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A PSYCHOLOGICAL CRITIQUE OF THE ASSUMPTIONS UNDERLYING THE LAW OF EVIDENTIARY PRIVILEGES: INSIGHTS FROM THE LITERATURE ON SELF-DISCLOSURE

*Edward J. Imwinkelried**

The rules governing privileges such as attorney-client and psychotherapist-patient are arguably the most important evidentiary doctrines. Most evidentiary rules relate to the courts' institutional concerns. For instance, the authentication and hearsay doctrines are largely calculated to ensure the reliability of the evidence submitted to the trier of fact.¹ By enhancing the trustworthiness of that evidence, the rules increase the probability that the trier will make accurate findings of fact. The focus of these rules is on the in-court behavior of witnesses, attorneys, and triers.

Privilege rules stand in sharp contrast. These doctrines rest on "extrinsic policy."² During the 1973 Congressional hearings on the then-proposed Federal Rules of Evidence, former Supreme Court Justice Arthur Goldberg remarked that privilege rules are "the concern of the public at large."³ During the Congressional

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1. See Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 229 n.11 (1988) (noting that underlying many of the categorical negative rules was the assumption that jurors in a less-sophisticated time were ill-equipped to accurately assess the reliability of some evidence).

2. 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, at v (John T. McNaughton rev., 1961).

3. *Rules of Evidence: Hearings Before the Spec. Subcomm. on Reform of Fed. Criminal Laws of the House Comm. on the Judiciary*, 93d Cong. 143-44 (1973) (testimony of Hon. Arthur J. Goldberg).

deliberations, Representative Elizabeth Holtzman observed that “unlike most evidentiary rules, privileges protect interpersonal relationships outside of the courtroom.”⁴ It is a matter of common knowledge that in selecting cases for decision, the Supreme Court tends to select cases that are most likely to have significant social impact. In that light, it speaks volumes that since the adoption of the Federal Rules of Evidence, the Court has rendered more decisions relating to privilege law than any other part of the Federal Rules.⁵

If privileges are the most important doctrinal area in Evidence, the late Dean Wigmore is undeniably the most important commentator on that doctrinal area. Although many of the volumes of his classic treatise are now badly out of date, even today his treatment of privileges exercises great authority.⁶ The original version of the Federal Rules of Evidence drafted by the Advisory Committee contained detailed privilege provisions, and the accompanying Advisory Committee Notes were replete with frequent citations to Wigmore’s privilege volume.⁷ During the Congressional hearings on the draft, numerous witnesses appealed to Wigmore’s work as authority.⁸ Of even more importance, the courts often treat the volume as persuasive secondary authority.⁹ In one decision, the Supreme Court declared that Dean Wigmore’s theorizing on the topic has long been viewed as the rationale for privileges.¹⁰ In its two most recent privilege opinions, *Jaffee v.*

4. H.R. REP. NO. 93-650, at 28 (1973).

5. See Note, *Protecting Confidential Communications Between a Psychotherapist and Patient: Jaffee v. Redmond*, 46 CATH. U. L. REV. 963, 963 n.1 (1997).

6. See WILLIAM TWING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 171 (1985).

7. See, e.g., PAUL F. ROTHSTEIN, FEDERAL RULES OF EVIDENCE 235, 237, 240, 243–47, 249, 253, 255, 257 (3d ed. 2003).

8. See generally 1 EDWARD IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 4.2.1 (2002) (noting that at many points the draft embodied Wigmorean views).

9. See 1 JOHN S. STRONG, MCCORMICK ON EVIDENCE § 72, at 300 (5th ed. 1999) (acknowledging that “Wigmore’s views have been widely accepted by the courts”).

10. See *United States v. Zolin*, 491 U.S. 554, 562 (1989) (stating that the central concern underlying the privilege is to “encourage full and frank communication between attorneys and their clients and thereby promote broader public interests” (quoting *Upjohn Co. v. United States*, 449 U.S. 383,

*Redmond*¹¹ dealing with psychotherapist-patient in 1996 and *Swidler & Berlin v. United States*¹² dealing with attorney-client in 1998, the Supreme Court invoked the authority of the treatise.

If Wigmore is the most important privilege theorist, perhaps his most important tenet is that interpersonal privileges must be “absolute” in character.¹³ In this context, “absolute” is a technical term of art.¹⁴ Wigmore realized that decision makers such as legislatures and judges must employ a balancing test to determine whether, as a matter of general policy, to confer a privilege on a particular relationship such as attorney-client.¹⁵ Furthermore, he conceded both that a privilege holder should be permitted to waive the privilege and that the privilege could be subject to exceptions enunciated beforehand.¹⁶

Yet Wigmore argued that if a privilege applied and there was no recognized exception to its scope, the opposing litigant ought not be allowed to overcome the privilege by a case-specific showing of need for the privileged information.¹⁷ Wigmore contended that the

389 (1981)).

11. 518 U.S. 1, 9 (1996).

12. 524 U.S. 399, 406 (1998).

13. Edward J. Imwinkelried, *The New Wigmore: An Essay On Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315, 319 (2003).

14. *Id.*

15. See Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 998 (1999) (referring to Wigmore’s fourth condition to establish a privilege, i.e., where the injury to the relation caused by the disclosure of communications must be greater than the benefit gained by the correct disposal of litigation).

16. Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. PITT. L. REV. 145, 147 (2004).

17. *Id.*; see, e.g., *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1495 (9th Cir. 1989) (remanding case “with instructions to vacate the part of the order compelling production” of privileged communications despite the loss of information needed to establish plaintiff’s case); *United States v. Grice*, 37 F. Supp. 2d 428, 431 n.13 (D.S.C. 1998) (acknowledging the principle that no matter how great prosecutorial need for privileged information may be, the privilege still prevails); see also 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 2.2, at 11 (2d ed. 1999) (noting that absent a waiver of protection, the privilege precludes the disclosure of communications regardless of the need for the information).

trial judge should be forbidden from employing a balancing test to determine whether, in a given case, the need for the privileged information outweighed the policies underlying the privilege.¹⁸ According to Wigmore, ad hoc balancing was anathema.¹⁹ That view reflected Wigmore's fundamental behavioral assumption that without the assurance of confidentiality that a formal evidentiary privilege provided, laypersons such as potential patients would not confer with or confide in consultants such as therapists.²⁰ For its part, the Supreme Court has not only indicated that it agrees with Wigmore's behavioral assumption,²¹ but has signaled in no uncertain terms that it shares Wigmore's view that interpersonal privileges must be absolute. In both *Jaffee* and *Swidler & Berlin*, the lower courts took the position that the privilege was qualified and could be defeated by a compelling demonstration of necessity.²² In both cases, the Supreme Court characterized the privilege as absolute in a Wigmorean sense.²³ In *Swidler & Berlin*, the majority stated that "uncertain privileges are disfavored."²⁴ The Court classified the privilege as absolute in order to avoid injecting "substantial uncertainty into the privilege's application."²⁵ In the Court's wording, "[b]alancing *ex post* the importance of the information against client interests . . . introduces" intolerable "uncertainty."²⁶

At first blush, it appears puzzling that Wigmore advocated absolute privileges. Like his predecessor, the great utilitarian philosopher Jeremy Bentham, Wigmore subscribed to the truth

18. See Imwinkelried, *supra* note 13, at 319–20.

19. See *id.*

20. *Id.* at 317.

21. In *Upjohn*, the Court asserted that at the very time of their interaction, the participants "must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). If the layperson, such as the potential client, cannot confidently forecast whether in the future a privilege will cloak his or her revelation, the person presumably will not consult or confide. The layperson cannot make that prediction if, after the fact of the communication, a judge may override the privilege based on a showing of need.

22. *Jaffee v. Redmond*, 518 U.S. 1, 5–7 (1996); *Swidler & Berlin v. United States*, 524 U.S. 1, 402 (1998).

23. See *Jaffee*, 518 U.S. at 17–18; *Swidler & Berlin*, 524 U.S. at 408–09.

24. *Swidler & Berlin*, 524 U.S. at 402.

25. *Id.* at 409.

26. *Id.*

theory of litigation.²⁷ He was sympathetic with Bentham's rationalist premise that the primary objective in adjudication is rectitude of decision.²⁸ The first and foremost objective of the litigation system must be to accurately ascertain the truth.²⁹ How then could Wigmore favor absolute privileges? He understood that in general, privileges impeded the search for truth. Worse still, an absolute privilege could be an insuperable barrier to the discovery of the truth.

In Wigmore's mind, though, it was easy to reconcile the truth theory with his advocacy of absolute privileges. Wigmore advocated the conferral of privileges on social relations only if the "element of *confidentiality*" is "essential to the full and satisfactory maintenance of the relation between the parties."³⁰ Confidentiality had to be so essential to the relationship that absent the assurance that an absolute privilege afforded, the layperson would not confer with or confide in the potential consultant. As support for his position, Wigmore quoted the sweeping language in an 18th century English decision to the effect that without such an attorney-client privilege, "there would be an entire stop to [legal] business; nobody would trust an attorney with the state of his affairs."³¹ In 1976, the Supreme Court explained in *Fisher v. United States*³² that the attorney-client privilege is designed to "protect[] only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege." In *Jaffee*, Justice Stevens wrote:

[T]he likely evidentiary benefit that would result from the denial of the [psychotherapist] privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled . . . Without a privilege, much of the desirable

27. See Imwinkelried, *supra* note 16, at 150 (noting that Wigmore agreed with Bentham's belief that the main objective in litigation is rectitude of decision).

