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The Futile Fifth Step: Compulsory Disclosure of Confidential Communications Among Alcoholics Anonymous Members

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THE FUTILE FIFTH STEP: COMPULSORY DISCLOSURE OF CONFIDENTIAL COMMUNICATIONS AMONG ALCOHOLICS ANONYMOUS MEMBERS

Admitted to God, to ourselves, and to another human being, the exact nature of our defects.

Alcoholics Anonymous, Fifth Step

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INTRODUCTION

Two homicide trials have threatened the integrity of Alcoholics Anonymous and other self-help groups that follow the Twelve Steps of Alcoholics Anonymous. In 1990, a Bangor, Maine jury convicted Ronald Boobar, Jr. of the murder of fourteen year old Becky Pelky. Boobar, an alcoholic, had attended Alcoholics Anonymous (hereinafter "AA") meetings before Pelky's November 1988 death. Shortly after her death, Boobar, while on the way to an AA meeting in the company of Joseph Sapiel, recalled being with "Becky" at the time she was killed. Boobar was subsequently arrested for the murder of Becky Pelky and was visited in jail by Daniel DesIsles, an AA member to whom he made admissions about the Pelky killing. Both DesIsles and Sapiel were called as State's witnesses and were compelled to disclose Boobar's conversations.¹

In New York, Paul Cox, a White Plains carpenter and AA member, was indicted in 1993 for murdering two physicians. The indictment was based in part upon a report made by a fellow AA member to the White Plains Police Department. Six AA members were called as witnesses in Cox's June 1994 trial to

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¹ State v. Boobar, 637 A.2d 1162, 1168-69 (Me. 1994).

testify under compulsion to confidential communications Cox made to them.² Cox's first trial ended in June 1994 with a hung jury. He was retried in November 1994 and convicted of first degree manslaughter.³

In both cases, defense counsel moved to suppress confidential communications made by the defendants to other AA members. The courts, however, refused to find a confidential communications privilege for conversations between AA members. This Article examines the *Boobar* and the *Cox* decisions in light of the law defining compulsory disclosure of confidential communications in group therapy. Following an analysis of the current state of the law, this Article investigates the effect of the constitutional right to privacy as it applies to group therapy. Finally, this Article proposes that confidential communications between Twelve Step group members are constitutionally protected and should be shielded by a judicially-enforced privilege.

I. THE SETTING

A. *State v. Boobar*

In November 1988, Ronald Boobar, an alcoholic and drug addict, and Thomas Dembowsky, a friend of Boobar, picked up three teenage girls in a Bangor, Maine bar.⁴ One of the three was fourteen year old Rebecca "Becky" Pelky. Boobar, Dembowsky, and the three girls left the bar and cruised the town in Boobar's car. Early the next morning, Boobar dropped Dembowsky and two of the girls off at their homes. Dembowsky, the last passenger to be let off, remembered that Boobar and Pelky drove off together. The next day, Becky Pelky's mother reported her daughter missing.

On November 9, 1988, two pedestrians found Becky Pelky's body lying in the woods in Hermon, Maine.⁵ A medical examiner determined that she had been strangled with a nylon rope about

² See Joseph Berger, *Alcoholic Said He Killed, Colleagues Testify*, N.Y. TIMES, June 7, 1994, at B1; Jan Hoffman, *Faith in Confidentiality of Therapy Is Shaken*, N.Y. TIMES, June 15, 1994, at A1; *Retrial Begins in Murder Case Tied to Confession to A.A. Group*, N.Y. TIMES, Nov. 3, 1994, at B7.

³ Joseph Berger, *Carpenter Guilty of Manslaughter in 1988 Slayings in Larchmont*, N.Y. TIMES, Dec. 7, 1994, at B1.

⁴ *Boobar*, 637 A.2d at 1164-65.

