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THE ORIGINS OF THE PHYSICIAN-PATIENT PRIVILEGE AND PROFESSIONAL SECRET

by

Daniel W. Shuman

THE need for personal privacy in communications and the need for probative evidence at trials are like separate melodies within the same musical composition. Each has a distinctive appeal, yet there comes a time in society, as in the composition, for a counterpoint or resolution of these independent themes within the fabric of a single work. That resolution has taken many forms. Some legal systems have concluded that the receipt of probative evidence at trials is more important than personal privacy in communications and, therefore, compel disclosure of private communications. Other legal systems reflect a balance in which personal privacy is more important than probative evidence at trials and, thus, prohibit disclosure of private communications. Still other legal systems have evolved a patchwork of rules and exceptions favoring privacy in one situation and probative evidence in another.¹

That different legal systems have reached different conclusions on this complex question is not at all surprising. The failure of the decisionmakers to examine the origins of their choice of the proper balance and the consequences of that choice, however, is surprising.² This Article examines the

¹ Privilege, professional secret, confidentiality, secrecy, and privacy are words used to describe relationships within which certain communications are sometimes protected from disclosure. These terms will be used throughout this Article. Privilege is the common law term for a rule favoring privacy over probative evidence and professional secret is its civil law counterpart. Privilege and professional secret are not, however, different words describing the same thing as these doctrines differ substantially in their application.

Confidentiality is the ethical duty of the professional, operating outside of the judicial setting, not to disclose confidential communications made by the patient or client. Secrecy is the expectation that a communication will not be disclosed. Privacy is the ability to control revelation of information about oneself.

² I am not the first to call for a more careful examination of the origins of privilege. Professor David Louisell was an outspoken critic of the contemporary analysis of this question who urged a similar reexamination. Louisell, Confidentiality, Conformity or Confusion: Privileges in Federal Court Today, 31 Tul. L. Rev. 101 (1956).
origins of the choice of the proper balance between privacy and probative evidence from the perspective of the physician-patient relationship and traces its roots in common and civil law systems.\(^3\)

The physician-patient relationship constitutes an interesting framework for studying the conflict between the need for privacy in communications and the need for probative evidence at trials for several reasons: (1) the stakes in the outcome—ineffective medical care that endangers life or limb versus inaccurate judicial decisions that put life, liberty, or property at risk; (2) the ferocity of argument by each side of this conflict; and (3) the markedly different ways in which various legal systems have resolved this same problem. The study of the origins of privilege and professional secret is critically important because contemporary American legal analysis has failed to recognize the historical bases for these doctrines. This failure was perhaps best identified by Professor David Louisell:

It is my opinion that the current analysis of the privileges is unsatisfactory and is contributing to confusion in judicial opinions. . . . [M]uch more extensive and thorough study in comparative law should be undertaken, including Roman, Canonical and European law; I think the eastern legal traditions also should not be neglected. Such study should be directed not only to the problem of the extent of recognition of the privileges in each country, but also to the question of the ultimate historical roots and precise rationale of each privilege. Indeed, so far as I know, this latter type of inquiry has not yet adequately been performed even in our own common law area.\(^4\)

Courts and legislatures in this country that choose to recognize or limit privilege do not, as they often assume, write on a blank slate. Other legal systems with histories much older than our own have wrestled with this same conflict between privacy and the need for probative evidence. The experience of these other legal systems is important, among other things, as a vehicle for learning of alternative approaches to this problem and for testing various assumptions upon which our own approaches rest.

I. THE JUDICIAL PROCESS

A. The Conflict in Policies

Judicial proceedings frequently require accurate knowledge of some past event to decide correctly an issue involving the potential loss of life, liberty, or property.\(^5\) Since the event at issue has already occurred and some knowledge of it has been irrevocably lost, the decisionmaker cannot possibly determine what occurred in the past to a one hundred percent degree of certainty. At best the decisionmaker might expect to learn what probably happened,


\(^4\) Louisell, supra note 2, at 101.

\(^5\) Shuman & Weiner, supra note 3, at 904.
and the probability that the decisionmaker will accurately find the facts increases as more relevant evidence is received. Rational systems of evidence, therefore, are structured to accept all relevant evidence in the absence of a strong policy justifying exclusion.\(^6\)

One policy that has been advanced to justify the exclusion of relevant evidence is the protection of certain important relationships and the values underlying those relationships through a privilege or professional secret. A privilege or professional secret permits its holder to prevent the discovery or introduction in judicial proceedings of confidential relational communications. Because this privilege may result in the exclusion of highly probative evidence, the policy underlying it presents a potential conflict with the policy of judicial proceedings to resolve disputes accurately.\(^7\)

The analytical approaches taken to resolve this conflict tend to fall into two different schools: the utilitarian or instrumental school and the deontological or humanistic school.\(^8\) The utilitarian approach to privilege is represented by the views of Dean Wigmore. Wigmore viewed privileges as obstructions to the truthfinding process that must be justified by their benefit to an important relationship. He thus imposed four requirements for recognition of a relational privilege:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
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.\(^9\)

This utilitarian approach, which considers the utility of a privilege to the relationship it seeks to protect and the relationship's value to society, raises empirical questions: Does the relationship originate in a confidence that communications will not be disclosed; is confidentiality essential to the fulfillment of the relationship? Thus, portions of the utilitarian arguments for privilege are, at least in theory, subject to empirical validation.

\(^{6}\) J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 530 (1898).

\(^{7}\) The United States Supreme Court recognized this conflict in Trammel v. United States, 445 U.S. 40, 50-51 (1980). In that case the Court affirmed several of its prior statements:

Testimonial exclusionary rules and privileges contravene the fundamental principle that "the public...has a right to every man's evidence." [United States v. Bryan, 339 U.S. 323, 331 (1950).] As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." [Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting); accord United States v. Nixon, 418 U.S. 683, 709-710 (1974).]

\(^{8}\) See 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 201, at 416-17 (1978); C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5422, at 670-72 (1980).

\(^{9}\) 8 J. WIGMORE, EVIDENCE § 2285, at 527 (J. McNaughten rev. ed. 1961).
The deontological approach to privilege, which often relies upon writings of Professor David Louisell, views privilege as a protection of "significant human values in the interest of the holders of the privileges and . . . the fact that the existence of these guarantees sometimes results in the exclusion from a trial of probative evidence is merely a secondary and incidental feature of the privileges' vitality."10 This school of thought focuses on the importance of the societal values ensconced within a privilege, arguing that disclosure of confidences revealed in certain relationships is of itself wrong.11 Proponents of the deontological view contend that recognition of a privilege requires only a choice between competing values and is not subject to empirical examination.12

The utilitarian argument in favor of a physician-patient privilege is that the privilege is necessary to permit the patient to develop confidence in the physician so that a candid revelation of all the facts necessary for accurate diagnosis and appropriate treatment will occur.13 Unless patients are certain that physicians cannot be compelled to disclose confidences, patients either will not seek medical care or will not reveal to their physicians all the information necessary for effective treatment. This argument assumes not only that the patient is aware of the applicable law of privilege and considers that law before consulting with a physician, but also that the patient would avoid treatment or withhold information necessary for effective treatment in the absence of a privilege.

Few seriously contend that these assumptions accurately reflect patient decision-making behavior in the case of physical problems.14 Opponents of the patient-physician privilege claim that people are not so shy or embarrassed about their medical problems that they avoid needed medical care in


12. See C. WRIGHT & K. GRAHAM, supra note 8, at 671.

13. From the utilitarian point of view the privilege must exist:

   to evoke and encourage the utmost confidence between the patient and his physician and to preserve it inviolate, so that the patient will freely and frankly reveal to his physician all of the facts, circumstances and symptoms of his malady or injury, or lay bare his body for examination, and thus enable his physician to make a correct diagnosis of his condition and treat him more safely and efficaciously.

C. DEWITT, PRIVILEGED COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT 27 (1958) (footnotes omitted). This argument was first made in the American Medical Association's 1847 Code of Ethics. C. LEAKE, PERCIVAL'S MEDICAL ETHICS 219-20, 222-23 (1927).

the absence of a privilege. Nor, claim the opponents, does any evidence exist that patients know about privilege laws or receive more effective medical care following the enactment of a privilege.