28. *Id.*; see TWINING, *supra* note 6, at 14–16.

29. See TWINING, *supra* note 6, at 14–16; BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT AND PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE (1991) (exploring the development of the beyond a reasonable doubt doctrine).

30. 8 WIGMORE, *supra* note 2, § 2285, at 527–28.

31. 8 *Id.* § 2291, at 545–46 (quoting *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1139 (Ex. 1743)).

32. 425 U.S. 391, 403 (1976).

evidence to which litigants such as [plaintiffs] seek access—for example, admissions . . . by a party—[would be] unlikely to come into being. This unspoken “evidence” [would] therefore serve no greater truth-seeking function than if it had been spoken and privileged.³³

In short, the absolute privilege is conceived as a necessary incentive for the typical layperson contemplating a communication with an attorney or therapist.³⁴ The assumption is that there is a causal relationship between the recognition of such privileges and the occurrence of the desired behavior; but for the existence of the privilege, the average person would supposedly be unwilling to engage in the conduct of consulting and confiding.³⁵

Positing this behavioral assumption allowed Wigmore to reconcile the truth theory of litigation with the classification of privileges as absolute. In the words of Professor Melanie Leslie, “In a perfect [Wigmorean] world . . . the privilege would shield no evidence. Privilege generates the communication that the privilege protects. Eliminate the privilege, and the communication disappears [T]he privilege would protect only . . . statements that would not otherwise have been made.”³⁶

Wigmore believed that on balance there would be a “wash”³⁷ because in most instances, absent the privilege the evidence would never have come into existence.³⁸ As Chief Justice Rehnquist stated

33. *Jaffee v. Redmond*, 518 U.S. 1, 11–12 (1996).

34. See 3 WEINSTEIN'S FEDERAL EVIDENCE § 504.03[4][a], at 504–10 (Joseph M. McLaughlin ed., 2d 2004); 26A CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5680, at 140–41 (1992) (noting that the policy for the privilege has given rise to the distinction between fact and opinion, and courts have limited the deliberative process privilege to opinions).

35. See 3 WEINSTEIN'S FEDERAL EVIDENCE, *supra* note 34, § 504.03[4][a], at 504–10 to 504–11.

36. Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 31 (2000).

37. See Pollard, *supra* note 15, at 999–1000 (noting that “exceptions to privileges and concepts such as waivers diminish the costs of the privilege and can provide access to the most important evidence”).

38. Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 215–16, 231 (1988).

in *Swidler & Berlin v. United States*, the justice system is in no worse position because “the loss of evidence is more apparent than real.”³⁹

Wigmore’s assumption is a comforting one. It is certainly reassuring to believe that we can safeguard sensitive relations such as psychotherapy while simultaneously honoring a commitment to the truth theory. The question, though, is whether the assumption is valid. There have been a number of empirical studies of the confidentiality expectations of attorneys’ clients and therapists’ patients.⁴⁰ On the one hand, the studies indicate that the lack of absolute privilege protection would altogether deter a small minority of persons from consulting and that a significant minority might be guarded in their communications, especially written communications.⁴¹ On the other hand, the data falls short of validating a generalization that absent the protection of a formal,

39. *Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998).

40. See 1 IMWINKELRIED, *supra* note 8, at § 5.2.2 (discussing major empirical studies of psychotherapist-patient and attorney-client privileges); Imwinkelried, *supra* note 13, at 321–22 (discussing psychotherapist-patient and attorney-client studies); Edward Imwinkelried, *The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court’s Instrumental Reasoning in Jaffee v. Redmond*, 518 U.S. 1 (1996), 49 HASTINGS L.J. 969, 980 (1998) (discussing the psychotherapist-patient studies); Richard C. Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 KY. L.J. 1165, 1173–74 (1999) (discussing “the shortage of empirical evidence about whether the candor of communications would or would not be lessened if the privilege were curtailed at the client’s death”); see generally J. Brad Reich, *A Call for Intellectual Honesty: A Response to the Uniform Mediation Act’s Privilege Against Disclosure*, 2001 J. DISP. RESOL. 197, 213–15 (2001) (discussing three surveys by Daniel Shumen and Myron Weiner); Jennifer Evans Marsh, *Empirical Support for the United States Supreme Court’s Protection of the Psychotherapist-Patient Privilege*, 13 ETHICS & BEHAV. 385 (2003) (detailing a research project in which the subjects were given hypothetical situations). In several situations, the subjects were informed that since an exception to the privilege applied, there would be no privilege protection; thus, at the time of the communication the subjects knew that no privilege would later apply. *Id.* In the study, knowledge served as a significant deterrent to disclosure; however, if the basic privilege were qualified rather than absolute, at the time of the communication the subjects would not already know that the privilege would be inapplicable. *Id.* The study did not investigate the impact of reclassifying the privilege as qualified rather than absolute. *Id.*

41. Imwinkelried, *supra* note 16, at 162.

absolute evidentiary privilege, the average would-be client or patient would not consult or confide.⁴² Thus, the findings of the empirical studies most directly on point are at odds with Wigmore's assumption.

However, those studies are few in number.⁴³ There are fewer than two handfuls of studies specifically addressing this important evidentiary issue.⁴⁴ Is there any other research or literature that could shed light on the question?⁴⁵

42. *See id.*

43. *Id.*

44. *Id.*

45. In the past, legal scholars have, on occasion, turned to the psychological literature to critique the behavioral assumptions underlying evidentiary doctrines. *See* Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: State of Mind in Issue*, 29 COLUM. L. REV. 147, 150-57 (1929); Robert H. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 MINN. L. REV. 675, 683-86 (1929) [hereinafter Hutchins & Slesinger, *Family Relations*]; Robert M. Hutchins & Donald Slesinger, *Legal Psychology*, 36 PSYCHOL. REV. 13, 15 (1929); Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence—Consciousness of Guilt*, 77 U. PA. L. REV. 725 (1929); Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence—State of Mind to Prove an Act*, 38 YALE L.J. 283, 291-98 (1929); Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence—Memory*, 41 HARV. L. REV. 860, 863-73 (1928); Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence—The Competency of Witnesses*, 37 YALE L.J. 1017, 1021-28 (1928). However, the subject of the assumptions underpinning privilege doctrine has been largely overlooked. In their article in the *Minnesota Law Review*, Hutchins and Slesinger do address the issue briefly. Hutchins & Slesinger, *Family Relations*, *supra* note 45, at 679-82, 686. They point out that "practically no one outside the legal profession knows anything about the rules regarding privileged communications between spouses." *Id.* at 682. Furthermore, "marital harmony among lawyers who know about privileged communications is not vastly superior to that of other professional groups." *Id.* The authors favor a qualified privilege and assert that the judge should be able to surmount the privilege when the holder invokes the privilege to exclude "important" or "crucial" evidence that "can be obtained no other way." *Id.* at 686. The brevity of the authors' analysis is understandable. The authors wrote in the late 1920s, and the intensive psychological study of self-disclosure did not begin until the 1930s. *See* Raymond R. Reno & David A. Kenny, *Effects of Self-Consciousness and Social Anxiety on Self-Disclosure Among Unacquainted Individuals: An Application of the Social Relations Model*, 60 J. PERSONALITY 79, 80 (1992).

In fact, there is a considerable,⁴⁶ extensive⁴⁷ body of psychological literature on the subject of communication in general, and of self-disclosure in particular. Beginning in the 1930s, Lewin began studying self-disclosure as a social psychological phenomenon.⁴⁸ In the late 1950s, Sidney Jourard published a celebrated article on the subject in *Mental Hygiene*.⁴⁹ That article spawned hundreds of studies investigating self-disclosure.⁵⁰ There has been a dramatic,⁵¹ virtually exponential⁵² increase in the size of the literature on this topic.

The purpose of this article is to survey that literature to identify any insights into the validity of behavioral assumptions underlying the current law of evidentiary privileges. More specifically, this article addresses two questions. One is the validity of Wigmore's generalization that without the protection of an absolute privilege, the average layperson would not confer with or confide in confidants such as therapists. Part one of this article surveys the psychological literature relevant to the generalization. That generalization is at the

46. See Gordon J. Chelune, *A Neuropsychological Perspective of Interpersonal Communication*, in SELF-DISCLOSURE: THEORY, RESEARCH, AND THERAPY 9, 9 (Valerian J. Derlega & John H. Berg eds. 1987) (noting that self-disclosure "has been extensively studied by social and clinical psychologists interested in interpersonal communication and close relationships").

