A Re-Evaluation of the Attorney-Client Privilege (Part II)

James A. Gardner

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Evidence Commons

Recommended Citation
James A. Gardner, A Re-Evaluation of the Attorney-Client Privilege (Part II), 8 Vill. L. Rev. 447 (1963). Available at: https://digitalcommons.law.villanova.edu/vlr/vol8/iss4/1

This Article is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
A RE-EVALUATION OF THE ATTORNEY-CLIENT PRIVILEGE†

(Part II)††

JAMES A. GARDNER†††

IV

IDEALS AND VALUES AND A PROPER RATIONALE

NO SMALL PART of the value of the law as the politically ordered rules of social control lies in the respect for law which the people must maintain in their own feelings and attitudes in democratic society. Lord Denning has referred to this point in the following passage:

The lawyers assume that the law is an end in itself. They regard law as a series of commands issued by a sovereign telling the people what to do or what not to do; or they regard it as a piece of social engineering designed to keep the community running smoothly and in good order. Lawyers with this case of thought draw a clear and absolute line between law and morals; or what is nearly the same thing, between law and justice. . . . This is a great mistake. It overlooks the reason why people obey the law. The people of England do not obey the law simply because they are commanded to do so: nor because they are afraid of sanctions or of being punished. They obey the law because they know it is a thing they ought to do. There are of course

† This paper was originally written in partial fulfillment of the requirements for the degree of Master of Laws in the Faculty of Law, Columbia University, J. S. D. Program, 1957-58. It has since been revised.
†† Part I has appeared in Volume VIII, Number 3.
This paper was written prior to the author’s employment by the Department of the Treasury. Nothing contained herein necessarily represents the views of the Treasury Department.
some wicked persons who do not recognize it as their duty to obey the law: and for them sanctions and punishments must be inflicted. But this does not alter the fact that the great majority of the people obey the law simply because they recognize that they are under a duty to obey it. . . . People will respect rules of law which are intrinsically right and just and will expect their neighbors to obey them, as well as obeying the rules themselves; but they will not feel the same about rules which are unrighteous or unjust. If people are to feel a sense of obligation to the law, then the law must correspond with what they consider to be right and just, or, at any rate, must not unduly diverge from it. In other words, it must correspond, as near as may be, with justice.

The privileges are a part of the law and are identified with the law by the populace. If the privileges did not exist, to such extent as the problems heretofore mentioned in the absence of the privilege should arise, such problems would tend to leave the public with a sense of injustice and thus would tend to bring disrepute on the law. The presence of the privileges tends to preserve the respect for law which would otherwise be diminished. Hence, no small part of the value of the privileges lies, at least indirectly, in the respect for law which the people must maintain in their own feelings and attitudes toward law in a democratic society.

This respect for law is not only grounded in the practical considerations heretofore discussed but also in our ideals. Men tend to equate the law in accordance with their legal ideals, and in this idealism they must not be permitted to become disillusioned. Rigid adherence to the most efficient means, in areas dealing with human ideals but subject to the weaknesses that flesh is heir to, could tend to have such an unwanted result. Though eighteenth century ideals have not been realized, though man has fallen short of the hopes and plans of eighteenth century optimism, much of value has been accomplished, and many of the tasks that were begun remain to be worked over and consolidated through the use of reason and experience of the nineteenth and twentieth centuries, against the background of the ideals of the twentieth century which are now coming to realize themselves. Among these tasks is the rewriting of our law of evidence. Here, one of the most important questions immediately facing us is what should be the position of the privileges in this modernized system of evidentiary proof. Here, the question of ideals and values must be considered no less than practical problems. One such ideal

186. As Dean Pound might put it, law must be backed by a social-psychological guarantee. Pound, The Task of Law 87 (1943); and see also id. 79-85
is that which makes for the greatest accuracy in fact-finding. Yet, there are competing values in the form of ideals which visualize the protection of the confidential nature of certain close, personal relationships. Since the ideals are on different levels, it is difficult to weigh them against each other, but it can be done, and the easiest way to do it is by reducing each component to the level of a social interest. When this is done, the personal privileges, as important interests of personality, appear more important in a narrow area than the value of the highest degree of efficiency in the trial of facts, especially when such efficiency is reduced on the average only to an imperceptible degree. Yet these interests of personality can be better defined, evaluated, protected, developed, and delimited if they can be subsumed under a larger premise. We will seek such a major premise in the hope that it will enable us to test our legal principles by the more ultimate teleological ideals of the end or purpose of law in our society — for, after all, trial efficiency is only an instrumental value. Interests of personality are on a higher level — yet, to what star can they be hitched? The social interest in the individual life cuts both ways. However, if the essential values on both sides of the ledger sheet can be preserved, the result will be a happy compromise.

The inarticulate major premise may be such that it cannot readily be put into words, such that it has never or seldom been called to mind, but the writer will endeavor to set it forth in the remaining pages of this section. People have long understood it intuitively.


188. The writer will assume here the ultimate value to be that of civilization, in the Poundian sense, as that which makes for the raising of the powers of the individual to their highest peak through the conquest of nature, both internal and external. Hence, the end of law is civilization, and this is best promoted in a mature culture by the according of full recognition to the social interest in the individual life. On this point, in addition to the various writings of Dean Pound, see generally the following articles by the writer: The Supreme Court and Philosophy of Law, 5 Vill. L. Rev. 181 (1959); The Sociological Jurisprudence of Roscoe Pound, (2 pts.) 7 Vill. L. Rev. 1, 165 (1961-62). See also text at notes 200, 215 post.

189. Survey 12.

190. Paraphrasing Holmes, in The Path of the Law, 10 Harv. L. Rev. 457, 466, 467, 469 (1897): "Behind the logical form lies a judgment . . . often an inarticulate and unconscious judgment, it is true, and yet the very root of the whole proceeding." He points out that "the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage," the result of which is "to leave the very ground and foundation of judgments inarticulate and often unconscious. . . . Still it is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for deserving that end are stated or are ready to be stated in words."

191. Thus, Holmes, J., urging judicial restraint in reviewing decisions of lay administrators, in C.B. & Q.R. Co. v. Babcock, 294 U.S. 585, 598 (1907), spoke of "an intuition of experience which outruns analysis and sums up many unnamed tangled expressions."
itively, without necessarily being able to rationalize and articulate it.\footnote{192}

In fact, rationalization has thus far failed. The privileges are a part of our Anglo-American heritage, our thought-ways, our social and moral ethos. And this heritage from the past is augmented by new ideals in the light of the crisis and aspirations of the twentieth century.\footnote{193} That such ideals have long been with us as abstract ideals cannot be denied, but they have been given a more prominent place in the scheme of values in this century, particularly in the realization of rights based thereon, than they have heretofore actually occupied. For example, the privileges recognize an aspect of the value of personality in the area of individual freedom and privacy, rather than in the area of security of possessions and transactions (property and contract rights). This actualizing of a new basis for the recognition of the personal privileges can be seen in the receding emphasis on the rights of property and the increased emphasis on the more intangible personal rights throughout the law. For example, the legal recognition of the intangible aspects of the rights of personality tends to make the personal privileges substantive rights within themselves rather than procedural rights for the securing of the substantive rights of property and contract, and this view may be gaining recognition. The following quotation is a further recognition of this change:

Toward the end of the nineteenth century a tendency became manifest throughout the world to depart radically from fundamental ideas which had governed the maturity of legal systems. In 1891, Jhering formulated it thus: ‘Formerly high valuing of property, lower valuing of the person. Now lower valuing of property, higher valuing of the person.’ He went on to say that the line of legal growth was, ‘weakening of the sense of property, strengthening of the feeling of dignity (\textit{Ehre})’. This states the matter well if by Ehre we understand the idea of the moral and so legal worth of the concrete human individual.\footnote{193a}

Dean Pound has written of the “balancing of interests,” giving us a guide to weigh the competing values in our society. He has shown us that the conflicting principles in competition for the mastery\footnote{194} must

\footnote{192. On intuitive understanding generally, see \textit{Cardozo, The Nature of the Judicial Process} (1921).}

\footnote{193. See, for example, \textit{Sorokin, The Crisis of Our Age} (1941); \textit{Sorokin, The Reconstruction of Humanity} (1949); \textit{Langer, Philosophy in a New Key} (3d ed. 1957). The writer uses the term “new” here in the sense of meaning ideals which are now beginning to realize themselves as contradistinguished from ideals such as those of the Greek stoics, which remained faraway visions, longed for, but impossible of concrete attainment for the civilization of the time and place.}

\footnote{193a. \textit{Pound, The Ideal Element in Law} 118-19 (1958).}

\footnote{194. Paraphrasing \textit{Cardozo, op. cit.} note 192, 40-41.}
be reduced to the common denominator of social interests and balanced in the light of "reason and experience." And the late Justice Cardozo has pointed out that just as a judge cannot decide a case by any set formula, so one cannot balance interests in the neat and easy manner of Justice Roberts in the constitutional law area. Interests can only be balanced by a consideration of all of life itself. That is, in a sense, the lesson of Charles F. Curtis's brilliant essay on The Ethics of Advocacy, and that is the thesis of the writer as to the rationale of the personal privileges in Anglo-American law. The end of law is justice. Justice has been defined as giving to every man his due and as the ordering of an ideal relation among men. Yet, in recent times, a broader vision of justice has been set forth as that which considers the entire picture, the totality of competing social interests, as that which makes for civilization, that which raises the powers of mankind to their highest pitch for the civilization of the time and place. Courts have always struggled to achieve justice, ignoring truth at times, when the state of development of the law did not permit them to reach the desired result by the generally presupposed route of truth. Thus, our law has a long history of resort to legal fictions to achieve the desired result. Professor Wu has commented on the matter as follows:

... practical reason being the soul of the law, its essential function is to serve the ends of justice. Where the law looks for the truth, it is for the purpose of rendering justice. Where it seems to disregard truth, it is also for the purpose of rendering justice. ... Law is the measure while the facts are the things to be measured. In other words, although justice is based upon truth, truth alone does not constitute justice. Only on a higher plane can we assert that justice and truth are one. On the human plane, they are inter-related, but do not fuse into a unity. This does not mean that justice is unreal or untrue. It is real and true, but not

---

195. See note 37, ante. For a succinct statement of Dean Pound's legal philosophy, see My Philosophy of Law 249-69 (Rosenwald Foundation 1941). On the balancing of interests, see Pound, Survey passim.

196. "When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." Roberts, J., in United States v. Butler, 297 U.S. 1 (1936).

197. Cardozo, op. cit. note 192, 112. "If you ask how he [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection, in brief, from life itself."


199. Cf. Pound, Justice According to Law 2 et Ch. I passim (1951). "In different theories which have been urged justice has been regarded as an individual virtue, or as a moral idea, or as a regime of social control, or as the end or purpose of social control and so of law, or as the ideal relation among men which we seek to promote and maintain in civilized society and toward which we direct social control and law as the most specialized form of social control. Definitions of justice depend upon which of these approaches is taken. Let us look at each of them." Id. 2.

200. See Pound, Interpretations of Legal History 141-65 (1923).
in the sense that it corresponds with empirical realities. It is real and true in the sense that it corresponds with the reality of the moral order. . . .

In her brilliant study of the oath, Professor Silving stated a principle which is equally applicable to the personal privileges:

The democratic state must limit its claim to man's truth to instances of clear superior interest, and it must yield that claim in cases where disclosure of truth cannot be expected from the individual. Such cases include all those involving the accused or the suspect, as well as all persons closely connected with them. With or without oath, no man should be bound by law to make disclosures which would cause him or persons close to him substantial harm. Man should be held by law to average law abidance, not to the utmost self-sacrifice.

In relation to the individual lawsuit, Mr. Curtis has put it thus:

Justice is something larger and more intimate than truth. Truth is only one of the ingredients of justice. Its whole is the satisfaction of those concerned. It is to that end that each attorney must say the best, and only the best of his own case.

In a famous and oft-quoted passage, the late Dean Wigmore set out what he termed the "General Principle of Privileged Communications." He held that there are four fundamental conditions which must be predicated as necessary to the establishment of a privilege, to wit: The relationship must originate in confidence; the confidentiality must be essential to the relationship of the parties; it must be a relationship which deserves the protection of the community (that is, "ought to be sedulously fostered"), and, finally:

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.

The fourth condition is the one which might be described as of "culminating importance," and it may be restated as essentially the balancing of the opposing interests involved. This was well put in a recent

202. Silving, The Oath: II, 68 YALE L. J. 1527, 1577 (1959). See also id. 1574-77, where Miss Silving discusses the subject of "human dignity."
203. VIII WIGMORE § 2285. These criteria are criticized in Functional Overlap 1229-31. The writer believes, however, that the objections raised by the Comment on page 1230 thereof are not really sound because they are the mere "details" which Wigmore himself considered in connection with the evaluation of the privilege. The writer has also endeavored to consider all aspects of the question in the present evaluation. They can all be subsumed under Wigmore's four categories when these are broken down (as the Comment breaks them down).
case decided by the Supreme Court of New Jersey, where the difficult balance between full disclosure and privileged communication was struck by the court:

Throughout their judicial endeavors courts seek truth and justice and their search is aided significantly by the fundamental principle of full disclosure. When that principle conflicts with the attorney-client privilege it must, of course, give way but only to the extent necessary to vindicate the privilege and its underlying purposes. The matter is truly one of balance.204

Yet, as has been pointed out, the interests may be balanced only from an understanding of life itself.205 This means that to a considerable extent the importance that one will attach to the privileges, when weighed against the need for evidence, will depend to a substantial degree on his understanding of the problem of evidentiary proof as integrated with his attitude toward social values generally.

The result is that one who puts greater emphasis upon the importance of full disclosure of all available evidence, so that a verdict will be more accurate, will tend to disapprove the privileges and to favor their abolition or at least their restriction within narrow limits. Teachers of evidence who are able masters of their specialty are likely to be found in this category.206 Thus, Professors Morgan and Maguire, writing in 1937, lamented that “Almost nothing has been done to limit the privilege of suppressing the truth.”207 They advocated the construction of a well-designed code upon the principle previously urged by Thayer, namely, that nothing shall be received in evidence which is not logically probative of some issue of fact; and that everything which is logically probative of some issue of fact should be admitted unless excluded on some clear ground of policy.208 Elsewhere, Professor Morgan has indicated that he would admit all relevant evidence except that which is too remote, confusing, time consuming, or unduly prejudicial.209

Practitioners of the law and those who work in the regular social sciences are likely to consider the personal element and the broader social values as more important in the over-all picture than mere technical accuracy in fact-finding and hence to hold with the late Mr. Curtis that “Justice is something larger and more intimate than truth.”210

---

205. See text at note 197, and note 197 ante.
208. Id. 923, citing Thayer, A Preliminary Treatise on Evidence 530 (1898).
209. Loc. cit. note 102, ante; see also op. cit. note 28, ante, 22 et seq.; McCormick Ch. 16; VI Wigmore § 1864.
The writer has found that the practitioners almost to a man favor the privileges, and they tend to favor broad constructions of the rules of privilege.211 It should be noted that they generally assume the privilege to be much broader than it actually is. In fact, there is a tendency for lawyers not versed in the technicalities of the law of attorney-client privilege to assume that it covers all preparatory materials in the possession of a party's counsel. Furthermore, even when they have become aware of the more narrow boundaries of the privilege, they very much dislike to have to call the opposing attorney as a witness and will not do so if it can possibly be avoided. They will frequently go to great trouble to obtain their proof from other sources, and on matters not clearly important to their cases they will often forego the right of cross-examination of opposing counsel, even when they believe that to call him to the witness stand would improve their position.

The professional attitude of lawyers toward the privilege is reflected in the substantial amount of attention which has been devoted to the subject by the various bar associations in the present century. Generally, no special benefit has come from such professional consideration, as the predestined conclusion has been an invariable tendency to reaffirm a blanket approval of the privilege, often with a broadening of its coverage. More critical analysis of the privilege in today's world, however, is not the task of the organized bar. That is the task of the jurist and teacher. Nevertheless, the attitude of the organized bar and the attitude of scholars from other socially oriented disciplines is entitled to some weight.

The American Bar Association took a stand in favor of a broad interpretation of the attorney-client privilege in its *amicus curiae* brief filed in *Hickman v. Taylor*,212 while the Advisory Committee on the Federal Rules had proposed amending Rule 30 (b) as early as 1942.213 Within the writer's personal experience, the State Bar of California has in recent years taken an active interest in preserving the privilege in California in its present broad form.214 In the wake of recent wire-
tapping experiences, the New York Bar has undertaken new activities to prevent the frustration of the privilege in its most important area, the face to face situation.\textsuperscript{215} Today, the social scientists are devoting some of their attention to the study of law, and the area of confidentiality is proving to be of interest to them, especially to those who are working in such disciplines as psychology and sociology. These scholars tend to favor the preservation of the personal privileges. The writer has discussed the matter with a distinguished professor of sociology. Speaking on the basis of recent developments in psychology and social relations, this professor has advised the writer that the privileges are of social value and should be retained. He feels that the confidentiality which they afford is important for a free and easy personal relationship in the protected areas and that this is of some value in the practice of law but more especially in the practice of medicine, where there are higher values at stake than mere monetary damages.\textsuperscript{216} However, the writer must point out that these higher values are also present in those legal situations where the personal element predominates.

Professor Louisell has probably written more ably and extensively on the subject of privilege than any other legal scholar in the common law world. His views therefore deserve to be considered at some length and are entitled to great respect. Professor Louisell maintains that "the historic privileges of confidential communication protect significant human values in the interest of the holders of the privileges, and that the fact that the existence of these guarantees sometimes results in the exclusion from a trial of probative evidence is merely a secondary and incidental feature of the privileges' vitality."\textsuperscript{217} The privileges are widely accepted in European legal thought and western society generally. "In European legal thought 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 an intolerable position, resulting as to some in the likelihood of perjury. . . ."\textsuperscript{218} Professor Louisell observes that the privileges of husband and wife, attorney and client, priest and penitent, and physician and patient "are deeply rooted in our political and social fabric, as they are in the mores.
and ethos of at least western society. Western Europe considers them of value to accurate fact-finding in that they help avoid perjury, whereas the Anglo-American analysis proceeds on the premise that they are a hindrance to accurate fact-finding. The writer would comment that this latter analysis, probably stemming from Bentham, has been fostered since Bentham's time by the scholarly writers on evidence, particularly the teachers of evidence in the American university law schools. Professor Louisell assumes that the privileges may result in some loss of information to opposing counsel and ultimately to the trier of fact, but he nevertheless maintains that this loss of evidence is not so important on the debit side of the ledger as the positive values which the privilege affords:

[T]here are things more important to human liberty than accurate adjudication. One of them is the right to be left by the state unmolested in certain human relations. At least, there is no violence to history, logic or common sense in a legislative judgment to that effect. It is the historic judgment of the common law, as it apparently is of European law and is generally in western society, that whatever handicapping of the adjudicatory process is caused by recognition of the privileges, it is not too great a price to pay for secrecy in certain communicative relations.

The number of these relationships are few, however, and the area of protection accorded in each one is small:

Primarily they are a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers and from the nuisance of its eavesdropping.