No empirical evidence concerning these assumptions has been presented by either the proponents or opponents of the physician-patient privilege. This fact, according to the utilitarian school of thought, should result in rejection of the physician-patient privilege, for the privilege should only be recognized if it is demonstrably necessary to protect an important relationship. Since the evidence, viewed in the light most favorable to recognition of the privilege, is in equipoise, proponents of the privilege have not satisfied the burden imposed upon them by the utilitarians.

The deontological argument in favor of the physician-patient privilege is that society should recognize the dignity of the individual by protecting the extremely personal physician-patient relationship from unnecessary intrusions. Disclosure is wrong, not because people will refrain from seeking


Although utilitarian scrutiny of the physician-patient privilege in the literature has been harsh, the commentators have been more favorably disposed towards a psychotherapist-patient privilege. Within the psychotherapist-patient relationship "[i]t is assumed that unless patients are assured that their communications on sensitive and potentially embarrassing subjects will be kept inviolate, no effective therapy for mental or emotional problems will occur." Shuman & Weiner, supra note 3, at 894. Yet, even in this case the privilege appears to have less influence on patient behavior than the privilege's proponents contend. Id. at 924-25.

medical care, but because society thereby intrudes upon the physician-patient relationship. The privilege represents to the deontologist a complete right to privacy in certain relationships. Thus, on the surface, recognition of a physician-patient privilege on this basis requires a value judgment: Should a society completely reject intrusion into the sanctity of the physician-patient relationship? This judgment does not appear subject to empirical scrutiny, but instead seems to turn on personal beliefs about the appropriate relationship between society and the individual.

This choice, however, is not entirely free from empirical underpinnings. Why should society reject any intrusion into the sanctity of the physician-patient relationship and the resulting communications? What is the value of privacy? According to one highly regarded authority on the subject of privacy, we should value privacy because it is an essential ingredient of a democratic society. Acceptance of this thesis requires more than a belief that democracy is a desirable form of government since the thesis posits a causal relationship between privacy and democracy. Does more privacy result in better democracy? Must privacy be absolute to assure the purest democracy?

Few, if any, of the deontological proponents of a physician-patient privi-

Black, supra note 10, at 49-51.

17. Professor David Louisell explained that “[p]rimarily they [privileges] are a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state’s coercive or supervisory powers and from the nuisance of its eavesdropping.” Louisell, supra note 2, at 110-11.

18. A. WESTIN, PRIVACY AND FREEDOM 32 (1967). Westin argues that in the absence of “personal autonomy, emotional release, self-evaluation, and limited and protected communication,” each of which requires privacy, democracy cannot exist. Id. at 32, 33-39; see also S. BOK, SECRETS 26-28 (1982) (in-depth work exploring the ethics of secrecy); Fried, Privacy, 77 YALE L.J. 475 (1968) (discussion of privacy as an aspect of social order). Not all students of privacy agree, however, that it is essential to a healthy individual or democratic society. Critics point to primitive societies in which little or no privacy exists, yet individuals are emotionally healthy and the society democratic. Illustrative of these societies are the Samoans studied by Margaret Mead who have no privacy for sleeping, dressing, bathing, excretory functions, birth, or death. M. MEAD, COMING OF AGE IN SAMOA 20 (1928); see also Bettelheim, The Right to Privacy is a Myth, SAT. EVENING POST, July 27, 1968, at 8 (discussion of positive aspects of lack of privacy). The notion that privacy is required for a healthy democratic society is undercut somewhat by experience closer to home. Privacy in our own society has not been physically possible until relatively recently. Ironically, the technological advances that have made privacy possible have brought new threats to privacy as well. Ruebhausen & Brim, Privacy and Behavioral Research, 65 COLUM. L. REV. 1184, 1185 (1965).

Nevertheless, although physical privacy such as a room of one's own has not been possible until relatively recently, most vertebrates and many behaviorally advanced invertebrates observe well-defined social spacing rules that, in part, define the compromise between attraction and repulsion of members of the same species. E. WILSON, SOCIOBIOLOGY: THE NEW SYNTHESES 256-57 (1975).

From another perspective, an attempt to avoid disclosure is thought to imply questionable behavior, an escape from the responsibility of public action. Friedrich, Secrecy Versus Privacy: The Democratic Dilemma, in NOMOS XIII 106-07 (1971). Avoiding criticism through secrecy prevents thorough examination of thoughts and beliefs. S. BOK, supra, at 25. Thus, rather than encouraging careful decisionmaking by individuals, secrecy may encourage individuals to reach untested conclusions.
lege contend that privacy in the relationship should be absolute.\textsuperscript{19} The protection of the public from incompetent physicians, the prevention of harm that the patient has threatened to third persons or the correct adjudication of child custody questions all suggest considerations that may, even to the deontological proponents of a physician-patient privilege, outweigh privacy concerns in certain instances. How should this balance be struck? In part the answer to the question turns upon empirical considerations: Can physician incompetency be effectively policed without resort to privileged information; can physicians make accurate predictions of their patients' future dangerousness; how will the loss of privacy affect the accuracy of the child custody adjudication? These questions are subject to empirical research,\textsuperscript{20} but deontological proponents of the physician-patient privilege do not take this possibility into account.

\textbf{B. The Legal Responses}

\textit{1. Roman Law}

The earliest reference to any relational privilege or professional secret in contemporary literature is the refusal of Roman law to compel the testimony of an attorney against a client during the pendency of the case.\textsuperscript{21} This refusal of testimony seems to relate to the attorney's role as a servant, obliged to keep his master's secrets.\textsuperscript{22} Just as a slave could not testify against a master because the slave was a part of the family and, therefore, a party to its mutual fidelity, so the attorney had a similar moral duty, which the law recognized.\textsuperscript{23} In addition, Roman law refused testimony offered by the attorney on behalf of the client based on the motive to falsify testimony.\textsuperscript{24} The Roman rule barring testimony of attorneys, therefore, incorporated what we now call a relational privilege and a rule of incompetence.\textsuperscript{25} The rationale for this relational privilege appears to be deontological: for society to compel a citizen to divulge a secret and thereby breach a moral duty is wrong.

\textsuperscript{19} See, e.g., Saltzburg, supra note 10, at 602.

\textsuperscript{20} To demonstrate that these are questions subject to empirical research, consider the following hypothetical study. One might conduct an empirical study reviewing the evidence used in physician disciplinary proceedings in a state that has effectively policed physician incompetency. In what percentage of cases did otherwise privileged information play a significant factor in the decision? Could this information have been gleaned from alternative, nonprivileged sources? Are there particular classes of physician problems that are only provable through privileged sources?

\textsuperscript{21} Radin, \textit{The Privilege of Confidential Communication Between Lawyer and Client}, 16 CALIF. L. REV. 487, 488 (1928).

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} \textit{Id.} at 488-89. Originally only testimony of a slave against his master was excluded. W. Buckland, \textit{The Roman Law of Slavery} 88 (reprint of 1908 ed. 1969). By the third century A.D., such testimony was excluded whether offered for or against the master. Exceptions were made in certain cases such as corruption of vestal virgins, adultery, and coinage offenses. \textit{Id.} at 89-90.

\textsuperscript{24} Radin, \textit{supra} note 21, at 488.

