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Leslie Katz

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The privileged communications rules may prevent a party to litigation from bringing into evidence matters he wishes to bring. His inability to do so may lead to a result less favourable to him than that which he would have obtained had a claim of privilege not barred his way. This different result may not only put him in a worse position than he would otherwise have been in, but may have harmful consequences for others as well, consequences which may be too subtle even to detect at the time the privilege is exercised.

How likely is it that the privileged communications rules will lead to such unfortunate consequences? In this connection, three mitigating factors may be mentioned: first, the privileged communication would have been of insufficient weight to affect the result in some of the cases in which privilege keeps it out; secondly, the party against whom a claim operates may have other admissible evidence which will prove the point he has been foreclosed from making by the claim of privilege; thirdly, if compelled to testify regarding a confidential communication, an unwilling witness may perjure himself and, if his evidence is believed, the party extracting it may actually have worsened his position rather than bettered it by attempting to exploit the absence of a privilege for the communication.

With respect to the first two factors, it should be noted that even those commentators who are strong opponents of the principle of privileged communications rules have admitted that certain of the rules are not significantly obstructive. Wigmore, speaking of the lawyer-client privilege said, "[T]he loss to truth [it causes] is comparatively small . . .,"[1] and McCormick, although disagreeing with Wigmore regarding the obstructiveness of the lawyer-client privilege, considered the marital communications privilege "less obstructive" than the lawyer-client one.[2] McCormick took the same

*Leslie Katz, Lecturer in Law, The University of Sydney. Mr. Katz thanks the Law Reform Commission of Canada for permission to make use in the preparation of this note of research undertaken by him for the Commission.

1. 8 *Evidence* s. 2291 (McNaughton rev. 1961).
2. "Law and the Future: Evidence" (1956), 51 Nw. U. L. Rev. 218, 220.

view regarding priest-penitent privilege, while Bentham, called by Wigmore "the greatest opponent of privileges," said in support of a priest-penitent privilege that the "advantage gained by . . . [its absence] . . . would be casual, and even rare . . ."[3] With respect to the third factor, common law authorities describe the privileged communications rules as being designed not to protect against the reception of unreliable evidence, but rather to exclude what would have been reliable evidence for the purpose of promoting other interests.[4] Thus they consider the rules a hindrance to accurate fact-finding. The Europeans take a different view.[5] They recognize that when a witness, because of his relationship with the communicator, would be under an almost irresistible temptation to perjure himself if compelled to testify as to a communication, he might as well be granted a privilege with respect to the communication in order to avoid erecting the collateral matter of his credibility into the prime issue in the litigation. Reasoning of this sort motivated English legal thinkers as well at one time in their decision to render a husband or wife incompetent to testify for or against his or her spouse.[6]

Let us assume now that none of these three factors is relevant in a particular piece of litigation, in other words, that a witness would testify truthfully as to a communication if compelled and that his evidence would be crucial to the conclusion of the litigation. On what basis, if any, ought we nevertheless to exclude it?

Any discussion of the rationale for doing so must, for custom's sake at least, start with Wigmore's four conditions necessary to establish a privilege for communications[7]: (i) The communications must originate in a *confidence* that they will not be disclosed; (ii) This element of *confidentiality* must be essential to the full and satisfactory maintenance of the relation between the parties; (iii) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered;* (iv) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

These conditions have been criticized for their extreme ambiquity and it has been suggested that they could justify great expansion

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3. *Op. cit.*, at s. 2396.
4. Crim. Law Rev. Comm., *Evidence (General)* (1972), Cmnd. 4991, para. 19.
5. D. W. Louisell, "Confidentiality, Conformity and Confusion; Privileges in Federal Court Today" (1956), 31 Tulane L. Rev. 101.
6. *Hawkins* v. *U.S.*, 358 U.S. 74, 75 (1958).
7. *Op. cit.*, at s. 2285.

of the privileged communications rules.[8] On the other hand it has been suggested that there is no class of relation, no matter how socially useful, in respect of which the absence of a privilege for confidential communications would be so harmful that people would not continue to enter into it in spite of the privilege's absence.[9] If this were true, as it may well be, then no class of relation could ever satisfy Wigmore's second condition and the law of privileged communications as we now know it would pass entirely from the scene. It is submitted therefore that we ought to turn our attention from Wigmore's formulation of the rationale for privileged communications rules, which consists essentially in using the rules as an encouragement to the public to enter into socially beneficial relations which would not otherwise have been entered into, and seek a new rationale for them.

