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The Psychologist in Criminal Proceedings

Glenn Dill

THE PSYCHOLOGIST IN CRIMINAL PROCEEDINGS

I. INTRODUCTION

Communications between physician and patient were not privileged at common law [1] Any privilege which exists is by grace of statute. Presently the physician-patient privilege is allowed in thirty-five jurisdictions by statute.[2] The general rule governing privileged communications between attorney and client, under which the communication must be addressed to the attorney in his professional character, is applicable to physician and patient; the physician must acquire his knowledge while acting in his professional capacity, for the purpose of obtaining information on which to base his treatment.[3]

The privilege includes not only communications by the patient to his physician, but any other information the latter may obtain from a physical examination of the patient, by observation, in the discharge of professional duty, or through intervention of a third person, with a view to intelligent treatment.[4]

The first statute of this nature was passed in New York in 1828,[5] the last in Illinois in 1959.[6] No state has abolished the privilege after once granting it.

II. APPLICATION TO CRIMINAL PROCEEDINGS

It would seem that if this privilege were to be given to the patient in any proceeding, it should be granted to the defendant in a criminal case, so that knowledge gained from him could not be used to incriminate him. But this is not the case. Less than one half of the states allow the defendant

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1. 8 WIGMORE, EVIDENCE § 2380, at 818 (McNaughten rev. 1961).
2. See appendix one, *infra*.
3. City and County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951).
4. See, *e.g.*, Meyers v State, 192 Ind. 592, 137 N.E. 547 (1922) State v. Miller, 105 Wash. 475, 178 Pac. 459 (1919).
5. N.Y. REV. STAT. 406 (pt. 3, c. 7, art. 9, § 74) (1828).
6. ILL. ANN. STAT. c. 51, § 5.1 (SmithHurd Supp. 1963).

this privilege.[7] Seven states and the District of Columbia apply the privilege to criminal cases by statute.[8] Illinois, Wisconsin, and the District of Columbia except homicide cases from its operation,[9] and Kansas restricts its application to misdemeanors.[10]

Fourteen states apply the privilege to criminal cases by decision.[11] In North Carolina and Virginia the statutory privilege is qualified to allow the judge to compel a disclosure if he believes it necessary to a proper administration of justice.[12] Five states withhold the privilege from criminal cases by decision,[13] and five have apparently not considered the point.[14] West Virginia's privilege is invocable only in Justice of the Peace courts, and thus, relatively useless.[15]

In statutes where the privilege is not specifically applied to criminal cases, or is restricted to civil proceedings, the judicial construction becomes all important. If the language of the statute is not limited to any particular proceeding, the decisions uniformly allow the privilege in criminal cases.[16] In jurisdictions where the language of the statute limits the privilege to civil proceedings, five states have held that the privilege does not apply to criminal actions in spite of the fact that another statute makes the rules determining the competency of witnesses and evidence in civil actions applicable to criminal actions except as otherwise provided.[17]

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7. See appendix one, *infra.*

8. *Ibid.*

9. *Ibid.*

10. *Ibid.*

11. Colorado, Wolf v. People, 117 Colo. 279, 187 P.2d 926 (1947) Indiana, Alder v. State, 239 Ind. 68, 154 N.E.2d 716 (1958) Iowa, State v. Booth, 121 Iowa 710, 97 N.W 74 (1903) Kansas, State v. Cofer, 187 Kan. 82, 353 P.2d 795 (1960) Michigan, People v. Wasker, 353 Mich. 447, 91 N.W.2d 866 (1958) Minnesota, State v. Peterson, 123 N.W.2d 177 (Minn. 1963) Mississippi, Keeton v. State. 175 Miss. 631, 167 So. 68 (1936) Montana, Territory v. Corbett, 3 Mont. 50 (1883) Nebraska, Thrasher v. State, 92 Neb. 110, 138 N.W 120 (1912) Nevada, State v. Fouquette, 67 Nev. 505, 221 P.2d 404 (1950). *cert. denied,* 343 U.S. 928 (1952) New York, People v. Preston, 176 N.Y.S.2d 542 (1958) North Dakota, State v. Moore, 52 N.D. 633, 204 N.W 341 (1925) Ohio, State v. Karcher, 155 Ohio St. 253, 98 N.E.2d 308 (1951) Oklahoma, Jasper v. State, 269 P.2d 375 (Okla. Cr. App. 1954) Washington, State v. Sullivan, 60 Wash. Dec. 216, 373 P.2d 474 (1962).

