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Psychologist in Today's Legal World: Part II

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The practice of psychology has come of age in American society during an era when legal scholars are prone to deprecate the social and moral worth of the historic privileges of confidential com-

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**This is the second in a series of articles on The Psychologist in Today's Legal World, commenced by the author in 39 Minn. L. Rev. 236 (1955) with a discussion of "The Psychologist as an Expert Witness." In that discussion the author assumed familiarity of the reader with the distinction between a psychiatrist and a psychologist, but since then it has become apparent to him from correspondence and otherwise that many persons outside the psychiatric and psychologic professions do not have the distinction clearly in mind. See Huston, A Psychiatrist's Observation on the Orientation of Clinical Psychology, in Psychology, Psychiatry, and the Public Interest 28, 30 (Krout ed. 1956), Schwartz, Is There a Need for Psychology in Psychotherapy? in id. at 113, 128. See Havemann, The Age of Psychology in the U.S., Life, Jan. 7, 1957, p. 68, where psychological and psychiatric practices are mentioned together without delineation or definition. A psychiatrist is a specialist in psychiatry, "the medical specialty that deals with mental disorders, especially with the psychoses, but also with the neuroses." Webster, New International Dictionary (2d ed. 1947). A psychologist is one versed in psychology, "the science which treats of the mind in any of its aspects; systematic knowledge and investigation of the phenomena of consciousness and behavior; the study of the organism and its activities, considering it as an individual whole, especially in relation to its physical and social environment." Id. Thus a psychiatrist is a doctor of medicine who after completing a regular medical course has specialized in psychiatry. The psychologist is a non-medically trained specialist in psychology, often with a Ph.D., whose particular specialty within psychology involves performance of one or more of numerous functions, ranging from industrial psychology (which may pertain to the conduct of labor relations), to psychodiagnosis and psychotherapy, sometimes carried on by a clinical practitioner of psychology. It is activities of the clinical psychologist as a practitioner of psychodiagnosis and psychotherapy which most closely coincide with the activities of the psychiatrist. There would seem to be general consensus among the psychiatric and psychological professions that (1) people in need of professional psychological services whose needs involve organic pathology require the competence of the psychiatrist, and (2) some psychological functions, such as diagnosis by projective tests, vocational guidance, and corrective-educational procedures are normally within the competence primarily of the psychologist. See Bone, Psychotherapists, Psychological and Medical, in Krout, op. cit. supra, at 146; Huston, A Psychiatrist's Observation on the Orientation of Clinical Psychology, in id. at 28, 31, Krout, Can Psychologists and Psychiatrists Share Their Responsibility to the Public? in id. at 103, 108, Yacorzynski, The Functions of Psychology in a Medical Situation, in id. at 60, 71. The interprofessional issue between psychiatry and psychology seems largely to arise over the question of the independent practice by the psychologist of psychodiagnosis and psychotherapy. Relations of Medicine and Psychology: A State-
ment by Organized Psychiatry, in id. at 23-24, Kubie, Psychology and Psychiatry, 157 J. Am. Med. Assn 466 (1955) (calling for a new profession, one that would stand midway between the clinical psychologist and the medical psychiatrist of today, whose members would have a doctorate of medical psychology), Lindner, Who Shall Practice Psychotherapy? in Krout, op. cit. supra, at 148, 159-60, Shakow, Psychology and Psychiatry: A Dialogue, Part II, 19 Am. J. Orthopsychiatry 381 (1949). For an illustration from recent litigation of the psychiatrist and psychologist functioning together in a clinical setting, see Iverson v. Frandsen, 237 F.2d 898 (10th Cir. 1956), where a psychologist was held not liable for alleged libel contained in a psychological report because the report was qualifiedly privileged and was free from actionable malice. The Tennessee law licensing psychologists provides "The psychologist or psychological examiner who engages in psychotherapy must establish and maintain effective inter-communication with a psychologically oriented physician, usually a psychiatrist, to make provision for the diagnosis and treatment of medical problems by a physician with an unlimited license to practice the healing arts in this state." Tenn. Code Ann. § 63-1108 (1955). Arkansas has a provision substantially the same. Ark. Stat. Ann. § 72-1506 (Supp. 1955).