⁵ *Id.* at 1164.

five to ten days before her body was discovered.⁶ The Maine State Police learned that Boobar had been the last person who had contact with Rebecca Pelky before her death.⁷ Shortly after her body was discovered, the police went to Boobar's house to take him in for interrogation. During a four hour interrogation, Boobar denied killing Pelky and insisted he had dropped her off at her mother's house on the night in question.⁸ Nevertheless, the police detained Boobar for the grand jury; he was thereafter indicted for Pelky's murder.⁹

In the fall of 1988, Ronald Boobar was attempting to recover from alcohol and drug addictions.¹⁰ Nine days after Becky Pelky's body was discovered, he went to an AA meeting with Joseph Sapiel, a fellow member.¹¹ Boobar told Sapiel that the State Police believed he murdered Becky Pelky. Boobar admitted that he had been with Becky Pelky the night she died, but claimed to have been helping her with her addiction problems and an unwanted pregnancy.¹² This conversation occurred before Boobar was taken into custody; it is unclear whether this exchange took place in Sapiel's car before the meeting, or during the AA meeting itself.

Boobar also contacted AA during his pretrial detention.¹³ Daniel DesIsles, an AA member, was a volunteer group leader for the county jail. At Boobar's request, DesIsles met with Boobar in the lockup, where Boobar admitted that he had been out with Becky and had an argument with her after dropping off all the other passengers.¹⁴ DesIsles tried to discourage Boobar from talking about the crime, but Boobar persisted, eventually telling

⁶ *Id.*

⁷ *Id.* at 1165. One of the three girls later identified Boobar as their host for the night.

⁸ *Id.* at 1165.

⁹ *Boobar*, 637 A.2d at 1165. Boobar was held without bail in the county jail. *Id.* Two fellow inmates later testified that Boobar had made damaging admissions to them concerning Becky Pelky's death. Inmate Charles Kimball, Jr. testified that he overheard Boobar talking on the telephone stating that "I didn't mean to do it. I just kind of, like, blacked out. I was drunk and stuff." *Id.* Inmate Richard Everett, Jr. also testified that Boobar admitted killing Pelky to Everett and another inmate.

¹⁰ *Id.* at 1165. He had attended Alcoholics Anonymous meetings before the Pelky killing. *Id.*

¹¹ *Boobar*, 637 A.2d at 1168.

¹² *Id.* at 1168-69.

¹³ *Id.* at 1169.

¹⁴ *Id.* at 1169 & n.6.

DesIsles, "You and one other person know that I did it."¹⁵ Boobar's attorney made a pretrial motion to suppress Boobar's statements to fellow AA members on the grounds of psychotherapist-patient privilege.¹⁶ The trial judge denied the motion.

The State presented strong circumstantial demonstrative evidence linking Boobar to the scene of the crime. Paint traces found embedded in a fir tree near the crime scene matched paint on Boobar's dented side view mirror and vegetative matter found on the mirror proved compatible with the fir tree.¹⁷ Moreover, two pubic hairs found on the victim matched Boobar's hair under microscopic examination.¹⁸ In addition, the testimony of Dembowsky and of one of Pelky's companions demonstrated that Boobar was the last person seen with Becky before her death. The State called Daniel DesIsles as a witness who gave the following testimony:

Well, he was giving me—telling me different stuff in between, you know, and I was trying to say about the Twelve Step program. And, at the end, he looked at me and he said, 'You and one other person know that I did it.' And, then, at the end when I was walking out, he said, 'I did it.'¹⁹

Boobar's counsel objected to the admissibility of this testimony on three grounds. First, the conversation was privileged under Rule 503 of the Maine Rules of Evidence as a confidential communication made in the course of psychotherapeutic treatment. Second, 42 U.S.C. §290dd-3 requires that communications between prisoners and therapists in federally funded substance abuse programs be held confidential. Third, the probative value of the statements made to DesIsles was substantially outweighed by the prejudice to the defendant.²⁰

Joseph Sapiel, also called as a witness for the State, testified

¹⁵ *Id.*

¹⁶ *State v. Boobar*, 637 A.2d 1162, 1169 (Me. 1994). Rule 503 of the Maine Rules of Evidence rests in the patient the privilege to prevent disclosure at trial of communications to a physician or psychotherapist. ME. R. EVID. 503.