\textsuperscript{25} Roman law excluded the parties to a case from testifying as another aspect of the rules of incompetence. W. Buckland, \textit{A Textbook of Roman Law} 637 (3d ed. 1963).
2. Canon Law

Chronologically, the next reference to any relational privilege or professional secret is found in the early Middle Ages when continental European codes excused and occasionally prohibited testimony from the clergy. This restriction has its origin in secular recognition of the seal of confession and canon law. Although confession during the third century occurred in front of the entire congregation, by the fifth century the Church had stopped its practice of public confession and instituted private confession. The seal of confession was viewed as absolute, and betrayal by the father confessor was impermissible. The seal of confession existed to avoid the risk of prosecution for crimes or humiliation that would deter confessions in the absence of the seal. Canon law provided for the dismissal of a priest who divulged what he learned by hearing confession. In some instances a greater sanction was extracted. Consider the following:

At Toulouse, in 1579, an innkeeper murdered a guest and buried the body in the cellar: he confessed the crime to a priest who, seduced by a reward offered from the detection of the murderer, denounced the criminal to the magistrates; under torture the culprit confessed the crime, adding that no one but the confessor could have betrayed him; an investigation ensued, which resulted in the Parlement of Toulouse releasing the criminal and hanging the priest, after he had been degraded by the


27. Canon law developed as the exclusive law governing disputes among members of the early Christian church, although governmental recognition did not occur until the ninth century. G. Espinay, De l’Influence Du Droit Canonique sur le Développement de la Procédure Civile et Criminelle, in Revue Historique de Droit Français et Étranger, Tome II, 503-05 (1re Série 1856). Canon law fostered the development of privileges through the use of an adversary system and a requirement that judgments be based on legally admissible evidence. Id.


29. H. Lea, supra note 28, at 415; R. Naz, Traité de Droit Canonique, Tome II, Livre III, Des Sacraments (2d ed. Letourzey, Paris 1954). In support of this position St. Thomas Aquinas maintained that “the priest should conform himself to God, of whom he is the minister, and as God does not reveal the sins made known to him in confession, so the priest should be equally reticent.” H. Lea, supra note 28, at 412.

30. Armenian and Syrian Canons in the sixth century A.D. provided for dismissal of priests breaching the seal of confession. Canon 18 of Verses II of Achtarak, 548-557 A.D., in Disciplina Antiochena Antica 213 (P. Hinda ed. Sira, Vatican 1941). Canon 22, which also provided for dismissal, was incorporated into the Canon Law Compilation of Anselm of Lucca (11th Century) and later into the Decree of Gratian. Gratian, Dist. VI, De Paenit., C2. To this penalty, life imprisonment in a convent was added by the Council of Lateran of 1215. Decr., I.V., T. XXXVIII, C-12.

Canons 889, 890, and 2369 of the Canon Law Code of 1917, which flow from the Council of Lateran, are the present-day Church law applicable to this subject. Canon 889 prohibits any breach of the seal of confession. Canon 890 prohibits the priest from using knowledge acquired at confession even without disclosure of the secret itself. Canon 2369 imposes criminal sanctions and excommunication for violation of Canon 889. R. Naz, Traité de Droit Canonique, Tome IV, Livre V, Des Défis et Des Peines, 777-78 (2d ed. Letourzey, Paris 1954).
With the exception of crimes or conspiracies against the king and his family, ancient French caselaw recognized this fundamental tenet of Catholicism and did not permit the priest to violate the seal of the confession by testifying. Furthermore, although the French monarchy law did not generally impose criminal sanctions for breach of professional secret, the law did impose criminal sanctions in the case of violation of the seal of confession.

The Concordat in 1801 between the Catholic Pope and the French Emperor Napoleon provided for the establishment, respect, and free exercise of Catholicism in France. Because of the role of confession in the Catholic Church, French judges were required to respect and enforce the seal of the confession without exception. Consistent with a deontological rationale for privilege, intrusion by the state upon this tenet of Catholicism was viewed as improper.

3. Common Law

The modes of trial at common law in England prior to the fifteenth century did not suggest the need for relational privileges. They included trial by oath or oath helpers, trial by ordeal, trial by battle, and trial by witnesses. Even in the case of trial by witnesses, jurors did not hear evidence so much as they reached conclusions based upon their prior knowledge of the case as members of the community. Indeed, procedures for compelling testimony of nonparties did not generally exist. A witness who volunteered testimony was viewed as an unwanted intermeddler and subjected to suit for maintenance, a common law tort for stirring up litigation. Gradually, the common law trial process changed. During the period 1450-1460 equity courts recognized a subpoena that the Chancellor might issue on behalf of the plaintiff to a nonparty witness. A similar change did not occur in law courts until the sixteenth century. In 1562-1563 the Statute of Elizabeth abolished suit for maintenance against a witness and authorized penalties for a witness's refusal to testify after service of process and tender of expenses. With the risk of compelled testimony came the need to examine the concept of privilege.

The first privilege to spring forth following the risk of testimonial compul-

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31. H. Lea, supra note 28, at 455 (footnote omitted). This incident may be one of the first reported instances of the exclusionary rule.
32. C. PÉN. ANNOT. art. 378, Tome I, Livre III (annotated by E. Garçon, Sirey, Paris 1901-06).
33. The term "monarchy law" is used to refer to the exercise of royal power. See R. David, French Law 8-11 (1972).
35. J. Thayer, supra note 6, at 16.
36. 8 J. Wigmore, supra note 9, § 2190, at 62; see J. Thayer, supra note 6, at 47-48, 90-93.
37. 8 J. Wigmore, supra note 9, § 2190, at 63-64; J. Thayer, supra note 6, at 126-29.
38. J. Thayer, supra note 6, at 129.
39. 8 J. Wigmore, supra note 9, § 2190, at 65.
sion was the attorney-client privilege. Wigmore concludes that the attorney-client privilege was recognized in the reign of Elizabeth I and cites cases that follow closely on the heels of the Statute of Elizabeth. Other sources refer to Wigmore's dating of the privilege and cite no earlier cases recognizing an attorney-client privilege.

Did the common law's recognition of an attorney-client privilege spring forth independent of Roman law and its earlier recognition of an attorney-client privilege? One can answer this question, if at all, only through educated guesswork. Although the Roman Empire included the territory now constituting England, Roman jurisprudence did not survive as a dominant influence on Anglo-Saxon laws. English law did, however, borrow from Roman law. The development of equity, for example, is thought to be based on the Roman aequitas. English law also incorporated principles of

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40. Id. § 2290, at 542-43. In Medieval England prior to the reign of Henry VIII the law of the Roman Church and the law of England were so intertwined that the seal of the confession functioned as a priest-penitent privilege. See Hogan, A Modern Problem on the Privilege of the Confessional, 6 Loy. L. Rev. 1, 8 (1951-1952). Following Henry VIII's break with the Roman Church a priest-penitent privilege was rejected by English courts, and contemporary sources now typically state that the common law did not recognize a priest-penitent privilege. See id. at 2, 13.

41. 8 J. Wigmore, supra note 9, § 2290, at 542 n.1. Wigmore cited and analyzed the cases as follows:

Berd v. Lovelace, Cary 88, 21 Eng. Rep. 33 (Ch. 1577) (solicitor exempted from examination touching the cause); Dennis v. Codrington, Cary 143, 21 Eng. Rep. 53 (Ch. 1580) (on a motion to examine one Oldsworth, "touching a matter in variance, wherein he hath been of Counsel, it is ordered he shall not be compelled by subpoena or otherwise to be examined upon any matter concerning the same, wherein he the said Mr. Oldsworth was of counsel, either by the indifferent choice of both parties or with either of them by reason of any annuity or fee"); Kelway v. Kelway, Cary 127, 21 Eng. Rep. 47 (Ch. 1580) (solicitor of plaintiff to be examined for defendant, "upon any interrogatory which shall not be touching the secrecy of the title or of any other matter which he knoweth as solicitor only"); Onbie's Case, March N.C. 83, pl. 136, 82 Eng. Rep. 422 (K.B. 1642) ("a lawyer who was of counsel may be examined upon oath as to the matter of agreement, not to the validity of an assurance, or to matter of counsel"); Roll, C.J., in Waldron v. Ward, Sty. 449, 82 Eng. Rep. 853 (K.B. 1654) ("He is not bound to make answer for things which may disclose the secrets of his client's cause"); Sparke v. Middleton, 1 Kebl. 505, 83 Eng. Rep. 1079 (K.B. 1664) (counsel required in testifying to tell only "such things as he either knew before he was of counsel or that came to his knowledge since by other persons"); Legard v. Foot, Rep. t. Finch 82, 23 Eng. Rep. 44 (Ch. 1673) (attorney privileged); Anonymous, Skin. 404, 90 Eng. Rep. 179 (K.B. 1693) (counsel privileged).