1. Note, 51 Colum. L. Rev. 474 (1951), which the author commences with the accurate observation. "The sale of psychological aid to individuals, particularly in metropolitan areas, has become a lucrative profession. This development has resulted in an influx of private practitioners who undertake to render psychological counseling to the relatively normal, and psychotherapy to the emotionally distraught." See Sanford, Psychotherapy and the American Public, in Krout, op. cit. supra note **, at 3. For a discussion for the layman of the extent of psychological practice in American society today, see Havemann, The Age of Psychology in the U.S., Life, Jan. 7, 1957, p. 68, The Tools Psychologists Invented, Life, Jan. 14, 1957, p. 106, The Psychologist's Service in Solving Daily Problems, Life, Jan. 21, 1957, p. 84, Unlocking the Mind in Psychoanalysis, Life, Jan. 28, 1957, p. 118, Where Does Psychology Go from Here? Life, Feb. 4, 1957, p. 68. That author begins his series with a typical day for John Jones, American, who slaves with a razor bought because of an ad approved by an advertising agency's psychologist; reads in his morning paper two columns of psychological fact and advice, drives to work guided by road signs painted yellow and black pursuant to psychological advice, passes the office of the company's psychiatrist available for consultation (the author does not here delineate psychiatry from psychology), confers with an industrial psychologist on pending union contract negotiations, reads in the afternoon paper more psychological columns, and the news item that his favorite movie actress is taking with her to location in Africa her personal psychoanalyst, learns that a public opinion poll by a psychological research firm has found that his company recently suffered a marked loss of good will, returns home to find his family disturbed by the son's continuing argument with the school psychologist relative to repeated impudence to his teacher; goes to a double feature, one concerned with a mental institution, the other with a farcical psychoanalyst, and ends the day with a TV newscast informing of a governmental hassle over expenditures for psychological warfare. The rapid ascendency of psychological practice in American society has not always had its counterpart in American judicial administration. See Hutchins and Slesinger, Some Observations on the Law of Evidence—the Competency of Witnesses, 37 Yale L.J. 1017, 1027 (1928) (urging psychological testing to ascertain competence of certain witnesses). While sometimes judicial hesitancy may represent only cultural lag, sometimes it proceeds from a sound skepticism concerning scientific validity of the purpose technique, e.g., Lindsey v. United States, 237 F.2d 893 (9th Cir. 1956) (admission of recording of interview of complainant while under "truth serum," for purposes of rehabilitation after imprisonment, held error), see Desson, Freedman, Donnelly and Redlich, Drug-Induced Revelation and Criminal Investigation, 62 Yale L.J. 315 (1953), or because of wise regard for the essentials of human liberty. See Louisell, The Psychologist in Today's Legal World, 39 Minn. L. Rev. 236, 253-56, 288 (1955)
munication. The "practice of psychology" recently has been defined by Tennessee and Arkansas as the rendering "to individuals or to the public for remuneration any service involving the application of recognized principles, methods and procedures of the science and profession of psychology, such as interviewing or administering and interpreting tests of mental abilities, aptitudes, interests and personality characteristics, for such purposes as psychological evaluation or for educational or vocational selection, guidance or placement, or for such purposes as over-all personality appraisal or classification, personality counseling, psychotherapy or personality readjustment." More briefly, New York has in effect defined the practice of psychology as the rendering of services to individuals, corporations or the public for remuneration by anyone holding himself out to the public under the description "psychology" or its derivatives. In view of the current deprecation of the philosophy of the confidential communication privileges by eminent evidence scholars, it is noteworthy that all four states known at this writing to have passed licensure laws for psychologists accord to their clients the privilege of confidential communication, and two of the six states known to have passed psychologist certification laws have done likewise.


Further, the six states which by statute have accorded to psychologists’ clients the privilege of confidential communication have given the privilege a status equivalent to that enjoyed by client-attorney communications. Thereby such states have accorded the new statutory privilege as broad a scope, and underpinned it with sanctions at least as significant, as those appurtenant to any of the common law confidential communication privileges. The New York statute\(^7\) provides (and the other five statutes are identical or substantially similar)\(^8\)

The confidential relations and communications between a psychologist registered under provisions of this act and his client are placed on the same basis as those provided by law between attorney and client, and nothing in this article shall be construed to require any such privileged communications to be disclosed.

New York’s willingness to extend confidentiality to psychologist-client relations in terms at least as inclusive as that enjoyed by any of the privileged relations at common law, is perhaps particularly significant because New York historically has been and currently is outstanding in its willingness to abide by the philosophy of confidentiality and to effectuate its logical and policy requirements even in “hard cases.”\(^9\)

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\(^7\) N.Y. Educ. Law § 7611.

\(^8\) The statutes of Georgia, Tennessee, Arkansas, Kentucky, and Washington, cited in notes 5 and 6 supra.

\(^9\) E.g., Meyer v. Supreme Lodge Knights of Pythias, 178 N.Y 63, 70 N.E. 111 (1904), aff’d, 198 U.S. 508 (1905), People v. Shapiro, 308 N.Y 453, 458-59, 126 N.E.2d 559, 561-62 (1955), a case involving client-attorney communications, where the court said. “Such statutes and decisonal law [pertaining to confidential communications] express a long standing public policy to encourage uninhibited communication between persons standing in a relation of confidence and trust, such as husband and wife, confessor and clergyman, or doctor and patient, attorney and client. In carrying out such policy the statutes are accorded a broad and liberal construction. To say that the broad protection of such policy is not available to a defendant when he takes the stand in a criminal case would entail consequences far more detrimental to the interests of society than does rejection of the evidence that might be disclosed. Any other policy than strict inviolability, unless expressly waived, would seriously hamper the administration of justice.” People v. Decina, 2 N.Y.2d 133, 138 N.E.2d 799 (1956).
American society is therefore confronted with increasing recognition of privilege for client-psychologist relations at a time when the doctrine of confidentiality for even the established professional communication privileges is under strong attack.\textsuperscript{10} Professor Chafee, attempting in 1943 to substantiate his thesis that the patient-physician privilege obstructs justice, was able to state, "There is no privilege for communications to unlicensed practitioners. And those psychoanalysts who have been too busy to study medicine must have spicier facts to relate than physicians, but no court has yet bound them to secrecy."\textsuperscript{11} 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.\textsuperscript{12} Whether the legislatures currently convened will add to the growing list of states according privilege to client-psychologist communications is not known;\textsuperscript{13} but the fact that within the last decade six states have put themselves on that list would seem to make an affirmative prediction reasonable.

How is the cumulating growth of this new privilege to be appraised? Does it represent a felt social need for confidentiality in relationships that are multiplying in frequency and doubtless also in

\textsuperscript{10} See note 2 \textsuperscript{supra}. At least nine states have enacted a client-accountant privilege, and at least twelve have enacted a privilege for journalists to withhold their sources of information. See McCormick, Evidence § 81 nn. 4 & 5 (1954), Vanderbilt, Minimum Standards of Judicial Administration 344-46 (1949), 8 Wigmore § 2286 nn. 13 & 14. For analyses of the journalists privilege, see Notes, 35 Neb. L. Rev. 562 (1956), 36 Va. L. Rev. 61 (1950).