Wigmore himself may provide a convenient starting point. Arguing for the retention of a lawyer-client privilege, he says that:

> . . .[I]t must be repugnant to any honourable man to feel that the confidences which his relation naturally invites are liable . . . to be laid open through his own testimony. He cannot but feel the disagreeable inconsistency of being at the same time the solicitor and the revealer of the secrets of the cause. This double-minded attitude would create an unhealthy moral state in the practitioner. Its concrete impropriety could not be overbalanced by the recollection of its abstract desirability. If only for the sake of the peace of mind of the counsellor, it is better that the privilege should exist.[10]

In other words, one of the costs of not privileging confidential communications to lawyers would be the assault on the peace of mind of the lawyer should he be required to testify when he felt obliged not to. Of course, not only the legal profession's peace of mind is capable of being assaulted by compulsion to testify in these circumstances. It should be noted in this connection that recent amendments to the law of evidence in England now allow a husband or wife in civil proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose his or her spouse to subsequent criminal proceedings.[11] In Continental countries, a witness is excused from answering a question that would tend to incriminate not

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8. "Functional Overlap between the Lawyer and other Professionals: Its Implications for the Privileged Communications Doctrine" (1962), 71 Yale L. J. 1226, 1230.
9. Morgan, "Foreword" in *American Law Institute Model Code of Evidence* 17-22.
10. *Op. cit.*, at s. 2291.
11. Civil Evidence Act, 1968, s. 14(1)(b).

only his spouse, but other relatives as well.[12] It is submitted that witnesses other than lawyers and relatives could appropriately be relieved of the trauma of being forced to incriminate other persons by means of repetition of communications made to them in confidence.

If this reasoning is not considered sufficiently persuasive to justify the granting of privileges on a large scale, or if the recipient is willing to testify, is there any other reason why we ought not to compel him to do so and ought even to prevent him from doing so? It is submitted that there is.

When discussing the justification for not compelling an accused person to testify at his trial, some commentators declare that it would be too great a violation of the dignity of even a guilty person to make him compellable, since then he would be forced to choose between lying to exculpate himself and telling the truth to convict himself. If he chose the former, as he would be greatly tempted to do so, he would then be liable to prosecution for perjury.[13] This concern for the dignity of even the guilty accused has manifested itself in the United States in the exclusion of involuntary confessions made by accused persons even if true.[14] Such an approach has not found favour in Canada,[15] although it is submitted that it ought to.[16]

We have scientific evidence which indicates that disclosure of personal information to intimates, family and close friends, is systematically related to mental and possibly physical health.[17] We can therefore argue that such disclosure is in a sense compelled, not by external pressures but by internal ones. In the same way that we ought to recoil from using against an accused person communications made by him to persons in authority which were compelled from him by force, we ought to recoil from using against him communications, made by him to intimates, which he was compelled to make to preserve his health. This reasoning would justify the current husband-wife, priest-penitent and doctor-patient privileges[18] as they

