



6-1-1977

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Recommended Citation

Eric L. Christensen, *Constitutional Law—Right of Privacy—Evidence Law of Privileges—the Patient-Litigant Exception to the Psychotherapist-Patient Privilege—Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976)*, 10 Loy. L.A. L. Rev. 695 (1977).

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CONSTITUTIONAL LAW—RIGHT OF PRIVACY—EVIDENCE LAW OF PRIVILEGES—THE PATIENT-LITIGANT EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE—*Caesar v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976).

In *Caesar v. Mountanos*,¹ the Ninth Circuit Court of Appeals held that a constitutional right of privacy does not afford absolute constitutional protection for psychotherapist-patient communications.² Thus it rejected a licensed psychiatrist's challenge to the patient-litigant exception to the psychotherapist-patient privilege. The court's holding was based upon its finding that the challenged statutory exception to the privilege was justified by a compelling state interest³ and was narrowly drawn to express only the legitimate state interest.⁴ This decision is thus consistent with the California Supreme Court's holding in *In re Lifschutz*,⁵ which construed the patient-litigant exception as a limited waiver of the psychotherapist-patient privilege—a waiver limited only to those mental conditions the patient has disclosed in instituting his action.⁶

I. INTRODUCTION

Dr. Caesar, a licensed psychiatrist, treated Joan Seebach approximately twenty times for psychotherapy after she was involved in two automobile accidents. In subsequent suits arising from these accidents, Ms. Seebach alleged that she incurred personal injury and pain and suffering not limited to her physical ailments. She stated in a deposition that some of Dr. Caesar's care and treatment "may be involved in [this] lawsuit."⁷ When Dr. Caesar was deposed he refused to answer any questions regarding his treatment of Ms. Seebach, because he believed such testimony would be psychologically harmful to her. After he was ordered by the superior court to give his deposition, Dr. Caesar acknowledged that he had treated Ms. Seebach for injuries she had received in the accidents and had diagnosed her condition as de-

1. 542 F.2d 1064 (9th Cir. 1976).

2. *Id.* at 1070.

3. *Id.* at 1069.

4. *Id.* at 1069-70.

5. 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

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

7. 542 F.2d at 1065.

pressed. He refused, however, to answer questions concerning the relationship of her emotional condition to the accidents, a stance which prompted the court to find him in contempt. After exhausting his state court remedies, Dr. Caesar petitioned for a writ of habeas corpus to set aside the contempt citation. The United States District Court for the Northern District of California denied relief and Dr. Caesar appealed to the Ninth Circuit Court of Appeals.⁸

Although based on sound constitutional principles and solid precedents, *Caesar* highlights the quandary of the psychotherapist when confronted with the competing demands of his patient's right to privacy and society's interest in full disclosure in court when the patient has introduced his mental condition as a relevant consideration in the litigation. The well-reasoned dissent of Judge Hufstедler in *Caesar* is directly responsive to this problem.⁹ It is the opinion of this author that the psychotherapist-patient privilege is no longer a viable means of protecting the privacy of psychotherapist-patient communications. A recognition of the minimal probative value of the testimony of a treating psychotherapist and a strict application of the relevancy standard will provide the patient adequate protection without giving the patient-litigant an unfair, absolute right to prevent disclosure in court.

II. NARROWING THE ISSUES

The basic psychotherapist-patient privilege is provided in California by section 1014 of the Evidence Code.¹⁰ California limits this privilege in section 1016 by providing that the privilege does not apply to a communication relevant to an issue the patient has tendered concerning his mental or emotional health.¹¹ In his appeal, Dr. Caesar attacked this California statutory scheme as being violative of an absolute constitutional protection for such communications based on rights of

8. *Id.* at 1065-66.

9. *Id.* at 1070-75.

10. Section 1014 provides in pertinent part:

Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

(a) The holder of the privilege

CAL. EVID. CODE § 1014 (West 1970).