\textsuperscript{11} Chafee, Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand? 52 Yale L.J. 607, 611 (1943).

\textsuperscript{12} Binder v. Ruvell, Civil Docket 52C2535, Circuit Court Cook County, Ill. (1952), discussed in Guttmacher and Weihofen, Privileged Communications Between Psychiatrist and Patient, 28 Ind. L.J. 32 (1952); Note, 47 Nw. U. L. Rev. 384 (1952). The psychotherapist there involved was a psychiatrist, but the rationale of the court would appear applicable to any authorized psychotherapist. That Illinois has no patient-physician privilege, see Cleary, Handbook of Illinois Evidence 56 (1956).

\textsuperscript{13} Of the various bills regulatory of the practice of psychology pending in the California Legislature at this writing, at least two, A.B. No. 1785, § 1805, and A.B. 2712, § 2904, follow the pattern of Georgia, Tennessee, Arkansas, Kentucky, New York and Washington, in placing the confidential relations and communications between psychologist and client upon the same basis as those provided by law between attorney and client. The writer has been informed that, in addition to California, psychologist certification or licensure bills are or may be presented in 1957 legislative sessions in Alabama, Florida, Idaho, Maryland, Massachusetts, Michigan, North Carolina, Pennsylvania, Texas and Wisconsin, and attempts at amendment of the Connecticut certification law may be made. See note 6 \textsuperscript{supra}.
significance as the result of the tensions of an increasingly complex and difficult environment? Is such growth but the function of the incredibly rapid increase in the rendition of psychological services? Or is such growth merely the result of well-integrated efforts on the part of the organized profession of psychology to achieve for itself additional professional status? An answer to those and similar questions is important. The legal profession and the public should be willing to weigh dispassionately this new privilege on the scales of principle, measuring the values of the freedom it promotes against the countervailing need in adjudication for the kind of information that application of the privilege will preclude. If the privilege is necessary or strongly desirable to fulfill the needs of psychodiagnoses and psychotherapy, the importance of these processes to individual well-being would seem to preclude sacrificing their values to the less frequent and often less cogent need of judicial administration for disclosure of the communications in order to get all relevant facts. On the other hand, if the new privilege is irrationally based and is but the fruit of the professional ambitions of "newer crafts and professions whose secret communications with their patrons" were not historically privileged, establishment of the new privilege may do great harm. For 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.

It seems appropriate, therefore, to analyze the strengths and weaknesses of placing the confidential relations and communications between a psychologist and his client on the same basis as those provided by law between attorney and client. The author's conclusion is that because of the multiple and diverse functions currently performed by psychologists, according confidentiality to clients of psychologists as such is unwarranted. On the other hand, clients of psychologists functioning in certain capacities, especially patients of the psychologist psychodiagnostician and psychotherapist, should be entitled to the privilege of confidential communication.

Of course, from the self-centered viewpoint of professional prestige and pride characterized by Shakow as "familiocentrism"—the viewpoint that emphasizes "real or fancied shelter or prestige to special groups of [professional] people"—there can be little

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doubt that the six statutory provisions obtain for the profession of psychology the maximal confidentiality in relations with clients known to our legal system. While confidentiality of spousal and penitent-clergymen communications was probably recognized at common law, it is clear that confidentiality existed for client-attorney communications just as it is clear that it did not exist for patient-physician communications. State statutes on client-attorney communications are only declarative and definitive of a privilege deeply rooted in our legal system and social fabric long prior to such statutes. 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. However, as will be developed later, it is believed that there is a sound rationale and sociological and moral need for a properly defined privilege for the patients of certain psychologists, especially those functioning as psychodiagnosticians and psychotherapists.

It seems clear that the six mentioned states, in placing the new privilege on the same basis as that for client-attorney communications, have achieved at least the virtue of relative simplicity of definition. The client-attorney privilege is of ancient lineage with widespread if not universal acceptance at least in the Anglo-American

18. See Cook v. Carroll, [1945] I.R. 515, Regina v. Hay, 2 F & F 4, 175 Eng. Rep. 933, n. (a) (N.P. 1860), Best, Evidence § 584 (12th ed. 1922), cf. McCormick, Evidence § 81 at 166 (1954). Wigmore regarded as open to argument whether this privilege was recognized in common law courts during the period before the Restoration, but concluded that since the Restoration it has been denied in English courts. 8 Wigmore § 2394. However, he also concluded that his four conditions of legitimate privilege exist in this case and the privilege should be recognized. Id. § 2396.
19. 8 Wigmore § 2380.
21. The rationale of the privilege, however, has undergone evolution. The earlier emphasis on the oath and the honor of the attorney, see McCormick, Evidence § 91 (1954), 8 Wigmore § 2290, has given way to emphasis on the necessity of the privilege to induce full disclosure by the client so as to make possible proper functioning by the attorney. McCormick, Evidence § 91 (1954), 8 Wigmore § 2291. This justification has been cogently attacked in an incisive analysis. Morgan, *Suggested Remedy for Obstructions to Expert Testimony by Rules of Evidence*, 10 U. Chi. L. Rev. 285, 288–90 (1943). For the present author’s analysis of the rationale of this privilege, summarized in note 46 infra, see Lousell, supra note 2, at 107
22. See notes 3 and 6 infra.
legal world, and has been so often construed and applied that there is a well-established body of doctrine available for assimilation to the new privilege. When one considers the large number of decisions which have characterized the evolution of the client-attorney privilege, the desires of formulators of a new privilege to reap the fruits of battles fought and victories won, rather than invite new warfare by generalized statement of principle, are quite understandable. Further, blanketing the clients of psychologists as such.

