professionals who view themselves as ethically bound by confidentiality requirements are frequently broader than those outlined in statutes."); Cleckley, *supra* note 252, at 4 ("A distinction must also be drawn between a communication that is merely confidential and a communication which is privileged. Confidentiality, in the context of a psychotherapist-patient relationship, is determined normally by professional codes of ethics.") (citation omitted).

[419] *See* Mary Kearny Stroube, *The Psychotherapist-Patient Privilege: Are Some Patients More Privileged Than Others?*, 10 PAC. L.J. 801, 806 (1979) ("Those who by circumstance or their ability to afford the fees of a psychiatrist or psychologist are able to seek psychotherapeutic treatment from such a professional are provided a significantly greater scope of protection than are those individuals able to afford only the lesser fees of other mental health professionals.").

[420] Ellen S. Soffin, *The Case for a Federal Psychotherapist-Patient Privilege That Protects Patient Identity*, 1985 DUKE L.J. 1217, 1223 (1985) ("Because no doctor-patient privilege existed at common law, courts that fail to distinguish the psychotherapist-patient relationship from the traditional doctor-patient relationship automatically refuse to recognize a psychotherapist-patient privilege."); Lauren Messersmith, Comment, *Evidence: The Psychotherapist-Patient Privilege under Federal Rule of Evidence 501*, 23 WASHBURN L.J. 706, 707 (1984) ("The development of the psychotherapist-patient privilege originated in the physician-patient privilege, which was not recognized at common law.").

neither was the more specialized psychotherapist-patient evolution.[421] But whilst rudimentary physicians were known from antiquity, therapists were not a broadly accepted profession until quite recently.[422] Luminaries like Sigmund Freud and Carl Jung contributed greatly to the increased visibility and esteem accorded to psychoanalysts in the early twentieth century,[423] and as the field accrued respectability as a "medical" pursuit, the prospect of a privilege for psychoanalysis began to germinate by the 1950s.[424]

1. Evolution of Psychotherapeutic Confidentiality

Legal luminary David W. Louisell observed in 1957 that all four of the states that licensed the bourgeoning practice of psychology accorded their newly minted professionals privilege equivalent to the archetypal attorney-client privilege, as did Washington and, of course, New York.[425] During this early turmoil of law, some states lacking a statutory physician-patient privilege nonetheless recognized a distinct psychotherapist-patient privilege.[426] Even in latter days, some embraced a psychiatric privilege whilst excluding communications regarding physical ailments, a rather astonishing inversion of primogeniture.[427] Though the judiciary was properly slower to bend to policy arguments,[428] by the late twentieth century, the psychotherapist's privilege has been legislatively

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[421] Cleckley, *supra* note 252, at 7 ("The privilege is a child of statutory origin, not a common law creation."); Baumoel, *supra* note 252, at 802 ("Although the psychotherapist-patient privilege did not exist at common law, courts and commentators have given it strong approval.").

[422] *See* Jaffee v. Redmond, 518 U.S. 1, 22 (1996) (Scalia, J., dissenting) ("When is it, one must wonder, that the psychotherapist came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends, and bartenders — none of whom was awarded a privilege against testifying in court.").

[423] *See* SARAH WINTER, FREUD AND THE INSTITUTION OF PSYCHOANALYTIC KNOWLEDGE 19 (Stanford Univ. Press 1999) ("I analyze how Freud deployed classical learning as a source of prestige and authority—as cultural capital—for psychoanalysis. I demonstrate that Freud's formulations of the Oedipus complex worked to promote public 'recognition' of psychoanalysis.").

[424] Baumoel, *supra* note 252, at 802 ("The privilege first gained recognition in the 1950's when psychology and psychotherapy gained acceptance as fields of medical practice.").

[425] Louisell, *supra* note 412, at 733-34. The four states were Arkansas, Georgia, Kentucky, and Tennessee. New York did offer the privilege but only certified rather than licensed mental health care professionals.

[426] Louisell, *supra* note 412, at 735 ("But since then a court in Illinois, which has no statute recognizing a patient-physician privilege and where presumably the common law rule refusing to recognize such a privilege prevails, nevertheless spelled out a privilege for the patient of a psychotherapist, carefully distinguishing that relationship from the conventional patient-physician relationship."); *id.* at 741 ("Indeed, this is the situation which apparently now exists in Georgia and Tennessee, where client-psychologist communications have the confidentiality accorded client-attorney communications " and where, because there is no statute privileging patient-physician communications, the common law rule denying privilege presumably prevails.") (citations omitted).

[427] *See* Green, *supra* note 414, at 145 ("Communications are privileged only when the purpose of the relationship is for the diagnosis, evaluation, or treatment of any mental or emotional condition or disorder. Therefore, the privilege does not cover communications to a physician concerning physical disorders.") (citation omitted).

[428] Cleckley, *supra* note 252, at 7 ("Although historically there are many reasons why the judiciary failed to develop a psychotherapist-patient privilege, perhaps the primary reason had to do with the judiciary's inability to value and understand the need and importance of the mental health profession in the fabric of society.").

recognized in more states than the physician's—forty-nine versus forty-two (a convincing majority either way).[429] The lone dissenter to psychiatric privilege, West Virginia, was the target of calls to join the throng.[430]

Some theorists have grouped the psychotherapist-patient privilege together with the physician-patient and priest-penitent privileges as some sort of sanative suite of confidences.[431] Louisell was critical of such overgeneralizations, and indeed deplored the according of an expansive privilege even to all scientists of the mind with their "multiple and diverse functions," given that "the spawning of spurious privileges can only augment the tendency to undermine the philosophy of privilege, to the serious loss in this writer's opinion of personal freedom."[432] If the newfangled psychologists were only desirous of accruing prestige akin to physicians, they ought to be rebuked.[433] After due consideration, however, the lauded Louisell deemed the more narrowly-tailored category of practicing psychotherapists to deserve the privilege,[434] citing Judge Henry White Edgerton of the D.C. Circuit in *Taylor v. United States* as to why:[435]

> 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

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[429] *Compare* Baumoel, *supra* note 252, at 802, n.44 (psychotherapist), *with id.* at 801, n.34 (physician).

[430] *Compare* Cleckley, *supra* note 252, at 6 (asserting that West Virginia was "currently the only state" without the privilege in 1990 in advocating for adoption); *with* State v. Simmons, 309 S.E.2d 89, 96 (W. Va. 1983) ("We do not view the statute as creating any sort of a general psychotherapist-patient privilege."); *and* Marano v. Holland, 366 S.E.2d 117, 132 n.28 (W. Va. 1988). Neither had West Virginia a physician-patient privilege. State *ex. rel.* Allen v. Bedell, 454 S.E.2d 77, 80 (W. Va. 1994) ("We have no statutory scheme establishing a physician/patient privilege, nor has this Court judicially recognized such a privilege.").

[431] Baumoel, *supra* note 252, at 800-801 ("Similar to an attorney's need for a confidential relationship with the client for effective representation, the medical and counseling professionals claim that confidential relationships with their clients are essential for effective mental and physical health treatment. The medical and counseling privileges include the physician-patient privilege, the clergy-communicant privilege, and the psychotherapist-patient privilege.").

[432] Louisell, *supra* note 412, at 736. *Contra* Green, *supra* note 414, at 150-53 (arguing that communications regarding mental health with chiropractors and anyone else practicing the "healing arts" be protected, stating: "If, however, the identical communications to the chiropractor were subject to compelled disclosure, the purpose of the privilege would be destroyed").

[433] Louisell, *supra* note 412, at 737 ("Therefore if the new privilege be viewed as the objective of organized psychology sought for reasons of professional prestige, there can be no doubt that so far as statutory law is concerned the profession has already achieved its objective in Kentucky, Georgia, Tennessee, Arkansas, Washington and New York.— But if this were the true or principal reason for the new privilege, the public would be confronted with a spurious privilege which ought to be resisted."); *cf. supra* notes 320 & 323 and accompanying text (Wigmore and Shuman describing similar motives regarding physician-patient privilege).

[434] *Id.* at 745-46.

[435] Taylor v. United States, 222 F.2d 398 (D.C. Cir. 1955) (Edgerton, J.).

> that the psychiatrist learns from what they say—may be revealed to the whole world from a witness."[436]

As *Taylor* recital shows, psychotherapist-patient privilege likely fulfills Wigmore's test[437] far better than does the more generalized physician-patient privilege that the Dean deprecated.[438] It is little disputed that the first three prongs are amply met—patients reasonably expect privacy, their successful treatment depends upon the candor invited by that expectation, and society ought to sedulously foster such treatment.[439] Indeed, given the stigma so often imputed to mental disorders, the very fact that a patient is undergoing therapy may be so sensitive as to deserve protection.[440]

As to Wigmore's last prong, however, psychotherapy may sometimes fall short: even if protecting confessions in therapy ordinarily outweighs the hypothetical harms of affording a legal shield to those confession, many boffins thought that not so for a credible threat of violence to another.[441] Of course, not all commentators agreed that even a potentially murderous mental patient ought to be tattled on, given the broader implications of such a breach of trust.[442] So too, some commentators and courts thought mandatory disclosure rules regarding other harms such as child abuse should bow to the privilege.[443] As a cautionary tale, one professor of law and psychiatry conjured the risible image of therapists formulaically issuing a "quasi-Miranda warning" to patients commencing treatment: that someday their confessions might be divulged in court based on some exception to the privilege, and used against them—hardly an auspicious way to encourage

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[436] *Id.* at 401.

[437] *Cf.* WIGMORE, *supra* note 46, § 2285 at 3185 (quoted *infra* note 791).

[438] Green, *supra* note 414, at 141-42; Messersmith, supra note 420, at 709-10 ("Authorities view the unique nature of the psychotherapist-patient relationship as justification for a privilege separate from the general physician-patient privilege."); *see* Catherine M. Baytion, *Toward Uniform Application of a Federal Psychotherapist-Patient Privilege*, 70 WASH. L. REV. 153, 156-57 (1995); H. Carol Bernstein, Comment, *Psychotherapist-Patient Privilege Under Federal Rule of Evidence 501*, 75 J. CRIM. L. & CRIMINOLOGY 388, 397-398 (1984) ("The psychotherapist-patient relationship, however, is readily distinguishable from the physician-patient relationship."); *see also* Baytion, *supra* note 420, at 1223 ("When the psychotherapist-patient relationship is examined, however, it becomes clear that the relationship fully satisfies the requirements for a federal evidentiary privilege.").

[439] *See* Baytion, *supra* note 438, at 156-57; Soffin, *supra* note 420, at 1223-25; Bernstein, *supra* note 438, at 391-394; Judith Sparks Jordan, Case Note, *Evidence - Psychotherapist-Patient Privilege – The Psychotherapist-Patient Privilege, the Child Abuse Exception, and the Protection of Privacy Through the Fifth Amendment*, 6 WHITTIER L. REV. 1033, 1038-39 (1984); Messersmith, *supra* note 420, at 710-12.

[440] Soffin, *supra* note 420, at 1227 ("In order to encourage people to seek needed psychiatric help, the mere existence of the relationship must remain confidential. A powerful social stigma is often associated with psychiatric treatment.") (citations omitted).

[441] Baytion, *supra* note 438, at 157 ("For example, the relationship may fail to meet Wigmore's fourth condition when a patient, during treatment, tells a psychotherapist that he intends to kill his father. The benefit of disclosing this statement would outweigh the possible harm of impairing the relationship of trust between the psychotherapist and the patient.") (citations omitted); *see* Green, *supra* note 414, at 161-68 (noting "the most important exception concerns disclosures to medical or law enforcement personnel when the patient/client may imminently injure himself or others").

[442] *See* Bernstein, *supra* note 438, at 406-11 (omitting the interdict of imminent violence to another as a valid exception to the privilege).

[443] *See* Jordan, *supra* note 439, at 1039-41 (examining People v. Stritzinger, 668 P.2d 738 (Cal. 1983)).

trust and candor.[444]

In the face of such doomsaying, a series of treatments by Shuman and his colleague Myron F. Weiner in the 1980s deserve close attention, as they interrogated critically those little-disputed assumptions that the privilege in fact merited protection to facilitate therapy, developing empirical studies to test the proposition.[445] In the first of these, Shuman & Weiner assayed the views of Dallasites—therapists, patients, lawyers, laymen, and judges—in the wake of Texas adopting the privilege for the first time, supplementing the survey data with insurance figures for psychotherapy billings.[446] The authors hypothesized that few (besides the attorneys) knew or cared about the new legal privilege, which, like the physician-patient version,[447] was so riddled with implied waivers, exemptions, and exceptions that it offered only a "false sense of security" at most.[448] The handful of earlier studies had not fully accounted for patients' underlying (un)awareness of the existence of the privilege, rendering the findings less than instructive when they artificially drew legal privilege to the attention of respondents who might never have considered it unbidden.[449]

Shuman & Weiner's results demonstrated resoundingly that patients were indeed unfamiliar with the legalities of privilege, and would not be deterred or delayed in seeking treatment even if they knew of its absence.[450] Any reticence in therapy itself was largely attributable to fear of judgment by the *therapist* rather than of the subsequent disclosure of

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[444] Ralph Slovenko, *Child Custody and the Psychotherapist-Patient Privilege*, 19 J. PSYCHIATRY & L. 163, 172 (1991) ("At the outset of therapy, should the therapist give the patient a quasi-Miranda warning? To wit, 'Some day you may be involved in a divorce or custody battle and the records may come up in a courtroom.' That kind of warning would be detrimental to therapy.").

[445] Daniel W. Shuman, Myron F. Weiner & Gilbert Pinard, *The Privilege Study (Part III): Psychotherapist-Patient Communications in Canada*, 9 INT'L J.L. & PSYCHIATRY 393 (1986); Myron F. Weiner & Daniel W. Shuman, *Privilege—A Comparative Study*, 12 J. PSYCHIATRY & L. 373 (1984); Daniel W. Shuman & Myron S. [*sic*] Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893 (1981).

[446] Shuman & Weiner, *supra* note 445, at 895-96, 917-24.

[447] *See supra* notes 328-336 and accompanying text.

[448] Shuman & Weiner, *supra* note 445, at 912 ("Thus, the existence of a privilege, if known by a patient, provides a false sense of security against compelled judicial disclosure.").

[449] *Id.* at 916-17 ("These studies are informative but leave a number of important questions unanswered. For example, these studies suggest that people alerted to the risk of compelled judicial disclosure in the absence of a privilege are less likely to disclose fully, but do not indicate whether patients consider the possibility of compelled judicial disclosure or the existence and scope of protection a privilege provides before seeking therapy or making disclosures in therapy. Are patients aware of whether their state recognizes a privilege? If not, how can the lack of a privilege deter or delay people from seeking therapy or affect their disclosures in therapy? Are patients psychologically harmed by disclosure of their confidential communications; do they terminate therapy when this occurs?") (discussing Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962); Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165 (1978); John M. Suarez & Eugene J. Balcanoff, *Massachusetts Psychiatry and Privileged Communications*, 15 ARCHIVES GEN. PSYCHIATRY 619 (1966); and Eleanor Singer, *Informed Consent: Consequences for Response Rate and Response Quality in Social Surveys*, 43 AM. SOC. REV. 144 (1978)).

[450] *Id*. at 924-25.

any confessions.[451] Although patients viewed confidentiality as imperative, they predominantly saw their therapist's ethics as its safeguard, not a hypothetically applicable stricture of the law.[452] It was only when patients were threatened explicitly with disclosure that their reserve (or even cessation of therapy) increased.[453] And these fundamental findings were well corroborated in the authors' follow-on studies testing different, far flung comparator populations in other states and countries.[454] For all the statutory adoptions and academic asseverations of necessity, the putative beneficiaries were apparently oblivious to their privilege.

2. The Beginning of the End—or the End of the Beginning?

Throughout the 1970s and 80s, an ill wind blew for the novel privilege in federal courtrooms. Numerous courts rejected the recognition of a psychotherapist-patient privilege out of hand, and even those willing to entertain the concept were ambivalent.[455] The vicennium had begun with some measure of hope when the Southern District of New York (in the ancestral home of the physician-patient privilege[456]) had mused in 1971 that "psychologist-patient privilege, if one exists, would be a form of doctor-patient privilege," though it did not squarely reach the question—and in any case, was vacated by the Second Circuit the next year.[457] A decade later, the district court *did* reach the question, refusing the invitation to carve a therapeutic privilege out of the common law, and commenting that "even if a psychotherapist-patient privilege is theoretically plausible," it would not be

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[451] *Id.* at 925-26 ("From the above data, we conclude that withholding information from therapists is common, but that it probably has little relationship to fear of disclosure, and would therefore probably not be greatly enhanced by a statutory privilege. The basic reason why patients withhold items is because they fear the judgment of their therapists.").

[452] *Id.* at 926 ("Our group of patients very clearly viewed confidentiality as a requisite for the trust necessary for therapy. When asked on what they relied most heavily to guarantee the privacy of their communication with the therapist, patients stated that they relied much more strongly on the therapist's ethics than on a statutory guarantee of privilege.").

[453] *Id.* at 926 ("The outcome is different when the therapist threatens to disclose or actually discloses. Threats of disclosure reduce the communication of violent urges and lead to premature termination of the patient-therapist relationship. Actual disclosure leads to premature termination in a few cases, but there is no positive evidence that emotional damage is done to patients who are called to account for their behavior in a court of law.").

[454] Weiner & Shuman, *supra* note 445 (comparing populations in South Carolina and West Virginia, which then lacked the privilege, with Texas); Shuman, Weiner & Pinard, *supra* note 445 (comparing Canadian populations under common law, which lacked the privilege, with Quebec, which observes it).

[455] *In re* Grand Jury Proceedings, 867 F.2d 562 (9th Cir.), *cert. denied*, 493 U.S. 906 (1989); United States v. Corona, 849 F.2d 562 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989); *In re* Pebsworth, 705 F.2d 261, 262-63 (7th Cir. 1983); *In re* Zuniga, 714 F.2d 632 (6th Cir.), *cert. denied*, 104 S. Ct. 426 (1983); United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983); United States v. Meagher, 531 F.2d 752 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976); United States v. Witt, 542 F. Supp. 696, 698-99 (S.D.N.Y.), *aff'd*, 697 F.2d 301 (2d Cir. 1982); United States v. Layton, 90 F.R.D. 520 (N.D. Cal. 1981); United States v. Brown, 479 F. Supp. 1247 (D. Md. 1979); Flora v. Hamilton, 81 F.R.D. 576, 578-580 (M.D.N.C. 1978); *see also* Bernstein, *supra* note 438, at 389-90, n.6.

[456] *See supra* notes 317 and accompanying text and cases cited Part III.B.2.

[457] United States v. Williams, 337 F. Supp. 1114, 1115 (S.D.N.Y. 1971), *vacated*, 486 F.2d 1397 (2d Cir. 1972). A subsequent case, *Lora v. Bd. of Ed. of City of New York*, 74 F.R.D. 565 (E.D.N.Y. 1977), also made sympathetic noises about psychotherapist-patient privilege but found it would have been waived in the instant case under the unenacted FRE 504's provisions and ordered disclosure. *Id.* at 585-587.

"absolute" but subject to a balancing test that could never be met where, as in the instant case, the practitioner was allegedly complicit in facilitating criminal conduct.[458] This time, the Second Circuit affirmed, summarily.[459]

The other courts of appeals were, as they say, in violent accord. In 1976, the Fifth Circuit, after disavowing physician-patient privilege as unknown to the common law, refused to recognize a psychotherapist-patient refinement either, even though one had been proposed by the Supreme Court.[460] The Eleventh Circuit, only a few years later after its partition from the Fifth, offered conciliatory words for the "general validity" of patients' privacy interests, but nonetheless held psychological records enjoyed no protection from discovery to cross-examine a witness's mental condition.[461] A few years later, it held squarely there was no such privilege.[462] The Seventh Circuit thought the privilege at best "arguable" and waived anyway by disclosure of the patient records to insurers,[463] discounting the objection to "put[ting] prospective psychotherapy patients to the unconscionable Hobson's choice of either receiving no treatment or receiving treatment only at the cost of making public their illness."[464] And in 1989, the Ninth Circuit briskly deferred to Congress's decision not to step in where the common law did not.[465]

The most searching and auspicious treatment came from the Sixth Circuit in *In re Zuniga*.[466] As with the other courts, the panel noted that FRE 501 deputed courts to

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[458] United States v. Witt, 542 F. Supp. 696, 698-699 (S.D.N.Y.), *aff'd*, 697 F.2d 301 (2d Cir. 1982).

[459] United States v. Witt, 697 F.2d 301 (2d Cir. 1982) (table).

[460] United States v. Meagher, 531 F.2d 752, 753 (5th Cir.) ("This proposed psychotherapist-patient privilege was not accepted by Congress in its final enactment of the Federal Rules of Evidence; yet, even if such a privilege had been adopted via the Supreme Court's proposed rules, it could not be utilized when the defendant is a criminal trial claims insanity as a defense."), *cert. denied*, 429 U.S. 853 (1976).

[461] United States v. Lindstrom, 698 F.2d 1154, 1167 (11th Cir. 1983) ("Broad-brushed assertions of the societal interest in protecting the confidentiality of such information cannot justify the denial of these defendants' right to examine and use this psychiatric information to attack the credibility of a key government witness. A desire to spare a witness embarrassment which disclosure of medical records might entail is insufficient justification for withholding such records from criminal defendants on trial for their liberty.").

[462] United States v. Corona, 849 F.2d 562, 567 (11th Cir. 1988) ("This circuit has declined to recognize a psychotherapist-patient privilege in federal criminal trials. . . . [W]e reaffirm earlier rulings in this Circuit that no physician (including psychotherapist)-patient privilege exists in federal criminal trials."), *cert. denied*, 489 U.S. 1084 (1989).

[463] *In re* Pebsworth, 705 F.2d 261, 262-63 (7th Cir. 1983) ("Our finding that a waiver of any arguable psychotherapist-patient privilege exists in the specific circumstances present here is indeed less harsh than is authorized by the accepted regime governing waiver of privilege.").

[464] *Id.* at 264. In fairness, some district courts reading tea leaves in dicta imagined that the Seventh Circuit *would* recognize privilege in a case implicating core records like accounts of therapy itself. *See In re* August, 1993 Regular Grand Jury (Medical Corp. Subpoena II), 854 F. Supp. 1392, 1398 (S.D. Ind. 1993); Cunningham v. Southlake Center for Mental Health, 125 F.R.D. 474, 477 (N.D. Ind. 1989).