11. Section 1016 provides in pertinent part:

There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

(a) The patient

CAL. EVID. CODE § 1016 (West 1970).

privacy and equal protection.¹² Although these contentions were largely answered by the California Supreme Court in *Lifschutz*, Dr. Caesar urged a re-examination of the matter, contending that recent United States Supreme Court decisions have so broadened the scope of the doctor-patient zone of privacy that the issue should be reconsidered.¹³

Judge Hufstedler correctly noted that the *Lifschutz* court never addressed "the question whether confidential communications within the protection of a constitutional right of privacy were 'fundamental' or whether the patient's right could be overcome by interests less weighty than 'compelling.'" ¹⁴ However, the *Lifschutz* decision had recognized the constitutional basis of a right to privacy in the patient's psychotherapeutic communications.¹⁵ The court said that the right "has deeper roots than the California statute and draws sustenance from our constitutional

12. This casenote will focus on the right of privacy arguments. The court rejected petitioner's equal protection arguments, holding that section 1016, as construed and limited by *Lifschutz*, does not impermissibly deter lawsuits by patients who forego their right to sue for fear of forced disclosure of psychotherapeutic communications, nor does it impermissibly discriminate against psychotherapists in the relief of emotional distress vis-a-vis clergymen, to whom California has granted an absolute privilege. 542 F.2d at 1068-69. See CAL. EVID. CODE §§ 1030-1034 (West 1970). The court held that section 1016, rather than discriminating, puts psychotherapeutic patients "on the same footing as other litigants" who must disclose the facts upon which their suit is based. 542 F.2d at 1068. And the difference between privileges granted clergymen and psychotherapists was a necessary "accommodation by the secular state to strongly held religious tenets of a large segment of its citizenry." *Id.* at 1069 (quoting *In re Lifschutz*, 2 CAL. 3d at 428, 467 P.2d at 565, 85 Cal. Rptr. at 837).

13. 542 F.2d at 1066. Petitioner relied heavily on *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), contending that they broadened the zone of privacy concept established in *Griswold v. Conn.*, 381 U.S. 479 (1965), and required absolute constitutional protection. However, this argument is not persuasive since the Supreme Court specifically answered the plaintiff's contention in *Roe* by holding that a woman's right to an abortion is not absolute and that "some state regulation in areas protected by . . . [the right of privacy] is appropriate." 410 U.S. at 154.

14. 542 F.2d at 1072 n.2 (Hufstedler, J., dissenting).

15. Because the court in *Caesar* relied so heavily on the *Lifschutz* opinion, a brief consideration of the facts upon which the *Lifschutz* decision was based is important. Dr. Lifschutz treated the plaintiff in an assault case over a six-month period some ten years prior to the alleged assault. Dr. Lifschutz, when subpoenaed for deposition, refused to produce any records or answer any questions, even as to whether he treated the plaintiff at all. Pursuant to section 1016 of the Evidence Code, the superior court held that the patient had tendered as an issue his mental and emotional health and that Dr. Lifschutz must testify. After his refusal, Dr. Lifschutz was found in contempt. The California Supreme Court then agreed to hear his appeal. 2 Cal. 3d at 420-21, 467 P.2d at 559-60, 85 Cal. Rptr. at 831-32.

heritage."¹⁶ Quoting the United States Supreme Court in *Griswold v. Connecticut*¹⁷ to the effect that "[v]arious guarantees [of the Bill of Rights] create zones of privacy,"¹⁸ the *Lifschutz* court declared, "[W]e believe that the confidentiality of the psychotherapeutic session falls within one such zone."¹⁹ However, holding that the right of privacy in psychotherapeutic communications is of a fundamental constitutional nature is not to say that it is absolute.²⁰ As the United States Supreme Court stated in *Roe v. Wade*²¹ after reviewing a long line of privacy cases, "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate."²² The state may properly regulate fundamental constitutional rights if such regulation is "justified only by a 'compelling state interest' and [such regulation must be] narrowly drawn to express only the legitimate state interest at stake."²³ The issue in *Caesar*, then, was not whether the privilege was absolute, but rather whether the substantial rights of privacy involved were sufficiently weighed and correctly balanced against the state's compelling interest.

The majority in *Caesar* found, as the *Lifschutz* court did, a state interest in insuring that "truth is ascertained in legal proceedings in its courts of law."²⁴ The majority recognized the substantial rights of privacy relied on by Dr. Caesar,²⁵ but concluded that "California's interest in requiring psychotherapists to produce limited disclosure of confidential communications is adequately supported by a compelling interest under current constitutional standards."²⁶ Granting that

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

17. 381 U.S. 479 (1965).