This right to be left alone is a part of the value which men call freedom, which in turn is a part of that more comprehensive value concept toward which we are moving and which we are here struggling to articulate — even as our society is struggling to realize it. True freedom might be defined as the ability to do what one wills when he wills it. This, however, is an illusion, because it does not and cannot exist. The abstract concept ignores the conflicting desires of the individual personality, the demands of the primary group, the conflicting demands of the numerous groups that affect a person's life, the countervailing pull of diverse responsibilities, the sense of duty to the loved ones, and

219. Id. 108.
220. Id. 110.
221. Ibid.; and Professor McCormick recognizes that the disclosure of marital and professional confidences can "needlessly shock our feelings of delicacy." McCormick 166.
222. Louisell 110-11; see also Psychologist 743, 744.
the sense of obligation to society. Yet, freedom in the narrower sense of the right to be let alone, a part of that broader value of freedom in the socio-political sense, as the right to have some choice in one's work in life, one's mobility in space, and, at least theoretically, in the form of one's government, is an element in the recognition of the personal privileges. The relationship of the individual man to the problem of freedom in general is specifically applicable in the resolution of the place of the privileges in the law of evidence. That point is well made in the lines quoted at the beginning of this essay — there, from the standpoint of striking the proper balance. It is pointed up also in the following passage on freedom — here, from the standpoint of maintaining a responsible freedom by a ceaseless struggle (which seems to inhere in the nature of man):

The struggle to be free is inherent in the human predicament and is unique to man. The other animals have problems, but they do not have the problems of the integrity of the self-conscious individual who must always feel the tensions set up by the relationships between self and society. Since it is inherent in his predicament, the problem of freedom is never fully solved. Being both social and individual in his requirements and being self-conscious about both, man finds himself in an unending emotional crisis. Freedom is not something which can be purchased once and for all. It is not a matter in which there is any easy security. The human situation is such that we have neither security nor simplicity of defense.

To such extent as freedom is an important value, to that extent the privileges must be considered in connection with the balancing of freedom and responsibility as a part of the right of choice against the opposing need of the state for efficiency in the administration of justice in the more technical sense.

By the same reasoning, this general sense of freedom coincides with (and is reinforced by) other values which are a part of the overall framework of man's life in society. One of these values lies in the desire to be free of the sense of treachery. Another lies in the felt need to be free in the sense of having some degree of discretion in an area where the circumstances disclose a case that is not clear-cut (i.e., neither black nor white).

223. Professor Sorokin to his class in sociology (Society, Culture and Personality), Harvard University, Fall Term, 1947, the writer being present. And see Sorokin, Society Culture and Personality 469-78 (1947). "An individual is free when he can satisfy all his desires by the means at his disposal. If the sum total of his desires exceeds the sum total of the means for their satisfaction, he is unfree." Id. 469.

Both Wigmore and Louisell have deemed the sense of treachery to be important, and Radin recognized it as controlling when he justified the privilege on the basis of loyalty and the sense of honor. Louisell points out Dean Wigmore’s answer to Bentham, emphasizing the sense of treachery, the belief that no man of elevated mind would stoop to the occupation of legal counselling if required to disclose his client’s confidences, the appearance of inconsistency which the occupation of such a conflicting position would create, and the importance of peace of mind to counsel. He reminds us that even Bentham recognized the priest-penitent privilege as a necessary concomitant to religious freedom.

He makes the following observation on the marital privileges:

A marriage without the right of complete privacy of communication would necessarily be an imperfect union. Utter freedom of marital communication from all government supervision, constraint, control or observation, save only when the communications are for an illegal purpose, is a psychological necessity for the perfect fulfillment of marriage...

Louisell urges precise analysis and investigation and inquiry “into the true nature and psychological, social, historical and moral importance to human freedom of claims to privilege” in order to best separate the genuine from the spurious; and he believes that the present “hodgepodge treatment” of the privileges, which lumps them all in a class with the exclusionary rules generally, has resulted in much confusion, making the privileges a matter of status, the cause of professional pride and jealousy that has resulted in the spawning of new and spurious privileges.

He feels that Wigmore has contributed to the confusion by his insistence on a strict utilitarian basis for the privileges, and he refers to Professor Morgan’s “telling attack on the Wigmore thesis.”

Professor Louisell has set out what the writer believes to be the soundest evaluation of the place of the privileges in the law of evidence today. Louisell recognizes that the really important privileges are those of husband and wife, attorney and client, priest and penitent, and,

---

226. Id. 113. There are actually two such confidential privileges: (1) The privilege not to have disclosed confidential communications between the husband and wife; and (2) the privilege of a spouse not to have the other spouse testify against him. See VIII WIGMORE §§ 2332-41, 2227-45.
228. Id. 111. Professor Louisell believes that Wigmore’s thesis, justifying the privilege as promoting free consultation, is not the chief reason why the privilege should be accorded legal recognition. Rather, it is the sense of treachery argument which Wigmore makes in answer to Bentham (VIII WIGMORE § 2291 at 557). Here, Louisell quotes from Bacon’s Essays, XX, Of Counsel, as to the partial confidences which men put in others, but in their counsellors, “they commit the whole: By how much the more, they are obliged to all Faith and integrity.” (Louisell 111-13.) To compel counsel to disclose these confidences would pervert the function of counselling.
229. Louisell 112.
to a lesser extent, physician and patient. The whole tenor of his article (supported by important passages in particular) is to the effect that the privileges are more than mere procedural rules of exclusion and are actually substantive rights, the infringement of which would be manifestly unfair even in those areas where the courts have the discretionary power to remove the immunity. He states that in the federal courts today much confusion exists as a result of the failure of the bench and bar to understand the true nature of the privileges. He urges that:

[T]here are things more important to human liberty than accurate adjudication. One of them is the right to be left by the state unmolested in certain human relations. At least, there is not violence to history, logic or common sense in a legislative judgment to that effect. It is the historic judgment of the common law, as it apparently is of European law and is generally in western society, that whatever handicapping of the adjudicatory process is caused by recognition of the privileges, it is not too great a price to pay for secrecy in certain communicative relations — husband-wife, client-attorney, and penitent-clergyman.

While recognizing “the social importance of accurate fact finding,” Louisell prefers “the significance to human freedom of well based privileges of confidential communications.” Nevertheless, he realizes that there is no absolute or final answer:

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.

However, we are not left without hope of a better answer in the future. This will require new insights, based upon experience and scholarly analysis. The rationale of the privileges and their proper place in the law of evidence must receive much further study in the scholastic world:

[The problem] cannot be definitively settled until (1) the experience of all the great traditions of the legal world, East as well as West, on the problem of confidentiality are thoroughly analyzed

230. Id. 107-08.
231. Id. 110-11, 118, 120-23.
232. Id. 110.
233. Id. 749.
234. Id. 750. Dean Pound has dealt with this problem of evaluating different interests of society through the judicial process in a most penetrating manner. A good example is his Contemporary Jurisprudence 57-58 (1940). The writer submits that Pound’s studies point to the same conclusion that Professor Louisell has reached, namely, that the particular problem involves value judgments which at the present stage of civilization cannot be scientifically tested.
by some great scholar, or (2) psychoanalytic learning focuses up[on] some additional rationales, or (3) perhaps some genius of great spiritual insight into the realities of the human personality, makes vivid to us the needs of the human mind and soul in this area.  

The history of Anglo-American law is proof that procedure is the most important item in the preservation of our liberties. Without effective procedures for the enforcement of substantive rights, such rights become mere "preachments" or vague and ineffective ideals.  

As Lord Denning has reminded us:

... the English law respecting the freedom of the individual has been built upon the procedure of the Courts: and this simple instance of priority in point of time contains within it the fundamental principle that, where there is any conflict between the freedom of the individual and any other rights or interests, then no matter how great or powerful these others may be, the freedom of the humblest citizen shall prevail over it.

Moreover, the rule of law applies to all alike and in a general kind of way which cannot take into account individuality. The uniqueness of personality has led to a revulsion from the over-mechanization of justice in the nineteenth century to the individualization of justice through judicial discretion in the twentieth century.  

The judges, however, can move only by "molecular motions" and within the narrow confines of judicial tradition and sanctioned practice. Individualized justice must be justice according to law, and this necessarily requires rules, doctrines, principles, and standards.  

"The standards of the law," wrote Holmes in _The Common Law_, "are standards of general application. The law takes no account of the infinite varieties of temperament, intellect and education which makes the internal character of a given act so different for different men. It does not attempt to see men as God sees them. ..." This is why, generally speaking, the application of the rules of privilege should not be a matter of judicial discretion. It would leave too much to "the luck of the draw" in an area where the people need to feel reasonably secure and the lawyers

---

235. Letter from Professor David W. Louisell to the writer, December 3, 1959, as qualified by letter of January 21, 1960, from Professor Louisell to the writer, quoted with permission. And see text at note 281 et seq., post. Louisell 114-15 (emphasizing the importance of comparative study).


239. See generally Pound, Hierarchy of Sources and Forms in Different Systems of Law, 7 Tul. L. Rev. 475, 485 (1933).


need to be able to know the answers in the course of their preparations and in trial, in the rough and tumble of the combative adversary process. Moreover, it is these "infinite varieties of temperament, intellect, and education," both in the people themselves and in the judges who administer the law, which have caused eminent jurists and scholars to differ so strongly and sometimes ardently as to the proper place of the privileges in the law of evidence. This is why there is no easy answer to the problem, why it must be worked out in terms of a balancing of the social interests which the state exists to protect.

Because personality is what it is, we can never know the ultimate reality in relation to the privileges. Because of the antinomy between liberty and government, we can never know just where to draw the line as to that which the state should require one to produce and that which it should declare to be in a category immune from production. As Cardozo has elegantly put it in relation to the problems of jurisprudence in general: "Antithesis permeates the structure. Here is the mystery of the legal process, and here also is its lure. These unending paradoxes tease us with the challenge of a riddle, the incitement of the chase. The law, like science generally, if it could be followed to its roots, would take us down beneath the veins and ridges to the unplumbed depths of being, the reality behind the veil." The result is a public policy which endeavors to meet the current needs of the community, "the highest common factor of public sentiment and intelligence as ascertained by the judges assisted by the bar"; but "not an ideal standard to which the law ought to conform." Public policy is rarely up to ethical standards and usually falls below such standards. A person is not required to claim a privilege, and, in fact, the writer knows many people who would scorn to do so, at least under ordinary circumstances, though business generally has not reached that high plane of ethics, and perhaps the vast majority of people, both laymen and lawyers, will continue to use all of the available technicalities when it appears to

242. See Corwin, Liberty Against Government passim, esp. 181-83 (1948). But there are those who hold that "There is no proper antagonism between the role of society and that of the individual." While the man in the street thinks in terms of such an antagonism as necessary, society is never a separate entity from those who compose it. There are only differences of temperament among the individuals who compose a culture. The problem of the individual is not clarified by stressing the differences, but rather "by stressing their mutual reinforcement. This rapport is so close that it is not possible to discuss patterns of culture without considering specifically their relation to individual psychology." Benedict, Patterns of Culture 251-54 (1934). Professor Corwin suggests that the notion of liberty against government may be gradually eliminated under new social patterns in which man seeks self-realization in cooperation and community endeavor rather than self-advancement and self-exploitation. Corwin, op. cit. supra 182-83. See also Pound, Social Control Through Law 127 (1942).


244. Winfield, Ethics in English Case Law, 45 Harv. L. Rev. 112 (1931).

245. Id. 112.
their interest to do so. Therefore, we have felt it necessary to show that the law of privilege is inextricably intwined with a multitude of variegated problems of grave and far-reaching personal and legal consequences. However, these catch-phrase arguments and the related illustrations merely serve to point up the problem. The rationale of the privileges is contained in a trans-empirical value concept which justifies numerous principles of law and ethics and rules of social control. The privileges are only one series of components which can be subsumed under this larger value postulate. Recognized generally since ancient times, it is only now coming to be specifically recognized in the law in the areas of our finer personal sensitivity. For our purposes, a statement by Professor Lasswell seems to synthesize the postulate very well:

Our overmastering goal in interpersonal relationships may, I think, be stated in terms of human dignity. I affirm my own goal values in these terms, and conceive of the task of man as guiding the processes of society toward the realization of human dignity on the world scale in theory and fact. Among the component values designated by the term 'human dignity,' I understand the sharing of respect and affection. Respect is the deference that we give and deserve in our capacity as human beings, and on the basis of our individual merit. The presumption in favor of privacy follows from our respect for freedom of choice, for autonomy, for self-direction on the part of everyone. It is apparent, of course, that the presumption on behalf of privacy is refutable when the group, by democratic processes, decides that privacy is being used in ways that result in the infliction of damage upon the members of the group (including the individuals immediately involved), or when the group decides that an emergency exists in which the activities which are necessary to the survival of the whole, no longer admit of the accustomed forms of privacy.\footnote{Lasswell, The Threat to Privacy, in Conflict of Loyalties 121, 139 (1952). See also The Canadian Bill of Rights, which is entitled An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, Part I, Sec. 3 (a), (c), (d), and (e); The United Nations Declaration of Human Rights, esp. Articles 10 and 11. The Canadian Bill of Rights is set out in 37 CAN. B. Rev. 1-3 (1939). The principle of "human dignity" is well recognized in both of these documents.}

Professor McDougal has stated that "the most elementary considerations of human dignity" require "that private choice will be respected in the highest degree and that coercion shall not be applied to human beings beyond common need."\footnote{McDougal, Perspectives for an International Law of Human Dignity, Proceedings Am. Soc'y Int'l. L. 107, 118 (1959).}
an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.” And when old rules retain their vitality by reason of new or continued utility, “new reasons more fitted to the time have been found for them,” and “they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted.” Hitherto this process has been largely unconscious.248

The writer believes that this process has been at work in the case of the privileges. They remain important to the twentieth century. While they have a historical origin, they are not mere vestiges of the past. In part they are a concession to the weakness of human nature, but this is not the basis of their present justification. As the writer has shown, there are practical considerations which are grounded in history, human insecurity, the nature of our adversary system; and there are idealistic reasons, which have their origin in the twentieth century belief that justice is something larger and more intimate than truth, that the social interest in the individual personality is an intrinsic value to be protected and cultivated. Yet both the practical and the idealistic reasons are inextricably intwined, and the idealistic reasons, in their effect upon the attitudes toward the judicial system, also become practical reasons. Nevertheless, it is this idealistic basis, which is coming to be articulated as an actuality in the juristic comprehension, that can provide a sounder and more comprehensive rationale on which the privileges as well as other personal-social values shall rest securely. We choose to describe this rationale as the principle of human dignity.

The privileges deal with the concept of “human dignity” in its most formal sense, before the courts of law and governmental agencies, in matters of public record, often of unusual public interest. Yet the principle which entitles them to recognition goes far beyond this immediate sphere, to the outlook on life as a whole. In weighing the values which inhere in “the scientific principle,” as embodied in the recognized need for evidence, on the one hand, contrasted with “the dignity principle,” on the other, we can perceive that the two principles are pulling in opposite directions. One points toward the efficient and omnipotent state and machine-like justice; the other, toward the individual’s right to privacy, toward his right to subjective freedom of thought in a small but important sphere into which the omnipotent state cannot intrude. Choices do make a difference, and here the contrast points up the importance of the over-all problem. The difference might conceivably be as great as that of the inherent fear which exists in the police state, on the one hand, and the disordered state of Greek anarchy,

on the other. Yet the proper compromise might well represent a component of that general spirit of individual freedom which has been felt and cherished in English-speaking countries for so long.  

V

A PROCEDURAL POSTULATE AND SOME APPLICATIONS TO LIFE AND LAW

A. Formulation of a Jural Postulate:

Lord Acton spoke of liberty as "the delicate fruit of a mature civilization." He defined liberty as "the assurance that every man shall be protected in doing what he believes his duty against the influence of authority and majorities, custom and opinion." Historical study has shown a steadily widening process of respect for the integrity of the individual from the days of the Greeks and the Romans to the present time. The common law rights of Englishmen thrived and grew on English soil, were transplanted to America, united with natural law ideas from the Continent in the seventeenth and eighteenth centuries, and became the natural rights of man. Kent thought of the law as a rule of freedom whereby each and every individual could do whatever he might choose to do insofar as compatible with the freedom of each and every other individual to do likewise, according to a universal law. Hegel saw in history a process of evolution, a continual becoming from lesser to greater individual freedom, within the confines of the state. Dean Pound has written brilliantly of the stages of legal history and the ends of law in each stage. The result of his research and interpretations shows the end or goal of law as an ever-widening process working for the advancement of civilization through the improvement of the lot of the individual. Pound has classified legal history into five stages and has restated the ends of law for each of these stages. The first stage is the primitive law, in which the end or purpose of law is to keep the peace. The second stage is that of the strict law, in which the end is certainty and uniformity in the ordering of society. The third stage is that of equity and natural law, in which ideals of

249. For a frame of reference in respect to the related problem of modern scientific devices for the invasion of privacy, see generally Report of the California Senate Judiciary Committee on the Interception of Messages by the Use of Electronic and other Devices (1957).

250. ACTON, THE HISTORY OF FREEDOM AND OTHER ESSAYS 1, 3 (1907).

251. See generally POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (2d ed. 1954).

252. See POUND, THE SPIRIT OF THE COMMON LAW CHS. III and IV, esp. at 100 (1921).

253. See CAIRNS, LEGAL PHILOSOPHY FROM PLATO TO HEGEL 556 (1949); see also id. Ch. XII.

254. Id. 556; see also Ch. XIV.
ethics and morality are brought into the law through the development of reason. The end of law becomes the assurance of moral conduct as derived from reason, or the securing of individual rights derived from the nature of man as a rational creature. The fourth stage is that of maturity of the law. Here, the watchwords are "equality" and "security." The end of law is free individual self-assertion. The working out of individual rights is emphasized here; hence, emphasis is on equality, property, and mechanical adherence to fixed rules. The fifth stage, socialization of law, is marked by a new infusion of ethical notions into the law, and emphasis on social rather than individual interests. The end of law is the advancement of civilization through the protection of the social interests which are best designed to accomplish this purpose. A complete change of attitude has been responsible for a state of fluidity in the present stage of the law. Thus, in law and philosophical thinking, there has been a continual broadening of the sphere of recognized and secured interests, a widening of the conception of the nature and end of law, from primitive societies to the present day. Today, the social interest in the individual life is conceived of as the value which makes for civilization.255

In western society there was born the ideal of respect for the individual personality, and this ideal was later fertilized by the heritage from the Judaeo-Christian religious ethos, which has maintained a strong hold on western thought for nearly two thousand years.256 With the Age of Reason, the Enlightenment, men came to grasp a finer vision of life in the future than any past civilization had achieved, and there was born a hope to rise above the golden age of the ancients.257 With this broader Weltanschauung, there came a new religion of man and a new lease on life, a new hope for progress in the future. It has been said that Grotius freed law from theology and that Hobbes was the first modern man. Hobbes recognized that man is unique and that he is all important to himself. Certain rights he has even against the state.258 This idea was augmented by the writings of other social thinkers, and John Locke gave man inherent natural rights which no government could take away.259

255. For discussion of the stages of law and the ends of law in each successive stage, see Pound, op. cit. note 252, 139. For consideration of the various social interests, particularly "the social interest in the individual life," see Pound, Survey passim, esp. at 12. For the fact that we are now moving from contract to status, see Pound, op. cit. note 252, 28; Pound, New Paths of the Law 22-23 (1950).
256. Muller, Uses of the Past Ch. IV (1952).
257. See generally Brinton, Ideas and Men, esp. Ch. XI (1950).
258. Hobbes, Leviathan, esp. Ch. XXI, esp. at 152 et seq. (Waller ed. 1904).
259. Locke, Second Treatise on Civil Government Chs. 4, 5, 6, 11, and 19 (1690).
These ideas permeated the thought of our founding fathers. Men believed that reason was the key that could unlock the universe. Grotius taught that God himself could not make twice two other than four and that man was fully capable of governing himself by reason of his rational nature even if God lacked interest in human affairs. The doctrines of these centuries were such that men sneered at history and set out to remake the world according to their own notions. As a result, we have from this period new documents, political and legal charts to guide man for all time thenceforth.

It was in the light of this background that the Constitution was written, with a Bill of Rights setting forth and protecting certain principles which were defined as inalienable rights. Natural law, demonstrable by reason, existed to secure these rights. This it did through positive law, which must conform to natural law. The state itself was the product of a social compact into which man had entered to secure his natural rights. Its purpose, authority, and limitations were prescribed by natural law. The bills of rights in the Federal Constitution and the various state constitutions were efforts to preserve these rights inviolate and to transmit them to posterity. These documents recognize that the state can become a kind of leviathan against which the individual needs protection, that the individual has rights above and beyond the state, which no government can rightfully take away, and the "concept of human dignity and inviolate personality" are natural rights which ought to be protected.

