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Constitutional Privacy in Psychotherapy

STEVEN R. SMITH*

I. Introduction

The recognition of a constitutional right of privacy has been a significant development in individual rights in the United States. The right of privacy generally limits unwarranted governmental intrusion into fundamentally important areas of people's lives and unwarranted release by or to the government of very sensitive personal information. As acceptance of the right has grown, courts and commentators have voiced increasing concern about the absence of protection for confidential communications between patients and psychotherapists. Their concern has generated support for extending the constitutional right of privacy to protect patients from state-ordered disclosure of the confidences revealed in therapy, or, more simply, a limited constitutional psychotherapist-patient privilege.¹

Because the existence of a constitutional right of privacy has only recently been recognized and has generated serious controversies in the courts and among commentators, the scope of the right has not yet been determined. This article suggests that the constitutional right of privacy should include the protection of the confidential com-

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1. For the purposes of this article, the term "psychotherapist-patient privilege" includes psychologist-patient and psychiatrist-patient privileges generally, as well as specific psychotherapist-patient privileges. See notes 14-67 *infra* and accompanying text.

munications of therapy. The article first discusses the evolution and current status of psychotherapist-patient privileges. After proposing a definition of the right of privacy, the article will apply that definition to the confidences of therapy and demonstrate that the establishment of a constitutional psychotherapist-patient privilege is consistent with current Supreme Court doctrine. Finally, the article will attempt to define the scope of the proposed constitutionally-based privilege.

Status of the Psychotherapist-Patient Privilege

A constitutional psychotherapist-patient privilege would provide considerably more protection than is now available for the confidences revealed in therapy. Most jurisdictions in this country do not provide for a specific psychotherapist-patient privilege.² Most states provide for a physician-patient privilege, which may protect communications between patients and psychiatrists because psychiatrists are also physicians.³ In these states, however, the patients of professionals in the mental health field who are not also physicians, such as clinical psychologists, may receive no protection. Moreover, even jurisdictions that provide for a psychotherapist-patient privilege may exclude some forms of treatment from the protection of the privilege.⁴ Extension of the federal constitutional right of privacy to protect the confidences of therapy, of course, would effectively provide a psychotherapist-patient privilege in every jurisdiction, state as well as federal.

The Federal Rules of Evidence do not explicitly provide for a psychotherapist-patient privilege. Before adopting the Federal Rules of Evidence, Congress rejected a set of rules proposed by the Supreme Court ("Proposed Rules")⁵ which had enumerated several specific privileges, including a psychotherapist-patient privilege.⁶ Based on the assumption that an assurance of confidentiality is essential to effective psychotherapy,⁷ Rule 504 of the Proposed Rules provided testimonial confidentiality for communications between a patient and a

2. See R. SLOVENKO, PSYCHOTHERAPY, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION 171-94 (1966); Ferster, *Statutory Summary of Physician-Patient Privileged Communication Laws*, in READINGS IN LAW AND PSYCHIATRY 239 (R. Allen, E. Ferster & J. Rubin eds. 1975).

3. See Ferster, *supra* note 2, at 239.

4. Group therapy, for example, probably would not be covered by most privileges because the members of the group may be considered "third parties" whose presence destroys the privilege. See Cross, *Privileged Communications Between Participants in Group Psychotherapy*, 1970 L. & SOC. ORD. 191, 193-94; Meyer & Smith, *A Crisis in Group Therapy*, 32 AM. PSYCHOLOGY 638, 641 (1977); Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 CATH. U. L. REV. 649, 663 (1974); Note, *Group Therapy and Privileged Communications*, 43 IND. L. J. 93, 99 (1967); notes 276-77 *infra* and accompanying text.

5. See Pub. L. No. 93-12, 87 Stat. 9 (1973). See generally Note, *Congressional Preemption of the Federal Rules of Evidence*, 49 WASH. L. REV. 1184 (1974).

6. Proposed Rules of Evidence, Rule 504, reprinted in 56 F.R.D. 183, 240-41 (1972) [hereinafter cited as Proposed Rule 504].

7. Advisory Committee's Note, Proposed Rule 504, reprinted in 56 F.R.D. 183, 242 (1972). The Committee stated, "A threat to secrecy blocks successful treatment." *Id.* (quoting Group for the Advancement of Psychiatry, *Confidentiality and Privileged Communications in the Practice of Psychiatry*, Rep. No. 45, at 92 (1960)).

psychotherapist made for the purposes of diagnosis or treatment of a mental or emotional condition.⁸ In considering Rule 504 and the other proposed rules, however, Congress became embroiled in controversies regarding which privileges should be adopted and whether privileges generally are a matter of substantive or procedural law.⁹ To avoid the difficult issues raised by these questions, Congress chose to replace the enumerated privileges with one general rule governing all privileges.

Rule 501 of the Federal Rules of Evidence now provides that the existence of a privilege in the federal courts is "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . . However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law."¹⁰ In other words, in federal courts, state law regarding privileges governs in diversity cases and federal law regarding privileges governs in federal question cases. One purpose underlying the requirement that federal courts apply state privilege rules in diversity cases is to protect the prerogatives of the states in establishing privileges.¹¹ Congress did allow some room for the federal courts to fashion privileges in federal nondiversity cases by providing that common law privileges were to be applied in those cases "as they may be interpreted by the courts of the United States in the light of reason and experience."¹² Because of the ambiguity of this language, the extent of Congress' mandate authorizing the federal courts to devise appropriate privileges is unclear.¹³

8. Proposed Rule 504, reprinted in 56 F.R.D. 183, 240-41 (1972).

9. See 10 MOORE'S FEDERAL PRACTICE ¶ 500.01, at 1 (2d ed. 1979); Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 682-85 (1975); Moore & Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 9, 22-27 (1974); Schwartz, *Privileges Under the Federal Rules of Evidence — A Step Forward?*, 38 U. PITT. L. REV. 79, 81 (1976).

10. FED. R. EVID. 501.

11. See 10 MOORE'S FEDERAL PRACTICE ¶ 501.05, at 25 (2d ed. 1979); Comment, *Erie, Privileges, and the Proposed Federal Rules of Evidence: Confusion*, 10 NEW ENG. L. REV. 399, 415 (1974). Ironically, by mandating that the federal courts apply different rules of privilege depending upon the nature of the courts' jurisdiction, Rule 501 may actually frustrate a state's purpose in providing for a psychotherapist-patient privilege. The possibility that a patient's communications to his psychotherapist will be protected only in state court suits or in federal diversity actions, but not in federal court suits raising federal questions, may make the patient less open in therapy and dilute the effectiveness of the state's privilege.

12. FED. R. EVID. 501. See generally Symposium, "In the Light of Reason and Experience": *Rule 501*, 71 NW. U. L. REV. 645 (1977).

13. Some evidence suggests that Congress meant to give the federal courts considerable latitude in adopting new common law privileges in appropriate circumstances. See notes 209-13 and accompanying text.

II. Constitutional Protection for the Confidences of Psychotherapy

Some authority is evolving for the proposition that the confidences of psychotherapy are included within the protection of the constitutional right of privacy. A constitutionally based right of privacy may protect the confidences revealed in therapy even if they are not protected by statute or the common law. One court has stated that the constitutional right of privacy does not encompass a psychotherapist-patient privilege.¹⁴ Other courts have shown an awareness of the relationship between the right of privacy and the need to protect a patient's communications to his psychotherapist, but have not resolved the issue of a privilege on constitutional grounds.¹⁵ A third group of courts suggest, without expressly holding, that the Constitution may protect the privacy of psychotherapy and of mental health information.¹⁶ Only California, Pennsylvania, and the United States Court of Appeals for the Ninth Circuit have recognized a constitutionally based psychotherapist-patient privilege.

Constitutional Psychotherapist-Patient Privilege

California was the first jurisdiction to recognize a constitutional psychotherapist-patient privilege. In *In re Lifschutz*,¹⁷ one of Dr. Lifschutz's psychiatric patients filed a damage suit against the defendant for assault, claiming severe mental and emotional distress. When the defendant tried to take Dr. Lifschutz's deposition regarding the doctor's treatment of the patient, Dr. Lifschutz refused to answer any questions regarding the patient and refused to produce any of the requested records.¹⁸ The patient neither directly consented

14. See *Bremer v. State*, 18 Md. App. 291, 334, 307 A.2d 503, 529 (1973) (denying the existence of a constitutional psychiatrist-patient privilege), *cert. denied*, 415 U.S. 930 (1974); *cf. Felber v. Foote*, 321 F. Supp. 85, 89 (D. Conn. 1970) (the right of privacy does not extend protection to the physician-patient relationship, even when the physician is a psychiatrist).

15. See *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955) (noting the extraordinary sensitivity of psychotherapist-patient communications); *State v. Looney*, 294 N.C. 1, 28, 240 S.E.2d 612, 627 (1978) (upholding the refusal of a trial court to grant a defense request to order a psychiatric examination of a primary prosecution witness in part because such exams are a "drastic invasion" of the right of privacy); *cf. Rennie v. Klein*, 462 F. Supp. 1131, 1144 (D.N.J. 1978) (because the right of privacy includes the right to protect mental processes from governmental interference, a patient has the right to refuse mind-altering drugs). Some courts have failed to consider the existence of a constitutional right of privacy, but have limited discovery of medical and psychiatric files by broadly construing statutory privileges to favor a general public policy against disclosure of psychotherapist-patient confidences. See *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C. 1978) (construing a North Carolina statute that recognized a psychiatrist-patient privilege as favoring a policy of non-disclosure).

16. *Robinson v. Magovern*, 83 F.R.D. 79, 91 (W.D. Pa. 1979) (acknowledging the possibility of a constitutional psychiatrist-patient privilege, the court made an exception for highly generalized information released under a confidentiality order); *Miller v. Colonial Refrig. Transp., Inc.*, 81 F.R.D. 741, 747 (M.D. Pa. 1979) (conceding that there may be a psychotherapist-patient privilege, court held that the interests of the state in the fairness of the adversary process required a patient-litigant exception to confidentiality); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1044 (E.D.N.Y. 1976) (recognizing a patient-litigant exception to any constitutionally based psychiatrist-patient privilege), *aff'd mem.*, 556 F.2d 556 (2d Cir. 1977).

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

18. *Id.* at 420, 467 P.2d at 559, 85 Cal. Rptr. at 831.

nor objected to the release of information about his treatment. Dr. Lifschutz appealed a citation for contempt of court that resulted from his refusal to produce the records. Acknowledging the sensitive nature of the confidences that patients reveal in psychotherapy, the California Supreme Court indicated that the constitutional right of privacy protects those communications.¹⁹ The *Lifschutz* decision, in effect, recognized a constitutional psychotherapist-patient privilege.

In defining the scope of this newly recognized right, the court sought to limit the privilege to those situations in which the protection of a patient's privacy interests was paramount. The court, for example, rejected Dr. Lifschutz's broad formulation of a psychotherapist-patient privilege. First, Dr. Lifschutz contended that forced disclosure of any confidential communications violated his own constitutional rights of privacy as a psychotherapist.²⁰ Disagreeing with this contention, the court stated that because only the patient reveals intimate details about his life, only the patient, not the therapist, has any interest in preventing the release of that information.²¹ Second, Dr. Lifschutz argued for an absolute psychotherapist-patient privilege. Rejecting this broad extension of the right of privacy, the court held that the constitutional right can be limited by the state when necessary to protect or to advance a compelling state interest.²² In fact, the court held that under the circumstances of the case, California had demonstrated a compelling interest sufficient to justify an incursion into the confidences of Dr. Lifschutz's patient. California, the court observed, required disclosure only in cases "in which the patient's own action initiates the exposure," and, therefore, "intrusion' into a patient's privacy remains essentially under the patient's control."²³ This exception to the psychotherapist-patient privilege, commonly referred to as the patient-litigant exception, provides that when a patient brings his own mental condition into question in a legal proceeding as an element of a claim or a defense, the patient has waived any psychotherapist-patient privilege covering informa-

19. *Id.* at 431-32, 467 P.2d at 567, 85 Cal. Rptr. at 839. Even though California had enacted a psychotherapist-patient privilege, the court refused to limit its holding to statutory grounds:

We believe that a patient's interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots than the California statute and draws sustenance from our constitutional heritage. In *Griswold v. Connecticut*, the United States Supreme Court declared that various guarantees [of the Bill of Rights] create zones of privacy, and we believe that the confidentiality of the psychotherapeutic session falls within one such zone.

Id. (citation omitted).

20. *Id.* at 423, 467 P.2d at 561, 85 Cal. Rptr. at 833.

21. *Id.* at 424, 467 P.2d at 562, 85 Cal. Rptr. at 834. The court also rejected Dr. Lifschutz's claim that disclosure of the requested information would interfere with his business and result in economic loss. *Id.* at 425, 467 P.2d at 563, 85 Cal. Rptr. at 835.

22. *Id.* at 432, 467 P.2d at 568, 85 Cal. Rptr. at 840.

23. *Id.* at 433, 467 P.2d at 568, 85 Cal. Rptr. at 840.

tion relevant to that mental or emotional condition.²⁴ By acknowledging the legitimacy of the state's inquiry into the communications between Dr. Lifschutz and his patient, the court effectively recognized the validity of the patient-litigant exception.²⁵

The court took care to emphasize, however, that it would not sanction all inquiries into a patient's confidences under the guise of a compelling state interest. Rather, the court held that even when the state demonstrates a compelling interest requiring disclosure of the confidences of therapy, it must limit its inquiry into the confidential information as narrowly as possible to avoid unnecessary invasions of privacy.²⁶ In the context of the patient-litigant exception, for instance, the state may conduct only a "limited inquiry into the confidences of the psychotherapist-patient relationship."²⁷ Specifically, the court permitted the trial judge to compel disclosure only of those psychotherapist-patient confidences directly related to the conditions the patient himself had disclosed or brought into controversy.²⁸ As further protection against unwarranted intrusions into the patient's privacy, the *Lifschutz* court advised trial courts to issue protective orders to limit inquiries into confidential matters,²⁹ to use their powers to exclude evidence if its probative value is substantially outweighed by the danger of undue prejudice to the patient,³⁰ and to convene *ex parte* proceedings to determine the materiality of requested confidential evidence.³¹ The court also indicated that trial courts might protect the patient's privacy by limiting, when possible, the therapist's testimony to conclusions, rather than permitting a description of the intimate factual details of the patient's life.³²

24. *Id.* at 422-23, 467 P.2d at 561, 85 Cal. Rptr. at 833. The California psychotherapist-patient privilege statute in effect when *Lifschutz* was decided provided for a patient-litigant exception. *Id.* at 433 n.15, 467 P.2d at 568 n.15, 85 Cal. Rptr. at 840 n.15 (citing CAL. EVID. CODE § 996 (Deering 1966)).

25. 2 Cal. 3d at 433, 467 P.2d at 568, 85 Cal. Rptr. at 840. The reason for the court's acceptance of California's claim that its interest outweighed that of Dr. Lifschutz's patient is not entirely clear. Apparently, the court permitted a limited inquiry into the communications between Lifschutz and his patient by combining the patient's implicit waiver of his privacy in bringing his mental and emotional condition into question with the "compelling interest" of the state in obtaining all relevant evidence at trial. *Id.* at 433-34, 467 P.2d at 568-69, 85 Cal. Rptr. at 840-41. Arguably, the court required the presence of both these factors to justify the inquiry. If Dr. Lifschutz's patient had not brought his own mental condition into issue, the California court probably would not have required the psychotherapist to reveal any of his patient's confidences. In other words, whether the state's interest in acquiring all relevant evidence would have been sufficient to allow the invasion of privacy is doubtful. Nevertheless some state interests, such as preventing imminent serious physical harm to its citizens, are so significant that they alone would justify requiring a breach of the confidentiality of therapists. See notes 285-305 *infra* and accompanying text.

26. 2 Cal. 3d at 437-38, 467 P.2d at 572, 85 Cal. Rptr. at 844.

27. *Id.* at 431, 467 P.2d at 567, 85 Cal. Rptr. at 839.

28. *Id.* at 435, 467 P.2d at 570, 85 Cal. Rptr. at 842.

29. *Id.* at 437, 467 P.2d at 572, 85 Cal. Rptr. at 844; see CAL. CIV. PROC. CODE § 2019(b)(1) (Deering 1973) (granting the court discretion to "make any . . . order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression").

30. 2 Cal. 3d at 437, 467 P.2d at 572, 85 Cal. Rptr. at 844. See CAL. EVID. CODE § 352 (Deering 1966).

31. *Id.* at 437 n. 23, 467 P.2d at 571 n.23, 85 Cal. Rptr. at 843 n.23. The court noted that these protective measures were provided for by the Code of Civil Procedure and rules of evidence of California. *Id.* (quoting CAL. EVID. CODE § 915(b) (Deering 1966)).

32. 2 Cal. 3d at 438 n.25, 467 P.2d at 572 n.25, 85 Cal. Rptr. at 844 n.25. The court

The constitutional protection for psychotherapist-patient communications recognized in *Lifschutz* has been ratified in a series of California decisions since 1970.³³ But the California Supreme Court has also narrowed the scope of the privilege to accommodate what it perceived to be the state's legitimate concerns. In *Tarasoff v. Regents of the University of California*,³⁴ the court recognized an additional "compelling interest" justifying the state's breach of psychotherapist-patient confidentiality: the protection of human life. The court held that a psychotherapist has a duty to take affirmative steps, including disclosure of patient confidences, to protect potential victims from attack when he determines that his patient presents a serious danger of violence.³⁵ The *Tarasoff* decision is of additional significance because it presented a clear conflict between the privacy interests of a patient and a significant interest of the state; unlike the situation in *Lifschutz*, the patient's conduct in no way manifested an intent to waive his privilege. Consequently, *Tarasoff* endorses the proposition that the psychotherapist-patient privilege must yield to certain compelling state interests, regardless of the patient's willingness to waive the privilege.³⁶

Evincing a similar sensitivity to the confidentiality of psychotherapy, the United States Court of Appeals for the Ninth Circuit has also held that the constitutional right of privacy protects the confidentiality of psychotherapist-patient communications. In *Caesar v. Mountanos*,³⁷ a case factually similar to *Lifschutz*, Dr. Caesar refused to answer questions about one of his patients and was held in contempt of the California state court.³⁸ The patient had filed suit against third parties alleging that two separate automobile accidents had caused her "pain and suffering not limited to her physical ailments."³⁹ Refusing to discuss the treatment even after the patient specifically waived the psychotherapist-patient privilege,⁴⁰ Dr. Caesar claimed

stated: "Necessary information will often be accessible without delving deeply into specific intimate factual circumstances and such searching probes ought to be avoided whenever possible. The psychotherapist's general conclusions about specific emotional symptoms will often suffice to convey the needed information while preserving the patient's dignity and interest in privacy." *Id.*

33. See, e.g., *Roberts v. Superior Court*, 9 Cal. 3d 330, 337, 508 P.2d 309, 313, 107 Cal. Rptr. 309, 313 (1973); *People v. Hopkins*, 44 Cal. App. 3d 669, 674, 119 Cal. Rptr. 61, 64 (1975).

34. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (vacating *Tarasoff v. Regents of the Univ. of Cal.*, 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974)).

35. 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

36. Although few would dispute the court's conclusion that the state has a compelling interest in preventing unnecessary deaths, whether *Tarasoff* advances that interest is subject to considerable disagreement. See notes 285-90 *infra* and accompanying text.

37. 542 F.2d 1064 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977).

38. 542 F.2d at 1065.

39. *Id.*

40. *Id.* at 1066. The patient later officially revoked her waiver of the psychotherapist-patient privilege. *Id.* In several decisions, the party opposing disclosure has con-

that the Supreme Court's broad extension of constitutional protection to physician-patient privacy in *Roe v. Wade*⁴¹ and *Doe v. Bolton*⁴² implied that in the context of psychotherapy, the right of privacy was absolute.⁴³ Although the Ninth Circuit agreed that confidentiality is essential to psychotherapy⁴⁴ and that the very nature of the communications brings them within the constitutional right of privacy through a constitutional psychotherapist-patient privilege,⁴⁵ it rejected the argument that the privilege was absolute. Instead, the court held that the privilege may be limited when necessary to advance a compelling state interest.⁴⁶ The court next proceeded to evaluate the state interest in obtaining disclosure and found that an invasion of the confidences of Dr. Caesar's patient was justified.⁴⁷ In reaching this conclusion, however, the court failed to identify precisely the state interest that would be furthered by disclosure. At one point the court asserted that the "state has a compelling interest to insure that truth is ascertained in legal proceedings in its courts of law."⁴⁸ The court also focused on the implied waiver of the privilege by Dr. Caesar's patient in bringing her mental condition into issue.⁴⁹ Apparently, the state's interest in obtaining all material evidence, coupled with the implicit waiver by the patient, provided the necessary basis for the Ninth Circuit's holding in *Caesar*.⁵⁰

tended that the psychotherapist, instead of the patient, should decide whether to waive the privilege or that both the patient and the psychotherapist should have the right to prevent waiver of the privilege. See, e.g., *In re Lifschutz*, 2 Cal. 3d at 423 & n.4, 467 P.2d at 561-62 & n.4, 85 Cal. Rptr. at 833-34 & n.4. Two justifications for this proposal are cited: (1) requiring the psychotherapist to disclose confidential matters relating to his patients unconstitutionally impairs the practice of his profession; (2) the psychotherapist has a privacy interest in the therapy he has conducted. See *id.* at 423-27, 467 P.2d at 561-64, 85 Cal. Rptr. at 833-36. Rejecting these contentions, the court in *Lifschutz* held that only the patient has the right to prohibit or to authorize disclosure of confidences revealed during psychotherapy. *Id.*; see note 21 *supra* and accompanying text.