18. 2 Cal. 3d at 431, 467 P.2d at 567, 85 Cal. Rptr. at 839 (quoting *Griswold v. Conn.*, 381 U.S. 479, 484 (1965)).

19. *Id.* at 431-32, 467 P.2d at 567, 85 Cal. Rptr. at 839.

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

21. 410 U.S. 113 (1973).

22. *Id.* at 153-54.

23. *Id.* at 155 (citations omitted).

24. 542 F.2d at 1069.

25. "We have no doubt that the right of privacy relied on by Dr. Caesar is substantial." *Id.* at 1068. The majority's discussion of the patient's right of privacy is superficial, and despite the conclusionary statement, it does not appear sensitive to the real weight of the interest involved. Thus, in the one statement concerning the importance of confidentiality to the relationship, the court stated, "The *Lifschutz* court recognized, as we do, that psychotherapy is *perhaps* more dependent on absolute confidentiality than other medical disciplines." *Id.* at 1067 (emphasis added). Most commentators do not qualify the need for confidentiality in the psychotherapeutic relationship, and certainly not in relation to other medical disciplines. See notes 42-45 *infra* and accompanying text.

26. 542 F.2d at 1069.

a compelling state interest exists, it is not clear in the majority opinion that the court balanced the state interests involved against the substantial needs of privacy for psychotherapeutic communications or that the court was sufficiently sensitive to the unique requirements of confidentiality in the psychotherapeutic relationship.²⁷

Additionally, the court held that section 1016, as construed by the California Supreme Court in *Lifschutz*, was narrowly drawn to express only the legitimate state interest.²⁸ The *Caesar* majority specifically endorsed the *Lifschutz* reasoning by rejecting Dr. Caesar's contention that section 1016 operates as a complete waiver of the psychotherapist-patient privilege:

Under section 1016 disclosure can be compelled only with respect to *those mental conditions* the patient-litigant has "disclose[d] . . . by bringing an action in which *they* are at issue". . . ; communications which are not directly relevant to those specific conditions do not fall within the terms of section 1016's exception and therefore remain privileged.²⁹

The California Supreme Court also noted important safeguards were available to protect parties and witnesses, including California Code of Civil Procedure section 2019(b)³⁰ and California Evidence Code section 352.³¹ With these safeguards and the judicial construction placed on section 1016 limiting the exception to relevant communications actually put in issue, the majority concluded that section 1016 "strikes a proper balance between the conditional right of privacy encompassing the psychotherapist-patient relationship and the state's compelling need to insure the ascertainment of the truth in court proceedings."³²

27. See notes 42-50 *infra* and accompanying text.

28. 542 F.2d at 1069-70.

29. *Id.* at 1069-70 (quoting *In re Lifschutz*, 2 Cal. 3d at 435, 467 P.2d at 570, 85 Cal. Rptr. at 842 (citation omitted)).

30. California has provided broad protection to the litigant and deponent by granting the court the authority to make any "order which justice requires to protect the party of witness from annoyance, embarrassment, or oppression." CAL. CIV. PROC. CODE § 2019(b)(1) (West Supp. 1977). The court in *Caesar* recognized this safeguard and specifically held that it, along with the express limitation in the statute itself and the additional protection provided by section 352 of the California Evidence Code, *see* note 31 *infra*, afforded sufficient protection to withstand constitutional attack. 542 F.2d at 1070.

31. Section 352 provides:

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

CAL. EVID. CODE § 352 (West 1970).

32. 542 F.2d at 1070.