[465] *In re* Grand Jury Proceedings, 867 F.2d 562, 565 (9th Cir.) ("When Congress chose not to enact the psychiatrist-patient privilege, it may have been unaware that that privilege did not have common law foundations. We note that the Hippocratic tradition of physician non-disclosure of patient secrets is ancient; we decline to reach the merits of the efficacy of the psychotherapist-patient privilege by this holding, but we do opine that if such a privilege is to be recognized in federal criminal proceedings, it is up to Congress to define it, not this court.") (citation omitted), *cert. denied*, 493 U.S. 906 (1989).

[466] *In re* Zuniga, 714 F.2d 632 (6th Cir. 1983), *cert. denied*, 464 U.S. 983 (1983).

recognize privileges under an amorphous extension of the common law "in the light of reason and experience,"[467] and that Congress had declined to enact a more specific psychotherapist-patient privilege in the proposed FRE 504 submitted to it for consideration.[468] Delving deeper, however, the appellate court did not think Congress's inaction precluded recognition, and turned to the merits of such a privilege.[469] Finding the "compelling considerations" in favor "readily apparent," the court also acknowledged the (at best euphemistic) "mixed reception in the federal courts,"[470] compared to nigh-universal adoption in states.[471] Taking the discord with states into account, and dwelling on the powerful interests of society in encouraging mental health, the court opted to recognize the privilege under FRE 501.[472] Hedging, however, the court straightaway cautioned that the privilege would be "determined by balancing the interests," and, indeed, that in the present case, the balance tilted to disclosure: the nominally recognized privilege would not actually be enforced.[473] As *Zuniga* exemplifies, even the most favorable decisions were disappointing. Revisiting the subject in 1992, the Second Circuit too ostensibly recognized a psychotherapist-patient privilege in light of its widespread adoption in the states.[474] But in the next breath, the panel said the new privilege would be "highly qualified" and subject to "case-by-case assessment," admitting that therefore "the [so-called] privilege amounts only to a requirement that a court give consideration to a witness's privacy interests as an important factor to be weighed in the balance in considering the admissibility of psychiatric histories or diagnoses."[475]

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[467] The acronym FRE will be used in the main text consistently to refer to a Federal Rule of Evidence, or a proposed item of the same. So "FRE 501" here equates to Fed. R. Evid. 501, whence the quoted material derives.

[468] Zuniga, *supra* note 462 at 636-37.

[469] *Id.* at 637 (The fact that Congress elected not to accept proposed Rule 504 does not preclude recognition of a psychiatrist-patient privilege. . .. Congressional enactment of Rule 501 thus, 'provide[s] the courts with greater flexibility in developing rules of privilege on a case-by-case basis.') (quoting United States v. Gillock, 445 U.S. 360, 368 (1980)).

[470] *Id.* at 638.

[471] *Id.* at 638-39, n.3 (citing the local statutes of forty states and D.C.).

[472] *Id.* at 639 ("This Court has evaluated these interests, taking into account the aforementioned position of the states, the Judicial Conference Advisory Committee and various commentators, and finds that these interests, in general, outweigh the need for evidence in the administration of criminal justice. Therefore, we conclude that a psychotherapist-patient privilege is mandated by 'reason and experience.'").

[473] *Id.* at 639-40 ("This is necessarily so because the appropriate scope of a privilege, like the propriety of the privilege itself, is determined by balancing the interests protected by shielding the evidence sought with those advanced by disclosure. . .. In weighing these competing interests, the Court is constrained to conclude that, under the facts of this case, the balance tips in favor of disclosure. The essential element of the psychotherapist-patient privilege is its assurance to the patient that his innermost thoughts may be revealed without fear of disclosure. Mere disclosure of the patient's identity does not negate this element. Thus, the Court concludes that, as a general rule, the identity of a patient or the fact and time of his treatment does not fall within the scope of the psychotherapist-patient privilege.").

[474] Doe v. Diamond, 964 F.2d 1325, 1328 (2nd Cir. 1992) ("Given the importance of the interests at stake, personal privacy and the need for informed medical assistance, and the widespread recognition of the privilege adopted in forty-nine states, we recognize the existence of a psychotherapist-patient privilege under Rule 501.").

[475] *Id.* at 1328-29.

A few district courts had taken up the issue as the circuits mulled, faithfully resisting the suggestion of any new privilege whilst their overseers remained uncommitted.[476] The furthest one would venture without loftier sanction was to concede the powerful interests supporting privilege—the "right to have intimate details protected from disclosure by the government, and his right to be free to seek benefit from psychiatric counseling" and "encouraging the mentally and emotionally disturbed to seek out and fully cooperate in appropriate counseling"—before permitting inspection of the psychiatric records by counsel *in camera*.[477] Inevitably, an occasional court indulged the novelty,[478] but the overall trend was clear.

Meanwhile, 1976 had not just seen the first case in the litany of negative federal decisions, but also the infamous state case *Tarasoff v. University of California Board of Regents*.[479] The patient, one Prosenjit Poddar, had revealed his intention to murder his ex-girlfriend Tatiana Tarasoff in therapy, but the university's psychological staff did not report the threat; after Poddar carried out the killing, a wrongful death action ensued against the university, and when the trial court dismissed for failure to state a claim, an appeal.[480] The California Supreme Court ultimately found a claim did lie, notwithstanding the many amici urging that psychotherapist-patient communications be held sacrosanct, leaning heavily on the California legislature's own balancing that implied a duty to warn when a credible threat was made.[481] The inevitability of unnecessary breaches of confidence was a price that must be paid for the lives saved.[482] As consolation, the court cautioned that therapists should be sparing in fashioning any threat disclosures "discreetly," but the mandate to breach remained.[483] It need not be stressed that *Tarasoff*'s endorsement of a much less than absolute privilege proved enormously influential in normalizing greater laxity

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[476] *E.g.*, United States v. Layton, 90 F.R.D. 520 (N.D. Cal. 1981); United States v. Brown, 479 F. Supp. 1247 (D. Md. 1979).

[477] Flora v. Hamilton, 81 F.R.D. 576, 578-80 (M.D.N.C. 1978).

[478] *See, e.g.*, *In re* Grand Jury No. 91-1; Grand Jury Subpoena No. 16320CR, 795 F. Supp. 1057, 1059 (D. Colo. 1992).

[479] Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976).

[480] *Id.* at 430.

[481] *Id.* at 440-41 (balancing "the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication" against "public interest in safety from violent assault" and comparing the statutory exception defining when the latter outweighs the former).

[482] *Id.* at 440 ("The risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved. We would hesitate to hold that the therapist who is aware that his patient expects to attempt to assassinate the President of the United States would not be obligated to warn the authorities because the therapist cannot predict with accuracy that his patient will commit the crime.").

[483] *Id.* at 441 ("We realize that the open and confidential character of psychotherapeutic dialogue encourages patients to express threats of violence, few of which are ever executed. Certainly a therapist should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened. To the contrary, the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger.").

nationwide.[484]

By the last decade of the century, commentators had turned pessimistic, contemplating at most a highly qualified psychotherapeutic privilege that would rarely yield protection in practice.[485] In case after case, certiorari had been sought but rebuffed as the Supreme Court stood aloof, leaving the question to percolate,[486] perhaps designedly towards extinction. In 1992, Jonathan Baumoel penned an article entitled "The Beginning of the End for the Psychotherapist-Patient Privilege," pronouncing that since *Tarasoff*, "neither the legal world nor the world of psychology has been the same."[487] Baumoel prophesied that, unless somehow arrested, the prevailing trajectory of exception-drawing and lax presumptions of waiver "will ultimately result in the end of the privilege."[488] On the eve of *Jaffee* in 1995, another scholar surveyed the wild disparities in statutes spanning fifty states and unpredictable outcomes in the many inferior courts in wondering if a unifying principle could ever be enunciated.[489] And that same year Catherine M. Baytion lodged a plea that Congress standardize practice regarding the privilege given those deep geographical divides, adding a particularly ill-timed prediction: "Although in theory the Supreme Court could impose uniformity on the circuits, it is unlikely that the Supreme Court will resolve the many issues that trail the psychotherapist-patient privilege anytime soon."[490] She was proven wrong later the same year:[491] the 1990s were not to be the beginning of the end, but the end of the beginning.[492]

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[484] *See generally, e.g.*, J. Thomas Sullivan, *Mass Shootings, Mental "Illness," and* Tarasoff, 82 U. PITT. L. REV. 685 (2021); Mark A. Rothstein, Tarasoff *Duties After Newtown*, 42 J.L. MED. & ETHICS 104 (2014); Chris Jones, *Tightropes and Tragedies: 25 Years of* Tarasoff, 43 MED. SCI. & L. 13 (2003); Peter F. Lake, *Revisiting* Tarasoff, 58 ALB. L. REV. 97 (1994); D.L. Rosenhan, Terri Wolf Teitelbaum, Kathy Weiss Teitelbaum & Martin Davidson, *Warning Third Parties: The Ripple Effects of* Tarasoff, 24 PAC. L.J. 1165 (1993); Lance C. Egley, *Defining the* Tarasoff *Duty*, 19 J. PSYCHIATRY & L. 99 (1991); Thomas J. Murphy, *Affirmative Duties in Tort Following* Tarasoff, 58 ST. JOHN'S L. REV. 492 (1984); Kathleen M. Quinn, *The Impact of* Tarasoff *on Clinical Practice*, 2 BEHAV. SCI. & L. 319 (1984).

[485] Bernstein, *supra* note 438, at 401 ("For each case, therefore, a court must weigh the benefits that accrue to the patient and to society from keeping all evidence of communications between the psychotherapist and the patient confidential against society's interest in gathering all information relevant to enforcement of its laws."); *e.g.*, Doe, *supra* note 470 at 1328 (employing balancing test to rule that privilege would not apply); Zuniga, *supra* note 462 at 639-40, *cert. denied*, 464 U.S. 983 (1983) (same).

[486] Doe v. United States, 493 U.S. 906 (1989); Corona v. United States, 489 U.S. 1084 (1989); Zuniga v. United States, 464 U.S. 983 (1983); Meagher v. United States, 429 U.S. 853 (1976).

[487] Baumoel, *supra* note 252, at 797.

[488] *Id.* at 826.

[489] Anne D. Lamkin, *Evidentiary Privileges - Should Psychotherapist-Patient Privilege Be Recognized*, 18 AM. J. TRIAL ADVOC. 721 (1995).

[490] Baytion, *supra* note 438, at 161.

[491]

v. Redmond, 516 U.S. 930 (Oct. 16, 1995) (granting certiorari).

[492] *Cf. In re* Domestic Drywall Antitrust Litig., 163 F. Supp. 3d 175, 259 (E.D. Pa. 2016) ("'Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.' Winston Churchill, Remarks at the Lord Mayor's Luncheon at Mansion House: The End of the Beginning (November 10, 1942).").

B. In the Light of Reason and Experience: *Jaffee v. Redmond*

1. Precursors to a Proper Privilege

The dispute that would become *Jaffee v. Redmond* had modest if sensational beginnings, validating Baytion's implicit assumption that it would come to naught jurisprudentially.[493] As the Seventh Circuit narrated, after responding to a reported altercation, Mary Lu Redmond, a sworn officer in a small community in Illinois, was informed someone had been stabbed within the dwelling, and entered in order to provide aid if needed. Events then grew more hazy: "Within minutes thereafter, Officer Redmond stated that she fired her weapon and killed Ricky Allen, Sr. as he was pursuing and rapidly gaining on another man, and was poised to stab him with a butcher knife. Allen's surviving family members filed suit against Officer Redmond and her employer."[494] On appeal from a trial finding her use of force unreasonable, Redmond contended that her privilege in conversations with a social worker in whom she had confided after the incident had been violated.[495] The social worker, Karen Beyer, had developed a regular therapeutic relationship with Redmond over the course of multiple weekly sessions for at least half a year.[496] All the same, the trial court ordered Beyer to testify to the substance of those sessions notwithstanding the asserted privilege.[497] After Beyer proved nonresponsive in depositions and refused to turn over written records, the court instructed the jury that they were permitted to draw the inference that the undisclosed information "would be unfavorable to Mary Lu Redmond."[498]

The Seventh Circuit noted the question as one "of first impression," although the Second and Sixth Circuits had formally recognized such a privilege,[499] whilst the Fifth, Ninth, Tenth, and Eleventh had refused.[500] Agreeing with the former circuits that "reason tells us that psychotherapists and patients share a unique relationship, in which the patient's

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[493] *Cf.* Baytion, *supra* note 438, at 157-58.

[494] Jaffee v. Redmond, 51 F.3d 1346, 1348 (7th Cir. 1995), *aff'd*, 518 U.S. 1 (1996).

[495] *Id.*

[496] *Id.* at 1350 ("After the shooting, Officer Redmond sought counseling from Karen Beyer, a licensed clinical social worker3 certified by the state of Illinois as an employee assistance counselor and employed by the Village. Officer Redmond met with Beyer for the first time three or four days after the shooting incident and continued counseling for approximately two or three sessions per week through at least January of 1992, six months after the shooting.") (citing Doe, *supra* note 470; and Zuniga, *supra* note 462, *cert. denied*, 464 U.S. 983 (1983)).

[497] *Id.* at 1350-51 ("The trial court denied the defendants' motion to quash, based on the judge's belief that the psychotherapist/patient privilege recognized in other circuits does not extend to a licensed clinical social worker, and ordered Karen Beyer to testify as to 'the disclosures made to her by Ms. Redmond of the incidents of the day that relate to [the shooting].'") (citation omitted).

[498] *Id.* at 1351.

[499] *Id.* at 1354-55 ("This is a case of first impression before the Seventh Circuit, questioning the existence of a federal privilege for confidential communications between a licensed clinical social worker and a patient. The Second and Sixth Circuits have determined that 'reason and experience' compel the recognition of the psychotherapist/patient privilege in both civil and criminal cases.").

[500] *Id.* at 1355 (citing United States v. Burtrum, 17 F.3d 1299 (10th Cir.1994); *In re* Grand Jury Proceedings, 867 F.2d 562 (9th Cir.), *cert. denied*, 493 U.S. 906 (1989); United States v. Corona, 849 F.2d 562 (11th Cir.1988), *cert. denied*, 489 U.S. 1084 (1989); United States v. Meagher, 531 F.2d 752 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976)).

ability to communicate freely without the fear of public disclosure is the key to successful treatment," the panel concurred also in recognizing privilege.[501] As with those predecessors, it too allowed that the nominal privilege would perforce be a highly qualified one, applicable only if the privacy interests of the patient exceeded the interests of justice in disclosure[502]—no great advancement in the disorderliness of doctrine theretofore. Unlike those predecessors, however, the Seventh Circuit found that "the balance of the competing interests tips sharply in favor of the privilege if we hope to encourage law enforcement officers who are frequently forced to experience traumatic events by the very nature of their work to seek qualified professional help."[503]

For the very first time, a federal court of appeals had held not only that the psychotherapist-patient privilege existed in theory, but also that it in fact applied to the case at hand.[504] Surely this made it noteworthy; in an echo of *Swidler & Berlin*,[505] a suggestion for rehearing *en banc* was made and denied—though no impassioned dissent ensued this time.[506] But whatever its noteworthiness, after all the serial denials of certiorari dating back to 1976,[507] it must have been rather surprising when the Supreme Court granted review in October 1995.[508]

A January 1996 article by Professor Bruce J. Winick of the University of Miami provided an apt platform from which to reassess the putative privilege in light of the impending decision.[509] After narrating the factual underpinnings to date, Winick turned to the issue before the Court, opining that constitutional concerns of liberty militated in favor of privilege even if the issue presented was not ultimately a constitutional question given FRE 501.[510] He credited greatly the need for addressing mental health in society,[511] disparaging both the studies by Shuman & Weiner and those preceding which taught that legal privilege was largely unknown and immaterial to the patient.[512] Although Winick questioned the studies' methodology and was clearly doubtful in advance,[513] his primary critique reduced to a prospective uncertainty: "Can it be assumed, however, that patients

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[501] *Id.* at 1355-56.
[502] *Id.* at 1357.
[503] *Id.*
[504] *Id.* at 1358 ("Based on the facts and circumstances presented in this record, we recognize the existence of the psychotherapist/patient privilege in this Circuit and thus the confidential communications between Mary Lu Redmond and her licensed clinical social worker Karen Beyer are protected from compelled disclosure.").
[505] *See supra* notes 124-127 and accompanying text.
[506] Jaffee v. Redmond, 51 F.3d 1346, 1348 (7th Cir. 1995) (noting suggestion for rehearing en banc had been denied).
[507] *See* cases cited *supra* note 486.
[508] Jaffee v. Redmond, 516 U.S. 930 (Oct. 16, 1995).
[509] Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249 (1996).
[510] *Id.* at 250-52.
[511] *Id.* at 253-54 ("Were more to get help, the many individual and social problems engendered by this high prevalence rate of mental illness would be considerably reduced.").
[512] *Id.* at 254 ("The existing empirical literature is inconclusive concerning whether legal recognition of a psychotherapist-patient privilege is an important factor in whether people seek mental health treatment.").
[513] *Id.* at 255-57.

will be unaware of the privilege question once the Supreme Court has decided the issue and it receives the usual extensive publicity that follows Supreme Court decisions on matters of public interest?"[514]

Winick thought it could not: that by taking the case, the Supreme Court had altered the status quo irrevocably,[515] analogously to Shuman & Weiner's worries about earlier studies that informed their respondents of theretofore unknown legalities.[516] With this newfound communal cognizance already *fait accompli*, only the Supreme Court's sustaining the privilege would maintain the (mental) health of society, notwithstanding arguments that broader knowledge of the privilege's absence might actually deter situations like that confronted in *Tarasoff*.[517] Given the diverse needs of the nation, furthermore, Winick advised that "if the privilege is recognized, it should be extended to all mental health professionals licensed by the state, including psychiatric social workers,"[518] invoking the hoary bugaboo of the rich enjoying better treatment than the poor.[519] "Fine-tuning of the privilege," as for cases like *Tarasoff* and elsewhere, could be left for another day.[520] Faced with such blithe, near Fabian, procrastination and interim expansivity, Louisell might have (figuratively) rolled over in his grave[521]—the illustrious scholar had died in 1977.[522]

2. The Triumph of Hope over (Reason and) Experience

If the Supreme Court took note of Winick's impassioned exhortation (or Louisell's more measured admonitions), it did not say so, even as it followed the former's advice almost to the letter in disregard of the latter. Writing for the Court, Justice John Paul Stevens delivered the verdict on behalf of seven members in June 1996.[523] The Seventh Circuit had recognized a qualified privilege that "would not apply if, 'in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling

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[514] *Id.* at 255.

[515] *Id.* at 258-59 ("The publicity that surely would follow a Supreme Court decision on whether the privilege should be recognized will predictably bring the issue to heightened public awareness. Were the Court to reject the existence of the privilege, people considering whether to enter therapy would learn of it.").

[516] *See supra* note 449.

[517] Winick, *supra* note 509, at 261-263.

[518] *Id.* at 264 (initial majuscule reduced to minuscule) ("Given the largely unmet mental health needs of the nation, it is essential that psychiatric social workers play the significant therapeutic role that this expanding profession has served so well in recent years. There are approximately 30,642 psychiatrists, 56,000 psychologists an 81,000 psychiatric social workers practicing mental health counseling today. In reality, an increasing amount of patient contact involves psychiatric social workers, rather than psychiatrists and psychologists.") (citation omitted).

[519] *Id.* at 264-65 ("Recognizing a privilege that extends to psychiatrists alone, or to psychiatrists and psychologists, but not to psychiatric social workers, would in effect create a second-class professional relationship for people lacking the financial means to hire the more expensive psychiatrist or psychologist. The psychiatric social worker has become 'the poor person's psychiatrist.'"); *see supra* note 419 and accompanying text.

[520] Winick, *supra* note 509, at 265.

[521] *See supra* notes 432-433 and accompanying text.

[522] *See* Christopher B. Mueller, *David W. Louisell—In Memoriam*, 66 CAL. L. REV. 921 (1978).

[523] Jaffee v. Redmond, 518 U.S. 1 (1996).

sessions outweighs that patient's privacy interests,'" but for once had found the privilege survived, raising the issue to the Supreme Court's cognizance.[524] Noting that the courts of appeals "do not uniformly agree that the federal courts should recognize a psychotherapist privilege under Rule 501," Justice Stevens explained that the Court had granted certiorari to resolve the conflict[525]—after all, the Second and Sixth Circuits had previously purported to recognize the new privilege where their sister circuits had cloven more closely to customary common law that had never admitted such a novelty.[526]

Justice Stevens recited once again the authority granted the judiciary by FRE 501 to recognize new dimensions of privilege "in the light of experience and reason," tracing the source of the rule back to the Court's own pronouncements,[527] implicitly directing the courts to "'continue the evolutionary development of testimonial privileges.'"[528] The psychotherapist-patient privilege was one such evolution deserving of recognition, the Court declared.[529] The litmus test was whether "the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust,'"[530] and the Court concluded that it must be, for all the reasons discussed at length *ante* herein.[531] Because a privilege recognized by the commonwealth must also "serv[e] public ends," the Court confirmed that just as the furtherance of the legal advice and domestic tranquility secured by other historical protections, the "mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."[532]

Without citation, the Court asserted that "if the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled."[533] (Surely![534]) As with other privileges, Justice Stevens posited that, absent a well-known legal protection, the communications at issue would never occur at all.[535] Moreover, to

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[524] *Id.* at 6-7.

[525] *Id.* at 7-8.

[526] *Compare In re* Doe, 964 F.2d 1325, 1328 (2nd Cir. 1992); and Zuniga, *supra* note 462 at 639-40; *with* cases cited *supra* notes 460-465 (Fifth, Eleventh, Seventh, and Ninth Circuits).

[527] *Id.* at 8 (citing Wolfle v. United States, 291 U.S. 7, 12 (1934); and Funk v. United States, 290 U.S. 371, 383 (1933)).

[528] *Id.* at 9 (quoting Trammel v. United States, 445 U.S. 40, 47 (1980)).

[529] *Id.* at 9-10 ("Guided by these principles, the question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient 'promotes sufficiently important interests to outweigh the need for probative evidence . . . .' Both 'reason and experience' persuade us that it does.") (citations omitted).

[530] *Id.* at 10 (quoting *Trammel*, 445 U.S. at 51).

[531] *Id.* at 10-11.

[532] *Id.* at 11 (quoting Upjohn v. United States, 449 U.S. 383, 389 (1981)).

[533] *Id.* at 11-12.