41. 410 U.S. 113 (1973).

42. 410 U.S. 179 (1973).

43. *Caesar v. Mountanos*, 542 F.2d at 1066, 1067.

44. *Id.* at 1067. According to the court, "psychotherapy is perhaps more dependent on absolute confidentiality than other medical disciplines". *Id.*

45. *Id.* at 1067 n.9. The court stated, "We agree, as did the court in *Lifschutz*, that the right of privacy encompassing the doctor-patient relationship identified and explained in *Griswold*, *Roe*, and *Doe* goes beyond the factual context of those cases, i.e., intimate marital and sexual problems, and extends to psychotherapist-patient communications." *Id.*

46. *Id.* at 1067-68. The court observed, "We have no doubt that the right of privacy relied on by Dr. Caesar is substantial. However, the right is conditional rather than absolute and limited impairment of that right may be allowed if properly justified." *Id.* at 1068.

47. *Id.* at 1069, 1070.

48. *Id.* at 1069. In support of this assertion, the court cited *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Kastigar v. United States*, 406 U.S. 441 (1972); and *United States v. Callandra*, 414 U.S. 338 (1974). Obviously, the state's desire for all relevant testimony by itself cannot be the basis for overcoming a constitutional psychotherapist-patient privilege. The very purpose of the privilege is to keep certain kinds of information from courts, even though the information may be relevant. An exception to the privilege that permitted inquiries into patient confidences merely to obtain relevant testimony for trial would eviscerate the privilege.

49. 542 F.2d at 1066. The *Caesar* court's reliance on an implied waiver theory is similar to the approach adopted by the California Supreme Court in *In re Lifschutz*. See note 25 *supra*.

50. The basis for overcoming the constitutional psychotherapist-patient privilege

Judge Hufstedler, concurring and dissenting, believed that both the majority in *Caesar* and the California court in *Lifshutz* had failed adequately to define the compelling state interest and to limit the inquiry under the patient-litigant exception. She argued that communications between patient and psychotherapist were "squarely within the constitutional right of privacy"⁵¹ and therefore any infringement of the right, even if based in part on an implicit waiver by the patient-litigant, should be strictly limited.⁵² She asserted, moreover, that the state's general interest in ascertaining all relevant evidence would not alone be sufficient to compel disclosure of patient confidences.⁵³ Criticizing the majority for according this general interest too much weight, Judge Hufstedler sought to identify precisely the competing interests of the state and the patient-litigant, and to balance these interests in a manner that would maximize protection of the patient's privacy.⁵⁴ A party invoking the patient-litigant exception in civil litigation, she proposed, should in general be limited to ascertaining the time, length, cost, and ultimate diagnosis of the treatment.⁵⁵ Under the exception, an adverse party should be permitted to demand additional information concerning treatment and related confidential communications only if that party demonstrates a compelling need for this evidence.⁵⁶ Demonstrating a strong desire to protect the patient's right of privacy, Judge Hufstedler's consideration of the ways to prevent the patient-litigant exception from becoming an excuse for broad fishing expeditions into

in *Caesar* was somewhat difficult to determine in part because at one point the patient had explicitly waived the privilege. See note 40 *supra*.

51. *Caesar v. Mountanos*, 542 F.2d at 1071 (Hufstedler, J., concurring and dissenting).

52. *Id.* at 1072 (Hufstedler, J., concurring and dissenting). Judge Hufstedler argued, "This sensitive zone of privacy [psychotherapist-patient communications] is protected as a fundamental constitutional right. Although the right is not absolute, it enters the combat zone heavily armed. It will yield only to a compelling state interest, and then will give ground only to the extent necessary to protect a compelling adverse interest." *Id.* (citations omitted).

53. *Id.* at 1073 (Hufstedler, J., concurring and dissenting).

54. *Id.* Judge Hufstedler asserted:

The contest is not simply between the state's interest in facilitating the ascertainment of truth in connection with legal proceedings and the patient's interest in protecting his privacy. If it were, the patient's interest in his privacy would easily prevail over the state's general interest in the production of relevant evidence in a routine personal injury case. The public and private interests that are involved are more complex. The state is interested in effective access to the courts and in fair trials with respect to both plaintiffs and defendants in civil litigation. On the patient-plaintiff's side, the state also has interests in the deterrent effect of civil litigation upon the potential tort-feasors, in the health of its citizens, and in the protection of privacy of its citizens.

Id. (citations omitted). See generally S. HUFSTEDLER, *THE DIRECTIONS AND MISDIRECTIONS OF A CONSTITUTIONAL RIGHT OF PRIVACY* (1971), reprinted in 26 *THE RECORD* 546 (1971).

55. *Caesar v. Mountanos*, 542 F.2d at 1074-75 (Hufstedler, J., concurring and dissenting).

56. *Id.*

an adverse party's mental and emotional problems⁵⁷ is the most thorough and specific analysis found in the psychotherapy privacy cases.

In *In re B*,⁵⁸ the Pennsylvania Supreme Court, without a majority opinion, also recognized a constitutionally based psychotherapist-patient privilege.⁵⁹ Unlike the patients in *Caesar* and *Lifschutz*, the patient in *In re B* was not a party to the lawsuit for which her records were sought. Rather, the case involved a juvenile delinquency proceeding concerning "B." During the course of the predisposition investigation, juvenile court personnel discovered that B's mother had received psychiatric treatment at the Western Psychiatric Institute and Clinic of the University of Pittsburgh. Dr. Roth, acting for the director of the clinic, was ordered by the juvenile court to turn over the mother's psychiatric records. Without consent of the mother, Dr. Roth refused to do so and was cited for contempt of the juvenile court. Although it ruled that the state's statutory doctor-patient privilege did not apply to the disputed records, the Pennsylvania Supreme Court reversed the contempt citation on the ground that the constitutional right of privacy protected the information from involuntary disclosure.⁶⁰ Noting that psychotherapy requires patients to reveal the most intimate details of their lives,⁶¹ the court concluded that the constitutional right of privacy includes protection of the confidences revealed in therapy.⁶² The court conceded that recognition of constitutional protection for the confidences of therapy might hamper the efforts of juvenile courts to obtain necessary information, but emphasized that the right of privacy must prevail over the interest of the court in obtaining the privileged information.⁶³ The court also noted that the state's interest in securing access to a patient's files in such cases was diminished because, as a practical matter, courts could obtain most of the desired information from sources other than the psychotherapist.⁶⁴

57. Slovenko has noted that judicial failure to curtail fishing expeditions into an adverse party's emotional conditions is a major threat to the confidentiality of therapy even in jurisdictions that provide for a psychotherapist-patient privilege. Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 CATH. U. L. REV. 649, 654-61 (1974).

58. 482 Pa. 471, 394 A.2d 419 (1978).

59. *Id.* at 484, 394 A.2d at 425. The court was badly divided. Justices Eagen, Nix, and Pomeroy dissented. Justice Roberts wrote a concurring opinion, and Justice O'Brien concurred in the result.

60. *In re B*, 482 Pa. at 477-84, 394 A.2d at 422-26. Justice Roberts, concurring, believed that the statutory privilege covered the mother's records. Consequently, he argued that consideration of the constitutional question was unnecessary. *Id.* at 486-91, 394 A.2d at 426-30 (Roberts, J., concurring).

61. *Id.* at 485, 394 A.2d at 425-26.

62. *Id.* at 484, 394 A.2d at 425. The plurality opinion stated:

We conclude that in Pennsylvania, an individual's interest in preventing the disclosure of information revealed in the context of a psychotherapist-patient relationship has deeper roots than the Pennsylvania doctor-patient privilege statute, and that the patient's right to prevent disclosure of such information is constitutionally based. This constitutional foundation emanates from the penumbras of the various guarantees of the Bill of Rights as well as from the guarantees of the Constitution of this Commonwealth. . . .

Id. (citation omitted).

63. *Id.* at 486, 394 A.2d at 426.

64. *Id.* The court suggested, for example, that the mother could have been ex-

The strength of the protection afforded psychotherapist-patient communications in *In re B* is demonstrated by the refusal of the court to require disclosure of the information even though the countervailing state interest was quite substantial. The state sought access to a patient's psychiatric files in the disposition phase of a juvenile delinquency proceeding.⁶⁵ The importance of juvenile proceedings, in general, and the quasi-criminal nature of delinquency proceedings, in particular, increased the state's interest in obtaining all relevant information.⁶⁶ Furthermore, because the information concerning the mother's therapy would have been used only in a disposition report in a juvenile proceeding, the court could have assured the confidentiality of the material by sealing the patient's records and by not disclosing the information at a public hearing. Despite the state's significant interest and the means available to limit disclosure, the court rejected the state's request because of the possibility that even a limited breach of the confidentiality of psychotherapist-patient communications could involve a significant invasion of privacy.⁶⁷ The decision thus represents a vigorous endorsement of the privacy of communications between patient and psychotherapist.

Cases Not Involving Privileges

Other courts recently have extended some protection to confidential psychological information without recognizing a psychotherapist-patient privilege. These courts have held that the constitutional right of privacy protects information concerning an individual's mental and

amined by a court-appointed psychiatrist to determine her ability to care for her child. *Id.*

65. *Id.* at 485-86, 394 A.2d at 420-21.

66. See *Atwood v. Atwood*, 550 S.W.2d 465, 466-67 (Ky. 1976). The *Atwood* court stated, "A custody action is a civil proceeding of momentous importance. It not only affects the parents, but drastically affects the lives of the children." *Id.* at 466. The importance of juvenile proceedings led the *Atwood* court to interpret a statutory psychiatrist-patient privilege narrowly, to permit access to the psychiatric records of the juvenile's father. *Id.*

67. See 482 Pa. at 484-85, 394 A.2d at 425-26. In addition to the psychotherapist-patient relationship, several other types of confidential relationships may be subject to constitutional protection. For example, claims that the constitutional right of privacy protects parent-child communications have received judicial approval. See *In re Application of A & M*, 61 App. Div. 2d 426, 435, 403 N.Y.S.2d 375, 381 (1978); *People v. Fitzgerald*, 101 Misc. 2d 712, 716-17, 422 N.Y.S.2d 309, 312 (Westchester County Ct. 1979); Note, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 B.Y.U. L. REV. 1002, 1029. *Contra, In re Terry W.*, 59 Cal. App. 3d 745, 749, 130 Cal. Rptr. 913, 914 (1976). One student commentator has suggested that the attorney-client privilege also is constitutionally mandated. Note, *The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement*, 91 HARV. L. REV. 464, 485-86 (1977).

Interestingly, another scholar has suggested that the priest-penitent privilege as typically applied is constitutionally prohibited. See Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege — The Application of the Religion Clauses*, 29 U. PITT. L. REV. 27, 63 (1967).

emotional states and attitudes, and have acknowledged the obligation of the state to avoid releasing such information to the public.

In *Hawaii Psychiatric Society v. Ariyoshi*,⁶⁸ a federal district court enjoined the state of Hawaii from enforcing a statute that permitted the issuance of "administrative inspection warrants" to review the medical (mental health) records of Medicaid patients.⁶⁹ The court held that "an individual's decisions whether to seek the aid of a psychiatrist, and whether or not to communicate certain personal information to that psychiatrist, fall squarely within" the constitutional right of privacy.⁷⁰ Characterizing the significance of the privacy interest threatened by the statute, the court stated, "[N]o area could be more deserving of protection than communications between a psychiatrist and his patient."⁷¹ In the court's opinion, the Hawaii scheme for inspecting psychiatric records would interfere with therapy by destroying a patient's willingness to disclose intimate personal matters.⁷² Although the statute provided that patient information gathered from a psychiatrist's files was to remain confidential,⁷³ the court found that given the extremely sensitive nature of the information, its disclosure, even to state officials, would invade the patient's privacy.⁷⁴ Balanced against the patient's interest in privacy was the state's interest in protecting the Medicaid program from fraud, which the court accepted as compelling.⁷⁵ Nevertheless, the court held that the state had not shown that the issuance of warrants to inspect the confidential medical records of a psychiatrist was necessary to advance this compelling interest.⁷⁶

Merriken v. Cressman,⁷⁷ another federal district court decision expanding constitutional protection for psychological information, involved a junior high school program designed to identify emotionally handicapped students and provide "early intervention" to prevent drug abuse.⁷⁸ As part of the program, students were expected to complete a questionnaire dealing with matters of a personal nature and soliciting information regarding their emotional states.⁷⁹ The

68. 481 F. Supp. 1028 (D. Hawaii 1979).

69. *Id.* at 1052.

70. *Id.* at 1038.

71. *Id.*

72. *Id.* at 1039.

73. *Id.* at 1040. The record, however, did not reflect whether Hawaii had fully developed a scheme to ensure the confidentiality of the information once the state received it. The court noted that the existence of a scheme to prevent public disclosure of medical information was considered significant by the Supreme Court in *Whalen v. Roe*, 429 U.S. 589, 598-603 (1977), which upheld a state prescription drug reporting act. 481 F. Supp. at 1040.

74. 481 F. Supp. at 1041.

75. *Id.*

76. *Id.* The court was doubtful that Hawaii could prove that inspection of patient files was necessary to advance the compelling state interest in minimizing fraud. *Id.* *But cf.* *Gabor v. Hyland*, 166 N.J. Super. 275, 399 A.2d 993, 994-95 (App. Div. 1979) (permitting the state to review medical files when prosecuting a psychiatrist for Medicaid fraud if the patients agreed to waive confidentiality).

77. 364 F. Supp. 913 (E.D. Pa. 1973).

78. *Id.* at 914, 916.

79. *Id.* at 918. The questionnaire focused, in part, on family relationships and early childhood. It asked, for example, whether the student's family is "very close, somewhat close, not too close, or not close at all." The student was also asked to reveal

purpose of the questionnaire was apparently to identify those students with an emotional propensity toward drug abuse.⁸⁰ Noting the Supreme Court's frequent recognition of the importance of and need for careful protection of the right of privacy,⁸¹ and the inherently personal nature of the questions asked and the relationship between parent and child,⁸² the court held that the program was unconstitutional.⁸³ It acknowledged the state's apparent interest in correcting drug abuse, but doubted whether the program would serve this objective.⁸⁴ The court also mentioned that despite claims of the state to the contrary, the subpoena power of the state presented a threat to the confidentiality of the information collected about the students.⁸⁵ This threat, combined with the questionable efficacy of the program in combatting drug abuse, persuaded the court to issue an injunction prohibiting the state from further efforts to collect sensitive psychological and emotional data.⁸⁶

The court in *Lora v. Board of Education*⁸⁷ also found that the constitutional right of privacy protects records containing psychological information.⁸⁸ In a suit against the New York school board alleging the discriminatory evaluation and placement of handicapped children, plaintiffs moved to compel production of the diagnostic and referral files of fifty students. Because they contained sensitive psychological information, plaintiffs requested that the files be randomly selected and that all names and identifying data be removed.⁸⁹ The court noted the importance of privacy in protecting information a patient reveals to a psychotherapist.⁹⁰ In granting the plaintiffs' motion,

intimate behavior of and feelings expressed by his parents, such as whether they "hugged and kissed him good-night when he was small"; whether they told him how "much they loved him or her"; whether the parents "seemed to know the student's needs or wants"; and whether the student "feels that he is loved by his parents." *Id.*

80. *Id.* at 915.

81. *Id.* The court stated: "[T]he right to privacy is on an equal or possibly more elevated pedestal than some other individual Constitutional rights and should be treated with as much deference as free speech." *Id.* at 918.

82. *Id.*

83. *Id.* at 922.

84. *Id.* at 921.

85. *Id.* at 916. The court stated:

Even if those who are to be working with the CPI Program were to try and be as confidential as possible, . . . there is absolutely no assurance that the materials which have been gathered would be free from access from outside authorities in the community who have subpoena power. Thus, there is no assurance that should an enterprising district attorney convene a special grand jury to investigate the drug problem in Montgomery County, the records of the CPI Program would remain inviolate from subpoenas and that they could not determine the identity of children who have been labeled by the CPI Program as potential drug abusers.

Id.

86. *Id.* at 922.

87. 74 F.R.D. 565 (E.D.N.Y. 1977).

88. *Id.* at 570.

89. *Id.* at 568.

90. *Id.* at 569-74.

however, the court relied primarily on this scheme to ensure anonymity, as well as its own ability to fashion protective orders covering the use of the diagnostic files.⁹¹ Both of these safeguards convinced the court that granting the motion would cause at most only a minimal invasion of the privacy of those students whose files were released.⁹² In effect, there was no real invasion of privacy because the information would not be released in a personally identifiable form. The court cautioned, however, that the anonymous intrusion into the psychological files was justifiable only because the plaintiffs demonstrated a genuine need for the information and because the data was unavailable from any other source.⁹³

Applicants for positions as firefighters in Jersey City objected in *McKenna v. Fargo*⁹⁴ to the city's insistence that they undergo psychological testing as a prerequisite to being hired, and to the city's maintenance of the psychological profiles after it had made its hiring decisions.⁹⁵ The court acknowledged that the constitutional right of privacy limits the ability of the state to collect and to maintain certain kinds of very personal information concerning emotional and mental conditions,⁹⁶ including the kind of information elicited through psychological testing.⁹⁷ Nevertheless, the court upheld the psychological testing of the applicants because of the state's overriding interest in ensuring the selection of firefighters who would be emotionally stable under stress.⁹⁸ Firefighting is inherently dangerous and pressured, the court observed; consequently, firefighters must possess certain psychological traits to ensure the safety not only of the community, but also of the other firefighters.⁹⁹ Because of the life-endangering nature of firefighting, the court characterized the state interest in psychologically screening applicants as "of the highest order"¹⁰⁰ and "of an importance that would be found in very few occupations."¹⁰¹ The constitutionality of the psychological testing,

91. *Id.* at 574, 582-83. The court noted that it could use any of the following means to further safeguard individual privacy: (1) order that the information obtained be used only for the purpose of the pending litigation; (2) require strict confidentiality enforceable by the penalty of contempt; (3) limit the number of copies available; (4) order that the files submitted to the court be sealed; and (5) require that all materials be returned immediately after the conclusion of the suit. *Id.* at 582-83.

92. *Id.* at 583.

93. *Id.* at 584. The court explained that although "the impact of disclosure on the state and personal interests implicated is legally insignificant, even such minimal intrusion might be sufficient ground for denying discovery if plaintiffs had failed to demonstrate a genuine need for the material, or that the information sought is unavailable from an alternative source." *Id.*

94. 451 F. Supp. 1355 (D.N.J. 1978), *aff'd*, 601 F.2d 575 (3d Cir. 1979).

95. 451 F. Supp. at 1381.

96. *Id.*

97. *Id.* at 1380-81. Because only those who voluntarily applied for firefighting positions underwent psychological testing, potential applicants ultimately controlled whether they would be tested or not. This kind of "implicit waiver" is closely analogous to the patient-litigant exception to the psychotherapist-patient privilege recognized in the *Lifschutz* and *Caesar* decisions. See notes 13-57 *supra* and accompanying text.

98. 451 F. Supp. at 1381.

99. *Id.*

100. *Id.*

101. *Id.* at 1377. The interest of the state in preventing unnecessary injuries and deaths caused by emotionally unstable firefighters is similar to the state interest rec-

however, was conditioned on the city's development of formal plans and regulations to preserve the confidentiality of the information obtained during the testing.¹⁰² The court further suggested that the city limit access to the information to the psychologist reviewing the applicant and to city employees who had specific reason to use the data.¹⁰³ As final precautions, the court recommended that the city retain the records only for a specified period of time and that it establish a system for destroying those records that were not necessary to serve the compelling state interest.¹⁰⁴

The foregoing cases suggest that in a variety of circumstances courts have recognized that the constitutional right of privacy prohibits the state from publicly disclosing sensitive information concerning the mental and emotional condition of individuals. The principle that the confidences of therapy and other sensitive mental health information are protected by the constitutional right of privacy, however, has only recently begun to win judicial acceptance.¹⁰⁵ The viability of this principle, therefore, is dependent upon the continued development and application of the constitutional right of privacy.

III. The Constitutional Right of Privacy and the Confidences of Therapy

The constitutional right of privacy had its genesis in decisions during the past century in which the federal courts invoked several provisions of the Bill of Rights to protect personal privacy. These earlier decisions relied on specific rights of the Constitution — particularly the search and seizure provisions of the fourth amendment — to im-

ognized by the California courts in preventing unnecessary injuries and deaths caused by the actions of dangerous mental patients. *See Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 442, 551 P.2d 334, 347, 131 Cal. Rptr. 14, 27 (1976).

Despite the court's characterization of the city's interest as compelling, the danger presented by an unstable firefighter, as a practical matter, is unclear. The city produced evidence that in several instances firefighters refused orders or dropped fire hoses and fled from fires, 451 F. Supp. at 1361 n.8, 1367, but apparently offered no evidence concerning the extent to which these or similar incidents anywhere in the country had caused serious injury or death to any fire-fighter or member of the community. Although a firefighter who panicked undoubtedly would create some danger, the court should have demanded substantial evidence about the extent of the danger before it classified the city's interest as "of the highest order." Similarly, the court should have required the city to demonstrate the ability of city psychologists to predict which applicants would panic under pressure. By perfunctorily accepting the city's assertions, the court neglected its duty to safeguard fundamental constitutional rights from undue governmental encroachment.

102. *McKenna v. Fargo*, 451 F. Supp. at 1382.