12. Specifically provided for by statute, see appendix one, *infra,* see also State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921).

13. California, People v. West, 106 Cal. 89, 39 Pac. 207, (1895) Idaho, State v. Coburn, 82 Idaho 437, 354 P.2d 751 (1960) Oregon, State v. Betts, 384 P.2d 198 (Ore. 1963) Pennsylvania, Commonwealth v. Edwards, 318 Pa. 1, 178 Atl. 20 (1935) Utah, State v. Dean, 69 Utah 268, 254 Pac. 142 (1927).

14. Alaska, Hawaii, Missouri, New Mexico, and South Dakota.

15. W VA. CODE ANN. § 4992 (2) (1961).

16. See appendix one, *infra.*

17. See appendix one, *infra* and note 13, *supra.*

In *People v West*[18] the court held that this construction is sustained by the plainest rules of construction, the common law, and the interests of truth and justice. The internal construction of the physician-patient section indicated that it was the legislative intent that the privilege as to such communications was advisedly limited to civil actions.[19]

With the same statutory pattern, four states have reached an opposite conclusion.[20] In a long analysis of the problem, the New York court in *People v Preston*[21] held that "Section 352 of the Civil Practice Act is made applicable to criminal cases by section 392 of the Code of Criminal Procedure." The North Dakota Supreme Court held,[22] with two dissents, that, "It will serve no useful purpose through reasons of expedition to consider the beneficient or harmful results of the statute in either protecting the rights of liberty or inhibiting proofs of crime. The statute is mandatory in its character "[23]

It is a rare occasion when the issue of self-incrimination is effectively raised, despite the fact that it would seem to be the strongest reason for granting the privilege. The court reasoned in *State v Fouquette*[24] that since the relationship of physician and patient did not exist, it was clear that the defendant was not compelled to furnish evidence against himself. The privilege against self-incrimination was the point of decision in *People v Wasker* [25] The court said:

> The troubling claim of appellant that his constitutional rights were violated in permitting his personal psychiatrist to use confidential information in the psychiatric examinations and in testifying for the People, is not answered satisfactorily by the prosecution's claim that it was trapped.

The real problem arises when the defendant seeks to

18. 106 Cal. 89, 39 Pac. 207, 209 (1895).
19. See State v. Bounds, 74 Idaho 136, 258 P.2d 751 (1953) for a good general discussion.
20. Alder v. State, 239 Ind. 68, 154 N.E.2d 716 State v. Booth, 121 Iowa 710, 97 N.W 74 (1903) People v. Preston, 176 N.Y.S.2d 542 (1958) State v. Moore, 52 N.D. 633, 204 N.W 341 (1925).
21. People v. Preston, 176 N.Y.S.2d 542, 553 (1958).
22. State v. Moore, 52 N.D. 633, 204 N.W 341 (1925).
23. *Id.* at 342.
24. 67 Nev. 505, 221 P.2d 404 (1950).
25. 353 Mich. 447, 91 N.W.2d 866, 867 (1958).

invoke the privilege of his victim and thus exclude the physician's testimony or hospital records. The great weight of authority in jurisdictions which recognize the privilege in criminal cases is that the defendant cannot invoke the privilege of his victim whether the victim is dead or alive.[26]

To the contention by the state that it could invoke the privilege, the court said:

> The same reasons which deny to the defendant the right to invoke his victim's privilege, prevent the People from invoking the complainant's privilege. The People may not in any criminal case withhold evidence which could conceivably disprove or tend to disprove the defendant's guilt.[27]

III. THE PSYCHOLOGIST-PATIENT PRIVILEGE

The passage of fifteen statutes since 1948 which make confidential communications between psychologist and patient privileged gives rise to a curious anomaly.[28] Statutes in ten states place these communications on the same protected level as those between attorney and client,[29] thus making the communications privileged in criminal cases. The attorney-client privilege evolved from common law and applies in any proceeding. The language in the Utah statute specifically applies it to criminal cases.[30]

Delaware, Kentucky, New Hampshire, and Tennessee have no statute granting the right of confidential communications to the physician-patient relationship, but grant an absolute privilege to the psychologist's patient.[31]

California, Idaho, and Utah refuse to apply the physician-patient privilege to criminal cases,[32] while the psychologist-patient statute places the privilege on the same basis as the attorney-client relationship.[33]

Washington statutes make confidential communications

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26. People v. Preston, 176 N.Y.S.2d 542, 554 (1958).
27. *Id.* at 556.
28. See appendix two, *infra.*
29. *Ibid.*
30. UTAH CODE ANN. § 58-25-9 (Replacement 1963).
31. See appendix two, *infra.*
32. People v. West, 106 Cal. 89, 39 Pac. 207, State v. Coburn, 82 Idaho 437, 354 P.2d 751 (1960) State v. Dean, 69 Utah 268, 254 Pac. 142 (1927).
33. See appendix two, *infra.*

made to both physician and psychologist privileged in criminal cases.[34]

In the remainder of the states, the applicability of the statute making confidential communications between psychologist and patient privileged would appear to be contingent upon the construction given that state's physician-patient privilege statute. Colorado, Michigan and Montana have granted the physician's patient this privilege, by judicial decision, in criminal cases.[35] Oregon withholds it,[36] and New Mexico and Arkansas have apparently not passed on the subject.

The psychiatrist is necessarily a physician and generally does not have the required type of education to qualify for registration under the state's psychologist registration act.[37] Thus the privileged communications section is inapplicable to his professional relationships. As a result of the statutory and judicial pattern, California, Delaware, Idaho, Kentucky, New Hampshire, Tennessee, and Utah would make communications from the patient to his psychologist privileged but would not grant the same privilege to the patient-psychiatrist relationship.

This extention seems strange as the physician-patient privilege is the one which has been under general attack for many years by courts, legislatures, and writers;[38] yet the psychologist-patient privilege statutes have all appeared since 1948, the greatest number in any one year having been passed in 1963.[39] Connecticut[40] and Georgia[41] have passed psychiatrist-patient privileged communication statutes without having a physician-patient privileged communication statute. In jurisdictions whose statutes grant the privilege to physician's patients without qualifying the word, there is little doubt that psychiatrist's patients are included within the scope of the statute.[42]

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34. See appendices one and two, *infra*.
35. Wolf v. People, 117 Colo. 279, 187 P.2d 926 (1947) People v. Wasker, 353 Mich. 447, 91 N.W.2d 866 (1958).
36. State v. Betts, 384 P.2d 198 (Ore. 1963).
37. See, *e.g.*, CAL. BUS. & PROF. § 2941 (West 1962), which requires a doctorate degree in psychology or the equivalent thereof for certification.
38. See, *e.g.*, 8 WIGMORE, EVIDENCE § 2380, at 829-30 (McNaughton rev 1961).
39. See appendix two, *infra*.
40. CONN. GEN. STAT. § 52-146 (a) (1961).
41. GA. CODE ANN. § 38-418 (5) (Supp. 1963).
42. City and County of San Francisco v. Superior Court, *supra* note 3.

IV RATIONALE OF THE PSYCHOLOGIST PRIVILEGE

It would appear from the legislation that there is a great deal of disagreement among legislatures as to the real difference between the physician and psychologist. It certainly cannot be on the basis of the Hippocratic Oath,

> All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal. ,[45]

for the psychologist is not bound to it as the psychiatrist is.