These constitutional rights have been much in the limelight in recent years. The Bill of Rights in the Federal Constitution was first declared not binding on the states, but was later declared binding in part, by reason of the Fourteenth Amendment, the test being whether a right is "of the very essence of a scheme of ordered liberty" or "so rooted in the traditions and conscience of our people as to be ranked as fundamental." On a lesser scale, new rights have appeared under the laws relating to privacy, beginning with a celebrated article in the Harvard Law Review for 1890. That this right was originally

260. See Corwin, op. cit. note 17, 381, for a good discussion of the philosophy and influence of Grotius.
261. See Pound, Interpretations of Legal History 12 (1923).
263. Letter from Dean Pound to the writer, March 3, 1958, specifically pointing to the first, third, fourth, fifth, sixth, and eighth amendments, as to the federal government; and the thirteenth, fourteenth, and fifteenth amendments as to the states. Quoted with permission.
introduced into our law under the guise of a property right did not make it any the less an important "interest of personality." The right is probably older in European law.

With the rise of modern urban society and its concomitant problems of social control — the complex law enforcement agencies, the efficient methods and devices of modern science used by both police and criminals, the broad threat of modern crime — these rights of the individual have been much pressed upon the courts and legislatures for recognition in law. The nineteenth century was identified with the commercial interests of the middle class, free trade, the rights of property and contract, and an idealized version of eighteenth century natural law. Even the so-called civil liberties took a back seat. An abstract individual freedom of self-assertion was the all-important thing. But with the advent of the twentieth century, new ideals were in vogue, and property and contract have been relegated to secondary status. Human rights are in the forefront, and the rise of the modern police states and the horrors of two world wars are impressing upon the people of the western democracies the importance of constant vigilance for the preservation of these rights of the individual. The picture has been one of steadily increasing recognition of new constitutional rights and broadened interpretation of old ones. Moreover, rights which are not deemed sufficiently vital to be a part of due process have nevertheless been enforced in the local forum of both state and federal courts as being proper for the maintenance of higher judicial standards. This trend is not yet at an end.

Dean Pound has written much on the subject of claims pressing for recognition in a given society, and he has demonstrated the need for and the value of a set of jural postulates to express the jural ideals of the civilization of the time and place. He has formulated such a set of postulates as a framework in which to carry on his great work of law reform through the balancing of social interests, and he has shown how these postulates must change as society changes in its progress toward civilization. As Pound has stated the matter in one of his

270. The jural postulates were first formulated in 1919 and are set out in Pound, Outlines of Lectures on Jurisprudence 168, 179, 183-84 (5th ed. 1943). There are five in number and might be called "major major premises," under which all of our rules and principles of substantive law can be subsumed. As to changes taking place in our society which may render it necessary to form new postulates for the correlative changes that are taking place in fundamental principles of the substantive law, see Pound, Social Control Through Law 115 (1942); Pound, New Paths of the Law 32 (1950). For the four basic steps in the balancing of interests, the best concise summary is contained in Stone, A Critique of Pound's Theory of Justice, 20 Iowa L. Rev. 531 (1935).
best writings, a dogmatic scheme of natural law is not the answer to the need for furthering civilization through legal purposes. Yet, judges and legislators must have a more detailed picture to guide them in their lawmaking tasks, "a clear picture whereby to lay out the lines of creative as well as of ordering and systematizing activity." The jurist at least must realize that the picture is only a tentative one, which requires constant "repainting."

The civilization of every time and place has certain jural postulates — not rules of law but ideas of right to be made effective by legal institutions and legal precepts. It is the task of the jurist to ascertain and formulate the jural postulates not of all civilization but of the civilization of the time and place — the ideas of right and justice which it pre-supposes — and seek to shape the legal materials that have come down to us so that they will express or give effect to those postulates. . . . Given such jural postulates, the legislator may alter old rules and make new ones to conform to them, the judges may interpret, that is, develop by analogy and apply, codes and traditional legal materials in the light of them, and jurists may organize and criticize the work of legislatures and courts thereby.\textsuperscript{271}

Two important recent documents, which have formulated postulates of procedure and have recognized the dignity of the individual and his right to protection, are the United Nations Declaration of Human Rights and the Bill of Rights of the Canadian Constitution. Article 10 of the Declaration of Rights provides:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him.

Article 11 provides:

(1) Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he had all the guarantees necessary for his defense.

Canada, a long-established government, ruling over a people in whom the law-abiding habit is engrained, has nevertheless felt the need for a Bill of Rights in its written constitution (the British North American Act). This document is entitled "An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms."\textsuperscript{272} For our purposes, Part I, Sec. 3, is most important. It prohibits, among other things, "inhuman or degrading treatment" and provides in sub-
section (c) that no person shall be compelled to give evidence if he is denied counsel or other constitutional safeguards. Subsection (d) provides that no law shall “deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations”; and subsection (a) provides that no law shall “deprive a person of the right to a fair and public hearing by an independent and impartial tribunal for the determination of any criminal charge against him.” These general declarations as guides for detailed procedures have been justified in legal writings. Professor Kauper has stressed the importance of procedural values in the following passage:

The thesis may be advanced that procedural limitations represent the supreme legal achievement of any civilized society, for in their primary impact on the administrative and judicial process they do symbolize the basic idea of government by law, and the further idea, implicit in the first, or certainly a corollary to it, that all men shall receive equal treatment before the law. On these two related propositions hangs much of our constitutional system. To hem in and canalize the exercise of power when it is brought to bear directly on the individual in order that his liberty shall not be impaired except where required by the rule of law is the important function of procedural limitations.

The writer believes that a valuable addition to Dean Pound’s jural postulates of the substantive law would be a procedural postulate to serve as a kind of “major major premise” under which might be subsumed the various claims or interests now struggling for mastery, not only in the area of constitutional due process but in the area of legislation and case law as well. One must evaluate procedural measures against the background of the substantive rights which they are designed to secure, the limitations of effective legal action, and the practicability of the means of enforcement. This can best be done through the use of reason and experience.

Justice Frankfurter was dealing with the abstract principle in connection with a concrete claim when he spoke for the majority in the Rochin case. There he defined due process of law as “those canons of decency and fairness which express the notions of justice of English-


274. KAUPER, FRONTIERS OF CONSTITUTIONAL LIBERTY 146 (1956).

275. Since the ordinary principles of law in syllogistic reasoning are called major premises, the principles under which they are subsumed might be called “major major premises.” Thanks to Dean Pound for the analogy of “natural natural law.” See Pound, Natural Natural Law and Positive Natural Law, 68 L. Q. REV. 330 (1952). The natural sciences also use the phrase “per second per second” in describing the speed of light.
speaking peoples." The conception of due process, he holds, is no mere fixed or static concept, nor subject to the mere personal and private notions of the judges. The one would make for mechanical application of the law, the other for wild caprice. Due process "requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly stated, on the detached consideration of conflicting claims . . . on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and change in a progressive society." 276 Here the court was limiting its considerations to the matter of constitutional requirements. That there are conflicting claims struggling for recognition outside the constitutional area is the basis of the jural postulates and of most of our substantive law subsumed thereunder. The jural postulates go beyond what is required by the Constitution as minimal protections to property, contract, personal liberty, and personal security. They represent the common expectation under government according to law in our western society today.

As our law now exists, the privileges are procedural claims which are a recognized part of the legal status quo. The original basis of the privilege of attorney and client, the honor of the attorney, was weighed and found insufficient in the Age of Reason. The combination of honor and loyalty, on the one hand, together with the fear of treachery and the felt need for free communication between the parties on the other, has since served as the rational basis of the privilege. When Bentham pointed out special problems, this was met by the "degrees of gray" theory, which is premised on the recognized truth that in most civil cases there is no clear-cut factual situation which indisputably puts one party in the right and the other party in the wrong. These components, however, are only elemental particles in a larger chart or scheme of values which is summed up in the principle of human dignity. One feels it on every hand. It permeates our serious thought and literature. It is "in the air," so to speak. It is the teleological element in the twentieth century scheme of values. If the privileges are to coincide with twentieth century values, retain their vitality, and manifest a sound salubrious growth, they must be subsumed under the cardinal principle of human dignity. That the value of the privileges has been doubted was due to the failure of the critics to understand this broader social viewpoint and to perceive the need for the correlative change of rationale.

To repeat, the basis for the recognition of the privileges today is the twentieth century scheme of values, and here there must now be

some major major premise under which the privileges may be properly subsumed as a part of the scheme of interests. This will enable judges and legislators to act as “social engineers” in the balancing of interests, and thus to shape the law to meet the needs of society with the least friction and waste. Such a major major premise might be articulated in the form of a jural postulate of procedure. Adopting the Poundian style or form, the writer suggests the following formulation of a procedural postulate: In civilized society men must be able to assume:

That when they press or defend a claim subsumed under the substantive law jural postulates of the civilization of the time and place, they will be given a full and fair hearing, according to fair and reasonable methods of procedure, designed to accomplish the purposes of social justice.

It is submitted that such a postulate is the procedural ideal for which we are striving in our time. It is more than a mere “preachment,” because it represents a concrete goal toward which great human effort is being directed, a standard by which we can measure our accomplishments, and an ideal to which we can aspire. It is a practical formulation because it describes not a mere far-off ideal, such as natural law

278. The writer suggested the idea of a procedural postulate to Dean Pound in a personal conference at the Harvard Law School on February 25, 1958, and the Dean encouraged the writer to formulate one. The postulate set out above, except for certain minor deletions, was sent to Dean Pound on February 28, 1958, and he replied on March 3, 1958, in a letter which is set out in full:

"Referring to the suggested jural postulate of procedure sent with your letter of February 28, I suggest what I said in my lecture before the Brooklyn Bar Association [Pound, Toward a Law of the World, 9 Brooklyn Barrister 59 (1957)] as to the elements of due process of law. On reflection I think that our jural postulates of procedure must be due process of law. If so I still adhere to my statement of those elements as follows: An independent, unbiased and courageous tribunal; full notice in advance to all interested parties of the nature of the controversy to be determined and the claim or claims to be urged or charges to be preferred [sic] by the parties; a procedure affording full and free opportunity for each party to present evidence in support of his or its case to the tribunal, to cross examine witnesses, and to argue both the credibility, weight and relevance of the evidence, as to each item and as a whole, and the legal propositions applicable thereto; and a judgment according to law, not the will of the tribunal, and not directed directly or indirectly from without. A shorter statement embracing these elements might serve your purpose.

"I quite agree that the concept of human dignity and inviolate personality, recognized in the 1st, 3rd, 4th, 5th, 6th, and 8th amendments to the federal Constitution, and as against the states in the 13th and 14th amendments is ultimately behind the idea of due process of law. I think with those amendments in mind, and my discussion and Lord Kilmuir’s discussion to which I referred in my Brooklyn address [Kilmuir, The State, the Citizen and the Law, 73 L. Q. Rev. 172 (1957)] you will be able to formulate for yourself an adequate body of postulates of procedure.”

(Quoted with permission.)

Lord Kilmuir’s conception of the substance of the major premises of fair procedure, referred to by Dean Pound, are apparently the ones set out on page 177 of his article: “(a) the formulation of a fixed rule — that is the law; (b) the investigation of the facts by an impartial and independent judge; (c) the ascertainment of the truth by reasoned deduction from evidence, however adduced; (d) the unbiased application of the rule to the facts found to be true.”
principles in the Greek city-state, but rather a generalization that combines practical accomplishment with the ideals of the age, ideals which we have achieved or for which we are still striving. "The intelligent direction of human action necessarily involves the use of generalizations." When one endeavors to embrace the whole field of procedure under a single generalization, it must necessarily be very general, but it represents a criterion by which to test procedure as a whole with reference to values no less important than those of the substantive law. Moreover, these procedural values are just as important in the accomplishment of the end of justice conceived in terms of the advancement of civilization. As to the concept of human dignity, the postulate necessarily embraces this under both the term "fair and reasonable" in relation to methods of procedure and again under the term "social justice." What is "fair and reasonable" depends only superficially upon the spirit of the times, Zeitgeist, and ultimately upon the Weltanschauung of the civilization, the latter being that part of our cultural outlook which has endured and become the permanent scheme of values. Our "World View" is the product of the values which have been accumulating in time, in the light of the felt needs of our particular age. It is the sum total of our heritage as we understand it today. The term "social justice" takes into consideration all the components which go to make up the jural objectives of society, what might be termed jus, right, or law. A fair procedure is only a part of this concept, but it is important as an instrumental value in proportion to the extent to which it can be an influence for the accomplishment of good or the infliction of harm. It is the means by which we can strive to achieve the intrinsic values and thus ultimately to lead the good life. Bearing in mind the ethical ideal that humanity, including each individual, should be treated as an end in itself rather than as a means to an end, we perceive at once that procedures are no less important than principles of substantive law, that fair procedures are not necessarily and entirely those which get at the technical truth most efficiently, but rather those which reasonably endeavor to accomplish this objective, taking into account the various other values which are components of the entire picture that we designate as "justice." Therefore, in the balancing of interests, a procedural postulate has an important role to play, and the concept of human dignity and inviolate personality is one of the components which constitute that postulate.

In formulating this postulate, the writer does not maintain that it is drawn from the mass of claims being asserted by litigants in society

today, though concededly this may be a factor in its recognition. However, the writer sees it as the articulation of an ideal toward which jurists, philosophers, and social planners are striving, and it can lay claim to some foundation in current legal decision. Therefore, although it can point to some historic antecedents in its lineage, the procedural postulate is clearly oriented toward the future. What was recently said by a man of affairs in connection with human affairs in general is worth consideration here as a facet of the larger problem:

The big need today is to break out of the narrow old nationalisms and to develop larger allegiances. Human society today is still underdeveloped and immature: it is still rather tribal in its attitudes. The trouble with nationalism is that it tends to seal people in, to cut them off from the larger experiences that we need if the human family as a whole is to figure out a way of staying alive . . . I have the feeling that the world today desperately needs a break-through. We have to find some way of breaking through old approaches, old habits of thought, that are part of a world divided into hardened national sovereignties. I take my stand on the ground that these old approaches are no longer workable. They can't maintain peace. They can't protect people. They can't maintain freedom. They can't even maintain national independence. The kind of break-through we need is not just one of establishing a new form, necessary though it may be for the grouping of the nations. The break-through we need may require people to think about themselves in a new way, with new and higher relationships and loyalties.

The writer submits that such a "break-through" in law is imminent and will be forthcoming as we critically re-examine the law in the light of twentieth century needs, methods, and values. The concept of human dignity as embodied in the above proposed procedural postulate is a phrase of this progress.

In urging "an engineering interpretation" of the law, Dean Pound has said:

An interpretation that will stimulate juristic activity in common-law countries, that will bring our writers and teachers to lead courts and legislatures, not to follow them with a mere ordering and systematizing and reconciling analysis, will have done its work well.

On a small scale, this paper is an attempt to aid the courts to do more than order, systematize, and reconcile analysis of the extant rules of

283. Pound, Interpretations of Legal History 165 (1923).
law subsumed under the legalistic conception of the attorney-client privilege. The privilege was derived historically from an intuitively felt need and later justified by a post hoc abstract rationalist foundation. It was then expanded beyond its strict necessities as a result of professional interest and lack of legal learning. It now requires re-evaluation in the light of new ideals which are taking shape in the twentieth century and delimitation in accordance with the needs created by the circumstances of society today. A re-writing of the whole body of our law, both procedural and substantive, with this approach as the criterion, is the task which faces the next generation of jurists. In connection with such advancement, we must not forget the way in which the phenomena of growth and progress take place. Words written in connection with the growth of freedom, itself the matrix of a larger whole, are equally in point here:

It is obvious that the earlier writers could not have been meeting issues raised by those who came after them. And the number of later writers who focus on issues as framed by their predecessors is very limited. Rather, they start from new insights, a new hypothesis, a different experience. They ask and answer new questions, or at least discuss the old ones from a new point of view which advances our understanding of the problem to a new level.284

Our law was taken over from England and re-written to meet the needs of a nineteenth century rural economy. Some principles were rationalized; others have been accepted on authority. This law must now be re-written to meet twentieth century urban needs and must be undergirded with sound legal principles. The commentators and jurists have put system into the modern Roman law. We have attempted to do it through procedure and later, in particularly important subjects, through the writings of jurists and teachers, the development of uniform laws, and the Restatement of the American Law Institute. “But until this putting of system into particular subjects or branches has been carried out to substantial completeness, we shall not be able to put system effectively into our law as a whole.”285

The varied subjects in

284. Pound, Introduction, CLARK, SUMMARY OF AMERICAN LAW iv-vii (1947). "There is manifest need for a system of Anglo-American law. There is need of an institutional book, which we cannot expect until we have developed a system. The books on 'elementary law' in the last century and the perennial attempts at new editions of Blackstone failed because they purported to set forth a system in a subject in which there was no system to expound." Id. v.

285. Morray, Book Review 47 CALIF. L. REV. 201, 202 (1959). The reviewer points to the analogy of growth in the scientific field, where each generation went beyond the previous one, making new assumptions and gaining new insights to form new hypotheses suggested by new evidence, but always with continuity and building on the work of the past. Id. 202.
our law are now nearing a system of completeness and only require being rounded out and adapted to our continuing growth and development. But we must wait a while for system to come to our law in its entirety and in the interrelation of its various branches. Nor will this come by fiat of some juristic genius. It will come with a broad understanding which develops with the fulfillment of the system as a complete body of law.  

B. The Privilege as an Absolute Rule versus Qualified Immunity:

There is a close relation between the privilege against self-incrimination, the privilege against illegal search and seizure, the right to counsel, a fair hearing, and the various procedural requirements "implicit in the concept of ordered liberty." Closely connected with these notions is the right to reasonable privacy and a high respect for the individual as an inviolate personality. In this scheme of values, important to liberty and justice as an ideal relation among men in ordered society, the personal privileges have an important part to play.

The jural postulate proposed above does not give an absolute recognition to these specific doctrines of adjective law. Rather, it recognizes the values involved in the competing social interests struggling for recognition, or to quote Justice Frankfurter, "interests of society pushing in opposite directions." Actually the privileges are a generally recognized part of our law, and the question is whether they should be extended, curtailed, or abolished. The writer agrees with Professor Louisell that much of the confusion pertaining to the privileges today is the result of the conflict of opinion between the writers on evidence and the bench and bar as to the value of the privileges.  

Both of these groups, however, view the privileges from the peculiar vantage point of their own specialty. A careful evaluation requires that consideration should be given not only to the opinions of these groups but also to the studies of the legal philosophers as well. It is this last-named group that is specially equipped to arbitrate the effective weight to be allocated to the various competing interests involved. The personal privileges will ultimately stand or fall with the above-mentioned constitutional rights: the right to privacy and the respect for the individual as an inviolate personality. These are all a part of the same stone, hued from the same quarry — the paramount position of

289. See Louisell passim.
the individual as a cardinal entity in the scheme of western values. Taken altogether, they constitute the essence of human dignity.\textsuperscript{290}

Then, by what method shall we evaluate the privileges? The answer is by the application of the above-stated principles and the balancing of interests in accordance therewith. The privileges should not always prevail because they are not absolutes.\textsuperscript{291} They must be weighed against competing interests or policies, in order that fair rules may be worked out as to applicability, scope, and duration. Moreover, within the narrow confines of "molecular motion" the judges must not hesitate to restrict or to extend the privileges in accordance with these principles. However, such extension must be by judicial precedent and not by discretion in the individual case, except perhaps in a few instances, such as hereinafter considered, where discretion might be conferred by legislation. The most important point to realize, however, is that the privileges are not just anachronisms come down from a prior age of confusion in the law of evidence or the product of mere maudlin sentimentality,\textsuperscript{292} but that they continue to exist and are dynamic because they have worth in relation to the degree that they help to preserve important human values in our society, values that justify some lessened efficiency in the detection and punishment of crime or in the preservation of rights of property and contract. In fact, considering the twentieth century scheme of values in the light of the complexities of today's world, the writer believes that the greatest worth of the personal privileges lies in their anticipated role of service to future generations. As the personal relationship in modern urban society becomes more impersonal, some solvent such as the privileges will become more essential as a psychologically desirable basis for confidentiality in those relationships where rapport is a professional necessity. The next point to remember is that the privileges should not be construed more broadly than necessary to accomplish this purpose.