[534] *Cf.* AIRPLANE! (Paramount Pictures & Howard W. Koch Productions 1980), *as transcribed in* IMDB, *Airplane! Quotes*, https://www.imdb.com/title/tt0080339/quotes/qt0484136 (last visited Feb. 10, 2023) ("Ted Striker: Surely you can't be serious / Rumack: I am serious . . . and don't call me Shirley.").

[535] *Jaffee*, 518 U.S. at 12 ("Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged.").

endorse a balancing test for the privilege afforded any mental practitioner would put its surety in doubt, a compromise long since rejected for other privileges: therefore, the "highly qualified"[536] conception of privilege on probationary status conceived by the Second and Sixth Circuits (and followed below) had to be rejected in favor of an unimpeachable trust akin to prior privileges.[537] Taking refuge in the obvious acceptance of some measure of protection throughout stateside jurisprudence, the Court positioned its holding as only stabilizing and reconciling the counterproductively labile posture of federal law with a consensus reached by the more forward-thinking states.[538]

All this was revolutionary enough after the measured abstinence of the prior decades, but Justice Stevens went further: "We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy."[539] Justice Stevens dwelt fulsomely on the idea that to demur would open a chasm of baseless inequality, observing of humble social workers that "their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals."[540] Yet despite the audacity of discerning a new privilege for the lower courts to apply (and thus overruling much of their previous practice) and endorsing social workers as qualifying therapists, Justice Stevens trod no further, stating with ostentatious modesty that the Court left the "full contours" of the privilege for another judge on another day,[541] though he did add by footnote that a *Tarasoff*-like safety valve would doubtless be appropriate.[542]

Only Justice Antonin Scalia and the chief justice dissented:[543] Justices O'Connor and Thomas in the majority were not so skeptical of the expansion of the privilege as they would be two years later in *Swidler & Berlin*.[544] For this diminished minority, Justice Scalia offered a customarily droll counterpoint, arguing in sum that recourse to psychotherapists

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[536] Doe, *supra* note 470 at 1328; *see also* Zuniga, *supra* note 462 at 639-40, *cert. denied*, 464 U.S. 983 (1983) (endorsing a balancing test for the privilege and finding it fell short in the case at bar).

[537] *Jaffee*, 518 U.S. at 17 ("We reject the balancing component of the privilege implemented by that court and a small number of States. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.") (citation omitted).

[538] *Id.* at 12-14.

[539] *Id.* at 15.

[540] *Id.* at 16 (initial majuscule reduced to minuscule and citation omitted).

[541] *Id.* at 18 ("These considerations are all that is necessary for decision of this case. A rule that authorizes the recognition of new privileges on a case-by-case basis makes it appropriate to define the details of new privileges in a like manner. Because this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would 'govern all conceivable future questions in this area.'") (quoting Upjohn v. United States, 449 U.S. 383, 386 (1981)).

[542] *Id.* at 18 n.19 ("Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.").

[543] *Id.* at 18-36 (Scalia, J., dissenting).

[544] *See supra* Part II.C.2.

was a passing fad never known to history, hardly indispensable, and thus unworthy of precipitous induction into the most rarefied Olympian pantheon of legal protection.[545] Setting aside the rife exceptions and doubtful deterrent to therapy that the majority had not deigned to resolve,[546] he questioned the most rudimentary basis of the privilege: that no patient is compelled to confess the truth to his therapist, but one who wishes the benefit of therapy afforded must accept the consequences of that confession in a court of law.[547] Most of all, however, he castigated the Court's interposition into the matter given states had been proceeding variously and agreeably under their own openly legislative judgments rather than invoking any pretense of following any higher wisdom of the unavailing federal common law, evidenced by every single one opposing federal recognition as *amici*.[548]

Notwithstanding this foundational disagreement, Justice Scalia spent most of his dissent raging over the (absurd, he thought) admittance of social workers to the aegis of the newly (and foolishly, he thought) recognized privilege.[549] Echoing Louisell without citation, he observed that the defining feature of licensed psychiatrists and psychologists was their well-trained and well-regulated practice of psychotherapy, which arguably might merit protection; social workers assuredly did much else, and without such institutional direction and accreditation.[550] The alleged unanimity amongst the states in according social workers protection was a mirage, pockmarked by uncertain definitions, exceptions, and reservations.[551] Characteristically, his dissent concluded that only the people's elected representatives could rightly render the policy judgment laid before the humble judges of the highest court: "Perhaps Congress may conclude that [privilege] is also tolerable for the purpose of encouraging psychotherapy by social workers. But that conclusion assuredly

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[545] *Jaffee*, 518 U.S. at 22 (Scalia, J., dissenting) ("Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege.").

[546] *Id*. at 22-23 ("And even more pertinent to today's decision, to what extent will the evidentiary privilege reduce that deterrent? The Court does not try to answer the first of these questions; and it cannot possibly have any notion of what the answer is to the second, since that depends entirely upon the scope of the privilege, which the Court amazingly finds it 'neither necessary nor feasible to delineate.'") (citation omitted).

[547] *Id.* at 23 ("Even where it is certain that absence of the psychotherapist privilege will inhibit disclosure of the information, it is not clear to me that that is an unacceptable state of affairs. . . . It seems to me entirely fair to say that if she wishes the benefits of telling the truth [to the therapist] she must also accept the adverse consequences.").

[548] *Id.* at 26 ("[A]ll 50 States have enacted this privilege argues not for, but against, our adopting the privilege judicially. At best it suggests that the matter has been found not to lend itself to judicial treatment.").

[549] *Id.* at 27-36 ("Turning from the general question that was not involved in this case to the specific one that is: The Court's conclusion that a social-worker psychotherapeutic privilege deserves recognition is even less persuasive.").

[550] *Id.* at 30 ("Another critical distinction between psychiatrists and psychologists, on the one hand, and social workers, on the other, is that the former professionals, in their consultations with patients, *do nothing but psychotherapy*. Social workers, on the other hand, interview people for a multitude of reasons.").

[551] *Id.* at 33-35 ("Thus, although the Court is technically correct that 'the vast majority of States explicitly extend a testimonial privilege to licensed social workers,' ante, at 1931, that uniformity exists only at the most superficial level. No State has adopted the privilege without restriction; the nature of the restrictions varies enormously from jurisdiction to jurisdiction.").

does not burst upon the mind with such clarity that a judgment in favor of suppressing the truth ought to be pronounced by this honorable Court."[552]

The mental burst that occurred to Justice Stevens was not quite so unthinkable as Justice Scalia made it out, thought it had theretofore been rejected all the same. The austere Louisell had seriously considered allowing the earliest incarnations of social workers, regardless of license or degree, within the privilege in the 1950s,[553] though he retreated from the notion as conducing to an unseemly and ill-delimited expansion of privilege beyond functionally specified lines, resisting even inclusion of degreed practitioners who did not *actually* treat patients.[554] A more recent philosopher of law mulled the prospect of governmental agents being embraced with privilege by a legislature cynically endowing them with something so nominal as statutory licensure as so-called social workers, critical of so flexible a rule as might be extended to objectionably policiary interlocutors like parole officers by the strict letter of the law.[555] Comparison of these thought experiments proves one of Justice Scalia's points: where once states (and scholars) had been free to tinker with the novel privilege *vis à vis* social workers outside the homogenizing gravity of common law, they were now saddled with an ill-defined national jurisprudential regime not of their own making, looming as highly influential albeit not controlling authority.[556] The Court's opinion left no doubt, withal, that the psychotherapist-patient privilege—however it was to be defined—was there to stay,[557] blessed by the supposedly eternal light of reason and experience.[558]

3. A Few Responses from the Peanut Gallery

With *Jaffee* decided and psychotherapist-patient privilege firmly installed in the legal firmament, the question of perpetuity became inescapable quite quickly,[559] even amidst all the academic furor over the new pronouncement from the Court,[560] as the "full

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[552] *Id.* at 36.

[553] Louisell, *supra* note 412, at 742 ("("Certain of the approved functions of non-psychologist social workers would seem to be sufficiently similar to corresponding functions of psychologists as to justify the privilege for clients of the former if it exists for those of the latter . . . . If so, it would seem that such a privilege should be defined as precisely as possible in terms of the function performed or service rendered, and not arbitrarily be accorded or withheld solely on the basis of whether the professional person involved happens to be a licensed, registered or certified psychologist.").

[554] *Id.* at 742-43 ("On the other hand, society cannot afford to subordinate the needs of judicial administration to a never-ending expansion of confidential communication privileges to embrace a multitude of additional relationships. It is therefore important to limit as precisely as possible the creation of new privileges to those relationships for which confidentiality is rationally necessary or strongly desirable.").

[555] Green, *supra* note 414, at 156 ("However, other counseling-related specialists, such as social workers and family counselors, might be subjected to licensing and certification statutes by future legislatures.")

[556] Jaffee v. Redmond, 518 U.S. 1, 26, 33-35 (1996) (Scalia, J., dissenting).

[557] *Id.* at 17-18 (1996) (majority).

[558] FED. R. EVID. 501.

[559] *See infra* Part VI.C.1.

[560] *See, e.g.*, Bruce G. Borkosky & Mark S. Thomas, *Florida's Psychotherapist-Patient Privilege in Family Court*, 87 FLA. B.J. 35 (2013); Marcia M. Boumil, Debbie F. Fretias & Cristina F. Freitas, *Waiver of the Psychotherapist-Patient Privilege: Implications for Child Custody Litigation*, 22 HEALTH MATRIX 1 (2012); Daniel M. Buroker, *The Psychotherapist-Patient Privilege and Post*-Jaffee *Confusion*, 89 IOWA L. REV. 1373 (2004); Michael L. Orenstein, *The Psychotherapist-Patient Privilege*, 20 TOURO L. REV. 679 (2004); Ryan

contours"[561] of the novel privilege were probed.[562] As with the commentary after *Swidler & Berlin*, the headline for *Jaffee* remained that the privilege was "now entrenched,"[563] and would not be dislodged easily. Perhaps, however, the decision entered into academia with less shock and awe because *Tarasoff* had already occupied the role of the foundational seismic homily on the subject.[564]

Jaffee did not lack for august critical attention, however, as Edward Imwinkelried (then a mere promising professor at U.C. Davis) was one of the first to address the decision after the initial crop of case notes.[565] He focused on the Court's singular reliance on the "instrumental" rationale: that without privilege, patients would be dissuaded from seeking therapy at all, and thus the statements at issue would never exist.[566] But, he noted, Justice Stevens's support for this proposition was a bare footnote that "referred to 'studies and authorities' cited in the American Psychiatric Association's and the American Psychological Association's amicus briefs."[567] Scrutinizing those supposed bases, Imwinkelried found their substantiation, the "linchpin" of the majority's argument, to be misleading and "illusory."[568] Deceptively selective excerpts from the Shuman & Weiner studies loomed large, given those authors' stated findings stood so starkly opposed to an absolute privilege.[569] Read faithfully, the studies on which Justice Stevens had staked his argument implied the opposite: that no privilege was needed.[570] Although his verdict demolished *Jaffee*'s foundation, Imwinkelried thought that a privilege might yet be sustained on a "humanistic" or deontological rationale along the lines of Louisell, unassumingly recommending further research.[571]

Kathleen M. Maynard in 1997 was more sympathetic to the Court's zeal after

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M. Gott, *The Evolving Treatment of Garden-Variety Claims under the Psychotherapist-Patient Privilege*, 6 SUFFOLK J. TRIAL & APP. ADVOC. 91 (2001); Melissa L. Nelken, *The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law*, 20 REV. LITIG. 1 (2000); Edward Imwinkelried, *The Rivalry between Truth and Privilege: The Weakness of the Supreme Court's Instrumental Reasoning in* Jaffee v. Redmond, *518 U.S. 1* (1996), 49 HASTINGS L.J. 969 (1998); Anne Bowen Poulin, *The Psychotherapist-Patient Privilege after* Jaffee v. Redmond*: Where Do We Go from Here?*, 76 WASH. U. L.Q. 1341 (1998); Kathleen M. Maynard, *The Psychotherapist-Patient Privilege: A Rational Approach to Defining Psychotherapist*, 45 CLEV. ST. L. REV. 405 (1997).

[561] *See supra* note 541.

[562] *See infra* Part VI.C.1 (analysis of posthumous privilege); *cf.* notes 156-157 and accompanying text (characterizing typical reaction to a Court ruling).

[563] *Cf. supra* note 223.

[564] *See* sources cited *supra* note 484.

[565] Imwinkelried, *supra* note 560, at 969 n.*.

[566] *Id.* at 972-73.

[567] *Id.* at 972.

[568] *Id.* at 974-80.

[569] *Id.* at 978-79; *see also supra* notes 445-454 and accompanying text (discussing the studies).

[570] Imwinkelried, *supra* note 560, at 982 ("Quite to the contrary, although the studies are not conclusive, they point to the conclusion that in the typical case, the invocation of the privilege suppresses evidence which would have come into existence even if the privilege did not exist. Thus, the recognition of the privilege does not come relatively cost free, as Justice Stevens would have us believe.").

[571] *Id.* at 982-988.

detailing the protracted discord in the inferior courts.[572] When proposed expanded rules of privilege had been sent to Congress in 1975, she thought it natural that social workers had been excluded from psychologists and psychiatrists given their meager role in those times; she quoted one congressman as quipping: "[W]hen you open this up, the social workers and the piano tuners want a privilege."[573] Yet the Supreme Court's modern embrace of social workers made sense to her in light of the modern role they played in democratizing mental health services for the poor.[574] Indeed, Maynard thought courts should go much further, and extend the umbrella of psychotherapist-patient privilege to any "other professionals who counsel mentally troubled clients," respecting both reality and comity with states that had done so.[575] (Wigmore would have approved, she thought.[576]) As for how to define such professionals, she eschewed sole reliance on credentials, which favored those ministering to the more affluent,[577] in favor of a hybrid "credential-functional" approach looking to the communication's purpose as well.[578] This compromise was, to be fair, nothing new, being roughly where Louisell had landed in his analysis a half century before, looking to what alienists *did* rather than who they *were*.[579]

Anne Bowen Poulin posed her riddle in the title of her 1998: "Where we do go from here" after *Jaffee*, she wondered, lambasting both the Court and Congress for past abdications of their responsibility to define a clearer regime, but focusing fixedly on the future.[580] Poulin microanalyzed the various other subspecies of therapists potentially

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[572] Maynard, *supra* note 560, at 408-13.

[573] *Id.* at 413-14.

[574] *Id.* at 414-15 ("The Court, in abandoning the distinction between therapy provided by expensive psychiatrists and psychologists and the more available and less costly counseling provided by social workers, has acknowledged that the majority of psychotherapeutic services today are rendered by clinical social workers. This decision reflects both the surge in demand for counseling during the last two decades and the psychotherapeutic community's efforts to adapt to the needs of the American public, and especially lower-income groups.") (citations omitted).

[575] *Id.* at 415-18 (naming rape crisis counselors, school guidance counselors, counselors of battered women, sexual assault counselors, drug or alcohol abuse counselors, psychiatric nurses, and marriage and family counselors).

[576] *Id.* at 418-21 ("[F]ederal courts should include not only psychiatrists, psychologists, and licensed social workers in the definition of 'psychotherapist,' but other mental health professionals as well, because Dean Wigmore's four tests for determining whether a privilege is justified have been met with regard to the relationships between these professionals and their patients.").

[577] *Id.* at 428-30 ("These states have acknowledged that the increasing demand for less costly mental health services has resulted in the need to use professionals whose training differs from licensed or certified therapists. Lower federal courts should acknowledge that patients who cannot afford the expensive commodity of highly credentialed therapists should not be denied the benefit of privilege.") (citations omitted).

[578] *Id.* at 428 ("Use of the credentials-functional approach will allow courts to consider not only the credentials of the counselor, but also the purpose of the communication. Using this approach, courts may avoid the inequality that results by granting a privilege to highly credentialed counselors, while denying it to counselors whose clients tend to be poor.").

[579] *See supra* notes 432-434 and accompanying text.

[580] Poulin, *supra* note 560, at 1341 ("Both the Court and Congress can be criticized for their approaches to federal privilege law. Congress can be faulted for abdicating responsibility for privilege law because it categorically refused to codify privilege law when it enacted the Federal Rules of Evidence. . . . Moreover,

embraced by *Jaffee*, anticipating that those recognized in states would seek the same federally,[581] but came away cynical that the miscellany did not enjoy the same level of structure, expertise and ethical strictures that ought to characterize a privileged relationship.[582] Extending privilege to unqualified practitioners as a sop to the poor made for a condescending logic, and was to be reprehended.[583] That the privilege must be limited to professionally elicited therapeutic confidences seemed self-evident, and easier to discern than Justice Scalia had credited—judges decided such things daily of other privileges.[584] Yet she agreed that the identity of the client, unlike with attorney-client privilege, was subject to stigma, suggesting that this basic datum might need to be confidential.[585] And, of course, there were the myriad established exceptions inherited from physician-patient precedent, which Poulin cautioned must not coalesce into a *de facto* retrogression to the balancing tests of a qualified privilege.[586]

A 2000 article by Melissa L. Nelken offered the unique perspective of a combined professor of law and practicing psychoanalyst.[587] At base, she lauded the strong stance in

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the Court can also be faulted for capitulating to Congress and then later adopting new privileges in the federal common law, rather than originally deferring complete responsibility to Congress.").

[581] *Id.* at 1355-58 ("Many state statutes extend privilege protection to other types of counselors. Most likely, the beneficiaries of these state privileges will seek similar protections in federal court. Indeed, some federal courts already have encountered arguments that the privilege recognized in Jaffee should apply to other relationships, such as those involving counselors with comprehensive training.")

[582] *Id.* at 1358 ("By contrast, the nonprofessional counselors who have obtained statutory privilege protection in a number of states typically possess far less training and are not subject to codes of conduct. The common bond among the nonprofessional counselors is merely the setting in which they counsel and a modicum of training. They do not constitute cohesive quasi-professional groups and consequently have not promulgated regulations to guide their counseling practice. Therefore, their sensitivity to the need for confidentiality, their ethical obligations, and their training to provide beneficial therapy are all of a lower order than those of professional therapists.").

[583] *Id.* at 1359-60 ("Extrapolating from this aspect of *Jaffee*, some argue that the privilege should extend to nonprofessional counselors because they provide an important source of counseling to poor clients. Courts should receive this argument with caution. . . . A strong privilege can be justified only if the counseling promises to provide the therapeutic benefit on which the privilege rests. If courts extend protection to a range of nonprofessional counselors, they are likely to weaken the protection. Courts should not dilute the privilege merely to accommodate the circumstances into which society forces patients of limited means.") (citations omitted); *cf.* source cited *supra* note 433-434 (Louisell's rebuke of adopting a broad privilege as jeopardizing the protection of those who deserved it for the sake of those who did not).

[584] Poulin, *supra* note 560, at 1364 ("Justice Scalia, however, overstated the problem. Courts routinely decide whether a client approached a lawyer for legal advice or for an unprivileged matter, such as business advice. Further, the distinction between therapeutic and nontherapeutic contacts, such as counseling for assistance in housing problems or interaction within a community group working on a particular project, seems far easier to make.") (citation omitted).

[585] *Id.* at 1367-71; *see* Soffin, *supra* note 420, at 1227 (analysis of stigma before *Jaffee*).

[586] Poulin, *supra* note 560, at 1374 ("Although the Court explicitly rejected the balancing test under which the privilege would give way when outweighed by greater public interests, there are likely circumstances under *Jaffee* in which courts must balance interests to determine the extent of protection derived from the privilege. Specifically, courts may turn to a balancing test to define the exceptions to the privilege.").

[587] Nelken, *supra* note 560, at 1-2 ("As a practicing psychoanalyst as well as a law professor, I have more than an academic interest in the fate of the recently recognized psychotherapist-patient privilege in federal court.").

favor of professional confidentiality staked after decades of hostility in federal courts.[588] She confirmed that Maynard's proposed broadening was already underway as courts sought to define the outer bounds of mental professionals under *Jaffee*.[589] Yet they had not, and Nelken did not think they should, reflexively defer to uniquely state determinations, which reflected local legislative priorities and would spawn chaos amongst and even within circuits.[590] She did, however, direct attention to the Court's allowance that "there are situations in which the privilege must give way" without specifying when, attesting to the lopsided harm wreaked by such uncertainty as to exemptions on real-life psychotherapy.[591] It was in the course of that lengthy discussion of unjustified exceptions that Nelken interrogated the first ensuing case to consider the privilege postmortem, *United States v. Hansen*, where the court had allowed the privilege to be penetrated despite surviving death, under an irregular sort of balancing test outwardly foreign to the absolute privilege imagined by *Jaffee*.[592] Nelken noted hopefully that the decision had since been cast into doubt by *Swidler & Berlin* in 1998.[593]

C. The Postmodern Posture for Psychotherapists Postmortem

Aside from Nelken's drive-by disapprobation, and an even briefer mention in Poulin,[594] the commentariat left the fate of the psychotherapist-patient privilege postmortem largely unplumbed. Amidst all the angst over existential threats and challenges to the privilege itself prior to 1996, no one had seriously considered whether psychotherapist-patient privilege persisted after death: why spill words to assess the longevity of a privilege potentially not long for this world? It was left to the courts to grapple with the question when it inexorably arose: unlike academic scholars, judges had to take their disputes as they came.[595]

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[588] *Id.* at 2 ("[R]ecognition by the United States Supreme Court has both practical and symbolic value. From a practical standpoint, the decision in *Jaffee v. Redmond* decreases the likelihood that a particular confidential communication will be held inadmissible in state court, but admissible should suit be brought in or removed to a federal court sitting in the same state. . . . On a symbolic level, federal courts have not been hospitable to claims of privilege in the nearly thirty years since Congress rejected proposed privilege rules recommended by the Judicial Conference Advisory Committee.").

[589] *Id.* at 9-12 ("[T]he lower courts have already tended to broaden the definition of who is a psychotherapist for purposes of the privilege by looking primarily to the counseling purpose of the consultation in question as evidence of its privileged nature.").

[590] *Id.* at 14-17 ("In light of these competing policy concerns, the federal courts should not simply adopt state psychotherapist-patient privilege laws to determine who is a psychotherapist. That would inevitably lead to considerable disuniformity within a given circuit, much less among the various circuits. Instead, the courts should continue to develop the federal privilege by examining arguments for extending it to licensed mental health professionals in addition to psychiatrists, psychologists, and social workers.").

[591] *Id.* at 17-20.

[592] *Id.* at 31.

[593] *Id.* at 32 ("The exception recognized in Hansen has been cast into doubt, however, by the Supreme Court's most recent privilege decision, a case involving posthumous application of the attorney-client privilege in the context of a criminal investigation").