23. The six statutes according privilege to client-psychologist confidential relations and communications specify "psychologists," for purpose of the privilege, as those licensed or certified, as the case may be, under the applicable statute, e.g., Arkansas, "licensed psychologist" (also includes "psychological examiner"). Ark. Stat. Ann. § 72-1516 (Supp. 1955), Georgia, "licensed applied psychologist," Ga. Code. Ann. § 84-3118 (1955), Kentucky, "certified clinical psychologist," Ky. Rev. Stat. Ann. § 319.110 (1955), New York, "psychologist registered under the provisions of this act," N.Y. Educ. Law § 7611, Tennessee, "licensed psychologist" (also includes "psychological examiner"). Tenn. Code Ann. § 63-1117 (1955), Washington, "certified psychologist," Wash. Rev. Code § 18.83.110 (1955). Thus the "psychologist" within the ambit of the confidential communication privilege is he who is a "psychologist" within the definition provision of the statute. In the New York statute (a certification type statute, see note 5 supra) appears this definition "A person represents himself to be a 'psychologist' when he holds himself out to the public by any title or description of services incorporating the words 'psychological,' 'psychologist' or 'psychology,' and under such title or description offers to render or renders services to individuals, corporations, or the public for remuneration." N.Y. Educ. Law § 7601(2). It would seem that all types of psychologists, including, e.g., industrial psychologists, are comprised within this definition and are registrable under the act, and therefore since the privilege of confidential communication is given to clients of all registered psychologists, the client of the registered industrial psychologist is given the privilege. However, it is possible that under § 7605 of the act pertaining to qualifications of examinees for certification, administrative officials might so limit acceptable degrees or educational institutions as to exclude certain types of psychologists from certification. The Tennessee and Arkansas licensure definitions (see note 5 supra) of the "practice of psychology" are given at the beginning of the text, and Kentucky's and Georgia's definitions are similar. See note 3 supra. In view of the phraseology of these licensure definitions, it may technically be arguable, under such canons as expressio unius est excluso alterius, or possibly ejusdem generis, that they exclude certain types of psychologists, e.g., industrial psychologists, and hence that the clients of such psychologists are not given the privilege. See Newman and Surrey, Legislation. Cases and Materials 654-55 (1955), 2 Sutherland, Statutory Construction §§ 4909-4917 (3d ed. Horack, 1943). But likely, finical interpretive techniques judicially would be subordinated to realistic ascertainment of the intention of the statutes which would be deemed to comprehend all psychologists.

The difficulty inherent in attempts to define that portion of psychological practice which generally composes most closely with psychiatry, namely, clinical psychology, see note ** supra, is well put in the famous imaginary dialogue between a psychiatrist and psychologist in Shakow, Psychology and Psychiatry. A Dialogue, Part I, 19 Am. J. Orthopsychiatry 191, 195 (1949).

**Psychiatrist:** Would you tell me just which group ["clinical psychologists"] that is? I must confess that I am often puzzled by what you psychologists mean when you talk about clinical psychology. Sometimes you seem clearly to mean the psychology that is practiced in medical or, more specifically, psychiatric institutions. Then again, I hear of clinical psychology in public schools, in reformatories, in
within the scope of the privilege helps to avoid the perplexing definitional problems which would ensue from a statute granting or withholding privilege according to the function performed by the psychologist. But the problem of recognition of a new privilege is too important to be resolved exclusively or primarily by considerations of ease of definition, especially in view of the danger to all privilege of undue extension of confidentiality. If the result is to achieve a privilege more soundly based in a justifying rationale, even though more difficult of definition, it is far better to face up to hard definitional problems and resolve them as well as possible.

Against the virtue, then, of relative simplicity of definition of the new privilege by the six mentioned states, must be balanced whatever undesirable features inhere in placing client-psychologist relations and communications on the same basis as those of client-attorney. It is believed that according a privilege to the client of the psychologist qua psychologist, (1) may result in the anomaly of wrongly failing to give the privilege in certain relations (patient-psychiatrist) identical in essential attributes to privileged client-psychologist relations, (2) discriminatorily grants the privilege in certain client-psychologist relations while not granting it in industry—in places where there is no medical contact or, at least, where medical relationships are at a minimum. What do you really mean?

PSYCHOLOGIST: I can understand your puzzlement, since psychologists themselves are vague about the boundaries of this field and in some respects divided about its inclusiveness. Some hold that clinical psychology should be limited to psychology in medical settings; others hold that it involves a much broader area and includes all work where the problems of individual adjustment are the primary concern. When one comes right down to it, however, there is not so much difference of opinion as at first appears. Actually there is more confusion about the issues that are involved than true difference of opinion about the range of activity. The difficulty seems to arise from not distinguishing clearly between the content of the training for the field, and the range of ultimate practice in the field.

See also Note, 51 Colum. L. Rev. 474, 488-91 (1951). In addition to the ten states presently known to have psychologist licensure or certification acts, see notes 3-6 supra, and Montana, see note 6 supra. Oklahoma in its Healing Arts Act regulatory of the practice of psychotherapy defines “qualified psychologist.” Okla. Stat. Ann. tit. 59, § 731.1(e) (1949). For a discussion of this law, see Note, 51 Colum. L. Rev. 474, 480 (1951).

24. Although the client-attorney privilege is of ancient lineage and widely accepted, see, e.g., Radin, The Privilege of Confidential Communication between Lawyer and Client, 16 Cal. L. Rev. 487 (1929), and has engendered a multitude of interpretive decisions, it still occasions definitional problems, e.g., Preiser v. United States, 181 F.2d 326 (6th Cir. 1950), aff'd, 339 U.S. 974 (1950) (denying confidentiality to communications to a judge, who thought he might give solicited legal advice and then withdraw from any case involving the advice which might result from pending grand jury investigations).