The tendency to treat the privileges in too "absolute" a manner and without adequate consideration for the competing interests involved is well illustrated by the case of \textit{United States v. Fair}.\textsuperscript{293} In that case,

\textsuperscript{290} Albert Schweitzer's phrase "Reverence for Life" is a much broader term, but Schweitzer would undoubtedly agree that the same part of our ethos which sparks the concept that has become his guiding philosophy also contains the elements which give rise to the included value concept of the principle of human dignity. See \textit{Schweitzer, op. cit. note I passim}, esp. at 156.

\textsuperscript{291} By "absolute" as used here, we mean something like this: eternal, immutable, not subject to question.

\textsuperscript{292} Referring to the privilege against self-incrimination, Wigmore terms it "a mark of traditional sentimentality." \textit{VIII Wigmore} § 2251 at 317. Speaking of the case of \textit{Weeks v. United States}, 232 U.S. 383 (1914), which raised the issue of illegal search and seizure, Dean Wigmore described it as a "heretical influence" and the thought which justifies it as "misguided sentimentality." \textit{Id.} § 2184 at 32, 36.

soldier A, suspected of being party to a murder, was granted immunity from prosecution and turned state's witness. At the trial, A testified that defendant B, a fellow soldier, had fired the fatal shot. On cross-examination, A was asked if he had not originally informed his counsel, who was the cross-examiner and counsel for B, that he, A, had fired the fatal shot. A refused to answer, claiming the privilege against self-incrimination. A's claim of privilege was sustained by the trial court, and the ruling was upheld on appeal. The appellate court recognized two rights as inherent in the privilege, to wit: (1) freedom from fear of incrimination; and (2) freedom from fear of social disgrace. It recognized that while the former was not present in the instant case, the latter remained an issue, and therefore the claim of privilege was properly sustained. But on a balancing of interests, it would seem that in criminal cases the paramount value to be protected is the right to be free to conduct a fair defense, and that once the defense has been completed or has become unnecessary, the privilege should cease to exist. This would seem true a fortiori when the liberty of an individual hangs in the opposite balance.

The celebrated Leo Frank case contains an interesting illustration of the problems which can arise in the area where the privilege may tend to frustrate not only the ascertainment of the truth but also the vindication of innocence and the protection of individual freedom. In his fascinating autobiography, the late Judge Arthur G. Powell stated that he knew that Leo Frank was innocent. He did not indicate how this information came to him, but the reasonable implication was that

294. Professor McCormick lists four dangers against which the privilege protects: incrimination, penalties and forfeitures, disgrace, civil liability. McCormick § 128. Protection from these dangers would be afforded in any principle or rule limiting the discovery of evidence or proof of facts.

In the early seventeen hundreds a privilege was recognized against compelling answers as to matters not material to the issues, which would degrade or disgrace though not incriminate the witness. This privilege has become obsolete in England and in most of our states [except where statutes have preserved the relic: e.g., CAL. CODE OF CIV. PROC. § 2065]. The policy behind this former rule is now given effect by rules restricting the scope of cross-examination as to collateral matters. McCormick § 128.

295. The rule that an accomplice forfeits the privilege was held not to apply because technically A was not an accomplice. The rule that the privilege does not apply inter sese when two or more persons having shared an attorney concerning a matter of common interest subsequently take adverse positions with respect to the same was apparently not deemed relevant, and a joint client may waive the privilege only for his own individual statements. See op. cit. note 149 at 276-78 and sources cited.

296. See III Wigmore §§ 984-87; VIII Wigmore § 2255. These sections discuss the privilege against answering questions which tend to disgrace. It is recognized in a few jurisdictions today, and Wigmore criticizes it severely. The writer agrees.

297. Powell, I Can Go Home Again 291 (1943). When the writer first read Judge Powell's autobiography, which was before he had studied law, he was disturbed to find that the law should permit this situation to exist. Time has not changed his views.

For a fuller account of the Frank case, see Busch, Guilty or Not Guilty Ch. I (1952).
it came to him as a privileged communication from a client to his attorney. Judge Powell stated that he could never reveal the information so long as certain persons were living.\(^{298}\) This information came to him while Leo Frank was in the state penitentiary of Georgia under sentence of death, following his conviction of a terrible crime.\(^{299}\) Assuming that the information came to Judge Powell either directly through a client or through another attorney acting in behalf of a client seeking legal advice, Judge Powell was correct in recognizing that he could not reveal it without the permission of the client.\(^{300}\) In fact, he could not reveal it even after the client’s death, since the privilege as a general rule continues to exist for all time. Yet, the writer submits that the law should be changed, at least to permit, and probably to require counsel to come forward and make full disclosure when another person who is innocent has been charged with or sentenced for the commission of a crime. This requirement, of course, might not extend to the case where counsel does not learn of the wrongful accusation or conviction until it is too late to rectify the case, as where the wrongfully accused party is no longer living or has served his sentence or has obtained a dismissal of the charges. The termination of the privilege would occur only when this would tend to effectuate the principle sought to be recognized as controlling. Here, the answer must follow naturally from the recognition of the higher values which are presently being defeated by the recognition of the privilege under the circumstances, namely, the combined interest of the state in detecting crime, punishing the guilty, and protecting the innocent. It seems particularly shocking that there is a rule of law which would go so far as to protect a guilty man at the expense of an innocent one.\(^{301}\) The writer believes

\(^{298}\) But the privilege extends beyond life for all time, except it be waived. VIII Wigmore § 2323.

\(^{299}\) Incidentally, the case was one in which the jury was dominated by mob violence.

\(^{300}\) Nor could disclosure be made under the theory that the consultation was in furtherance of a crime or tort, for the crime involved had already been consummated. See VIII Wigmore § 2298. Yet it is obvious that this salutary rule is of far less social importance in a particular case, though it may come into play more often.

The writer assumes of course that Judge Powell was not on the bench at that time. See Prichard v. United States, 181 F. 2d 326 (6th Cir. 1950); affirmed 339 U.S. 974 (1950) (advice of judge to "client" held not privileged). See VIII Wigmore § 2376; McCormick § 92 at 185-86. Wigmore argues for a privilege for communications made in confidence to the court. McCormick disagrees with Wigmore. He points out that such revelations would ordinarily embarrass the judge in carrying out his duties. The writer submits that if any privilege can be justified here, it must not be comprehended under the principle governing the attorney-client privilege, and the judge should be the holder of the privilege, with revelation to be in his discretion. However, the writer would deny the privilege in accordance with keeping the rules prohibiting disclosure of evidence within the strictest bounds. This would exclude the judge who is not concurrently a practicing attorney and acting in that capacity (or believed by the communicant to be so acting) when he receives the communication.

\(^{301}\) The general treatment of the rule as an absolute begins to appear absurd when one reflects upon the numerous situations in which the privilege has been forced to yield to more important policy considerations. The examples will be found mostly
that the law should give only a qualified privilege in serious criminal
cases, particularly where the death sentence is involved, and that this
privilege should be terminated when counsel learns that the criminal
conviction of an innocent person has taken place. Moreover, it should
be the ethical duty of counsel under such circumstances to come forward
and make full disclosure to the court of such knowledge as he might
have which would vindicate the wrongfully convicted party.

C. Application of Principles to Other Privileges:

Another point at which numerous jurists are negative absolutists
is in connection with the creation of new privileges to cover relation-
ships not heretofore accorded the protection of immunity from dis-
closure of the confidential communications of the parties. Many
writers favor the limitation of the classes of privileges to those recog-
nized at the classical common law. Some of these writers state their
case with a positiveness which apparently admits of no room for opposi-
tion. Though these authors may confirm their position by rational
analysis, the writer submits that strong arguments can be presented for
according privileges to certain personal relationships not previously held
entitled to immunity from disclosure through compulsory process. The
Wigmore test has been discussed earlier herein. Applying this test,
the writer would extend the privilege of confidential communications
to physicians (including psychiatrists), psychologists, and marriage
counsellors; he would deny it to accountants, house counsel, insurance
counsel representing the assured, and some types of agents. He would
also deny it to large (at least, quasi-public) corporations and govern-
mental agencies. We will consider these relationships in connection
with a confidential communications privilege in the remainder of this
section.

in the area relating to the crime or tort exception and the area of application of
waiver principles. The cases go so far as to hold that the privilege does not apply
when there is a dispute between the client and his lawyer — for example, over the
fee of the latter. The exceptions are summarized in rule 26(2), Uniform Rules.
The writer submits, however, that all of these exceptions as well as the one suggested
above are sound. It might be added that in the case of these exceptions the com-
munications will be found not to pass the test laid down by Dean Wigmore in his
four principles (VIII Wigmore § 2285).

302. Referring to the death sentence, Professor Cahn speaks of "the insight of
irreversibility." Cahn, Fact-Skepticism and Fundamental Law, 33 N.Y.U. L. Rev. 1
passim (1958). Any wrongful conviction is irreversible, but it might be said that
death is the most irreversible of all. It has a terrifying finality.

303. For additional cases, see op. cit. note 149 at 275 and note 45.

304. These principles are discussed in text at note 203.

305. That is, insurance counsel theoretically representing the insured but actually
representing the carrier alone or primarily (and only incidentally representing the
insured).
First, consider the position of the psychiatrist and the psychologist. Should the consultations of the patient with his professional counsellor be privileged? The writer submits that they should be. The role of these classes of practitioners is one that is vital to society, because of the preservation and improvement of the mental health of the people; it is one of growing importance, both by reason of the increase in medical knowledge available, the increase in the number of cases involving problems of mental health, and the intimate nature of the disclosures which effective psychiatric treatment requires. It is important for people to have physicians, and in order for the treatment to be effective, the patients must give their full cooperation. This cooperation can only be gained by the physician if he has the complete trust and confidence of the patient. The assurance of the complete confidentiality of the relationship is a most important factor in obtaining and keeping this trust and confidence of the patient. Though seldom called into court without his consent, a physician will occasionally be compelled to testify, particularly in a criminal case or a domestic relations matter. The patient's communications might be protected under the attorney-client privilege, but by the better rule this will not generally hold true. Hence, if the confidentiality of the relationship of physician (or psychologist) and patient is to be maintained, it must be done through the according of the privilege to the confidential aspects of the relationship for its own sake and not through some other privilege. In the domestic relations cases, more good might result to all parties concerned by not having the confidential items disclosed, and in any event the information could be obtained in other ways. These are practical considerations, but they are not the basis on which the physician-patient privilege should rest. The only proper basis on which the privilege can be fully justified is through the according of some special recognition to the dignity of the individual in this highly personal relationship which society should desire to protect from unnecessary intrusion. Interests of substance, such as property and con-

306. The differences between psychiatrists, psychoanalysts, and psychologists are clarified in GUTTMACHER & WHEHOFEN, PSYCHIATRY AND THE LAW 6-9 (1952).

306a. "The essence of professional secrecy is that the patient should be able to tell the practitioner everything that is necessary for his medical assessment and treatment. This means that the doctor must hear many things that otherwise would remain in the knowledge of the patient alone. The patient must be entirely confident that nothing he reveals will go further. Once there is a suspicion among patients that their confidences are not safe with a doctor the relationships between them become seriously impaired and quite unsuited to the proper practice of medicine." HADFIELD, LAW AND ETHICS FOR DOCTORS 56 (1958).

307. San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P. 2d 26 (1951). Here, Dr. C., at the request of P's attorney, examined P as an aid to trial preparation. It was held that the physician-patient privilege did not apply but that the attorney-client privilege did apply. The client in communicating his physical condition to counsel required the assistance of the physician to interpret it to the attorney.
tract, are insignificant factors here. Such protection as they acquire through the recognition of the right to maintain confidentiality in this area should be treated as purely incidental. The important values here are the interests of personality. Personal liberty may be involved; but the main items are freedom from fear of social disapproval and freedom from fear of disturbance of intimate personal relationships other than that of physician and patient itself. Here, the social interest in the individual life would seem to stand out above all others.

To a lesser extent, the justification for the recognition of the principle of confidentiality which the privilege affords to the psychiatrist-patient relationship extends also to other areas of the physician-patient relationship, though such justification is probably not so strong in these areas as it is in the area of psychiatric treatment. The regular medical practitioner learns many things incidentally which might not be strictly necessary to the treatment of the patient's physical ailments. Nevertheless, this knowledge is obtained in the course of treatment, as a part of the broader confidence that a close physician-patient relationship engenders, it usually comes naturally under the circumstances, and it may be of importance in diagnosis and treatment. For example, it may be important in determining whether the physical ailment complained of is merely symptomatic of psychosomatic illness or whether the patient has actual physical illness of some kind. It may be important in determining the kind of treatment to be prescribed and in ascertaining whether the patient is responding to the particular treatment. Thus, it is obvious that the effective treatment of the patient is promoted to some extent by the recognition of a privilege for confidential communications in the non-psychiatric area. However, as in the case of the attorney and client, this is not essential to the adequate disclosure of the information on which treatment will be predicated. Therefore, this privilege, if it is to be sustained, cannot be sustained on the basis of its promotion of full disclosure alone. If this privilege is to be sustained, it must be sustained largely on the basis of the psychological effect on the patient of forced disclosure and fear of forced disclosure — facets of the insecurity of personality in the area of privacy, as a part of the dignity of the individual. If the privilege is recognized here, it

307a In fact, the interests of substance of the opponent at least weigh equally in the balance, and the opposing interests cancel out each other. Furthermore, in any long range evaluation, the protection of such interests can best be achieved by the abolition of all privileges, since their protection lies in the maintenance of the highest degree of accuracy in fact-finding, as in all other phases of the judicial process.

308 Survey 12.

309 For what appears to be the definitive treatment of the physician-patient privilege from the practical standpoint of the view of the lawyer in daily practice, see Dewitt, Privileged Communications Between Physician and Patient (1958).
should be given a broad construction in order to fully effectuate its purpose and without strict regard to the rules of relevancy. \(^3\)

The physician-patient privilege is entirely statutory in origin, having first been adopted by the state of New York in 1828 and since that time by more than half of the other states. \(^3\) There are sixteen states which do not recognize the privilege. It should be granted by legislation in those states, and the grant should be broad enough to include practicing psychologists as well as physicians and psychiatrists. In those states now recognizing the physician-patient privilege, a similar privilege should be accorded by legislation to consulting psychologists. \(^3\)

Dean Wigmore argues against recognition of this privilege, holding that his four fundamental principles are not satisfied. \(^3\) He points to the North Carolina law, which allows a qualified privilege \(^3\) as a substantial improvement over the law of those states where the privilege is recognized unqualifiedly. But the cases in which injustice might tend to result from the recognition of the claim of immunity under the medical privilege fall primarily in three categories, namely: (1) workmen's compensation cases; (2) personal injury claims; and (3) suits based on life insurance policies. In the area covered by these categories, however, the privilege of confidentiality is not accorded its customary degree of recognition. Thus, modern industrial accident legislation has made an exception to the privilege in that category of litigation. \(^3\) As to the second category, some of the statutes provide that by bringing suit for personal injuries one waives the privilege to the extent that one's physical condition might become an issue. \(^3\) And as to the last-named category, according to the better rule, one may waive the privilege by including an express provision to that effect in the policy, and

\(^3\) But see Van Wie v. United States, 77 F. Supp. 22 (N.D. Iowa 1948) (physician permitted to testify that plaintiff said he did not see the vehicle which struck him).

\(^3\) VIII WIGMORE § 2380. In addition to New York, twenty-nine other states and the District of Columbia now have such statutes. Id. § 2380; see also Note, 47 NW. U. L. REV. 384 (1952), setting out statutes.

\(^3\) See Weithofen. Privileged Communications between Psychiatrist and Patient, 28 IND. L. REV. 32 (1952).

\(^3\) VIII WIGMORE § 2380a. The late Professor Chaffee also opposed this privilege. Chaffee, Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand, 52 YALE L. J. 607 (1943). For a highly critical view of the physician-patient privilege, see Geer and Adamson, The Uniform Rules of Evidence: A Defendan't's View, 40 MINN. L. REV. 347, 356-58 (1956).

\(^3\) VIII WIGMORE § 2380a at 815 citing N. C. GEN. STAT. vol. 1A § 8-53 (1953).

\(^3\) Id. 2380 and n. 6.

\(^3\) A typical statute is that of California. See CAL. CODE OF CIV. PROC. § 1881 (4). See the statutes set out in VIII WIGMORE § 2380 n. 5 at 803.

Moreover, the privilege is waived if the patient testifies to privileged matter in any case. Likewise, liberal courts hold that if the holder calls one physician to testify to privileged matter, he waives the privilege not only as to the particular doctor but as to all other doctors he has consulted in the case. VIII WIGMORE § 2390; MCCORMICK § 106.
such contractual waiver provisions are recognized as valid in a majority of the states. Thus, the insurance company can adequately protect itself. While much might be said for a qualified privilege in the area of physician-patient relations, the writer believes that the above-indicated types of exceptions should cover most of the hardship cases, and the answer to the qualified privilege argument in the remainder of the cases would be that, at least in non-jury cases, to disclose the information to the trier of fact on some kind of voir dire examination might well result in the injury (through preliminary disclosure) which the policy supporting the privilege endeavors to avoid. This is because when they are trying non-jury cases, even judges might not be able to keep their knowledge of the category of excluded evidence (revealed on voir dire but not admitted into the record) separate and distinct from the category of evidence admitted into the record of the trial.

Nevertheless, something might be said in favor of providing some kind of in camera disclosure when "good cause" should first be shown in a pretrial hearing. Such good cause would be in the nature of a showing of need for the particular evidence in order to make out a case (or to afford a higher degree of proof than the minimum requirement), on the one hand, balanced against the harm to interests of personality which would be likely to result from judicially compelled disclosure, on the other. The likelihood of harm resulting from such compelled disclosure would be reduced if provision should be made for the court to first hear the matter in chambers and to receive the initial disclosure in confidence. The particular pretrial procedure would have to be worked out, but some preliminary inspection, such as the English courts follow in close cases when the attorney-client privilege is claimed, would seem to be in order. It is believed that this would have a salutary effect in several respects. First, it would tend to limit the claim

317. VIII WIGMORE § 2388. All but two states, Michigan and New York, recognize that contractual stipulations waiving the privilege are valid and effectual. See MCCORMICK § 106 at 217. But N. Y. INSURANCE LAW § 149 (4) provides that if the plaintiff prevents full disclosure the alleged misrepresentation shall be deemed proven and material.

318. The MODEL CODE OF EVIDENCE, Rules 220-22 (1942) and the UNIFORM RULES, rule 27 are so drawn as to give adequate protection against abuses which might arise from a claim of this privilege. One writer has proposed that "as a basic principle, the law should honor the judgment of a doctor who reasonably decides that he must reveal certain information to protect an interest that he believes, in good faith is more important than his patient's interest in keeping the information secret. . . . A court should inquire only whether, under the circumstances, the doctor exercised his discretion reasonably. . . . " subject however to certain provisions suggested to prevent abuse and to aid in promoting uniformity. Note, Medical Practice and the Right to Privacy, 43 MINN. L. REV. 943, 962 (1959).