[594] Poulin, *supra* note 560, at 1374.

[595] *See* Chicot Cty. v. Sherwood, 148 U.S. 529, 534 (1893) ("[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. This

1. Posthumous Privilege in the Second Millennium

Start with *Hansen*, a decision of the District of Montana in 1997 in the fleeting interval between *Jaffee* and *Swidler & Berlin*.[596] With little further analysis, the court found the new privilege properly asserted by the decedent's therapist, though *Jaffee* had left the bounds unclear on who had standing to object, along with everything else.[597] Nevertheless, the court favored an exception to or exemption from the asserted privilege under some undefined balancing test, given the "holder of the privilege has little private interest in preventing disclosure, because he is dead," whilst the adducer of the testimony sought to show the dead man posed a credible threat giving rise to a claim of self-defense in her trial.[598] Though the living public too had an interest in encouraging therapeutic confessions via confidentiality, the court held the defendant's due process and liberty interests in a fair trial and avoiding imprisonment were greater.[599] Many states, the court detailed in self-confirmation, would allow disclosure if a patient's mental state was put in question after death, and *Jaffee* had authorized courts to elaborate on the new privilege as needed.[600] Thus the first federal examination yielded a clear negative to an absolute posthumous privilege.

Swidler & Berlin complicated matters, as the next federal case adverted to both it and *Jaffee* in its ruling.[601] *Richardson v. Sexual Assault/Spousal Abuse Resource Center, Inc* benefitted from the attention of the noted privilege scholar Judge Paul W. Grimm of the Maryland district court,[602] who gave due shrift the Court's concerns over differential treatment of the poot, albeit treating the asserted psychotherapist-patient privilege equally with any other.[603] "Notably, under the supervision of licensed social workers," Grimm explained, "unlicensed counselors also provide mental health treatment and often serve

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principle has been steadily adhered to by this court.") (citing Suydam v. Broadnax, 36 U.S. (14 Pet.) 67 (1840); and Union Bank of Tenn. v. Vaiden, 59 U.S. (18 How.) 503 (1855)).

[596] United States v. Hansen, 955 F. Supp. 1225 (D. Mont. 1997).

[597] *Id.* at 1225-26.

[598] *Id.* at 1226.

[599] *Id.* ("The public does have an interest in preventing disclosure, since persons in need of therapy may be less likely to seek help if they fear their most personal thoughts will be revealed, even after their death. However, I find that the defendant's need for the privileged material outweighs this interest.") (citation omitted).

[600] *Id.* ("This ruling is consistent with the approach taken, by the states, most of which allow for disclosure of privileged information under the facts presented here. Several states specifically authorize psychotherapists to release information after the patient's death if the patient's mental or emotional condition is an element of a claim or defense. . . . It is also consistent with the *Jaffee* Court's intent that the precise contours of the privilege be developed in specific cases.").

[601] Richardson v. Sexual Assault/Spouse Abuse Resource Center, Inc., 764 F. Supp. 2d 736 (D. Md. 2011); *see id.* at 739 (*Jaffee)* & 741 (*Swidler & Berlin*).

[602] This author has previously acknowledged Judge Grimm's efforts and rulings in the still-rocky adoption of the new Federal Rule of Evidence 502, *see* Jared S. Sunshine, *Failing to Keep the Cat in the Bag: A Decennial Assessment of Federal Rule of Evidence 502's Impact on Forfeiture of Legal Privilege Under Customary Waiver Doctrine*, 68 CLEV. ST. L. REV. 637, 643-44, 692, 748-49 (2020) (citing Paul W. Grimm, Lisa Yurwit Bergstrom & Matthew P. Kraeuter, *Federal Rule of Evidence 502: Has It Lived Up to Its Potential?*, XVII RICH. J.L. & TECH. 8 (2011)), but Judge Grimm has had far greater impact that this author could not possibly catalogue outside an outright encomium to the jurist.

[603] *Richardson*, 764 F. Supp. at 738-39.

'the poor and those of modest means who cannot afford a psychiatrist or psychologist,' as they are providing the services of a social worker, albeit under supervision."[604] Over objection, Grimm ruled that the licensed social worker—together with her institution and unlicensed subordinates—had standing to assert the privilege on behalf of an absent client, even if that client was quite alive but had declined to intervene as a party.[605] In doing so, he relied not only on the few cases that had approved the therapist's interposing the privilege by proxy generally (theretofore, usually a hospital),[606] but also on those addressing specifically prerogatives when a patient was dead and *could* no longer assert.[607]

In 2011, at last, the Northern District of Illinois squarely confronted the prospect of perpetuity for psychotherapeutic privilege in *Awalt v. Marketti*.[608] The plaintiff had brought suit against a county jail and its personnel for the death of her husband whilst incarcerated, alleging violations of his constitutional rights.[609] All agreed he had died of suffocation from a sock inserted into his mouth by hospital functionaries, but the parties differed as to how that came to be: she alleged either a reckless attempt to address a seizure (precipitated by negligent medical care) or outright murder, whilst the defendants contended it was either a reasonable response to an unforeseeable medical emergency or suicide.[610] To support this last theory of the crime, the jail defendants sought the decedent's mental health records, and the widowed plaintiff objected on behalf of her dead husband.[611] First of all, the court did not think the widow had affirmatively put mental health at issue so as to create an implied waiver, finding not a single case "which holds that the psychotherapist-patient privilege may be abrogated by a *defendant*'s desire to present an alternative theory of liability to a jury."[612]

As for the fact that the husband was dead, the court located only two decisions to have touched on the issue over a decade after *Jaffee—Hansen* and *Richardson*—venturing that "there is a paucity of decisions on the issue of whether the federal common law psychotherapist-patient privilege . . . survives the death of the patient."[613] The court thus looked back to *Jaffee* for instruction, gathering therefrom that the Supreme Court

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[604] *Id.* at 740 (quoting Oleszko v. State Comp. Ins. Fund, 243 F.3d 1154, 1155 (9th Cir. 2001)).

[605] *Id.* at 741 ("Plaintiff argues that, if the psychotherapist-patient privilege applies, Defendants lack standing to assert the privilege because any such privilege 'belongs to Sherri Richardson,' who 'has lodged no objection to the release of the documents nor filed any motion with this or any other Court.' . . . This Court is satisfied that Ms. Powers, an unlicensed counselor working under the supervision of a licensed social worker, had standing to assert the psychotherapist-patient privilege on behalf of Ms. Richardson.").

[606] *Id.* (citing, inter alia, *In re* August, 1993 Regular Grand Jury (Hospital Subpoena II), 854 F. Supp. 1380 (S.D. Ind. 1994), and *In re* Grand Jury Subpoena (Psychological Treatment Records), 710 F. Supp. 999, 1012, 1019 (D.N.J. 1989)).

[607] *Id.* (citing, inter alia, United States v. Hansen, 955 F. Supp. 1225, 1226 (D. Mont. 1997), and Zuniga, *supra* note 462 at 635, 639).

[608] Awalt v. Marketti, 287 F.R.D. 409 (N.D. Ill. 2012).

[609] *Id.* at 411.

[610] *Id.* at 411-12.

[611] *Id.* at 412. Defendants also asserted the discovery was probative also to attack the claimed damages for loss of consortium and emotional distress to explore allegations of his domestic abuse. *Id.*

[612] *Id.* at 413 (emphasis added).

[613] *Id.* at 414 (initial majuscule reduced to minuscule).

"essentially held that the psychotherapist-patient privilege is identical in all material respects to the attorney-client privilege."[614] Illinois state law, moreover, concurred.[615] With authorities both obligatory and persuasive aligned, the conclusion was clear: "In light of the close connection made by the *Jaffee* Court between the psychotherapist-patient privilege and the attorney-client privilege, it is reasonable to conclude that *Swidler*, which holds that the attorney-client privilege survives the death of the party who holds the privilege, likewise applies to the psychotherapist-patient privilege."[616] The privilege would persist postmortem,[617] and not one subject to any fiddly balancing test that death might tip towards disclosure: the protection was and would remain absolute, as the Supreme Court had purportedly prescribed.[618]

A majority of the Georgia Supreme Court agreed a few years later in *Cooksley v. Landry* in interpreting its own statute.[619] There, a psychiatrist invoked privilege to shield discovery of therapy records after a patient's suicide gave rise to a suit for malpractice and wrongful death.[620] The trial court ordered production on principles of equity, and the defendant appealed.[621] The high court held the order below to be error, under the paramount maxim that equity follows the law—and Georgia law granted an absolute privilege to encourage patients' complete candor.[622] "Moreover, and of primary importance in this case, is the fact that unlike other recognized privileges, the psychiatrist-patient privilege survives the death of the patient."[623] Indeed, it did not just survive, but hardened into immutability, because statute withheld from a decedent's surviving representative (there, the plaintiffs as parents) the right of waiver,[624] echoing the reasoning given anent the physician-patient privilege a century before—to assert but not to waive.[625] The plaintiffs exhorted the court to fashion some prudential end to the privilege postmortem on grounds of public policy, but the court demurred,[626] finding the intent of the legislature

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[614] *Id.* at 416.
[615] *Id.* at 415-16.
[616] *Id.* at 416.
[617] *Id.* ("Accordingly Mrs. Awalt may assert the psychotherapist-patient privilege on behalf of her deceased husband to prevent from compelled disclosure his psychological records that are properly protected by the privilege.")
[618] *Id.* at 417 ("Thus, this Court is not to balance Mr. Awalt's interest in the privacy of his psychological records against the need for the psychotherapist-patient communications by the Defendants.").
[619] Cooksley v. Landry, 761 S.E.2d 61 (Ga. 2014).
[620] *Id.* at 63
[621] *Id.*
[622] *Id.* at 64.
[623] *Id.* at 65 (citing Sims v. State, 311 S.E.2d 161, 165-66 (Ga. 1984) ("This privilege survives the death of the communicant.") and Boggess v. Aetna Life Insurance Co., 196 S.E.2d 172 (Ga. App. 1973)).
[624] *Id.* ("Consistent with the protections afforded psychiatrist-patient communications even after a patient's death, our legislature has determined that a deceased patient's representative cannot waive the psychiatrist-patient privilege.").
[625] *See* Novak v. Chicago Fraternal L. Ass'n, 16 P.2d 507, 509 (Kan. 1932) (quoted *supra* note 351); Westover, Ex'r v. Aetna Life Ins. Co., 1 N.E. 104, 106 (N.Y. 1885) (quoted *supra* note 346).
[626] *Cooksley*, 761 S.E.2d at 65 n.6 ("Appellees urge this Court to distinguish this case on the ground that the psychiatrist-patient privilege has no application when the patient is deceased. This argument fails for several reasons. First, it is clear from the cases cited that the privilege survives the death of the patient. Second,

manifest, explicit, and dispositive notwithstanding its interdiction of valuable evidence—that was what a privilege did.[627]

A minority took umbrage.[628] Justice Benham thought public policy *did* call for an exception given the privilege was being invoked by an alleged perpetrator in the patient's own death,[629] long held a perversity:[630] "How ironic it is to permit the doctor in this case to assert the patient's privilege and not to recognize the right of the patient's survivors to waive the privilege, thereby permitting the doctor to shield himself from potential liability for providing *unsuccessful* psychotherapeutic treatment."[631] If the decedent's representatives cannot "speak for the patient after death," then no one can—which was of course the majority's point in endorsing an eternal seal.[632] But read faithfully, Georgia law was not so implacably opposed,[633] as an earlier Massachusetts case agreed in allowing a deceased patient's representative to waive after death (in the interests of the patient) on the model of a guardian in life.[634] Moreover, assuming the psychotherapist-patient privilege mirrored the attorney-client privilege, the latter had long allowed for variation in the

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appellees' argument ignores the recognition that it is the promise of confidentiality that encourages patients to openly discuss their emotional and mental health issues. If psychiatrist-patient communications were protected only until the patient's death, patients might not feel as free to make the disclosures necessary for effective treatment, thereby impeding the primary goal of the privilege.").

[627] *Id.* at 65-66 ("We conclude by emphasizing that it is no small matter for a court, given its focus on the pursuit of truth and justice, to hold that potentially relevant evidence is shielded from disclosure. Our legislature, however, has determined that the public policies supporting the creation of a mental health privilege necessitated enactment of a nearly absolute privilege, one without exception if the patient is deceased or the nature of the patient's mental condition is put at issue.").

[628] *Id.* at 67-70 (Benham, J., dissenting).

[629] *Id.* at 67 ("I am of the opinion that this Court should hold as a matter of public policy that, at least in the factual scenario presented in this case, the representative of the deceased patient should have the authority to act on behalf of the deceased to waive the psychiatrist-patient privilege where that representative is asserting a claim on behalf of the survivors or the patient's estate against the very health care professional who is asserting the privilege as a shield to such a claim. That is not the intended purpose of the evidentiary privilege. Its purpose is to protect the patient, along with the public interest in promoting mental health care, not the doctor.").

[630] *See supra* notes 369-370 and accompanying text.

[631] *Cooksley*, 761 S.E.2d at 67-68 (Benham, J., dissenting) ("If the Landrys' son had lived and sought to pursue a malpractice claim against Dr. Cooksey for injury from attempted suicide sustained as a result of Cooksey's allegedly negligent treatment, the son could have waived the privilege, sought his treatment records, and presented them as evidence in the action. . .. Ironically, again, the effect of the majority opinion is to shield the psychiatrist from disclosure of confidential information in the event the alleged malpractice results in the patient's death, even though disclosure would be permitted in the event the same alleged malpractice results in a less catastrophic injury because the patient survives.").

[632] *Id.* at 68 ("For many purposes, an estate representative stands in the place of the deceased after death, and, at least in the factual situation posed by this case, the estate representative may speak for the patient after death for the purpose of asserting the right to psychiatric treatment that meets the appropriate standard of care. It follows that the effective assertion of this right may require the waiver of the privilege, just as the patient would be required to waive the privilege in order to assert this right in life.").

[633] *Id.* ("That statute does not apply to the release of otherwise privileged material by a psychiatrist engaged in private practice in response to the waiver of the privilege by the deceased patient's legal representative.")

[634] *Id.* at 69 (discussing District Attorney for the Norfolk District v. Magraw, 628 N.E.2d 24 (Mass. 1994), treated *infra* notes 652-672 and accompanying text).

interests of justice,[635] and though Georgia courts had not yet reached the issue, other states had recognized the latter could be waived after death by proxy to pursue claims of malpractice.[636] If *Jaffee*'s admonition that some case would rightly intrude on the privilege was ever to be reified, this was such a case: "Otherwise, because of the patient's death, there may be no effective recourse for the failure to provide [effective and appropriate] treatment," leading to the patient's death.[637] All told, though, Justice Benham did not dispute the survival of the privilege postmortem, but only who might waive it.

History repeats itself: by 2019, some courts were again assuming that the psychotherapist-patient privilege survived death,[638] just as they had for decades, indeed for centuries, of the attorney-client privilege,[639] even absent a clear statement before *Swidler* and *Jaffee*. A Utah district court judge considered only whether the decedent's privilege had been waived by her estate having placed her mental condition at issue in its claims, concluding that it had not and denying discovery of the dead woman's records.[640] No suggestion was even made that her death might terminate the privilege over the decade of records, which were anyway not germane to the dispute at hand regarding her treatment immediately prior to her demise.[641]

2. Antecedents from an Earlier Era

Awalt observed in its search for guidance that a handful of federal courts had considered privilege by proxy in the years before the right was firmly established.[642] Only

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[635] *Id.* at 69-70 ("Just as our courts have been willing to recognize limited exceptions to the attorney-client privilege, we should also be willing to forego a rigid application of the psychiatrist-patient privilege in limited circumstances, where the application of that privilege operates only as an impediment to the pursuit of justice on behalf of the very individual it was intended to protect.").

[636] *Id.* at 70.

[637] *Id.* ("I believe this is a proper factual situation for holding that the statutory privilege that may be asserted or waived by a patient may also be waived by the patient's representative upon the patient's death. Here, the estate representative of the deceased patient effectively stands in the shoes of the patient and should be permitted to exercise the patient's right to waive the privilege granted to communications between him and his psychiatrist in order to pursue a potential claim against the psychiatrist.").

[638] *E.g.*, Ostler v. Harris, No. 2:18-CV-00254, 2019 WL 6879337 (D. Utah Dec. 17, 2019).

[639] *See supra* Part II-A.

[640] *Ostler*, 2019 WL 6879337 at *3-4 ("Thus, the court finds Plaintiff did not put Ms. Ostler's mental state in issue in this case by claiming Ms. Ostler suffered emotional and mental pain in the days leading up to her death. Nor did Ms. Ostler expressly waive her privilege or otherwise fail to have an expectation of privacy in her mental health records. As such, Ms. Ostler's records are protected by the psychotherapist-patient privilege and are not subject to discovery by Defendants.").

[641] *Id.* at *4 ("Plaintiff alleged Ms. Ostler suffered from emotional and mental pain prior to her death. ECF No. 183 at p. 70, 74. The court finds the relevant time period in assessing Ms. Ostler's emotional and mental pain is the time while she was held in the Salt Lake County Metro Jail, from March 29, 2016 to April 2, 2016. Defendants request ten years of Ms. Ostler's mental health records, dating from 2007 to 2016. These records are not brief, recent, or directly related to issues injected into the lawsuit by the Plaintiff. While there are records from 2016, none of Ms. Ostler's records are directly related to the mental or emotional pain Ms. Ostler allegedly suffered while in jail.").

[642] Awalt v. Marketti, 287 F.R.D. 409, 415 (N.D. Ill. 2012) ("The majority of courts that recognized the psychotherapist-patient privilege prior to *Jaffee* also concluded that the privilege could be asserted on behalf of the patient, while a minority of pre-*Jaffee* cases concluded that the patient's death extinguished the privilege.") (citing *In re* August, 1993 Regular Grand Jury (Medical Corp. Subpoena II), 854 F. Supp. 1392,

the Tenth Circuit, however, had before it the posthumous privilege proper.[643] Noting the general rejection of the privilege under FRE 501 in circuits beyond than the Sixth in *Zuniga*, the court of appeals nonetheless undertook to assume such a privilege existed *arguendo*,[644] allowing that "a personal representative of a deceased patient may claim the privilege,"[645] only to hold it would not apply in the instant case by virtue of the age-old exception preserved in proposed FRE 504 for a plaintiff having put "mental condition at issue."[646] To support its holding, the court went on to read Weinstein's Evidence to endorse a weakened standard for implied waiver if the patient was dead that could be met by a *defendant* seeking to argue mental state as a defense[647]—a notion for which *Awalt* would later find little support.[648] As the court admitted, however, this so-called implied waiver was really just a form of balancing test of competing interests masquerading under another name,[649] which would seemingly not pass muster after *Jaffee*.[650] Two years later, one of the Tenth Circuit's district courts did recognize the privilege when confronted with the question inescapably, and apparently one that would survive death to be claimed by a decedent's personal representative.[651]

It seems fitting to give the last word to the Supreme Judicial Court of Massachusetts (which had been so proactive in the history of posthumous attorney-client privilege) in *District Attorney for Norfolk v. Magraw*,[652] the case to which the dissent in *Cooksley* had adverted.[653] In 1994, it accepted interlocutory appeal from a court ruling in the grand jury investigation in which the husband and executor David Magraw was suspected of his wife Nancy's murder after their acrimonious separation (though he said reconciliation was in the cards), refusing in his capacity as executor to waive his dead wife's privilege with her therapist before her death.[654] Furthering the obvious parallels to the Charles Stuart

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1397–98 (S.D. Ind. 1993); Cunningham v. Southlake Center for Mental Health, 125 F.R.D. 474 (N.D. Ind. 1989); and Dixon v. City of Lawton, Okl., 898 F.2d 1443, 1451 (10th Cir. 1990)).

[643] Dixon v. City of Lawton, Okl., 898 F.2d 1443 (10th Cir. 1990).

[644] *Id.* at 1450 ("Assuming, without deciding, that such a privilege does exist, we would look to Supreme Court Model Rule [504] and hold that the privilege does not apply in these circumstances.").

[645] *Id.*

[646] *Id.*

[647] *Id.* at 1451 ("Even if we viewed the subject matter of Dixon's communications to the psychotherapist as pertaining, not to an element of plaintiff's claim, but as pertaining only to the defense of this action, we would reach the same result. 'After the patient's death, the privilege does not apply "in any proceeding in which *any* party relies upon the condition as an element of his claim or defense" so that little scope remains for the personal representative's right to claim the privilege . . . .'") (quoting 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 504[07] at 504–35 (emphasis in original)).

[648] Awalt v. Marketti, 287 F.R.D. 409, 413 (N.D. Ill. 2012) (quoted *supra* text accompanying note 612).

[649] *Dixon*, 898 F.2d at 1451. ("We find the approach of the model rule to be a reasonable accommodation of the competing interests inherent in such privilege and in accordance with the above would find the privilege not applicable to the communications in this case. Accordingly, the admission of defendants' exhibit 15 was not error on the ground of privilege.").

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

[651] *In re* Grand Jury No. 91-1; Grand Jury Subpoena No. 16320CR, 795 F. Supp. 1057, 1059 (D. Colo. 1992).

[652] District Attorney for Norfolk Dist. v. Magraw, 628 N.E.2d 24 (Mass. 1994).

[653] *See supra* note 634.

[654] *Magraw*, 628 N.E.2d at 25; *see* Dist. Att'y for Norfolk Dist. v. Magraw, 616 N.E.2d 106, 107 (Mass App. 1993) ("When David Magraw became a suspect in the murder of his wife, Nancy Magraw, the grand jury

controversy, albeit absent any suicide,[655] the district attorney had taken the appeal "pursuant to []his duty" to the interests of justice for the dead, maybe also seeking to quell the public disquiet over the notorious murder with its echoes of the recent past.[656]

Notwithstanding his ardent dissent from privilege surviving Stuart's death but a few years earlier,[657] Justice Nolan was tapped to write for the unanimous high court that "it has been long recognized that the privilege of nondisclosure of confidential communications between a client and his or her attorney survives the client's death,"[658] espying no basis to distinguish between the attorney-client and psychotherapist-patient privileges.[659] Given that the principle of waiver applied to both, and the right to do so was explicitly given to a temporarily incompetent patient's guardian by the statute defining the psychotherapeutic privilege, the court thought it followed that a deceased (*i.e.*, *permanently* incompetent) patient's executor must too hold the reins.[660] The privilege's survival of death and identity of its designated holder were thus not in doubt.[661] But because of his plain conflict of interest as the prime suspect in his wife's death, the husband-executor had to be removed from his latter capacity to allow for a more objective representative who would be "honestly, fairly, and dispassionately" faithful to the decedent's interests.[662]

Perhaps explaining Justice Nolan's agreement in the result, unlike the court's prior

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investigating her death became interested in what she might have said about her husband, from whom she was separated, to her lawyer and her psychotherapist. In her will, executed on November 17, 1978, Nancy had named her husband executor. In that capacity, David declined to waive either his wife's attorney-client or psychotherapist-patient privilege, effectively preventing the lawyer and therapist from testifying before the grand jury. Thereupon, the district attorney of Norfolk petitioned the Probate Court to remove the husband as executor . . .").