But there certainly is a rational basis for extending to the psychologist's patient a privilege not extended to the physician's patient. The psychologist has a unique need to preserve the confidence of his patient both in and out of court. Patients are likely to be more ashamed of mental ill-health than of physical impairment or injury There is much more reason to assume that one consulting a psychologist intends confidence more than the ordinary accident plaintiff.[44]

> What is more, the patient's statements may reveal to his therapist much more than the patient intends or realizes. The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express, he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. It would be too much to expect them to do so if they knew that all that they say — and all that the psychiatrist learns from what they may say — may be revealed to the whole world from a witness stand.[45]

Confidentiality becomes difficult in the case of the self-referred criminal, especially in instances where the individu-

43. STEDMAN, MEDICAL DICTIONARY, at 708-09 (1961) (Physician's oath).
44. GUTTMACHER AND WEIHOFFEN, PSYCHIATRY AND THE LAW 271 (1952).
45. *Id.* at 272, (Quoted in part with approval by Taylor v. U.S., 222 F.2d 398 (D.C. Cir. 1955).

al's crime has not yet been discovered. Since crime itself makes up the illness for which treatment is sought, anything connected therewith is privileged.[46]

In *People v Hawthorne*[47] the court stated, "I do not think it can be said that his (the psychologist's) ability to detect insanity is inferior to that of a medical man whose experience along such lines is not so intensive."[48]

If the law of a state recognizes that psychologists perform a useful and legitimate function by legalizing their practice, and requiring their registration, it would appear that a privilege for the psychologist-patient relationship should be granted on the basis of the statutory acceptance of the psychologist.

The psychiatrist has even gone so far as to risk contempt of court to protect this relationship. Prior to the enactment of the statute in Illinois, a psychiatrist, when called to the stand, refused to divulge confidences that one party had communicated to him as a patient. The trial court ruled that a psychiatrist is not required to testify to such confidential communications, even though there was no Illinois statute conferring such a privilege. The Illinois court has recognized that there is a distinction between mental and physical illness and the man who receives treatment for mental illness ought to have the privilege of confidential communications. The court said that the relationship between the psychiatrist and his patient "is unique and is not at all similar to the relationship between physician and patient."[49] Similarly, it would seem that this uniqueness is true of the psychologist.

V THE WIGMORE TEST

What is the result of the application of Wigmore's famous tests[50] for legitimate privilege as applied to physicians and psychologists? First, that "The communications must originate in a confidence that they will not be disclosed."[51] In

46. Eaton, *Treatment for the Criminal*, in CRIMINAL PSYCHOLOGY 220 (1962).
47. 293 Mich. 15, 291 N.W 205 (1950).
48. *Id.* at 208 (separate opinion).
49. Guttmacher, *op. cit., supra* note 44, at page 269-70.
50. 8 WIGMORE, EVIDENCE § 2285, at 527 (McNaughton rev. 1961). See applicable tests at 527.
51. *Ibid.*

his evaluation of the physician-patient privilege, Wigmore says that of the thousands of cases occurring, very few of the communications are confidential in any real sense.[52]

Communications to a psychologist during the course of treatment are of a confidential nature. The very essence of psychotherapy is confidential personal revelations about matters which the patient is and should normally be reluctant to discuss. The inviolability of that confidence is vital to the achievement of the purposes of the relationship. A confession obtained by improper influence exerted by a psychiatrist working for the prosecution has been held inadmissible in evidence by a New York Court, which said: "This interview was a subtle intrusion upon the rights of defendant and was tantamount to a form of mental coercion, which, despite the good faith of the prosecution, we may not countenance here."[53]

The second of these tests is that: "This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties."[54] As to this test the author comments that even though the disclosure to the physician might be confidential, it would likely be made regardless of any privilege existing. People will not refrain from seeking medical aid solely because of the possibility of its being disclosed.[55]