47. See *id.*; Ken J. Rotenberg, *Disclosure Processes: An Introduction*, in DISCLOSURE PROCESSES IN CHILDREN AND ADOLESCENTS 1, 2 (Ken J. Rotenberg ed., 1995) (noting that disclosure processes in adults have been investigated extensively, but little is known about disclosure processes in children and adolescents); Nancy L. Collins & Lynn Carol Miller, *Self-Disclosure and Liking: A Meta-Analytic Review*, 116 PSYCHOL. BULL. 457, 457 (1994).

48. Reno & Kenny, *supra* note 45, at 80.

49. Charles H. Tardy, *Self-Disclosure and Health: Revisiting Sidney Jourard's Hypothesis*, in BALANCING THE SECRETS OF PRIVATE DISCLOSURES 111, 111-12 (Sandra Petronio ed. 2000); see also SIDNEY M. JOURARD, SELF-DISCLOSURE: THE TRANSPARENT SELF, at xi (1971) (acknowledging that Chapter 3 of *Transparent Self* appeared in *Mental Hygiene*).

50. Tardy, *supra* note 49, at 112.

51. Susan S. Hendrick, *Counseling and Self-Disclosure*, in SELF-DISCLOSURE: THEORY, RESEARCH, AND THERAPY, *supra* note 46, at 330.

52. Gordon J. Chelune, *Preface* to SELF-DISCLOSURE: ORIGINS, PATTERNS, AND IMPLICATIONS OF OPENNESS IN INTERPERSONAL RELATIONSHIPS, at x (1979).

heart of Wigmore's argument for classifying evidentiary privileges as absolute rather than qualified. If the literature undermines that assumption, there is a powerful case for treating privileges as qualified and permitting judges to employ a balancing test to decide whether to override the privilege in a given case.

If privileges should be reclassified as qualified, a second question naturally arises. In deciding whether to surmount the privilege, how much weight should the judge give to the layperson's interests? More fundamentally, what are the layperson's interests? Is the layperson interested only in obtaining the confidant's advice to help the layperson resolve a legal or medical problem? Part two of this article argues that in some circumstances, the layperson has other—and often weightier—interests at stake. Especially when such interests come into play, they cut in favor of upholding the privilege and against ordering the disclosure of the privileged information.

I. THE STRENGTH OF THE PSYCHOLOGICAL CASE FOR ABSOLUTE PRIVILEGES: THE VALIDITY OF WIGMORE'S BEHAVIORAL ASSUMPTION

At the outset, it is crucial to define the question. The question is not whether the creation of absolute evidentiary privileges is a sufficient incentive to encourage laypersons to disclose to confidants such as therapists. Realistically, no incentive will suffice to guarantee disclosure in all cases or perhaps even in the vast majority of cases.⁵³ Rather, the issue is whether the recognition of absolute privileges is a necessary incentive for the average layperson. It seems plausible that absolute privileges could function in that manner, but in scientific investigation it can be a grave mistake to equate the plausible with the proven. What does the literature tell us?

53. See Barry A. Farber, *Patient Self-Disclosure: A Review of the Research*, 59 J. CLINICAL PSYCHOL. 589, 591–92, 599 (2003) (“In one study . . . Weiner and Shuman (1984) found that 42% of their sample had withheld information from their therapists . . .” “Approximately two thirds of long-term psychotherapy patients acknowledge leaving something unsaid during sessions, and almost half admit having secrets . . . Thus, it does appear that a substantial proportion of therapy patients—perhaps about 50%—keep secrets from their therapists . . .”).

A. Support for Wigmore's Generalization

Two lines of research documented in the literature strengthen the case for the validity of Wigmore's generalization. One line shows that assurances of confidentiality, such as privileges, result in greater disclosure.⁵⁴ The subjects in some studies rate a person's willingness to keep secrets as one of the most important characteristics of a desirable confidant.⁵⁵ For example, assurances of confidentiality appear to promote disclosure by battered women to members of the staff of crisis centers.⁵⁶ Assurances serve "a . . . facilitating function."⁵⁷

Even accepting this line of research at face value, however, it falls short of validating Wigmore's generalization. Although the proponents of Wigmore's view need not establish that absolute privileges can function as a sufficient incentive for disclosure, they must demonstrate that it is a necessary incentive for the average layperson. Even if the person's realization of the existence of an absolute privilege increases the level of self-disclosure from 40% to 50%, it is fallacious to leap to the conclusion that the recognition of such privileges is an essential incentive. Simply stated, this line of research does not prove up Wigmore's claim.

There is, however, another line of relevant research that proponents of Wigmore's view can point to. This line of research concerns the hypothesis that in deciding whether to disclose private information, the layperson rationally balances the rewards and costs, including the long-term risk that the disclosed information will be used to the layperson's disadvantage. Perhaps the typical layperson attaches such great weight to that long-term risk that without an absolute privilege, he or she would be deterred from consulting.

As a general proposition, researchers have found that in making

54. See ANITA E. KELLY, *THE PSYCHOLOGY OF SECRETS* 182 (2002); Kevin J. Corcoran, *The Relationship of Interpersonal Trust to Self-Disclosure When Confidentiality Is Assured*, 122 J. PSYCHOL. 193, 193-94 (1988).

55. See KELLY, *supra* note 54, at 184.

56. See Lara E. Dieckmann, *Private Secrets and Public Disclosures: The Case of Battered Women*, in *BALANCING THE SECRETS OF PRIVATE DISCLOSURES*, *supra* note 49, at 275, 280.

57. William B. Stiles, *Disclosure as a Speech Act: Is It Psychotherapeutic to Disclose?*, in *EMOTION, DISCLOSURE, & HEALTH* 71, 71 (James W. Pennebaker ed. 1995).

their decision, laypersons engage in a balancing process.⁵⁸ In effect, the layperson practices privacy regulation.⁵⁹ On the one hand, laypeople consider the rewards,⁶⁰ benefits,⁶¹ or utility⁶² of disclosure. For example, they may factor into their decision whether the disclosure will contribute instrumentally⁶³ to the accomplishment of a goal.⁶⁴ They may weigh that benefit against the costs⁶⁵ or risks⁶⁶ incident to disclosure. Moreover, to an extent, they may make a forecast or prediction⁶⁷ of the long-term reward/cost consequences of disclosure.⁶⁸ Those who do so will plausibly be deterred from

58. See SANDRA PETRONIO, BOUNDARIES OF PRIVACY: DIALECTICS OF DISCLOSURE 1–2 (2002); see also Sandra Petronio, *Preface to BALANCING THE SECRETS OF PRIVATE DISCLOSURES*, *supra* note 49, at xiv (discussing that “balancing may result in de-emphasizing openness”); Kathryn Greene, *Disclosure of Chronic Illness Varies by Topic and Target: The Role of Stigma and Boundaries in Willingness to Disclose*, in *BALANCING THE SECRETS OF PRIVATE DISCLOSURES*, *supra* note 49, at 123, 134–35 (“People balance positive and negative potential consequences of disclosure before being willing to make decisions about illness.”).

59. See VALERIAN J. DERLEGA ET AL., SELF-DISCLOSURE 65–67, 86 (1993).

60. See IRWIN ALTMAN & DALMAS A. TAYLOR, SOCIAL PENETRATION: THE DEVELOPMENT OF INTERPERSONAL RELATIONSHIPS 6–7 (1973); Chelune, *supra* note 52, at xii.

61. PETRONIO, *supra* note 58, at 26; Lawrence B. Rosenfeld, *Overview of the Ways Privacy, Secrecy, and Disclosure Are Balanced in Today’s Society*, in *BALANCING THE SECRETS OF PRIVATE DISCLOSURES*, *supra* note 49, at 3, 10.

62. See Julia Omarzu, *A Disclosure Decision Model: Determining How and When Individuals Will Self-Disclose*, 4 PERSONALITY & SOC. PSYCHOL. REV. 174 (2000); David L. Vogel & Stephen R. Wester, *To Seek Help or Not to Seek Help: The Risks of Self-Disclosure*, 50 J. COUNSELING PSYCHOL. 351, 352 (2003).

63. See Chelune, *supra* note 52, at xii; ALTMAN & TAYLOR, *supra* note 60, at 161; see also David R. Shaffer et al., *Gender and Self-Disclosure Revisited: Personal and Contextual Variations in Self-Disclosure to Same-Sex Acquaintances*, 132 J. SOC. PSYCHOL. 307, 308 (1992).

64. See Valerian J. Derlega & Janusz Grzelak, *Appropriateness of Self-Disclosure*, in *SELF-DISCLOSURE: ORIGINS, PATTERNS, AND IMPLICATIONS OF OPENNESS IN INTERPERSONAL RELATIONSHIPS*, *supra* note 52, at 151, 154.

65. See ALTMAN & TAYLOR, *supra* note 60, at 6–7; Chelune, *supra* note 52, at xii.

66. See PETRONIO, *supra* note 58, at 26; Rosenfeld, *supra* note 61, at 10; Vogel & Wester, *supra* note 62, at 352.

67. See ALTMAN & TAYLOR, *supra* note 60, at 7.

68. See *id.*; see also Dalmás A. Taylor, *Motivational Bases*, in *SELF-*

disclosing by the risk that at a later point in time, a court will compel the disclosure of the information revealed to the confidant.