[655] *See supra* note 75 and accompanying text.

[656] *See Magraw*, 628 N.E.2d at 25. One might have thought the high court would strive to avoid repeating so rapid a reentry into such fraught controversy, but it commendably clove diligently to its duties to decide the law as presented. A better question is why Boston has been so uncommonly plagued with suspected uxoricides invoking divisively problematic claims of privilege.

[657] *See supra* notes 86-95 and accompanying text.

[658] *Magraw*, 628 N.E.2d at 26.

[659] *Id.* ("The psychotherapist-patient privilege was created by statute, and, like the attorney-client privilege, it survives the death of its beneficiary, the patient. Section 20B, however, does not address waiver of the privilege by the executor or administrator of the patient's estate. Nevertheless, it is evident that the policy behind the psychotherapist-patient privilege is identical to that supporting the attorney-client privilege. The rationale is that the most effective assistance of a therapist or an attorney can be achieved only through open communication, which is likely not to occur absent a guarantee that what the patient, or client, says will not be disclosed to others without her consent.") (citations omitted).

[660] *Id.* at 173-74 ("There is no reason to allow waiver of the privilege—either by the patient or her guardian—during the patient's life, while disallowing it after her death; waiver of the privilege may be in the patient's estate's best interest when the patient is deceased, just as it may be in her own best interest while she is living. We hold that the psychotherapist-patient privilege may be waived by the administrator or executor of the estate of the deceased patient.").

[661] *Id.* at 174.

[662] *Id.* at 174-75 ("This interest certainly 'creates reasonable doubt' that he honestly, fairly, and dispassionately could execute his responsibilities as executor of his wife's estate. In particular, his personal circumstances present reasonable doubt that he could dispassionately decide whether to waive on behalf of his wife's estate her attorney-client and psychotherapist-patient privileges.").

excursion, the ruling honored the psychotherapist-patient privilege more in the breach than the observance, by ordering the substitution of a representative who would designedly be more amenable to its waiver.[663] The instinct was both understandable and even consistent with long-standing precedent refusing accused murderers to perversely assert their victims' physician-patient privilege.[664] Theretofore, happily, courts had not faced the greater perversity of an indicted proponent of the privilege appearing as presumptive successor at law to the victim's prerogatives (and husband).[665] In the ensuing fulsome trial of David Magraw, the truth ultimately came out.[666] He was convicted of his wife's murder, as affirmed in ample appellate review,[667] and imprisoned for life.[668] (The Supreme Judicial Court had repeatedly held the death penalty statute passed by successive legislatures forbidden under the Massachusetts constitution.[669]) Ostensibly, no unsolved crime was left open, nor an unknown murderer left at large to threaten the body public.[670] For whatever it

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[663] *Id.* at 175 ("It was plainly wrong for the probate judge not to act in the face of the allegations and evidence presented before him. The case is remanded to the Probate and Family Court where an order will be entered removing the defendant as executor of the estate of Nancy B. Magraw.") (citation omitted).

[664] *See supra* notes 362-363 & 368 and accompanying text.

[665] *Cf. supra* notes 360-362 and accompanying text (New York high court explaining refusal to accord physician-patient privilege asserted by the patient's alleged murderer as a "great mischief" and subversion of the intended protection) & 368 (Mississippi high court agreeing with principle).

[666] *Compare supra* note 85 (N.Y. Times predicting foreclosure of a resolution in the Stuart case) *with* note 78 (Justice Nolan ruing the majority's absolute prohibition) and accompanying text.

[667] *See* Commonwealth v. Magraw, 793 N.E.2d 403, 403 (Mass. App.) ("The defendant appeals from his 1999 conviction of murder in the second degree of his estranged wife, his earlier conviction of murder in the first degree having been reversed on appeal and remanded for a new trial. He contends that (1) the trial judge on remand committed error in allowing certain state of mind evidence to be introduced; (2) the indictment should have been dismissed due to the Commonwealth's intentional destruction of certain evidence he claims was potentially exculpatory; (3) the evidence was insufficient as matter of law; and (4) evidence of private marital conversations between him and the victim should have been excluded. He argues that such errors require a reversal of his conviction and dismissal of the indictment. We affirm.") (citation omitted), *app. denied*, 799 N.E.2d 593 (Mass. 2003) (table); Magraw v. Roden, No. 09-11534-FDS, 2013 WL 1213056 (D. Mass. Mar. 23, 2013) (habeas denied), *aff'd*, 743 F.3d 1 (1st Cir. 2014).

[668] *See* Shelley Murphy, *79-Year-Old Who Killed Wife Could End Up Sharing Her Burial Site*, BOSTON GLOBE, Mar. 5, 2019 ("On a July morning in 1990, Nancy Magraw was strangled to death by her husband in their Walpole home hours before they were to meet with their divorce lawyers. David Magraw purchased a $700 plot at Maple Grove Cemetery in Walpole, where his wife's remains were buried. Four years later he was convicted of her murder and sent to prison for life."), https://www.bostonglobe.com/metro/2019/03/05/parole/izP9lU0PQR3yJjEC7JhgOJ/story.html; *Magraw v. Roden*, 2013 WL 1213056, at *1 (noting "he is now serving a term of life imprisonment").

[669] Commonwealth v. Colon-Cruz, 470 N.E.2d 116, 124 (Mass. 1984) (interceding in interlocutory posture to hold that the threat of the death penalty impermissibly dissuades defendants from exercising the right to jury trial); Dist. Att'y for Suffolk Dist. v. Watson, 411 N.E.2d 1274, 1281-82 (Mass. 1980) (holding the death penalty offensive to contemporary standards of decency and unenforceable); *see* Commonwealth v. O'Neal, 339 N.E.2d 676, 662-663 (Mass. 1975) (death penalty cruel and unusual) ("The complete absence of executions in the Commonwealth through these many years indicates that in the opinion of those several Governors and others who bore the responsibility for administering the death penalty provisions and who had the most immediate appreciation of the death sentence, it was unacceptable. In its finality, the death penalty may cruelly frustrate justice. Death is the one punishment from which there can be no relief in light of later developments in the law or the evidence.").

[670] *Cf. supra* note 78.

is worth, despite parole being denied because of his dogged denial of guilt,[671] David Magraw steadfastly maintained his innocence until the day he died in prison, and was (controversially) buried beside his wife at his own insistence.[672]

VII. PROBING PRESENT PRACTICE PRESERVING POSTHUMOUS PRIVILEGE PERPETUALLY

> *Olivia Benson*: And I hear you, but if Ralph revealed anything to you that could help us... *Dr. Peter Lindstrom*: I cannot reveal it to you. I am sworn to protect my patient's privacy. *Olivia Benson*: And he's gone. *Dr. Peter Lindstrom*: He's gone, but confidentiality extends beyond the grave.[673]

With even the storied *Law & Order* franchise echoing the principle,[674] it is no doubt too late in the day to readily undo the postmortem application of the attorney-client privilege, or for that matter the imperishability of its longstanding brethren ensconced in both law and public culture.[675] *Swidler & Berlin* was only the fancified capstone on an edifice of policy, precedent, presumptions of propriety, and positive law dating back

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[671] *In re* David Magraw, COMMONWEALTH OF MASSACHUSETTS EXECUTIVE OFFICE OF PUBLIC SAFETY AND SECURITY PAROLE BOARD, Dec. 12, 2019, at 3, https://www.mass.gov/doc/david-magraw-life-sentence-decision/ ("When the Board members expressed their belief that Mrs. Magraw was murdered, rather than died of natural causes, Mr. Magraw responded that 'If Nancy was killed, I would be the only one who would have done it or could have done it.' Nonetheless, Magraw maintained that he had no part in her death. . . . David Magraw has not demonstrated a level of rehabilitative progress that would make his release compatible with the welfare of society. Mr. Magraw has yet to fully accept responsibility for Nancy Magraw's murder. He shows no remorse, is not truthful as to the circumstances of the crime, and shows no insight into his violent behavior and causative factors.").

[672] *See id.*; Murphy, *supra* note 668 ("Decades later, Nancy Magraw's family is haunted by the possibility that her killer may be buried in the same plot with her when he dies, because he owns the parcel and has refused to part with it. On Tuesday, Magraw, 79, was questioned about the gravesite as he appeared before the Massachusetts Parole Board seeking release, insisting he did not kill his wife.").

[673] *Law & Order: Special Victims Unit, The Longest Night of Rain* (Wolf Entertainment & Universal Television Jan. 30, 2020), *as transcribed in* IMDB, https://www.imdb.com/title/tt11007986/characters/nm0410347 (italics added for clarity).

[674] The franchise, originated by Dick Wolf in 1990 with the unadorned *Law & Order*, has thus been in continuous production for well over three decades dating back to 1990, and has featured the survival of the other privileges after death as surely as the psychotherapist-patient from its earliest days. *See, e.g.*, *Law & Order, The Wages of Love* (Wolf Entertainment & Universal Television Sept. 24, 1991), *at* IMDB, https://www.imdb.com/title/tt0629467/. There, Jerry Orbach, making a guest appearance as a defense attorney before joining the main cast as Detective Lennie Briscoe, objects to the district attorney's questioning on the basis that "the attorney-client privilege survives death." After the DA clarifies that he is "asking about documents in the public record," the judge overrules the objection "on that basis only." After the DA strays from the limitation, Orbach again interposes the objection more successfully. In the very next episode, the show embraced without cavil the physician-patient privilege postmortem. *Law & Order, Aria* (Wolf Entertainment & Universal Television Oct. 1, 1991), *as transcribed in* IMDB, https://www.imdb.com/title/tt0394752/quotes/ ("*Dr. Seliger:* Unfortunately, it falls under the category of privilege. *Mike Logan:* Whose? I mean, the girl's dead. *Dr. Seliger:* Privilege does survive the death of a patient.") (italics added for clarity).

[675] *Cf. id.*

several centuries.[676] Myriad canons of professional ethics as adopted locally stand athwart any loosening of limitations on disclosure.[677] Most states' statutes prescribe the survival of the privilege after death.[678] Nor is it self-evident that perpetuating the privilege for lawyers is wrongheaded in principle, as revered legal theorists from Phillipps[679] to Wigmore[680] (not to mention the Supreme Court[681]) have endorsed and defended the merits of the privilege eternal, presumably in full cognizance of its drawbacks. The many modern critiques offering refinements, however, suggest that there is much to ponder as to whether the rule is fully fit for purpose, even if it is unlikely to be rolled back anytime soon given the weight of precedent.[682] But it is not too late for the johnny-come-lately psychotherapist-patient privilege and the rather different calculus of costs and benefits it engenders as well as its more plastic and sparse body of precedent. True, that would create a philosophical schism between the arriviste and its predecessors—but it is never too late to answer a question correctly.

A. Cessante Ratione Legis, Cessat Ipsa Lex

The attorney-client privilege was never meant to be an unbreakable seal, unlike the priest-penitent or marital privileges, where permanence is in some sense part of the package.[683] Its machinery always presumed the possibility of waiver by a client desirous of doing so on the advice of counsel.[684] The happenstance of the client's death removes that safety valve, not necessarily to the benefit of the privilege or the legal system—and still the gears of legal machinery churn on unbidden, as Epstein posited, implying the eternity of privilege.[685] Privilege thus becomes a "reverse dead man's switch" that locks forever into one position—on—with the holder's expiry.[686] The disputant views in Georgia's *Cooksley* illustrate this of the psychotherapist-patient privilege too: the dissent highlighted the irony of allowing the doctor's lethal failure to cloak itself in privilege forever *because* the patient died,[687] whilst the majority admitted the severity of the rule of perpetuity that it ratified, stressing that it did not take the step lightly.[688] Underpinning this rule, the Georgia court reasoned that even well-intentioned fishing expeditions into the affairs of the dead would retard the living from confiding in their therapists, and so the

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[676] *See supra* Part II.

[677] *See supra* notes 174-179 and accompanying text; *see also* Knight, *supra* note 157, at 270-71; Zamacona, *supra* note 157, at 282-83.

[678] EPSTEIN, *supra* note 26, at 991; *see supra* notes 64-72 and accompanying text.

[679] *See* source cited *supra* note 35.

[680] *See* source cited *supra* note 46.

[681] *See supra* Part II.C.2.

[682] *See supra* Part II.D.

[683] *See supra* Parts III & V; *see also* Stein v. Bowman, 38 U.S. (13 Pet.) 209, 223 (1839) (quoted *supra* text accompanying note 408).

[684] *See generally, e.g.*, John Dragseth, *Coerced Waiver of the Attorney-Client Privilege for Opinions of Counsel in Patent Litigation*, 80 MINN. L. REV. 167 (1995); George A. Davidson & William H. Voth. *Waiver of the Attorney-Client Privilege*. 64 OR. L. REV. 637 (1985).

[685] EPSTEIN, *supra* note 26, at 983 (quoted *supra* note 26).

[686] "A dead man's switch deactivates a machine when the user becomes incapacitated." Fernandes v. City of New York, No. 160131/2013, 60 Misc. 3d 1221(A), 2018 WL 3850310, at *5 (N.Y. Sup. Ct. Aug. 13, 2018).

[687] Cooksley v. Landry, 761 S.E.2d 61, 67-68 (Ga. 2014) (Benham, J., dissenting) (quoted *supra* note 631).

[688] *Id.* at 65-66 (majority) (quoted *supra* note 627).

privilege must be absolutely permanent.[689]

1. Millers of Privilege and the Mills of God

The North Carolina Supreme Court had grappled thoughtfully with the conflation of absoluteness with permanence for attorney-client privilege postmortem at the same time as recognizing it for the first time in 2003.[690] The facts were once again worthy of exclamation in *In re Miller*: after the apparent murder by arsenic (!) of the pediatric AIDS researcher (!!) Eric Miller during a bowling outing with his wife's coworkers, it emerged during the investigation that one of the bowlers, Derril H. Willard, had been romantically involved with the victim's wife (!!!).[691] Thereupon becoming a suspect in the murder, Willard sought the advice of counsel Richard Gammon, and precipitously committed suicide, leaving his wife Yvette as executrix and Gammon as the only living man who knew the truth (!!!!).[692] The state moved to compel Gammon to divulge whatever Willard had said, and after the trial court ordered Gammon to submit an affidavit for *in camera* review, a swift appeal was certified.[693] The state had obtained a putative waiver of her husband's privilege from the executrix, but the high court found that no statute granted her that power and that her reopening of the estate to enter the waiver was pretextual of her own interests (perhaps to air the details of her late husband's dalliances), not in the faithful interests of the decedent's estate.[694]

This left the state of North Carolina advocating only a balancing test under which a narrow disclosure of crucial information outweighed the privilege, an argument the trial court had accepted.[695] But it was no small thing to find the "oldest and most revered" privilege wanting, given no well-established exception applied.[696] The court ruminated on the *Cohen*, *Swidler & Berlin*, and *John Doe* cases at length,[697] concluding in the end that any kind of balancing test would hollow out the privilege,[698] and that thusly weakening the

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[689] *Id.* at 66-67 ("Likewise, to allow a trial court, through the exercise of its equitable powers and its own notion of what is right, to require disclosure of privileged communications would bring uncertainty to Georgia's well-defined psychiatrist-patient privilege and eviscerate its effectiveness. The interests protected by OCGA § 24–5–501 are weighty and cannot simply be set aside in even the most sympathetic of circumstances to allow individuals to search through psychiatric records with the hope of discovering evidence. *Bobo*, *supra*, 256 Ga. at 360, 349 S.E.2d 690 (psychiatrist-patient privilege 'prohibits the defendant from engaging in a "fishing expedition" regarding a witness' consultations with a psychiatrist').").

[690] *In re* Miller, 584 S.E.2d 772, 779 (N.C. 2003) (quoted *supra* note 233) (initial recognition).

[691] *Id.* at 776-77.

[692] *Id.* at 777. This author promises no more exclamation points.

[693] *Id.* at 777-78.

[694] *Id.* at 779-82.

[695] *Id.* at 782.

[696] *Id.*

[697] *Id.* at 782-84.

[698] *Id.* at 785 ("A strict balancing test involving the attorney-client privilege, in the context of the present case after the client's death, subjects the client's reasonable expectation of nondisclosure to a process without parameters or standards, with an end result no more predictable in any case than a public opinion poll, the weather over time, or any athletic contest. Such a test, regardless of how well intentioned and conducted it may be, or how exigent the circumstances, would likely have, in the immediate future and over time, a corrosive effect on the privilege's traditionally stable application and the corresponding expectations of clients.").

personal protection most essential to the public good must be rejected.[699] Yet there remained the question of whether the content of Gammon's affidavit was actually privileged, for not all that passes between an attorney and client is eligible.[700] Information about a third party unrelated to any legal representation might simply exceed the privilege *ab initio*, for example.[701] Moreover, even an unqualified privilege as reaffirmed under *Swidler & Berlin* might yet peter out once its proper purposes—to shield against any possible civil, criminal, or reputational harm to self or loved ones—were wholly exhausted, as the court summed up in remanding:[702]

> In the event the trial court, upon *in camera* review, should conclude that any of these consequences still apply to any portion of the communications, they should remain undisclosed. If, on the other hand, the trial court should determine that the communications asserted to be privileged would have no negative impact on Mr. Willard's interests, the purpose for the privilege no longer exists. When application of the privilege will no longer safeguard the client's interests, no reason exists in support of perpetual nondisclosure.[703]

This was assuredly no balancing test—if *any* harm to *any* of Willard's interests would result, no disclosure could be made no matter how urgent the need for the secrets to the living.[704] But if naught remained of Willard's interests in the privilege, then it must

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[699] *Id.* ("The attorney-client privilege is unique among all privileged communications. In practice, communications between attorney and client can encompass all subjects which may be discussed in any other privileged relationship and indeed all subjects within the human experience. As such, it is the privilege most beneficial to the public, both in facilitating competent legal advice and ultimately in furthering the ends of justice. We therefore conclude that the balancing test as proposed by the State is not appropriate and should not be applied under the circumstances of the instant case.").

[700] *Id*. at 786 ("While the attorney-client privilege is an essential component in our system of justice, many ethical and moral dilemmas exist as a result of this limitation on finding the truth. . . . It is universally accepted and well founded in the law of this State that not all communications between an attorney and a client are privileged."). Perhaps the most celebrated case of privilege at English common law, *17 How. St. Trials 1139 (174)* turned on the distinction between casual confidences to an attorney and matters of legal import. *Annesley,* 17 How St. Trials at 1224-28; *see* Sunshine, *supra* note 31, at 446 (discussing *Annesley*).

[701] *Miller*, 584 S.E.2d at 788 ("While communications made by a client to an attorney which pertain to the culpability or interests of the client are privileged and ordinarily remain privileged after the client's death, communications between an attorney and a client that relate to or concern the interests, rights, activities, motives, liabilities, or plans of some third party, the disclosure of which would not tend to harm the client, do not logically fall within North Carolina's definition of attorney-client privileged information.").

[702] *Id*. at 790 ("When a client retains an attorney for legal advice in regard to an ongoing criminal investigation, the client's desire to keep the communication confidential is premised upon three possible consequences in the event of disclosure: (1) that disclosure might subject the client to criminal liability; (2) that disclosure might subject the client, or the client's estate, to civil liability; and (3) that disclosure might harm the client's loved ones or his reputation. See *Swidler*, 524 U.S. at 407. Therefore, in determining whether the reasons for the privilege still exist after the client is deceased, the trial court should consider the *Swidler* factors. In the instant case, the trial court should consider whether these possible consequences would apply to, or would have any negative or harmful effect on, Mr. Willard's rights and interests if the State was permitted to obtain the information communicated between Mr. Willard and respondent.").

[703] *Id.*

[704] *Id.* at 789 ("[T]he trial court should be mindful that the statements were made by Mr. Willard when he presumably knew he was a suspect in a criminal investigation. In this context, it is conceivable that statements by Mr. Willard which implicated a third party may have also implicated him in a crime. If so, those

lapse and disappear, following the fundamental canon of *cessante ratione legis, cessat ipsa lex*, as stated in the Supreme Court's 1933 decision in *Funk v. United States*.[705]

The novel observation by *Miller* was that the privileged quality of a communication could be reassessed with time, even as the principle of secrecy remained absolute: permanence could be decoupled from absoluteness.[706] There was little fear of dissuading confidences *ex ante* under a rule that they could never be disclosed so long as they could *possibly* harm the client or *anyone* he had cared for, even after death.[707] It might be a rare case where death and time had rendered the privilege a nullity, but present circumstances on the ground were not to be ignored.[708] As the saying goes, the wheels of justice, like the mills of God, grind slowly—but grind on they do, inexorably exacting their due.[709] In the event, the hypothetically "rare" case was not theoretical: on remand, the trial court held that some of Willard's statements to counsel had no further extant bearing on him or his loved ones, and ordered disclosure, which decision the high court affirmed again on appeal.[710]

2. Foundational Statements of the Canon

Not to bury the lede, the decedent Derril H. Willard was not the murderer in *Miller*.

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statements, if then revealed, would have subjected him to criminal liability. Therefore, at the time Mr. Willard made the statements, anything he said relating his collaborative involvement with a third party in the death of Dr. Miller was covered by the attorney-client privilege."); *id.* at 791 ("To the extent the communications relate to a third party but also affect the client's own rights or interests and thus remain privileged, such communications may be revealed only upon a clear and convincing showing that their disclosure does not expose the client's estate to civil liability and that such disclosure would not likely result in additional harm to loved ones or reputation.").

[705] *Id.* at 790 ("If the reasons on which a law rests are overborne by opposing reasons, which in the progress of society gain a controlling force, the old law, though still good as an abstract principle, and good in its application to some circumstances, must cease to apply as a controlling principle to the new circumstances.") (quoting Funk v. United States, 290 U.S. 371, 385 (1933)).

[706] *Id.* at 791 (directing the trial court to determine *in camera* whether "any portion of the communications made between the client and the attorney is either not subject to the attorney-client privilege, or though privileged no longer serves the purpose of the privilege and may be disclosed").