The difficulty with the majority's analysis was lucidly illustrated by the dissent. As Judge Hufstedler noted, the majority applied the proper constitutional test, but incorrectly balanced the patient's relative rights to privacy in his psychotherapeutic communications against the rights of the state in the production of relevant evidence. The dissent emphasized the confidential nature of psychotherapeutic communications which probe "the core of the patient's personality."³³ "This sensitive zone of privacy is protected as a fundamental constitutional right. Although the right is not absolute, it enters the combat zone heavily armed."³⁴ In contrast to the majority's superficial treatment, the dissent is sensitive to the complexity of the rights involved. Judge Hufstedler noted that if the conflict were merely between the state's interest in truth in legal proceedings and the patient's right to his privacy, "the patient's interest in his privacy would easily prevail over the state's general interest in the production of relevant evidence in a routine personal injury case."³⁵ She believed that the majority, as well as the *Lifschutz* court, "incorrectly assessed the weight of the patient's right of privacy."³⁶

Judge Hufstedler further stated that the "means adopted in *Lifschutz* to ameliorate the impact of section 1016 upon the patient's right of privacy are not sufficiently sensitive to withstand constitutional scrutiny."³⁷ She concluded that the *Lifschutz* test of limited waiver to allow disclosure of only those communications relevant to the specific issues tendered by the patient was a failure, because it was impossible to apply in practice. Moreover, to the extent that it can be applied, it "impermissibly encroaches on the patient's zone of protected privacy."³⁸ In order for the plaintiff-patient to sustain his burden of showing that the requested communications are not relevant, he will be forced to reveal the very communications sought to be protected. Further, the dissent perceptively recognized that the doctrine of the patient-litigant

33. *Id.* at 1071-72.

34. *Id.* at 1072 (footnote omitted).

35. *Id.* at 1073. Judge Hufstedler's analysis correctly recognizes the complexity of the interests involved:

The state is interested in effective access to the courts and in fair trials with respect to both plaintiffs and defendants in civil litigation. On the patient-plaintiff's side, the state also has interests in the deterrent effect of civil litigation upon potential tort-feasors, in the health of its citizens, and in the protection of privacy of its citizens. The economic interests of the plaintiff and defendant are also at stake.

Id. (footnote omitted).

36. *Id.* at 1071.

37. *Id.*

38. *Id.* at 1073.

waiver, strongly relied upon as a justification for section 1016 by the *Caesar* majority and also by the *Lifschutz* court, is not voluntary but coercive.³⁹ A psychotherapeutic patient's only recourse to safeguard his constitutionally-protected right of privacy is to forego legal redress for an injury.

Judge Hufstедler concluded her dissent by offering an alternative to the *Lifschutz* approach:

As applied to civil personal injury litigation, I would restrict the concept of relevance used in Section 1016 . . . as follows: No confidential communication between a psychotherapeutic patient and his treating doctor shall be deemed relevant for the purpose of Section 1016, except the fact of treatment, the time and length of treatment, the cost of treatment, and the ultimate diagnosis, unless the party seeking disclosure of the communication establishes in the trial court a compelling need for its production.⁴⁰

The fact of treatment and the time, length and cost thereof are termed "only arguably confidential" in justifying their disclosure, while the ultimate diagnosis would be compelled to "permit a defendant to decide whether that mental or emotional condition has some bearing upon the issues."⁴¹ This compromise between the protection of the patient-plaintiff's right of privacy and the defendant's right to a fair trial is a sensible approach to the complex balancing required when fundamental constitutional rights conflict with compelling state interests. However, it is submitted that the dissent's approach is based upon a fundamental misconception that the treating psychotherapist's testimony is inherently relevant. Moreover, the dissent's approach fails to recognize that the privilege standard is a poor analytical framework within which to balance such important rights.

III. ANALYSIS

There is general agreement among the commentators and a wide acceptance in the case law that the psychotherapist-patient relationship is deserving of special protection.⁴² At the core of the relationship is

39. *Id.* at 1074.

40. *Id.* at 1074-75.

41. *Id.* at 1075.

42. Judge Edgerton, in an oft-quoted opinion, stated, "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." *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955). He continued, "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

trust, and that trust is founded upon the patient's belief that his psychotherapist will maintain the confidentiality of their communications.⁴³ Freud said, "The whole undertaking becomes lost labour if a single concession is made to secrecy."⁴⁴ Indeed, the unique nature of psychotherapy and the need to protect the confidentiality of the psychotherapeutic relationship is expressly recognized in the Comments to the California Evidence Code:

Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. . . . Unless a patient . . . is assured that such information can and will be held in utmost confidence, he will be reluctant to make full disclosure upon which diagnosis and treatment . . . depends.⁴⁵

Not only is the psychotherapist-patient relationship deserving of protection, but the very nature of the relationship weighs against disclosure. Psychotherapy has been defined as the "alteration of human behavior through interpersonal relationships."⁴⁶ It is really "a form of

fantasies, his sins, and his shame." *Id.* (quoting M. GUTTMACHER & H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 272 (1952)).