¹⁷ *Boobar*, 637 A.2d at 1166. The police cut down the fir tree with the paint samples. *Id.* Using the tire tracks found at the crime scene, the fir tree was reconstructed at the original site for an experiment. *Id.* Boobar's car was brought to the scene and positioned in the tracks. This demonstration showed that the dented mirror lined up with the gouge mark in the tree. *Id.*

¹⁸ *Id.* at 1168.

¹⁹ *Boobar*, 637 A.2d at 1169 n.6. DesIsles also testified that Boobar did not specifically indicate what "it" was. *Id.*

²⁰ *Id.* at 1169.

to the conversation he had with Boobar on the way to the AA meeting.²¹ Boobar objected to Sapiel's testimony on two of the grounds raised in the objection to DesIsles's evidence: the psychotherapist-patient privilege and the prejudicial effect pursuant to Rule 403 of the Maine Rules of Evidence.²²

Nevertheless, Boobar was convicted of murder. Defense counsel asserted several grounds for reversing his conviction, including, *inter alia*, the assertion that the court erred in admitting DesIsles's and Sapiel's testimony.²³ Boobar claimed that his statements to DesIsles at the county jail were intended to be confidential: the statements pertained to his drug and alcohol addiction problems and DesIsles was functioning as a drug and alcohol counselor when he received those statements. Boobar argued that exchanges between therapist and patient at a federally-funded drug and alcohol treatment program privileged communications.²⁴ The court, however, rejected this argument

²¹ *Id.* at 1168-69.

²² *Id.* at 1169.

²³ Boobar claimed three other grounds for reversal. First, Boobar claimed that he did not freely and voluntarily waive his Miranda rights before giving a statement to the Maine State Police. The court, holding that Boobar's statement to the police was properly admitted because it was not coerced, noted that Boobar had three coffee breaks and went to the bathroom before giving a statement. Additionally, the interrogating officers testified Boobar was advised of his rights before they asked any questions. *State v. Boobar*, 637 A.2d 1162, 1165-66 (Me. 1994). Second, Boobar claimed the out-of-court demonstration staged by the Maine State Police at the scene of the crime—using Boobar's car and a section of fir tree to show that the dent on Boobar's rear view mirror corresponded to the height of the gash on the tree—was inadmissible because it was not substantially similar to the known facts of the Pelky homicide. Boobar contended that the demonstration preserved on videotape for the court, was more prejudicial than probative and could not be the basis for expert testimony. The court rejected this claim of error because the demonstration was substantially similar to the known facts surrounding Pelky's death. *Id.* at 1167-68. Boobar also objected to admission of expert testimony that footprints found on the exterior of Boobar's car resembled footprints on the victim's neck and admission of microscopic slides of wood and leaf fragments made by the State's expert for the purpose of identifying the vegetation found in the dent on Boobar's car, and admission of the damaged mirror and the segment of fir tree with the gash used in the out of court demonstration. These items of evidence were collateral to the admissibility of the demonstration and were held to be within the trial judge's discretion. *Id.* at 1167. Third, Boobar claimed the forensic evidence introduced by the State showing that Becky Pelky had sexual intercourse at some time shortly before her death unduly prejudiced him because the evidence suggested he had committed statutory rape. The court rejected this assertion finding that the trial court did not abuse its discretion. *Id.* at 1168.