[707] *See id.* at 790 ("We acknowledge that, while some risk of withholding information might remain if an attorney were permitted, even under this very narrow premise, to disclose privileged information after a client has died, the instant case presents unique circumstances in which there may be little or no risk of harm to the client.").

[708] *Id.* at 790-91 ("It is indeed a rare case where the full application of the above rationale would apply; therefore, trial courts should carefully analyze each individual factual situation on a case-by-case basis when determining whether to permit disclosure of information asserted to be privileged.").

[709] Sullivan Cnty. v. Pope, 448 S.W.2d 666, 668 (Tenn. 1969) ("It is often said that the Wheels of Justice, like the mills of God grind slowly, yet they grind exceeding small. Many will agree but complain with the first part of this phrase, but disagree violently with the last part, and sometimes for good reason.")

[710] *In re* Miller, 595 S.E.2d 120, 123 (N.C. 2004) (quoting trial court's finding that "disclosure of the information regarding a third party's activities and statements would not expose Derril Willard to criminal liability, even if he were living; would not subject Derril Willard or his estate to civil liability, and would not harm Derril Willard's reputation or harm Derril Willard's loved ones.").

Although police originally arrested one Tyquawon Parker,[711] he was released in relatively short order. Eventually, they focused their attention on Miller's widow Ann, who pled guilty to conspiring with Willard to poison her husband and was sentenced to over twenty-five years in prison.[712] In fairness, this outcome shed some doubt on the court's holding that Willard's confession to his lawyer could not harm him any longer: if his words supported the theory that his paramour had conspired with him in a murder, the words were hardly harmless to her (presumably a "loved one"?) nor even to his own legacy. Fortunately, the elder cases reciting the *cessante* canon were not so luridly sensationalistic.

In the epochal *Funk*, law students may recall, the Supreme Court had disavowed the ancient common law incompetence of a wife to testify on behalf of her husband.[713] Modern jurisprudence, as the Court discerned in 1933, had eroded every foundation of the dated view that interested parties could not testify, leaving the wife's disability an historical artifact unmoored from any reason and all experience.[714] The question was only whether judges rather than legislators had the power to recognize that an application of the common law had obsolesced, and the Court thought the judiciary had not only the power but the duty.[715] Fundamentally, it was not the courts that eradicated the law but the lapse of time itself, as the Supreme Court of Connecticut had explained of the *cessante* maxim: "This means that no law can survive the reasons on which it is founded. It needs no statute to change it; it abrogates itself."[716] If it needs no statute, then it needs no Congress. In *Funk*, of course, it was not one singular instance of privilege whose roots had withered away, as

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[711] Mary Ramsey, *Police Make Arrest in Murder of Woman Found Dead in Charlotte Apartment Complex*, CHARLOTTE OBSERVER, Nov. 30, 2022, https://www.aol.com/news/police-arrest-murder-woman-found-173226247.html.

[712] Cindy George, *Ann Miller Kontz Gets 25 Years in Eric Miller's Poisoning Death*, CHARLOTTE OBSERVER, Apr. 11, 2022, https://www.newsobserver.com/news/local/crime/article215183555.html.

[713] Funk v. United States, 290 U.S. 371, 373 (1933).

[714] *Id.* at 378-81 ("Whatever was the danger that an interested witness would not speak the truth—and the danger never was as great as claimed—its effect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances. The modern rule which has removed the disqualification from persons accused of crime gradually came into force after the middle of the last century, and is to-day universally accepted. The exclusion of the husband or wife is said by this court to be based upon his or her interest in the event. And whether by this is meant a practical interest in the result of the prosecution or merely a sentimental interest because of the marital relationship makes little difference. In either case, a refusal to permit the wife upon the ground of interest to testify in behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity.") (citation omitted).

[715] *Id.* at 381-82 ("It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but, if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possess the power, to decide it in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past? . . . That this court and the other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist, we think is not fairly open to doubt.").

[716] *Id.* at 385 (quoting Beardsley v. City of Hartford, 50 Conn. 529, 542, 1883 WL 1564, at *7 (Conn. 1883)).

in *Miller*, but an entire legal doctrine.[717]

An earlier case merits mention in this connection, this time probing the physician-patient privilege still in the full bloom of its youth in Edwardian New York.[718] In *People v. Bloom*, the defendant failed to assert his privilege in a civil action but then attempted to resurrect it in the subsequent criminal action brought by the state.[719] The court was unswayed: the purpose of the privilege was only to bar "disclosure of delicate and confidential matters, which might humiliate the patient in his lifetime and disgrace his memory when dead, so as to enable him to consult a physician in safety, knowing that his lips would be sealed by the law until he himself removed the seal."[720] But once the truth was out, the court thought it "almost grotesque" to imagine it could be somehow rescinded even if it did tend to disgrace the patient's name, as it already had.[721] Lawmakers "did not intend to continue the privilege when there was no reason for its continuance, and it would simply be an obstruction to public justice,"[722] invoking that same old Latin saw in a yet earlier case from 1887: *cessante ratione legis, cessat ipsa lex*.[723]

In turn, the 1887 case cited still more ancient rulings, as where in 1853 "the principle embodied in the maxim was applied to modify the rule excluding the opinions of witnesses as evidence, and it may be said that it is applicable to every case where the sole reason for a rule has entirely ceased to exist."[724] As held in that eldest case, *Dewitt v. Barley*, where circumstances rebut the presumption on which a rule rests, "the rule itself naturally ceases."[725] The *cessante* maxim pervades the common law throughout the breadth

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[717] *Id.* at 386-387.

[718] People v. Bloom, 85 N.E. 824 (N.Y. 1908).

[719] *Id.* at 824-25 ("The defendant did not cause or procure the evidence of the physicians to be admitted when the civil action was tried, but he made no attempt to prevent its admission, although it was within his power to keep it out, or to avail himself of the privilege conferred by the statute. He did not waive by acting, but by failing to act. Whether his failure to object was owing to inadvertence, or policy, or to some other reason, does not appear, and is not now material. It is conceded that the defendant waived the benefit of section 834 so far as the trial of the civil action was concerned, and the real question is, what effect did that waiver have upon subsequent trials, civil or criminal?").

[720] *Id.* at 826 (quoting Clifford v. Denver & Rio Grande R.R. Co., 80 N.E. 1094, 1097 (N.Y. 1907)).

[721] *Id.* ("After intentionally permitting its publication to the world by the physician himself, upon one trial, it would seem almost grotesque to sustain an objection made upon a later trial that the evidence is privileged from disclosure, because it might tend to humiliate or disgrace. There can be no disclosure of that which is already known, for when a secret is out, it is out for all time, and cannot be cought against [*sic*] like a bird, and put back in its cage.")

[722] *Id.*

[723] *Id.* ("'The object of the statute having been voluntarily defeated by the party for whose benefit it was enacted, there can be no reason for its continued enforcement in such case. The maxim of *cessante ratione legis, cessat ipsa lex*, is of frequent application, and is a sound rule of interpretation.'") (quoting McKinney v. Grand St., P.P. & F.R. Co., 10 N.E. 544, 545 (N.Y. 1887)).

[724] McKinney v. Grand St., P.P. & F.R. Co., 10 N.E. 544, 545 (N.Y. 1887) (citing Dewitt v. Barley, 9 N.Y. (5 Seld.) 371 (1853)).

[725] Dewitt v. Barley, 9 N.Y. (5 Seld.) 375 (1853) ("This rule, however, like most other general rules, has its exceptions; "being based upon the presumption that the tribunal before which the evidence is given is as capable of forming a judgment on the facts as the witness. Where the circumstances are such as to rebut this presumption, the rule itself naturally ceases; 'cessante ratione legis cessat et ipsa lex.'").

and history of the nation,[726] far predating even the Revolution.[727] Privilege is not immune to so universal and primal a principle: although privilege may trump virtually all other priorities,[728] and even transcend its holder's death, it cannot survive the extinction of its own *raison d'être*.[729]

B. The Precarious Presumptuousness of Presuming Intent

If the purposes behind the privilege (and indeed any imposition of law) are so paramount, however, then it is passing strange that the client need not actually evince *any* intent, desire, or expectation that his interlocutor protect the secrecy of the communication, according to nearly all authorities. The Iowa Supreme Court pronounced in 1970 that even with "the burden of proof being upon him who seeks to establish the privilege," nonetheless "no express injunction of secrecy is essential."[730] This terse diktat reflected a long-standing proposition, as treatises had adverted to the "implied promise of secrecy" in any consultation with a lawyer from early in the 1800s.[731] Nor was this lack of rigor a matter of disavowing an unfair insistence upon some particular magic words,[732] as Elliott & Elliott in 1904 had not even thought it "necessary that the client should *in effect* enjoin secrecy."[733] To be fair, Wigmore was far more exacting in his assessment the same year:

> The privilege assumes, of course, that the communications are made with the intention of confidentiality. The reason for prohibiting disclosure ceases when the client does not appear to have been desirous of secrecy. "The moment confidence ceases," said Lord Eldon, "privilege ceases." This much is universally conceded. No express request for secrecy, to be sure, is necessary; but the circumstances are to indicate whether by implication the communication was of a sort intended to be confidential ; and the mere relation of attorney and client does not raise a presumption of confidentiality.[734]

But as Wright & Miller would later observe far later, Wigmore invented from whole cloth this last assertion rejecting implied secrecy in any professional communications

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[726] *See generally* Frederick G. McKean Jr., *A Useful Maxim*, 4 N.C. L. REV. 118 (1926).

[727] *Id.* at 126-28; *see* Joseph Casula & Morgan Dowd, *Cessante Ratione Legis Cessat Ipsa Lex (The Plight of the Detained Material Witness)*, 7 CATH. U. L. REV. 37, n.* (1958).

[728] Whether privilege exceeds the protections of the First Amendment remains a fecund and largely open question, as this author has delved into. *See generally* Sunshine, *Collision*, *supra* note 23.

[729] EDMUND POWELL, JOHN CUTLER & EDMUND FULLER GRIFFIN, THE PRINCIPLES AND PRACTICE OF THE LAW OF EVIDENCE ch, VII § 2 at 96 (London, Butterworths 3d ed. 1869) (1856) [hereinafter POWELL 3D] ("But when the reason for the privilege ceases the privilege will cease also.").

[730] Bailey v. Chicago, Burlington & Quincy R.R. Co., 179 N.W.2d 560, 564 (Iowa 1970).

[731] *E.g.*, POWELL 3D, *supra* note 729, ch. VII § 2 at 96 ("[N]either the attorney nor counsel can be compelled or permitted, without the consent of the client, to make any disclosure or admission which may be fairly presumed to have been communicated by the client, with reference to the matter in issue, under an implied promise of secrecy.").

[732] *See* Doe 1 v. Baylor Univ., 320 F.R.D. 430, 441 (W.D. Tex. 2017) ("As with the attorney-client privilege, however, there are no magic words a party must use to invoke the work-product privilege.").

[733] ELLIOTT & ELLIOTT, supra note 43, § 625 at 737 (emphasis added)

[734] WIGMORE, *supra* note 46, § 2311 at 3233 (citations omitted) (quoting Parkhurst v. Lowten, [1819] 2 Swanst. 194, 216 (Ch.)).

regardless of the client's expectations,[735] part of the Dean's project to fabricate a rule that the communications must be designedly kept secret.[736] Wright & Miller opine that "the cases he cited for his view would not support his dogmatic statement,"[737] and they do not; notably, he cites conspicuously few compared to his usual superfluity—and not a single American case at all.[738]

As for the robust rebuttal in American law uncited by Wigmore, begin in 1814, when the Virginia Supreme Court of Appeals upbraided an attorney who thought himself unbound by privilege because he had been buttonholed offhandedly in the crowded galleries of a public courthouse without any intimation that secrecy was desired.[739] The Virginia court instructed that "counsel and attornies ought not to be permitted to give evidence of facts imparted to them by their clients, when acting in their professional character. . . . whether such facts were communicated with an injunction of secrecy, or for the purpose of asking advice, or otherwise."[740] Alabama wholly agreed two decades later,[741] and Maine followed soon after that, finding an "impenetrable veil of secresy [*sic*]" inhered automatically on the basis of the professional retention, irrespective of the client's

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[735] Kenneth W. Graham Jr., *Confidential Communication*, *in* 24 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 5484, nn.208-10 (1st ed. 1969 suppl. Apr. 2022) ("A device that would make the administration of the confidentiality requirement much simpler is a presumption of confidentiality arising from proof that a communication was made in the course of a professional relationship between attorney and client. Wigmore insisted that there was no such presumption, but the cases he cites for his view would not support his dogmatic statement.").

[736] *See generally* Sunshine, *supra* note 31 (studying Wigmore's project on confidentiality as secrecy).

[737] Graham Jr., *supra* note 735, § 5484, n.210.

[738] Specifically, he cited a total of five cases, two from England (1878 and 1891) and three from Canada (1894, 1897, and 1901), all issued centuries after the Revolution and thus the divergence of English and American law, though he did "[a]dd to the following, which seem reasonable," two California cases, but they are tangentially supportive at best, and really contrary if read faithfully. WIGMORE, *supra* note 46, § 2311 at 3233 n.4. Regardless of one's opinion of the law, a pair of inapposite cases from California and nonbinding cases from Britain and Canada do not a revolution in law establish, whatever Wigmore's skill at making truth of falsities. *See generally* Sunshine, *supra* note 31 (narrating Wigmore's fabrication of a precedentless rule of confidentiality now largely accepted in law).

[739] Parker v. Carter, 18 Va. (4 Munf.) 273, 285-286, 1814 WL at *667 (Va. 1814) ("We must not, in relation to a fact of a highly confidential nature, and strictly applying to the question submitted, embark in a field of uncertainty and conjecture, and, without any certain scale to go by, undertake to decide, from the place and manner of the conversation, that this fact was not disclosed in confidence. It is safer, and more conducive to that free intercourse which should exist between a client and his attorney, to consider all communications confidential, which fall within the description just mentioned: unless, indeed, the client should seem to vaunt his disclosures to the public, and, as it were, challenge the by-standers to hear them.").

[740] *Id.* at 273.

[741] Crawford v. McKissack, 1 Port. 433, 434, 1835 WL 519, at *1 (Ala. 1835) ("The privilege, that matters communicated to counsel are are [*sic*] not to be divulged, is the privilege of the client, and not of the counsel. The counsel is not at liberty to divulge such matters, as evidence against his client, if he were disposed to do so. The court will not permit a communication of this kind to be made. It is not necessary that it should be stated to be confidential. The confidence is implied. Information received, as counsel, is in its nature confidential information."). If two decades seems a long lacuna, recall that jurisprudence in early America proceeded at a slower pace for want of litigants.

instruction or intent.[742]

A subsequent nineteenth-century case of the Maine Supreme Court offers some explanation for this especial presumption of privilege, holding that "it is not essential that [the communication] should be made under any special injunction of secresy, or that the client should understand the extent of the privilege."[743] Admittedly reading between the lines, one might surmise that courts feared that laypeople unfamiliar with the privileges afforded them might forgo something that *was* desired out of ignorance, if some legalistic signification of secrecy were required. Wigmore's imprimatur ordinarily carried the day,[744] but this time it did not: in 1916, the South Carolina Supreme Court plowed on unperturbedly in finding that the privilege was "not restricted to such matters as may have been communicated in special confidence" given that the "relation itself is of a confidential character" and the client need not "even be aware of the existence of any privilege."[745] By the 1970s, the Iowa Supreme Court could unremarkably hold as it did,[746] and the Judicial Conference's proposed (though unadopted[747]) FRE 503 could credibly repudiate any need for "a specific desire that the lawyer not reveal the communication" to obtain privilege, still stressing that the client need not even know of the entitlement.[748]

As Wright & Miller noted, it is far simpler to presume intent from the confidential attorney-client relationship.[749] Proving such intent would be both self-serving and self-

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[742] Wheeler v. Hill, 16 Me. (4 Shep.) 329, 333, 1839 WL 764, at *3 (Me. 1839) ("And the law does not regard it as necessary for the protection of the client, that his communications should be made to his attorney under any particular circumstances or injunctions of secresy. It is sufficient that the relation of client and attorney subsisted between them to throw around the proceeding an impenetrable veil of secresy").

[743] McLellan v. Longfellow, 1851 LEXIS 38, at *2 (Me. 1851) ("To entitle a communication to this privilege, it is not essential that it should be made under any special injunction of secrecy, or that the client should understand the extent of the privilege.").

[744] *See* Sunshine, *supra* note 31, at 432-33 (discussing sources illustrating Wigmore's hegemony).

[745] Raleigh & C.R. Co. v. Jones, 88 S.E. 896, 898 (S.C. 1916) ("The rule is not restricted to such matters as may have been communicated in special confidence. The relation itself is of a confidential character, and every fact derived through the medium of it partakes of its nature. Hence it is not necessary, in order for a client to be entitled to claim the privilege, that he should, at the time of making the communications, enjoin secrecy upon the attorney, or even be aware of the existence of any privilege.").

[746] Bailey v. Chicago, Burlington & Quincy R.R. Co., 179 N.W.2d 560, 564 (Iowa 1970) (quoted *supra* text accompanying note 730).

[747] *Compare* Ralph C. Barnhart, *Privilege in the Uniform Rules of Evidence*, 24 OHIO ST. L.J. 131 (1963) (writing before the proposed rules on privilege); *with* Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61 (1973) (exploring political controversy and jurisprudential wisdom of the proposed privilege rules); *see* Paul F. Kirgis, *A Legisprudential Analysis of Evidence Codification: Why Most Rules of Evidence Should Not Be Codified—But Privilege Law Should Be*, 38 LOY. L.A. L. REV. 809 (2004) (per title).

[748] Graham Jr., *supra* note 735, § 5484, nn.216-19 ("Must the client go further and show that at the time of the communication he had a specific desire that the lawyer not reveal the communication? It would seem not under the Rejected Rule [503], which on its face makes confidentiality turn on the absence of an intent to disclose rather than the presence of an intent for secrecy. It would follow from this that the client need not show that he was aware of the privilege or the lawyer's duty of confidentiality.").

[749] *See supra* note 735; *see also* Sunshine, *supra* note 31, at 472-76 ("It is past time to accept [Paul R.] Rice's exhortation to return to the long-tested common law of privilege as to confidentiality prior to

defeating, inevitably turning on intrusion into the privileged exchange via testimony from the speakers themselves: the protected statements are usually oral, and by definition lack any objective third-party witness.[750] At least with the professional privileges, the expert practitioner—be it the lawyer, the priest, or the doctor—can vouchsafe nondisclosure and advise laypeople of their rights, lessening the evident fear of uninformed ignorance.[751] Marital privilege, however, epitomizes the expediency of a presumption, for unlike professionals inculcated in ethics by training and practice, spouses will seldom preface quotidian confidences with a solemn adjuration to secrecy.[752] "For these reasons, the Supreme Court long ago held that 'marital communications are presumptively confidential,'"[753] and even Wigmore heartily endorses *that* presumption,[754] even as he

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Wigmore, as expressed in the very title of one of Rice's articles: "the eroding concept of confidentiality should be abolished.'").

[750] United States v. McCollum, 58 M.J. 323, 336–37 (C.A.A.F. 2003) ("From an evidentiary standpoint, proving that a party intended a communication to be confidential can be difficult. Such exchanges are often entirely oral, and the nature of confidential communications is such that there are rarely third parties or other evidence to attest to the facts."), *superseded by statute as recognized in* United States v. Slape, 76 M.J. 501, 505 (A.F. Ct. Crim. App. 2016); *see* State v. Smith, 384 A.2d 687, 691 (Me. 1978) ("Requiring the spouse who claimed the privilege to show that he or she intended the communication to be confidential would introduce significant problems of proof. Moreover, to the extent that it could be shown, it would undercut the purpose behind the privilege for it would usually force the spouses to come forth and repeat that which was meant to be confidential.").

[751] Committee on Rules and Practice of the Judicial Conference of the United States, *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315, 370 (1971) ("Nor can it be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware. The other communication privileges, by way of contrast, have as one party a professional person who can be expected to inform the other of the existence of the privilege. Moreover, the relationships from which those privileges arise are essentially and almost exclusively verbal in nature, quite unlike marriage."); *see* Borden, *supra* note 376, at 580 ("[T]he marital privilege differs from the other communications privileges, such as the attorney-client and the clergyman's privileges, because the marital privilege does not involve a professional who is likely to inform the other person of the privilege's existence."); Fawal, *supra* note 379, at 322 ("In each of these other situations, the parties have entered into the relationship with the guarantee of confidentiality as an inducement: the client conversing with his attorney; the penitent confessing to his priest; or the patient conferring with his doctor."); *see also* DePrez, *supra* note 377, at 137 ("[U]nlike the professional communication privileges, the marital privilege is not complemented by a code of ethics requiring that the receiving spouse keep the information confidential.").

[752] *McCollum*, 58 M.J. at 336–37 ("This difficulty is heightened in the marital context, where, because of the spousal relationship, there are rarely 'express injunctions of secrecy,' and the only evidence of intent may be the statement itself. Moreover, in marriage, iterative processes of thought are shared, and not just conclusions and actions.") (citation omitted); *Smith*, 384 A.2d at 691 ("In the unusual situation where there is an express invocation of confidentiality which the circumstances do not belie, the marital communications will be privileged. In the more typical case, no express invocation of confidentiality will occur; nevertheless, from the nature of the communication and the surrounding circumstances, it is apparent that the spouses assume that the communication is and will remain confidential."); Deprez, *supra* note 377, at 129 ("The justification for this presumption is that spouses typically exchange confidences casually, with few express requests for secrecy. As a result, it is argued, intention would be difficult to establish and thus a presumption is necessary.") (citation omitted).

[753] *McCollum*, 58 M.J. at 337 (quoting Blau v. United States, 340 U.S. 332, 333 (1951)).