The inviolability of the confidence is essential to the achievement of the relationship between psychologist and patient. Almost all information elicited from the patient in psychotherapy is necessary for treatment. "Many physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him."[56] It should be noted that the avoidance of litigation is often the reason a person submits himself to psychotherapy He seeks aid in an attempt to control unconventional activity

The third test is that: "The relation must be one which in the opinion of the community ought to be sedulously

52. 8 WIGMORE, EVIDENCE § 2380, at 829 (McNaughton rev. 1961).
53. People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553, at 558 (1961).
54. *Supra* note 50.
55. *Supra* note 52.
56. Taylor v. U.S., 222 F.2d 398, 401 (D.C. Cir. 1955).

fostered."[57] As to this, Wigmore says, "That the relation of physician and patient should be fostered, no one will deny "[58]

The psychologist-patient relationship is one that should be fostered. Psychology today has gained a position of popularity, respect, and status. This is illustrated by the fact that psychiatric departments have been established to aid the courts and prison officials.

The fourth requires that: "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."[59] Wigmore emphatically denies that as compared to the other privileges, injury to the patient can never be so great in a physician-patient relationship.[60]

The information gained from a patient by a psychologist, if revealed, would produce an injury of far greater consequence to the relationship of that patient and his psychologist and to the whole area of psychotherapy than it would any ultimate benefit to justice. The material dealt with in psychotherapy is not strictly of the world of reality, but often is made up of fantasies, which are not pertinent to the inquiry of the court. By and large, the data is of no value in the realism with which the court must deal, and should be excluded as irrelevant.

VI. CONCLUSION

It is submitted that granting a privilege to the patient of the psychologist, an absolute necessity for that relationship, demands uniform legislation which is not contingent upon any physician-patient privilege or its construction or application. Those states which have adopted it as a part of their psychologist registration acts and given it the same status as the attorney-client privilege, have saved both the courts and the patients a great deal of grief.

Wigmore, in reference to use of the physician-patient

57. *Supra* note 50.
58. *Supra* note 52, at 830.
59. *Supra* note 50.
60. *Supra* note 52, at 830.

privilege by the plaintiff in a civil action, says, "In all of these the medical testimony is absolutely needed for the purpose of learning the truth. In none of them is there any reason for the party to conceal the facts, except as a tactical maneuver in litigation."[61]

61. *Id.* at 831.

Appendix One:

Physician-Patient Statute	Statute applies to criminal cases	No limit in statute	Civil rules apply in criminal cases	Decision applies	Decision withholds
1. Alaska Rules of Court Procedure Rule 45 (h) (4) (1962)					
2. ARIZ. REV. STAT. § 13-1802 (5) (1956)	x				
3. ARK. STAT. ANN. § 28-607 (1947)					
4. CAL. CIV. PROC. § 1881 (West 1955)			x		x
5. COLO. REV. STAT. ANN. § 153-1-7 (4) 1953)		x		x	
6. HAWAII REV. LAWS TIT. 25 § 9840 (1945)*					
7. IDAHO CODE ANN. § 9-203 (4) (1947)			x		x
8. ILL. ANN. STAT. c. 51 § 5.1 (SmithHurd Supp. 1953)	x(h)				
9. IND. ANN. STAT. § 2-1714 (4) (Burns 1946)			x	x	
10. IOWA CODE ANN. § 622.10 (1950)			x	x	
11. KAN. GEN. STAT. ANN. § 60-427 (S.B. 140 1963)	x(m)				
12. LA. REV. STAT. § 15-476 (1950)	x				
13. MICH. COMP. LAWS § 617.62 (1948)		x		x	
14. MINN. STAT. ANN. § 592.02 (1947)		x		x	
15. MISS. CODE ANN. § 1697 (1957)		x		x	
16. MO. REV. STAT. § 491.060 (1959)		x		x	
17. MONT. REV. CODES ANN. § 93-701-4 (4) (1963)			x	x	
18. NEB. REV. STAT. § 25-1206 (1943)		x		x	
19. NEV. REV. STAT. § 48-080 (1957)		x		x	
20. N.M. STAT. ANN. § 20-1012 (d) (1953)		x			
21. N.Y. C.P.L.R. § 4504 (a)		x		x	
22. N.C. GEN. STAT. § 8-53 (1951)		x		x(d)	
23. N.D. CENT. CODE § 31-01-06 (1960)			x	x	
24. OHIO REV. CODE ANN. § 2317.02 (A) (Baldwin 1958)		x		x	
25. OKLA. STAT. TIT. 12, § 385 (6) (1961)		x		x	
26. ORE. REV. STAT. § 44-040 (d) (1963 Replacement)			x		x
27. PA. STAT. ANN. TIT. 28, § 328 (Purdon 1958)			x		x
28. S.D. CODE § 36-0101 (3) (1939)					
29. UTAH CODE ANN. § 78-24-8 (4) (1953)			x		x
30. VA. CODE ANN. § 8-289.1 (1957 Replacement)				x(d)	
31. WASH. REV. CODE ANN. tit 10, § 52-020 (1961)	x				
32. W VA. CODE ANN. 4992 (e) (1961) (j)					
33. WIS. STAT. ANN. § 325.21 (1958)	x(h)				
34. WYO. STAT. ANN. § 1-139 (1) (1957)		x			
35. D.C. CODE ANN. § 14-308 (1961)	x(h)				

*possible later amendments unavailable.
(h) homicide exception.
(m) restricted to misdemeanors.
(d) at the discretion of the court.
(j) justice of the peace courts only.

This criticism is not available when the subject is the defendant in a criminal case. The use of such confidential communications as the patient may make to a psychiatrist is an intrusion upon the defendant's rights, and, is little better than coercion when by an unwilling defendant.[62] However valid the criticism of the physician-patient privilege may be, it is unrealistic when applied to the communications of a defendant to his psychologist in a criminal case.

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62. People v. Leyra, *supra* note 53. Though the court was concerned with a psychiatrist, it is obvious that the same decision would obtain were a psychologist involved.

Appendix Two

Psychologist-Patient Statute	Psychologist privilege on attorney-client basis	No limit in statute	Has physician-patient privilege	Which applies in criminal cases	Psychologist privilege applies in criminal cases	Date of passage
1. ARK. STAT. ANN. § 72-1516 (1957)	x		x	x	x	1955
2. CAL. BUS. & PROF. § 2904 (West 1962)	x		x		x	1957
3. COLO. REV. STAT. ANN. § 153-1-7* (Supp. 1961)		x	x	x		1961
4. DEL. CODE ANN. tit. 24, § 3534 (Supp. 1962)	x				x	1962
5. GA. CODE ANN. § 84-3118 (1955)	x				x	1951
6. IDAHO CODE ANN. § 54-2314 (Supp. 1963)	x		x		x	1963
7. KY. REV. STAT. ANN. § 38-1018	x				x	1948
8. MICH. COMP. LAWS § 38-1018 (Mason Supp. 1961)		x	x	x		1959
9. MONT. REV. CODE ANN. § 93-701-4* (1963) (Children only)		x	x	x		
10. N.H. REV. STAT. ANN. c. 330-A, § 19 (Supp. 1963)	x				x	1957
11. N.M. STAT. ANN. § 67-30-17 (Supp. 1963)		x	x			1963
12. N.Y. EDUC. § 7611	x		x	x	x	1956
13. ORE. REV. STAT. § 44-040*			x			1963
14. TENN. CODE ANN. § 63-1117 (1956)	x				x	1953
15. UTAH CODE ANN. § 58-25-9 (1963)	x		x		x	1959
16. WASH. REV. CODE ANN. TIT. 18, § 83-110 (1963)	x		x	x	x	1955

*part of general privileged communications statute.