42. See, e.g., W. Cleary, McCormick on Evidence § 87, at 204 n.2 (3d ed. Lawyer's ed. 1984); J. Prince, Richardson on Evidence § 426, at 440 (9th ed. 1964). Professor Hazard questions whether acceptance of the attorney-client privilege was firmly rooted as early as Wigmore suggests. Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 Calif. L. Rev. 1061, 1070 (1978). According to Hazard's analysis of the early cases, recognition of the attorney-client privilege was at first viewed with much skepticism, only hesitantly accepted until the nineteenth century, and thereafter subject to exceptions for crimes and wrongdoing by the client. See id. at 1070-87.

43. Radin, supra note 21, at 489.


45. 3 W. Holdsworth, A History of English Law 491 (5th ed. 1942).

46. 1 J. Scott, Law, The State and the International Community 257 (1939). Scott defines aequitas as essentially the same as the Law of Nature. Id.
the Roman law of slavery, from which the Roman attorney-client privilege traces its roots. Although the earliest English cases recognizing an attorney-client privilege make no reference to Roman law or any other body of law as a basis for decision, the English jurists who decided those cases had ample opportunity to read and be influenced by Roman jurisprudence.

The decline in the importance of Canon law following the Reformation resulted in English law becoming more receptive to Roman law. This period of increased receptivity coincides with the earliest recorded recognition of an attorney-client privilege in English law. Indeed, Berd v. Lovelace, the 1577 decision cited by Wigmore as the earliest case recognizing an attorney-client privilege, was a decision of the Court of Chancery, which administered the English system of equity based on Roman law.

Most authors conclude that the common law rationale for the attorney-client privilege initially was a "point of honor" that gentlemen do not reveal secrets entrusted to them. With the shift in the factual orientation of trials, this basis for recognition of a privilege did not prevail for long. The adequacy of honor as a basis for refusing to give testimony was rejected along with a common law physician-patient privilege in 1776 in the famous Duchess of Kingston's Case. The Duchess was tried for bigamy before the House of Lords. The Crown sought to compel the testimony of Hawkins, her physician, that she had admitted to him the existence of an earlier marriage. Hawkins responded, "I do not know how far any thing that has come before me in a confidantial trust in my profession should be disclosed, consistent with my professional honour." To this Lord Mansfield, in what is now oft-quoted language, replied:

If a surgeon was voluntarily to reveal these secrets, to be sure he would be guilty of a breach of honour and of great indiscretion; but, to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever.

That the first known physician-patient privilege decision in English law did not occur until two hundred years after the first known attorney-client privilege decision is curious. This occurrence might be explained in several ways. First, because of the existing state of medical science, physicians may not have been a reliable source of evidence. Second, attorneys may have

47. 3 W. Holdsworth, supra note 45, at 491.
48. See supra notes 22-23 and accompanying text.
51. 8 J. Wigmore, supra note 9, § 2290, at 543; 9 W. Holdsworth, A History of English Law 202 (3d ed. 1944).
53. Id. at 572.
54. Id. at 573 (footnotes omitted). Even if a physician-patient privilege had been recognized in this case, the communications for which disclosure was sought might not have come within its protection. The privilege, when recognized, protects only information reasonably necessary to secure medical care. Hawkins's testimony related to delivering a child of the Duchess. Id. at 577. The Duchess' disclosure of the child's father may not fall within this requirement.
assumed that physicians should not or could not be compelled to disclose confidential patient communications, and thus may not have requested such information. Third, attorneys may have assumed that physicians could be compelled to disclose confidential communications, and thus may not have objected to requests for such disclosure. Fourth, courts may have addressed this question prior to 1776 in decisions that remain undiscovered. The plausibility of each of these explanations is explored in the following paragraphs.

Was medical science likely to be of assistance to courts in the sixteenth and seventeenth century? Although the modern scientific method took hold in the seventeenth century, science still coexisted with a belief in sorcery, witchcraft, and astrology. Thus, for example, wounds were frequently treated with "weapon salves" and "sympathy powders," cures in which the physician administered a salve to the weapon that had caused the wound. The state of medical science revealed by this procedure suggests that medical testimony would be of limited assistance to courts. The question, however, is not whether medical testimony would help, but whether people believed it would help. No doubt in two hundred years medical historians will look incredulously at some medical testimony currently received into evidence. Just as this testimony is accepted as beneficial now, so people utilized medical testimony in trials prior to the eighteenth century in the apparent belief that such testimony was beneficial then.

During the seventeenth century medical testimony regarding the cause of death was received into evidence in criminal trials. Furthermore, in addition to the humdrum proceedings that allowed medical testimony, seventeenth century witchcraft trials permitted the introduction of medical testimony. For example, in a 1662 English witchcraft trial two types of medical testimony were received. One physician testified as an expert that in his opinion the activities of the defendants were the work of witches. Another physician, who had treated a child cared for by one of the "witches," testified regarding the treatment he had prescribed for the child. Thus, whatever its actual or perceived benefit, medical testimony was received by English courts at least one hundred years prior to the Duchess of Kingston's Case.

56. L. Zimmerman & I. Veith, Great Ideas in the History of Surgery 258 (1961); see Klein, supra note 55.
57. F. Birkenhead, Famous Trials of History 66, 71, 95-99 (1926). There is evidence that medical malpractice cases were litigated in English courts at least as early as the fourteenth century. Post, Doctor versus Patient: Two Fourteenth Century Lawsuits, 16 MED. HIST. 296, 296-300 (1972).
59. Id. at 3.
60. Id. at 2.
61. Rex v. Duchess of Kingston, 20 How. St. Tr. 355 (1776). The earlier use of medical testimony is consistent with the experience of Roman law in which medical testimony, although not always physician testimony, was frequently received. Amundsen & Ferngren, The Forensic Role of Physicians in Roman Law, 53 BULL. HIST. MED. 39, 39-56 (1979).
Did attorneys assume that physicians could not or should not be compelled to disclose confidential information? Although this question probably cannot be resolved with any degree of certainty, the possibility that the legal profession assumed it improper to compel disclosure of confidential physician-patient communications seems unlikely. In the sixteenth and seventeenth century the practice of medicine in England was foremost a trade, not a profession of high calling. Practitioners of law thus would have been unlikely to accord deferential treatment to most practitioners of medicine in sixteenth and seventeenth century England either as a matter of class reciprocity or professional respect.

Did English courts consider the question of a patient-physician privilege prior to 1776 though no evidence of such consideration has been discovered? The Duchess of Kingston’s Case cites only one other case involving physician testimony in support of its rejection of a physician-patient privilege. That case, The Trial of Lawrence Earl Ferrers, was decided in 1760. Thomas Kirkland, a surgeon, was called as a witness by the attorney general to testify as to the wound received by the deceased as well as to statements made by the defendant and the victim concerning the source of the wound. No objection to this testimony was made either by the defendant or sua sponte by the court. Thus, the court made no ruling on the propriety of the surgeon’s testimony. Blackstone’s Commentaries, another source cited by the court in the Duchess of Kingston’s Case, discusses only the attorney-client privilege, infamy, and interest as excuses that release a witness from the duty to testify. Thus, the question remains unanswered. In the absence of the discovery of other cases, the most plausible theory for the lack of recorded consideration of the patient-physician privilege is that attorneys assumed that physicians could be compelled to disclose confidential communications and, therefore, did not bother to litigate the question.

Dean Wigmore viewed the Duchess of Kingston decision rejecting the physician-patient privilege as an historical turning point in the analysis of privi-

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63. 19 How. St. Tr. 886 (1760).
64. Id. at 912-19.
65. 3 W. BLACKSTONE, COMMENTARIES *370. Blackstone states:
   All witnesses, that have the use of their reason, are to be received and examined, except such as are infamous, or such as are interested in the event of the cause. All others are competent witnesses; though the jury from other circumstances will judge of their credibility. Infamous persons are such as may be challenged as jurors, proper delictum; and therefore never shall be admitted to give evidence to inform that jury, with whom they were too scandalous to associate. Interested witnesses may be examined upon a voir dire, if suspected to be secretly concerned in the event; or their interest may be proved in court. Which last is the only method of supporting an objection to the former class; for no man is to be examined to prove his own infamy. And no counsel, attorney, or other person, intrusted with the secrets of the cause by the party himself, shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of privacy, as came to his knowledge by virtue of such trust and confidence: but he may be examined as to mere matters of fact, as the execution of a deed or the like, which might have come to his knowledge without being intrusted in the cause.