103. *Id.*

104. *Id.*

105. *See notes 17-67 supra* and accompanying text. Other cases suggest, but do not explicitly hold, that the constitutional right of privacy may protect the confidences of therapy. *See note 15 supra* and accompanying text.

plement a general concept of privacy, or the "right to be let alone."¹⁰⁶ The notion of a distinct right of privacy first received general recognition in an article by Samuel D. Warren and Louis D. (later Justice) Brandeis.¹⁰⁷ The article, however, only facilitated judicial acceptance of civil tort actions to protect privacy;¹⁰⁸ it did not lead directly to the establishment of a separate constitutional right of privacy.¹⁰⁹

Not until 1965 in *Griswold v. Connecticut*¹¹⁰ did the Supreme Court recognize a specific constitutional right of privacy.¹¹¹ Striking down a Connecticut statute that prohibited married couples from using con-

106. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Brandeis argued:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Id. at 478; *Boyd v. United States*, 116 U.S. 616, 630 (1886).

107. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The article was apparently induced by Mr. Warren's distress over the editorial treatment of his family's social activities in the Boston newspapers. In a letter to Warren, Brandeis recounted that it was "a suggestion of yours [Warren's], as well as your deepseated abhorrence of the invasions of social privacy, which led to our taking up the inquiry," to which Warren later added the notation, "You are right of course about the genesis of the article." Letter from Louis D. Brandeis to Samuel D. Warren (April 8, 1905) with note added by Warren (April 10, 1905) (copy on file in the University of Louisville Law Library).

108. The invasions of privacy cognizable in tort were the public disclosure of private facts, the intrusion upon physical seclusion or solitude, the placement of another in a false light in the public eye, and the appropriation of another's name or likeness for profit. See W. PROSSER, *THE LAW OF TORTS* 802-803 (4th ed. 1971); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1420 (1974).

109. The historical development of the right of privacy is well documented. See generally Clark, *Constitutional Sources of the Right of Privacy*, 19 VILL. L. REV. 833 (1974); Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965); *Griswold, The Right to be Let Alone*, 55 NW. U. L. REV. 216 (1960); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); O'Connor, *Right to Privacy in Historical Perspective*, 53 MASS. L.Q. 101 (1968); Heyman & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U. L. REV. 765 (1973); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977); Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U. L. REV. 633 (1977); Comment, *Roe v. Wade and In re Quinlan: Individual Decisions and the Scope of Privacy's Constitutional Guarantee*, 12 U.S.F. L. REV. 111 (1977); cf. Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1977) (describing the development of the new substantive due process).

110. 381 U.S. 479 (1965).

111. *Id.* at 485. In fashioning this new right, the court drew upon aspects of earlier decisions. The right of privacy in making fundamental personal decisions, such as whether to use contraceptives, had been anticipated in *Skinner v. Oklahoma*, 316 U.S. 535, 537-38 (1942). Similarly, the right of privacy in controlling family relationships and child rearing had been evolving in several earlier cases. See *Prince v. Massachusetts*, 321 U.S. 158, 171 (1944) (state statute prohibiting minors from selling merchandise in public places overrides a parent's claim of authority in her own household); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing the right to make certain decisions regarding the education of one's children); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (state law prohibiting the instruction of elementary school children in a foreign language unconstitutionally interferes with the power of parents to control their children's education). The Court has subsequently acknowledged the privacy aspects of all these decisions. See *Carey v. Population Services Int'l*, 431 U.S. 678, 684 (1977).

traceptives, the Court enumerated several reasons compelling recognition of a constitutional right of privacy in the context of the case: the historical importance of marriage,¹¹² the intimate nature of the relationship between husband and wife,¹¹³ the private nature of the relationship between the couple and their physician,¹¹⁴ and the belief that governmental intrusion into the marital bedroom is inappropriate.¹¹⁵ The Justices could not agree, however, whether the right emanated from the penumbras of several constitutional guarantees,¹¹⁶ or was specifically derived from the ninth¹¹⁷ or fourteenth amendments.¹¹⁸

The Court again recognized a constitutional right of privacy in *Eisenstadt v. Baird*,¹¹⁹ in which it reversed the defendant's conviction for distributing contraceptives to an unmarried person.¹²⁰ Although the Court based its decision primarily on the defendant's equal protection claim that the state impermissibly distinguished between married and single persons,¹²¹ it also relied significantly on the right of privacy.¹²² As in the *Griswold* decision, however, the Court again failed to identify the specific constitutional basis of the right. Noting that its decision in *Griswold* recognized the right of privacy only in the marital relationship, the Court extended the right to other individuals and relationships: "[If] the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."¹²³ In other words, the court viewed the right of privacy as the right of

112. *Griswold v. Connecticut*, 381 U.S. at 486.

113. *Id.* at 482.

114. *Id.*

115. *Id.* at 485-86.

116. The opinion of the Court, written by Mr. Justice Douglas, suggested that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. . . . The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 484-85 (citations omitted).

117. Chief Justice Warren, Justice Brennan, and Justice Goldberg, while joining the opinion of the Court, emphasized the importance of the Ninth Amendment: "To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever." *Id.* at 491 (Goldberg, J., concurring).

118. Justice Harlan and Justice White relied upon the fourteenth amendment to strike down the Connecticut law. *Id.* at 499, 502 (White, J., concurring). Justice Harlan stated that the proper question was "whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.'" *Id.* at 500 (Harlan, J., concurring) (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

119. 405 U.S. 438 (1972).

120. *Id.* at 443.

121. *Id.* at 447.

122. *Id.* at 453.

123. *Id.* at 453.

individuals to make certain “fundamental decisions,” such as those regarding procreation, free from governmental compulsion.

In *Roe v. Wade*,¹²⁴ the Court struck down criminal abortion laws, which proscribed abortions except for the purpose of saving the life of the mother, because the laws interfered with a woman’s right of privacy.¹²⁵ Though conceding that the Constitution does not explicitly mention any right of privacy,¹²⁶ the Court traced the general concept of personal privacy, or zones of privacy, to its 1891 decision in *Pacific Railroad Co. v. Botsford*¹²⁷ and examined at length the line of decisions that subsequently contributed to the establishment of the right of privacy.¹²⁸ Unlike previous decisions, however, *Roe* clearly tied the right of privacy to the fourteenth amendment’s “concept of personal liberty and restrictions upon state action.”¹²⁹ Adopting a “fundamental right” standard for determining when privacy is constitutionally protected, the Court stated in language derived from fourteenth amendment cases that “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ . . . are included in this guarantee of personal privacy.”¹³⁰ The Court qualified this standard, however, and held that, as with other funda-

124. 410 U.S. 113 (1973).

125. *Id.* at 164.

126. *Id.* at 152.

127. 141 U.S. 250 (1891) (a court of the United States cannot order a plaintiff in a personal injury action to submit to a physical exam in advance of the trial).

128. *Roe v. Wade*, 410 U.S. at 152-53. Mr. Justice Brennan stated:

In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right of privacy in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967); *Boyd v. United States*, 116 U.S. 616 (1886); see *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. [479], 484-485 [(1965)]; in the Ninth Amendment, *id.* at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty,” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S. [438], 453-454 [(1972)]; *id.* at 460, 463-65 (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, *supra*. *Id.* (parallel citations omitted).

129. 410 U.S. at 153. Contending that the specific constitutional basis for the right of privacy was not determinative of the petitioners’ entitlement to protection, the Court stated: “This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” *Id.*

130. *Id.* at 152. Although he agreed that the state laws were constitutionally infirm, Justice Stewart rejected the concept of a constitutionally protected right of privacy. *Id.* at 167 n.2 (Stewart, J., concurring). Crediting *Griswold* for influencing his views, he premised his decision on the concept of “liberty” protected by the due process clause. *Id.* at 168 (Stewart, J., concurring) (citing *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Harlan, J., concurring)). Justice Rehnquist, dissenting, also criticized the majority’s acceptance of a constitutional right of privacy. 410 U.S. at 171-78 (Rehnquist, J., dissenting).

mental rights, the right of privacy is not absolute and may be limited by the state through narrowly drawn laws designed to protect a "compelling state interest."¹³¹ On this basis, the Court distinguished *Griswold* and *Eisenstadt*, which concerned marital intimacy and the right to use contraceptives, from *Roe*, which concerned the right to an abortion, by holding that the state, at some point, has a compelling interest in the life of the developing fetus.¹³² At that point, the Court continued, "[t]he woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly."¹³³

Despite the Supreme Court's acceptance of a constitutional right of privacy, the nature and scope of that right remains unclear. In early privacy decisions, not only the nature of the right, but also its constitutional basis were indefinite; not until *Roe* did any constitutional theory for the right of privacy command a majority of the Court. Even though *Roe* removed doubts as to the textual basis for the right of privacy, the scope of the right nonetheless has remained uncertain. A recent case, moreover, has further confused, rather than clarified, the proper scope of the right. *Doe v. Commonwealth's Attorney*,¹³⁴ which upheld without opinion a sodomy statute applied to homosexual conduct,¹³⁵ has been particularly difficult for legal scholars to fit within the framework of constitutional privacy.¹³⁶ Because it sanctioned state interference with a privacy interest of a most intimate nature — an individual's sexual orientation¹³⁷ — the decision created concern for the continued viability of the right of privacy.¹³⁸ *Doe*, however, must be read in light of other post-*Roe* decisions, particularly those relating to procreation and home and family life, which have reaffirmed the right of privacy.¹³⁹ These decisions indicate that when raised in a different context than *Doe*, the right of privacy may provide extensive protection against unwarranted state intrusion

131. *Roe v. Wade*, 410 U.S. at 155-56 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 460, 463-64 (1952) (White, J., concurring); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 307-308 (1940)).

132. 410 U.S. at 159.

133. *Id.*

134. 425 U.S. 901, *rehearing denied*, 425 U.S. 985 (1976) (reported below at 403 F. Supp. 1199 (E.D. Va. 1975)).

135. 403 F. Supp. at 1203.

136. See Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 Nw. U.L. REV. 417, 436-51 (1976); Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 591-600 (1977). See generally Comment, *Constitutional Protection of Private Sexual Conduct Among Consenting Adults: Another Look at Sodomy Statutes*, 62 IOWA L. REV. 568 (1976); Comment, *Doe v. Commonwealth's Attorney: A Set-Back for the Right of Privacy*, 65 KY. L. J. 748 (1977).

137. See *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1200 (E.D. Va. 1975).

138. Some scholars have suggested that the constitutional right of privacy as an independent constitutional right is no longer viable. See, e.g., Silver, *The Future of Constitutional Privacy*, 21 ST. LOUIS U. L.J. 211, 215-29, 253-55, 273-80 (1977).

139. See, e.g., *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 60-61 (1975); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40, 648 (1974).

into areas of personal concern. The right is limited, however, by the compelling state interest doctrine. Because states may limit the right of privacy, as well as other constitutional rights, when necessary to protect a compelling state interest, the protection afforded by the privacy right will vary depending upon the Court's willingness to classify particular state interests as compelling.¹⁴⁰

Although the nature and scope of the right remain somewhat vague, the right of privacy has become part of the due process clause of the fourteenth amendment. In other words, the right of privacy acquires a constitutional dimension when protection of the privacy interest involved is "implicit in the concept of ordered liberty."¹⁴¹ These constitutional privacy interests have been defined in a variety of ways,¹⁴² and divided into a number of categories.¹⁴³ In addition to the privacy interests specifically protected by particular provisions of the Constitution — for example, the search and seizure provision of

140. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 597-98 (1977) (state statute requiring pharmacists to furnish prescription information about certain dangerous, though legitimate, drugs was a valid exercise of state police power); *Planned Parenthood v. Danforth*, 428 U.S. 52, 65-82 (1976) (Court upheld the right of the state to require a woman to give written consent to an abortion, but struck down the requirement of spousal or parental consent when either party could veto the woman's decision). *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972) (newsman does not have a first amendment privilege to refuse to testify and answer questions before a grand jury). For a more complete examination of *Whalen*, *Planned Parenthood*, and *Branzburg*, see notes 225-52 and accompanying text. See also *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977) (former President's expectation of privacy in personal communications was overcome by an "important public interest" when the invasion of privacy was very limited).

141. Mr. Justice Douglas, concurring in *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973), a companion case, suggested that the Constitution protects three kinds of interests in privacy:

First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality. These are rights protected by the First Amendment and, in my view, they are absolute, permitting no exceptions. . . . [T]hese aspects of the right of privacy are rights "retained by the people" in the meaning of the Ninth Amendment.

. . . .
Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children. . . . These rights are "fundamental," and we have held that in order to support legislative action the statute must be narrowly and precisely drawn and that a "compelling state interest" must be shown in support of the limitation.

. . . .
Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf. These rights, though fundamental, are likewise subject to regulation on a showing of "compelling state interest."

Doe v. Bolton, 410 U.S. 179, 211-13 (1973) (Douglas, J., concurring).

142. See generally *Fried, Privacy*, 77 *YALE L.J.* 475 (1968); Gerety, *Redefining Privacy*, 12 *HARV. C.R.-C.L. L. REV.* 233 (1977); Gross, *The Concept of Privacy*, 42 *N.Y.U. L. REV.* 34 (1967); Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 *COLUM. L. REV.* 693 (1972); Parker, *A Definition of Privacy*, 27 *RUT. L. REV.* 275 (1974); Soler, *Of Cannabis and the Courts: A Critical Examination of Constitutional Challenges to State Marijuana Prohibitions*, 6 *CONN. L. REV.* 601 (1974); Note, *The Massachusetts Right of Privacy Statute: Decoy or Ugly Duckling?*, 9 *SUFFOLK L. REV.* 1248 (1975); *Symposium in Privacy* (J. Pennock & J. Chapman eds. 1971).

143. See generally *Bazelon, Probing Privacy*, 12 *GONZ. L. REV.* 587, 604-18 (1977); *Beaney, The Right to Privacy and American Law*, 31 *L. & CONTEMP. PROBS.* 253 (1966); *Kurland, The Private I*, 1976 *U. CHI. MAG.*, Autumn 11; Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*, 64 *CALIF. L. REV.* 1447 (1976); Note, *Roe and Paris: Does Privacy Have a Principle?*, 26 *STAN. L. REV.* 1161 (1974).

the fourth amendment — the right of privacy has at least two elements: the right to be free from governmental interference in certain areas of paramount personal concern,¹⁴⁴ and the right to avoid unwarranted disclosure by the government of important personal matters.¹⁴⁵

The Right to Be Free From Governmental Intrusion in Areas of Fundamental Personal Concern

The element of the right of privacy most clearly recognized by the courts is the right to make basic personal decisions free from unwarranted governmental intrusion, also referred to as “the right of autonomy”. To invoke the right of autonomy, an individual must satisfy three criteria: first, the government intrusion must involve a vital personal interest concerning the most fundamental human matters; second, the government action must significantly — not merely incidentally — interfere with this personal interest; and, third, either the government action must not be necessary to advance a compelling state interest, or the governmental action must be more invasive of the personal interest than is required to advance the state interest.¹⁴⁶

Fundamental Interests. The loss of autonomy must involve matters that are “fundamental to the concept of ordered liberty.”¹⁴⁷ Home and family life, child bearing and rearing, and marriage are areas in which the constitutional protection of privacy has been most clear.¹⁴⁸ There is no reason, however, to limit the protection of the right of

144. This branch of the right of privacy has been identified in *Griswold, Roe* and other privacy cases, see note 171 *infra*, but it is not universally accepted. See Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 438-39 (1980).

145. See *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977); note 158 *infra*.

146. See *Roe v. Wade*, 410 U.S. 113, 155-56 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 495-98 (1965) (Goldberg, J., concurring); notes 110-33 *supra*. See generally, Craven, *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699; Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977). For a more complete discussion of the compelling state interest doctrine, see notes 189-218 *infra* and accompanying text.

Other tests for invoking autonomy privacy have been proposed. Professor Soler, for example, has suggested that the constitutional right of autonomy requires that the conduct be personal to the actor, that the actor's interest in the aspects of the conduct be personal, that the harm to the individual be significant, and that the conduct not harm the public at large. Soler, *supra* note 142, at 697-98.

Another commentator has suggested the courts adopt a “none-of-their-business” test under which an action that does not adversely affect anyone but the actor would not be a legitimate government concern. Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision*, 64 CALIF. L. REV. 1447, 1480-81 (1976). A similar standard was apparently developed by the Alaska Supreme Court in *Ravin v. State*, 537 P.2d 494, 505 (Alaska 1975) (state cannot prohibit the use of marijuana in the home without a showing that such use will harm other persons). See generally Comment, *Roe v. Wade and In re Quinlan: Individual Decision and the Scope of Privacy's Constitutional Guaranty*, 12 U.S.F. L. REV. 111, 150-54 (1977).

147. See notes 129-30 *supra* and accompanying text.

148. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

privacy to these areas. The Supreme Court has noted that the "outer limits" of the constitutional right of privacy have not yet been established.¹⁴⁹ Other matters, including the personal interest in mental and emotional health, are as basic and fundamental to ordered liberty as the rights related to family life and child bearing. One would expect, therefore, that significant interference with such other fundamental interests, in the absence of a compelling state interest, would also violate the right of privacy.

The concern of an individual for his own mental health is unquestionably a vital, and even paramount, personal interest. The ability to seek effective psychotherapy is as important to a person suffering an emotional or mental illness as the ability to seek an abortion is to a woman experiencing an unwanted or dangerous pregnancy. Mental illness may often be even more protracted and debilitating than an unwanted pregnancy. By disrupting and hindering thought, decision-making, cognition, and mentation, psychological disabilities may interfere significantly with marriage, child rearing, and family life. In addition to emotional suffering, mental illness may also interfere with the exercise of many other human rights, including freedom of religion, speech, and the press.¹⁵⁰ In fact, some level of mental health is a *sine qua non* for the exercise of many of the basic freedoms and civil rights.

Significant Governmental Interference. To invoke constitutional protection, the interference must significantly interfere with the ability of an individual to control an important aspect of his life. An incidental or minor impediment to the exercise of individual autonomy does not result in an unconstitutional invasion of the right of privacy, even though some particularly sensitive people may find the invasion to be significant. State record-keeping of information concerning abortions, for example, does not unconstitutionally burden the abortion rights of women if the state ensures that the information will remain secure from public view.¹⁵¹ Nor is a state system to record prescriptions for dangerous drugs unconstitutional, even though it may cause some unusually sensitive patients to avoid or postpone needed medical treatment.¹⁵² In both these circumstances, the interference with

149. *Carey v. Population Services Int'l*, 431 U.S. 678, 684 (1977).

150. Some courts have suggested that the concept of a right of privacy embodies first amendment protection for the communication of ideas. They argue that free communication assumes that each individual has the capacity to produce ideas. As one court noted, the mental ability to order one's thoughts and coherently express oneself "is fundamental to our cherished right to communicate and is entitled to comparable constitutional protection." *Rogers v. Okin*, 478 F. Supp. 1342, 1366-67 (D. Mass. 1979). Another court stated, "If one is not protected in his thoughts, behavior, personality, and identity, then the right of privacy becomes meaningless." *Kaimowitz v. Department of Mental Health*, No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973), reported in 42 U.S.L.W. 2063-64 (July 10, 1973); see Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237, 258-76 (1974). But see *Rennie v. Klein*, 462 F. Supp. 1131, 1143-44 (D.N.J. 1978) (forced medication of involuntary mental patients that temporarily dulls the senses may violate the right of privacy, but it does not violate the first amendment).

151. *Planned Parenthood v. Danforth*, 428 U.S. 52, 79-81 (1976).

152. *Whalen v. Roe*, 429 U.S. 589, 603 (1977). Emphasizing that the government interference must be significant, the Court stated: "Nor can it be said that any individual has been deprived of the right to decide independently, with the advice of his physi-

the underlying privacy right is simply too tenuous to constitute a violation of that right.

Any significant burden on the exercise of the right of autonomy, however, may be unconstitutional, even though the state has not prohibited the activity altogether. The Supreme Court has held, for example, that a state law permitting only pharmacists to sell contraceptives unconstitutionally burdens the right to make fundamental decisions concerning childbearing by reducing access to contraceptives.¹⁵³ In another context, the Court held that a state cannot constitutionally prohibit one form of second trimester abortion when such a prohibition would increase the medical risks associated with second trimester abortions. The state law was invalid because it seriously abridged the right to obtain an abortion, even though, it did not ban second trimester abortions altogether.¹⁵⁴ Similarly, the Court struck down a statute requiring that abortions be performed only in accredited hospitals because the law impermissibly burdened the right to choose to have an abortion.¹⁵⁵ Reviewing these latter two decisions the Supreme Court in *Carey v. Population Services*¹⁵⁶ concluded that "the same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely."¹⁵⁷

No clear line separates an insignificant annoyance to privacy interests from an impermissible burden on the exercise of the right of privacy. Though held impermissible in *Carey*, a state-imposed requirement that contraceptives be sold only by a pharmacist hardly seems overly burdensome. The law at issue in *Carey* only limited the accessibility of contraceptives, "the opportunity for privacy of selection and purchase," and the "possibility of price competition,"¹⁵⁸ it did not directly prohibit the use of contraceptives. *Carey*, therefore, establishes that a state regulation may impermissibly burden the right of privacy even though it does not approach a total prohibition on the right to decide matters of fundamental personal concern. The line between the state action held invalid in *Carey* and the state action held permissible in other cases, however, is difficult to discern. Unlike the statute challenged in *Carey*, statutes that require physicians to maintain records on abortions and prescriptions may inter-

cian, to acquire and to use needed medication This case is therefore unlike those in which the Court held that a total prohibition of certain conduct was an impermissible deprivation of liberty." *Id.*

153. *Carey v. Population Services Int'l*, 431 U.S. 678, 686-91 (1977).