318a. See also Functional Overlap 1245, which opposes the placing of such discretion in the court in the case of any privilege, in the absence of a showing that the privilege is more "dangerously obstructive" than appears to be the case at the present time.
of privilege to areas where true interests of personality might otherwise be harmed. Moreover, in close cases, unless the matter is preliminarily revealed, it is most difficult for a court to make a sound determination as to whether disclosure should be judicially compelled. It should also be pointed out that permitting such preliminary judicial evaluation of evidence would have a stronger claim to recognition than would the non-recognition of a privilege for such communications when the equities favoring recognition and those opposing it are closely balanced. Furthermore, such preliminary judicial examination of the evidence would tend to minimize the harm which might otherwise occur to interests of personality as a result of such disclosure, since it might be assumed that the court would tend to rule according to the element of moral persuasion in close cases. Such procedure would also tend to have a salutary effect in the deterrence of parties in the pursuit of causes tainted with fraud or having the appearance of being so tainted. This would probably be the chief benefit that might result from the establishment of a qualified immunity only in this area.

A good illustration of the kind of situation in which the physician-privilege works well without interference with accurate fact-finding is the following case, taken from the experience of a successful practicing lawyer: In a personal injury action, counsel for the plaintiff feared that defense counsel would bring out on cross-examination of plaintiff's personal physician the fact that plaintiff had once been afflicted with syphilis. This fact was irrelevant to the issues, but might have adversely affected the jury's decision and would definitely have been detrimental to plaintiff's relations with her husband's family and perhaps to her relationship with her husband also. Her counsel, therefore, did not call her physician to the witness stand, and if the defendant had called him, counsel was prepared to claim the physician-patient privilege. By reason of the protection, which the privilege accorded in this instance, counsel was allowed considerably more freedom of action than the circumstances would otherwise have permitted. Furthermore, opposing counsel was not able to introduce an irrelevant, but prejudicial, element into the case, assuming that he had knowledge of the particular item of medical history. Thus, the cause of justice was actually aided by the privilege in two respects. More important, however, than the cases in which such factors are present in litigation is the psychological satisfaction which the privilege must afford in the many instances in which litigation never actually arises.

319. De Parcq, op. cit. note 119, 326.
320. See also text at notes 177-81.

The Uniform Rules, rule 27 (4) stripped this privilege of practically all usefulness by making it inapplicable when the condition of the patient is an element or
To sum up, the relationship of the physician and his patient, at least in a restricted area, covers matters in which the fear of incrimination and the fear of social disgrace lurk just around the corner. While the fear is likely to be exaggerated and more imaginary than real, for social-jural purposes it must be reckoned with as a hard fact because the physical and mental health of the patient is no less at stake than if the matter were a deleterious substance infecting the patient's working environment. The normal desire for privacy in an area of the individual's personal and ultimate problems is an additional factor. Moreover, here the personal relationship is strong, and counselling for the long range future is an important factor. Hence, it follows that the establishment and maintenance of rapport between the parties is essential to the best treatment of the patient. In this area, the privilege is justifiable, and the numerous exceptions tend to hold it within reasonable bounds. The writer submits that Dean Wigmore's four fundamental tests are met.

Until 1959, Illinois had repeatedly refused to enact the physician-patient privilege into law. Yet, in 1952, in a case of first impression, a trial court judge in Chicago held that a privilege existed for confidential communications between a patient and her psychiatrist in a domestic relations case (alienation of affections). It is highly questionable whether this result should have been reached in the absence of legislation and whether it should be construed as a precedent covering non-psychiatric cases of confidential communications between physician and patient. The answer no doubt depends upon one's philosophy of law, particularly as relates to a theory of judicial decision. The writer submits, however, that it would be much easier to reach this result in the case of consultation with psychologists in those states which already recognize the physician-patient privilege.

It is questionable as to whether the physician-patient privilege should extend to criminal cases of the type where the physical examination of the patient or his communications to the examining physician factor of the claim or defense of the patient. The rule also contains other broad exceptions.

321. The privilege not to disclose confidential communications was extended to the physician-patient relationship in Illinois in that year. Ill. Rev. Stat. ch. 51 § 5.1 (1959). It does not apply when the party's "physical or mental condition is an issue." Ibid.


323. The significance of this material in relation to a theory of judicial decision has been discussed by the writer in an article entitled The Supreme Court and Philosophy of Law, 5 Vill. L. Rev. 180, 198 (1959).

324. It has been so extended by legislation in New York. See N. Y. Education Law § 7611.

Presumably, the psychiatrist is included in the term "physician" in connection with the physician-patient privilege, since he holds an M.D. degree.
for purposes of diagnosis and treatment are relevant in the proof of serious crime. Here again, the infringement of the right to privacy must be balanced against the policy favoring the scientific principle, but there is also in the balance on the side of the latter the social interest of the state in individual security in the more important sense of freedom from physical transgression. Nevertheless, in the case of the psychiatrist and his patient, a strong argument can be made in support of the privilege, as the relationship is far more personal and intimate than that of physician and patient in general. The case for the recognition of a privilege for the confidential communications of psychiatrists and their patients has been stated most persuasively in the following passage:

The reasons are apparent to anyone with even the most basic understanding of this field [i.e., psychiatry]. A relationship of extreme trust and confidence must be established often even before the patient reveals anything of value to the psychiatrist. Fear of disclosure may delay or prevent altogether the creation of [t]his relationship; on the other hand, legal assistance of non disclosure would cast aside at least one barrier to establishing the essential rapport. Necessary to this method of treatment is the revelation by the patient himself of the acts and thoughts precipitating his illness, whereas in the ordinary case of physical illness, such participation by the patient is often unimportant. If fear of disclosure silenced the patient at this point, the entire treatment process would be frustrated. The argument that the individual would not remain silent where his health was concerned does not necessarily apply here. Many if not most people do not consider mental illness as serious as physical illness; consequently the fear of sickness or death attendant to a physical ailment is not present to aid the psychiatrist. Furthermore, the patient is not trained in recognizing significant from insignificant facts. [Drugs are an important factor, as is the popular regard of mental illness as an object of ridicule or shame.] Legislation should be mindful of the fact that the patient should be protected from any such humiliation, and further that this in itself evidences the fact that the patient intends his ailment for the ears of the psychiatrist alone; this confidence is an essential element of this particular relationship.

The priest-penitent privilege needs no further consideration than to note, in passing, that it finds its justification in freedom of religion and conscience, embodied in the First Amendment to the Federal Constitution and made binding on the states by the expanding inter-

325. See VIII Wigmore § 2385.
327. VIII Wigmore §§ 2394-96.
The First Amendment represents the embodiment of one of the highest values of our civilization. Moreover, as the priest-penitent privilege only results in the non-disclosure of admissions which in the absence of the privilege would not likely be made — or if made would not be disclosed by priests in the course of their religious discipline enjoining absolute secrecy — the writer does not perceive how it can do any substantial harm to the evidentiary principle. To compel disclosure would seem to run afoul of the First Amendment and would at best result in a contempt charge against the disobedient clergyman. Furthermore, the existence of this privilege must afford a great sense of satisfaction to the members of those religions in which confidential communications between the clergy and their laity are prescribed. Few cases have arisen in this area, and it is difficult to conceive of a case in which opposing counsel would insist upon a priest or minister’s testifying over the personal objection of the latter, especially in a jury trial.

The husband and wife situation really consists of two distinct concepts of privilege, to wit: (1) the privilege of either spouse not to testify for or against the other spouse except by mutual consent; and (2) the privilege of a spouse not to have a communication made in confidence to the other spouse disclosed by the latter. The former privilege exists only during the continuation of the marriage; the latter is of permanent duration.

Contrary to Dean Wigmore, the writer believes that the former of the two privileges arising out of the marital relationship (referred to as the anti-marital privilege) is the more valuable and that it would generally suffice to protect the essential privacy of the relationship, though there are situations where the desired coverage would be lacking, due to the factors of divorce and death. In these circumstances, however, the harm done would not tend to be substantial, since

329. See Fahey, J., in Mullen v. United States, 263 F. 2d 275, 277-80 (D. C. Cir. 1958), distinguishing the situations in which “the priest is known to be bound to silence by the discipline and laws of his church” from those in which a penitent confesses to a minister in his capacity as such in order to obtain spiritual aid but holding both kinds of confessions to be within the purview of the privilege.
331. VIII WIGMORE §§ 2227-45. Wigmore criticizes this privilege.
332. Id. §§ 2332-41. Wigmore approves this privilege. He distinguishes the two privileges in § 2334.
333. The UNIFORM RULES rule 23 and rule 28 give the greater weight to the confidential communication. They also distinguish between civil and criminal cases, making the privilege slightly broader in the latter than in the former.
in the case of divorce, the relationship has already been disrupted; while in the case of death, the original holder will not be in a physical state to suffer the embarrassment (or disgrace) when disclosure by the other party to the communication is compelled. As regards either possibility, during marriage one's personal dignity and freedom can be threatened only remotely and in the prospective sense. To some extent there is the policy of preserving domestic harmony, and as a practical matter this undoubtedly has a certain degree of importance. But it is probably true that the harmony would not be adversely affected by the prospect of the spouse's being forced to testify to such confidential communications after the dissolution of the marriage. The absence of such a privilege might put the ex-spouse to an unhappy choice of perjury or injury to her ex-husband, but could one urge a strong policy objection to that? In a sense, there might be a greater infringement on privacy than in the case of the compulsory violation of the confidences of a friend, but it does not appear that this would generally be the case. Such special recognition of confidentiality as might be claimed here would result from the combination of a relation back when considered from the vantage point of the time when the evidence is sought and of a projection of the matter into the future (prospective fear of revelation) from the vantage point of the time when the communication is made. Hence, the situation has an element of delicacy, and there are both rational and emotional overtones which lend some support to the privilege. The resolution of the issue must come from a choice of competing values. We do not like the idea of forcing a choice here (that is, on the part of the individuals involved), but choices are inevitable, and the prospective injury to interests of personality are not sufficient to tip the scales in favor of the privilege.

Furthermore, if the anti-marital privilege is recognized, the confidential communications privilege is not necessary except in cases of death or divorce and third party suits, where little harm would seem to be likely to result. And after the marriage has been terminated, any public policy favoring the preservation of domestic harmony would not be applicable here, while the time when the communication channels should be kept open between the spouses would have already passed. Actually, the writer submits that the policy favoring the maintenance of free and easy communications between the spouses is aided very little by the existence of either privilege. Husband and wife do not think about the matter, and if they did they would have no choice.

334. It has been maintained that "[T]he privilege against the disclosure of marital communications does not actually serve the purposes assigned for its existence. Few laymen are aware of such a privilege and when informed of it by their attorney, the resultant invoking of it by them is usually a result of past marital discord, and
but to proceed much as they do at the present time. There might be exceptions in the case of various criminal actions, which make such neat illustrations for the casebook editors, but these are peripheral matters. Free communications and domestic harmony are essential to the preservation of the family, but the writer does not believe that a threat to this institution would exist if the privilege were abolished entirely. Marriage and the family, perhaps our most dynamic social institutions, would hardly feel the jolt.

Dean Wigmore's argument for the confidential communications privilege and against the anti-marital testimonial privilege smacks of the lampwick of eighteenth century rationalism, and the writer submits that a justifiable quaere might be this: Did not Wigmore's fervent desire to eliminate insofar as possible all rules which prevent the reception of relevant evidence cause him to select the confidential communications privilege over the anti-marital testimonial privilege as the lesser of two evils? The way one looks at a point might be determinative of the conclusion which one reaches concerning its value.335

The writer submits that these two privileges rest on a stronger basis in our society, however. This basis is the concept of human dignity in connection with an especially confidential relationship, one incidentally packed with "emotional dynamite" and one which the state has a strong interest in protecting and fostering. In a personal and intimate sense the husband and wife relationship is the closest one known to man. Ideally, it involves a union of minds as well as bodies. A spouse reveals himself to his marital partner in almost every way more thoroughly than to others — even when he does so unconsciously. This intimate relationship is of great worth in the promotion of the ultimate interests of society. Immediately, the problem is one of the security of domestic institutions, but behind this is the ultimate interest of the state in the individual life.

Therefore, private matters occurring in the area of the marital relationship are not to be brought out lightly in formal public hearings, such as judicial, legislative, and administrative proceedings. After the marital relationship has come to an end, the confidential matters are not so deserving of protection from public scrutiny. Nevertheless, something in the spirit is shocked and hurt at the betrayal of former confidences, at the revelation of the secrets of the bed-chamber, and perhaps at the vindictiveness of alienated ex-spouses, in some cases to the point of perjury, and at the conduct of fortune hunters, who

not as the rule contemplates, a deterrent to future marital difficulties." Greene, Husband-Wife Privilege, in Symposium: Evidentiary Privileges of Non Disclosure, 33 CONN. B. J. 182, 190 (1959) (brief but excellent recent treatment of this privilege).

335. See generally POLANYI, THE LOGIC OF LIBERTY (1951), esp. the interesting examples drawn from science at 12-13.
make a mockery of the institution of marriage. However, the relationship itself is no longer in existence, and there are other policies competing for recognition, policies which pull in the opposite direction. One of these is the policy favoring accuracy in fact-finding, which in general is and should be the strongest one known to the courts, standing ever-ready to tip the scales when the weight in the opposing balance is lightened. The writer therefore advocates that the confidential communications privilege should be qualified by statute to provide that the court should have the power to allow disclosure after the marriage has ceased to exist, if it should first be shown that the benefit to be derived from the disclosure would tend to outweigh the harm which might tend to result from such disclosure. This would leave a kind of qualified immunity, to be dissolved upon the showing of good cause.

The anti-marital privilege is limited in the sense that it contains a healthy exception in certain cases of necessity, such as crimes by one spouse against the other, and in divorce proceedings. The courts have rightly refused to extend the confidential communications privilege to cases of communication through agents. As the late Chief Justice Stone once put it, "Normally husband and wife may conveniently communicate without stenographic aid, and the privilege of holding their confidences immune from proof in court may reasonably be enjoyed and preserved without embracing within it the testimony of third persons to whom such communications have been voluntarily revealed." The two marital privileges are thus of rather limited scope. Each spouse's testimony is generally available in favor of the other spouse, especially in cases where other evidence would least likely be obtainable. On balance, it would seem that these privileges should be preserved for the protection of privacy as an element of human dignity in this most intimate of all personal relationships.

D. Termination of the Privilege:

Finally, the question of termination of the privilege should be considered. (This has already been done in the case of husband and wife. In the case of priest and penitent, the privilege must be permanent for reasons of religion and conscience and so its termination cannot reasonably be permitted. In the case of attorney and client, the rationale seems to be weighted in favor of the termination of the privilege after the death of the communicant, and similar conditions point to a like conclusion in the case of the physician and patient. Therefore, we will consider the question of termination of these privileges to-

336. Wigmore § 2239.
gether.) Since the privileges are for the protection of human dignity through formal privacy in a highly personal relationship, the question arises as to whether that value is destroyed or greatly diminished by limiting the duration of the privilege to the lifetime of the communicant. Certainly the value of the privileges is not destroyed, because most of this value will ordinarily have been received during the communicant's natural life. Generally, what value remains to be enjoyed by immunity from compulsory disclosure by the attorney (or by the physician) is small, and the confidence is seldom subject to challenge. Furthermore, the dissolution of the privilege here certainly could not embarrass or disgrace (that is injure in the personal sense) a deceased person, not even when the court should order the compulsory disclosure of the communication which had been privileged prior to the death of the declarant. The factors favoring the right of privacy are the sense of freedom from fear of injury to expectations arising out of established relations in the property and contract sense and a sense of freedom from fear of social disapproval. The latter, however, is personal, in any strong sense, only to the declarant. The former is present but only in a lesser degree (and without the same sense of immediacy) and then largely in the property and contract sense of privity of relationship under the laws of ownership and succession. Perhaps the conceptual notion of privity derived from property and contract had a place in the thought ways which led to the extension of the privilege to cover cases after death in the first instance. Certainly, the attorney's sense of honor was a factor, as this does not cease on the death of the client. Yet, as has been shown, this sense of honor, though still a factor, is no longer of controlling importance. The type of thinking which led to the establishment of rules of competency, the remnants of which are still with us in the form of the dead-man statutes, must have contributed to the permanency of this privilege. But notions of competency have been discredited, and the rules of privity have no more place per se in the law of privilege than agency fictions, the fiction of the corporate personality, or the discredited doctrine of mutuality of remedy in equity. Based on either notions of human dignity or Wigmore's lesser rationale, the justification for the privilege is not sufficient to hold the scales against the strong policy favoring accurate fact-

338. It is clear, however, that fear of social disgrace after death is not an uncommon occurrence, and in situations where this factor creates fear on the part of the communicant (or would be communicant), the dignity principle continues to have substantial value.

339. Fear of loss of estates in land after death in England, a country where landed estates were the prime source of status and power, might have been a factor originally, but would hardly need to be taken into account in an evaluation of the privilege in twentieth century urban America.

340. McCormick § 65; II Wigmore § 488 at 575.
finding when the original personal relationship between the client (or patient) and his professional adviser (or physician) has ceased to exist by reason of the death of the former. The values which the privilege tends to accord have been generally fulfilled. Any remaining value is largely tenuous and uncertain. Hence, when weighed against the important countervailing values of evidence, which remain constant, they no longer tip the scales in favor of the immunity from disclosure. The writer therefore submits that the privilege should be limited by statute to the life-time of the original communicant. By the same reasoning, the privilege should be personal to the client (or patient) and should never be transferred to those in privity with him as a result of contractual relations.

E. New Areas of Development: Corporate and Agency Problems:

There are two other areas in which the privilege is recognized today wherein there is some cause for uncertainty as to the value of the privilege when balanced against the need for evidence, and the matter deserves careful study. These areas are as follows: (1) the area of communications of corporate agents to corporate counsel; and (2) the area of communications of agents conducting legal business for their principals to counsel for such principals. Both areas will be considered briefly in this subsection.

The corporation in the nineteenth century was a small business operation, frequently personally owned or closely held and having a large element of the personal relationship in the association of the principal owners and shareholders with their legal counsel. The rela-

---

341. See also McCormick § 98, to the same effect. The ethical obligation of non-disclosure, as embodied in Canons 6 and 37 would remain in effect, however. Cf. 52 A.L.R. 2d 1243 (1954) (propriety and effect of attorney representing interest adverse to former client).

Professor McCormick favors the termination of the privilege on the death of the original holder. McCormick 200, A valuable note on California law reaches the same result. 10 Stan. L. Rev. 297, 320 (1958). (This note draws the line so as to favor the privilege slightly more than the writer would favor it in general, but nevertheless the conclusions there reached are fundamentally sound.) And see Comment, Posthumous Privilege in California, 8 U.C.L.A. L. Rev. 606, 616-25, 632-33 (1961) (generally to same effect).

The writer might also suggest as a possible alternative here a qualified privilege to be terminated for good cause shown, along the lines suggested for the physician-patient privilege and the husband-wife confidential communications privilege.

342. The Uniform Rules, rule 26(b) adopts this position.

343. These two subjects, to wit: the applicability of the attorney-client privilege to corporations and to communications between attorney and client through agents, the investigation of the case made in anticipation of litigation, including the investigations of the client and the use of agents by the attorney and the client for purposes other than direct communication, and the ascertainment of expert information and advice bearing on the problems of litigation will be the subject of two forthcoming papers by the writer. The paper on corporate privilege will appear in 40 U. Det. L. J. (1963), under the title of A Personal Privilege for Communications of Corporate Clients—Paradox or Public Policy?
tionship of the corporate owners was generally a face to face relationship with counsel in the particular community wherein the corporation was located and did business. It was on the basis of these conditions that the extension of the attorney-client privilege to the corporation appeared both natural and reasonable. In general, this picture no longer holds true. Many corporations have reached gigantic size, management is largely divorced from ownership, and the managers are in the position of trustees for the many and widely dispersed stockholders. Even those in the positions of top management and their staffs are not “clients” in the true sense of the word. They are only agents for the transmission of communications from the corporation.