The California Supreme Court stated in *Lifschutz*:

We recognize the growing importance of the psychiatric profession in our modern, ultracomplex society. The swiftness of change—economic, cultural and moral—produces accelerated tensions in our society, and the potential for relief of such emotional disturbances offered by psychotherapy undoubtedly establishes it as a profession essential to the preservation of societal health and well-being. Furthermore, a growing consensus throughout the country, reflected in a trend of legislative enactments, acknowledges that an environment of confidentiality of treatment is vitally important to the successful operation of psychotherapy.

2 Cal. 3d at 421-22, 467 P.2d at 560-61, 85 Cal. Rptr. at 831-32 (footnote omitted).

For recognition of the need for protection of the psychotherapeutic relationship, see *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 440-42, 551 P.2d 334, 346-48, 131 Cal. Rptr. 14, 26-28 (1976); *Roberts v. Superior Court*, 9 Cal. 3d 330, 339-40, 508 P.2d 309, 314-15, 107 Cal. Rptr. 309, 314-15 (1973); *Grey v. Superior Court*, 62 Cal. App. 3d 698, 703, 133 Cal. Rptr. 318, 320 (1976). See also R. SLOVENKO, *PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATIONS* 37-52 (1966) [hereinafter cited as *PRIVILEGED COMMUNICATIONS*]; Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 621 (1964) [hereinafter cited as Fisher]; Louisell & Sinclair, *The Supreme Court of California 1969-70—Forward: Reflections on the Law of Privileged Communications—The Psychotherapist-Patient Privilege in Perspective*, 59 CALIF. L. REV. 30, 51-53 (1971) [hereinafter cited as Louisell & Sinclair].

43. D. DAWIDOFF, *THE MALPRACTICE OF PSYCHIATRISTS* 44 (1973). "In fact, the essence of much of psychotherapy is the learning of trust in the external world by the formation of a trusting relationship with the therapist." *Id.*

44. S. FREUD, *COLLECTED PAPERS* 356 (1969 ed.), quoted in Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope*, 23 CATH. U.L. REV. 649 (1974) [hereinafter cited as Slovenko].

45. CAL. EVID. CODE § 1014 (West 1970) (Comment—Senate Committee on Judiciary).

46. Comment, 8 AM. PSYCHOLOGIST 49 (1953), quoted in Fisher, *supra* note 42, at 618.

education, a means of restoring morale, and not part of any medical system Persons may come to psychotherapy for relief of specific symptoms or disabilities, but the underlying reason for seeking help is demoralization, a state of mind that results from persistent failure to cope with internally or externally induced stresses."⁴⁷ Once the law recognizes that psychotherapy is a process, less value will be placed upon psychotherapeutic testimony and, in balancing the rights of privacy against disclosure, the substantial rights of privacy involved will be afforded their due protection.

Furthermore, the type of testimony given is not reliable for use in court. "Psychic reality (inner reality) is not the same as actual reality (outer reality). . . . As the material revealed in psychotherapy does not deal with reality of the outer world, it would make poor, yet prejudicial evidence."⁴⁸ Psychotherapy necessarily deals with fantasies, free-associations and dreams—none of which are representative of truth or suitable as the basis for courtroom deliberation. And the psychotherapist, in treatment and diagnosis, resorts to language that is as confusing to the fact finder as the subjects with which he or she deals.⁴⁹ The testimony of the treating psychotherapist has generally no relevant value in the courtroom and should be excluded altogether or very strictly limited to protect the patient's fundamental right of privacy.⁵⁰

Privileges operate as an exemption from the generally recognized duty of all persons to give testimony and are therefore generally disfavored.⁵¹ The California Evidence Code is consistent with this ap-

47. Slovenko, *supra* note 44, at 670.

48. PRIVILEGED COMMUNICATIONS, *supra* note 42, at 47.

49. *See id.* at 48-49.