154. *Planned Parenthood v. Danforth*, 428 U.S. 52, 75-79 (1976).

155. *Doe v. Bolton*, 410 U.S. 179, 193-95 (1973).

156. 431 U.S. 678 (1977).

157. *Id.* at 688.

158. *Id.* at 689.

fere only with the decisions of particularly sensitive individuals to obtain abortions or medical services.¹⁵⁹

The difference between statutes regulating the performance of abortions and the sale of contraceptives — which the Court struck down — and statutes requiring the maintenance of records on abortions and prescriptions — which it upheld — is in the nature and extent of the burden placed upon the exercise of a fundamental right. In each case in which a regulation was struck down, the exercise of a fundamental right was limited or made more difficult by the regulation. In the case of reporting statutes, the Court's holding that the state law did not constitute an impermissible burden is distinguished by the fact that the reporting scheme probably would not affect the decisions of persons of ordinary sensitivity. This distinction accounts for the Court's emphasis on the security arrangements to protect the release of the information.¹⁶⁰ Strict safeguards preserving confidentiality may well have convinced the Court that the record-keeping requirements would not affect the quality of medical services or deter a person of reasonable sensitivities from deciding to seek the services. If the records had not been kept confidential, the regulations might have influenced individuals not to exercise their fundamental right to seek medical assistance and, therefore, infringed on their right of privacy. Thus, the absence of safeguards to preserve the confidentiality of the data would have presented a different and more difficult privacy question.¹⁶¹

Forced governmental disclosure of the confidences of therapy would constitute a significant interference with a fundamental personal interest. A state requirement that the confidences of therapy be revealed would not of course, prohibit the practice of psychotherapy. The requirement would, however, disrupt effective therapy in two ways. First, the possibility of public disclosure of confidential information may be so frightening or distasteful that the patient may not enter therapy, or may be less inclined to disclose personal information in therapy. Second, the absence of a privilege may erode the trust between therapist and patient upon which successful psychotherapy depends.

The personal nature of the information typically revealed in therapy makes it understandable that people of average sensitivity might hesitate to be completely open in therapy, or to even enter therapy, without an assurance of confidentiality. A variety of psychotherapy experts have noted that confidentiality is essential to effective therapy.¹⁶² In addition, some limited empirical data gathered from poten-

159. See notes 151-52 *supra* and accompanying text.

160. See *Whalen v. Roe*, 429 U.S. 589, 594-95 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52, 81 (1976).

161. See *Whalen v. Roe*, 429 U.S. at 605-606; *Planned Parenthood v. Danforth*, 428 U.S. at 80-81; *McKenna v. Fargo*, 451 F. Supp 1355, 1381 (D.N.J. 1978).

162. See generally S. FREUD, 2 COLLECTED PAPERS 356 (Am. rev. ed. 1959); Group for the Advancement of Psychiatry, *Confidentiality and Privileged Communications in the Practice of Psychiatry*, Rep. No. 45 (1960); Am. Psychiatric Ass'n, *Position Statement on Confidentiality and Privilege with Special Reference to Psychiatric Patients*, 124 AM. J. PSYCHIATRY 175 (1968); Am. Psychological Ass'n, *Standards for Providers of Psy-*

tial patients indicates that the absence of confidentiality will cause many people to avoid therapy or to be considerably less open in therapy.¹⁶³ As patients become less open in psychotherapy, the therapist has less information with which to assist the patient. In fact, the ideas, fantasies, and fears that a patient may be least likely to disclose without the assurance of confidentiality may be among the most important to communicate to the therapist.

The threat to privacy resulting from the absence of a psychotherapist-patient privilege is considerably different from the threat to privacy inherent in state collection of medical information regarding prescriptions and abortions. Confidentiality is more vital to effective psychotherapy than it is to medical treatment generally. The relative importance of confidentiality to psychotherapy treatment compared with other medical treatment accounts for the general acceptance by commentators of the need for a psychotherapist-patient privilege and the general criticism of the physician-patient privilege.¹⁶⁴ Moreover,

chological Services, APA MONITOR 19 (March 1975); Dubey, *Confidentiality as a Requirement of the Therapist: Technical Necessities for Absolute Privilege in Psychotherapy*, 131 AM. J. PSYCHIATRY 1093 (1974); Foster, *Group Psychotherapy: A Pool of Legal Witnesses*, 25 INT'L J. GROUP PSYCHOTHERAPY 50 (1975); Geiser & Rheingold, *Psychology and the Legal Process: Testimonial Privileged Communications*, 19 AM. PSYCHOLOGIST 831 (1964); Mykel, *The Application of Ethical Standards to Group Psychotherapy in a Community*, 21 INT'L J. GROUP PSYCHOTHERAPY 248 (1971); Plant, *A Perspective on Confidentiality*, 131 AM. J. PSYCHIATRY 1021 (1974); Shah, *Privileged Communications, Confidentiality and Privacy*, 1 PROFESSIONAL PSYCHOLOGY 59 (1969); Slovenko & Usdin, *The Psychiatrist & Privileged Communication*, 4 ARCHIVES GEN. PSYCHIATRY 431 (1961); Slovenko, *Psychotherapy and Confidentiality*, 24 CLEV. ST. L. REV. 375 (1975); Trachtman, *Pupils, Privacy and the School Psychologist*, 27 AM. PSYCHOLOGIST 37 (1972); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1255 (1962); Siegel, *Privacy, Ethics, and Confidentiality*, paper presented to the American Psychological Ass'n, 85th Annual Meeting, San Francisco, Aug. 27, 1977.

163. See Meyer & Smith, *A Crisis in Group Therapy*, 32 AM. PSYCHOLOGIST 638, 638-40 (1977). Meyer and Smith found that a substantial portion (81.8%) of respondents to a questionnaire on confidentiality indicated that they would refuse to enter or would be substantially less inclined to be open in group therapy without the assurance of confidentiality. The respondents were third year university students. *Id.* Another survey revealed that a substantial number of people thought they would be less open in therapy if they knew their psychotherapist was legally obligated to release information from therapy. Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1262 (1962). Willage and Meyer found that subjects were more open and candid in answering personality inventories when confidentiality was assured than they were if they thought the results of their survey might be released. Willage & Meyer, *The Effects of Varying Levels of Confidentiality on Self-Disclosure*, 2 GROUP 88, 94-96 (1978). Finally, a survey of therapists revealed that about one fourth of them had, within one year, observed patients' reluctance to discuss violent tendencies when informed of the possibility of a breach of the confidences of therapy. Project, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165, 183 (1978).

164. See 8 J. WIGMORE, EVIDENCE §§ 2285, 2380a, at 527-28, 828-32 (McNaughton rev. ed. 1961); Chafee, *Privileged Communications*, 52 YALE L.J. 607, 611 (1943); Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 276, 300 (1962); Purrington, *An Abused Privilege*, 6 COLUM. L. REV. 388, 395 (1906). But see D. LOUISELL & C. MUELLER, 2 FEDERAL EVIDENCE § 215, at 593-603 (1978); Black, *The Marital and Physician Privileges — A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 50-51.

in its proposed federal rules of evidence, the Supreme Court recognized that the potential release of medical information is much less disruptive to medical treatment than the potential release of information about psychotherapy is to therapy. The proposed rules provided only for a psychotherapist-patient privilege, not a general physician-patient privilege.

Even if a patient enters and attempts to be open in therapy, the absence of a privilege may still interfere with effective therapy by reducing the trust between the patient and the therapist.¹⁶⁵ Patients who do not view their therapist as one in whom their confidences are safe are likely to repress some feelings and emotions that might be important to the treatment. The importance of trust between patient and therapist has been widely recognized.¹⁶⁶ The Advisory Committee for the Supreme Court's proposed rules of evidence in its comments on the psychotherapist-patient privilege noted that "[t]here is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. . . . A threat to secrecy blocks successful treatment."¹⁶⁷ Persuaded by this reasoning, the Court rejected arguments that successful treatment has prospered without the protection of a privilege, and that a privilege was therefore unnecessary.¹⁶⁸

165. See Slovenko, *Psychotherapy and Confidentiality*, 24 CLEV. ST. L. REV. 375, 395 (1975). Slovenko has suggested that trust between the patient and therapist is of utmost importance to successful therapy, and that the assurance of confidentiality is otherwise of limited concern. *Id.*

166. See notes 161-63 *supra*. Justice Clark, dissenting in *Tarasoff*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), emphasized the importance of trust between therapist and patient:

[E]ven if the patient fully discloses his thoughts, assurance that the confidential relationship will not be breached is necessary to maintain his trust in his psychiatrist — the very means by which treatment is effected. [T]he essence of much psychotherapy is the contribution of trust in the external world and ultimately in the self, modelled upon the trusting relationship established during therapy. Patients will be helped only if they can form a trusting relationship with the psychiatrist. All authorities appear to agree that if the trust relationship cannot be developed because of collusive communication between the psychiatrist and others, treatment will be frustrated.

Id. at 460, 551 P.2d at 359-60, 131 Cal. Rptr. at 39-40 (quoting Dawidoff, *The Malpractice of Psychiatrists*, 1966 DUKE L.J. 696, 704) (other citations omitted).

167. Proposed Rules of Evidence, Rule 504, Advisory Committee's Note (quoting Group for the Advancement of Psychiatry, *Confidentiality and Privileged Communications in the Practice of Psychiatry*, Rep. No. 45, at 92 (1960)), reprinted in 56 F.R.D. 183, 242 (1973). The Advisory Committee continued: "The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely." *Id.*

168. See *id.* By providing for a psychotherapist-patient privilege in the Proposed Rules of Evidence, the Court concluded that the privilege was necessary and useful. The Court reached a different conclusion in *Branzburg v. Hayes*, 408 U.S. 665 (1972), about the necessity for a news reporters' privilege. The Court stated: "From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press." *Id.* at 689-99.

The potential effects of a psychotherapist-patient privilege upon the legal system are difficult to predict. Slovenko has suggested that the protection of confidences in states without a psychiatrist-patient privilege is no different from protection in states with the privilege. In other words, the protection afforded does not increase after a state has adopted the privilege. Slovenko, *Psychotherapist-Patient Testimonial Privilege: A*

The possibility that the state will require disclosure of the confidences of therapy may also affect other important individual rights. For some patients, the threat of disclosure may preclude the option of obtaining effective therapy. This serious interference with the ability of some people to obtain successful therapy to treat, prevent, or alleviate mental illness seriously burdens the privacy right of autonomy. State interference with effective therapy may also affect first amendment rights.¹⁶⁹ Assuming that one of the essential interests protected by the first amendment is the right to think and believe what one chooses, the opportunity to obtain effective therapy is necessary for some people to be able to exercise this first amendment right. Mental illness may prevent one from understanding religious and political ideas, or interfere with the ability to communicate ideas. Some level of mental health is necessary to be able to form belief and value systems and to engage in rational thought. By interfering with effective psychotherapy, therefore, the state may violate both elements of the right of privacy and impair the opportunity of a patient to exercise rights to free thought and belief guaranteed by the first amendment. The compelling state interest doctrine may, however, provide a justification for the state to interfere with the rights of privacy.

Unwarranted Disclosure of Personal Matters

The right to prevent the disclosure of very personal matters, often referred to as "information or informational privacy," has received less judicial attention than autonomy privacy,¹⁷⁰ a phenomenon that had led some scholars to suggest that informational privacy is not included within the constitutional right of privacy.¹⁷¹ The Supreme

Picture of Misguided Hope, 23 CATH. U.L. REV. 649, 658-59 (1974). Ironically, though he presented no evidence of the ineffectiveness of the privilege, he did present some evidence that the privilege does make a difference. *Id.* at 658-59 n.20. Many protections provided by the privilege are not readily apparent — e.g., the elimination of discovery fishing expeditions. The critical effect of the privilege, of course, is not on legal relationships, but on the relationship between psychotherapist and patient. The real success or failure of the privilege is determined by whether it increases the willingness of patients to be open and forthright in therapy. A considerable amount of professional opinion has concluded that the privilege encourages openness, see note 162 *supra*, and some preliminary data indicates that potential patients find the privilege very important to openness, see note 163 *supra*.

169. See *Rennie v. Klein*, 462 F. Supp. 1131, 1143-44 (D.N.J. 1978); *Kaimowitz v. Department of Mental Health*, 42 U.S.L.W. 2063-64, No. 73-19434-AW (Cir. Ct. Wayne County, Mich., July 10, 1973); Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U. L. REV. 461, 492-97 (1977); Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237, 253-76 (1974).

170. The right of information privacy described here applies only to the disclosure of information. It does not include protection against methods of collecting information the disclosure of which would otherwise violate the right of privacy. Limitations on collection methods employed by the government are contained in the fourth, fifth, and fourteenth amendments. See *Rochin v. California*, 342 U.S. 165, 172 (1952).

171. See *Henkin, Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1411 (1974); Note,

Court, however, has subsequently identified the protection of certain very personal information as part of the constitutional right of privacy.¹⁷² For example, the Court has suggested that government disclosure of some kinds of information regarding individual medical treatment may violate the right of privacy.¹⁷³

Four criteria must be satisfied to properly invoke constitutional information privacy. First, the information involved must be of a highly personal and sensitive nature. Second, the information must be private, *i.e.*, not available to the public, before it is sought by the state. Third, protection against the release of information to persons outside a limited governmental body must be inadequate, or the information must be so extremely sensitive and personal that the very collection of the information by the state alone offends individual privacy. Finally, there must be either (1) no compelling state interest in obtaining and maintaining the information or, (2) some other method of advancing the state interest that is less invasive of personal rights. The first three criteria determine the nature of the information that deserves constitutional protection. The fourth criterion concerns whether the state's infringement of individual privacy is justified by the furtherance of an important state interest.

Personal Information. The right of privacy protects only those kinds of information that people generally regard as highly confidential and that they release to others only for the most compelling reasons.¹⁷⁴ The more the information reveals about intimate physical characteristics or mental processes of a person, the more likely it is to be of a highly confidential nature. For example, information about a person's property or possessions is much less likely to be of such a personal nature that he would regard it as highly confidential or refuse

On Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U. L. REV. 670, 770-72 (1973); Comment, *Roe v. Wade and In re Quinlan: Individual Decision and the Scope of Privacy's Constitutional Guarantee*, 12 U.S.F. L. REV. 111, 119 (1977). But see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 929-30 (1973) (arguing that the right of privacy should primarily restrict data gathering).

172. See *Whalen v. Roe*, 429 U.S. 589, 598 n.24 (1977). The *Whalen* Court stated: "The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters . . ." *Id.* at 599-600 (citations omitted); see *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457-59 (1977) (noting the individual interest in information privacy).

For a collection of federal and state cases involving informational privacy, see Leigh, *Informational Privacy: Constitutional Challenges to the Collection and Dissemination of Personal Information by Government Agencies*, 3 HASTINGS CONST. L.Q. 229, 231-45 (1976). See generally A. WESTEN, *PRIVACY AND FREEDOM* 33 (1970); Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1282-97 (1975); Note, *Informational Privacy: The Concept, Its Acceptance and Affect on State Information Practices*, 15 WASHBURN L.J. 273 (1976); Note, *Roe and Paris: Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161 (1974).

173. See *Whalen v. Roe*, 429 U.S. 589, 605-606 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52, 80-81 (1976).

174. Leigh has described this kind of information as that "which a person desires to keep private and which, if disseminated, would tend to cause substantial concern, anxiety or embarrassment to a reasonable person." Leigh, *Informational Privacy: Constitutional Challenges to the Collection and Dissemination of Personal Information by Government Agencies*, 3 HASTINGS CONST. L.Q. 229, 251 (1976); see Note, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother is Watching You*, 2 HASTINGS CONST. L.Q. 773, 792-96 (1975).

to release it except in unusual circumstances.¹⁷⁵

As a general matter, no information is more intensely personal and private than the information revealed in psychotherapy. Psychotherapy deals not only with information about a person, the disclosure of which may be embarrassing or harmful, but also with the patient's most intimate fantasies, fears, and anxieties. It deals with the very essence of a person and may well concern certain subjects that create such anxiety in a patient that they have been relegated to the subconscious.¹⁷⁶ The patient is expected to talk with the therapist about feelings and matters which the patient would not consider revealing to anyone else.¹⁷⁷ Because of the often extremely personal nature of the information revealed in therapy, in no other relationship is the right to be free from public disclosure of that personal information likely to be so highly desired as in psychotherapy.¹⁷⁸

175. See *United States v. Miller*, 425 U.S. 435, 442 (1976); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 63 (1974); *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978); cf. *Fisher v. United States*, 425 U.S. 391, 399 (1976) (there is a privacy interest in tax records, but the state interest in the records is overriding); *Couch v. United States*, 409 U.S. 322, 335-36 (1973) (there is no privacy interest in tax records).

176. Anxiety surrounding the release of information concerning therapy may be increased by the psychotherapists' use of terms that have clear technical meaning but may have quite a different connotation to the lay public. The Group for the Advancement of Psychiatry has noted: "The confusion and misunderstanding which can result from inappropriate testimony is well illustrated by a newspaper article of a few years ago which reported that a psychiatrist testifying in a criminal trial stated that the defendant suffered from an unresolved Oedipus complex and wished to have intercourse with his mother. It is not hard to imagine what effect this had upon the jury." Group for the Advancement of Psychiatry, *Confidentiality and Privileged Communications in the Practice of Psychiatry*, Rep. No. 45, at 93 (1960).

177. Several courts have found Guttmacher and Weihofen's statement of the intensely private nature of therapy persuasive:

The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect of them to do so if they knew that all they say — and all that the psychiatrist learns from what they say — may be revealed to the whole world from a witness stand.

M. GUTTMACHER & H. WEIHOFFEN, 22 *PSYCHIATRY AND THE LAW* 272 (1952); see *Caesar v. Mountanos*, 542 F.2d 1064, 1072 (9th Cir. 1976) (Hufstедler, concurring and dissenting), cert. denied, 430 U.S. 954 (1977); *In re Lifschutz*, 2 Cal. 3d 415, 431, 467 P.2d 557, 567, 85 Cal. Rptr. 829, 839 (1970).

178. The participants in a confessional protected by the priest-penitent privilege or couples in marriage protected by the husband-wife privilege arguably may desire privacy more than the patient in therapy. During the course of therapy, however, the participant may reveal the same information revealed in a confessional; the husband or wife is likely to reveal in therapy the most private aspects of the marital relationship. The information revealed in therapy, therefore, would be at least as sensitive as that protected by the priest-penitent or the husband-wife privilege. These common law testimonial privileges are not meant so much to directly protect the right of privacy as they are to foster a socially important relationship by allowing complete freedom of discussion without fear of public disclosure. See R. SLOVENKO, *PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATIONS* 8-14 (1966); 8 J. WIGMORE, *EVIDENCE* §§ 2285, 2290, at 527, 543 (McNaughton rev. ed. 1961); Louisell & Kent, *The Supreme Court of California 1969-1970, Foreword: Reflections on the Law of*

Confidential Information. Two factors determine whether information is confidential or "private." First, the information must not be generally available to the public. Protecting the privacy of information that is already public would be meaningless. Second, the person must have a reasonable expectation of confidentiality.¹⁷⁹ A patient usually has a high expectation that the information revealed in therapy will remain confidential.¹⁸⁰ The codes of ethics of major psychiatric and psychological organizations require therapists to maintain confidentiality, and therapists often assure patients that their confidences will be protected.¹⁸¹ Even in group therapy, in which a number of patients participate, each patient usually has an obligation to maintain the confidentiality of the communications of the other group members.¹⁸² Finally, the obligation to prevent disclosure of the confidences of therapy is often recognized and enforced by law; in these jurisdictions, a therapist who improperly reveals the confidences of patients may be subject to civil liability.¹⁸³

Protection from Release. Some forms of personal information may be collected and stored by the state, provided the confidentiality of the information is protected so that the information is not released be-

Privileged Communications — The Psychotherapist-Patient Privilege in Perspective, 59 CALIF. L. REV. 30, 32 (1971).

179. The reasonable expectation of confidentiality in information privacy is analogous to the "expectation" of privacy in fourth amendment cases. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457-59 (1977).

The importance of a person's expectation of privacy in determining the extent of privacy interests can be traced to Justice Taft's opinion in *Olmstead v. United States*, 277 U.S. 438, 468-69 (1928) and was clearly enunciated by the Court in *Katz v. United States*, 389 U.S. 347, 351-53 (1967). See *United States v. White*, 401 U.S. 745, 751-52 (1971).

The Court has indicated that the following situations do not involve a reasonable expectation of privacy: conversations with a hired private investigator, *Osborn v. United States*, 385 U.S. 323, 331 (1966); conversations in jail, *Lanza v. New York*, 370 U.S. 139, 143 (1962); conversations with friends in one's own store, *On Lee v. United States*, 343 U.S. 747, 751 (1952). See generally O'Brien, *Reasonable Expectation of Privacy: Principles and Policies of Fourth Amendment-Protected Privacy*, 13 NEW ENG. L. REV. 662 (1978); Note, *Formalism: Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977); Note, *Fourth Amendment Right of Privacy: Mapping the Future*, 53 VA. L. REV. 1314 (1967).

180. See Meyer & Smith, *A Crisis in Group Therapy*, 32 AM. PSYCHOLOGIST 638, 639-40 (1977); Swoboda, Elwork, Sales & Levine, *Knowledge and Compliance with Privileged Communication and Child Abuse Reporting Laws*, 9 PROF. PSYCH. 448, 449 (1978); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1255 (1962); Willage, *Group Therapists' Understanding of Privileged Communication and Confidentiality*, paper presented to the American Psychological Ass'n, 85th Annual Meeting, San Francisco, Aug. 27, 1977.