344. Even Wigmore in his great treatise does not notice the problem. The right of a corporation to the claim of privilege on the same basis as an individual is tacitly assumed. The only article to appear thus far specifically devoted to the subject takes the position that the privilege should apply to both outside counsel and house counsel for corporate bodies. Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L.J. 953 (1956).

Two other articles, valuable for their attempts to brief the law and its present tenuous distinctions in the area of “work product,” are Strack, *Attorney-Client Privilege—House Counsel*, 12 Bus. Law 229 (1957); and Hunt, *Corporate Law Department Communications—Privilege and Discovery*, 13 Vand. L. Rev. 287 (1959). They collate the decisions and state the law but do not attempt to rationalize it.

345. See Berle and Means, *The Modern Corporation and Private Property*, esp. Ch. 1 of Bk. I and Ch. 4 of Bk. 4. This excellent work traces the rise of the modern corporation, the gradual separation of management from ownership, the new corporate institution and its power, and new problems which it poses, with suggestions for dealing with them.

Analogy is suggested in the treatment of the privilege against self-incrimination, which in the United States does not extend to a corporation. Hale v. Henkel, 201 U.S. 43 (1906); Wilson v. United States, 221 U.S. 361 (1911). See also VII Wigmore § 2259a; McCormick § 125. Moreover, the privilege cannot be asserted personally by an officer-custodian of the corporate records on the ground that they would tend to incriminate him, inasmuch as he acts only in a representative capacity in connection with such records. Wilson v. United States, supra. Also the privilege does not extend to an unincorporated association, and agents of such association in whose custody the records of the association are reposed can be compelled to produce such records, although production would tend to incriminate them personally. United States v. White, 322 U.S. 694 (1944). Recently, the privilege has been held not to be available to a general partner of a large limited partnership when summoned to produce partnership records. Silverstein v. United States, 314 F. 2d 789 (2d Cir. 1963); petition for certiorari filed April 25, 1963, Supreme Court No. 1048. The theory of these cases is that the privilege against self-incrimination is personal to the individual, being in connection with his individual acts in a personal capacity, whereas, the employees of the institutions involved in the above-cited cases in the performance of their work for such institutions were acting in their representative capacities. The institutions, not being entitled to the claim of privilege, since not within the purview of the policy on which the privilege is based, it cannot be asserted by anyone. For our purposes, the important point is that the privilege against self-incrimination is a personal thing and is not accorded to an institution. By analogy, this should be true a fortiori in the case of the attorney-client privilege.


The extension of the attorney-client privilege to corporations came before the development of the giant corporation of the twentieth century, which is entirely different from the business unit owned by an individual or small group. See Berle and Means supra 2. This latter type of group organization was never so depersonalized as is the new corporation of the present century. Id. 9, 352. It was natural
as "client" to the corporation's lawyers. These agents cannot individually determine whether they will seek legal advice and if so what lawyer or lawyers they will choose to represent their company. They cannot determine what and how much information they will communicate to counsel. Furthermore, the managerial agents who conduct the corporate enterprise do not occupy the same type of close personal relationship with their lawyers as the individual client does with his lawyer. In the nature of things, the managers cannot occupy the same kind of relationship because of the vicarious nature of their role of company representative. The agent ex necessitatae is not the client. Hence, the personal counselling element, so strong in the relationship of the individual client with his attorney, is almost entirely absent here.\textsuperscript{45a}

The managerial agents cannot determine whether to claim the privilege originally, nor whether they should waive the privilege later. At least, they cannot make such determination in their individual or personal capacities. If they should attempt to do so, such action would ordinarily be held to be beyond the scope of their authority. All of these things must be determined by company policy. This policy and

for the courts to analogize the corporation to the individual, since the corporation represented an extension of individual personality in an area where the courts were friendly toward the objectives (which situation was not so generally the case when the privilege against self-incrimination was raised).

Nevertheless, the extension of the privilege in the corporate area is a result of the conceptualistic type of thinking which was in vogue in the last century and urged by the historical school of jurists. Once a particular legal concept was formulated, all cases had to be fitted to the concept rather than the concept shaped to meet the particular needs that arose from the confrontation of new types of situations. Thus, when the attorney-client privilege had become well established as a legal concept, the modern corporation began its phenomenal growth and development. Jurists applied the concept automatically, thinking in terms of the concept rather than the objectives to be accomplished and the interests to be balanced in the particular situation. \textit{Cf.} Pound, \textit{Interpretations of Legal History} 119-24 (1923); Radin, \textit{A Re-Statement of Hohfeld}, 51 Harv. L. Rev. 1141, 1144 (1938). Even the great Wigmore, who had endeavored to re-examine all the evidentiary principles and to determine their merit, failed to consider this problem of the applicability of the attorney-client privilege to the modern corporation.

Finally, it should be noted that — even apart from the non-existence of the problem of the \textit{face to face relationship} and the concept of human dignity — the privilege as applied to the corporation, especially the giant corporation, does not satisfy Professor Wigmore's four fundamental conditions (discussed in text at note 203 \textit{ante}). Nor does the fact that management's position may be challenged a generation later make the corporation any more personal. Rather, as a result of the gradual shifting of the source of control to investment trusts and other corporate holding devices, the giant corporation has only become more autonomous and more impersonal in relation to both the individual shareholder and the public. For a good discussion of the change that is now taking place, see Berle, \textit{Power Without Property} (1959).

\textsuperscript{345a} For example, the communications of the corporate agent to counsel can never fall in the second category set out under practical considerations. See pt. III 337-38 \textit{ante}. Yet, this category is an important factor in the justification of the personal privilege and particularly in making it both an unqualified immunity at the particular time as well as permanent in duration. Hence, it would seem that at best any privilege accorded to the corporation should only be for the duration of the particular suit and subject to non-recognition when the opponent otherwise would not be able to obtain the necessary evidence on which to proceed with his case.
the manner of its execution are the product of staff decisions. The corporate managers can only carry out this policy.

In the relationship which will exist between the corporation and its legal advisers, the business element will predominate. Such personal element as comes to exist must be on an individual basis, between the corporate managers and their legal advisers as individuals, although the managers are actually representing their company. Hence, it is more in the nature of the kind of relationship which exists between friends and business associates than that which exists in a more formal sense between the individual client and his attorney. Most of the considerations heretofore discussed in connection with an evaluation of the personal privilege and the illustrations analyzed are not applicable in the case of the corporate client-attorney relationship. The very frame of reference itself is too different. For example, as previously indicated, the generally accepted rationale of the privilege is the freedom which it affords to the client to communicate with his attorney without fear that either party will be forced to disclose such communications at a later date without the consent of the client. If the privilege did not exist, this feeling of freedom on the part of the client would be lacking, and he would not make full disclosure to counsel. Yet, in the case of the corporate client, the privilege does not have this motivational effect, since the matter of communications to counsel is a policy matter, to be determined by the corporate management as a body. An individual member of the managerial body can only carry out the policy as an agent for transmission of communications, according to instructions, and his personal feelings will not enter into the matter. Hence, the personal motivational factor is entirely lacking and irrelevant here. Moreover, in the case of the corporation, the information which would be communicated to counsel should generally be a part of the corporate business records and as such subject to pretrial discovery in any event. It should be pointed out that inasmuch as the client is not a person but an institution, the high degree of secrecy (confidentiality) which exists when the client is an individual being cannot exist here, unless the privilege is restricted to the communications of some single designated corporate agent, which would, of course, deprive the corporation of most of the practical benefits presently derived from the recognition of the privilege.\footnote{\textit{See Petition for Certiorari} to the Supreme Court of the United States, in the case of General Electric Co. v. Kirkpatrick, No. 831, October Term, 1962; 	extit{cert. denied}, 372 U.S. 943 (1963). This case is also referred to with additional case history in note 350a.} Yet, to such extent as the privilege is extended so as to include communications other than those originating with the individual client, the prerequisite confidentiality is lacking. As the writer
will show hereinafter, communications originating with the client's agents must necessarily lack the requisite confidentiality to qualify for the privilege. For example, they fail to meet the first condition for the recognition of a privilege.\textsuperscript{345e} Moreover, if the shareholders rather than the managers are deemed to be the group entitled to recognition as "the client," the communications of the latter could not qualify as communications of the client even if the requirement of strict confidentiality were relaxed in the case of the corporate client.\textsuperscript{345d} Yet, if the shareholders are not the group which constitute "the client" for purposes of the privilege but are nevertheless entitled to have access to the corporate records, the requisite confidentiality is lacking for that reason. Finally, the visitatorial powers of the state of incorporation would entitle it to inspect the corporate records, and these records, not being entitled to confidential treatment, would not originate in confidence since the knowledge sought would be available to third parties as a matter of law, under another rule of law.\textsuperscript{345e}

As another example, the case of the client going to Attorney A to ascertain the law and then improving the case which he communicates to Attorney B would be most unusual action on the part of the corporate management — in fact, it would be almost inconceivable in the case of one of the quasi-public corporations. The dignity principle would not be infringed if the corporate privilege were abolished, since the disclosure of corporate matters would constitute no threat to individual privacy, and no injury to the individual personality would result from forced disclosure. There could be no conceivable threat in that area, since individual privacy cannot exist in the area of the relationship of the members of the corporate management with the corporation. What the managers do is done for the corporation and hence cannot be private and confidential as to the individual actor (agent) but only as to the corporation for which the individual is acting, to such extent as is permitted by the policy of the law. The element of freedom of the individual managerial agent is similarly lacking (and irrelevant), since the agent can have no freedom in the sense of individual freedom of choice, for the same reason that he can have no privacy and no injury to personality from compelled disclosure.

The element of loyalty, so important in the case of the attorney and the individual client, is of a different nature here, since loyalty in the personal sense must run to the corporate managers, while the obli-

\textsuperscript{345c} VIII Wigmore § 2285; discussed in text at note 203 ante.
\textsuperscript{345e} This point was also emphasized by Judge Campbell in Radiant Burners, supra.
gation of counsel is to the corporation. Since this is understood by all parties, the sense of loyalty never develops in the same manner nor to the same extent as in the case of the individual client and his attorney. If the managerial agents leave the service of the company, the corporation as client nevertheless remains in the same relationship, at least theoretically, with its lawyers. Finally, since in the United States a corporation is held not to be entitled to the claim of privilege against self-incrimination, the incrimination element that is generally so important a part of the privilege in the case of the individual is entirely non-existent here.

Since the corporation is not a person in the physical sense, the communications from the client to the lawyer can never originate with the client in the literal sense of that term (as a term of personification). The communications can only originate with the client's agents. Hence, there can never be a true face to face relationship between the corporation and its lawyers. Yet, this is the only area of the attorney-client relationship which the writer believes should be recognized as within the purview of the classical privilege, and even here it should be recognized only to such extent as the question is deemed settled by the principle of stare decisis. 345f

There has also grown up in the present century a new type of legal adviser to the large corporation, known as "inside counsel" or "house counsel." Such counsel maintain their offices on the corporate premises and devote their full time to the handling of corporate matters, generally for a single corporation that is their full-time employer. Such counsel handle all legal matters assigned to them by their company managers, and they may handle a substantial amount of non-legal business. Corporate counsel have come to be recognized as a distinct branch of the corporate enterprise. As an entity, they are customarily referred to as "the corporate law department." Frequently, such counsel also occupy high executive positions in the corporations which they simultaneously represent as house counsel. They learn about the legal problems of the businesses which they represent as these problems arise — not, like outside lawyers, at a later date. All parties ex necessitate must accept and work with each other. Hence, all the delicacy, com-

345f. Compare Radiant Burners, Inc. v. American Gas Association, 207 F. Supp. 771 (N.D. Ill. 1962); supplemental opinion in 209 F. Supp. 321 (1962) (refusing to recognize a corporate privilege), with Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962) (recognizing corporate privilege on ground that it has been established practice for too long to be denied by the courts). The writer submits that the position reached by Judge Campbell on this point in Radiant Burners is sound. The case is now pending on appeal to the Seventh Circuit. In United States v. Becton Dickinson & Co., 210 F. Supp. 889 (D. N.J. 1962), an anti-trust case, the court recognized the corporate privilege, deeming itself bound by the specific language of the New Jersey Evidence Act. Each of these cases also presents a nice question of choice of law in the area where substantive law and procedure seem to merge into each other.
plexity, subtlety, and changeability of the relationship which exists in the case of an individual client and his counsel is lacking here, at least in the same personal-professional sense. The relationship here is much more stable than even that of the corporation with outside counsel. House counsel are actually a branch of the corporate management. Such counsel are in no better position to demand special status as attorneys for the purpose of establishing the attorney-client privilege in this area than any other members of the corporate management would be to demand a communications privilege for their various corporate communications and activities. Nevertheless, it has been held recently that communications to house counsel are within the scope of the privilege.346 However, the question is far from settled, it is an open one in most jurisdictions, and the writer believes that it would be wise for the courts to refuse to extend the privilege to cover confidential communications to house counsel.

Thus, there are two basic reasons why the privilege should not apply to the communications of corporate management to corporate counsel: (1) The relationship of attorney and client is not personal to the managers in the same close, individual-personal-professional sense in which it is personal to the individual client and his lawyer; and (2), as to the relationship of management with house counsel, this is more in the nature of an ordinary intracompany relationship than one between an individual client and his legal adviser in the traditional sense of the term. The additional reason that corporate communications to counsel lack the requisite confidentiality is more technical in nature, yet it cannot be denied that corporate communications to counsel do not originate in confidence in any close personal sense, or in any restricted sense such as that of man to man; this is true a fortiori in the case of communications to house counsel, who is treated as a part of the institution, whereas, the relationship with an outside lawyer would be on a more formal professional basis.

The same kind of reasoning would prevent the application of the privilege to those cases in which defendants in damage suits are represented by casualty insurance firms. In these cases, according to current practice, the attorney actually represents the insurance company, and the insured is little more than a witness who is bound by the terms of his contract of insurance to cooperate with the insuring company. Nevertheless, at the present time, the courts ignore the true relationship of the parties and treat the insurance counsel as though they were actually representing the insured, who is only the nominal party de-

fendant. When the insured is more than a nominal party, as where the damage claim may exceed the policy coverage, there is a conflict of interest between the assured and the carrier, and the assured, in order to be adequately represented, should have his own personal counsel. When resort is had to a fictional stretching of the attorney-client relationship so as to treat the carrier's counsel as counsel for the assured, the insurance carrier is in effect the windfall beneficiary of an immunity that is not within the sound policy on which the privilege should be based. The relationship of the insurance defense counsel to the assured is not the close personal relationship of attorney and client, and it is not one which should inure to the benefit of the carrier by virtue of some kind of magical transference. The insured as agent is in reality only the agent for the company, for the defense of a lawsuit, as provided in the contract of insurance. Moreover, the assured is not an agent of the managerial staff level. He is not even a general agent. He is a special agent, for a very limited purpose and for a period of short duration at best. The company does not have the same basis for the claim of privilege in the case of the insured as it would have in the case of an ordinary employee of less than staff level. At "low twelve," we should now perceive that Cinderella's coach is still a pumpkin and not insist that it be treated as a coach merely because there are coaches on the streets.

A fortiori, the privilege should not extend to governmental bodies which are more depersonalized than corporations and also

347. The case against the privilege for corporate clients applies a fortiori to governmental bodies because these are in a position of trust to all the people, not just the limited groups of shareholders and creditors. Also, the positions of management are more impartial and disinterested than is true of corporate management. There is a public policy of openness of governmental meetings and records and governmental business in general. In fact, there is a strong public policy favoring the disclosure to the public of all of the facts pertaining to governmental action. This is true at least where the national interest would not be jeopardized by threats to governmental relations with other powers or to internal and external security. Furthermore, this kind of policy is essential to healthy democratic government, while the government is able to protect itself adequately in the area of diplomatic relations and military security by what has come to be known as governmental privilege. This includes rules designated both as procedural and substantive.

See McCormick § 92 at 185; cf. VIII Wigmore §§ 2316, 2375; but see Simon 955 n. 9 (contra); Rowley v. Ferguson, 48 N.E. 2d 243, syl. 8 (Ohio App. 1942) (state auditor and attorney general; privilege upheld without discussion); Auten v. Rayner, [1960] 1 All E.R. 692; 1 Q.B. 669 (C.A.) (police officer and public prosecutor; privilege upheld per broad English Rule); Holm v. Superior Court, 42 Cal. 2d 500, 267 P. 2d 1025 (1954) (city employee to city attorney; privilege assumed); Jessup v. Superior Court, 151 Cal. App. 2d 102, 311 P. 2d 177 (1957) (city park supt. to attorney for city; report held privileged in spite of legislative declaration that public records should be open to inspection). Jessup is the only case in which the matter has been argued, and even here counsel for the proponent of discovery assumed that the attorney-client privilege would apply in the absence of the particular statute! See however Radiant Burners, Inc. v. American Gas Association, 207 F. Supp. 771 (N.D. Ill. 1962), supplemental opinion in 209 F. Supp. 321 (N.D. Ill. 1962) (excellent opinions, per Campbell, C. J.), which specifically considered the question and held that historically the communications privilege did not extend to the corporate client and his attorney,
face the countervailing policy favoring openness of governmental records and proceedings. Moreover, when such records require secrecy, it is accorded under the public policy which recognizes a privilege for state secrets.\textsuperscript{348} In the case of outside counsel, until recently, it was generally believed to be the law that the attorney-client privilege extends to the corporate client. Recent ferment in the area of pretrial discovery, however, has caused the re-examination of practices which were not so much established in the judicial sense as they were accepted without the customary scrutiny which has been the traditional basis on which the common law was "hammered out" so as to meet the needs of several great modern nations. The entire question of the applicability of the privilege to groups of people is now ripe for careful examination no less than is the same issue in the area of the privilege against self-incrimination.\textsuperscript{348a} Break with established ways and accepted tradition is always difficult, however, and there may be some justification for the corporate client and his counsel to be put in a position such that they can study their case out together without risk of discovery of their work before they themselves have ascertained what has actually happened or have decided what their formal legal position will be. The gravamen of the evil in the twentieth century has been not only that the voluminous corporate records have masqueraded as communications to counsel, but also that many important records and documents have been drafted only as communications to counsel. This last named practice, of course, technically meets the requirements of the privilege if it extends to corporations, but the same information should be available in the corporate records and thus subject to discovery. The history of discovery of corporate records indicates that this is not the case. Herein lies the seriousness of the problem for an enlightened system of evidence. Since change within the legal frame of reference must often be accomplished piecemeal and gradually, perhaps a qualified immunity might be the immediate answer in the areas of both corporate and governmental "attorney-client" relationships. In the long run, however, the personal privileges as substantive rights accorded to corporate and governmental bodies simply cannot be justified under a scientific system of evidence.

Mention has already been made of the development of the common law privilege to cover the communications of clients to their attorneys. This includes the communications made either directly to counsel or

that nothing contained in the decisions of the United States Supreme Court or the Seventh Circuit Court of Appeals requires the recognition of the privilege, and that accordingly the privilege covers only the communications of the individual client to his lawyer.

\textsuperscript{348} See VIII \textit{Wigmore} §§ 2367-79; \textit{McCormick} §§ 143-50.

\textsuperscript{348a} See note 345, paragraph two.
through the use of agents for purposes of transmission of the client's communications. This is the scope of the classical privilege in its essential area, and the writer has designated it as the face to face situation, in contrast with the extended privilege, which covers a larger but more indefinite area and one in which the decisions continue to be in conflict.