Id.
After this case, according to Wigmore, the courts imposed a utilitarian test for privilege. Necessity, not honor, became the requirement for recognition of a privilege. First, the justification for the attorney-client privilege shifted to necessity. An acceptable showing of necessity required proof that unless the privilege existed clients would not tell their attorneys everything required for effective representation. Next, recognition of a physician-patient privilege was rejected as unnecessary because even in the absence of a privilege courts believed that patients would tell their physicians everything required for effective treatment. Indeed, the courts acknowledged that even necessity would not cause recognition of a privilege in all cases:

In the first place, the principle protecting confidential communications is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honour, or of his fortune. There are many communications which, though absolutely necessary because without them the ordinary business of life cannot be carried on, still are not privileged. The communications made to a medical man whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, are not protected. Communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected. Therefore it must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected.

Courts in the United Kingdom have consistently refused to recognize a

66. See 8 J. Wigmore, supra note 9, § 2286, at 531.
67. See id. § 2290, at 543.
68. See Wheeler v. LeMarchant, 17 Ch. D. 675, 681 (1881). A contemporary analysis of the early cases sums up their approach:

And Lord Brougham in Greenhough v. Gaskell [1833] gives as the reason for the privilege of legal advisers that it is out of regard to the interests of justice which cannot be upheld, and to the administration of justice which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources: deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case.

Having regard to these considerations it is clear why the privilege, so called, is not extended to medical advisers. They have nothing to do as such with the administration of justice. The reason of the privilege in relation to legal advisers does not extend to them. It is not absolutely necessary in the interests of justice that inviolable secrecy should attach to all transactions between a man and his medical adviser. The reason for the obligation of honour on the part of medical advisers is not to enable the patient or party by whom they are consulted to obtain justice according to law, but enable him to preserve that privacy in personal matters which every man is lawfully entitled to maintain.

Professional Confidences of Medical Men, 64 Just. P. 241, 242 (1900).
physician-patient privilege or any of its variants. Legislative attempts to abrogate the common law's refusal in the United Kingdom to recognize a physician-patient privilege have also been rejected. Although no privilege

70. R. CROSS, EVIDENCE 258 (4th ed. 1974); Brooke, Medicine, Pharmacy, Drugs and Medicinal Products, HALSBURY'S LAWS OF ENGLAND ¶ 9 (Lord Hailsham ed. 1980).

71. LAW REFORM COMMITTEE (LONDON) PRIVILEGE IN CIVIL PROCEEDINGS 20-22 (Sixteenth Report 1967) [hereinafter cited as LAW REFORM COMMITTEE]. Relevant portions of their report are set forth below:

This [the physician-patient relationship] is another confidential relationship to which no absolute privilege attaches but which, in practice, causes little difficulty. The relationship of doctor and patient enables the doctor to obtain information of two different kinds, i.e., information resulting from his clinical observation of the patient (e.g. symptoms of venereal disease) and information communicated by the patient to the doctor for the purpose of enabling him to diagnose and prescribe. The justification for treating the first kind of information as confidential is that it improves the health of the nation by encouraging persons to seek medical advice and treatment. The justification for treating the second kind of information as confidential is that candour on the part of the patient is essential in order to determine the appropriate treatment for him. But in the great majority of civil cases in which doctors are called as witnesses they are called by the patient himself to give evidence of fact or opinion as to the patient's condition . . . .

Personal injury cases are the commonest of those in which doctors are called as witnesses; but there may be others in which justice cannot be done without a doctor's disclosing information which he has obtained in the course of the doctor-patient relationship. Medical negligence cases, issues as to the sanity or testamentary capacity of the patient and statements made to obtain life insurance are examples. It is said, no doubt with justification, that successful psychiatric treatment is dependent upon the utmost candour and confidence between doctor and patient and that psychiatrists are the recipients of a wide variety of confidences which might be relevant as admissions upon issues other than the health of the patient. But we find it difficult to envisage situations which are not fanciful in which a psychiatrist is likely to be called as a witness except on an issue as to the mental or emotional state of a patient; and, since a psychiatric diagnosis depends largely upon what the patient has told the psychiatrist, we find it impracticable to draw any line a priori between communications by the patient which ought to be disclosed to enable the accuracy of the diagnosis to be tested and those which it is unnecessary to disclose for this purpose.

These considerations have driven us to the conclusion that, where a doctor is called, whether by the patient himself or by some other party, to give evidence upon an issue as to the mental or physical condition of one of his patients, it is impracticable to define in a statute the circumstances in which he should be permitted to refuse to answer questions upon information obtained from the patient as his medical adviser unless the patient consents to his doing so. The propriety of allowing him to refuse must depend upon all the circumstances of the case and is, we think, best left, as at present, to the judge. The way in which judges have exercised that discretion in the past in civil cases has given little ground for complaint from the medical profession and we think that they can be relied on in the future to hold the balance fairly between the Hippocratic oath and the witness's oath to tell the whole truth . . . .

In arriving at the conclusion that no statutory privilege should be conferred on communications made either to priests or doctors, we have been concerned to avoid making recommendations inconsistent with such views as may be expressed by the Criminal Law Revision Committee. It is in criminal, rather than in civil, proceedings that there is likely to arise any question of a priest or doctor being compelled to reveal communications made to him in confidence by a penitent or patient. For the reasons we have given, the issue is one of little practical importance in civil proceedings, but it would be anomalous, and would imply a false set of values, if we were to rate the secrecy of the confessional or the inviolability of the Hippocratic oath as more important than the ascertainment of the
is recognized, the judge has broad discretion to allow witnesses to refuse to disclose information if such disclosure would result in a breach of an ethical or social duty and if disclosure is not required to effect justice in the particular case. Judges have used this discretion in some cases to permit nondisclosure of physician-patient communications.

Legislative abrogation of the common law has occurred in other countries that derive their common law heritage from England. In 1828 the State of New York enacted the first physician-patient privilege statute in any common law jurisdiction. The revisers’ notes reveal the rationale for that statute:

In 4 Term Rep. 580, Buller J. (to whom no one will attribute a disposition to relax the rules of evidence,) said it was “much to be lamented” that the information specified in this [statute] was not privileged. Mr. Phillips expresses the same sentiments in his Treatise on Evidence, p. 104. The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defence or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offense. Besides, in such cases, during the struggle between legal duty on the one hand, and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversion or concealment of truth, too strong for human resistance.

The reference to Justice Buller’s lamentation is from the case of Wilson v. Rastall, a 1792 English decision of the King’s Bench. Although that case turned upon the attorney-client privilege, in particular whether the defendant had consulted the attorney witness in his capacity as an attorney, Justice

truth about a crime, but not as important as the ascertainment of the truth about a private wrong to an individual. However, we have been informed that, after a thorough examination of these questions, the Criminal Law Revision Committee does not propose to recommend any change in the existing law. In this respect, our own conclusions do not differ from theirs.

Id.

72. Id. at 3.
73. Id. at 22; see Mole v. Mole, [1950] 2 All E.R. 328, 329; McTaggart v. McTaggart, [1948] 2 All E.R. 754, 755.
74. See infra notes 80-86 and accompanying text.
75. N.Y. REV. STAT. 1829 II, 406, part III, tit. 3, ch. VII, art. VIII, § 79. The original statute provided:

No person duly authorized to practice physic or surgery, shall be compelled to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him, as a surgeon.

Id.