181. See, e.g., Am. Psychiatric Ass'n, *Position Statement on Confidentiality and Privilege with Special Reference to Psychiatric Patients*, 124 AM. J. PSYCHIATRY 175, 175-76 (Jan. 1968); Am. Psychological Ass'n, *Standards for Providers of Psychological Services*, APA MONITOR 19 (Mar. 1975).

182. See Cross, *Privileged Communications Between Participants in Group Psychotherapy*, 1970 L. & SOC. ORD. 191, 198-99 (1970); Morgan, *Must the Group Get Up and Testify? An Examination of Group Therapy Privilege*, 2 GROUP 67, 70-73 (1978); Mykel, *The Application of Ethical Standards to Group Psychotherapy in a Community*, 21 INT'L J. GROUP PSYCHOTHERAPY 248 (1971); Note, *Group Therapy and Privileged Communication*, 43 IND. L.J. 93, 104 (1967).

183. See Eger, *Psychotherapists' Liability for Extrajudicial Breaches of Confidentiality*, 18 ARIZ. L. REV. 1061, 1094 (1976); cf. Cooper, *The Physician's Dilemma: Protection of the Right to Privacy*, 22 ST. LOUIS U. L.J. 397, 412-18 (1978) (involving medical information generally). See generally Note, *Roe v. Doe: A Remedy for Disclosure of Psychiatric Confidences*, 29 RUTGERS L. REV. 191 (1975).

yond a limited portion of the government.¹⁸⁴ For example, a state may obtain and keep information concerning medical prescriptions, even though that information may be private, but at the same time the state may be obligated to protect the information from public disclosure.¹⁸⁵ Similarly, states may collect and maintain ordinary personal data, but they must implement security systems to safeguard against the release of sensitive information.

The degree of protection required depends primarily upon the nature of the information involved. The more highly personal and sensitive the information, the greater the protection necessary, and the more limited the distribution permissible. Records of medical prescriptions, for example, may require less protection than records concerning intimate matters such as sexual habits. At one extreme, some information is so personally sensitive that the state probably cannot compel release of the information at all, except perhaps, for *in camera* inspection and only for the most extraordinary reasons.¹⁸⁶ At the other extreme, the release of information in a manner that makes identification of its source impossible, as with publication of aggregate data, results in no real loss of privacy as long as the information was gathered lawfully.¹⁸⁷

Because of the extremely personal nature of the information revealed in therapy, it is doubtful whether any safeguard could adequately protect against or limit its release at trial without rendering the information useless. In the context of litigation, for example, any disclosure of the confidences of therapy at trial results in some public disclosure because of the public nature of the proceedings. Presumably, any information received during a trial would be a matter of public record. Requiring a person to disclose to the court the confidences

184. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 456-65 (1977); *McKenna v. Fargo*, 451 F. Supp. 1355, 1382 (D.N.J. 1978); cf. *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960) (the absence of adequate safeguards to protect the security of information was one basis for striking down a law requiring teachers to inform school boards of all organizations to which they belonged).

Protective measures need be implemented only with regard to information which the state in some manner requires that citizens provide, or which is gathered without the free consent of the citizen. The government is not required to safeguard information a citizen freely provides for general release by the government. Moreover, a person may freely consent to the release of any information, personal or not, but in doing so, waives the privacy of that information.

185. See *Whalen v. Roe*, 429 U.S. 589, 605 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52, 80-81 (1975).

186. See A. MILLER, *THE ASSAULT ON PRIVACY* (1971); A. WESTIN, *PRIVACY AND FREEDOM* 398 (1967); Donner, *Political Intelligence: Cameras, Informers and Files*, in *PRIVACY IN A FREE SOCIETY*, Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States 57 (1964); Pipe, *Privacy: Establishing Restrictions on Government Inquiry*, 18 AM. U. L. REV. 516, 542 (1969). See generally Greguras, *Informational Privacy and the Private Sector*, 11 CREIGHTON L. REV. 312 (1977).

187. See *Lora v. Board of Educ.*, 74 F.R.D. 565, 580-81 (E.D.N.Y. 1977), discussed at notes 87-93 *supra* and accompanying text.

revealed in therapy would effectively eliminate any protection of the information from public view. Although courts might be able to fashion protective orders to limit the amount or use of information released, they could not hold the information in strict confidence and totally prevent its general release. The absence of a psychotherapist-patient privilege in litigation, therefore, is tantamount to the state requiring public release of information of the most sensitive kind. In a broader context than litigation, some information is so sensitive and personal that no security arrangements could adequately safeguard against disclosure. In these situations, a state should not be permitted to collect information at all, at least absent a compelling state interest "of the highest order."¹⁸⁸ Because the confidences of therapy are often of an extremely sensitive nature, the courts must place some limitations on the power of the state to compel disclosure to the government.

Compelling State Interest

A state may interfere with fundamental personal rights, including the right of privacy, when necessary to advance a legitimate compelling state interest.¹⁸⁹ Protecting a viable fetus, for example, is a compelling interest that may justify a state limitation on the right of a woman to obtain an abortion — a right clearly within the woman's right of privacy.¹⁹⁰ The compelling state interest doctrine, however, cannot be applied without limitation. An absolute application of the doctrine, permitting a state to violate any fundamental right in pursuit of every compelling interest, would result in an unacceptable invasion of personal liberty. For example, the state cannot justify the use of extremely invasive procedures on the ground that the procedures enable it to obtain evidence for use at trial.¹⁹¹ The state, of course, has some interest in obtaining and preserving all relevant evidence for trial to ensure the fair administration of justice.¹⁹² But if this interest alone could routinely defeat even fundamental personal rights, personal privileges, such as the privilege against self-incrimination, would be virtually meaningless. If the state needed evidence regarding a pregnancy and the evidence could be obtained only if the pregnancy went to term, the state's compelling interest would surely not justify forcing the woman to carry the fetus to term to preserve the evidence.

A state interest may justify interference with a fundamental right only if five criteria are satisfied. First, a compelling interest of the state must be involved. Second, the state must not seek to interfere with an "essential interest." Third, the means chosen to further the state interest must be the least restrictive reasonable alternative

188. See *McKenna v. Fargo*, 451 F. Supp. 1355, 1381 (D.N.J. 1978).

189. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155-56 (1973).

190. *Id.* at 163-64.

191. *Rochin v. California*, 342 U.S. 165, 172 (1952) (court reversed the defendant's drug conviction because incriminating evidence was obtained through the use of invasive medical procedures).

192. See note 198 *infra* and accompanying text.

available to the state. Satisfaction of this criterion requires that the state activity or regulation used to promote the compelling state interest be as narrowly drawn as possible to provide for the least interference with personal rights and that it be the means the least invasive of fundamental rights available to the state. Fourth, the state interest must in fact be significantly advanced by the state activity or regulation. Finally, the compelling state interest advanced must be greater than the harm inflicted upon the fundamental right.

Compelling Interests. The Supreme Court has identified three general compelling state interests:¹⁹³ preventing violent overthrow of the government,¹⁹⁴ preserving democracy,¹⁹⁵ and resolving or accommodating conflicts between fundamental rights.¹⁹⁶ This list, however, is

193. See generally Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U. L. REV. 462, 479-93 (1977). These three compelling interests have been characterized as all being part of the general compelling state interest in preserving a constitutional democratic state. *Id.* at 479. Some commentators have identified a fourth class of cases upholding government infringement of fundamental rights. These cases do not actually sanction governmental abridgment of the fundamental right, but only permit governmental interference with certain aspects of the right other than those core elements that make the right fundamental. *Id.* at 479-80. For example, the court has generally upheld regulation of speech when the government's interest was contained in the non-communicative aspect of the speaker's conduct. *Id.* at 479.

194. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 220 (1944) (wartime detention). *Korematsu* indicates that the Court views this interest as justifying a wide range of government activities.

195. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (limiting campaign contributions); *Storer v. Brown*, 415 U.S. 724, 733 (1974) (limiting access to ballot); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) (restricting political rights of federal employees). In each of these cases, the Court held that the state interest in promoting political stability, avoiding voter confusion, and ensuring proper operation of democratic processes justified interference with individual political rights.

196. Courts have identified this compelling interest in three categories of fundamental rights: (1) first amendment, see, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 700-701 (1972) (first amendment right of a newsman to refuse to divulge news sources conflicted with the state interest in preservation of property and the safety of citizens); *Rowan v. Post Office*, 397 U.S. 728, 736-37 (1970) (preservation of right of privacy conflicted with the right of a mail-order company to distribute "pandering" advertisements); *Sheppard v. Maxwell*, 384 U.S. 333, 350-51 (1966) (defendant's right to a fair trial weighed against right of a newsman to cover a trial); *Kovacs v. Cooper*, 336 U.S. 77, 81 (1949) (right of a defendant to broadcast announcements from a sound truck conflicted with the right of citizens to be free from unwarranted noise); *Action v. Gannon*, 450 F.2d 1227, 1232-33 (8th Cir. 1971) (right of church members to religious worship conflicted with the right of human rights advocates to demonstrate); (2) due process, see, e.g., *Roe v. Wade*, 410 U.S. 113, 150 (1973) (preserving the life of a fetus conflicted with the right of a woman to terminate her pregnancy); *Barsky v. Board of Regents*, 347 U.S. 442, 452 (1954) (physician's right to a medical license weighed against state's right to regulate medical profession); *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (right of the state to protect public health conflicted with the individual's right not to be vaccinated); and (3) equal protection, see, e.g., *Craig v. Boren*, 429 U.S. 190, 199-200 (1976) (state right to protect public safety conflicted with the right of appellant not to be discriminated against on the basis of sex). See generally Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, *supra* note 193, at 482-86. The courts have not yet resolved the conflicts between the right of privacy of a minor to decide to have an abortion and her parents' right of privacy in child rearing and between the right of privacy and free speech. In resolving these conflicts, the govern-

by no means exclusive. The state potentially has several other compelling interests that might justify interference with the privacy rights of therapy. Under special circumstances, interests such as avoiding death and serious injury to citizens might justify an intrusion into the privacy of therapy.¹⁹⁷ The state also has a compelling interest in acquiring all relevant evidence to ensure fair administration of justice.¹⁹⁸

The state's compelling interest in having all relevant testimony poses a major threat to a constitutional psychotherapist-patient privilege. Because the very purpose of a privilege is to prevent the state from obtaining certain material evidence, recognition of a compelling state interest in obtaining all relevant testimony sufficient to justify the release of confidential information in all cases would emasculate a constitutional psychotherapist-patient privilege. The operation of the other criteria necessary to invoke the compelling state interest doctrine, however, prevents this complete destruction of the privilege.

Essential Interests. Some rights protected by the constitution are so basic or "essential" that even a compelling state interest may not justify their violation.¹⁹⁹ Many rights are derived from language in the Constitution that clearly indicates they are not absolute;²⁰⁰ other rights are only related to or implement essential interests.²⁰¹ A few rights may be absolute, in that they go to the very essence of the individual interests protected by the Constitution.

The interests protected by the first and fifth amendments are examples of "essential" interests. One essential interest protected by the first amendment is the right of an individual to believe and to think freely. No compelling interest of the state would justify a prohibition of certain beliefs or thoughts.²⁰² An essential right protected by the fifth amendment is the right of an individual to refuse to pro-

ment inevitably will infringe or compromise some fundamental rights in order to effectuate others.

197. See *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 438, 551 P.2d 334, 347, 131 Cal. Rptr. 14, 27 (1976).

198. See *United States v. Nixon*, 418 U.S. 683, 709 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 695-701 (1972); *Miller v. Colonial Refrig. Transp., Inc.*, 81 F.R.D. 741, 746 (M.D. Pa. 1979); Note, *From the Mouths of Babes: Does the Constitutional Right of Privacy Mandate a Parent-Child Privilege?*, 1978 B.Y.U. L. REV. 1002, 1020-22.

199. The "essential interest" test perhaps could be merged with the fifth criterion, which requires that individual rights be harmed less than the degree to which the state interest is advanced. Any "essential interest" would be so heavily favored in such a comparison that virtually no state interest would be sufficient to overcome the "essential interest." The "essential interest" test has two advantages. First, it expressly recognizes that some individual rights cannot be defeated by compelling state interests. Second, the test avoids the balancing of interests in some situations. See note 208 *supra*.

200. See U.S. CONST. amend. III (quartering of troops); *id.* amend. IV (search and seizure); *id.* amend. V (deprivation of property). These constitutional provisions protect only against *peace time* quartering of troops, *unreasonable* searches and seizures, and taking of property *without reasonable compensation*.

201. See Note, *supra* note 193, at 479-80. The "Miranda rights," for example, implement the right to avoid self-incrimination and the right to counsel.

202. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (speech that does not incite others to imminent lawless action is immunized from government control); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (observing that the "freedom to believe" is absolute).

vide testimony by which the state convicts him of a crime. Even the state's interest in having all relevant testimony — a state interest that has been described as "compelling" to ensure a fair trial — cannot overcome the individual's right to withhold self-incriminating testimony. Only when that essential interest is no longer involved, for example when the prosecution has granted immunity, can the state's compelling interest in having the testimony overcome the fifth amendment privilege against self-incrimination.²⁰³

Although the courts have recognized the importance of the right to privacy,²⁰⁴ they have not classified it as an "essential interest." Consequently, a state is not completely precluded from interfering with the right of privacy and the confidences of therapy when necessary to advance a compelling state interest.

Least Restrictive Reasonable Alternative. A legitimate state interference with the constitutional right of privacy must be as limited and as narrowly drawn as possible.²⁰⁵ When information privacy is involved, the state must precisely and narrowly define the scope of the information sought or maintained and limit its distribution. In addition, less invasive means of achieving the compelling state objective must not be available. Security measures may be required to avoid accidental or unauthorized release of the information. Similarly, when autonomy privacy is involved, the intrusion into extremely personal matters must be as limited as is reasonably possible, and the state must be unable to promote the compelling interest by employing a less intrusive procedure.

Because of the extremely personal nature of information often disclosed in therapy, the state has a significant responsibility to restrict the collection of psychological data and to control its distribution. This responsibility may dictate that the state provide a testimonial privilege protecting the confidences of therapy. Even if such a broad privilege is not required, however, a broad state rule or procedure that permits the government routinely to interfere with the privacy of therapy in order to provide evidence for trial does not sufficiently limit the invasion of a patient's right to informational privacy. Cer-

203. See, e.g., *Ullman v. United States*, 350 U.S. 422, 431 (1956).

204. See, e.g., *Merriken v. Cressman*, 364 F. Supp. 913, 918 (E.D. Pa. 1973). Characterizing the elevated significance of the right of privacy, the *Cressman* court stated that "the right to privacy is on an equal or possibly more elevated pedestal than some individual Constitutional rights and should be treated with as much deference as free speech." *Id.*

205. See *Roe v. Wade* 410 U.S. 113, 155 (1973). The *Roe* Court stated that "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155 (citing *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)); see *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *Branzburg v. Hayes*, 408 U.S. 665, 680 n.19 (1972); *Eisenstadt v. Baird*, 405 U.S. 438, 446-50 (1972); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell v. Connecticut*, 310 U.S. 296, 307-308 (1940).

tainly, not all communication between patient and therapist will be relevant at trial. A state, therefore, has a duty at least to ensure that only information absolutely necessary to a complete and fair trial is released.

A state may avoid the unnecessary release of very personal information in several ways: (1) it may permit inquiry into psychotherapist-patient communications only when the information is not available from another source; (2) it may provide for *in camera* judicial inspection of the information to ensure that only the most limited amount of personal information is released; and (3) it may restrict an adverse party's inquiry to that information clearly relevant to the issue before the court.²⁰⁶ Few jurisdictions have employed these safeguards. This failure to safeguard against unnecessary intrusions into information privacy raises serious doubts whether these jurisdictions can legitimately rely on the compelling state interest in obtaining all relevant testimony to justify an interference with the privacy of therapy.²⁰⁷

Actual Advancement of State Interest. The narrowly drawn regulation or activity must also actually and significantly advance the state interest.²⁰⁸ For example, claims that laws against the sale of contraceptives to singles or minors advance the interest of the state in encouraging adherence to the criminal fornication law are not effective, in part, because the prohibition on contraceptive sales is unlikely to reduce or eliminate fornication.²⁰⁹ Without this limitation on the compelling state interest doctrine, governments might claim that every state regulation furthered a compelling interest, even though it promoted that interest in only the most trivial or tenuous manner.

Requiring that the confidences of therapy be revealed in court advances the state's interest in having evidence for trial. This promotion of the state interest, however, may be more apparent than real. As patients recognize that their confidences may be revealed, they

206. Judge Hufstедler has suggested similar limitations on the patient-litigant exception to the psychotherapist-patient privilege. *See* *Caesar v. Mountanos*, 542 F.2d 1064, 1074-75 (9th Cir. 1976) (Hufstедler, J., concurring and dissenting).

207. At least one authority believes that evidentiary requirements — especially the requirements of relevancy and materiality — provide better protection for the confidences of therapy than the psychotherapist-patient privilege. Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 CATH. U. L. REV. 649, 657-60, 673 (1974).

208. This criterion may be considered a component of the fifth criterion — that the benefits to the state will be advanced more than the fundamental right harmed. If the state action does not advance a legitimate state interest, the “benefits” would be non-existent and any substantial harm to fundamental rights should invalidate the state regulation. The fifth criterion, however, essentially requires a balancing of costs (harm to the patient's privacy interest) and benefits. Because of the absence of apparent constitutional standards to guide balancing determinations, the Supreme Court may be reluctant to use such an analysis. *See generally* Duval, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 172-87 (1972). By applying the “actual advancement of the state interest” test, courts can often avoid difficulty encountered in balancing.

209. *See* *Carey v. Population Servs. Int'l*, 431 U.S. 678, 697-99 (1977); *Eisenstadt v. Baird*, 405 U.S. 438, 449-50 (1972); *cf.* *Planned Parenthood v. Danforth*, 428 U.S. 52, 72-75 (1976) (the Court discounted claims that requiring parental or spousal consent prior to a minor's abortion would promote family or marital relationships).

can be expected to minimize the confidential information revealed in therapy, especially if they have any reason to believe that their therapy or confidences may become the subjects of litigation. By making patient communications vulnerable to discovery, therefore, the state will ultimately limit, rather than increase, the evidence available from psychotherapy. Currently, patients and therapists alike seem to substantially overestimate the degree of protection afforded to the confidences of therapy.²¹⁰ Extensive publication of instances of forced disclosure of confidential psychotherapist-patient communications would undoubtedly result in greater appreciation of the threat to confidentiality. Paradoxically, by demanding that the information from therapy be revealed in court, a state may tend to remove from therapy the very information it seeks. Whether mandated disclosure or the confidences of therapy significantly advances a compelling state interest in obtaining testimony is therefore questionable.

Advancement of State Interest Versus Harm to Fundamental Rights: Striking the Balance. Even if the state can demonstrate that each of the previous criteria has been met, the compelling state interest doctrine cannot be properly invoked if the benefit to the state interest will be less than the harm to the fundamental personal right.²¹¹ This determination requires a court to balance the benefits to the compelling state interests against the severity of the infringement of fundamental rights. A state regulation that will advance a compelling state interest only slightly, and at a significant cost to a fundamental personal right, should not receive constitutional approval. For example, the state's interest in having all relevant evidence would not justify torture of a witness reluctant to testify against another, or the insistence that a pregnant woman carry a fetus to term to provide evidence for a trial. In these situations, the state's interest, though compelling, is not as important as the personal interest in privacy and freedom from torture.

Advancement of a state interest and harm to a fundamental right are compared by calculating the *net* gain or benefit to the state and the *net* loss or harm to the individual. The real value of the state interest promoted by the action is the total benefit to the state interest less any accompanying losses incurred by the state as a result of

210. See note 180 *supra*.

211. In determining whether state interests justify regulation or interference by the state, the Court will "look to the extent of the burden that they place on individual rights." *Buckley v. Valeo*, 424 U.S. 1, 68 (1976). At least one court has indicated that the Supreme Court is implicitly relying on a balancing test in every privacy case that involves an identified compelling state interest. *Hawaii Psych. Soc'y v. Ariyoshi*, 481 F. Supp. 1028, 1043 (D. Hawaii 1979).

See Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217, 1245; Silver, *The Future of Constitutional Privacy*, 21 ST. L. U. L. REV. 211, 226 (1977). See generally Note, *Of Interests, Fundamental and Compelling: The Emerging Constitutional Balance*, 57 B.U. L. REV. 55 (1977).

the activity. For example, the net benefits of a regulation that prohibits the use of one method of abortion because it presents a somewhat higher risk of infection than another method should not be calculated as the total health improvement resulting from the decrease in infections. Instead, if the approved method of abortion increases the chance of hemorrhage or if it presents a substantial risk to the mental health of women, those "costs," measured in terms of the state interest in the overall health of its citizens, should be subtracted from the "benefits" to that interest resulting from the state regulation.²¹²

The true measure of the harm to a fundamental personal right is the difference between the harm to that right and any accompanying additions or gains to that right resulting from the state action.²¹³ The harm to freedom of speech resulting from a regulation that limits the right of a person to interrupt a speaker at a town meeting, for example, should be reduced by the increased protection accorded that person, whose first amendment rights are enhanced by his own opportunity to speak at the meeting free of interruption. The harm to one's personal rights might be accompanied by gains to other personal rights; these gains should be included as a part of the net gain to state interests.²¹⁴ Finally, in calculating the net loss to the right of privacy resulting from state actions, courts might consider the degree to which an individual can in some way avoid the invasion of privacy: The more control an individual has over the governmental intrusion, the less harmful the interference with the right of privacy.²¹⁵

Courts are not able, of course, to compare the costs (in terms of individual rights) and benefits (in terms of state interests) with precision. The Supreme Court has indicated that its function is not to choose between constitutional rights and interests of approximate

212. Cf. *Planned Parenthood v. Danforth*, 428 U.S. 52, 75-79 (1976) (invalidating a Missouri statute that prohibited the use of saline amniocentesis in second trimester abortions because, as a practical matter, the law did not promote the state's interest in protecting maternal health).