[754] WIGMORE, supra note 46, § 2336 at 3260 ("It would seem proper to hold that all marital communications are by implication confidential, and that the contrary intention must be made to appear by the circumstances of any given instance. Looking at the habits of married persons and the infrequency of express injunctions of

demands that a proponent of physician-patient privilege must prove it, including a specific intention that the communication be held confidential.[755] He also, however, admits that many courts did not agree.[756]

Yet the courts' long-standing presumption has a price.[757] Because the holder need never enunciate his wishes in the first place to claim the privilege, it is yet more impossible to know whether he would have wanted the privilege to survive his death, or even cared. Allow even the inference that a confidence shared in contemplation of imminent death is meant to outlast that impending inevitability, but then it must be likewise inferred that one *not* contemplating the end of life is not thinking of posthumous privilege at all—and distinguishing the moribund from the lively is an even less savory or practicable task for courts than discerning intent in the first place.[758] So long as the privilege-holder is alive, a presumption of intent for secrecy is relatively innocuous, for when the presumption is mistaken, a holder undesirous of privilege can waive it at any time. Indeed, as *Bloom* illustrated, one can do so passively by declining to object when a stranger seeks to elicit the secret.[759] (Though a corrective waiver may be required where a professional misguidedly asserts an undesired privilege by proxy.[760]) Death, however, means that the holder's intent can no longer be so readily ascertained, and so a continuing unfounded presumption in favor of the privilege loses its ready defensibility.

Given the closure of the escape valve for privilege if the holder is dead, and underlying infirmity of presuming intent where none may exist, compounded by the

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secrecy, this implication of confidence seems more consonant with the facts of life. Such is practically the general judicial attitude.").

[755] *Id.*, § 2381 at 3351-52 ("When the confidential nature of the communication has been expressly stated at the time of making it, the application of the privilege is plain. But is confidentiality to be implied from the mere relation of physician and patient ? Or is it to be implied only according to the circumstances . . . ?").

[756] *Id.* at 3352 ("Some Courts, however, have declared that the mere relation of physician and patient implies a confidentiality for all communications ; and this assumption is tacitly made in other Courts.").

[757] None of this even begins to grapple with how reflexively imputing intent conflicts with the privilege's utilitarian purpose: *viz.* how is someone unaware of the privilege to be encouraged or dissuaded in his communications by something so unintended it is not within his cognizance? That enigma, however, would open a can of worms far beyond the means of this Article to unpack, though others have. It is philosophically jarring that, in modern jurisprudence, a proponent's explicit intent that a privileged communication be held secret is neither necessary nor sufficient for the privilege: "It is not necessary that a document be labeled as privileged in order for it to be subject to an Attorney/Client or work product privilege, if the document otherwise fits within such a privilege. On the other hand, labeling a document as privileged does not meet the privilege claimants' burden of establishing the privilege claim." Lifewise Master Funding v. Telebank, 206 F.R.D. 298, 301 (D. Utah 2002).

[758] *See* Lee, *supra* note 157, 747-48 ("In short, the speech of people who expect to die will likely be chilled by a posthumous exception to the attorney-client privilege, while disclosures by those who do not expect to die soon will not likely be affected by such an exception. An optimal rule would thus extend privilege beyond death for only those people who expect to die. How do we determine who will be likely to die soon? Some cases, like the facts of this case, will be relatively clear. But for most other cases, trying to answer that question will open up a Pandora's box and force the courts to engage in medical, psychological, and epidemiological issues that they are ill-equipped to handle.").

[759] *E.g.*, People v. Bloom, 85 N.E. 824, 824-25 (N.Y. 1908) (quoted *supra* note 719).

[760] *See, e.g.*, Richardson v. Sexual Assault/Spouse Abuse Resource Center, Inc., 764 F. Supp. 2d 736 (D. Md. 2011) (discussed *supra* notes 601-607).

implausibility that someone without reason to expect death is even conscious of her wishes thereafter, it would be logical to conclude that the longstanding judicial presumption of intent is no longer valid after death. Crucially, this proposal does not mean that privilege cannot survive death. Any privilege-holder who demonstrably expressed the intent whilst alive that the privilege persist postmortem would still be entitled to it; nor would it be unreasonable to infer posthumous intent when circumstances warranted, as with deathbed confessions.[761] This tweak to the law would mean only that the "dead man's switch" would revert to its ordinary operation—that absent any cognizable evidence that the decedent actually desired privilege to linger on indefinitely even beyond death, it would default into the off position.[762] Conveniently, this arrangement allows professionals who feel strongly about the principle of privilege after death to secure it by soliciting a statement of postmortem intent from their client.[763] (Then again, should the client knowingly decline after being asked, then the professional cannot ethically contravene the refusal—and what research exists implies clients will rarely care one way or the other.[764])

Technically speaking, *Swidler & Berlin* does not foreclose such a resolution: it says nothing about the propriety of presuming a client's intent that the privilege continues after death as a rule. In its generalist discussion, the Court too supposes that a hypothetical privilege-holder intends as much without question, expatiating instead about the deterrent effect that not according a posthumous privilege to those (presumedly) desirous of it might have.[765] The Court did not interrogate whether death changed the calculus of a client's

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[761] Lee, *supra* note 157, 746-47 ("Although [a] posthumous exception may not likely affect the candor of most clients, such an exception can have a profound impact on people who expect to die soon, whether because of illness, old age, or suicide. This group's speech will likely be chilled by the prospect of posthumous disclosure because the fear of criminal punishment is at its nadir, while reputational concerns are at their maximum. First, a person likely to die will be particularly concerned how his peers and family remember him (whereas for most other people, post-mortem reputation will be too distant in the future to substantially affect their candor calculus). Second, he will also be more likely to be concerned with the reputation and well-being of his friends and family, and will fear posthumous disclosure of information detrimental to them.") (citation omitted).

[762] *See supra* note 686 and accompanying text.

[763] *E.g.*, Fox Butterworth, *Dispute Emerges in Boston Murder*, N.Y. TIMES, Apr. 5, 1990, at A20 ("But Mr. Dawley said he believed deeply that the lawyer-client privilege extended beyond death and that he had 'an obligation as a lawyer to maintain the confidence of a client.' 'It's the cornerstone of our system,' he said. Mr. Dawley said he could not comment on whether Mr. Stuart confessed to him on Jan. 3, as investigators believe. But he said that 'after 7 P.M. on Jan. 3 we no longer represented Charles Stuart.' The investigators believe that Mr. Dawley was so stunned by Mr. Stuart's disclosure that he withdrew as Mr. Stuart's lawyer and suggested other lawyers instead.").

[764] Pragmatically, nothing beyond personal ethics would prevent a professional from testifying that the dead client "would have wanted" the privilege to persist beyond death notwithstanding a demurral, or even from overtly perjurious testimony that the client stated as much, and with no one to controvert testimony that would be on its face credible, a professional so profoundly opposed to ever being party to a breach of confidence that it outweighed duty to individual clients' wishes or the law could easily effect the desired result with scant resistance even if not every client concurred. Obviously, such a vitiation of clients' wishes is to be deplored *ex ante*, but the possibility ought not be ignored.

[765] *Compare* Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998) ("Clients **may** be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications **may** be as feared as disclosure during the client's lifetime.") (boldface added); *with id.* at 408 ("The contention that the attorney is being required to disclose only what the client could have been

wishes at the time of disclosure; indeed, it suggested that evidence for assessing such intent was absent.[766] That the privilege was upheld postmortem in the particular case of Vince Foster is readily attributable to the circumstances: there was solid foundation to infer that Foster, a learned lawyer mere days away from taking his own life, intended that his confidences to his chosen counsel be kept secret afterwards.[767] Technicalities aside, however, *Swidler & Berlin* is undoubtedly persuasive authority that courts will take to endorse the dubious inference of intent postmortem for the attorney-client privilege, as did *Awalt*.[768] The operative question then becomes whether the psychotherapist-patient privilege can or should be distinguished in any relevant way from the attorney-client.

C. Can Psychotherapeutic Privilege Be Distinguished?

The district court in *Awalt*, of course, relied on the idea that in *Jaffee* the Supreme Court had thoroughly equated the newest privilege with the eldest, importing *sub silentio* all of the accompanying rules and reasoning, including the then-soon-to-be *Swidler & Berlin*.[769] But that equation was never more than a convenience; the bedrock of the psychotherapist-patient privilege did not and does not parallel that of the attorney-client privilege, even if attempts had and have been made at some false equivalence since the former's recent origins.[770] Nor was *Awalt*'s false equivalency even cogent on its own terms: *Jaffee* had written only that psychotherapist-patient privilege was just as much a privilege as *any* other under common law (yes, including the attorney-client), not that it was identical to a particular one[771]—and as has been discussed, the nuances of the several privileges are

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required to disclose is at odds with the basis for the privilege even during the client's lifetime. In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place.").

[766] *Id.* at 409-410 ("Empirical evidence on the privilege is limited. . . . While the arguments against the survival of the privilege are by no means frivolous, they are based in large part on speculation—thoughtful speculation, but speculation nonetheless—as to whether posthumous termination of the privilege would diminish a client's willingness to confide in an attorney. In an area where empirical information would be useful, it is scant and inconclusive.").

[767] *Id.* at 408 ("In the case at hand, it seems quite plausible that Foster, perhaps already contemplating suicide, may not have sought legal advice from Hamilton if he had not been assured the conversation was privileged."); *see* Lee, *supra* note 157, 747 ("Vince Foster is a salient example. He seems to have been particularly concerned about his and his friends' reputation. To Foster, his 'public persona as a man of integrity, honesty, and unimpeachable reputation was of utmost importance.' Foster denied any wrongdoing in a suicide note, and lamented that 'ruining people is considered sport' in Washington. The note also expressed Foster's concern for others' reputations: he rued that 'the public will never believe the innocence of the Clintons and their loyal staff.' If the attorney-client privilege did not extend beyond death for Vince Foster, he may have never even spoken to his attorney.") (citations omitted); *see also Swidler & Berlin*, 524 U.S. at 410 ("It has been generally, if not universally, accepted, for well over a century, that the attorney-client privilege survives the death of the client in a case such as this.").

[768] Awalt v. Marketti, 287 F.R.D. 409, 414-417 (N.D. Ill. 2012) (discussed *supra* notes 613-618).

[769] *Id.* at 416 (quoted *supra* text accompanying note 614).

[770] Louisell, *supra* note 412, at 733-34.

[771] *See* Jaffee v. Redmond, 518 U.S. 1, 10 (1996) ("Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is 'rooted in the imperative need for confidence and trust.'") (citation omitted); *id.* at 11 ("Thus, the purpose of the attorney-client privilege is to 'encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' And the spousal privilege, as modified in *Trammel*, is justified because it 'furthers the important public interest in marital harmony.'") (citations omitted).

quite distinct, especially in their interface with infinity.[772] Lest there be any doubt, Chief Justice Rehnquist in *Swidler & Berlin* belabored the fact that the appellant sought to overthrow not just longstanding precedent, but the extent of the eldest privilege of them all, *not* some parvenu invention.[773] The psychotherapy privilege recognized two years later surely qualifies as a parvenu by that logic. The *Awalt* court was not misguided in looking to the Court for greater specificity of guidance as to privilege after death,[774] but, read fairly, *Jaffee* had none on offer.[775]

1. Beyond Attorney-Client Privilege

The *Swidler & Berlin* Court did not stand alone in distinguishing attorney-client as the most hallowed privilege of them all.[776] In *Miller*, the North Carolina Supreme Court declared the species to be "unique amongst all privileged communications" by virtue of the breadth of the safeguard against disclosure it afforded its holders, given the sheer illimitability of the subject matter a client and her attorney might discuss within the latter's professional capacity—namely, anything and everything.[777] It was thus "the privilege most beneficial to the public," in implicit contradistinction to the narrower psychotherapist-patient privilege and other more circumscribed analogues.[778] These observations are not wrong: whatever its faults, the attorney-client privilege encourages every citizen (with the means and reason to retain a lawyer) to enjoy recourse to a professional who may advise intelligently on virtually any vicissitude of life without fear of divulgence,[779] comparable only to the marital privilege that permits spouses to share unreservedly in the navigation of all those vicissitudes,[780] and very unlike the specialized duties, competencies, contexts, and therefore privileges of the priest, the physician, or the psychotherapist.[781]

Of those more specialized privileges, set aside that of the priest and penitent, where the entitlement is entangled with the confessor's own canonical strictures and moral prerogatives, where the nature of the privilege was in its inception divinely eternal and even unwaivable, and about which disputes have been exceedingly rare and thus the law

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[772] *See supra* Parts III-VI.

[773] *Swidler & Berlin*, 524 U.S. at 410 ("Finally, the Independent Counsel, relying on cases such as *United States v. Nixon*, 418 U.S. 683, 710 (1974), and *Branzburg v. Hayes*, 408 U.S. 665 (1972), urges that privileges be strictly construed because they are inconsistent with the paramount judicial goal of truth seeking. But both *Nixon* and *Branzburg* dealt with the creation of privileges not recognized by the common law, whereas here we deal with one of the oldest recognized privileges in the law. And we are asked, not simply to 'construe' the privilege, but to narrow it, contrary to the weight of the existing body of case law.").

[774] *Awalt*, 287 F.R.D. at 416 ("The *Jaffee* Court, throughout much of its decision, analyzed the confidential communications protected by the psychotherapist-patient privilege in accordance with the protections created by the attorney-client privilege.").

[775] *See Jaffee*, 524 U.S. at 515 (quoted *supra* note 541).

[776] *See In re* John Doe Grand Jury Investigation, 562 N.E.2d 69, 72 (Mass. 1990) (Nolan, J., dissenting) ("hallowed" privilege) (quoted *supra* note 87).

[777] *In re* Miller, 584 S.E.2d 772, 785 (N.C. 2003) (quoted *supra* note 699).

[778] *Id.*

[779] *Id.*

[780] *See supra* Part V.

[781] *See supra* Parts III, IV, & VI.

ill developed.[782] By default, physician-patient privilege emerges as the best analogue to that of the psychotherapist—rather conveniently, given Louisell and his successors envisioned the latter as a new evolution of the former privilege in both foundation and reason.[783] Yet with physicians too the scholar can discern only an eternal privilege in contemplation by a legion of thoughtful courts,[784] just as did (most of) the few courts considering the psychotherapist-patient privilege in recent decades.[785] Accepting that *Jaffee*'s failure to anticipate *Swidler & Berlin* demands a distinct justification for or against posthumousness apart from *Awalt*'s blithe equivalence, and that *Swidler* itself expressly disclaims newfangled privileges riding on its coattails, what then does provenance in or proximity to the doctrines of the more established physician-patient privilege teach of the psychotherapeutic species?

First and foremost, legal theorists examining psychotherapeutic privilege have always (for the last seventy years, anyway) imported the exceptions native to physician-patient privilege, such as that for dangerous patients and child abuse.[786] Moreover, *avant-Jaffee* federal courts used a weighted balancing test on the rare occasions they even deigned to entertain the privilege that almost never yielded the result of secrecy being protected, where some impromptu weighing of the equities was oft the decisor.[787] And *après-Tarasoff* state courts looked at the Supreme Court's newly fashioned psychotherapeutic privilege as at best a presumption of secrecy that could be readily overcome by a patient's presentment of sufficiently frightening threats.[788] After *Jaffee*, even those commentators who ostensibly wrote in defense of a more defensible privilege confessed that *Tarasoff* and *Jaffee* contemplated a rather limited (never be it said *qualified*) one,[789] notwithstanding both cases' rhetorical effusion in favor of a reliably secure privilege.[790] Undoubtedly, therefore, both physicians' and psychotherapists' privilege were the most riven with outright

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[782] *See supra* Part III.

[783] *See supra* sources cited notes 420-421 (identifying origins of the psychotherapist-patient privilege not in the common law but in statutes mirroring those providing for physician-patient privilege).

[784] *See supra* Part IV.B.

[785] *See supra* Part VI.C.1.

[786] Baytion, *supra* note 438, at 170-74.

[787] *See supra* cases cited notes 466-478 and accompanying text.

[788] *See* Nelken, *supra* note 560, at 33 ("The Supreme Court in *Jaffee* made only one explicit mention of a potential exception to the new privilege. . . . the language of the footnote could suggest a potentially far broader scope for disclosure along the lines of the so-called *Tarasoff* exception to confidentiality."); *e.g.* sources cited *supra* note 484 (analyzing variously the state law *Tarasoff* exception). One notable theoretical flaw in *Tarasoff* was its deferral of what to do with a mental patient whom the therapist thought to be a danger to anyone encountered, but without particularization to a single person. Because other states and federal courts followed California's lead, *Tarasoff*'s limitation that a dangerous patient's stated but generalized intention or predilection to injure *someone* without a plan to assault an identifiable person was not sufficient basis to breach, until and unless the patient specified whom he would target. *Id.*

[789] *See, e.g.*, Poulin, *supra* note 560, at 1376 ("The exception must be construed cautiously. If applied overbroadly to psychotherapeutic communications, the exception may discourage parties who have undergone therapy from seeking any emotional or mental damages for fear of exposing their entire therapeutic file to the opposing party. . . . Some allegations clearly place the pleading party's mental and emotional state in issue in a way that waives the privilege.").

[790] Jaffee v. Redmond, 518 U.S. 1, 17 (1996) (quoted *supra* note 537); Tarasoff v. Regents of the University of California, 551 P.2d 334, 340-41 (Cal. 1976).

exceptions and poorly-disguised balancing tests. The revised version of the original question is *why* that is so, for every privilege requires its own justification, which defines its proper metes and bounds.[791]

Lawyers, priests, and spouses have no ethical responsibility over the literal life of the privilege-holder, whereas doctors both corporal and mental can very much hold a patient's life in their hands—such is their duty. Encouraging the patient's complete surrender to their ministration, to ensure that all that can be done will be done, is the basis of the privilege allowed to all healers. The common disregard in so many states of the hegemonic Wigmore's dictate signified that legislators broadly perceived in the role and duty of a doctor to be something uncommonly worthy of the utmost solicitude the law can afford—privilege—notwithstanding the theoretical defects that the Dean surmised.[792] Should a lawyer fail to win the case, or a priest to offer spiritual satisfaction, the privilege-holder remains alive if not well: in these most extreme examples, perhaps convicted and jailed, disconsolate of the soul, or even divorced if a spouse is the privileged interlocutor suffering the failure. But in equally extreme exemplars, if a physician should fail with a critically ill patient,[793] or a psychotherapist with an acutely suicidal one,[794] then the privilege-holder's death is the result. Surely there must be some significance to posthumous privilege in the distinction that only the duties and derelictions of physicians and psychotherapists can directly end the privilege-holder's life.

Though it be a fool's errand to assay the moral compasses of past legislators,[795] they may well have reasoned that human life was a pearl of such great value that a privilege

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[791] WIGMORE, *supra* note 46, § 2285 at 3185 ("Looking back at the principle of Privilege, as an exception to the general liability of every person to give testimony to all facts inquired of in a court of justice, and having in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception (ante, §§ 2192, 2197), four fundamental conditions may be predicated as necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation. (1) The communications must originate in a confidence that they will not be disclosed ; (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties ; (3) The relation must be one which in the opinion of the community ought to be sedulously fostered ; and (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").

[792] *See* WIGMORE, *supra* note 46, § 2380 at 3349 ("What is to be said in favor of such an innovation upon the common law ? The privilege has been supported, in the home of its origin, in the following passages . . . .") (proceeding to quote state cases).

[793] *See, e.g.*, Massachusetts Mut. Life Ins. Co. v. Brei, 311 F.2d 463, 468-69 (2d Cir. 1962) (quoted *supra* text accompanying note 369-370).

[794] *E.g.*, Cooksley v. Landry, 761 S.E.2d 61 (Ga. 2014); *see, e.g.,* Awalt v. Marketti, 287 F.R.D. 409, 411-12 (N.D. Ill. 2012) (narrating defendants' contention that the decedent may have intentionally asphyxiated himself with a sock despite ongoing psychological treatment by the jail).

[795] *See* Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161, 164 (1996) ("A tremendous number of Supreme Court cases represent poor use of legislative history (either poor implementation or ignorance of legislative history). The greatest tension is usually not between conflicting legislative histories, but rather between the plain meaning of the statute and the legislative history which suggests a meaning other than that clearly in the text. These struggles have produced the greatest gulf in opinions over the use of legislative history.").

ought to be granted to all those who sought to preserve it, notwithstanding the jurisprudential qualms (nay, outright contumely) that the great and powerful Wigmore levelled. If that premise is true, then the Supreme Court's addition in *Jaffee* of assorted counselors treating troubled souls is no less exaltable,[796] especially given the disturbing frequency of questions of privilege regularly attending incidences of suicide, that most extreme failure of any psychotherapist's practice.[797] Whatever the reason, the reality that every single state legislature has ordained a psychotherapist- and (usually) physician-patient privilege by statute must have some basis. The physician- and psychotherapist-patient privileges are morally different, and always have been: even though they did not *deserve* the protection in the same way as professional privileges, at least according to Wigmore, the value protected—human life—was of such ineffable value that they were accepted nonetheless into the firmament of legal priorities.

2. The Fundamental Uniqueness of Such Rare Entitlements

But the two are not the same. When they directly conflicted, a modern author elevated the mental over the physical, allowing that a patient may elect "blissful ignorance" even if that means the physician cannot ethically inform the patient of the risks of treatment, in service of the patient's "psychological comfort."[798] This reminds that privileges reify the holder's autonomy, allowing recourse to assistance without compromising personal choice, by Louisell's deontological proof.[799] Patients undertake therapy to address perceived mental issues, voluntarily subjecting themselves to the judgment of their chosen healers.[800] If those therapists think attention to the eventuality of death and the question of posthumous privilege is helpful, those doctors are ethically obliged to raise it; if confidentiality beyond death is near and dear to patients' hearts, the patients will raise it unbidden.[801] But if a therapist surviving a patient's death can offer no relevant testament to decedent's intent after all such opportunities, then courts may rationally infer that the patient had no reason to have wanted his confidences to be concealed postmortem—whether because the patient answered that he did not (which the therapist cannot reveal); or because of a professional judgment that if asked, the patient would not care; or because the therapist deemed the

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[796] Jaffee v. Redmond, 518 U.S. 1, 11 (1996) ("The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."). One might argue that priests must occupy the same niche as psychotherapists, given they are the most obvious advisors to any availing of them in desperate need of psychic comfort before ever the professional of the therapist evolved. But, again, given the seal of the confessional was and remains all but unbreakable because of its origins in canon law and the discrete interest of confessors in not being compelled to do that which they faithfully cannot, that privilege remains an anomaly and poor analogue.

[797] *See generally* Paulsen, supra note 157 (discussed *supra* notes 213-217).

[798] Dworkin, *supra* note 326, at 249-50 ("The only exception to the information requirement that serves autonomy is the exception that allows a physician to withhold information if the patient has asked not to be informed. While voluntarily disabling oneself from acting autonomously may seem an odd way to exercise one's autonomy, it can be understood as an expression of an individual's preference for psychological comfort (ignorance is bliss) over the need to make hard choices") (citation omitted).

[799] David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 113-15 (1956); *see also* Sunshine, *Collision*, *supra* note 23, at 73-77 (discussing Louisell); Shuman, *supra* note 310, at 665.