76. Extracts from the Original Reports of the Revisers, REVISED STATUTES OF THE STATE OF NEW YORK (1836) (emphasis in original); see also C. DeWitt, supra note 13, at 15.
Buller’s gratuitous observations on the physician-patient privilege were noted and agreed with by the New York Legislature. Justice Buller stated:

There are cases, to which it is much to be lamented that the law of privilege is not extended; those in which medical persons are obliged to disclose the information which they acquire by attending in their professional characters. This point was very much considered in *The Duchess of Kingston’s Case*, where Sir C. Hawkins, who had attended the duchess as a medical person, made the objection himself, but was over-ruled and compelled to give evidence against the prisoner.\(^7\)

The New York Medical Society’s 1823 draft of *A System of Medical Ethics* contains a reference to an American judicial recognition of a physician-patient privilege during the same period. The footnote reference contains no case citation, but only the following statement: “The same principal was recognized by a superior court of Pennsylvania in the year 1800, in the case of a physician who refused to disclose his professional acts, against a defendant, in a suit for divorce on the plea of adultery.”\(^7\)\(^9\) This reference to an apparently unreported trial court decision is difficult to verify, but suggests that, even in American jurisprudence, the New York statute was not written on an empty slate.

Following the enactment of the New York statute a successful campaign of legislative advocacy ensued. Currently, forty states and the District of Columbia have a physician-patient privilege statute and, with the exception of South Carolina and West Virginia, all states have either a physician-patient, psychiatrist-patient, psychologist-patient, or psychotherapist-patient privilege.\(^8\)\(^0\) Similarly, other countries with a common law heritage, including New Zealand,\(^8\)\(^1\) Victoria (Australia),\(^8\)\(^2\) Israel,\(^8\)\(^3\) Tasmania (Australia),\(^8\)\(^4\) Newfoundland,\(^8\)\(^5\) and Honduras,\(^8\)\(^6\) have enacted physician-patient privileges. On the other hand, Canada\(^8\)\(^7\) (with the exception of Quebec\(^8\)\(^8\)), Australia\(^8\)\(^9\) (with the exception of Tasmania and Victoria), and South Africa\(^9\)\(^0\) have refused to recognize a physician-patient privilege.

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78. *Id.* at 1287 (footnote omitted).
82. Vict. Evidence Act 1958 S. 28 (as amended by Act 7418 (1966)).
83. Section 49 of the Israel Evidence Ordinance.
86. *Id.*
The debate over the physician-patient privilege in common law jurisdictions typically centers on the utilitarian rationale for the privilege. The majority of commentators, including Wigmore, have concluded that the physician-patient privilege cannot survive scrutiny under this approach. Many legislatures, however, have indicated a different opinion.

Although the physician-patient privilege statutes in common law jurisdictions vary greatly, they do have certain common characteristics. First, the statutes apply only to judicially compelled disclosures. Professional ethics, rather than privilege statutes, govern noncompulsory, extrajudicial disclosures. Second, the privilege belongs to the patient and may be waived by him expressly or impliedly. Third, the privilege is not absolute; exceptions to the privilege vary from jurisdiction to jurisdiction. For example, the privilege may not apply in criminal cases, personal injury cases, workers’ compensation proceedings, will contests, or when on balance the court finds that the need for the information outweighs the value of confidentiality.

When the privilege does apply in common law jurisdictions, courts typically strictly construe and limit the privilege to situations in which a person consults someone he reasonably believes to be a physician. The consultation must be for the purpose of securing treatment or diagnosis in contemplation of treatment, and the patient must communicate information essential for treatment to the physician in a confidential manner.

4. Civil Law

In contradistinction to the English common law, French civil law recognizes a limitation on the power of courts to compel disclosure of confidential physician-patient communications. This limitation in French law, and in the law of other civil law continental European countries that recognize the same rule, is referred to as professional secret. Historians have traced the

91. See, e.g., LAW REFORM COMMITTEE, supra note 71, at 20-21.
92. See, e.g., 8 J. WIGMORE, supra note 9, § 2380a, at 818; C. DEWITT, supra note 13, at 34-36.
94. Id. at 23.
95. Id. at 42-43.
97. E.g., San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26, 27-29 (1951); CONN. GEN. STAT. § 52-146f (West 1983); TEX. R. EVID. 510(d)(5).
100. E.g., People v. Stritzinger, 34 Cal. 3d 505, 513, 666 P.2d 738, 743, 194 Cal. Rptr. 431, 536 (1983).
101. E.g., N.C. GEN. STAT. § 8-53 (Supp. 1981); Section 49 of the Israel Evidence Ordinance. The privilege does not apply when the “Court has found that the necessity to disclose the evidence for the purpose of doing justice outweighs the interest in its non-disclosure.” Id.
103. For a list of such countries, see infra text accompanying notes 155-59.
roots of the physician-patient professional secret in French law, le secret médical, to the attorney-client privilege or professional secret in Roman law.104 When the territory now constituting France was incorporated into the Roman Empire, Roman law, including the attorney-client privilege, became the applicable law.105 Subsequently, when the Teutons and other Germanic tribes invaded France, Roman law was displaced, and all traces of privilege or the professional secret disappeared for several centuries.106 The Roman system was replaced with Germanic and Frankish procedures based upon trial by battle or ordeal that did not require rules of evidence.107

Ultimately, a combination of events fostered a rebirth of privilege or professional secret. The efforts of the Church reintroduced Roman law to Western Europe when extensive research by Gregorian monks led to the discovery of the Roman Digest.108 The attorney-client privilege contained therein was then incorporated into the Decree of Gratian,109 which served as the foundation for the Corpus Juris Canonici, or Canon Law Code.110 Roman and Canon law, laden with the seed of professional secret, impregnated the substantive and procedural aspects of French secular law through a process of imitation and incorporation.111

Another factor that contributed to the recognition of a physician-patient professional secret was the importation of medical science into the Western Christian world by Jews during the eleventh and twelfth centuries.112 This importation, after centuries of regression in the field of medical science, occurred first in Italy and then in France. Domat, the great French legal scholar, traced the roots of the physician-patient professional secret to the incorporation of the Hippocratic Oath in the Constitution of the old Paris Medical School at the time of the rediscovery of medical science.113

104. Digest, L 25, D. de Testibus, 22, 5, cited in A. ALLARD, HISTOIRE DE LA JUSTICE CRIMINELLE § 137, at 253-55 (Gand 1868). “[N]e patroni in causa cui patrocinium praestiterunt, testimonium dicant.” Id. at 253. The attorney-client and priest-penitent professional secret in French law have been similarly traced. See supra notes 21-25 and accompanying text for discussion of attorney-client privilege in Roman law.


106. Id. at 35-44.


110. G. LE BRAS, supra note 108, at 195-96. This also gave formal recognition to the absoluteness of the seal of confession.


climbing of the social ladder by the medical profession led to the profession's political importance and conferral of privileges upon its members by the ruling aristocracy.\textsuperscript{114}

At the end of the Feudal Period both Roman and French customary law\textsuperscript{115} began to have a serious impact upon French secular law. Canon law courts used Roman law to deal with both church and secular matters, and such use slowly transformed French procedure, culminating in the sixteenth and seventeenth centuries. In 1670 the "Ordonnance of 1670" established a limitation on evidentiary sources and instituted the practice of hearing witnesses in court.\textsuperscript{116} The first traces of physician-patient professional secret coincide chronologically with development of this new French procedure.\textsuperscript{117}

French customary law developed rules excluding certain relational communications that were later extended to physicians. Borrowing heavily from Roman and Canon law, the customary laws of some French provinces acknowledged that breach of the seal of confession should not only be prohibited, but also severely punished, because the confidences had been disclosed to the priest as a representative of God.\textsuperscript{118} French customary law also recognized a limitation on disclosure of attorney-client communications.\textsuperscript{119} The courts perceived these limitations on evidentiary sources as contrary to, and less important than, the goal of discovering truth at trial and, therefore, narrowly construed them.\textsuperscript{120} The development of professional secret in France, against the background of Roman, Canon, and customary evidence law, was slowed by the frantic desire to find truth, even through torture, by the authoritative political system, and by the French monarchy.\textsuperscript{121}