213. One must take care when employing this analysis to avoid "double counting" by using a factor both to reduce the benefit of a state regulation and to increase the cost of the regulation.

214. For example, two rights might be promoted by the absence of privileges: the right to obtain evidence for trial and the right to the correct adjudication of disputes. The gain to these rights would be included as part of the net gains to state interests.

215. Some courts have apparently adopted this approach. For example, the *Caesar*, *Lifschutz*, and *McKenna* courts all concluded that the harm to privacy interests was lessened by the power each individual had to avoid the government intrusion. Both the *Lifschutz* and the *Caesar* courts, noting that the patients had chosen to bring their mental conditions into question in the litigation, implied that the patients could have avoided any invasion of their privacy by not raising the issue of their mental condition in court. *Caesar v. Montanos*, 542 F.2d 1064, 1070 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977); *In re Lifschutz*, 2 Cal. 3d 415, 429-35, 467 P.2d 557, 570, 85 Cal. Rptr. 829, 838-42 (1970); see notes 17-57 *supra* and accompanying text. The reasoning of the court in *McKenna* was similar. Because the applicants for fire-fighter positions applied for the positions voluntarily, they ultimately controlled whether their mental condition would be examined by the state. See *McKenna v. Fargo*, 451 F. Supp. 1355, 1360-61 (D.N.J. 1978); see notes 94-102 *supra* and accompanying text. In each of these cases, the individuals did not "voluntarily" waive any right of privacy because they would have had to give up important rights to protect their privacy. Nonetheless, they were able to exercise some level of control over whether their privacy was infringed. All three courts apparently reasoned that such control reduces the net cost of the invasion.

equal value.²¹⁶ The courts undoubtedly recognize what amounts to a presumption that a state decision to promote a compelling state interest at the expense of a fundamental personal right is valid. Those challenging the state action carry the burden of demonstrating that the state action harms fundamental individual rights more than it promotes compelling state interests. Despite the difficulties involved in this determination, only by considering whether a state activity does in fact promote a compelling state interest and whether the state activity damages individual rights more than it benefits state interests can courts strike down those governmental acts that needlessly, arbitrarily, or capriciously infringe upon fundamental personal rights.

The calculation of the net state benefits produced by requiring in-court disclosure of psychotherapist-patient communications requires a public policy analysis similar to that used by the Advisory Committee, in considering a statutory psychotherapist-patient privilege in the Proposed Federal Rules of Evidence. The emphasis of such an analysis shifts from concern for the right of the individual to concern for society as a whole.²¹⁷ Under this approach, the interests of society in protecting the confidences of therapy should be compared with the interest of society in obtaining all relevant information for trial.

The societal interest in protecting the confidentiality of therapy is to promote emotional and mental health, which ultimately will reduce antisocial activity and other societal burdens that result from untreated or poorly treated mental problems. Successful psychotherapy may reduce social problems such as juvenile delinquency, marital complications, and violent crime.²¹⁸ It may also reduce the cost of caring for dependents of the mentally ill and increase the productivity of those with mental deficiencies or difficulties. Successful psychotherapy apparently requires, and thus the benefits of therapy presumably depend upon, the protection of the confidences of the patient.²¹⁹

In recent years, legal commentators, as well as the drafters of model statutes, and the Supreme Court,²²⁰ have been nearly unani-

216. See *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973); *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972).

217. See Advisory Committee Notes, Proposed Rule 504, reprinted in 56 F.R.D. 183, 241-44 (1973). The Supreme Court in *Branzburg* seemed to consider the constitutional claims for a news reporter's privilege on a general public policy level: "The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

218. See generally J. MELTZOFF & M. KORNREICH, RESEARCH IN PSYCHOTHERAPY (1970); Burton, *Encounter, Existence and Psychotherapy*, in ENCOUNTER 7, 8-9 (A. Burton ed. 1969); Hansell, *Casualty Management Method*, 19 ARCHIVES GEN. PSYCHIATRY 231 (1968).

219. See notes 161-63 *supra* and accompanying text.

220. Proposed Rule 504, reprinted in 56 F.R.D. 183, 240-41 (1972).

mous in suggesting that a psychotherapist-patient privilege would be in the best interests of society.²²¹ Professor Wigmore, a vigorous opponent of testimonial privileges,²²² suggested that a privilege can be justified only upon the satisfaction of four criteria: "(1) the communications must originate in a *confidence* that they will not be disclosed; (2) this element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between parties; (3) the *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; (4) the *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation."²²³

221. See C. McCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 9 n.9, at 213 (2d ed. E. Cleary 1972); R. SLOVENKO, PSYCHOTHERAPY, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION 38-39 (1966); Cross, *Privileged Communications Between Participants in Group Psychotherapy*, 1970 L. & SOC. ORD. 191, 195 (1970); Dubey, *Confidentiality as a Requirement of the Therapist: Technical Necessities for Absolute Privilege in Psychotherapy*, 131 AM. J. PSYCHIATRY 1093 (1974); Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 611 (1964); Fox, *Psychotherapy and Legal Privilege*, 53 MASS. L.Q. 307, 315 (1968); Geiser & Rheingold, *Psychology and the Legal Process: Testimonial Privileged Communications*, 19 AM. PSYCHOLOGIST 831, 836 (1964); Goldstein & Katz, *Psychotherapist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 36 CONN. B.J. 175, 178-79 (1962); Guttmacher & Weihofen, *Privileged Communications Between Psychiatrist and Patient*, 28 IND. L.J. 32, 33 (1952); Ladd, *Privileges*, 1969 L. & SOC. ORDER 555, 581 (1969); Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, 740-45 (1957); Rapoport, *Psychiatrist-Patient Privilege*, 23 MD. L. REV. 39, 49 (1963); Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 184-203 (1960); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1257-58 (1962); Note, *Group Therapy and Privileged Communication*, 43 IND. L.J. 93, 104 (1967); Note, *Privileged Communications — A Psychiatrist Has No Constitutional Right to Assert an Absolute Privilege Against Disclosure of Psychotherapeutic Communications*, 49 TEX. L. REV. 929, 941 (1971); Note, *State Statute to Provide a Psychotherapist-Patient Privilege*, 4 HARV. J. LEGIS. 307, 314 (1967). As McCormick has stated:

On account of the special therapeutic need for assurance to the patient of protection against disclosures it is cogently argued . . . that even in states not having the physician-patient privilege generally, a privilege should be recognized, by statute or decision, for confidential disclosures to psychiatrists, qualified psychologists trained in the treatment of mental disorders, and (in the court's discretion) general practitioners consulted for diagnosis or treatment of mental disease. . . .

A privilege of those receiving psychotherapy is necessary if the psychiatric profession is to fulfill its medical responsibility to its patients.

C. McCORMICK, *supra* § 9 n.9 at 213.

222. 8 J. WIGMORE, EVIDENCE § 2192, at 70 (McNaughton rev. ed. 1961). McNaughton argues:

For more than three centuries it has now been recognized as a fundamental maxim that the public (in the works sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.

The vital process of justice must continue unceasingly. A single cessation typifies the prostration of society. A series would involve its dissolution. The pettiness and personality of the individual trial disappear when we reflect that our duty to bear testimony runs not to the parties in that present cause, but the community at large and forever.

It follows, on the one hand, that *all privileges of exemption from the duty are exceptional*, and are therefore to be discountenanced. There must be good reason, plainly shown, for their existence.

Id. at 70-73.

223. *Id.* § 2285, at 527.

Evaluated under these strict criteria, the psychotherapist-patient privilege is justified as advancing the interests of society. The first two criteria are satisfied because patients generally consider communications in therapy to be confidential, and confidentiality is widely agreed to be essential to effective treatment. As to the third requirement, society should foster the therapist-patient relationship because effective treatment reduces the costs of antisocial behavior attributable to mental illness. Finally, though actual measurement is impossible, the cost to the therapeutic relationship of not having a privilege is probably greater than the benefit to society in requiring disclosure of these confidential communications.²²⁴

Given the wide agreement that the benefits to society of a psychotherapist-patient privilege outweighs its costs, the net benefit of a requirement that the confidences of therapy be revealed in court appears only *de minimis*, if not negative. The personal interest in privacy would therefore considerably outweigh any net benefits to the state interest. Because the loss of personal rights is so much greater than the state interest, the compelling state interest doctrine could not be invoked to justify a broad state rule that compelled the release of the confidences of therapy every time patient communications were relevant to an issue before a court.

IV. Whalen, Planned Parenthood, Branzburg, and the Confidences of Therapy

The Supreme Court has recently decided several cases that seem to raise doubts about the extent to which the constitutional right of privacy protects the confidences of psychotherapy. In *Whalen v. Roe*,²²⁵ *Planned Parenthood v. Danforth*,²²⁶ and *Branzburg v. Hayes*,²²⁷ it has permitted state collection of information concerning "dangerous" drug prescriptions²²⁸ and abortions,²²⁹ and has refused to provide a constitutional privilege for news reporters.²³⁰ A close examination of these cases, however, reveals that they are only superficially relevant to the issue of a constitutional psychotherapist-patient privilege. The differences between the issues raised in these cases and the issue of a psychotherapist-patient privilege include the nature of the information involved, the ability to protect sensitive information from public view, the harm that will result from a disclosure of the sensitive information, and the practical considerations in administering a privilege.

224. See *Allred v. State*, 554 P.2d 411, 417-18 (Alaska 1976).

225. 429 U.S. 589 (1977).

226. 428 U.S. 52 (1976).

227. 408 U.S. 665 (1972).

228. *Whalen v. Roe*, 429 U.S. at 603-604.

229. *Planned Parenthood v. Danforth*, 428 U.S. at 80.

230. *Branzburg v. Hayes*, 408 U.S. at 690.

The differences are so significant that these cases are of limited value in resolving the question of a constitutional psychotherapist-patient privilege.

The nature of the information at issue in *Whalen* and *Planned Parenthood* is fundamentally different from the nature of the information revealed during therapy. In both *Whalen* and *Planned Parenthood*, the Court permitted the state to collect and maintain medical information about its citizens.²³¹ Because a state may require the disclosure of some medical data, however, does not mean that the state may also, without interfering with the right of privacy, require the disclosure of information from psychotherapy. The subject matter of psychotherapy — emotional concerns and dysfunctions — is generally deemed more private by patients than most medical afflictions. The information revealed in therapy is likely to be more intensely personal than general medical information and its release more harmful to the patient. Because of the more personal and sensitive nature of the confidences of therapy, the release of information from therapy, even under judicial supervision, threatens the right of privacy more seriously than the disclosure of information about general medical treatment.

Efforts to control or to limit public access to information disclosed at trial will be largely unsuccessful. The Supreme Court has emphasized that security provisions to maintain the confidentiality of information might insulate from constitutional attack state actions that would otherwise offend the right of privacy. The computerized drug prescription forms in *Whalen*²³² and the abortion reporting system in *Planned Parenthood*,²³³ for example, included security provisions to avoid the improper release of medical information. In both cases, the Court indicated that the absence of security arrangements to preserve the confidentiality of the information would seriously threaten the privacy of patients and thus would present an entirely different constitutional question.²³⁴ In *Whalen*, however, the Court did suggest that states may release some information to the courts under judicial supervision of the information's evidentiary use.²³⁵ The evidentiary use of the medical information did not seriously threaten individual privacy, however, because the information was not extremely sensitive, was available from other sources, and was unlikely to be sought frequently for litigation purposes.²³⁶ By contrast, disclo-

231. 429 U.S. at 603-604; 428 U.S. at 80.

232. 429 U.S. 589, 601 (1977). The Court approved similar security arrangements in *Nixon v. Administrator of Gen. Servs.* 433 U.S. 425 (1977), which directed an archival staff with an "unblemished record for discretion" to review the former President's papers and return to him any that were personal. *Id.* at 462-65.

233. 428 U.S. 52, 81 (1976). The state claimed two purposes for the requirement that physicians and health facilities compile data concerning abortions: to preserve maternal health and life by advancing medical knowledge and to monitor abortions to assure that they were performed in accordance with the law. *Id.* at 79. The Court held that "[r]ecordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." *Id.* at 80 (emphasis added).

234. *Whalen v. Roe*, 429 U.S. at 601; *Planned Parenthood v. Danforth*, 428 U.S. at 81.

235. *Whalen v. Roe*, 429 U.S. at 601-602.

236. *Id.* at 593.

sure of the confidences of psychotherapy involves more than a limited release of non-sensitive information.²³⁷

Whalen, *Planned Parenthood*, and *Branzburg* are also distinguishable because the disclosure of information regarding drug prescriptions, abortions, and confidential sources threatens less severe harm than the disclosure of the confidences of therapy. Although the Court in *Whalen* admitted that the state disclosure requirement might make some patients reluctant to use, and some doctors reluctant to prescribe, certain drugs necessary for health, it held that the statute did not "pose a sufficiently grievous threat . . . to establish a constitutional violation."²³⁸ Noting that the statute provided protection against the release of information on drug use and that the petitioners failed to offer any evidence that the security provisions would not be administered properly, the Court rejected the claim that the New York program would interfere with the doctor-patient relationship or with medical treatment.²³⁹ Similarly, the Court in *Planned Parenthood* discounted contentions that maintaining records on abortions would seriously interfere with the abortion decision or with the physician-patient relationship.²⁴⁰ *Branzburg* also illustrates the significance the Court attaches to the need to demonstrate harm to sustain a claim of confidentiality. Despite claims that confidential news sources would dry up, the *Branzburg* Court remained unconvinced that the absence of a newsman's privilege would deter informers from furnishing information to reporters.²⁴¹ Consequently, the Court held that the alleged harm to the press was insufficient to warrant a news reporter's privilege.²⁴²

Unlike the newsman-informant and physician-patient relationships, the psychotherapist-patient relationship cannot function effectively without confidentiality: "a threat to secrecy blocks successful treatment."²⁴³ The opinions of both therapists and potential patients indicate that the absence of a psychotherapist-patient privilege

237. See note 231 *supra* and accompanying text.

238. 429 U.S. at 600.

239. *Id.* at 600-604.

240. 428 U.S. at 81.

241. *Branzburg v. Hayes*, 408 U.S. at 693-95. Writing for the Court, Justice White concluded:

[T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public [without the privilege]. Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative. It would be difficult to canvas the views of the informants themselves [T]he relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a . . . group that relies heavily on the media to propagate its views

Id.

242. *Id.*

243. Advisory Committee's Note, Proposed Rule 504, *reprinted in* 56 F.R.D. 183, 241, 242 (1972); see notes 161-66 *supra* and accompanying text.

would have a serious effect on, and significantly reduce the information exchanged in, therapy.²⁴⁴ Just as the *Branzburg* Court regarded claims by reporters of the need for confidentiality as conflicting and self-serving,²⁴⁵ some may view similar claims by psychotherapists with skepticism. The necessity of confidentiality, however, has been advocated by therapists virtually since the beginning of the profession.²⁴⁶ Unlike the claim for a news reporter's privilege, arguments in favor of psychotherapist-patient confidentiality did not originate with an eye toward litigation. A further distinction is that the need for confidentiality in psychotherapy has been reinforced by the opinions of potential patients.²⁴⁷ A final difference between news reporters and psychotherapists is the tremendous powers of communication available to reporters to protect themselves, even in the absence of a privilege.²⁴⁸ Psychotherapists and their patients, of course, do not have these powerful mechanisms of communication, or their equivalent, at their disposal and are thus less able to protect themselves.

The Court has also expressed concern about how a claimed privilege would work in practice. For example, the Court in *Branzburg* feared that the difficulties in determining who would qualify for the reporter's privilege would be insurmountable. The "lonely pamphleteer who uses carbon paper" would be as entitled to assert any newsman's privilege as the large metropolitan publisher.²⁴⁹ The Court chose no privilege at all over one that threatened seriously to hamper the fair administration of justice.²⁵⁰ The practical problems associated with a reporter's privilege, however, would not exist with a psychotherapist-patient privilege. As a practical matter, a therapist-patient privilege would be considerably easier to administer because licensing statutes and educational requirements define categories of therapists to whom the privileges might apply.²⁵¹

The policy and practical differences between the psychotherapist-patient relationship, on the one hand, and the newsman-informant and physician-patient relationships, on the other, are significant. In adopting the proposed rules of evidence, the Supreme Court apparently recognized these differences because the rules provided for a psychotherapist-patient privilege, but not a news reporter's privilege

244. See notes 161-66 *supra* and accompanying text.

245. *Branzburg v. Hayes*, 408 U.S. at 693-94. The Court observed: "[S]urveys of reporters on this topic are chiefly opinions of predicted informant behavior and must be viewed in of the professional self-interest of the interviewees." *Id.* at 694.

246. The view that confidentiality is necessary to successful psychotherapy has been traced to Freud. 2 S. FREUD, COLLECTED PAPERS 356, 357-58 (Am. rev. ed. 1959). See generally Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 CATH. U. L. REV. 649 (1974); notes 161-66 *supra*.

247. See note 163 *supra*.

248. *Branzburg v. Hayes*, 408 U.S. at 706 ("there is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm").

249. *Id.* at 704.

250. *Id.* at 703-704.

251. The categories of therapists who might be covered by such a privilege are considered at notes 270-74 *infra* and accompanying text.

or a physician-patient privilege.²⁵² Despite congressional rejection of the Court's proposed psychotherapist-patient privilege, the need for a privilege still remains. The most secure basis for a psychotherapist-patient privilege is in the constitutional right of privacy. Courts, however, may be reluctant to interpret that right broadly to include protection of confidential psychotherapeutic communications, at least absent further encouragement by the Supreme Court. As an alternative, they may instead rely upon their inherent common law power to devise the protection necessary to foster effective psychotherapy.

V. *The Common Law Alternative*

Courts faced with claims for a constitutionally based psychotherapist-patient privilege might avoid the constitutional question by establishing some form of common law privilege.²⁵³ Traditionally, few privileges were recognized by the common law, with the attorney-client privilege being the most notable of the "professional" privileges. Because privileges deprive litigants of material evidence, courts have been reluctant to expand the scope of testimonial privileges, have often construed statutory privileges narrowly,²⁵⁴ and have been most reluctant to recognize new privileges.²⁵⁵ Other than this traditional hostility toward privileges, however, no substantive rule of law bars the judiciary from establishing common law privileges in appropriate

252. See note 6 *supra* and accompanying text.

253. See *Allred v. State*, 554 P.2d 411, 418 (Alaska 1976) (holding that psychotherapist-patient communications are protected by a common law privilege). A lower court in Illinois 24 years prior to *Allred* also recognized a psychotherapist-patient privilege. *Binder v. Ruvell*, No. 52C2535 (Cir. Ct. of Cook County, Illinois June 24, 1952) (cited in Note, *Confidential Communications to a Psychotherapist: A New Testimonial Privilege*, 47 NW. U.L. REV. 384, 384-85 (1952)); see Note, *A State Statute to Provide a Psychotherapist-Patient Privilege*, 4 HARV. J. LEG. 307, 313 (1967).

254. See, e.g., *Caesar v. Mountanos*, 542 F.2d 1064, 1067 (1976); 8 J. WIGMORE, EVIDENCE § 2192, at 70, (McNaughton rev. ed. 1961) (citing a number of cases that have narrowly construed statutory privileges); C. DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 67-69 (1958) (same). Recently, however, several courts have construed statutory privileges more liberally to enhance the legislative purpose of protecting certain relationships. See *id.* at 69-72. See generally *Caesar v. Mountanos*, 542 F.2d 1064 (1976); *Roberts v. Superior Court*, 9 Cal. 3d 330, 508 P.2d 309, 107 Cal. Rptr. 309 (1973); *Howard v. Porter*, 240 Iowa 153, 35 N.W.2d 837 (1949).

255. See C. MCCORMICK, EVIDENCE § 77, at 156 (E. Cleary rev. 2d ed. 1972). One reason for the reluctance of courts to recognize new privileges may be their general distaste for privileges. In addition, courts and commentators disagree as to whether privileges are substantive or procedural. See *Allred v. State*, 554 P.2d 411, 415-16, (Alaska 1976); *id.* at 423 (Boochever, C.J., concurring); Emery, *Rules of Evidence and the Federal Practice: Limits on the Supreme Court's Rulemaking Power*, 1974 ARIZ. ST. L.J. 77, 78-79; Schwartz, *Privileges Under the Federal Rules of Evidence — A Step Forward?*, 38 U. PITT. L. REV. 79, 81 (1976); Note, *Erie, Privileges and the Proposed Rules of Evidence: Confusion*, 10 NEW ENG. L. REV. 399, 406-13 (1975). If privileges are classified as substantive law, the authority of the courts to adopt new privileges is necessarily circumscribed.

circumstances.²⁵⁶ Because the operation of a privilege primarily affects the work of the judiciary, courts would be justified in establishing a common law privilege when public policy warrants protection of particular communications, even in the absence of specific statutory authority.