Yet, even this body of literature does not validate Wigmore's generalization. To begin with, the hypothesis assumes that the layperson is acting rationally at the time of the decision whether to disclose. Although the decision has a cognitive component,⁶⁹ the nature of the event that triggers the necessity for consultation may trigger emotions. Those emotions might overwhelm more rational considerations.⁷⁰ Even if the layperson has a wholly rational frame of mind and recognizes that disclosure carries with it long term risks, the person may attach greater weight to the immediate demands of the situation,⁷¹ such as the need to resolve a pressing legal or medical problem then facing the person. The needs of the "here and now"⁷² can be more influential in the person's decision making.⁷³ It may well be rational for the person to assign greater weight to immediate considerations. After all, the future considerations are often more uncertain and speculative.⁷⁴ It would be rational for the person to advert to the possibility of subsequent, judicially compelled revelation of the disclosure. At the time when the person must decide whether to disclose, however, the possibility of a later lawsuit might be objectively remote.

Furthermore, the research demonstrates that it is simplistic to assume the only competing considerations in a person's decision making calculus⁷⁵ are the immediate instrumental benefit of

DISCLOSURE: ORIGINS, PATTERNS, AND IMPLICATIONS OF OPENNESS IN INTERPERSONAL RELATIONSHIPS, *supra* note 52, at 110, 116 ("[E]valuation of obtained rewards and costs . . . leads to forecasts about future exchanges." (emphasis omitted)).

69. See Leslie A. Baxter & Erin M. Sahlstein, *Some Possible Directions for Future Research*, in BALANCING THE SECRETS OF PRIVATE DISCLOSURES, *supra* note 49, at 289, 289–90.

70. See William B. Stiles, "I Have to Talk to Somebody": A Fever Model of Disclosure, in SELF-DISCLOSURE: THEORY, RESEARCH, AND THERAPY, *supra* note 46, at 257, 261.

71. See PETRONIO, *supra* note 58, at 1.

72. See ALTMAN & TAYLOR, *supra* note 60, at 33, 39.

73. See Sarah Knox & Clara E. Hill, *Therapist Self-Disclosure: Research-Based Suggestions for Practitioners*, 59 J. CLINICAL PSYCHOL. 529, 536 (2003).

74. See ALTMAN & TAYLOR, *supra* note 60, at 44, 64.

75. See PETRONIO, *supra* note 58, at 3.

disclosure, contributing to the solution of the person's medical or legal problem, and the long term risk that a court will later compel revelation of the disclosure. In fact, people can and often do have complex goal structures.⁷⁶ A person may have a diverse⁷⁷ variety⁷⁸ of conflicting,⁷⁹ contradictory⁸⁰ goals. People might, for instance, be quite concerned about how they present themselves to the confidant.⁸¹ They might be determined to manage the impression that the confidant forms of them.⁸² In their minds, these other goals may outweigh the considerations that privilege law has identified.

B Research at Odds with Wigmore's Generalization

As we have seen, although some of the literature lends support to Wigmore's position, even that literature falls short of validating his generalization about the behavior of persons contemplating self-disclosure. More importantly, other lines of research undermine the validity of the generalization.

To begin with, numerous researchers have reported variations in self-disclosure patterns from individual to individual.⁸³ The

76. See Walid A. Afifi & Laura K. Guerrero, *Motivations Underlying Topic Avoidance in Close Relationships*, in BALANCING THE SECRETS OF PRIVATE DISCLOSURES, *supra* note 49, at 165, 169.

77. *Id.* at 174.

78. Lynn Carol Miller & Stephen J. Read, *Why Am I Telling You This? Self-Disclosure in a Goal-Based Model of Personality*, in SELF-DISCLOSURE: THEORY, RESEARCH, AND THERAPY, *supra* note 46, at 35, 38.

79. *Id.*

80. Afifi & Guerrero, *supra* note 76, at 168.

81. KELLY, *supra* note 54, at 129-34.

82. See Roxanne Parrott et al., *Promoting Patients' Full and Honest Disclosure During Conversations with Health Caregivers*, in BALANCING THE SECRETS OF PRIVATE DISCLOSURES, *supra* note 49, at 137, 137-38.

83. See SOCIAL PENETRATION, *supra* note 60, at 29; see also DERLEGA ET AL., *supra* note 59, at 69-70; PETRONIO, *supra* note 58, at 83 ("[P]eople . . . make up their own rules."); Corcoran, *supra* note 54, at 194 (citing differences in disclosure levels between males and females under conditions of confidentiality assurance in a nonclinical population); Paul C. Cozby, *Self-Disclosure: A Literature Review*, 79 PSYCHOL. BULL. 73, 88 (1973) (discussing the different clarifications researchers assign to those who disclose and the variations between them); Farber, *supra* note 53, at 594 (discussing disagreement amongst researchers regarding the effects of client gender on the disclosure process); Maurice J. Levesque et al., *Self-Disclosure Patterns Among Well-Acquainted Individuals: Disclosers, Confidants and Unique*

variations are significant.⁸⁴ Researchers who have explored the issue have not found a correlation between willingness to disclose and various personality traits.⁸⁵ Instead, these researchers have discovered large standard deviations⁸⁶ indicating a wide⁸⁷ dispersion of the values.⁸⁸ There is no single,⁸⁹ linear⁹⁰ pattern or trajectory.⁹¹ Rather, the patterns are complex⁹² and varied.⁹³

Moreover, researchers have found that in many cases, a person has a strong internal impulse to disclose and consequently does not need an external incentive to do so. The literature includes numerous examples of this impulse.⁹⁴ It is sometimes called the fever model,⁹⁵ or the expressive need hypothesis.⁹⁶ A traumatic event generates stress, and a feverish need to talk about the incident can be a

Relationships, 30 SOC. BEHAV. & PERSONALITY 579 (2002) (explaining that the degree of self-disclosure is strongly influenced by individual differences); Mario Mikulincer & Orna Nachshon, *Attachment Styles and Patterns of Self-Disclosure*, 61 J. PERSONALITY & SOC. PSYCHOL. 321, 322 (1991) (discussing the manifestations of individual variations).

84. See Farber, *supra* note 53, at 594; see also Lynn Carol Miller, *Intimacy and Liking: Mutual Influence and the Role of Unique Relationships*, 59 J. PERSONALITY & SOC. PSYCHOL. 50, 51 (1990) (noting the effect of underlying interpersonal as well as intrapersonal dynamic processes and how therefore, disclosure is unpredictable).

85. Reno & Kenny, *supra* note 45, at 80.

86. JOURARD, *supra* note 49, at 11.

87. Jill Waterman, *Family Patterns of Self-Disclosure*, in SELF-DISCLOSURE: ORIGINS, PATTERNS, AND IMPLICATIONS OF OPENNESS IN INTERPERSONAL RELATIONSHIPS, *supra* note 52, at 225, 236.

88. 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 15-2(B) (2d ed. 1993).

89. DERLEGA AT AL., *supra* note 59, at 17.

90. See *id.*; ALTMAN & TAYLOR, *supra* note 60, at 73, 135.

91. Judee K. Burgoon et al., *Maintaining and Restoring Privacy Through Communication in Different Types of Relationships*, 6 J. SOC. & PERS. RELATIONSHIPS 131, 132 (1989).

92. Irwin Altman et al., *Dialectic Conceptions in Social Psychology: An Application to Social Penetration and Privacy Regulation*, 14 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 107, 111 (1981).

93. See DERLEGA, ET AL., *supra* note 59, at 27.

94. See Bernard Rime, *Mental Rumination, Social Sharing, and Recovery From Emotional Exposure*, in EMOTION, DISCLOSURE, & HEALTH, *supra* note 57, at 271.

95. See Stiles, *supra* note 57, at 71, 82; Stiles, *supra* note 70, at 257; PETRONIO, *supra* note 58, at 58.

96. See PETRONIO, *supra* note 58, at 49.

symptom of the distress. Thus, a high level of distress can cause people to engage in self-disclosure.⁹⁷ They feel pressure⁹⁸ or an outright need⁹⁹ to disclose. The need can be compelling,¹⁰⁰ extreme,¹⁰¹ and insatiable.¹⁰² In the vernacular, they feel a need to "get it off" their "chest[s]" and "out in the open."¹⁰³ In effect, they have no choice but to disclose.¹⁰⁴ The pressure to disclose is especially acute when people experience an intensely emotional episode.¹⁰⁵ In eight independent studies, after major emotional episodes, between 90.0% and 96.3% of the subjects disclosed information about the events.¹⁰⁶ When people feel such an overpowering internal need to divulge information about an event, they will likely make the disclosure whether or not the law recognizes an absolute evidentiary privilege cloaking the disclosure.

Of course, there will be many cases in which a person does not experience such powerful psychological pressure to disclose. Even then, however, there are factors other than the existence *vel non* of a privilege that can determine whether the person decides to disclose.¹⁰⁷ One notable factor is disclosure reciprocity. When two people are speaking, the extent of one person's disclosure output tends to match¹⁰⁸ or approximate¹⁰⁹ the disclosure input by the other

97. See Stiles, *supra* note 70, at 262; Vogel & Wester, *supra* note 62, at 353, 358.

98. See Stiles, *supra* note 70, at 261.

99. See KELLY, *supra* note 54, at 21; Rime, *supra* note 94, at 271-72; Robert E. Franken et al., *Sensation Seeking and Disclosure to Close and Casual Friends*, 11 PERSONALITY & INDIVIDUAL DIFFERENCES 829, 832 (1990).