By the sixteenth and seventeenth centuries, physicians joined priests and attorneys in having a legal duty of confidentiality.\textsuperscript{122} Breach of that duty gave rise to liability for damages resulting from the financial and social consequences of the breach, but no criminal penalties were imposed.\textsuperscript{123} While the duty of confidentiality did not translate exactly as a privilege, it did effect a limitation on judicial disclosure. Early French case law allowed members of some professions to ask the judge that he exempt them from testifying if their testimony would reveal secrets learned in their professional practice.\textsuperscript{124}

\begin{itemize}
\item \textsuperscript{114} GUYOT, RÉPERTOIRE DE JURISPRUDENCE, Tome XI, 438-41 (Paris 1785).
\item \textsuperscript{115} French customary law refers to the territorial law of a given region as applied by the controlling lord or monastery. \textit{R. DAVID, FRENCH LAW} 4 (1972).
\item \textsuperscript{116} E. GLASSON, HISTOIRE DU DROIT ET DES INSTITUTIONS DE LA FRANCE, Tome VI, 542 (Paris 1895).
\item \textsuperscript{117} 1858 D. Jur. 1, 476. The first examples of privileges in the common law also coincided with the change in common law procedures that allowed for the calling of witnesses to testify at trial. \textit{See supra} notes 38-41 and accompanying text.
\item \textsuperscript{118} Papon, Liv. 24, Tit. 7.
\item \textsuperscript{119} A. ALLARD, \textit{supra} note 104, § 137, at 253-54.
\item \textsuperscript{120} Menochius, Praes, Lib. 1, Q89.
\item \textsuperscript{121} May 1, 1899, Cass. civ., Fr., 1901 S. Jur. I, 162 n. § 1.
\item \textsuperscript{122} "Physicians, Surgeons and Pharmacists are forbidden to declare the secret ailments of those whom they try to heal." \textit{FERRIERE, DICTIOANNAIRE DE DROIT ET PRATIQUE} 93 (Paris 1769); \textit{see also} GUYOT, \textit{supra} note 114, at 439.
\item \textsuperscript{123} May 1, 1899, Cass. civ., Fr., 1901 S. Jur. I, 161.
\item \textsuperscript{124} Id.
\end{itemize}
With respect to the medical profession, that exemption was based on the risk of physician liability for damages upon breach of confidentiality and on the more general respect for professional secrets. Two theories were utilized to warrant judicial recognition of these professional secrets. The first theory postulated that the physician and patient were the bailee and bailor of secrets. The second theory viewed physician and patient as parties to a contract in which the physician promised to keep the patient's confidences.

The struggle between the search for truth at trial and the confidentiality of professional secrets continued, and a leading legal scholar of the time described its status prior to the French Revolution in this manner:

One cannot compel an attorney or a physician to disclose the secrets revealed to them by the client . . . . However there are some decisions of the “Parlement de Paris” mandating lawyers to testify about privilege matters, in light of the critical importance of their testimony in the search for truth. Marnac says that the ancient case law held that attorneys and other professionals could not be ordered to disclose secrets and confidences, but that now courts force them to do so; he adds that the most illustrious legal experts tried their hardest to keep the old position alive, but failed in their endeavor.

Ultimately this seesaw led to the passage of article 378 of the French Penal Code of 1810, which recognized professional secret and imposed criminal penalties for its violation.

Physicians, surgeons and other health officials, as well as pharmacists, nurses, and all other persons “bailees of secrets and confidences communicated” to them because of their status or profession, who will reveal those secrets, in all instances other than when the law compels them to disclose, will be punished with a term of no less than one month and no more than six months of imprisonment and a fine of no less than 10.00 and no more than 100.00 francs.

Legislative history reveals the original rationale for this article:

Should we not consider that disclosure of privileged information is a serious offense because—it shatters the reputation of the patient whose

125. Id. French case law dating from the sixteenth century recognized a duty of confidentiality upon the physician. 1854 D. Jur. I, 27, § 82, § 83. The moral duty of the Hippocratic Oath was transferred into a legal duty for which the patient might bring action for damages when the disclosure was malicious. 1858 D. Jur. I, 476-77. For example, in 1599 the Chambre de la Tournelle rendered a judgment against a pharmacist who disclosed a patient's loathsome disease because the patient defaulted in paying the bill. Id. The duty not to disclose is evidenced in part by a 1666 edict that required physicians to reveal to municipal authorities treatment given to injured patients so that the authorities could track down criminal activities. Id. at 476, § 4. Although unenforced due to its unpopularity, the edict is a response to the duty of secrecy.

126. C. PÉN. ANNOT. art. 139.

127. SERPILLAN, CODE CRIMINEL, 1re partie, 447 (Lyon 1767).

128. 1858 D. Jur. I, 477. Originally article 378 was categorized as a defamatory crime, and only slanderous disclosures were punishable. Thus, for example, a physician who attended a birth and thereby discovered evidence of an earlier abortion was liable for disclosure only if the patient enjoyed a good reputation. This interpretation of the professional secret codified in article 378 was abandoned toward the second half of the nineteenth century. Id. at 477-78.

Article 378 did not work a radical change in existing law, but was instead built upon existing law. PERRAUD-CHARMANTIER, LE SECRET PROFESSIONNEL 35-39, 55-64, Parts (1926).
secret is betrayed—it destroys the patient's confidence in the physician, since this confidence has become more harmful than useful—it causes people to choose silence and mental or physical suffering rather than benefiting from educated persons' help—it portrays professionals, whose image should be one of therapists, counselors and men looking for the patient's best interest, as traitors?

This provision is a novelty in our legal system. We would have wished that ethical considerations and tact would cause it to be useless. But how many times do we not see professionals, to whom secrets have been entrusted, sacrifice their duty on the altar of caustic humor, kid about the gravest matters, keep malice alive with indecent revelations, obscene stories, and bring shame and sorrow upon the patients and their families?¹²⁹

The underlying concern expressed is protection of the patient's reputation in the community from the perceived danger of indiscreet physicians.¹³⁰ In early 19th century France a person's reputation seriously affected his employment, friendship, marriage, and social status. Disclosure of conditions such as venereal disease or organic malfunction was, therefore, a serious evil.¹³¹

Since enactment of article 378, commentators have advanced additional, albeit overlapping, rationales to support the professional secret. One such rationale is that revelation of confidences disrupts the "social order."¹³² For example, revelation that a patient suffers from a communicable or genetically transmitted disease might disturb the peace of the patient's family, result in societal rejection of the patient, and thereby result in a weakening of the social fabric.

Another justification advanced for the professional secret is the right of privacy.¹³³ According to the privacy rationale, the state's intrusion upon highly personal, health-related aspects of a citizen's private domain is simply wrong. Particularly during troubled political times, arbitrary disclosure of patient information threatens the right to privacy.¹³⁴

Still another rationale advanced for the professional secret is that the physician is the trustee by necessity of the patient's secrets.¹³⁵ Proponents of this theory maintain that trust is conducive to the patient's seeking and receiving treatment. Thus, the patient must be assured that his confidences will be kept. A disclosure of confidential information would forfeit the patient's confidence in the physician, breach the physician's duty as trustee by necessity, and cause people with embarrassing diseases not to seek treatment.¹³⁶

¹³¹. Id. at 18.
¹³². Id. at 42-43.
¹³³. Id. at 7.
¹³⁴. Id. at 72.
¹³⁵. Id. at 13, 28.
¹³⁶. Id.
Because the initial rationale for the professional secret was the protection of patients' reputations from small talk at social events, the draftsmen of article 378 focused upon garrulous physician behavior rather than judicially compelled testimony. Much confusion has thereby resulted in article 378's relation to the legal system. One major ongoing question is whether article 378 is absolute. Can the professional secret be waived? Does it permit exceptions? Proponents of an absolute professional secret contend that the draftsmen designed the duty of professional secret to protect not only individual patients but also the larger interest of the community. If disclosure is permitted, other members of the community may hesitate to make disclosures to their physicians. Thus, the professional secret is not simply a right belonging to the patient that he may waive at his discretion. Rather, the professional secret is a protection of the entire community and is, therefore, beyond the capacity of any individual patient to waive.

French law does not permit the consent of the victim to alter the character of a criminal offense. The victim may not alter the policy of the criminal laws and society's power to punish violations. By analogy to this position at criminal law, absolutists argue that the patient may not waive or consent to a violation of professional secret because the patient may neither abrogate the policy underlying the secret nor limit society's power to punish violations.