One state court, for example, has recently established a common law psychotherapist-patient privilege. In *Allred v. State*,²⁵⁷ the Supreme Court of Alaska relied upon its inherent common law authority, as an alternative to the constitutional right of privacy, to protect confidential psychotherapist-patient communications.²⁵⁸ The privilege question arose when a murder suspect confessed to a social worker, who was associated with a psychiatrist, that he had committed the murder.²⁵⁹ The trial court ordered the social worker to testify regarding her conversations with the defendant.²⁶⁰ The Supreme Court of Alaska first found that no statutory provision protected the confidentiality of the communications between a psychotherapist and his patient.²⁶¹ After reviewing the history of common law privileges, the court concluded that although modern recognition of common law privileges is relatively rare,²⁶² a common law psychotherapist-patient privilege was justified on the basis of the Wigmore criteria.²⁶³ The Alaska court apparently concluded that if

256. Even if state courts consider privileges substantive, they might still establish a privilege when necessary to protect important confidential relationships.

257. 554 P.2d 411 (Alaska 1976).

258. *Id.* at 418. Another alternative, of course, is for the legislature to enact a psychotherapist-patient privilege. Because the judiciary is the branch of government that, absent a privilege, would compel disclosure of the confidences of therapy, however, the judiciary may properly consider the adoption of the privilege without a statutory mandate.

259. *Id.* at 413.

260. *Id.* Allred was taken into custody at the Langdon Psychiatric Clinic by the Anchorage police. While in custody, Allred asked to see Dr. Wolf, a psychiatrist, or Shirley Henderson, a social worker described by the court as "a drug program coordinator and a counselor to petitioner." *Id.* Allowed by the court to testify, Ms. Henderson stated that Allred told her that he and the deceased (Paul O'Keefe) had been drinking and taking drugs and that they had been discussing a suicide pact. She continued:

[Allred] told me that he had blacked out or passed out and was awakened by Paul, who was crying and begging him and saying, if you are my friend you will kill me — please, and he — with tears in his eyes— ahh — and begging [Allred]. [Allred] told me that he had a gun and that he did shoot Paul, and that Paul laid on the floor and was jerking and moving and that he hit him with the gun but that he still didn't stop moving, and that this was his friend and he was doing this for his friend because they were such good friends, and that he picked Paul up and put him in the bath tub and turned the water on until Paul stopped moving.

Id.

261. *Id.* at 415-16.

262. *Id.* at 416. As examples of recently established common law privileges, the court cited *Mullen v. United States*, 263 F.2d 275, 279 (D.C. Cir. 1959) (Fahy, J., concurring) and *Cook v. Carrol*, [1945] Ir. R. 515, 521 (High Ct.) (excerpted in 8 J. WIGMORE, EVIDENCE § 2394, at 87 (McNaughton rev. ed. 1961)), which followed common law priest-penitent privileges. The *Allred* court also cited *McTaggart v. McTaggart*, [1948] 2 All E.R. Reprint 754, 755 (Ct. App.), as an example of the English judicial doctrine of "conversation without prejudice," which protects statements made to marriage counselors attempting to effectuate reconciliation, and *In re Kryschuk and Zulynik*, 14 D.L.R.2d 676, 678 (Sask. Magist. Ct. 1958), which established a similar Canadian doctrine.

263. See 554 P.2d at 418; note 223 *supra* and accompanying text (discussing the Wigmore criteria). Applying these criteria to *Allred*, the court concluded:

the Wigmore criteria were met, nothing additional was needed to justify the establishment of a common law privilege.²⁶⁴

Federal courts may have congressional authority to recognize common law privileges. When Congress removed the enumerated privileges from the rules of evidence proposed by the Supreme Court, it substituted a general rule under which, in federal cases,²⁶⁵ common law privileges would apply "as they may be interpreted by the courts of the United States in the light of reason and experience."²⁶⁶ By refusing to adopt the rules as proposed by the Supreme Court, Congress did not intend to repudiate the specific privileges contained in the rules.²⁶⁷ The power to interpret the common law regarding privileges in light of reason and experience apparently empowers the federal courts to adopt new privileges.²⁶⁸

First, communications to a psychotherapist in the course of therapy are inherently confidential. Patients often make statements in psychotherapy which they would not make to even the closest members of their families. . . . Second, inviolability of the confidences is essential to achievement of the psychotherapeutic goal. . . . Without the patient's confidence a psychiatrist's efforts are worthless. . . . Third, the relationship between psychotherapist and patient is unquestionably one which should be fostered. . . . Finally, in balancing injury to the relation, by fear of disclosure, against the benefit to justice by compelling disclosure, the scales weigh heavily in favor of confidentiality. . . . Reason indicates that the absence of a privilege would make it doubtful whether either psychotherapists or their patients could communicate effectively if it were thought that what they said could be disclosed compulsorily in a court of law.

Id. at 417-18.

264. The court could not agree on whether the privilege was broad enough to cover communications to a social worker, as opposed to a psychotherapist. Two justices argued that communications to social workers were not covered by the common law privilege, *id.* at 418 (Connor & Erwin, JJ., concurring in part); two were of the opinion that they were covered by the privilege because a therapeutic relationship was established and because the social worker was the psychiatrist's "alter ego" in this case, *id.* at 425-26 (Rabinowitz & Diamond, JJ., concurring); the chief justice found that the communications between Allred and the social worker were protected by statute, *id.* at 422 (Boochever, C.J., concurring). See notes 270-75 *infra* and accompanying text.

265. "Federal cases" are those criminal and civil cases in which state law does not supply the rule of decision. See FED. R. EVID. 501. For the most part, federal privilege law applies in nondiversity cases.

266. *Id.*

267. See 10 J. MOORE, FEDERAL PRACTICE § 501.02, at 19-20 (2d ed. 1979). The Senate Report to new federal rules stated:

The committee has received a considerable volume of correspondence from psychiatric organizations and psychiatrists concerning the deletion of rule 504 of the rule submitted by the Supreme Court. It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis.

S. REP. NO. 93-1277, 93d Cong., 2d Sess. (1974) reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7059.

268. See 10 J. MOORE, FEDERAL PRACTICE, § 501.04, at 23 (2d ed. 1979). Professor Moore observes:

Ironically, Congressional deferral to judicial development of privileges on

Recognition of a common law psychotherapist-patient privilege, however, would not completely avoid the constitutional question. A federal common law privilege would not apply in state courts or in diversity actions in federal court. Because the absence of the privilege in those cases would still be open to constitutional challenge, the most desirable basis for the privilege remains the constitutional right of privacy.

VI. *The Psychotherapist-Patient Privilege*

Whether adopted as part of the common law or as a matter of constitutional interpretation, the scope of a judicially established psychotherapist-privilege should be reasonably clear. Precision regarding the applicability of the privilege is desirable because uncertainty tends to create concern among patients that the privilege will not protect their confidences. Patient concern, in turn, reduces the effectiveness of the privilege by discouraging openness in therapy. To avoid effectively destroying the privilege, therefore, the coverage of the privilege should be clear and its exceptions must be strictly limited.²⁶⁹

federal issues may result in the application of most of the Court Rules on privileges. When, for example, a district judge is faced with a complex and confusing question of a privilege for state secrets, he may reasonably turn to the Court draft for guidance. This, in our opinion, should be done in all types of cases for . . . the Court's rules and the accompanying notes are, at the least, a great source of information and guidance.

. . . .
As to federal issues the statutory rule is open ended. Subject to the exceptions of Rule 501, what privileges are to be applied depends upon the enlightened principles of common law. . . [U]nder this developmental approach, a federal court, for example, can by judicial decision modify or eliminate a generally accepted privilege or create and recognize a new privilege such as a reporter's privilege. [In contrast,] the Court's [proposed] rules, if they were in effect, provide certain privileges, which would be controlling in a case until the rules were amended. [Under these circumstances,] the creation of a new privilege would have to be by amendment of the rules and not by a common law development through judicial decision. The Court's rules do not contemplate any common law development, as does the first half of statutory Rule 501 dealing with federal issues.

Id. (footnotes omitted). See generally *United States v. Gillock*, 445 U.S. 360 (1980); 38 U. PRRT. L. REV. 79, 84-86 (1976). The Supreme Court cannot unilaterally modify the Federal Rules of Evidence without the consent of Congress. 28 U.S.C. § 2076 (1976).

269. See Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 CAT. U.L. REV. 649, 649 (1974). Professor Slovenko argues that judicial exceptions to statutory psychotherapist-patient privileges have so weakened the privilege that proponents of the privilege have been "false prophets":

The hope in privilege was misguided. . . Exceptions, purportedly designed to achieve balance, have been carved into the psychotherapy privilege, where it exists, leaving little or no shield cover — very much resembling a payroll statement where most or all of the pay has been deducted at the source. . . In every jurisdiction, the exceptions and implied waivers are so many and so broad that it is difficult to imagine a case in which the privilege applies.

Id. at 649-56.

A psychotherapist-patient privilege need not be a "misguided hope." If the constitutional right of privacy is to protect the confidences of therapy effectively, exceptions to the privilege must be narrow and limited. Only if exceptions and implied waivers are strictly limited will the privilege provide real protection for the patients of psychotherapy.

Coverage of the Privilege

The kinds of communications within the scope of a psychotherapist-patient privilege should be clearly understood, by patients and therapists alike. An effective privilege should assure patients in advance that their discussions will be held in confidence by the therapist. To provide certainty in the application of the privilege, some generalizations should be made concerning the necessity of confidentiality for various kinds of therapy. As a general proposition, the privilege should only extend to therapy that requires a deep, searching inquiry into the personality and life of the patient. Only this kind of therapy truly needs the protection of a privilege to promote the patient's complete candor. Psychotherapy easily satisfies this criterion because the therapist probes the innermost psyche of his patients. Without an assurance of confidentiality, the patient might hesitate to divulge extremely sensitive information, information that might be essential to the effectiveness of the therapy. Whether other kinds of therapy warrant the protection afforded by a privilege, however, would depend upon the nature of the communication between therapist and patient. The more intimate the patient's revelations, the more justifiable the extension of the privilege to cover those communications.

Defining the kind of therapy that necessitates confidentiality does not adequately narrow the scope of the privilege. Those therapists who may legitimately guarantee confidentiality to their patients must be limited in some reasonable manner. Obviously, not everyone is qualified to conduct therapy that necessitates a deep exploration of a patient's mind and background. Otherwise, a privilege covering therapy or counseling could conceivably be interpreted to include communication not only to licensed psychiatrists and psychologists, but also to social workers, marriage therapists, counselors of all kinds,²⁷⁰ and, ultimately, the corner bartender who informally assumes the role of therapist or counselor.²⁷¹ A privilege so broad, of course, would be unsatisfactory: too much relevant evidence would be excluded from the courts. The most satisfactory solution, at least ini-

270. Self-improvement group therapies or growth therapies of various kinds are available today. Some may provide at least some benefit to those who participate, others may be harmful. See M. GROSS, *THE PSYCHOLOGICAL SOCIETY* 277-317 (1978); Glass, Kirsh & Parris, *Psychiatric Disturbances Associated with Erhard Seminars Training: A Report of Cases*, 134 AM. J. PSYCHIATRY 245, 245 (1977); Keen, *Deliver Us From Shyness Clinics*, 11 PSYCHOLOGY TODAY 18 (Mar. 1978); Shostrom, *Group Therapy: Let the Buyer Beware*, in CLINICAL PSYCHOLOGY TODAY 149, 150-51 (B. Henker ed. 1967); Yalom & Leiberman, *A Study of Encounter Group Casualties*, 25 ARCHIVES GEN. PSYCHIATRY 16, 28-29 (1971). See generally Hogan, *Encounter Groups and Human Relations Training: The Case Against Applying Traditional Forms of Statutory Regulation*, 11 HARV. J. LEGIS. 659 (1974).

271. Bartenders recognize the counseling role they may play. One sign posted by a bartender-counselor reads: "Need help? Don't visit a psychiatrist — See your bartender instead. He's more available, he's cheaper and he'll never tell you to quit drinking."

tially, is to limit the privilege to the patients of psychiatrists and clinical psychologists. This alternative would not only limit the scope of the privilege in a reasonable manner, but also minimize the practical problems in determining the applicability of the privilege to various patient-therapist relationships. Most jurisdictions already distinguish psychiatrists and psychologists from other therapists or counselors, primarily by requiring that they be licensed and certified.²⁷² Because of their training, psychologists and psychiatrists are also more likely to be qualified to engage in psychotherapy and other kinds of treatment that explore the most personal aspects of a patient's personality and life.²⁷³ As the Alaska Supreme Court observed in *Allred*: "Counseling [as opposed to therapy] either does not, or should not, have as its aim a deep penetration into the psychic processes of the patient or client. The need for a privilege to foster the counselor-client relationship is, correspondingly, less readily apparent."²⁷⁴ Until further study demonstrates the need to extend the privilege to other mental health professions, therefore, the psychotherapist-patient privilege should be limited to communications between psychiatrists and licensed psychotherapists.²⁷⁵

272. "Psychiatrists" may be more difficult to identify because they may be licensed as medical doctors but not specifically as psychiatrists. In jurisdictions where psychiatrists are not specially certified, or where certification does not include substantially all the physicians practicing psychotherapy, a jurisdiction could, in accordance with the Rules of Evidence proposed by the Supreme Court, include persons reasonably believed to be medical doctors, "while engaged in the diagnosis or treatment of a mental or emotional condition." Proposed Rule 504(a)(2), reprinted in 56 F.R.D. 183, 240 (1972). Alternatively, a psychiatrist might be recognized to include a medical doctor reasonably believed by the patient to devote a substantial portion of his time to the practice of psychiatry. *Id.*

273. See *Allred v. State*, 554 P.2d 411, 418-20 (1976). At least part of the Alaska Supreme Court recognized the distinction between psychiatrists and psychologists, on the one hand, and counselors and social workers, on the other:

Counseling is aimed not primarily at uncovering deep psychological processes but at enabling the client to make more effective use of his present resources. Counseling includes vocational, educational, employee, rehabilitation, marriage, and personal guidance within its spheres of operation. . . . [C]ounseling is considerably more superficial and less searching than what we understand to be included within the term "psychotherapy."

Id. at 419. Although part of the opinion of the court in *Allred*, this portion of the opinion was supported only by Justice O'Connor and Justice Erwin.

274. *Id.* at 419. The court acknowledged that clients of counselors may reveal degrading facts about themselves:

Such revelations are more in the nature of an unintended byproduct of the counseling activity. Such utterances are neither essential nor necessary to the successful realization of the counseling goal. There may be instances in which counselors attempt to uncover the intimate, personal secrets of their clients, but we do not view such activity to be essential or proper to the counseling function."

Id.

275. Some commentators have suggested that the privilege should include social workers or some counselors. See, e.g., Logatto, *Privileged Communication and the Social Worker*, 8 CATH. LAW. 5, 5 (1962); Reynolds, *Threats to Confidentiality*, 21 J. NAT'L A. SOC. WORKERS 108 (1976); Robinson, *Testimonial Privilege and the School Guidance Counselor*, 25 SYRACUSE L. REV. 911, 917 (1974); Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 CATH. U. L. REV. 649, 664 (1974); Note, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 CALIF. L. REV. 1050, 1050 (1973); Note, *Testimonial Privileges and the Student-Counselor Relationship in Secondary Schools*, 56 IOWA L. REV. 1323, 1324 (1971); Note, *The Social Worker-Client Relationship and Privileged Communications*, 1965 WASH. U. L.Q. 362, 362. Whether communica-

Applicability to Group Therapy

Group therapy poses special problems in determining the applicability of the psychotherapist-patient privilege because of the presence of parties besides the therapist and the patient. This kind of therapy involves one or more third parties who, though they may be active to varying degrees in each other's therapy, are present primarily for diagnosis and treatment of their own conditions. The presence of third parties has traditionally destroyed a privilege unless those parties were acting as necessary assistants to the professional.²⁷⁶

Despite the presence of third parties, group therapy should also be included within a constitutional or common law privilege. Even though one or more third parties may be present during therapy, the patients often expect the confidentiality of the discussions of the group to be maintained by the members of the group as well as by the therapist. Indeed, the therapist often cautions group participants that confidentiality is mandatory. Because group therapy is an effective form of treatment,²⁷⁷ with the special advantage that several pa-

tions between these professionals and their clients would generally be of such a private nature that they would be covered by a constitutional privilege is unclear. In addition, expanding the privilege to include these people would significantly increase the cost of the privilege by keeping from the courts a considerable amount of relevant testimony without clearly offering a corresponding societal benefit.

One commentator has suggested that a privilege limited to psychologists and psychiatrists would be unconstitutional, violating both the right of privacy and the equal protection clause. Comment, *The Psychotherapist-Patient Privilege: Are Some Patients More Privileged than Others?*, 10 PAC. L.J. 801, 808-814, 814-818 (1979). The author suggested that the definition of psychotherapist include anyone "who, in the course of his or her regular profession or employment, may be expected to practice psychotherapy," such as psychiatrists; psychologists; licensed workers; school psychologists; educational psychologists; marriage, family, and child counselors; government employed psychiatric social workers; and school counselors with credentials. *Id.* at 820. One difficulty with this approach is determining with certainty what constitutes, and therefore who practices, "psychotherapy."

276. See *Pereira v. United States*, 347 U.S. 1, 6 (1954); *United States v. Lustig*, 555 F.2d 737, 748 (9th Cir. 1977); *United States v. Burks*, 470 F.2d 432, 436 (D.C. Cir. 1972); *In re Bretto*, 231 F. Supp. 529, 530 (D. Minn. 1964); *Goddard v. Gardner*, 28 Conn. 172, 173 (1859); *People v. Simpson*, 68 Ill. 2d 276, 280, 369 N.E.2d 1248, 1251 (1977); *Kansas v. Glover*, 219 Kan. 54, 58, 547 P.2d 351, 355 (1976); *Ellis v. Ellis*, 63 Tenn. App. 361, 370, 472 S.W.2d 741, 744-45 (1971); 8 J. WIGMORE, EVIDENCE §§ 2311, 2326, at 599, 603 (McNaughton rev. ed. 1961); Cross, *Privileged Communications Between Participants in Group Psychotherapy*, 1970 L. & SOC. ORDER 191, 193-94; Morgan, *Must the Group Get Up and Testify? An Examination of Group Therapy Privilege*, 2 GROUP 67, 70-73 (1978); Note, *Group Therapy and Privileged Communication*, 43 IND. L.J. 93, 98-100 (1967). For discussions of the effect of third parties on the applicability of the attorney-client privilege, see Note, *Legal Professional Privilege and Third Parties*, 37 MOD. L. REV. 601 (1974); Note, *The Attorney-Client Privilege in Multiple Party Situations*, 8 COLUM. J. L. & SOC. PROB. 179 (1972); Note, *Privileged Communications in Divorce Actions: Psychiatrist-Patient and the Presence of Third Parties*, 40 TENN. L. REV. 110 (1972).

The presence of third parties may effectively destroy the psychotherapist-patient privilege in two ways: the privilege may be lost altogether, so that the patient, the therapist (or other professional), or the third party may be required to testify about the communications; or the privilege may be retained, but not prevent the third party from being required to testify about the communications.

277. See generally A. BANDURA, PRINCIPLES OF BEHAVIOR MODIFICATION (1969); J. MELTZOFF & M. KORNREICH, RESEARCH IN PSYCHOTHERAPY (1970); O. MOWRER, THE

tients can be treated by the therapist at the same time, the courts should extend to it the benefits of the psychotherapist-patient privilege. To be effective, however, a group therapy privilege would have to protect the patient-patient communications within the group as well as psychotherapist-patient communications.

Waiver

Because a privilege ordinarily belongs to a patient or client, generally only the patient or client could waive it. Some scholars have suggested, however, that in the case of the psychotherapist-patient privilege, the patient may not be able to understand the nature of the disclosures that would be made if the privilege were waived, or may not appreciate the effect of any disclosure on his own psyche.²⁷⁸ As a result, some argue, the doctor rather than the patient, or the doctor in addition to the patient, should have to waive the privilege before the waiver is effective.²⁷⁹

These arguments are insufficient to modify the general rules regarding waiver solely because of a psychotherapist-patient constitutional or common law privilege.²⁸⁰ Though incompetent patients may, of course, be prevented from waiving rights or entering into enforceable agreements, the possibility that waiver of a privilege may do more harm than good has never been thought to be sufficient reason to prevent a competent person from waiving rights. As an additional safeguard, a psychotherapist should explain the consequences of a waiver to the patient if the dangers of a waiver are significant.

Patient-Litigant Exception

A patient who brings his own mental condition into question in litigation is generally deemed to have waived any psychotherapist-patient privilege.²⁸¹ The California Supreme Court and the Ninth Circuit, both of which recognize a constitutional psychotherapist-patient privilege, have indicated that the privilege is not absolute and may be implicitly waived by patients when they bring their mental condi-

NEW GROUP THERAPY (1964); Shostrom, *Group Therapy: Let the Buyer Beware*, in CLINICAL PSYCHOLOGY TODAY 149-51 (B. Henker ed. 1967); Allgeyer, *Using Groups in a Crisis-Oriented Out-Patient Setting*, 23 INT'L J. GROUP THERAPY 217 (1973); Cadagam, *Marital Group Therapy in the Treatment of Alcoholism* 34 Q.J. STUD. ALCOHOL 1187 (1973); Rogers, *Interpersonal Relationship: Year 2000*, 4 J. APPLIED BEHAVIORAL SCI. 265 (1968).

278. See Slawson, *Patient-Litigant Exception: A Hazard to Psychotherapy*, 21 ARCH. GEN. PSYCH. 347, 351 (1969); Suarez & Hunt, *The Patient-Litigant Exception in Psychotherapist-Patient Privilege Cases: New Considerations for Alaska and California Since In re Lifschutz*, 1 U.C.L.A.-ALAS. L. REV. 1, 15-19 (1971).