The quasi-privilege has also been mentioned. It is an immunity which has come to be recognized for the lawyer's preparation for trial. The lawyer will not be required to disclose the information which he has acquired in preparation of his case in advance of the trial. In other words, the lawyer's knowledge of the case and the evidence, which he has obtained personally or through his agents, are not subject to pre-trial discovery. This principle can also be conceded to have some basis for claim to validity in an adversary system, though the general subject of quasi-privilege, except where it connects with the classical privilege, is beyond the scope of this paper. The confusion which has developed in the law of privilege, however, has resulted from the failure of the courts, particularly in the United States (but nevertheless traceable to English precedent) to recognize the distinction between the classical privilege and quasi-privilege. There are areas where the two principles overlap. For example, when the lawyer interviews the client in connection with litigation, the information which the lawyer acquires is protected under the principle of quasi-privilege, as a part of the lawyer's preparation. It is also protected under the classical privilege, as a communication of the client to his counsel. Beyond this narrow area, however, there is a tendency for the two principles to diverge. When the client sends a message to counsel, it is protected under the privilege. When the lawyer interviews a witness, it is protected under the quasi-privilege. In England, when the busy lawyer came to use agents to investigate the case, their investigations were properly protected under the quasi-privilege. However, the client himself and his agents came to be recognized as agents of the lawyer. This raised a series of special problems, such as when the client was investigating as client and when he was investigating as agent for the attorney. The privilege of the client is broader than the quasi-privilege of the lawyer because it, the former, covers all of the writings which originate as communications by the client to counsel, either for purposes of obtaining legal advice or for purposes of litigation, while the quasi-privilege of the lawyer includes only materials gathered by the lawyer in preparation for litigation.

The tendency of modern business to operate entirely on the basis of written records was another factor which tended to promote con-
fusion in the delimitation of the boundaries of the law of privilege. As the clients came to make a record of the facts in those cases in which litigation might conceivably be anticipated, their lawyers began to advance the claim that all such records had been made in anticipation of litigation. Thus, it came about that these records, which were in the nature of business records and made in the ordinary course of business or would have been made for business purposes in any event, were claimed to have been made in anticipation of litigation and were therefore privileged. Though the parties might have claimed, with greater credibility, that the particular records were made to be laid before counsel for the purpose of obtaining legal advice thereon, this claim does not seem to have been generally made.\footnote{348b}

In time, the English courts came to pay little attention to the origin of the immunity, while the American courts, until recently, seem not to have realized that there are two distinct privileges involved. Hence, they have treated all investigations of the client as “communications” to counsel if they were of the opinion that the records did not qualify as ordinary business documents. They have also allowed the independent communications of the client’s agents (that is, those not originating with the client personally) to be treated as privileged communications by the client, thus extending the privilege beyond the more narrow confines of the face to face situation. This has probably been due to the failure to recognize that the agents’ independent communications should be protected only when they are obtained by the lawyer or his agents and then under the principle of quasi-privilege rather than

\footnote{348b. This was obviously because only communications which originated with the client personally were protected under the personal privilege, whereas evidence gathered by the attorney or his agents was protected under the quasi-privilege. Hence, the evidence gathered by the client’s agents in anticipation of litigation was protected under the quasi-privilege; since the client was treated as agent of the attorney (the client’s agents then being the attorney’s subagents). The end result was that materials which the client’s agents communicated to counsel for purposes of litigation were recognized as privileged, though the materials did not originate with the client (but only with his agents). The courts then tended to forget the distinction between privilege and quasi-privilege and to treat the materials gathered or prepared by the client’s agents as privileged if such materials had their origin in the client’s anticipation of litigation, even though the client did not have an attorney at the time when the source materials were gathered by the client’s agents. The result is that we have a situation that would have been wholly untenable if the original nature of the preparatory quasi-privilege had been kept clearly in mind. That it was not kept clearly in mind meant that the courts could treat the personal privilege as covering the source materials gathered by the client’s agents for communication to counsel, and the claim of privilege for such materials was exercised in all circumstances where it might conceivably be found by the courts to apply, while the courts themselves applied the expanding coverage broadly or liberally.}
the classical privilege itself. This is the general background of the situation which existed when Hickman v. Taylor was decided.

Hickman v. Taylor is the great American case on privilege and the leading case dealing with agency problems in the law of attorney-client privilege. In this case, the Supreme Court refused to apply the privilege broadly (as the American state courts had done) so as to cover "communications" made by the client's agents (at least his non-managerial agents) to the attorney in the course of the attorney's investigations for trial. Instead, the Court recognized a qualified immunity from discovery of "the work product of the lawyer," by which is meant the fruits of the lawyer's evidence-gathering and legal research in preparation of the client's case for trial. The Court thus recognized, for the first time in this country, the distinction between privilege and quasi-privilege. The holding dealt with the nature of the quasi-privilege in the context of pretrial discovery, with particular reference to the Federal Rules of Civil Procedure. The Court refused to make the quasi-privilege "absolute," in the sense that once the privilege attaches the information can never be disclosed unless the client consents to the disclosure or otherwise waives the privilege. Rather, it held that the information acquired by the attorney might be disclosed if the opponent could show "good cause" therefor, by which the Court meant a strong need on the part of the proponent of discovery for the ascertainment of the particular information in connection with the preparation of his own case for trial. In this respect, the decision is not definitive. It left open the exact scope of the term "the work product of the lawyer," and it failed to define clearly what it meant by the term "good cause," and the relationship of this term, if any, to the identical term in Rule 34 of the Federal Rules of Civil Procedure, which the Court also mentioned in its decision. Hence, these areas have been the source of much subsequent disputation by counsel and diversity of opinion among the lower federal courts.

In what might be described as the most important dictum in the American law of privilege, the Court restricted the personal privilege

348c. As the result of the failure to recognize this distinction, the American courts have consistently refused to recognize the privilege as covering the communications of third parties (non-agents of the client); yet, under the principle of quasi-privilege, the English courts have had no difficulty in reaching that result. In this connection, it should be pointed out that the fact of employment by the client should be of no significance. Nor should the fact that the client has actually or impliedly instructed the employee to convey the information to counsel be significant. The only significant thing is whether the agent conveys a message from the client to the lawyer (privilege) or as an investigator-agent of the attorney obtains information for the attorney in preparation for litigation (quasi-privilege). Of course, if the privilege is expanded to cover communications originating with the client's agents, it should only extend to those instances in which the agent is acting in the scope and course of authority from the client to ascertain (or formulate) the information and transmit it to counsel.

349a. Ibid.
as such to the face to face situation, what the client says to his lawyer directly or through agents acting as mere mechanical aids to communication. However, the employees whom counsel had interviewed were not agents with authority from their employer to communicate their original source knowledge, as eye-witnesses, to counsel, nor were they corporate agents of the managerial or staff level, with implied general authority to communicate with counsel when they might deem it in the best interest of the firm for them to do so. The Court did not directly consider the problem which communications to counsel by agents in these categories would raise. A distinguished federal district court has more recently considered the matter and held that the communications of agents of the staff level, made in the course of their regular duties to counsel are privileged in the classical or common law sense.

The future scope of the privilege in this important area is obviously yet to be definitively determined. The writer believes that the dictum of the Supreme Court literally (and hence strictly or narrowly) construed would constitute the proper scope of the classical privilege, as heretofore indicated, since this interpretation would preserve the essence of the personal nature of the relationship of attorney and client in the area of confidential communications without losing to the courts much valuable information which will be lost if the privilege is applied more broadly — as it has been unknowingly applied during the past seventy-five years. Perhaps the rule of qualified immunity is also a sound solution to the proper balancing of interests in an area where the relationship between the attorney and the client is more impersonal and less subject to damage by disclosure or the constant threat of disclosure than in the area of the classical privilege. Recent developments, however, indicate that there are equally sound if not more practicable solutions.

504 Villanova Law Review [Vol. 8: p. 447

---

350. The Court summarily disposed of the argument that the privilege protected reports involved in the case from discovery (here statements of witnesses who were employees of the client were taken by the attorney). The Court said:

"For present purposes, it is sufficient to note that the protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting the client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories." 329 U.S. 495, 508.


351. That is perhaps the most significant point to be drawn from Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P. 2d 266, 15 Cal. Rptr. 90 (1961), and companion cases. This is the great American case on discovery. It is discussed at some length in Agency Problems III and briefed in the Appendix II therein. (op. cit. notes
The state courts have generally been less liberal in allowing discovery and have construed the privilege more broadly than the federal courts since the adoption of the federal rules. Nor has Wigmore brought to this area of the law his usual high degree of learning, insight, and logical analysis. As a result, there is still much confusion in the decisions. Yet the trend is in the direction of confining the privilege more narrowly as regards the activities of the agents of both clients and attorneys. This is due to the combination of open discovery and the guiding light of Hickman v. Taylor, which, as pointed out above, has tended to consign the privilege itself to its proper area; namely, the face to face situation. This decision, in thus articulating

133, 343). But see Pruitt, Lawyer's Work Product, 37 Cal. B. J. 228 (1962), for the view that Greyhound is unsound.

352. The state court cases cited in note 71 ante are among the leading cases illustrative of this proposition. It may be well summarized by the statement that communications from the client's agent are entitled to the protection of the privilege. Though the rule as thus stated is too broad, it is the majority rule today. See 139 A.L.R. 1250 (1942), citing cases.

The other side of the coin is represented by the cases where the attorney's agent makes the communication. When he serves as a medium of transmission for communications of the client, the matter should be privileged, but when he is a fact gatherer, the evidence should not be privileged (in the classical sense); and this should be true even if the attorney assumes the role of his own investigator, which was basically the situation in Hickman v. Taylor, 329 U.S. 495 (1947).

The cases also hold that a report or communication from the agent to his principal is privileged if made for purposes of litigation (see 146 A.L.R. 977 [1943] and cases cited). It is here that the time element becomes important to separate the privileged items from the ordinary business reports and communications. The English courts have two healthy devices for protection here that American jurisdictions which go beyond the face to face situation in granting the privilege might do well to consider. They are the requirement of an affidavit of privilege by the solicitor for the claimant when challenged by the opponent; if the court so desires, it may inspect a written document to ascertain if it is actually privileged as claimed. See Westminster Airways, Ltd. v. Kuwait Oil Co., [1951] 1 K.B. 134 (C.A.), 22 A.L.R. 2d 648, a case involving both the affidavit and the demand for inspection.


354. Recent case history in several states would seem to bear this out. For a good illustration, see Witkin, California Evidence 459 (1958). The Supreme Court of California, however, in Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P. 2d 266, 15 Cal. Rptr. 90 (1961), and companion cases, recently held otherwise. Affirming the scope of the privilege as delimited in the Holm case (communications of the client's agents to counsel are protected), it held that the investigative activities of the client's agents and the attorney's agents are not protected generally (as in the case of third party witnesses' statements) and that the work product doctrine does not exist in California.

See Thompson v. Harris, 355 Mo. 176, 195 S.W. 2d 645, 166 A.L.R. 1425 (1946). Here the court refused to allow inspection of plaintiff's statement and third party witness statements obtained by defendant's investigator under a statute which allowed discovery of "evidence material to any matter involved in the action," on the theory that these items would not be admissible on behalf of plaintiff except for purposes of impeachment. And see Annot., 166 A.L.R. 1425 (1947).

Illinois avoided the problem by adopting a rule of court similar to the quasi privilege aspect of the English rule of privilege. Rule 19-5 of the Supreme Court Rules provides that disclosures of "memoranda, reports or documents made by or for a party in preparation for trial . . . shall not be required through any discovery procedure." Ill. Rev. Stat. ch. 110, § 101.19-5 (1959). Thus, evidence falling in
the distinction between privilege in the classical sense and quasi-privilege, has not only performed an important service through the liberalization of the scope of federal pretrial discovery, but it has also made the bench and bar aware of the fact that they have hitherto been confusing two privileges of diverse origin and nature and dealing with them as one and the same thing. Nowhere has the law gone forward more blindly — and hence with difficulty of pronouncement that has made its ultimate clarification heretofore impossible — than here. As a result of the success of the Federal Rules of Civil Procedure and the gradual acceptance on the part of the bar of the work product principle of the *Hickman* case, the scope of the area of quasi-privilege and the degree of its immunity are being worked out more knowingly, and the cause of open discovery is now making great headway in the state jurisdictions which have modernized their discovery procedures.

In criminal proceedings, the federal courts are free to follow their own view of the common law in defining evidentiary privilege. In civil cases, the choice is not so clear. *Hickman v. Taylor* was a non-diversity of citizenship (Jones Act) case; hence, the question of the applicability of state law of privilege did not arise. In diversity jurisdiction cases, the question arises as to whether the federal courts are free to develop their own rules of privilege, within the purview of the *Hickman* principles, or whether they must apply the state law of privilege as stated in the judicial decisions. The answer to this question turns upon the interpretation of Rule 43(a) of the Federal Rules of Civil Procedure. This is a rule pertaining to the admissibility of evidence and refers to the state law. Some writers believe that since Rule 43(a) is a rule of admissibility and not of exclusion, evidence is admissible if it meets any one of three tests of admissibility set out in the rule. Professor Moore takes the position that the issue turns upon whether the privilege is a matter of substantive law or procedure. He further maintains that the privileges are procedural rules and so the federal courts are entitled to develop their own rules of admissibility. Actually, the lower federal courts are divided, with perhaps

---

357. Id. at 1152. This is on the basis of the *Erie* doctrine (*Erie RR. Co. v. Tompkins*, 304 U.S. 64 [1938]).
358. 4 MOORE ¶ 26.23 [9] at 1152. But see Louisell 110-11, 118, 120-23 *et passim* (contra); text at note 231.
a majority following the state law.\textsuperscript{359} The several possible views have been well summarized as follows:

Able commentators have asserted variously: that the federal courts must defer to state privileges in all cases, diversity and non-diversity; that the federal courts are constitutionally bound to apply state privileges in diversity cases but not in other litigation; that it is normally desirable to honor and apply state privileges but the federal court is not compelled to do so; that the federal courts should follow state law where it denies a privilege but not where it grants one; and that the history and judicial holdings are so inclusive that no authoritative answer is yet possible.\textsuperscript{359a}

F. New Areas of Infringement: Eavesdropping:

There is an exception to the personal privileges for communications overheard by third parties.\textsuperscript{360} It is sometimes referred to as the eavesdropping exception. It does not require that communications which have been overheard shall be divulged by the client or his attorney, but rather it provides that such overheard conversations may be testified to by the third party. Wigmore supports this exception on the ground that the means of insuring confidentiality are in the hands of the client and that the preservation of the privileges does not require the silencing of the third party.\textsuperscript{361} Yet if the communicant does not know that the third party is present, is not the former being penalized for his negligence? And if the communicant took reasonable precautions not to be overheard, is he not being deprived of a substantial legal right without any justification in law? Even under Wigmore's rationale of the privilege, the possibility of eavesdropping might to some extent interfere with full and free disclosure by the client to his attorney, and regardless of whether it actually does deter full disclosure, it nevertheless remains a trap for the naive and the unwary, and, perhaps, also for those who cannot help themselves.\textsuperscript{362}

\textsuperscript{359} 4 Moore § 26.23 [9]. The Ninth Circuit recently adopted the view that state law controls in civil cases (law of the forum), even in tax cases arising under federal law. Baird v. Koerner, 279 F. 2d 623 (1960).

For a valuable discussion of the choice of law problem generally see Weinstein, Recognition in the United States of the Privileges of Another Jurisdiction, 56 Col. L. Rev. 535 (1956).

\textsuperscript{359a} 2B Barron and Holtzoff, Federal Practice § 967 at 242 (1961).

\textsuperscript{360} VIII Wigmore § 2326 (attorney-client); § 2339 (marital relations). And see Functional Overlap 1244-45; Note, Privileged Communications as Affected by the Presence of Third Parties, 36 Mich. L. Rev. 641 (1939).

\textsuperscript{361} VIII Wigmore § 2326.

\textsuperscript{362} The Uniform Rules eliminate this exception from the attorney-client privilege. Rule 26 (1) (ii) provides that when the information is obtained "in a manner not reasonably to be anticipated by the client" the privilege is not lost. While this would require interpretation, it presumably was meant to include eavesdropping generally. The writer believes that it would be so interpreted and that the provision is sound.
Eavesdropping is a bad, immoral, unethical, degrading thing. Recognition of the eavesdropping exception to some extent makes the state a party to these unethical activities. Moreover, such an exception unfairly penalizes the characters who are of too elevated a mind to suspect that it might be taking place, as well as the persons who cannot take precautions against it, the naive and the weak. It is an unfair and unwarranted intrusion upon one's right to privacy, and this is especially true when the expectation of privacy arises out of the attorney-client relationship, which is given special recognition and protection by the state in the form of the privilege of confidentiality. For the state to permit this exception is to unexpectedly take back part of what it has given; to violate the rules of the game, so to speak. Moreover, the eavesdropping exception is a clear contradiction on a small scale of the principle embodied in the privilege on a larger scale, that is, the principle of human dignity and inviolate personality. The eavesdropping exception should therefore be eliminated as unwise and unjust.

Furthermore, the problem becomes more urgent when the electronic devices of modern science are illicitly used to obtain the confidential information, both because they are difficult to detect, and because they are used in reckless disregard of the law. To condone the use of evidence obtained through the use of these devices would constitute a threat to all confidential communications in the future. (Shades of the police state and George Orwell's 1984!) Therefore, it is believed that brief mention should be made here of the recent history of such scientific eavesdropping in our courts.

The Coplon case recognized the right to counsel as fundamental and held that where the Federal Bureau of Investigation had listened in on the telephone conversations of the defendant and her counsel, prejudice would be presumed. Unless the state could show that it had not benefitted directly from this listening, the defendant must go free. The result seems fair and reasonable and consonant without traditional concepts of freedom and justice. The wire-tapping which had been declared "dirty business" in a famous dissent in the first instance was finally held to infringe other constitutional rights under more shocking circumstances. But is the relationship invaded there more deserving

363. An extreme case illustrative of the injustice of this rule is Clark v. State, 159 Tex. Crim. 187, 261 S.W. 2d 339 (1953), discussed in text at note 153, ante.
364. The best discussion which the writer has found of the practical aspects of the problem is contained in the Report of the California Senate Judiciary Committee on the Interception of Messages by the Use of Electronic and Other Devices (1957). The best discussion of the implications of the threat to privacy from the use of modern science is that of Lasswell op. cit. note 246 at 121-42.
of protection than that of husband and wife. And if it is a violation of the law to invade the area of confidential relations, why should any invasion be countenanced? The answer might be that in cases of infringement on the right to counsel the infringement is more direct and immediate. Other privileged relationships merely affect the collection of evidence, but in the Coplon case, the reprehensible conduct affected the actual management of the trial itself.

In the Lanza case, the Court refused to extend the privilege by the use of injunctive relief so as to prohibit disclosure of privileged communications between the client and his counsel by a legislative committee which had "bugged" the conference while Lanza was in prison. The case has been severely criticized by the New York Bar. Certainly, any policy behind the privilege demanded the protection of the privilege in that instance, and the technical argument that the courts do not have power to enjoin a legislative body is doubtful, for courts for many years have been enjoining governmental officials as private citizens when they overstep the proper bounds of official action. In a subsequent opinion, however, the Supreme Court of New York has held that the state will be denied "a fruit of the poisonous tree," that is, counsel's testimony on a matter not privileged but for which the lead was first obtained from the recording of Lanza's privileged conversation.

The case of In re Bull involved the lawyer's communication to the client. Here, the lawyer mailed a letter to his client in jail, expressing lack of confidence in taking an appeal from the client's conviction because the trial judge had doctored the transcript of the evidence and also had a friend on the appellate court. The letter was intercepted by the jailor and turned over to the court, which summarily disbarred counsel from further practice before that particular federal district court. In a subsequent hearing of the matter before another judge,
the Court refused to recognize that counsel's rights had been violated because of the security regulations of the prison, which reasonably required the examination of the prisoners' mail. Since there had been no communication of the client to counsel to which the intercepted letter of the latter was a reply, the court deemed that the attorney-client privilege was not involved. The proceeding was dismissed, however, to protect the right of defendants in custody to consult freely with their counsel. It would seem that the attorney in this instance should be entitled to protection under a substantive rule of privilege similar to the privilege which exists in the law of defamation. Furthermore, the jailor violated his duty in exposing this privileged communication, which did not affect the security of the prison, to the very party against whom the criticism was directed. The behavior of the original judge, which was unjustical to say the least, illustrates the importance of protecting the entire area of personal relations when exposure does not serve an important purpose.