Those who oppose the absolute view argue that the professional secret is designed to protect the interests of individual patients. Patients should thus be permitted to determine whether waiver will protect or hinder their individual interests. Proponents of this position argue that waiver by one individual patient will not deter another patient from seeking help since each individual realizes that waiver is his choice to make.

Although the absolute view of the secret prevailed initially, that supremacy has been tempered over time. Only the criminal chamber of the French high court, the Cour de Cassation, has adhered to the concept of the absolute professional secret. According to its decisions, the patient

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137. "[I]f we examine the foundations of the duty of professional secrecy we find that the interests of the community are considered just as important as the individual's need for privacy." PRIVACY AND HUMAN RIGHTS 59 (A. Robertson ed. 1973) (quoting NERSON, JOURNAL DES TRIBUNAUX 157 (1959)).


139. Id.


141. Id.


143. Id. No. 2936, A.A. 18-20. A 1966 decision of the French Cour de Cassation is illustrative. Dame Burdier, Dec. 22, 1966, Cass. crim., 1967 J.C.P. II No. 15126. The defendant was charged with murdering her lover and cutting his body into little pieces. She attempted to call her personal physician to testify on her behalf, but was refused the opportunity based upon the absolute nature of the professional secret. Over a dissenting opinion, the majority of the court reasoned that patient trust requires that the secret be absolute and beyond the capacity of the patient, physician, or judge to waive.

A Canadian law professor, Jack London, described a rape trial he observed in the south of France. The defense alleged was consent. The accused sought to present the testimony of a
may not waive the secret's application even when the physician's disclosure would be exculpatory. Even in criminal cases, however, a gradual loosening of the absolute position may be occurring.144 Conversely, the civil chamber of the Cour de Cassation has espoused a nonabsolute view of professional secret.145 That court has permitted waiver of the secret when waiver would serve the patient's best interests. Such situations include cases in which waiver of the secret is necessary to obtain testimony that supports a claim for disability benefits or explains a party's unavailability at trial.146 Similarly, the civil court has permitted waiver when it would serve the interests of the patient's family, for example, to support a challenge to the mental capacity of the author of a will.147 The court has also permitted an implied waiver of the secret to serve the public order, for example, to assist the physician to defend a medical malpractice claim148 or to allow testimony that a patient poses a serious danger to third persons.149

Article 378's protections apply both to information that a patient voluntarily reveals to a physician acting in a professional capacity and to information discovered or involuntarily revealed, sometimes called secrets by nature.150 The earlier view was that the secret covered only information prejudicial to the patient.151 This view, however, has been abandoned and the professional secret now covers disclosure of nonprejudicial information as well.152 A violation of the professional secret statute occurs whether the physician discloses the confidential information to the general public or merely to a single person.153 Furthermore, although violation of the professional secret initially required malicious conduct, that requirement has been
replaced by a requirement of intentional conduct. Negligent conduct, how-
however, remains insufficient to trigger a violation of article 378.\textsuperscript{154}

The professional secret statutes of other civil law countries are not abso-
lute. For example, Germany,\textsuperscript{155} Switzerland,\textsuperscript{156} Italy,\textsuperscript{157} Belgium,\textsuperscript{158} and Portugal\textsuperscript{159} require a complaint from the patient to initiate prosecution. In
addition, Italy and Portugal permit an exception to the secret when required
by the public interest.

5. \textit{Comparison and Summary}

The difference between the common law privilege and the civil law profes-
sional secret is not merely semantic. Professional secret has a much broader
application; it applies to the professional both in court and out of court.
Common law jurisdictions leave extrajudicial disclosures to the realm of pro-
fessional ethics and not to the realm of privilege. Professional secret, how-
ever, combines the common law concept of privilege with professional
ethics, and thus establishes a criminal sanction for the violation of either.

Professional secret protects a greater fund of patient information. Privi-
lege protects only information that the patient communicates to the physi-
cian; professional secret protects not only that information communicated
by the patient but information communicated by other sources as well.
Moreover, while common law courts require a close nexus between the privi-
leged communication and the treatment, civil law courts permit greater lati-
dude on this question.

Common law jurisdictions always permit a voluntary waiver of the privi-
lege by the patient, viewing it as any other individual right subject to waiver.
Civil law jurisdictions do not always permit a voluntary waiver of the profes-
sional secret by the patient, often viewing it as a societal right rather than
merely an individual right. Furthermore, although the rationales advanced
for the physician-patient privilege and professional secret tend to overlap,
the privilege tends to rely more heavily on the utilitarian rationale while the
professional secret tends to rely more heavily on the deontological rationale.

Many differences in civil and common law procedures are explained be-
cause the civil and common law systems differ in both the use of the inquisi-
torial or adversarial system and the use or nonuse of the jury.\textsuperscript{160} Hearsay

\textsuperscript{154} \textit{Id.} A recent example of cognizable violation occurred in a case in which a physician
consultant for an insurance company obtained access to the insured's hospital records and
disclosed to the insurance company that the patient suffered from a terminal disease and had a
crim., 1974 J.C.P. II No. 17712.} The Cour de Cassation affirmed a judgment finding that the
physician violated the professional secret since he knew he was disclosing confidential informa-
tion acquired in a professional capacity even though the information was obtained from a
source other than the patient. \textit{Id.}

\textsuperscript{155} German Penal Code of 1871, art. 300 (1961).

\textsuperscript{156} Swiss Penal Code art. 321.

\textsuperscript{157} Italian Penal Code art. 622 (1978).

\textsuperscript{158} Belgian Penal Code art. 458 (1810).

\textsuperscript{159} Decree Law 32,171, July 29, 1942, art. 7 (Portugal).

evidence, for example, is freely admitted in civil law countries where juries are rarely used. Common law countries, however, limit the admissibility of hearsay because of a fear that juries will not properly evaluate it. The distinction between privilege and professional secret, however, does not turn on these procedural differences. Unlike hearsay in a common law jurisdiction, evidence of a confidential communication is not excluded because the jury may accord it too much weight or be misled by it. Confidential communications may be extremely probative and unambiguous. Rather, confidential communications are excluded because the evil sought to be avoided is exposure to any unintended third party, judge or jury, in any context, adversarial or inquisitorial. Thus, nothing inherent in the civil and common law systems explains their different approaches to this problem.

Common and civil law systems wrestle with the same tension between accurate fact-finding and confidential communications. Despite their shared Roman law ancestry, the common and civil law approaches to this tension, as reflected in the statutes and cases that describe their laws, differ widely. But do these laws accurately reflect existing practice? For example, despite the lack of a formal physician-patient privilege, does the English jurist’s use of discretion to permit a refusal to disclose information yield a de facto privilege? Do the systems differ as radically in practice as they do on paper? That is a subject for another day.

II. CONCLUSION

Privilege and professional secret rules limiting intrusion into certain relationships did not, until the late eighteenth century, rest upon a utilitarian rationale. The earliest of these rules, the attorney-client privilege in Roman and English law and the priest-penitent privilege in French law, were based on a deontological rationale that compulsory disclosure of these confidences is morally wrong and society ought not to intrude into these relationships.

A shift in favor of the utilitarian rationale for privilege and professional secret rules accompanied the shift in the rationale for confidentiality in extrajudicial situations in the early nineteenth century. Although effective lobbying has convinced many legislators of the need for privilege and professional secret rules based upon a utilitarian rationale, no serious empirical studies justify the utility of these rules. Particularly in the area of the physician-patient relationship ample reasons exist to question the utilitarian basis for a privilege or professional secret. The dubiousness of the utilitarian rationale does not, however, yield the conclusion that a physician-patient privilege or professional secret should be rejected. Instead it requires serious analysis under a different rationale.

The deontological rationale for the physician-patient privilege or professional secret is enticing, yet it requires further examination. What values are protected by this privilege or professional secret and why? Does one set of values prevail in all situations? What changes, if any, should attend a deontologically based privilege or professional secret? Should the privilege or secret be absolute or should exceptions be permitted? If exceptions should be
permitted would they be the same exceptions currently recognized? Need those exceptions be articulated in advance of trial by the legislature or can they be determined at trial by the judge or jury when the competing values are brought into focus? Much work remains to be done.