25. See notes 5 and 6 supra.
substantially equivalent client relations with non-psychologists, without rational basis for the distinction, and (3) grants the privilege in respect of certain functions performed by psychologists which should not be privileged. Each of these defects will now be examined.

(1) While patient-physician communications clearly were not privileged at common law, nearly two-thirds of the states by statute have accepted the privilege with varying qualifications, exceptions and waiver provisions. But, seventeen states, including Georgia and Tennessee, have refused to adopt this privilege. Assuming for purposes of analysis the correctness of Wigmore’s famous four conditions of legitimate privilege, and his resultant conclusion that the American statutory enactments of patient-physician privilege are unsound and unjustified, it nevertheless seems clear that not all patient-physicians communications are legitimately classified in the same category. As this writer pointed out, communications to an orthopedic surgeon, for example, are

26. See note 20 supra.
27. E.g., in California the privilege is applicable only in civil cases, Cal. Code Civ. Proc. Ann. (Evid.) § 1881(4) (Deering 1953), People v. West, 106 Cal. 89, 39 Pac. 207 (1895), People v. Dutton, 62 Cal. App. 2d 862, 864, 145 P.2d 676 (1944). Even in jurisdictions where the privilege is generally acknowledged, it gives way to various statutory exceptions. E.g., Minn. Stat. § 626.52 (1953) (obligation on physician to report bullet wounds treated by him), id. at §§ 618.09, 618.17 (physicians’ narcotic records, including names of patients, open to narcotic enforcement officers), id. at §§ 144.159, 144.164 (physicians’ obligation to file birth, death and still-birth certificates), id. at §§ 144.42, 144.46 (physicians’ obligation to report tuberculosis), id. at § 257.30; (physicians’ obligation to testify as to pregnancy of patient without her consent in illegitimacy proceedings), see 8 Wigmore §§ 2380, 2385a. Illustrative of modern provisions for waiver, particularly significant in personal injury litigation, are Fed. R. Civ. P. 35(b), Minn. R. Civ. P. 35.02. See Doll v. Scandrett, 201 Minn. 316, 276 N.W. 281 (1937) (privilege waived as to both doctors who conducted a unitary examination of plaintiff when plaintiff called one as a witness), 8 Wigmore §§ 2388, 2389, 2390. Construction of the statutory concept of “physician and surgeon” is often restrictive. E.g., William Laurie Co. v. McCullough, 174 Ind. 477, 90 N.E. 1014 (1910) (orthopedist without physician’s license not within privilege), Robb v. Heathcote, 119 Cal. App. 404, 6 P.2d 576 (1931) (Christian Science practitioner not a physician or surgeon for privilege purposes).
30. “(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 accrue to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.” 8 Wigmore § 2285.
31. 8 Wigmore § 2380a.
normally quite a different thing by nature than communications to a psychiatrist. The psychiatrist's patient, or for that matter the patient of the medical internist or even of the general medical practitioner functioning in psychosomatic medicine, may well be entitled to the privilege of confidentiality even on the assumption that a general patient-physician privilege is unwarranted. In any event, certainly a psychiatrist's patient is entitled to confidentiality if a similarly situated patient of a psychologist is entitled to it. But the universal adoption in the United States of the client-psychologist privilege in terms of the New York or five other similar statutes would in some states produce the anomaly of statutory recognition of privilege for the psychologist's patient along with its non-recognition for the similarly situated psychiatrist's patient. 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.

The anomaly of statutory recognition of privilege for the psychologist's patient and non-recognition for the psychiatrist's patient might lead courts increasingly to follow the path of the Illinois court in spelling out, independently of statute, a privilege for all patients of psychotherapists, and thus protect the psychiatrist's patient and practically mitigate the statutory incongruity. But this is speculative and in any event no justification can be perceived for creating the incongruity in the first place. While this statutory incongruity would apparently have full-fledged significance only in states such as Georgia and Tennessee which continued to refuse privilege to patient-psychiatrist communications (because not recognizing a patient-physician privilege) while according it to client-psychologist communications, it would be felt in varying degrees elsewhere. This is because the patient-physician privilege statutes, which embrace psychiatrists as licensed physicians, are generally subject to varying limitations and restrictions productive of a net result often much less protective of confidentiality than the client-attorney privilege. Thus, for example, if California were to adopt the New York provision

33. See Note, 47 Nw. U. L. Rev. 384 (1952).
35. For the distinction between "psychiatrist" and "psychologist," see note ** supra. In states having a statutory patient-physician privilege, the patient of a psychiatrist, which psychiatrist is a licensed physician, has the privilege to the extent that the patient of any other physician has it.
36. See note 13 supra.
for confidentiality for clients of psychologists, the anomaly would exist whereby the client of the psychologist would have a privilege equal to that of the attorney's client which is applicable in both civil and criminal cases, whereas there is no patient-physician privilege at all in criminal cases in California. 37

(2) Under the New York statute and similar statutes, communications to a psychologist are per se privileged because of his status as a licensed, registered or certified psychologist. 38 But there is no privilege for the client of the non-psychologist even when he is performing functions akin to certain of the psychologist's functions, e.g., marriage counseling or other counseling. 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. 39 Perhaps, despite the current deprecation of the philosophy of confidentiality, 40 a clearly defined privilege for clients of certain social workers and of other counsellors not within the ambit of any presently recognized privilege, would be in the public interest. 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. 41