279. See note 278 *supra*. The courts in *Caesar* and *Lifschutz* rejected similar claims. 542 F.2d 1064, 1066 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); 2 Cal. 3d 415, 421-26, 467 P.2d 557, 560-64, 85 Cal. Rptr. 829, 832-35 (1960); see 49 TEX. L. REV. 929, 937-41 (1971). See generally Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609 (1964).

280. It may well be desirable to limit by law what amounts to involuntary waivers required as part of the payment by a third party for psychotherapeutic services. See generally PERSONAL PRIVACY IN AN INFORMATION SOCIETY: THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION 278-317 (1972).

281. See notes 19-32, 48-50 *supra* and accompanying text.

tions into issue.²⁸² This patient-litigant exception to the psychotherapist-patient privilege means the patient faces the unhappy choice of abandoning either a valid claim or defense, or the confidentiality of therapy.

Even if they hold that a patient-litigant waives his privilege, however, trial courts can do much to reduce the intrusion into the patient's privacy and thereby to minimize the adverse consequences of his choice. The California Supreme Court and the Ninth Circuit, as noted earlier, instruct trial courts to limit inquiries into the confidences of therapy as narrowly as possible to fulfill this mandate.²⁸³ Trial courts should interpret an implicit waiver to apply only to those mental conditions or defects that are directly relevant to the suit. Courts may further limit the adverse effects of a waiver by examining questionable evidence *in camera* and refusing to admit inflammatory or other psychotherapeutic evidence if the benefit to the proponent does not outweigh the harm to the patient.²⁸⁴

Future Crime and Dangerousness

Information concerning the commission of future crimes is generally not included within the scope of a testimonial privilege.²⁸⁵ The constitutional basis for a dangerous future crime exception to a constitutional psychotherapist-patient privilege is the compelling state interest in preventing death and serious physical injuries — a state interest “of the highest order.”²⁸⁶ By obtaining information about a “future crime” the state, forewarned, can take steps to prevent the crime. The state's interest, however, will vary depending on the nature of the information sought. After the commission of a crime, for example, the state's interest in obtaining what amounts to a confession to the therapist is weaker because it can do nothing at that point to prevent the commission of the crime.

282. *In re Lifschutz*, 2 Cal. 3d 415, 427, 467 P.2d 557, 564, 85 Cal. Rptr. 829, 836 (1970); *Caesar v. Mountanos*, 542 F.2d 1064, 1070 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977).

283. See notes 29-32, 51-57 *supra* and accompanying text.

284. See, e.g., *In re Lifschutz*, 2 Cal. 3d 415, 437-38, 467 P.2d 557, 572-73, 85 Cal. Rptr. 829, 844-45 (1970). Courts should also use the limitations on the patient-litigant exception proposed by Judge Hufstедler to avoid unnecessary invasions of privacy. They should limit the inquiry to the time, length, cost, and ultimate diagnosis of treatment. A party would be able to obtain additional information only if he demonstrated a compelling need for it. *Caesar v. Mountanos*, 542 F.2d at 1075 (Hufstедler, J. concurring and dissenting).

Whether or not a psychotherapist-patient privilege is recognized, strict application of relevancy and materiality rules may significantly protect the confidences of therapy. See Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 *CATH. U. L. REV.* 649, 657-79 (1974).

285. See generally Note, *The Future Crime or Tort Exception to Communications Privileges*, 77 *HARV. L. REV.* 730 (1964); Note, *Psychiatrist-Patient Privilege — A Need for the Retention of the Future Crime Exception*, 52 *IOWA L. REV.* 1170 (1967).

286. *McKenna v. Fargo*, 451 F.Supp. 1355, 1381 (D.N.J. 1978); see *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 440-42, 551 P.2d 334, 346-47, 131 Cal. Rptr.14, 26-27 (1976).

The efficacy of a "future dangerous crime" exception to a psychotherapist-patient privilege as a means of screening dangerous patients is difficult to assess. Theoretically, therapists should be better able than most persons to determine when a patient is likely to be dangerous and therefore should be in a better position to warn potential victims. At the same time, therapists are theoretically more likely than others to be able to use their skills to dissuade the patient from the violence or crime. If confidentiality is essential for effective therapy, an actual or even potential breach of confidentiality can interfere with the therapy and reduce the chance that the therapist can convince the patient to forego criminal or antisocial conduct. California, the first jurisdiction to recognize the existence of a constitutional right to a psychotherapist-patient privilege, has considered the constitutional and competing social policy claims regarding the need to protect the confidentiality of communications about imminent, dangerous activity.²⁸⁷ In *Tarasoff*, the California Supreme Court decided that the therapist has a duty to take reasonable steps to protect potential victims from a patient's dangerous proclivities.²⁸⁸ The duty attaches when the therapist knows or should know, that the patient is likely to be dangerous.²⁸⁹ That duty may require the therapist to breach the confidences of the patient.

The constitutionality of the dangerousness exception to the privilege is dependent upon two assumptions: (1) that therapists can predict dangerousness with reasonable accuracy, and (2) that by compelling therapists to breach the confidences of patients to protect potential victims, the state will induce a net reduction in the number of violent attacks by mental patients. The validity of both assumptions, however, is questionable.²⁹⁰ And if either of the two assump-

287. *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 440-41, 551 P.2d 334, 346-47, 131 Cal. Rptr. 14, 26-27 (1976).

288. *Id.* at 439-40, 551 P.2d at 345, 131 Cal. Rptr. at 25-26.

289. *Id.*

290. Several commentators have challenged the assumption that psychotherapists can predict the dangerousness of patients accurately. See Albers, Pasewark, & Meyer, *Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of the Doctrine of Immaculate Perception*, 6 CAP. U. L. REV. 11, 22-28 (1976); Coccozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUT. L. REV. 1084 (1976); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 711-16 (1974); Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQUENCY 371, 383 (1972). See generally J. ZISKIN, *COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY* (1975).

In addition, some legal scholars have argued that the psychotherapist's warnings to potential victims of violence will increase, not decrease, injuries and deaths by discouraging dangerous people from obtaining psychotherapy. See, e.g., Stone, *The Tarasoff Decisions: Swing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358, 370-71 (1976); Note, *The Dangerous Patient Exception and the Duty to Warn: Creation of a Dangerous Precedent?*, 9 U. CAL. D. L. REV. 549, 566 (1976). But see Fleming & Maximov, *The Patient of His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025, 1038-40 (1974).

Because state-required warnings to potential victims may involve a significant breach of the confidences of therapy, courts must determine whether the warnings to potential victims in fact promote the state interest in preventing death and injuries. One survey indicated that within one year after *Tarasoff*, one-fourth of the therapists surveyed indicated that they observed the reluctance of some patients to discuss their violent tendencies when informed of the "duty to warn." These therapists also reported more frequent breaches of confidentiality following *Tarasoff* (though many had

tions upon which it is premised proves invalid, the dangerousness exception to the privilege would not promote a compelling state interest.

Criminal Defense Exception

A psychotherapist-patient privilege may interfere with the sixth amendment rights of criminal defendants. The sixth amendment grants defendants in criminal trials the right to confront adverse witnesses and to have compulsory process for obtaining witnesses in their favor.²⁹¹ A defendant's ability to present an adequate defense to charges in a criminal case may require information that is protected by the psychotherapist-patient privilege of a third party. The defendant may need this information to impeach a witness who has testified for the prosecution or to establish a defense to the charge. For example, he might wish to present evidence that an adverse witness made statements to a therapist that were inconsistent with the testimony of the witness at trial, or that a patient confessed to a therapist the crime with which the defendant is charged. By limiting the opportunity to question witnesses about the confidences of therapy, a psychotherapist-patient privilege might interfere with the ability of a defendant to obtain or present this evidence to the court and thus might constitute a violation of the sixth amendment.

Until recently, sixth amendment rights clearly did not destroy privileges established by statute.²⁹² During the last two decades, however, courts have expanded the "confrontation" and "compulsory process" rights of criminal defendants.²⁹³ Today, the extent to which these sixth amendment rights override statutory privileges is largely undefined. In *Davis v. Alaska*,²⁹⁴ the Supreme Court held that a state ban on the use of juvenile records for impeachment purposes was unconstitutional when those records were crucial to the defense in a criminal case.²⁹⁵ The *Davis* decision has prompted some courts

warned potential victims even before *Tarasoff*). Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165, 182-86 (1978).

291. U.S. CONST. amend. VI. The sixth amendment reads in part: "In all criminal prosecution, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor"

292. See generally, 8 J. WIGMORE, EVIDENCE § 2191, at 69 (McNaughton rev. ed. 1961).

293. See, e.g., *Barber v. Page*, 390 U.S. 719 (1968); *Pointer v. Texas*, 380 U.S. 400 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965). See generally *Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713 (1976); *Griswold, The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971); *Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 569 (1978); Note, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska*, 73 MICH. L. REV. 1465 (1975).

294. 415 U.S. 308 (1974).

295. *Id.* at 319-20.

to hold that the rights of confrontation and of compulsory process compel the disclosure of evidence otherwise protected by statutory evidentiary privileges.²⁹⁶ These courts, however, may have read *Davis* too broadly.²⁹⁷ The Supreme Court has not indicated that statutory privileges are constitutionally required to yield in all cases to sixth amendment rights.²⁹⁸

To the extent that a psychotherapist-patient privilege is based on the constitutional right of privacy, it would be less vulnerable to sixth amendment challenges than a similar statutory privilege.²⁹⁹ A privilege with constitutional dimensions would generally not yield to sixth amendment attacks. The privilege against self-incrimination, for example, would not be destroyed upon a demand by a criminal defendant for information protected by that privilege. Under limited circumstances, however, a state might be justified in adopting a rule permitting criminal defendants to obtain some information regarding the confidences of therapy. The state would have to establish a compelling interest in resolving the conflict between the sixth amendment rights of the defendant and the constitutional right of privacy of others.³⁰⁰

Even if adopted as a matter of sixth amendment right or as a legislative judgment, any criminal defense incursion on the constitutional right of privacy should be subject to the limitations on the compelling state interest doctrine.³⁰¹ For example, before a court orders disclosure of the confidences of therapy, the evidence sought by the defendant must appear to be important to the defense and must not be available from other sources.³⁰² Courts might also use protective orders and *in camera* inspection of evidence to avoid unnecessary invasions of privacy. A court should order disclosure only upon a determination that the harm engendered by disclosing confidential patient communications is outweighed by the benefit to the defendant of obtaining the information.³⁰³ Moreover, the court must not

296. See *Salazar v. State*, 559 P.2d 66, 79 (Alaska 1976); *State v. Hembd*, 305 Minn. 120, 126, 232 N.W.2d 872, 876 (1975); *State v. Roma*, 140 N.J. Super. 582, 588, 357 A.2d 45, 51, *aff'd on reargument*, 143 N.J. Super. 504, 363 A.2d 923 (1976).

297. Some courts have gone so far as to use *Davis* to expand the power of prosecutors by allowing them to violate witnesses' privileges. See *Bellew v. Gunn*, 424 F. Supp. 31, 41 (N.D. Cal. 1976); *State v. Wilkins*, 215 Kan. 145, 148-49, 523 P.2d 728, 732 (1974).

298. See generally Hill, *Testimonial Privilege and Fair Trial*, 80 COLUM. L. REV. 1173, 1178-81 (1980); Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935, 958-71 (1978).

299. See generally Note, *State v. Looney: Defendants' Need for Ordered Psychiatric Evaluations of Witnesses' Credibility Outweighed by Witnesses's Right to Privacy*, 57 N.C. L. REV. 448 (1979).

300. Resolving legitimate conflicts between competing constitutional rights is a state interest that has been considered "compelling." See note 196 *supra*.

301. See notes 191-216 *supra* and accompanying text.

302. See *United States v. Ehrlichman*, 389 F. Supp. 95, 97 (D.D.C. 1974); *People v. Bridgeforth*, 51 Ill. 2d 52, 57, 281 N.E.2d 617, 662, *appeal dismissed*, 409 U.S. 811 (1972); *State v. Walters*, 528 S.W.2d 790, 793 (Mo. Ct. App. 1975).

303. The Supreme Court has suggested in a number of cases that courts should examine the policies underlying a testimonial privilege to determine whether sixth amendment interests are sufficiently strong to justify invading the privilege. See, e.g., *United States v. Nixon*, 418 U.S. 683, 711-13 (1974); *Davis v. Alaska*, 415 U.S. 308, 320 (1974); *Washington v. Texas*, 388 U.S. 14, 22-23 (1967).

compel disclosure if the information can be obtained through other means less intrusive of the patient's privacy. If the information from therapy is important to a successful defense, a court might order the state to narrow or modify its case to remove the defendant's need for the information. For example, it might direct a state not to use certain evidence in a criminal trial so that the defendant does not require confidential psychotherapeutic information to refute the state's evidence. In some cases, a court might even order a state to dismiss charges against a defendant to avoid creating a situation in which continuation of the case would inevitably cause either a violation of the defendant's sixth amendment rights or a violation of the right of privacy of a third party.³⁰⁴ The imposition of these kinds of limitations is analogous to the responsibility of the state to offer limited immunity to a witness necessary to the defense.³⁰⁵

Given the minimal constraints the Supreme Court placed on statutory privileges in *Davis*, the additional protection expected to accompany a constitutionally-based privilege, and the Court's failure to recognize any explicit criminal defense exception in its proposed rules of evidence, any criminal defense exception to a constitutionally based psychotherapist-patient privilege would probably be quite limited.

Court Ordered Examinations and Civil Commitment Exceptions

Statutory psychotherapist-patient privileges often exclude from their protection the results of psychiatric or psychological testing conducted pursuant to a court order and communications relevant to involuntary civil commitment when the therapist has determined that the patient is in need of hospitalization.³⁰⁶ The absence of a privilege during an examination conducted pursuant to a court order may be justified on the ground that, because the patient knows that the therapist is obliged to report to the court, he has no expectation of privacy. Theoretically, the patient may refuse to talk with the therapist

304. See Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 174-77 (1974). For an excellent review of the steps a court might follow to avoid unnecessary conflicts between the sixth amendment and various statutory privileges, see Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935, 985-90 (1978). Courts might engage a similar procedure in cases in which the right of privacy may be subject to sixth amendment limitations.

305. See, e.g., *United States v. Yates*, 524 F.2d 1282, 1286 (D.C. Cir. 1975) (per curiam); Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266, 1271-73 (1978); Note, "The Public Has a Claim to Every Man's Evidence": *The Defendant's Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211, 1221-30 (1978); Comment, *Right of the Criminal Defendant to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 953, 976 (1967); Comment, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74, 87 (1972).

306. See Proposed Rules of Evidence, Rule 504(d)(1), reprinted in 56 F.R.D. 183, 241 (1972); FLA. STAT. ANN. § 90.503(4)(a) (West 1979).

or at least to reveal intensely personal information. The voluntariness of this kind of waiver is difficult to accept, however, because patients may be committed or jailed if they refuse to talk with the therapist.³⁰⁷ In addition, some commentators have suggested that, in examinations related to involuntary civil commitment, patients should be informed that they have a right to refuse, without penalty, to talk with a therapist.³⁰⁸

Providing a general exception to the psychotherapist-patient privilege in civil commitment proceedings (or when the patient is in need of hospitalization) is unnecessary. Information regarding a patient's mental condition or dangerousness can almost always be obtained by court ordered examinations, which are not subject to the privilege. Because a person must generally be dangerous to be committed,³⁰⁹ the dangerousness exception to the privilege would often permit the disclosure of information concerning therapy when necessary to prevent the release of a dangerous patient.

Other Exceptions

Other exceptions to statutory psychotherapist-patient privileges may include provisions terminating the privilege upon the death of the holder of the privilege³¹⁰ or excluding from the privilege information relating to incidents of child abuse discovered during therapy.³¹¹ In the case of a common law or statutory privilege, these kinds of exceptions may be based either on the assumption that the harm to the therapist-patient relationship is minimal when the breach of certain kinds of confidentiality is allowed (*e.g.*, breach after the patient's death), or that the harm to the relationship if confidentiality is breached is not as great as the potential harm to others if the information is kept secret (*e.g.*, in child abuse cases). In a constitutionally based privilege, these exceptions could be based on a compelling

307. See notes 26-32 *supra* and accompanying text (discussing the efforts of California courts to deal with similar problems).

308. See Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examination?*, 26 STAN. L. REV. 55, 70-71 (1973); Fielding, *Compulsory Psychiatric Examination in Civil Commitment and the Privilege Against Self-Incrimination*, 9 GONZ. L. REV. 117, 154-64 (1973); Comment, *Application of the Fifth Amendment Privilege Against Self-Incrimination to the Civil Commitment Proceeding*, 1973 DUKE L.J. 729, 745-46. *But see* Orland, *Evidence in Psychiatric Settings*, 11 GONZ. L. REV. 665, 684-86 (1976).

309. See *O'Connor v. Donaldson*, 422 U.S. 563, 573-76 (1975). In general, a person may be involuntarily committed in a civil proceeding if, because of a mental illness, he is dangerous to himself or others. The state interest in restraining these dangerous people is sufficiently strong to allow their incarceration. See *Jackson v. Indiana*, 406 U.S. 715, 731-39 (1972). Consequently, the restraint on liberty resulting from the absence of a psychotherapist-patient privilege in commitment proceedings is not likely to be viewed as an impermissible invasion of privacy.

310. See, *e.g.*, Proposed Rules of Evidence, Rule 504(d)(3), *reprinted in* 56 F.R.D. 183, 241 (1972); FLA. STAT. ANN. § 90.503(4)(c) (West 1979).

311. See KY. REV. STAT. § 199.335(7) (Baldwin 1980). See generally Brown, *Child Abuse: Attempts to Solve the Problem by Reporting Laws*, 60 WOMEN LAW. J. 73 (1974); Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 FAM. L.Q. 245 (1974); Note, *Better Protection for the Defenseless — Tennessee's Revised Mandatory Child Abuse Reporting Statute*, 4 MEM. ST. U. L. REV. 585 (1974). For an interesting examination of the civil consequences of the failure to report child abuse, see Kohlman, *Malpractice Liability for Failing to Report Child Abuse*, 49 CAL. ST. B.J. 118 (1974).

state interest (*e.g.*, prevention of child abuse), or on the claim that the right of privacy is not violated at all by the disclosure (*e.g.*, loss of the privilege at death).

The state's interest in having information regarding child abuse is similar to the state's interest in a dangerous future crime exception to the privilege. Protecting children from serious harm is undoubtedly a state interest "of the highest order" and under some conditions would constitute permissible grounds to interfere with a patient's right of privacy in therapy. Broad child abuse reporting statutes, pursuant to which a therapist would be required to report any child abuse discovered during therapy, however, provide for more than a narrow interference with the constitutional right of privacy. As with a future dangerous crime exception, it is questionable whether a state rule requiring that therapists breach the confidentiality of therapy to report child abuse would actually advance the state's interest in preventing future child abuse. The threat of a breach of confidentiality might keep some child abusers from seeking the therapy they need, or might induce them, once in therapy, to keep information regarding child abuse from the therapist. Indeed, patients would probably conceal incidents of child abuse from therapists if they knew that the therapist would report their discussions to the state. By requiring therapists to breach the confidences of patients, therefore, the state would discourage child abusers from seeking effective psychotherapy to deal with the problems that cause them to abuse their children. To the extent that the state interest is not significantly promoted by laws requiring therapists to report all incidents of child abuse discovered during therapy, the compelling state interest doctrine would not justify an invasion of the privacy of patients.

VII. *Conclusion*

The recognition of the right of privacy is an important constitutional development. Courts have been faced with such a vast array of privacy claims, however, that privacy at times seems to be unworkable as a constitutional concept. Indeed, the absence of general principles to guide judicial application of the constitutional right of privacy may ultimately threaten its very existence. The analytical framework presented by this article for the application of the rights of information privacy and autonomy privacy defines the general principles underlying the concept of a constitutional right of privacy. Applied in the context of psychotherapy, these principles afford protection to the confidential communications of patients. The confidences revealed in psychotherapy are likely to include the most personal thoughts, feelings, and aspects of one's life. Government compelled disclosure of this most personal information is offensive, particularly

when the compelled disclosure is public, as in a trial. Mental illness, moreover, may be as protracted, painful and disruptive as is an unwanted pregnancy. Governmental action that significantly interferes with the treatment of mental illness, therefore, infringes on the right of privacy. At least some evidence indicates that threats to the confidentiality of therapy significantly interfere with successful therapy. Although a privilege fashioned out of constitutional principles of privacy would not necessarily be absolute, it would assure patients of protection in all but the most narrow and compelling circumstances.

Successful psychotherapy advances the interests of both individual patients and society. Because successful therapy depends upon confidentiality between patient and psychotherapist, the protection of individual and societal interests requires the recognition of a principle that will surround the communications of therapy with a nearly impenetrable veil. The attempt to afford protection through statutory privileges, however, has been a "misguided hope"; most statutory privileges are diluted by numerous exceptions, which often effectively destroy the privilege. Legislatures and courts should provide an exception only for the most extraordinary reasons, and even then, should strictly limit disclosure only to information that is not available from another source.

Constitutional protection for the confidences of therapy will have a considerable impact on persons beyond those who actually invoke a privilege. Few patients will need to invoke the privilege to prevent the disclosure of information regarding therapy. Knowledge that the privilege is available, however, will protect all psychotherapy patients, who will know that they can be fully open and honest in therapy.