50. *Id.* at 47-48. *See also* Fisher, *supra* note 42, at 631 ("communications to some classes of psychotherapists are often weird composites of fabrication and fantasy, the significance of which is beyond the trier of fact"); Note, 49 TEX. L. REV. 929, 936 (1971) ("the benefit to the administration of personal injury litigation is exaggerated because psychiatric testimony is necessarily cast in prejudicial terminology and inevitably founded upon debatable analyses of such material as subconscious fantasies").

Further, several commentators have recognized that the need for the treating psychotherapist's testimony is lessened because of the availability of at least an equally reliable source—the court-appointed examining psychiatrist. *See* PRIVILEGED COMMUNICATIONS, *supra* note 42, at 108-09; Note, 49 TEX. L. REV. 929, 936 & n.30 (1971).

In fact, . . . a psychiatrist appointed to carry out an examination usually obtains in one hour more information related to the legal issues without a promise of confidentiality, than a treating psychiatrist who may have seen the patient over a period of years. An examiner conducts an interview with the legal issue directly in mind, whereas in therapy, the subject may never come up or if it does it may be diluted with fantasy and association.

Slovenko, *supra* note 44, at 662.

51. 8 J. WIGMORE, EVIDENCE § 2192, at 73 (3d ed. McNaughten rev. 1961).

proach: "Except as otherwise provided by statute: (a) No person has a privilege to refuse to be a witness."⁵² Privileges have an anti-democratic connotation, and in the present post-Watergate environment they are particularly subject to disfavor. Moreover, the physician-patient privilege, with which the psychotherapist-patient privilege has been strongly associated, has been subjected to particularly strong criticism.⁵³ This general disfavor with privileges is manifested by the numerous statutory exceptions carved out of the various privilege rights and the strict construction generally applied by the courts to claims of privilege. The question, then, is whether privilege is any longer a viable means of protecting the confidentiality of psychotherapist-patient communications.⁵⁴

Privileges are especially inappropriate when dealing with the more modern psychotherapeutic techniques. Privileges are predicated on a one-to-one relationship and are held to be waived if the privilege holder has disclosed a significant part of the communications to nonessential third persons.⁵⁵ Group therapy is increasingly practiced today and the traditional one-to-one psychotherapeutic relationship is becoming the exception. Privilege law would have to be severely strained in order to protect communications made within such groups, despite the recognized need to maintain confidentiality and trust in order for the groups to function effectively.

The real question, however, is not one of privilege—although it is discussed as such—but relevance.⁵⁶ A privilege lends an aura of relevance to the communication sought to be protected. "The harm done, though, by privilege law is that the privilege gives an undue sense of importance to communications in psychotherapy."⁵⁷ The fact that these communications are protected by a privilege which is strongly defended in court often leads to the natural assumption that the communications are particularly relevant. In fact, they are generally irrelevant⁵⁸ and are strongly defended against disclosure only because of their tendency to be intimate, embarrassing and prejudicial.

Section 1016 of the California Evidence Code provides: "There is no privilege under this article as to a communication *relevant* to an is-

52. CAL. EVID. CODE § 911 (West 1970).

53. See 8 J. WIGMORE, EVIDENCE § 2380a (3d ed. McNaughten rev. 1961); Note, 49 TEX. L. REV. 929, 932-33 & n.13, 941 & n.56 (1971).

54. See generally Slovenko, *supra* note 44.

55. CAL. EVID. CODE § 912 (West 1970).

56. See Louisell & Sinclair, *supra* note 42, at 43-46; Slovenko, *supra* note 44, at 657-59.

57. See Slovenko, *supra* note 44, at 658-59.

58. See notes 48-50 *supra* and accompanying text.

sue concerning the mental or emotional condition of the patient”⁵⁹ Thus, before the court can rule upon the existence of a privilege, it must first determine whether the information sought is relevant to the mental or emotional issue tendered by the patient. *Lifschutz* expressly recognized that relevance was the correct test and used it to limit the patient-litigant exception to the privilege.⁶⁰ While *Caesar* fully endorsed the *Lifschutz* test, the dissent would have restricted its application.⁶¹ The significance of this formulation is that if relevance is the true test of whether a patient has waived his right to confidentiality of psychotherapeutic communications, then the court’s recognition of the minimal relevance of a treating psychotherapist’s testimony will adequately protect the patient’s right to privacy.