[800] *See* Shuman, *supra* note 310, at 665-66.

[801] *See* Shuman & Weiner, *supra* note 445, at 924-26.

inquiry itself harmful.[802]

Yet if lawmakers so widely felt obliged to disregard the instincts of so wise a guide as Wigmore as to physicians, there must be some compelling reason.[803] Those legal philosophers succeeding Wigmore offered only more skepticism, highlighting the physician-patient privilege's endless exceptions that met with little resistance.[804] Imwinkelreid offers one reason: that judges (and any other attorney-at-law) are by vocation more mindful of the law and inclined by vocation to extrapolate that others must be too—and thus must be desirous of the protections the law allows.[805] Refuting such assumptions empirically, authors have pointed to the numerous foreign jurisdictions where psychoanalysis thrives without legal privilege;[806] meanwhile, Shuman & Weiner's modern studies demonstrated that real-life American patients do not know or care about privilege.[807] Yet it is true that those same legally-minded courts safeguarding the attorney-client privilege had always worried that a client might *care* but not *know* about the right they were safeguarding.[808] And recourse to Shuman & Weiner misses the point anyway, for their surveyed patients avowedly *did* value the secrecy they thought to be assured by their therapist's ethical practices,[809] just not *legal* privilege as such.[810]

If the law were to create a chasm between legal privilege and professional rules, it would only be criminalizing the practice of psychotherapy when practitioners sought to stand on their ethics and refuse testimony, echoing the stark injustice that even Bentham would not allow of the priest-penitent privilege.[811] If such a regime coerced some therapists

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[802] For example, it seems self-evident that therapists' pestering suicidal patients as to their wishes after death could be perilously counterproductive. Current professional ethics as of this publication's date recognize that the default should be discussion of confidentiality but limited by recognizable counterindications. *Cf.* AM. PSYCHOLOGICAL ASSOC., ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, § 4.02(b), https://www.apa.org/ethics/code ("Unless it is not feasible or is contraindicated, the discussion of confidentiality occurs at the outset of the relationship and thereafter as new circumstances may warrant.").

[803] *See supra* notes 317-322 and accompanying text.

[804] *See supra* notes 323-327 and accompanying text.

[805] Imwinkelreid, *supra* note 560, at 981 ("It is perhaps understandable that the majority [in *Jaffee*] would be so willing to subscribe to the instrumental rationale. After all, the courts' business is litigation. On a daily, often hourly, basis, judges typically focus on litigation. Given that mind-set, judges are likely to find the instrumental rationale particularly plausible; since they devote so much of their professional thought to aspects of litigation, they would naturally be inclined to believe that other persons share their concern. Again the plausible, however, does not equate with the proven.").

[806] Baumoel, *supra* note 252, at 814.

[807] *See* sources cited *supra* note 445; *supra* notes 445-454 (discussing the Shuman studies).

[808] *See supra* notes 743-748 and accompanying text.

[809] Therapists are less tightly bound by ethics than their clients, or lawyers, may think. The American Psychological Association's ethical standards state only that confidentiality ought ordinarily to be considered, respected, and safeguarded, but that "[p]sychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose." AM. PSYCHOLOGICAL ASSOC., ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, § 4.05(b), https://www.apa.org/ethics/code.

[810] *See supra* note 452.

[811] *See supra* note 256; *see also supra* quoted text accompanying note 303 (Second Circuit describing the archetypal case of priest-penitent privilege in the same light as Bentham).

to violate their ethics to testify, it would tend to erode the patient's expectation that Shuman & Weiner observed, rightly causing some to doubt their doctors' fidelity, or at least ability to remain faithful. Opening chasms between law and ethics is not a thing to be lightly condoned, even if a few minor fissures are inevitable.[812] The rule that this Article proposes would not do so: a psychotherapist deeply convinced of a need to preserve confidences after death on ethical (or even personal moral) grounds could secure such secrets easily by obtaining a clear statement of intent from a patient, and a patient keen on his secrets' eternal protection could easily secure it by saying so.[813] The proposed rule does leave unaddressed the idea that a right to secure posthumous privilege may conduce suicide for those considering such a desperate quietus, but that urgent issue has been pending since Paulsen raised the appalling notion decades ago.[814] Another Article by a wiser author will have to grapple with *that* potential outcome.

This Article's modest protocol purposefully lies far from the seismic upheaval already instigated by *Tarasoff*.[815] It would be highly problematic to impose judicially a therapeutic standard of care declaring that counselors who fail to detect a patient's dangerousness are liable for not reporting the (undiscerned by them) potential of violence—just as the concurrence to *Tarasoff* argued ought to be stated expressly lest future courts err.[816] Adhering literally to the majority's confused and contrafactual mandate would be impossible: as the concurring Judge Stanley Mosk's explained, the court's rule would inculpate a therapist unaware of any threat, but only inadequately sagacious.[817] So groundless a mandate would not only deter the patients who most need help from candor, *à la* Shuman's studies, but also deter therapists from assisting patients who verged on violence for fear of ruinous litigation. *Jaffee* instructs to the contrary, albeit without binding the states who are the font of such law: that the surety of the psychotherapist-patient

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[812] *See supra* notes 173-179 and accompanying text.

[813] *Cf. supra* text accompanying notes 763-764.

[814] *See generally* Paulsen, *supra* note 157; *supra* notes 213-217 and accompanying text (discussing and acknowledging the import of Paulsen's thesis). This author has little cavil with Paulsen's straightforward proposal that the posthumous privilege of a suicide should be abrogated by reason thereof, but hesitates still at the pragmatic implementation of such a rule in less than obvious cases. As even Paulsen must admit, uncertainty as to the denial of privilege to a suicide would attenuate its deterrent effect on those contemplating self-destruction, and only fill the courts with yet more suits. As an author (in the Harvard Journal of Law and Public Policy, no less) argued, it is both unsettled and unsettling for courts to try to categorize the precise nuances of how and why anyone shuffled off this mortal coil. *Cf.* Lee, *supra* note 157, at 746-48 (quoted *supra* notes 758 & 761).

[815] *See, e.g.*, sources cited *supra* note 484.

[816] Tarasoff v. Regents of Univ. of California, 551 P.2d 334, 353-54 (Cal. 1976) (Mosk, J., concurring) ("I concur in the result in this instance only because the complaints allege that defendant therapists did in fact predict that Poddar would kill and were therefore negligent in failing to warn of that danger. Thus the issue here is very narrow: we are not concerned with whether the therapists, pursuant to the standards of their profession, 'should have' predicted potential violence; they allegedly did so in actuality. Under these limited circumstances I agree that a cause of action can be stated. . . . I would restructure the rule designed by the majority to eliminate all reference to conformity to standards of the profession in predicting violence. If a psychiatrist does in fact predict violence, then a duty to warn arises. The majority's expansion of that rule will take us from the world of reality into the wonderland of clairvoyance."). The majority declined the suggestion, and, alas, future courts did often err, as the numerous articles on *Tarasoff* dissect.

[817] *Id.*

relationship is to be uncompromisingly upheld without inviting such uncertainty, given "the mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."[818] Justice Stevens's supposition that the unimpeachability of legal privilege was required to succor that health prevailed over Justice Scalia's misgivings by a robust 7-2 majority.[819]

VIII. CONCLUSION: PRIVILEGE IN PURGATORY

Amidst all of the furor of commentators, mayhap maintaining privilege forever seems not so great an imposition—but neither was adhering to sometimes idiosyncratic strictures of inheritance so very great a burden by and large. There is a concrete benefit to be had *ex ante*: the surety of confidence to the reticent confessant (whether to an attorney, priest, physician, spouse, or psychotherapist matters little) is not so very different from the surety of the exacting testator that the details of his bequest will be honored. Hypothetically, absent such surety, the confessant or testator might never have confessed or bequeathed as he did. Thence their paths diverge, however: the dead man's privilege is held to be sacrosanct forever, whilst his bequest is subjected to the Rule Against Perpetuities sharply limiting how far in time a testament may reach. As to the latter, the endless operation of the "dead hand" of the testator is interdicted by the common law's condemnation of perpetuities, backed by all those American state charters in opposition.[820] But as the D.C. Circuit pronounced a century ago: "Where reason and experience call for recognition of a privilege . . . the dead hand of the common law will not restrain such recognition."[821] And there is little doubt of that principle after the Supreme Court's own pronouncements in *Swidler & Berlin* and *Jaffee*.[822] The dead hand of privilege has no common law limit.

Even granting the wisdom of the Rule Against Perpetuities, law need not be all things to all people at all times. Why not condone the Rule to accomplish its time-honored purpose to encourage the "genius" of the body politic and abrogate overreach in bequests whilst privilege abides unmolested? The ineluctable objection lies in lading the machinery of the law upon the living in perpetuity at the behest of the dead, leaving the living in limbo. Mortal law is at its best only a means to an end, and when that end evaporates, so too must

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[818] Jaffee v. Redmond, 518 U.S. 1, 11 (1996).

[819] *Id.* at 11-12. Justice Scalia in dissent did not dispute the assertion that the body public's mental health was a pearl of rare value, but concentrated on whether privilege had any real effect on its realization. As discussed before, the shift in the justices in dissent between *Swidler & Berlin* and *Jaffee* only two years later is indicative of the weakness of Justice Scalia's logic to the nine justices—even if the chief justice was swayed. *Cf. supra* notes 543-545 and accompanying text.

[820] *See supra* sources cited notes 17-18.

[821] Mullen v. United States, 263 F.2d 275, 279 (D.C. Cir. 1958); *see also* Rosen v. United States, 245 U.S. 467, 471 (1918) ("Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here.").

[822] *See supra* Parts II.C.2 and VI.B.2.

the law's dictate.[823] Real property long ago ceased to hold the exalted role it once did to nations' economies, and thus a modern discourse explained that the Rule's "only remaining justification is that of striking a balance between the dead and the living, limiting the control of the dead hand over succeeding generations."[824] The survival of the Rule Against Perpetuities implies that every legality must have an end, vindicating the liberty of the living against the laws protecting the dead

One might first trivially object that corporations are immortal, and so their privilege would be immortal too. (So there!) It is not, however: corporations can and do die, via dissolution, and courts have generally held that privilege terminates once a corporation is defunct and ceases to exist.[825] As far as posthumous privilege goes, corporations do not even have reputational or consanguineous interests postmortem as are supposed of flesh-and-blood people.[826] And besides, a dissolved corporation no longer has any authorized mouthpieces through which it *could* claim the privilege.[827] Corporate privilege is no rebuttal to the humanistic abhorrence of perpetuities.

Dante Alighieri wrote of his protagonist (a fictional version of himself) that upon arrival into Purgatory, his forehead was inscribed with seven capital Ps,[828] corresponding to the seven mortal sins (Latin: *peccata*), each of which would be stripped away via his ascent through the tiers of Purgatory until his soul was clarified and he might ascend into the realm of Heaven.[829] A book earlier, before descending into the Inferno proper, the equally fictional Virgil had guided Dante through the liminal realm of Limbo, where the souls of unbaptized babes and righteous heathens who had not known the new testament of Christ sojourned forever, neither condemned to punishment below nor able to ascend to

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[823] *See supra* Part VII.A.

[824] Lawrence W. Waggoner, *Uniform Statutory Rule against Perpetuities*, 12 PROB. NOTES 244, 245 (1987) ("One must ask how meaningful for this purpose is any rule which permits the dead hand to control for as long as 170 years (including the tack on period of running out of vested interests). Over six generations will not be able to control their own destinies, but will have to dance to the tune and to the trustee imposed by someone long dead. Looked at in this way, has the balance between the dead and the living been struck in the right place? Or is this a rule for perpetuities instead of one against perpetuities?").

[825] *E.g.*, John Doe Corp. 1 v. Huizenga Managers Fund, LLC, 188 N.E.3d 1259, 1279 (Ill. App. 2021) ("Limiting the duration of the attorney-client privilege to the life of a corporation is consistent with the principle that the privilege is to be construed narrowly because it withholds relevant information from the judicial process.") (discussing cases), *appeal denied*, 183 N.E.3d 879 (Ill. 2021).

[826] *Id.* at 1278 ("The privilege extends beyond an individual's life because the client's knowledge that the communication will remain confidential even after death encourages the client to speak freely with counsel and not have to 'be concerned about reputation, civil liability, or possible harm to friends or family.' These concerns cannot be applied equally to corporations because communications between current corporate managers and their attorneys are already subject to disclosure by future management, corporations do not have reputations to protect after dissolution, they do not have friends and family who could be embarrassed or harmed, and there are limitations periods for suing a dissolved company.") (quoting Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998)).

[827] *Id.* at 1279-80.

[828] Not unlike the title of the Prior Part, a Particularity that is not a Potential Possibility but a Premeditated Plan.

[829] DANTE ALIGHIERI, PURGATORIO 9:112-14 at 178-79 (Jean Hollander & Robert Hollander trans. and annot., Doubleday 2003); *id.* at 189 (explaining the significance of the incised Ps).

glory above.[830] Not without reason, "limbo" has become a generic description of any situation left in irresolution,[831] yet purgatory remains the better definition of the privilege's proper condition,[832] expressing as it does hope of discharging its ultimate *raison d'être*.[833] Purgatory implies that some process is being implemented, some purpose achieved, that may put an end to eternity, whilst limbo implies only empty endlessness. Many courts have imagined a more limbo-like character of meaningless permanence,[834] but *Miller* contemplates a richer concept of privilege, one that may eventually attenuate and lapse as the concerns of its dead holder pass into oblivion,[835] stripped away by the inevitability of time.

Moreover, it seems inherent in the human condition that catharsis is good for the soul, and secrets are an impediment to the living at large. The law must not give birth to a monstrosity that purports to permanently sequester some truths from scrutiny, dragooning those so entrusted into service unto their own deaths. And then what?[836] Must children bear on the burden should the therapist have let slip the secret? Must society organize judicially-ordered burnings of attorneys' books and records like Viking funeral pyres to ensure the written evidence of the eternal secret is destroyed forever once its last conscripted defender is gone?[837] What if the People, writ large, do not want to? After all, beloved writers who have insisted on their papers' destruction after death have engendered much woe amongst their posterity at such a bonfire not of vanities but of verities that might have greatly enlightened the human spirit.[838] Perhaps few attorneys or psychotherapists are harboring such glorious truths, but neither are they likely to be husbanding such inglorious infamies that the long-dead repositor of the secrets would be injured by their quiet passage into the historical record, probably only ever to be noticed or noted by recondite academics. Scholars still debate the ethical propriety of indulging such wishes for posthumous self-

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[830] DANTE ALIGHIERI, INFERNO 4:6-78 at 60-65 (Robert Hollander & Jean Hollander trans. and annot., Doubleday 2000); *id.* at 73-74 (discussing the state of the inhabitants of Limbo: aware of the possibility of greater grace but eternally unable to achieve it). True, Dante described the Harrowing of Hell in which some souls of Limbo were released to Heaven, *id.* 4:46-78 at 63-65, but even the fictional Virgil can explain only that the saved "*grazïa acquista in ciel, che sì li avanza*"—as the Hollanders translate, because their virtue "gains favor in Heaven, which thus advances them." Those remaining in Limbo thereafter, including many seemingly worthy souls, have no hope other than the Second Coming of Christ.

[831] THE OXFORD ENGLISH DICTIONARY 974 (2d ed. revised condensed 1982) (definition of "limbo").

[832] *Id.* at 1472 (definition of "purgatory").

[833] *Cf. supra* Part VII.A.1 (exploring early evolution of the reasoning for postmortem attorney-client privilege).

[834] *E.g.*, Cooksley v. Landry, 761 S.E.2d 61 (Ga. 2014).

[835] *See In re* Miller, 584 S.E.2d 772, 790-91 (N.C. 2003).

[836] Louisell, *supra* note 799, at 113-14 ("[Privileged secrets] normally survive all the vicissitudes of life save only waiver by the owner; they survive even his death. The law will protect them at all stages of their existence. If they are in the form of written documents, the law will protect them against theft, trespass, subpoena, or other infringement; if oral, from all types of seizure to which such are susceptible: coercion, physical or psychological, trickery or fraud.").

[837] *See, e.g.* William Safire, Op-Ed, *Shredding Foster's Files*, N.Y. TIMES, Sept. 1, 1994, at A27.

[838] *See* Frankel, *supra* note 106, at 62, n.86 ("So, too, do the noted practices of many prominent or public figures (and presumably innumerable private individuals as well) to destroy their letters or otherwise attempt to prevent their dissemination, both during life and beyond."); *see also id.* at n.89 ("These human tendencies play out repeatedly in literature.") (citing instances of the literary trope of destroying one's papers).

destruction.[839] Ethics aside, humanity ought not enthrall itself to the whims of would-be Pharaohs obsessed with their posterity seeking the immolation of their perceived sins to ensconce their imagined legacies, to cadge the popular metaphor.[840]

That megalomania was, ultimately, what the Rule Against Perpetuities aimed itself at: long-ago aristocrats who had wished to secure their legacies *in aeternum* by tying up their material underpinnings in a perpetual trust bound to their names, lest spendthrift descendants dare to dissipate their heritage. The elaborate machinations that those heirs employed to free themselves of the entailment, and the parallel elaborations attempted by the testators to preemptively defeat the same, became an intergenerational arms war that the law eventually refused to abet any further.[841] The Rule Against Perpetuities was an early riposte, but eventually, the British Parliament simply empowered all property-owners to disregard the fee tail (that is, the dead hand of the testator) descending through the generations.[842] The United States, meanwhile, had always looked upon such contrivances of the aristocracy with disgust, and many states outlawed such intergenerational conveyances via fee tail,[843] even beyond outright perpetuities under the Rule that had been installed in their constitutions.[844] As is widely agreed today,[845] the game of testatorial warfare is not worth the candle.

So too ought to be the case with the disquieting notion of privilege persisting down through the generations, especially that of the psychotherapist.At some point, once the

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[839] *See generally* Lior Jacob Strahilevitz*, The Right to Destroy,* 114 YALE L.J. 781 (2005).

[840] *See supra* note 219 and accompanying text (Wright & Graham establishing the phrase).

[841] *See* Maureen B. Collins, *Reading Jane Austen through the Lens of the Law: Legal Issues in Austen's Life and Novels*, 27 DEPAUL J. ART TECH. & INTELL. PROP. L. 115, 151-152 (2017) ("The fee tail system began disintegrating by the late eighteenth century. Further changes in the law mitigated the harsh effects of entailment. More frequently, land was settled 'not simply A in tail, but on A for life, remainder to his eldest son in tail male (if it was desired to restrict the succession to males).' The contingent remainders were also held by a trustee who would effectively block any attempt on the part of the tenant in possession to break it up by destroying the contingent remainder.") (citations omitted).

[842] Fines and Recoveries Act 1833 § 15, 3 & 4 Will. 4, c. 74, https://www.legislation.gov.uk/ukpga/Will4/3-4/74/section/15. Appropriately, the section of the Act abolishing the Rule, which is still in force today, was prolix to the point of incomprehensibility, declaring: "After the thirty-first day of December one thousand eight hundred and thirty-three every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous Act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the King's most excellent Majesty, whose estates are to take effect after the determination or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this Act authorized to be made." *See* GRANT NEWELL, ELEMENTS OF THE LAW OF REAL PROPERTY § 95 at 43-44 (1902).

[843] NEWELL, *supra* note 842, at § 95 at 44 ("In the early history of this country estates tail were not uncommon, but they are not generally looked upon with favor at the present day. In many of the states they have been abolished and their creation forbidden by statute.").

[844] *See generally* Raatz, *supra* note 17.

[845] Other former constituencies of British common law have agreed peremptorily in adopting the British abolition. *See, e.g.*, *Estates Tail Act 1881* (SA) s 2 (Austl.) ("Act 3 & 4 Wm. 4 c. 74, declared in force.").

speaker is dead, the secrets confessed ought to be accessible by *someone* upon a showing of need—be it heirs, loved ones, courts, or wrongly accused defendants. In all likelihood, none of the above (indeed, nobody) will ever seek to break the vault of the average client's confessions; but if someone does with good reason, there is really no countervailing reason to refuse them the prerogative to insist on "every man's evidence"—even dead men—demanded by the common law from the dawn of the common law, far before the Revolution.[846] Of course, any survivors or representatives of the decedent ought be heard in defense of the privilege should they wish to speak (and they rarely will), but in the end secrets will out, and no secret should be abetted *in aeternum* by an unthinking law standing in the way of inevitability by some obdurate default.

Sixty-five chapters and a thousand pages after its introduction, the seemingly immortal case of *Jarndyce & Jarndyce* finally meets its match and maker at Dickens's hand, as the tale's protagonist Allan Woodcourt confronts the barristers propounding the lawsuit that has become the "monument" of chancery practice:

> "You are to reflect, Mr. Woodcourt," observed Mr. Kenge, using his silver trowel persuasively and smoothingly, "that this has been a great cause, that this has been a protracted cause, that this has been a complex cause. Jarndyce and Jarndyce has been termed, not inaptly, a monument of Chancery practice."
>
> "And patience has sat upon it a long time," said Allan.
>
> "Very well indeed, sir," returned Mr. Kenge with a certain condescending laugh he had. "Very well! You are further to reflect, Mr. Woodcourt," becoming dignified almost to severity, "that on the numerous difficulties, contingencies, masterly fictions, and forms of procedure in this great cause, there has been expended study, ability, eloquence, knowledge, intellect, Mr. Woodcourt, high intellect. For many years, the—a—I would say the flower of the bar, and the—a—I would presume to add, the matured autumnal fruits of the woolsack—have been lavished upon Jarndyce and Jarndyce. If the public have the benefit, and if the country have the adornment, of this great grasp, it must be paid for in money or money's worth, sir."
>
> "Mr. Kenge," said Allan, appearing enlightened all in a moment. "Excuse me, our time presses. Do I understand that the whole estate is found to have been absorbed in costs?"
>
> "Hem! I believe so," returned Mr. Kenge. "Mr. Vholes, what do you say?"
>
> "I believe so," said Mr. Vholes.

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[846] United States v. Bryan, 339 U.S. 323, 331 (1950) ("Dean Wigmore stated the proposition thus: 'For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.'").

"And that thus the suit lapses and melts away?"

"Probably," returned Mr. Kenge. "Mr. Vholes?"

"Probably," said Mr. Vholes.[847]

So ought it to be with all creatures of the law—they must, eventually, lapse and melt away.

Probably.

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[847] CHARLES DICKENS, BLEAK HOUSE 975 (Penguin Classics 1996) (1853).