(3) 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

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37. See note 28 supra, City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951).
38. See note 23 supra.
40. See note 2 supra.
41. It is arguable that a professional practitioner's status as a licensee of the state per se has significance on whether confidentiality should be accorded, because such status may enhance the public's reasonable expectations of confidentiality. This would seem to be a consideration urging the licensing of those social workers whose functions deserving of confidentiality coincide with licensed psychologists' functions. But cf. Gellhorn, Individual Freedom and Governmental Restraints 105 (1956).
which confidentiality is rationally necessary or strongly desirable. There would seem to be neither need nor justification for confidentiality in connection with certain functions performed by some psychologists. Why, for example, should the client of an industrial psychologist, or of a psychologist engaged in polling public opinion, have the privilege of confidential communication? Yet the New York and Washington statutes\(^4\) seem broad enough to embrace all certified psychologists, and the Georgia, Tennessee, Arkansas and Kentucky statutes\(^4\) seem broad enough to embrace all licensed psychologists.\(^4\)

However, the most significant criticism of the six statutes is probably that the nature of the client-attorney relationship is so different from that of the client-psychologist relationship as to make equating the two for purposes of privileges unrealistic and unwarranted. The justification most often advanced for the client-attorney privilege is the need, for proper fulfillment of the relationship, of frank and complete disclosure by the client to his attorney, and the necessity of confidentiality to induce such disclosure.\(^4\) Doubtless complete disclosure is often also needed in the client-psychologist relationship, but in the practice of psychology, broadly defined, the necessity of confidentiality to promote such disclosure is not as pervasive and often probably not as cogent as in the client-attorney relationship. Certain, perhaps many, of the problems for which psychologists' clients seek aid may involve no inhibitions, theoretical or practical, against disclosure of all of the facts by them to their psychologists. This would seem normally to be true, for example, of the typical relations between clients and their industrial psychologists. But the attorney's client is typically in trouble or in reasonable apprehension thereof and correspondingly feels in need of a confidentiality certain to withstand all intrusion, especially from the state.\(^4\)

\(^4\) See note 6 supra.
\(^3\) See note 5 supra.
\(^4\) See note 23 supra. The mischief criticized in this paragraph of the text in practice may be mitigated considerably by the doctrine, applicable generally in privileged communication relationships, that confidentiality of communication is essential to privilege.


\(^4\) It seems to this writer that the raison d'etre of the client-attorney privilege properly indicates emphasis not so much on the privilege's conducent to full disclosure to the attorney as on a person's right of privacy in certain vital human relations, and the correlative obligation of the attorney to respect the right under sanction of a "sense of treachery" for disclosing confidences. See 8 Wigmore § 2291 at 557, Louisell, supra note 32, at 109-15; cf. Barber v. Time, Inc., 348 Mo. 1199, 1205, 159 S.W.2d 291 (1942), Prosser,
Of course there is no gainsaying that many of the clinical psychologist's patients are in serious trouble growing out of maladjustments or neuroses. This is why the privilege of confidentiality is favored, as later developed, for those of them undergoing psychodiagnosis and psychotherapy. Even so, their troubles do not typically involve, as do those of the attorney's clients, threats of exercise of the coercive powers of the state, either directly as the prosecutor of criminal proceedings or less directly as the authoritative adjudicator of private disputes. It is against state power that the protections of privacy and confidentiality seem to exert their most significant sanctions and have been demonstrated historically to be essential to the adequate protection of freedom.\textsuperscript{47}

Fortunately it seems possible to accord confidentiality to those client-psychologist relations, the nature of which require or justify confidentiality for proper fulfillment of the relationship, without blanketing within the protection all client-psychologist relationships whether or not they need the privilege. The trouble with the New York statute and the five other statutes is that the concept "psychologist" is descriptive of too many functions to justify its use as the definer of a confidential communication privilege.\textsuperscript{48}

It is therefore submitted that the New York statute and five similar statutes already enacted are defective in placing the confidential relations and communications between a psychologist and his client on the same basis as those provided by law between attorney and client. But there is a sound rationale strongly justifying, if not requiring, confidentiality for client-psychologist communications in certain of the many types of relationships between them. In brief, it seems to this writer that the demonstrable need is for confidentiality for communications between a patient and his licensed or otherwise authorized psychodiagnostician and psychotherapist, whether the professional practitioner be a medical psychiatrist or a

\textsuperscript{47} See Polanyi, The Logic of Liberty 46 (1951)

\textsuperscript{48} See note 23 supra.
non-medical psychologist. This need is well put in *Taylor v. United States*.49

In regard to mental patients, the policy behind such a statute [patient-physician privilege] is particularly clear and strong. Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. 'The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express, he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. It would be too much to expect them to do so if they knew that all they say — and all that the psychiatrist learns from what they say — may be revealed to the whole world from a witness stand.'50

A study of the literature of psychodiagnosis (whether psychoanalysis or otherwise) and psychotherapy sustains the quoted observations. It has accurately been noted that there is hardly any situation in the gamut of human relations where one human being is so much subject to the scrutiny and mercy of another human being as in the psychodiagnostic and psychotherapeutic relationships.51 Implicit in the nature and processes of psychodiagnosis and psychotherapy is a profound prying into the most hidden aspects of personality and character, a prying often productive of disclosure of secrets theretofore unknown even to the conscious mind of the patient himself. Sometimes the processes are aided by hypnosis or drugs, temporarily putting beyond control of the patient all deliberate choice as to the extent, continuation or termination of the inquiry. Obviously disclosure at large of data thus procured might have the most significant consequences for the reputation and status of the patient, and typically he is well aware of the potentialities of disclosure. It is hard to see how the psychodiagnostic and psychotherapeutic functions adequately can be carried on in the absence of a pervading attitude of privacy and confidentiality. Such an attitude