The shocking thing about most of these cases is that the law enforcement officials would so brashly and openly violate the law and then use the fruits of their ill-gotten gains in the courts of law, and that the state has done nothing to penalize this conduct, the fruits of an era of infringement on privacy since Olmstead. It is only since the law enforcement officers have begun to strike near home, on the "private domain" of the lawyers as a class, that genuine concern has been evinced by the New York Bar. Certainly any policy behind the privileges is defeated when rules permitting the reception of evidence obtained by eavesdropping are recognized. The same is true of evidence admitted under the waiver theory when the waiver is only technical, though here one runs into competing policies of the law in situations where the concept of fairness may require the working of an estoppel

374. McCormick § 93 at 186 argues against allowing the privilege to cover advice given by the lawyer to the client, unless offered to show circumstantially what the client said to the lawyer or as an implied admission. Wigmore agrees with this viewpoint. VIII Wigmore § 2320. Minter v. Priest, [1929] 1 K.B. 655 (C.A.), criticized in Note, 43 Harv. L. Rev. 134 (1929), recognized a privilege for defamatory statements made by the lawyer in declining employment and sought to be proved as a basis for an action for slander against the lawyer. The writer submits, however, that this would fall under substantive privilege.

Some statutes draw the curtain over matters generally of which the attorney has gained knowledge by virtue of the relationship (set out in VIII Wigmore § 2292 n. 2). McCormick § 93 at 187 criticizes this as obstructive, carrying the privilege beyond that justified by policy, probably a carry-over from the days when the privilege was for the protection of the attorney's honor. This position is sound.

375. Olmstead v. United States, 277 U.S. 438 (1928). For discussion of the legal aspects of the general problem aside from the problem of privilege, see McCormick § 142; Dash et al., The Eavesdroppers Part III (1959), with excellent bibliography. See also note 389 post, pointing out a recent change in the decisional law of far-reaching significance.

376. E.g., see Waldman and Silver, The Ethics, Morals, and Legality of Eavesdropping, 9 Brooklyn Barrister 147 (1958).
or where consent which could not fairly be revoked has been obtained previously, for to some extent the eavesdropping exception is a form of the waiver principle, and the two problems must be noted together. The striking injustice is only illustrated more dramatically when the refined devices of an era of electronics are the means used. But there is a finer principle involved here; namely, the notion that justice by definition requires fair play, the use of honorable means to achieve its ends or goals. We degrade both humanity and the law when we make the law and its agencies parties to lawless conduct.\textsuperscript{377} We violate the great rule of ethics that humanity, including oneself, should always be treated as an end in itself rather than a mere means to an end.\textsuperscript{378} We put ourselves in a class with the police state that we have recently fought to overthrow. We lessen the respect of both the criminal and the law-abiding citizen for our law, we encourage cynicism, we create grounds for psychological rationalization of criminal conduct, and we defeat justice by contradicting it. Thus, we frustrate the ordering of an ideal relation among men.\textsuperscript{379}

VI

Conclusion

“Fermat’s Last Theorem” has never been solved, but it has resulted in much serious mathematical thought and the discovery of other valuable problems and solutions.\textsuperscript{380} Thus progress is ever made. The writer is reminded of the intriguing history of this theorem when he reflects that he began his research in the field of privilege with the tentative belief that all of the personal privileges in general were not justifiable and should be restricted wherever possible, except perhaps the attorney-client privilege when necessary to fully carry out the policy behind the privilege against self-incrimination.\textsuperscript{381} He has now


\textsuperscript{378} \textit{Kant, Critique of Practical Reason and Other Writings in Moral Philosophy} 80 (Beck transl. 1949). The corollary of Kant’s famous \textit{categorical imperative} is also discussed in \textit{Cairns, Legal Philosophy from Plato to Hegel} 329-93 (1949).

\textsuperscript{379} This does not mean, however, that wire-tapping should not be legalized under proper restrictions and used in the processes of crime detection. See \textit{Dash et al., The Eavesdroppers} (1959) (fairly impartial); Savarese, \textit{Eavesdropping and the Law}, 46 A.B.A.J. 263 (1960) (succinct summary of recent developments); Symposium—\textit{The Wiretapping-Eavesdropping Problem: Reflections on ‘The Eavesdroppers’}, 44 Minn. L. Rev. 813-940 (1960). The answer to this problem will require further study.


\textsuperscript{381} This was not the result of his personal experiences in the private practice of law. Rather, it was the result of his study of the law of evidence under two truly great teachers of this subject (thus again proving the old axiom that taught law is hard law). The writer’s personal experiences were not generally focused upon the
reached a somewhat different conclusion, namely: that in the areas where interests of personality and dignity are seriously involved, the privileges have a renewed vitality, that the true justification and rationale has been adumbrated and only that in the recent writings reflective of the changing mores and maturing values of twentieth century western democratic culture. The classical reasons given to justify the privileges are only partial and inadequate in that they represent only facets of the broader foundation on which the privileges must rest in society as it exists today. The privileges can be justified only on the basis of a maturing social ethos which has given rise to the concept of human dignity and inviolate personality.

The writer has shown that the scope and rationale of the privileges cannot be settled by resort to authority, reason, history, or convenience — though these are entitled to consideration. The humanitarian values have first claim. As has been said previously, our judicial procedures must be evaluated with reference to the substantive rights we are endeavoring to secure, and as society progresses, new rights press for recognition and come to be accepted. Bentham has been proven wrong; Wigmore and Radin inadequate. Social change upsets settled legal notions, just as new power centers destroy old balances of power in the political world. The difficulty here has arisen from the mechanical application of old rules to new situations at a time when we were changing from a simple rural society to a complex urban society, and from the unquestioning acceptance of the reasoning advanced by a great analytical scholar at a time when the re-examination of the problem had become necessary. Principles which have worked well in one context do not necessarily work well in another, and the writers on evidence, with their sights trained especially on the technical excrescences of the problem, have not been without cause for alarm. The resultant difficulties have been made more urgent by the pressing need for simplification of our legal procedures, including the rules of evidence — and the

382. The writer does not pretend to have solved the problem because no problem can be solved when the solution is based on a value judgment on which reasonable men can be expected to differ considerably. He does believe that he has offered the best rationale for the satisfactory solution and reasonable delimitation of the problem for the time being. Other writers should improve upon this solution or show it to be in error. Further judicial consideration of the matter would also help.

383. Cf. Louisell, 123 n. 103: "The Moral importance of the individual and hence social significance of confidentiality in at least certain communications, e. g., husband-wife, would seem to increase with 'the intensity and complexity of life, attendant upon advancing civilization'. . . ."

384. Loc. cit. note 11, ante.

parallel need for a broad and effective set of pretrial discovery procedures — in this day when the impersonality of the city makes evidence difficult to obtain and the congested court calendars frequently amount to a denial of justice through "the law's delays." The issue has been further confused by conditions in which many rules of evidence were archaic and required drastic revision if not elimination.

The preservation and encouragement of personal security is promoted by the maintenance of a well balanced privilege for the communications of attorney and client. The elimination of the methods of the third degree — which follow in the wake of the depersonalized efficiency of the modern police organizations — demands a more stringent enforcement of the procedural safeguards of the Bill of Rights. It demands the extension and enforcement of the laws which recognize and uphold the rights of freedom and privacy, the right of the individual to be free from unnecessary interference in his personal and private life by the machinery of politically organized society, the state. The crime detection methods of modern science, which intrude no less on individual freedom and privacy than do other parts of our twentieth century culture, point up the urgent need for the protection of the individual in his personal anonymity. Here, the privilege has a vital role to play in the counterbalancing of the rights of the individual qua individual against those of the state as the aggregate of individuals politically organized for the common good. On the constitutional level, the above-indicated interferences with freedom have been condemned as violative of "those canons of decency and fairness which express the notions of justice of English-speaking peoples." 386 The individual is always entitled to the recognition in his life of those minimal safeguards against the state that are "of the very essence of a scheme of ordered liberty." 387 In this respect, it should be pointed out that the protections afforded by the federal bill of rights are considered minimal. They are constitutional rights, based on the ethical notions of the eighteenth century, which though it worshipped at the shrine of reason, had in actuality no tradition of the higher ethical values of the twentieth century as a part of the general social ethos. Nevertheless, the attorney-client privilege, through the right to counsel as embodied in the Sixth Amendment, and the priest-penitent privilege, under the free exercise of religion in the First Amendment, now operative on the states through the Fourteenth Amendment, would seem to enjoy constitutional protection, the former only in part but the latter in toto.

Today, the privileges are justified by both reason and experience. The privilege against self-incrimination is not considered as essential to due process of law, but there is a strong minority of our Supreme Court justices who would hold otherwise. Nevertheless, this privilege is recognized in its most essential principles in all of the state jurisdictions. The privilege against unlawful search and seizure is recognized as essential to due process but still not the method used to enforce it except perhaps where the principle of inviolability of the person has been disregarded. The right to counsel, at least in capital cases, the right to a fair trial, and the notion that courts must not act in a way that is arbitrary or shocking are now treated as constitutional rights. They have become a part of due process of law. Opposed to these claims are other claims based on the social interest in the security of political institutions and the social interest in the security of person and property from violent or antisocial conduct, interests which are likewise entitled to be accorded great weight. Therefore, interests in this area must be balanced on the constitutional level. But outside of the area of civil liberties, the preservation of human dignity does not demand so high a price. Thus, outside of the area of criminal justice, the protection afforded by the privilege of attorney and client is not essential to due process of law. The privilege might be abolished and justice still be done. Yet, in the opposing scale of the balance, there are not the same vital interests of the state in internal security, but only a general social interest in the security of property and contract and protection of the person from careless misconduct.

If this suggestion is correct, what it means is that in the balancing process, the claim of privilege is as much entitled to protection on the one level as on the other. But, of course, outside the area of the personal relationships which the policy behind the privileges is designed to protect, the privilege should not continue to exist. The social interest in accurate fact-finding then becomes the paramount value. Hence,

389. See, however, the recent case of Mapp v. Ohio, 367 U.S. 643 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949)), decided since the above words were written, wherein it was held that the exclusionary rule, as a part of the constitutional guarantee of the Fourth Amendment, extends to evidence obtained by state officers and offered in state tribunals. This extension of the effective scope of this privilege is illustrative of the growing vitality of the dignity principle in the constitutional area (as heretofore discussed by the writer). See Day & Berkman, Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of Mapp v. Ohio, 13 W. Res. L. Rev. 56 (1961).
391. Symposium—The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment, 56 Nw. U. L. Rev. 235, 258 (1961), recognizes that the privilege does not rise to constitutional dignity in civil cases but seems to think that it does in criminal cases, as a facet of the right to counsel. (Cases cited therein notes 115-17.)
the privilege should not extend to the protection of business and property relations where these can be separated from close personal relations; and in denying the privilege here, business and property rights are actually rendered more secure. This is only superficially paradoxical because it is obvious on reflection that business and property are rendered secure by accurate fact-finding; whereas, interests of personality (and social institutions such as the family and the church) might have fundamental values undermined by the compulsory disclosure of confidential matters which such higher accuracy in fact-finding would require.392

As has been said, the justification for this proposed shift in the area of protection of confidential relations is the growth of a new and higher measure of values in the twentieth century jurisprudence. Nor is this thesis something new or startling. Actually, the rationale of the privilege has changed once previously, and there is no reason why it should not change again, or take a more comprehensive point of view, to meet new needs as we proceed in new paths of the law. As Holmes has said: "The law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."393 Thus, it is proper that the rationale of a principle should change with the changed conditions of society, and this in turn will bring changes in the substantive rules which were designed to effectuate underlying principles.

The personal privileges are valuable and should be retained; but inasmuch as they interfere with the important function of fact-finding, they must not be made into too broad rules and must not be given mechanical application in new situations for which they were not originally intended. If extended to new situations, the extension should be based upon the determination that the principle underlying the rules should properly control in such extended area. The rules of law should always be construed to effectuate their purpose. Hence, in the case of the attorney-client privilege, the existing doctrines of waiver and eavesdropping should be re-examined to determine whether they are consistent with the policy on which the privilege now rests and if they are internally consistent with each other. The former should be limited in scope to eliminate technicalities that are inconsistent with the spirit

392. This is a general value judgment, and one can only say that it might happen in a particular case. A good illustration of the potential damage to which a domestic situation is vulnerable will be found in highly dramatic form in the play La Robe Rouge, by Brieux, of the French Academy. This drama is contained in Chief Contemporary Dramatists 471 (Dickinson ed. 1915).

of the law of privilege. The latter should be abolished as being inconsistent with the spirit of a free society — a larger matrix of which the privilege is only a tangible facet. As a rule of law, the eavesdropping exception tends to promote antisocial and dishonorable actions, and when carried on by the state officials, such conduct is reminiscent of the methods of the police state and the gestapo. This rule cannot rightfully claim recognition in our law of privilege today. The privilege should not be held to apply, however, when it would countermand the otherwise imperative duty of counsel to come forward and vindicate the innocence of a living person erroneously convicted (or accused) of a crime. Here, a higher personal value is weighed in the opposing balance (on the side of evidence). The privilege should not be expanded through a process of reasoning based on inapplicable analogies drawn from other areas of the law — analogies which should have no bearing on rules the justification of which must be founded upon principles having their origin in the concept of human dignity and inviolate personality.

For example, the scope of the privilege in the area of personal relations has no rational connection with the fictions of agency theory and should not be made to bear this load, but rather should be restricted to the narrower limits of the policy to be effectuated, to wit: the facility of the client and the attorney in communicating with each other. Hence, the communications of source agents and managerial agents should be eliminated from the protection of the privilege. The privilege should not extend to that artificial entity the corporation, more especially to house counsel, to automobile casualty insurance firms representing defendants, and to governmental bodies. In each instance, the opposing interests should be weighed in the balance, and here such interests (evidence) must prevail. Moreover, these healthy restrictions will remove the privilege from those areas of the law where it detracts most from accurate fact-finding. This will also serve the purpose of keeping the rules of evidence simple and easy to apply, in accordance with the Thayer principle. Furthermore, it will aid immeasurably in the achievement of a system of open discovery, which is of great importance to the litigation process of our day.

To recapitulate as to the other personal privileges: The physician-patient privilege should be recognized generally; interpreted liberally to effectuate its purpose, with proper recognition of the doctrine of waiver and contract provisions in insurance policies when necessary to prevent fraud; it should be extended to cover psychiatrists and psycholo-

394. Thayer, A Preliminary Treatise on Evidence 529 (1898). See also Morgan and Maguire, op. cit. note 207 at 910.
gists, thus protecting the dignity and privacy of the individual in the vital area of mental health. The priest and penitent privilege should be preserved and liberally interpreted to effectuate the principle which it was designed to protect, to wit: freedom of conscience or religion. The husband and wife privilege should be preserved to protect the institution of the family, as to testimony by one spouse against the other during marriage. The related privilege of confidential communications of spouses should be preserved to protect the right of privacy in what is perhaps the most intimate of personal relationships, even when that relationship no longer exists, though here a qualified privilege, to be terminated when the court finds that the interests of justice outweigh the advantages of privacy to the holder of the privilege, might be a satisfactory solution. Elsewhere, the urgent need for accuracy in fact-finding should be the controlling principle. This need is so great that the privileges themselves should not be allowed to exist in perpetuity, but should be terminated upon the death of the holder. This would be in accordance with the purpose of holding the privileges strictly within the limits of the policy which they exist to effectuate. The only exception would be that of priest and penitent, where the full protection of the principle of religious freedom would require continuation of the privilege even after the death of the communicant.

In new areas of the law and in the application of settled rules in new contexts, first principles must be constantly re-examined and made to stand the test of society's current needs and values. "New occasions teach new duties," and the law must constantly adjust itself to the pressing needs of our ever-changing and complex society. Modern science has come to think of reality itself as only a series of tentative hypotheses to be used as working tools and then discarded as new light appears, new insights are begotten. The criticisms contained in this paper are the result of ideas which came to the writer only after he had made a laborious survey of the subject and had endeavored to decide whether the privileges or any of them were worth preserving and if so to what extent. He reached the conclusion which Lord Erskine once held applicable to the whole body of principles of evidence, to wit: that "they are founded in the charities of religion — in the philosophy of nature — in the truths of history — and in the experience of common life." The writer would add, however, that they are

---

397. As quoted with approval in the first edition of *GREENLEAF ON EVIDENCE* § 584 (1842). The writer strongly disagrees with Lord Erskine but believes that the statement would be a reasonable one in relation to the personal privileges in the *face to face situation*.

As to attitudes toward the system of evidence generally, compare the above quoted words of Lord Erskine with the views of recent leading writers in the field.
ultimately based on twentieth century humanitarian ideals. The writer realizes that the notions indicated with reference to curtailment will be startling to the organized bar, not because they are new and novel — for they are not — but rather because they have not yet permeated the popular legal thought. On the other hand, the proposed restrictions on the privileges will not be adequate to satisfy those legal reformers who are strongly in opposition to the privileges. He hopes, nevertheless, that this critique will be accepted in the spirit in which it is made, as an effort to improve our judicial process, and that others will express their opinions, so that ferment may be had to catalyze progress.

In summation, the thesis of this paper is that the attorney-client privilege should not be disdained and abolished but rather should be understood and properly applied only in the area of the personal relationship — which alone was the area of its application in the setting in which it developed in Elizabethian society, when compulsory testimony was first introduced into our adversary system of litigation — and that the justification for the privilege in twentieth century jurisprudence is the developing concept of human dignity. He would also add that the privileges when properly limited can be subsumed under the jural postulate of fair procedures.

In setting forth these views, the writer claims no infallibility and above all no finality. Could we but have omniscience, we might be more precise, might plumb our sights down to the “depth of being, the reality behind the veil.”398 Hence, these views are subject to both revision and correction. Nevertheless, the writer presently concludes that in our culture, the personal privileges tip the scales. We wish that they were unnecessary, and we hope that in time this may come to be true. But though the ideal is a thing to be strived for, it must be the ideal of the here and now, not some far off utopia. And in the present stage of man’s social development, the privileges wear the badge of social worth — not primarily as a concession to man’s insecurity, but rather as a recognition of man’s moral and spiritual integrity by and toward his fellow man. Viewed thus, the personal privileges constitute a positive achievement, a mark of the maturity of society, rather than a concession to individual human weakness. It is therefore a mark of civilization that they should be preserved. In the far-off utopian vision of the future,399 ethical notions might again become the rule of conduct,

399. See generally Seidenberg, Post-Historic Man (1950).
human nature might occupy a higher plateau, and the utterly secure might need no privilege for the whole truth in a nobler world. By that time, law and procedure might be very different things themselves. But for our times, it has been well said, "Complete candor to anyone but ourselves is a virtue that belongs to the saints, to the secure, and to the very courageous." Hence, we should be permitted to remain silent in our secure privacy until officially called upon to speak. Then we should be permitted to tell our little story at our own gait and in our own fashion, perhaps even at the risk that a little bit may be omitted or deliberately colored here and there. Justice consists in the ordering of an ideal relation among men. Truth is but one of the components of justice, though it is an important one. Freedom, privacy, security, euphoria are others. Perhaps they all constitute dignity. Justice would be lacking an important element should we deny fair consideration to the claim of each.

400. Curtis, op. cit. note 161 at 8; and see text at note 161.
401. Ibid.
402. The delicate balance between freedom and restraint, sometime described as "responsibility," would be a preferable term. Here, however, the individual element of choice enters into it in a larger degree.
403. The loyalty and honor of the attorney are important factors, but they are not included as such because they directly involve the feelings of the lawyer only. They indirectly contribute to the client's sense of privacy and security, probably to his sense of euphoria.
404. See text following note 181 ante; see also op. cit. note 149, 262 at 282 n. 68.