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12. D. R. Coburn, "Child-Parent Communications: Spare the Privilege and Spoil the Child" (1970), 74 Dick. L. Rev. 599, 600 n. 5.
13. G. A. Martin, "The Privilege against Self Incrimination Endangered" (1962), 5 Can. Bar J. 5.
14. *Miranda* v. *Arizona*, 86 S. Ct. 1602, 1630 (1966).
15. *R.* v. *Wray*, [1971] S.C.R. 272.
16. See the dissenting judgement of Cartwright, C.J.C., *ibid.*, at 275; D. W. Roberts, "The Legacy of Regina v. Wray" (1972), 50 Can. Bar Rev. 19.
17. A. F. Westin, *Privacy and Freedom* (Atheneum, New York, 1967) 54.
18. These privileges all exist in at least one Canadian jurisdiction. As to the first, see, e.g., the Canada Evidence Act, R.S.C. 1970, c. E-10, s. 4(3). As to the second,

apply in criminal (including quasi-criminal) proceedings, and was impliedly recognized to be sound by Wigmore. In speaking of the rationale for a priest-penitent privilege, he said, "In criminal cases it would be impolitic to encourage a resort to this too facile channel of confessions."[19]

Other communications which were not compelled from a person in this sense may have been compelled in the sense that he had to make them to obtain benefits he could not obtain by his own efforts because he did not have the necessary skills. To obtain from the recipients of these communications made by an accused person evidence as to them is to take unfair advantage of the accused's compulsion to communicate because of lack of skills to further the chances of his conviction. This reasoning justifies the current lawyer-client and doctor-patient privileges as they apply in criminal (including quasi-criminal) proceedings, and has been accepted in an analogous sphere, that of search and seizure, by two American Supreme Court Justices in dissent in *Couch v. U.S.*[20] In that case the issue was the ability of the government to seize a person's business records from her accountant, to whom she had delivered them for the purpose of having him prepare her tax returns. The majority's sanctioning of the seizure of the records was based on a finding that the owner of the records had not expected their contents to remain confidential when she surrendered possession of them.[21] They were careful to point out, however, that they were not holding that the author of documents could never object to their seizure out of the hands of another.[22] Douglas, J., disagreeing regarding the owner's intentions, stated:

> Our tax laws have become so complex that very few taxpayers can afford the luxury of completing their own returns without professional assistance. If a taxpayer now wants to insure the confidentiality and privacy of his records, however, he must forego such assistance. To my mind, the majority thus attaches a

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see, e.g., the Newfoundland Evidence Act, R.S.N. 1952, c. 120, s. 6. As to the third, see the Quebec Code of Civil Procedure, art. 308(2). See also the Canada Evidence Act, s. 37, and the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 53(2), both of which provisions render the priest-penitent and doctor-patient privilege applicable in at least some federal proceedings.

19. *Op. cit.*, at s. 2396.
20. 93 S. Ct. 611 (1973).
21. *Ibid.*, at 618-620.
22. *Ibid.*, at 620, n. 20.

> penalty to the exercise of the privilege against self-incrimination. It calls for little more discussion than to note that we have not tolerated such penalties in the past.[23]

Marshall, J., also in dissent, referred to "a person's right to develop for himself a sphere of personal privacy" and saw the problem in the case before him as one of developing criteria for deciding whether evidence sought to be seized by the government fell within or without that sphere. His quarrel with the majority concerned their failure to articulate criteria for making such a decision and he suggested a number of them: the nature of the evidence, the ordinary operations of the person to whom the records were given, the purposes for which the records were transferred and the steps the author took to ensure their privacy. With respect to the third criterion he stated:

> that a transfer is compelled by practical considerations if the author is to claim benefits available under the law seems to me quite important. If petitioner had sought to take advantage of some complicated provision of the tax laws and needed the help of an accountant to do so, I would be quite reluctant to hold that the transfer of her records was a surrender of the privacy of her papers . . . As I understand it, the majority . . . recognize the importance of this criterion.[24]

If the learned justices took this view with respect to an owner's ability to object to the seizure of her personal records out of the hands of another person to whom she had delivered them in order to avail herself of a skill of that other person which she herself did not possess,[25] they would presumably take the same view with respect to the seizure of her written communications to that other person regarding her situation. If they would forbid the seizure of written communications from the hands of the recipient, they would presumably excuse the recipient of the communications from being required to testify as to their contents. That being so, they would presumably excuse him from testifying as to an oral communication made to him in order to enable him to perform a service for the communicator which she could not perform for herself. Justice Douglas apparently recognized the soundness of this chain of reasoning when, in discussing "the right of each individual 'to a private enclave where he may