Therefore, in order to adequately insure that the fundamental constitutional right of privacy will be protected, this casenote will propose a modification of the *Lifschutz* test. First, the initial burden of proving relevance should be placed upon the proponent of the evidence and should require him to make a prima facie showing that the information requested is indispensable to the presentation of his case and cannot be obtained from any other source. Secondly, if the requisite showing has been made by the proponent, the burden should shift to the privilege holder to prove that the communications sought are not relevant. Finally, upon proper motion by the privilege holder, the judge should hold an ex parte hearing in chambers to determine the validity of the privilege holder’s claim of irrelevance.

By shifting the burden of proof initially to the proponent of the evidence, this proposal would require the court to consider the need for the information, the proper limits to be put on the information disclosed, and whether adequate alternative sources are available before requiring disclosure. This would eliminate “fishing expeditions” and prevent the form of blackmail possible under the present approach wherein the privilege holder, in fear of revealing potentially embarrassing personal secrets under a general discovery demand for such information, might forego part of his claim rather than disclose the fact of treatment.⁶² The author is well aware of the arguments advanced by the *Lifschutz* court, and tacitly endorsed by the Ninth Circuit in *Caesar*, that it would be unjust to require the proponent to bear the burden of proving relevancy since “only the patient, and not the party seeking

59. CAL. EVID. CODE § 1016 (West 1970) (emphasis added).

60. 2 Cal. 3d at 431, 435, 467 P.2d at 567, 570, 85 Cal. Rptr. at 839, 842.

61. 542 F.2d at 1073-75.

62. Slovenko, *supra* note 44, at 653-54.

disclosure, knows both the nature of the ailments for which recovery is sought and the general content of the psychotherapeutic communications, . . .”⁶³ However, this argument is not convincing. The patient is rarely aware of the scope of his revelations to, or the nature of the conclusions of, his treating psychotherapist.⁶⁴ Moreover, this proposal only requires the proponent to demonstrate a particular need for information about the psychotherapeutic communications and does not require knowledge of the communications themselves.

By providing an *in camera* procedure for judicial determination of the privilege holder’s claim of irrelevancy, this proposal avoids the problem noted in the *Lifschutz* decision where the privilege holder would have to reveal part of his private communications in order to justify his privilege claim. The California Evidence Code already provides for such *in camera* hearings in those cases where the identity of an informer and the nature of a trade secret are sought.⁶⁵ Psychotherapeutic communications deserve no less protection.

This proposal, it is submitted, is also preferable to Judge Hufstedler’s approach in the *Caesar* dissent because it correctly recognizes the minimal probative value of the treating psychotherapist’s testimony,⁶⁶ and because it protects the very fact of treatment from unwarranted disclosure. Judge Hufstedler’s proposal, by failing to shift the initial burden of proof to the proponent, does not adequately protect the substantial right of privacy involved when weighed against the probative value of the treating psychotherapist’s testimony. Further, she errs in maintaining that disclosure of the fact of treatment alone is only “arguably confidential”⁶⁷ where, in fact, it can be a severe intrusion into a person’s privacy.⁶⁸ Unless that intrusion is warranted by an indispensable need

63. 2 Cal. 3d at 436, 467 P.2d at 571, 85 Cal. Rptr. at 843.

64. Note, 49 TEX. L. REV. 929, 938 & nn.39-41 (1971).

65. CAL. EVID. CODE § 915 (West 1970).

66. See notes 48-50 *supra* and accompanying text.

67. 542 F.2d at 1075.