100. KELLY, *supra* note 54, at 21.

101. See PETRONIO, *supra* note 58, at 59.

102. Rime, *supra* note 94, at 271.

103. Stiles, *supra* note 70, at 263.

104. See Dieckmann, *supra* note 56, at 280 (acknowledging an interviewee's admission that she had no choice but to make a disclosure).

105. Rime, *supra* note 94, at 271-72.

106. *Id.* at 274.

107. One factor is whether, on a personal level, the layperson likes the proposed confidant. See Collins & Miller, *supra* note 47, at 466, 468.

108. See John H. Berg & Richard L. Archer, *Responses to Self-Disclosure and Interaction Goals*, 18 J. EXPERIMENTAL SOC. PSYCHOL. 501-02 (1982) (noting that "studies have found that recipients reveal information about themselves that matches the intimacy of received information"); David R. Shaffer et al., *Self-Monitoring as a Determinant of Self-Disclosure Reciprocity*

speaker.¹¹⁰ It may be that one person's disclosure prompts feelings of responsiveness on the part of the other person.¹¹¹ One person's disclosure serves as a model for the other person,¹¹² and the latter experiences a pressure to emulate¹¹³ or imitate¹¹⁴ the former and reciprocate.¹¹⁵ Or it may be that the former's disclosures demonstrate commonalities between the two speakers, establishing a basis for trust.¹¹⁶

It is true that some have questioned the extent of the reciprocity phenomenon.¹¹⁷ Moreover, even those who subscribe to disclosure reciprocity concede that there are limits to the phenomenon. In particular, there appears to be consensus that as a relationship advances, the degree of reciprocity decreases.¹¹⁸ The vast majority of researchers who have investigated the question, however, have concluded that disclosure reciprocity is a strong norm.¹¹⁹ There is a large body of research,¹²⁰ documenting numerous experiments,¹²¹ that verify the hypothesis.¹²² The relation holds in many contexts; it

During the Acquaintance Process, 43 J. PERSONALITY & SOC. PSYCHOL. 163, 163 (1982).

109. See Shaffer et al., *supra* note 108, at 163.

110. Lynn Carol Miller & David A. Kenny, *Reciprocity of Self-Disclosure at the Individual and Dyadic Levels: A Social Relations Analysis*, 50 J. PERSONALITY & SOC. PSYCHOL. 713, 713 (1986).

111. PETRONIO, *supra* note 58, at 114.

112. See JOURARD, *supra* note 49, at 112; George Stricker, *The Many Faces of Self-Disclosure*, 59 J. CLINICAL PSYCHOL. 623, 628 (2003).

113. Stricker, *supra* note 112, at 628.

114. Shaffer, et al., *supra* note 108, at 171.

115. See Myong Jin Won-Doornink, *Self-Disclosure and Reciprocity in Conversation: A Cross-National Study*, 48 SOC. PSYCHOL. Q. 97, 102 (1985).

116. See PETRONIO, *supra* note 58, at 215.

117. See *id.* at 50 (referring to Dindia's writings).

118. *Id.* at 51; see Paul C. Cozby, *Self-Disclosure, Reciprocity and Liking*, 35 SOCIOMETRY 151, 152 (1972); Teru L. Morton, *Intimacy and Reciprocity of Exchange: A Comparison of Spouses and Strangers*, 36 J. PERSONALITY & SOC. PSYCHOL. 72, 72 (1978).

119. See Petronio, *supra* note 58, at 51.

120. Miller & Kenny, *supra* note 110, at 713.

121. See Susan Singer Hendrick, *Self-Disclosure and Marital Satisfaction*, 40 J. PERSONALITY & SOC. PSYCHOL. 1150, 1150 (1981).

122. The research tends to show a curvilinear relationship. *Id.* at 1150; Cozby, *supra* note 118, at 151, 155. The relationship is strongest when the disclosure is moderate or medium. However, high levels of disclosure sometimes do not prompt reciprocation at the same level. Persons who engage

applies to adults and adolescents¹²³ as well as to strangers, mere acquaintances,¹²⁴ and spouses.¹²⁵

The existence of the disclosure reciprocity relationship is considered to be the best established finding in the self-disclosure literature.¹²⁶ It is the most frequently cited,¹²⁷ the most commonly discovered,¹²⁸ and the most consistent¹²⁹ finding in the self-disclosure research. It is a powerful¹³⁰ and strong¹³¹ determinant¹³² of a person's willingness to engage in self-disclosure. It is the best¹³³ and most reliable¹³⁴ predictor of a person's willingness to disclose. For that reason, it is a commonly employed strategy to encourage self-disclosure.¹³⁵ Nevertheless, at one time therapists frowned on self-disclosure.¹³⁶ The fear was that the therapist's revelation would

in very high levels of disclosure may be viewed as indiscreet and less well-adjusted. *Id.* at 158. Their disclosures may pose a seeming threat to the other person's privacy. *Id.* The other person often reacts negatively to indiscriminate openness. See Tardy, *supra* note 49, at 120; Cozby, *supra* note 83, at 88 ("fear of a tyranny of openness"). The relationship can break down for over-and-underdisclosers. Loneliness has been found to be inversely related to willingness to self disclose, and lonely subjects either overdisclose or underdisclose compared with their nonlonely counterparts in dyadic exchange. Gordon J. Chelune et al., *Loneliness, Self-Disclosure, and Interpersonal Effectiveness*, 27 J. COUNSELING PSYCHOL. 462, 465-66 (1980).

123. Rotenberg, *supra* note 47, at 2-3.

124. Valerian J. Derlega & Alan L. Chaikin, *Privacy and Self-Disclosure in Social Relationships*, 33 J. SOC. ISSUES 102, 105-06 (1977).

125. See Hendrick, *supra* note 121, at 1150.

126. See Miller & Kenny, *supra* note 110, at 713.

127. Mikulincer & Nachshon, *supra* note 83, at 322.

128. See Alan L. Chaikin & Valerian J. Derlega, *Liking for the Norm-Breaker in Self-Disclosure*, 42 J. PERSONALITY 117, 117 (1974).

129. Shaffer et al., *supra* note 108, at 163.

130. See Carl F. Johnson & James M. Dabbs, Jr., *Self-Disclosure in Dyads as a Function of Distance and the Subject-Experimenter Relationship*, 39 SOCIOMETRY 257, 261-62 (1976).

131. See Cozby, *supra* note 118, at 151 (citing SIDNEY M. JOURARD, *THE TRANSPARENT SELF* 179 (1964)).

132. See Won-Doomink, *supra* note 115, at 97 (also noting that reciprocity of exchange is not the sole determination of mutual exchange).

133. See Shaffer et al., *supra* note 108, at 163.

134. PETRONIO, *supra* note 58, at 50.

135. See Knox & Hill, *supra* note 73, at 531; Stricker, *supra* note 112, at 623.

136. See Knox & Hill, *supra* note 73 at 530; Stricker, *supra* note 112, at 624-25.

undermine the appearance of objectivity and neutrality;¹³⁷ ideally, the therapist was supposed to be a “blank screen.”¹³⁸ However, modernly,¹³⁹ therapists realize that self-disclosure can be a beneficial intervention.¹⁴⁰ So long as the therapist avoids self-indulgence,¹⁴¹ disclosure of his or her own difficulties¹⁴² can make the therapist a more authentic human presence for the patient.¹⁴³ The strategy is not only confined to mental health therapists. Counselors also employ it.¹⁴⁴ Attorneys can also utilize it.¹⁴⁵

In summary, rather than supporting Wigmore’s generalization, the research stresses the role of individual variation in persons’ willingness to self-disclose. In some cases, the individual feels such strong internal pressure to disclose that there is no need to fashion an absolute privilege to remove any potential disincentive for

137. PETRONIO, *supra* note 58, at 113.

138. See Knox & Hill, *supra* note 73, at 531; David B. Yourman, *Trainee Disclosure in Psychotherapy Supervision: The Impact of Shame*, 59 J. CLINICAL PSYCHOL. 601, 601 (2003); Stricker, *supra* note 112, at 625.

139. See Barry A. Farber, *Self-Disclosure in Psychotherapy Practice and Supervision: An Introduction*, 59 J. CLINICAL PSYCHOL. 525, 526–27 (2003). Professor Horn adds a caveat. In her experience, even today there are doubts about the applicability of the reciprocity norm to clinical relationship. In her words, “Even therapists who do disclose don’t do it reciprocally.” Interview with Jacqueline Horn, Professor, Psychology Department, University of California Davis (2004) (on file with author); see also JEREMY D. SAFRAN & J. CHRISTOPHER MURAN, *NEGOTIATING THE THERAPEUTIC ALLIANCE* 39–41 (2000) (describing the pitfalls of a clinician who does not practice reciprocity disclosure); SHELDON J. KORCHIN, *MODERN CLINICAL PSYCHOLOGY: PRINCIPLES OF INTERVENTION IN THE CLINIC AND COMMUNITY* 165–66 (1976) (discussing how the clinical process lacks, to its detriment, “the normal reciprocity of ordinary social encounters”).