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23. *Ibid.*, at 623.
24. *ibid.*, at 627.
25. Of course, the issue which arose in the *Couch* case could not even arise in Canada, given the current state of the law of search and seizure. See the Ouimet Committee Report, at 64-65.

lead a private life,''' he pointed out, ''One's privacy . . . has a very meaningful relationship to what he tells any confidant . . .''[26]

Apropos the *Couch* case, the American Law Institute has recently been engaged in drafting a Model Code of Pre-Arraignment Procedure and it has dealt therein with permissible objects of search and seizure. The Code excludes from search and seizure ''. . . personal diaries, letters, or other writings or recordings, made solely for private use or communication to an individual occupying a family, personal or other confidential relation, other than a relation in criminal enterprise, unless such things have served or are serving a substantial purpose in furtherance of a criminal enterprise.''[27]

It is submitted that such a proposal is readily transferable to the area of testimonial privilege. A rule of privileged communications ought to be formulated which allows an accused person to prevent from being used against him evidence as to any communication he made to another person in an expectation of confidentiality so long as that expectation was justified in the circumstances. Such a rule would constitute society's guarantee that it would not seek convictions either by putting recipients of such communications in an intolerable position or by relying on communications the accused reasonably expected would remain confidential and which he was compelled to make. It would recognize a sphere of privacy surrounding a person which extended beyond his self and took in other persons who constitute an extension of his self for the purpose of receiving confidential communications. It would not discriminate among various sorts of relationships, ascribing higher value to some than to others as the present rules do, but would rather focus on the value of the relationship from the point of view of the communicator.

If such a rule were appropriate in criminal cases would it not also be appropriate in civil cases? It might be argued that if it is improper for society to advance its own claims by the use of a particular sort of evidence, then it is just as improper for it to allow private individuals before the courts to advance their claims by the use of that sort of evidence. This suggestion has, however, never been accepted. For instance, while an accused person cannot be compelled to testify at his trial, a civil defendant can. While a statement which constitutes an involuntary confession is, absent the existence of subsequent confirming facts, inadmissible at a criminal trial, it is admissible at a civil

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26. *op. cit.*, at 623.
27. Proposed Official Draft No. 1, (1972), Section SS 210.3(2).

trial.[28] The reason for this distinction is said to be that "[i]n a prosecution the Court is not adjusting rights between two persons . . ."[29] When it is, truth can be bought at a greater cost. Thus it is submitted that the policy to be followed with respect to the privileged communications rules is that they should be broadened as to the classes of relations to which they apply in criminal cases and removed in civil cases.

Such a policy would obviously lessen whatever obstructive effect there is to the current privileges, since objection could only be taken to answering questions regarding confidential communications whose repetition would incriminate the communicator.

Furthermore, it is suggested that if evidence as to the communication were sought in a legal proceeding other than the criminal trial of the communicator, such evidence should be admitted, but that neither it nor its fruits should be admissible in a criminal trial, should one follow. This limitation on the use of the fruits of the incriminating evidence would be broader than the limitation now imposed on the prosecution with respect to the use that may be made of self-incriminating answers by witnesses, but it is submitted that the limitation suggested here is the only sound one. The opinion of Falconbridge, C.J.K.B., with respect to the protection offered to a witness by the immunity now conferred in the federal Evidence Act is, it is submitted, appropriate, namely, that it "does not afford sufficient immunity . . . The prosecutors might well get information from him which would enable them to get convicting evidence *aliunde* without using his own evidence against him at all."[30] In any event, such a scheme would be less obstructive than one which excused the witness from answering the question altogether.

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28. *Tompkins* v. *Ternes* (1960), 32 W.W.R. 299 (Sask. Q.B.D.)
29. *Hurst* v. *Evans*, [1917] 1 K.B. 352, 357.
30. Quoted in *Re Ginsberg* (1918), 38 D.L.R. 261, 267 (Ont. C.A.).