50. The quoted portion within this quotation from the court's opinion was taken by Edgerton, J. from Guttmacher and Weihoen, *Psychiatry and the Law* 272 (1952). Cf. *Leyra v. Denno*, 347 U.S. 556 (1954). See, however, D.C. Code Ann. §14-3-8 (Supp. 1956), which was amended about five months after the *Taylor* case was decided so as to exclude privilege for evidence relating to mental competency in criminal trials and proceedings involving the mental condition of the accused.
can hardly exist without sure guarantees against disclosure of the patient's secrets. It seems clear that such guarantees must include organized society's ultimate safeguard against revelation, namely, privilege against legally coerced disclosure in all circumstances save that of voluntary and intelligent waiver of the privilege by its owner, the patient. It seems accurate to conclude, therefore, that a patient's right of confidential communication to his psychodiagnostician and psychotherapist is a function of his right to engage and get help from such services. If he has a right to obtain such services, he has a correlative right to the essential confidentiality of communication.

It is also submitted that the foregoing conclusions are sound even on the assumption that Wigmore was correct in rejecting the patient-physician privilege as such. His famous four conditions of legitimate privilege all appear to be fulfilled in the case of communications to a psychodiagnostician or psychotherapist. The communication originates in a confidence, the inviolability of that confidence is vital to the achievement of the purposes of the relationship, the relationship is one that should be fostered, the expected injury to the relationship, through the fear of later disclosure, is greater than the expected benefit to judicial administration of forcing breach of the confidence. A distinction apparently basic, recurrent in the literature, is well noted in Taylor v. United States "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."

52. In the case of all of the professional communication privileges the right to the privilege, i.e., the ownership of it, is in the client or lay person, the correlative obligation of secrecy is on the professional person. McCormick, Evidence § 73 (1954), 8 Wigmore § 2196.

53. However appealing the argument for reduction of the conventional patient-physician privilege so that "the presiding judge may compel disclosure, if in his opinion the same is necessary to a proper administration of justice," N.C. Gen. Stat. § 8-53 (1953), see McCormick, Evidence § 81 at 166 (1954), Leusink v. O'Donnell, 255 Wis. 627, 632, 39 N.W.2d 675 (1949), it is submitted that in any event such a "discretionary" privilege is clearly inadequate to the needs of the psychotherapist's patient. See note 56 infra, cf. Shoen, Psychologists and Legality: A Case Report, 5 Am. Psychologist 496 (1950).

54. See note 30 supra.
55. See text accompanying notes 63-67 infra.
56. 222 F.2d 398, 401 (D.C. Cir. 1955). It is cogently argued by Rogers, A Physician-Patient or Therapist-Client Relationship in Krout, op. cit. supra note ** at 135, 136, that the patient-psychotherapist relationship differs essentially from the conventional patient-physician relationship which prevails in those situations which are clearly and almost solely organic. In the latter, normally the patient is relatively passive and the physician active, it is the physician's diagnosis and treatment that is all important, it is secondary or even immaterial whether the patient has any basic understanding
It must be conceded that rejection of the kind of provision for confidentiality of the six enacted statutes in favor of the foregoing rationale justifying privilege only for the patient of the psychodiagnostician and psychotherapist has the disadvantage of substituting for the broad concept "psychologist," which because of its comprehensiveness tends to preclude problems of interpretation as to applicability, the narrower concept "psychodiagnosis and psychotherapy", which inherently invites interpretation. A judicial attempt at precise definition of psychodiagnosis and psychotherapy for purposes of fixing entitlement to the privilege would present a formidable task, occasioning perhaps an uncertain and inconclusive meandering line of interpretation. Distinguishing between psychodiagnosis and psychotherapy on the one hand, and certain other functions performed by psychologists on the other, presents all the definitional problems of distinguishing between "treating the abnormal" and "counseling the normal." Attempts at distinctions as they evolved from case to case might produce definitions as relative, hazy and overlapping as those of "health" and "sickness", "vitality" and "enervation", "well-being" and "malaise."

It is apparent that no attempt has been made in this article to define psychodiagnosis or psychotherapy for the purpose of prescribing the conditions of their legitimate practice by the non-medically trained psychologist. That must await another time. Perhaps in respect to this problem the hour is so late that one should not speak at all unless he is willing to name the solution for the day. This the present writer is still unable to attempt. It is a problem in the first instance to be threshed out by the medical profession, particularly its psychiatric branch, and the psychological profession, and still to be authoritatively threshed out in some localities. This problem, the resolution of which is vital to the public welfare and which increasingly engages public interest, may represent one of the illness or theory or method of cure. But the very art of successful psychotherapy seems to consist in helping the patient learn for himself the causes of his conduct and the methods of correction. See also May, The Work and Training of the Psychological Therapist, in id. at 161, 170-80. Of course this distinction is as relative, and involves from a therapy viewpoint about the same overlap, as that between "mind" and "body." Interestingly illustrative of the current flux in emphasis as between "psyche" and "soma" is the fact that while, apparently, "internal medicine turns hopefully to psychology in tracing etiology (in cardio-vascular, gastro-intestinal, genito-urinary, and other pathologies), psychiatry (which is preeminent psychologically) is veering toward the organic viewpoint." Krout, Can Psychologists and Psychiatrists Share Their Responsibility to the Public? in id. at 103, 108.

57. See notes 3 and 6 supra.
58. See note 23 supra.
those conflicts of expert opinion which ultimately has to be settled by non-professional or lay judgment.60 In the meantime the inherent difficulty of the problem is well put by Shakow in his famous imaginary dialogue between a psychiatrist and a psychologist.61

PSYCHIATRIST I was going to say last night that of all the aspects of your training program, the part about which most questions would arise among psychiatrists is, of course, that relating to therapy. This is the area in which the greatest conflict exists. One has here all the problems that stem from traditional medical control of the field—the natural insistence by the physician that treating the sick person is his prerogative.