140. See Marvin R. Goldfried et al., *Therapist Self-Disclosure in Cognitive-Behavior Therapy*, 59 J. CLINICAL PSYCHOL. 555, 555 (2003); Knox & Hill, *supra* note 73, at 532.

141. See Stricker, *supra* note 112, at 627.

142. See, e.g., Robert Gaines, *Therapist Self-Disclosure with Children, Adolescents, and Their Parents*, 59 J. CLINICAL PSYCHOL. 569, 569 (2003) (stating that sharing of one’s own adolescent social difficulties can help put an anxious teenager at ease).

143. See Michael J. Mahoney, *Emotionality and Health: Lessons from and for Psychotherapy*, in *EMOTION, DISCLOSURE & HEALTH*, *supra* note 57, at 241, 250; Knox & Hill, *supra* note 73, at 531–32.

144. See Dieckmann, *supra* note 56, at 280.

145. See ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING* 265–73 (1990).

disclosure. Admittedly, in other cases, the individual may need encouragement to reveal. The literature does not clearly single out evidentiary privileges as the most effective type of encouragement, however. Rather, other factors, such as self-disclosure reciprocity, can be more potent. If the question is whether the psychological literature validates Wigmore's case for absolute evidentiary privileges, the answer must be no.

II. IN A REGIME OF QUALIFIED PRIVILEGES, HOW MUCH WEIGHT SHOULD BE ASSIGNED TO THE LAYPERSON'S INTERESTS COUNTERVAILING AGAINST DISCLOSURE?

Assume that the legislatures and courts come to reject Wigmore's generalization. What impact would that rejection have on privilege doctrine? On the one hand, that rejection would not signal the end of all evidentiary privileges. On the other hand, it would probably lead to the reclassification of most¹⁴⁶ privileges as qualified or conditional.¹⁴⁷ In the past few decades, there has been an incipient trend to treat privileges as qualified rather than absolute.¹⁴⁸ In deciding whether to uphold a particular privilege claim, trial judges would no longer be forbidden from employing a case-specific balancing test.¹⁴⁹ Rather, they could weigh the opponent's interest in discovering the truth against the interests served by the privilege.¹⁵⁰

Can the psychological literature provide the judge with any guidance as to how to conduct the balancing analysis? Understandably, the psychological literature has little to say about the weight that the judge should attach to the opposing litigant's interest in discovering and proving the privileged communications at

146. "However, given the national interest at stake, it is likely that the [legislatures and] courts [would] continue to classify the privilege for military and state secrets as absolute There is also a good possibility that to avoid the unpleasant prospect of imprisoning clergy for contempt of court, the courts and legislatures might decide to continue to accord clergy an absolute privilege to refuse to disclose at least confessional disclosures." 1 IMWINKELRIED, *supra* note 8, § 5.4.4.a, at 420 n.138.

147. *Id.* § 5.4.4.a, at 420.

148. *Id.* § 5.4.4.b, at 426.

149. *Id.* § 5.4.4.a, at 423.

150. *Id.*

trial. The law has more expertise in assessing that interest. The literature has a good deal to say, however, about how to define the holder's interests that can countervail in favor of sustaining the privilege claim. When we think of the typical patient-therapist or client-attorney consultation, we tend to identify the layperson's stake as his or her interest in the resolution of the immediate medical or legal problem prompting the consultation. Anyone familiar with the psychological literature, however, would realize that the layperson can have other, often weighty, interests at stake. In a significant number of cases, the layperson's most important interest may be the preservation of his or her long-term mental and physical health. Wigmore's generalization may be flawed, but in some cases the layperson will be reluctant to disclose absent a formal evidentiary privilege. Especially when the incident precipitating the consultation is a traumatic event that causes the layperson to experience troubling emotions, the layperson's inability to disclose can have serious implications for his or her health.

In an article in *Mental Hygiene* in the late 1950s, Jourard advanced the hypothesis that an opportunity to self-disclose is vital to achieving "healthy personality."¹⁵¹ Initially, Jourard's hypothesis was dismissed as unsubstantiated.¹⁵² Indeed, it was vilified as a manifestation of an "ideology of intimacy."¹⁵³ A consensus has since emerged, however, that over the long term the inhibition of a person's self-disclosure can lead to negative¹⁵⁴ mental and physical¹⁵⁵ health consequences. Researchers in a variety of

151. See Tardy, *supra* note 49, at 111; see also Gordon J. Chelune, *Summary, Implications, and Future Perspectives, in SELF-DISCLOSURE: ORIGINS, PATTERNS, AND IMPLICATIONS OF OPENNESS IN INTERPERSONAL RELATIONSHIPS, supra* note 52, at 243, 244, 253 (noting that Jourard developed his notion of self-disclosure within the context of the healthy personality, and his interest in self-disclosure grew out of his interest in healthy personality); Derlega & Grzelak, *supra* note 64, at 152 ("[T]he humanistic view has been that self-disclosure is a prerequisite for healthy personality functioning.").

152. Tardy, *supra* note 49, at 112.

153. *Id.* at 111.

154. PETRONIO, *supra* note 58, at 210.

155. See KELLY, *supra* note 54, at 56-57; see also James W. Pennebaker, *Preface to EMOTION, DISCLOSURE, & HEALTH, supra* note 57, at xiii (recognizing that disclosure can promote physical and mental health).

disciplines¹⁵⁶ have amassed an overwhelming¹⁵⁷ body of evidence indicating that inhibited persons¹⁵⁸ are more likely to suffer psychological and physical sicknesses¹⁵⁹ and that, conversely, self-disclosure can be therapeutic.¹⁶⁰ In Freud's words, self-disclosure can be a "talking cure."¹⁶¹

A. *The Connection Between Inhibition and Impaired Mental Health*

A large number of vernacular expressions reflect the notion that it can be healthy in a psychological sense to self-disclose.¹⁶² The concepts of "letting off steam" and "getting something off your chest" are illustrative.¹⁶³ Freud and Breuer came to the same conclusion.¹⁶⁴ They believed that by enabling the patient to release "pent-up emotions,"¹⁶⁵ disclosure could provide palliative relief to patients and sometimes make a therapeutic solution possible.¹⁶⁶ Likewise, Harry Stack Sullivan, one of the leading American psychiatrists of the 20th century, believed that inadequate

156. See James W. Pennebaker, *Emotion, Disclosure, and Health: An Overview*, in EMOTION, DISCLOSURE, & HEALTH, *supra* note 57, at 3, 4 ("researchers from several disciplines"); Tardy, *supra* note 49, at 112.

157. See Pennebaker, *supra* note 156, at 3.

158. See Christine Stephens, *Health Benefits of the Disclosure of Emotions About Traumatic Experiences: What Is the Evidence and Potential for Therapeutic Benefits?*, 2002-1 AUSTRALASIAN J. DISASTER & TRAUMA STUDIES, available at [http://www.massey.ac.nz/~trauma /issues/2002-1/edital.htm](http://www.massey.ac.nz/~trauma/issues/2002-1/edital.htm).

159. *Id.*

160. Paul Corcoran, *Therapeutic Self-Disclosure: The Talking Cure*, in DISCLOSURES, 118, 118 (Paul Corcoran & Vicki Spencer eds. 2002).

161. Paul Corcoran & Vicki Spencer, *Introduction: Revealing Disclosure*, in DISCLOSURES, *supra* note 160, at 1, 14.

162. See Eugenia Georges, *A Cultural and Historical Perspective on Confession*, in EMOTION, DISCLOSURE, & HEALTH, *supra* note 57, at 11, 15.

163. *Id.*

164. See Mahoney, *supra* note 143, at 241 (acknowledging that "there was already an awareness that the theater of personal affective life was the metaphorical fountain of all other modes of psychological experience"); see also KELLY, *supra* note 54, at 85 (noting that Freud and Breuer found that "the patient only gets free from the hysterical symptoms by reproducing the pathogenic impressions that caused it and by giving utterances to them with an expression of affect").

165. Corcoran, *supra* note 160, at 127.

166. *Id.*

communication contributes to a wide array of mental disorders.¹⁶⁷ Jourard believed that self-disclosure is central to maintaining psychological well-being.¹⁶⁸ Although the claimed linkage between self-disclosure and psychological well-being is still a controversial topic among psychologists,¹⁶⁹ many researchers have linked inhibition and repression to such psychological disorders as dissociative identity disorder (multiple personality disorder), bipolar disorder, anorexia, and melancholia.¹⁷⁰

Various theories have been advanced to explain the linkage between self-disclosure and psychological well-being. The connection appears to be more complex¹⁷¹ than simple catharsis¹⁷² or venting.¹⁷³ One theory is that a person's inability to engage in appropriate self-disclosure heightens feelings of loneliness¹⁷⁴ and isolation.¹⁷⁵ Those feelings give the person's psychological life a negative tone¹⁷⁶ and can make the person susceptible to more serious mental problems.¹⁷⁷ Others theorize that when a person feels compelled to withhold information from others, the person becomes obsessed¹⁷⁸ or preoccupied¹⁷⁹ with the information. Thoughts about

167. See Mabel Blake Cohen, *Introduction to 1 THE COLLECTED WORKS OF HARRY STACK SULLIVAN, M.D.*, at xii (1953).

168. Collins & Miller, *supra* note 47, at 457.

169. Just as Professor Horn cautioned against generalizing that therapists routinely employ self-disclosure, in a conversation with the author Professor Goodman noted that many psychologists are skeptical of this claimed linkage. Interview with Jacqueline Horn, *supra* note 139.