68. The very fact of the psychotherapeutic relationship is still largely regarded as a badge of dishonor. The effects of the revelation of Senator Eagleton’s past psychiatric treatment is a striking example of the way society views such treatment. Numerous commentators have stressed that the very fact of treatment can be a severe intrusion into a person’s zone of privacy. See Fisher, *supra* note 42, at 643-44 (author’s model statute extended privilege to prevent disclosure of facts “tending to show that the patient and a psychotherapist have entered into a psychotherapeutic relationship”); Fleming & Maximov, *The Patient or His Victim: The Therapist’s Dilemma*, 62 CALIF. L. REV. 1025, 1050-51 (1974) (authors discuss the Eagleton affair and Ford’s Vice-Presidential confirmation hearings and conclude that the patient wants protection from disclosure of the very fact of therapy; from disclosure of intimate, personal facts;

for the information, disclosure is simply too high a price to pay for revealing the fact of treatment in light of the potential harm it may cause.

IV. CONCLUSION

In holding that the patient-litigant exception to the psychotherapist-patient privilege is valid, *Caesar v. Mountanos* has failed to provide the psychotherapeutic patient the complete protection his communications require. However, it should be recognized by the litigant that even under the *Caesar* approach—limiting the waiver of the psychotherapist-patient privilege to those communications directly relevant to an issue tendered by the patient-litigant and concerning his mental or emotional condition—there are numerous means available to protect the confidentiality of the litigant's psychotherapeutic communications.⁶⁹ Although this approach can provide adequate protection for psychotherapeutic communications,⁷⁰ this writer believes that a recognition of the

and from being subjected to a psychiatric label); Slovenko, *supra* note 44, at 654 ("many persons feel that they will become objects of stigma, censure and ridicule if even disclosure of the relationship is made").

69. See Suarez & Hunt, *The Patient-Litigant Exception in Psychotherapist-Patient Privilege Cases: New Considerations For Alaska and California Since In Re Lifschutz*, 1 U.C.L.A.-ALAS. L. REV. 2, 16 & n.40 (1971). The principal safeguards include: (1) the arguable requirement that true informed consent of the patient be obtained for his waiver under section 1016; (2) the limitation placed on the patient-litigant exception by *Lifschutz* in allowing disclosure of only those mental or emotional conditions directly relevant to the action; (3) the requirement that in order to constitute a waiver the patient must have disclosed "a significant part of the communication" (CAL. EVID. CODE § 912 (West 1970)); (4) the possibility of *ex parte* disclosure to determine relevance; (5) the imposition, upon motion, of a court order to protect parties and deponents (CAL. CIV. PROC. CODE § 2019(b) (West Supp. 1976) and *see* note 30 *supra* and accompanying text); and (6) the court's discretion to exclude prejudicial evidence (CAL. EVID. CODE § 352 (West 1970) and *see* note 31 *supra* and accompanying text).

70. The present approach of the California courts at least arguably provides sufficient protection for psychotherapeutic communications. In the *Lifschutz* case, Dr. Lifschutz had refused to reveal any information, including the fact of treatment, but since the patient had revealed that fact in a deposition, it could be argued that all that Dr. Lifschutz would be required to reveal is the mere fact of treatment. 2 Cal. 3d at 439, 467 P.2d at 573, 85 Cal. Rptr. at 845. In *Roberts v. Superior Court*, 9 Cal. 3d 330, 508 P.2d 309, 107 Cal. Rptr. 309 (1973), the California Supreme Court held that the section 1016 waiver did not apply under the *Lifschutz* test when the patient alleged that she was "rendered sick, sore, lame, and disabled as a result of defendants' negligence," since such an allegation does not constitute placing the patient's mental condition in issue and the psychotherapeutic communications are not "directly relevant to a specific mental condition placed in issue by petitioner." *Id.* at 338, 508 P.2d at 314, 107 Cal. Rptr. at 314. Finally, in *Grey v. Superior Court*, 62 Cal. App. 3d 698, 133 Cal. Rptr. 318 (1976), the court held that an insurance company had not presented prima facie proof that a psychiatrist's testimony would be relevant in a wrongful death action in which the insurance company merely speculated that the accident might be the result of suicide. "That

minimal probative value of the treating psychotherapist's testimony and a strict application of the relevancy standard with appropriate procedural safeguards⁷¹ will provide the substantial protection the patient's fundamental constitutional right of privacy deserves.

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kind of speculation, based solely on the physical evidence of the collision, is not enough to justify an invasion of the doctor's privacy." *Id.* at 704, 133 Cal. Rptr. at 321.

71. See notes 62-65 *supra* and accompanying text.