PSYCHOLOGIST I recognize the central nature of this problem in the relationship of the two professions. Some have held that this crucial question could be solved by defining the 'sick' person. It is my belief, however, that a satisfactory definition cannot really be formulated, and even if formulated, it would not be too helpful. Obviously, the medical man is, by the very nature of his work, bound to pass over from the problem of treating disease to the problem of preventing disease, and once he does that, he necessarily leaves the realm of dealing with the sick person. When you broaden 'sickness' to include 'potential sickness' you cover a rather wide territory.

PSYCHIATRIST To say nothing of the problems lying in the immense borderline area between health and disease. Let's not even raise the question which has been asked by some, whether psychological sickness is of the same order as physical sickness.

PSYCHOLOGIST From the psychologist's side the problem, though different, is also great. The psychologist is interested in the functioning of the normal organism. He is naturally interested in the variations in behavior—not only the natural biological variations, but also the more extreme ones that border on the pathological. In the final analysis, can we put it any differently than this? Psychologists work from the normal end of the distribution toward the middle, and psychiatrists work from the pathological end toward the middle. There is bound to be a very considerable area of overlap (to a slight degree extending even to the other extreme), an area of overlap where definition is not, and cannot be, clear. Is not our major concern with the development of adequately prepared professional people who have a care for the needs of the person studied, who are sensitive to the range of problems in their own field and to the problems of colleagues in other fields, who are appreciative of social needs, and who above all possess essential good will? Under such circumstances couldn't we depend on specific problems being taken care of satisfactorily as they arise?

It is noteworthy that at least two states already have expressly embraced psychotherapy within their definitions of the practice of

60. See Note, 51 Colum. L. Rev. 474, 488-91 (1952).
61. Shakow, supra note ** at 381-82.
It does seem safe to conclude at this time that to the extent the psychologist is or may be determined to be an authorized practitioner of psychodiagnosis and psychotherapy, those of his patients who invoke his services in those capacities, as well as the psychiatrist's patients, should be entitled to the privilege of confidential communication.

Recognition of a patient-psychologist privilege even on the limited basis stated above will hardly find acceptance by those eminent evidence scholars whose antipathy toward the philosophy of privilege proceeds from a realization of the social importance of accurate fact finding in litigation, and from their convictions that the values of confidentiality in practically all relations must be subordinated to ascertainment of the truth in legal proceedings. But it seems to this writer, who of course would not deny the social importance of accurate fact finding, or that full disclosure of relevant facts is important to complete and fair trials, that too often in contemporary thinking there is failure adequately to evaluate the significance to human freedom of well-based privileges of confidential communication. Moreover, it seems that there is a tendency to overemphasize the value to the adjudicative processes of forcing the professional man to disgorge in court secrets confided to him. Often the communication pertains to an objective fact, the ascertainment of which if really important to just decision in a lawsuit, is normally feasible for a competent and diligent counsel from sources extrinsic to the communication. This seems increasingly true with the developments of modern discovery. The fact of availability of the sought data from extrinsic sources does not undermine the psychological and moral importance to the individual of confidentiality of communication. The fact that he can talk freely with his professional adviser without enhancing his difficulty or embarrassment remains, even if he is aware that his predicament may be exposed from extrin-

63. See note 2 supra.
64. See Louisell, supra note 32, at 107-15.
65. The observation made in respect of the privilege against self-incrimination often seems apposite to confidential communication privileges: "It is far pleasanter to sit comfortably in the shade [in India] rubbing red pepper into a poor devil's eyes than to go about in the sun hunting evidence." Quoted in 8 Wigmore § 2251 at 315.
sic sources. Where the communication does not pertain to an objective fact ascertainable independently of the communication, but rather to a subjective mental state relevant in the litigation, it is true that forcing open the mouth of the spouse, lawyer or psychotherapist may be not only a highly convenient aid to accurate fact finding, but in some instances the *sine qua non* of discovery of the full truth. But it is just such situations, where there is lacking the possibility of objective checks on the truth of testimony, that occasion the gravest temptation to perjury by the holder of the secret. This is apparently why in the legal thought of a number of European countries emphasis is placed upon the moral importance of refraining from coercion of witnesses in matters of conscience. Such coercion, in the face of conflicting concepts of loyalty and duty, is considered to put witnesses in morally intolerable positions, and to be productive of perjury. It seems to this writer that any values to judicial administration inherent in attempts to force the psychotherapist to disgorge the secrets of his patients are over-balanced by (1) the inducement to perjury implicit in such attempts and (2) the harm to the human personality, and hence to freedom, in governmental forcing of a serious conflict of conscience.

Ultimately, the evaluation of the social and moral importance to human freedom of any confidential communication privilege, in relation to the significance at a trial of foreclosing ascertainment of the full facts, involves value judgments, the testing of which, so far as known to this writer, is presently subject to no scientific technique. Without gainsaying the importance to the individual involved in litigation of accurate fact ascertainment, it is obvious that for every such involvement a person typically has numerous relations — and relations with a psychotherapist are in modern society increasingly illustrative — wherein confidentiality is promotive of vital personal interests and therefore important to human freedom. Moreover, when it is the state which may be the opponent of the claimant to privilege, as in criminal cases, there is no sound reason automatically to foreclose the issue against such claimant. Such a foreclosure seems to this writer to be the function of a philosophy which deems state processes *per se* valuable and significant and individual interests *per se* subordinate, a philosophy whose devastating effects on human freedom often have been demonstrated by history ancient and recent, and are being demonstrated today (**To be continued**)