170. KELLY, *supra* note 54, at 104.

171. Mahoney, *supra* note 143, at 247.

172. See Anita E. Kelly et al., *What Is It About Revealing Secrets That Is Beneficial?*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 651, 652-53 (2001).

173. See James W. Pennebaker et al., *Accelerating the Coping Process*, 58 J. PERSONALITY & SOC. PSYCHOL. 528, 536 (1990).

174. See Chelune et al., *supra* note 122, at 462.

175. Cecilia H. Solano et al., *Loneliness and Patterns of Self-Disclosure*, 43 J. PERSONALITY & SOC. PSYCHOL. 524, 525 (1982).

176. See *id.*

177. *Id.*; Chelune, *supra* note 122, at 465-67; see KELLY, *supra* note 54, at 21 (stating that "lack of attachments has been linked to a variety of ill effects on health, adjustment, and well-being").

178. See Daniel M. Wegner & Julie D. Lane, *From Secrecy to Psychopathology*, in EMOTION, DISCLOSURE & HEALTH, *supra* note 57, at 25, 26 (suggesting that thoughts, when kept secret, might become targets for obsessive thinking and attention).

that topic become intrusive,¹⁸⁰ contributing to a disordered thought pattern and behavior.¹⁸¹ The inhibition becomes a cumulative stressor on the person's mental health.¹⁸²

B. Physical Health

As previously stated, at one time there was skepticism of any claimed connection between inhibition and health problems.¹⁸³ Although there were doubts about the connection between inhibition and mental health, there was heightened skepticism of any supposed nexus between inhibition and physical health.¹⁸⁴ Today, however, there is a great deal¹⁸⁵ of empirical support¹⁸⁶ for the existence of such a connection. James Pennebaker has conducted some of the most important studies on this subject.¹⁸⁷ The evidence is so strong¹⁸⁸ and impressive¹⁸⁹ that there is now widespread acceptance¹⁹⁰ of this hypothesis.

179. *Id.* at 31.

180. *See id.* (cognitive processes involved with withholding of information is comprised of these steps: (1) withholding causes thought suppression; (2) suppression causes intrusive thought; (3) intrusive thought causes renewed effort at thought suppression; and (4) steps two and three continue cyclically).

181. *See id.* at 43.

182. Dario Paez et al., *Confrontation: Inhibition, Alexithymia, and Health*, in EMOTION, DISCLOSURE, & HEALTH, *supra* note 57, at 195, 206.

183. *See* Tardy, *supra* note 49, at 111–12 (noting that the contention put forth by Jourard in *Mental Hygiene*, i.e., that self-disclosure facilitates physiological health and well-being, appeared “so radical and unacceptable”).

184. *Id.*

185. *Id.* at 121.

186. *See* Benjamin Dominguez et al., *The Roles of Disclosure and Emotional Reversal in Clinical Practice*, in EMOTION, DISCLOSURE & HEALTH, *supra* note 57, at 255, 258.

187. Tardy, *supra* note 49, at 113. *See generally* James W. Pennebaker, *Preface* to EMOTION, DISCLOSURE & HEALTH, *supra* note 57, at iii, xiii (addressing basic issues in psychology, including how people respond to emotional trauma in their lives and why translating an event into language affects physical and psychological health).

188. Keith J. Petrie et al., *Repression, Disclosure, and Immune Function: Recent Findings and Methodological Issues*, in EMOTION, DISCLOSURE, & HEALTH, *supra* note 57, at 223, 224; *see* Tardy, *supra* note 49, at 116.

189. *See* Pennebaker, *supra* note 156, at 6 (acknowledging “impressive data” that links “inhibited emotional expressiveness in various parts of the body to headache and back pain”).

190. Tardy, *supra* note 49, at 116.

The evidence indicates that the inhibition of a person's self-disclosure can correlate with numerous,¹⁹¹ objective¹⁹² indices of physical health. For example, there are empirical studies linking inhibition to autonomic nervous system irregularities,¹⁹³ lower cancer remission and survival rates,¹⁹⁴ elevated heart rate,¹⁹⁵ proneness to coronary problems,¹⁹⁶ cardiovascular illness,¹⁹⁷ exaggerated blood pressure,¹⁹⁸ tension headache,¹⁹⁹ back pain,²⁰⁰ poorer natural kill (NK) cell activity,²⁰¹ higher serum anti-body titers in subjects with Epstein-Barr virus (EBV),²⁰² greater susceptibility to infectious illnesses,²⁰³ and increased negative response to viral vaccines.²⁰⁴ Conversely, persons who engage in more extensive self-disclosure tend to make fewer physician visits.²⁰⁵

The nature of the causal relation between inhibition and decreased physical health is not well understood.²⁰⁶ There are plausible theories, however. One popular, plausible theory is that inhibition is an active process,²⁰⁷ requiring physiological effort²⁰⁸ to

191. *Id.* at 121.

192. Pennebaker et al., *supra* note 173, at 529.

193. *Id.*

194. Paez et al., *supra* note 182, at 206, 213.

195. KELLY, *supra* note 54, at 27–28.

196. *Id.* at 28.

197. Rosenfeld, *supra* note 61, at 13; Tardy, *supra* note 49, at 115.

198. Tardy, *supra* note 49, at 115–16; *see also* Pennebaker, *supra* note 156, at 5 (noting that disclosure of emotional events brings about reductions in blood pressure).

199. *See* Harald C. Traue, *Inhibition and Muscle Tension in Myogenic Pain, in EMOTION, DISCLOSURE, & HEALTH*, *supra* note 57, at 155, 158–61.

200. *See id.* at 163–68.

201. Petrie et al., *supra* note 188, at 225–27 (indicating that NK cell activity is the most readily measurable element of immune function with relevance to the control of tumors).

202. *Id.* at 225.

203. *See id.* at 224; KELLY, *supra* note 54, at 37.

204. *See* Petrie et al., *supra* note 188, at 228–29.

205. *See* KELLY, *supra* note 54, at 70–72, 79; *see also* Pennebaker, *supra* note 156, at 4 (noting that “investigators have now found that writing about traumatic experiences produces . . . drops in physician visits”); Pennebaker et al., *supra* note 173, at 535 (discussing the results of an experiment that demonstrates that freshmen writing about their feelings regarding attending college reduces the number of health center illness visits).

206. *See* Georges, *supra* note 162, at 12.

207. *See* DERLEGA ET AL., *supra* note 59, at 74; KELLY, *supra* note 54, at 4;

suppress the information.²⁰⁹ The expenditure of resources in the effort²¹⁰ to suppress information causes a visceral²¹¹ or emotional²¹² arousal.²¹³ Over the long-term,²¹⁴ the strain²¹⁵ involved in this effort impairs immunologic functioning.²¹⁶ A compromised²¹⁷ immune system²¹⁸ reduces the person's resistance to disease²¹⁹ and renders the person vulnerable to a wide variety of illnesses.²²⁰

C. The Significance of the Connection in a Regime of Qualified Evidentiary Privileges

Assume *arguendo* that a privilege claim is urged in a jurisdiction that has abandoned Wigmore's insistence on absolutism and has shifted to the view that communications privileges are qualified in character. In this jurisdiction, even if the holder has not waived the privilege and no special exception applies, the judge can override the

see also Gary E. Schwartz & John P. Kline, *Repression, Emotional Disclosure, and Health: Theoretical, Empirical, and Clinical Considerations*, in *EMOTION, DISCLOSURE & HEALTH*, *supra* note 57, at 177, 177-78 (describing repression as an active, energy consuming process); Petrie et al., *supra* note 188, at 225 (describing inhibition of emotional expression as active).

208. Tardy, *supra* note 49, at 113.

209. Petrie et al., *supra* note 188, at 226.

210. *See* KELLY, *supra* note 54, at 98.

211. *See* Dominguez et al., *supra* note 186, at 256 (noting that visceral arousal is necessary for emotional experience).

212. *See* KELLY, *supra* note 54, at 85 (noting that the venting of pent-up emotions reduces the level of emotional arousal surrounding a troubling event more often than not).

213. *See id.*; Dominguez et al., *supra* note 186, at 256; *see also* Stiles, *supra* note 70, at 264 (noting the argument made by Pennebaker and his associates that inhibition of disclosure following a traumatic event produces a chronic physiological arousal that may ultimately result in physical symptoms).

214. *See* Traue, *supra* note 199, at 172; *see also* Rime, *supra* note 94, at 280 (discussing how subjects who had suffered from traumatic experiences were more prone to later health problems if they did not share their experiences with others).

215. *See* Traue, *supra* note 199, at 171 ("the effort and strain of suppressing the emotional impulse").

216. *See* KELLY, *supra* note 54, at 31, 70, 79, 98; *see also* Pennebaker, *supra* note 155, at xiii (discussing how emotional upheavals can disrupt many aspects of life, including illness rates).

217. Petrie et al., *supra* note 188, at 226.

218. *See* KELLY, *supra* note 54, at 70-72.

219. *See* Tardy, *supra* note 49, at 113.

220. Pennebaker et al., *supra* note 173, at 529.

privilege based on a case-specific balancing of a litigant's need for the information against the policies supporting the privilege. Furthermore, suppose that the facts²²¹ strongly suggest that, in the instant case, during the consultation the layperson might not have disclosed absent the assurance of confidentiality furnished by an evidentiary privilege. For example, assume that the consultation occurred after litigation was filed or at least expressly threatened. Early in the consultation the layperson said little.²²² When the confidant asked about the reason for the layperson's evident reticence, the layperson responded that she was worried that any revelation would come back to haunt her at trial.²²³ The confidant then explained the relevant evidentiary privilege. After the explanation, the layperson finally made the revelation in question. Later in the litigation, the opposing party seeks to discover the content of the revelation. The layperson responds by asserting the privilege. Although *ex hypothesi* the privilege is qualified and the opposing party may have an acute need for the information, should the judge necessarily deny the privilege claim? How much weight should the judge give to the interests underlying the privilege? It is submitted that when two additional circumstances occur, the judge should assign great weight to the layperson's interest in upholding the privilege.

One possible circumstance is that the event triggering the consultation was traumatic,²²⁴ or at least troubling,²²⁵ in nature. If the

221. The alleged holder of the privilege could disclose these facts in the trial without waiving the privilege. A waiver occurs only when the holder reveals the content or substance of the allegedly privileged communications. 2 IMWINKELRIED, *supra* note 8, § 6.12.4.a.(2), at 860. Hence, even a detailed description of the circumstances surrounding the communication would not effect a waiver of the privilege.

222. See Greene, *supra* note 58, at 126 (the person struggles with the decision whether to disclose).

223. See *id.* In certain situations, it is quite plausible that the layperson would make such a remark even without prompting by the confidant. For example, the layperson might have been involved in earlier litigation. Alternatively, in the current litigation there might have been earlier discovery events such as deposition hearings which drove home to the layperson the message that his or her pretrial revelations could conceivably be used as evidence against him or her at a later trial.

224. See Stiles, *supra* note 70, at 261 (noting that a person's distress may result from an isolated traumatic event).

event that prompts the layperson to seek the confidant's help is horrific²²⁶ in character, the layperson may feel a high level of stress.²²⁷ Unless the layperson can relieve the distress²²⁸ by disclosing to someone, such as the proposed confidant, the inhibition may in the long term cause the type of mental and physical health problems described above.

The second circumstance is that, as a practical matter, the layperson has nowhere to turn other than to the confidant.²²⁹ The research indicates that the preferred method of relieving the distress is speaking with a live person rather than merely recording the troubling information in a writing such as a diary.²³⁰ If the layperson is unmarried, the person may have no close family member with whom he or she has a privileged relationship.²³¹ Even when the layperson enjoys a privileged relationship with someone other than a professional confidant, revelation in the course of that relationship may not fill the layperson's needs. The quality of the communication may be more important to the layperson's health than the mere quantity of communication.²³² More specifically, a social interaction may not suffice;²³³ professional intervention²³⁴ may

225. See Corcoran, *supra* note 160, at 118 (discussing how the act of confiding has long been considered an effective therapy for troubled minds). See generally KELLY, *supra* note 54, at 118 (providing various types of troubling secrets).

226. See PETRONIO, *supra* note 58, at 210 (discussing the application of the communication privacy management theory in the study of children who have been exposed to horrific experiences like child abuse).

227. *Id.* at 57.

228. See Vogel & Wester, *supra* note 62, at 353, 358.

229. If the person perceives that he or she lacks nonprofessional social support, they are more likely to seek professional assistance. *Id.* at 355.

230. See KELLY, *supra* note 54, at 72-74.

231. Most jurisdictions do not recognize a privilege between parent and child, or parent and siblings. 1 IMWINKELRIED, *supra* note 8, at § 6.2.2. Moreover, the jurisdictions recognizing a privilege for confidential spousal communications do not extend the privilege to cohabitants who have not been formally married. 1 *Id.* at § 6.9.1.a.(1).

232. See KELLY, *supra* note 54, at 119; see also Rime, *supra* note 94, at 283-87 (suggesting that the critical factor for recovery lies in the qualitative aspects of social sharing).

233. See Rime, *supra* note 94, at 287 (noting that the "[n]atural social situations are not likely to offer people opportunities to verbalize in depth and at length").

be necessary if an in depth²³⁵ exploration of the layperson's problem necessitates expertise.

III. CONCLUSION

For the past decade, the doctrinal area of evidentiary privileges has been one of my primary research interests. In the process of researching that subject, I stumbled across the few studies, reported in the legal literature, which explore the question of whether the typical layperson is willing to consult and confide absent a formal evidentiary privilege.²³⁶ The discovery of those studies prompted me to broaden my research to the psychological literature. The question naturally arose: Does psychology have anything to tell the law about the assumptions underlying privilege doctrine? Privilege law obviously rests on a number of assumptions about human motivation and behavioral assumptions that in principle, should not be accepted *a priori*.

I discovered that there is an enormous body of psychological literature and research on the topics of communication in general and self-disclosure in particular. This Article merely scratches the surface of the extensive psychological investigations of those topics. Even after a cursory review of the psychological learning, however, it is clear that the account of human motivation and behavior, upon which privilege law rests, is incomplete.

To begin with, the law's account of the motivations of persons contemplating disclosure is incomplete. For example, the law assumes that in deciding whether to disclose to a professional confidant, such as a therapist or attorney, the layperson focuses primarily on: (1) the degree to which the consultation will contribute to the immediate resolution of the problem that prompted the layperson to consult the professional; and (2) the magnitude of the risk that any disclosure will later be used adversely against the layperson at a trial. Further, influenced mightily by Wigmore, the law assumes that the typical layperson is so concerned about the second factor that without the assurance of confidentiality furnished

234. *See id.*

235. *See id.*

236. *See sources cited supra* note 45.

by an absolute evidentiary privilege, the layperson would be unwilling to consult or confide.

The psychological literature calls both of these assumptions into question. That literature has revealed several factors other than the two identified by privilege law that can significantly influence the layperson's willingness to self-disclose. Psychology paints a far more complex picture of the motivations of human beings contemplating self-disclosure than the law posits. Moreover, as the fever model of self-disclosure indicates, in a given case the layperson may have such an overpowering need to disclose to the confidant that there is no need to provide an absolute privilege to remove disincentives to disclosure. Finally, the research has established such marked individual variations in tendency to disclose that any generalization about the decision making of the "typical" or "average" layperson is suspect. In short, the psychological literature appears to undermine the assumptions upon which the law has historically relied to rationalize its insistence on absolute communications privileges. It would be dishonest to claim that the available data completely discredits the assumption. Most of the studies in the literature do not involve cases in which the layperson must decide whether to disclose or withhold highly incriminating information about a crime.²³⁷ For that matter, however, the typical consultation with a professional confidant does not fall within that category of cases. At the very least, the literature does not validate the law's traditional assumption.

In addition, the law's account of the interests of the layperson contemplating disclosure is incomplete. The law tends to focus on the layperson's instrumental interest in obtaining information and advice to resolve the legal or medical problem that prompted the consultation. At most, the law considers the instrumental interests of similarly situated laypersons, as well as those of the particular

237. In a conversation with the author, Professor Goodman made the common sense point that in an extreme case in which the layperson is deciding whether to reveal information with profound criminal law implications, the layperson may be reluctant to disclose absent the assurance of confidentiality furnished by an evidentiary privilege. Interview with Gail S. Goodman, Professor, Psychology Department, University of California Davis (2004) (on file with author).

layperson pressing the privilege claim upon which the judge must rule.

The psychological research demonstrates that in many cases, the layperson's stake includes far more than the instrumental benefit of resolving the immediate medical or legal problem. In cases in which the layperson is genuinely concerned about later disclosure, and in which there is judicially compelled disclosure of his or her revelations to a confidant, the inhibition of disclosure can not only impair the layperson's ability to satisfactorily resolve the medical or legal problem but, worse, may in some instances have serious, long-term repercussions for the layperson's health. Especially when the incident prompting the consultation was a troubling one and the layperson has nowhere else to turn to release his or her distress, inhibition can impair the layperson's mental and physical health. The judge ruling on a privilege claim should not be blind to that consideration. Rather, in an appropriate situation, the judge should attach significant weight to that consideration as a factor cutting in favor of upholding the privilege.