²⁴ *Id.* at 1169. The Public Health Service Act provides for the confidentiality of treatment in connection with a program relating to substance abuse treatment con-

indicating that since the jail where the conversation occurred was not receiving federal assistance for drug and alcohol abuse treatment, the defense privilege claims could not be sustained.²⁵

The court examined Boobar's argument based on the psychotherapist-patient privilege. Rule 503 of the Maine Rules of Evidence provides a broadly-based privilege for confidential communications between psychotherapists and patients. The privilege applies to exchanges between therapists and patients, patients and other patients, and patients and family members participating in group psychotherapy. Boobar's attorney argued that communications between AA members were protected by Rule 503. Rather than claim Boobar had a constitutionally-based right to keep his AA communications privileged under the right to privacy, she attempted to stretch Maine's psychotherapist-patient privilege rule to include communications between AA members. She argued that the Maine legislature intended to bring self-help groups within the definition of "psychotherapy" by allowing peer groups to perform psychotherapeutic counseling without a license.²⁶ However, the court rejected this analogy because AA was not a legally recognized professionally-supervised group therapy program. The court found that professional supervision of group therapy sessions was critical to the application of psychotherapist-patient privilege. The court therefore upheld Boobar's conviction and compulsory disclosure of confidential communications between AA members.²⁷

B. People v. Cox

Early on the morning of January 1, 1989, the bodies of Dr. Shanta Chervu and her husband Dr. Lakshman Rao Chervu were discovered in their Larchmont, New York home. An intruder had entered their house and attacked the couple in their beds, killing the two with repeated stab wounds after what ap-

ducted by any department or agency of the United States. 42 U.S.C. § 290dd-2(a) (1994).

²⁵ *Boobar*, 637 A.2d at 1169. The court also stated, in dicta, that the statute did not establish an evidentiary privilege because it provided for a civil fine in case of a violation. *Id.*

²⁶ ME. REV. STAT. ANN. tit. 32, § 13856(1) (West 1995). Boobar's counsel also argued that ME. REV. STAT. ANN. tit. 32, § 13856(b) (West 1995), granted a privilege to communications made to licensed psychotherapists, and a similar provision for licensed social workers, ME. REV. STAT. ANN. tit. 32, § 7005 (West 1995), extended by analogy to self-help groups. *Boobar*, 637 A.2d at 1169.

²⁷ *Boobar*, 637 A.2d at 1169-70.

peared to be a protracted struggle. There were no forensic clues identifying the attacker, and the Chervus' murder case went unsolved until 1993.²⁸

In May 1993, Larchmont police received a tip that the perpetrator was Paul Cox, a carpenter who had lived in the house owned by Dr. Chervu from 1967 to 1974. Although the identity of the informant was not officially disclosed, it later became apparent that the person reporting Cox's admissions was a fellow member of AA.²⁹ According to the confidential source, Cox had become intoxicated after drinking with friends at a bar on New Year's Eve. On his way home, Cox wrecked his car and fled on foot toward the house in Larchmont where he had lived as a boy. The informant alleged that Cox broke into the house and killed the Chervus with a kitchen knife. Based on this information, the Larchmont police matched otherwise unidentified fingerprints in the house to Cox. He was arrested and indicted on two counts of murder.³⁰ As a result, the Westchester District Attorney's office indicated an intent to subpoena AA members who had conversations with Cox after the 1989 incident in which Cox admitted to the break in and homicides. Cox's attorney tried unsuccessfully to suppress the witnesses' statements as confidential communications.³¹

At Cox's trial in June 1994, the People called six AA members, who had received confidential communications from Cox regarding a possible homicide committed during an alcohol induced "blackout" on New Year's Eve 1988, to testify. One witness³² testified that Cox told her he believed he had murdered a man and woman in a bedroom once used by his parents. The witness testified that Cox told her, "I don't remember this night, I don't know what happened. I don't know what went on. But I might have done it."³³ Another AA member testified that Cox told him "he had gone to a house and that he killed two people

²⁸ Berger, *supra* note 2, at B5.

²⁹ *Id.* at B1.

³⁰ *Id.* at B1.

³¹ *Id.* at B1, B5. Cox pled insanity, alleging that he murdered the Chervus in a psychotic outburst triggered by his over-consumption of alcohol prior to the homicide. *Id.* at B5.

³² Berger, *supra* note 2, at B1. All six AA members testified under alias to protect their anonymity. *Id.*

³³ *Id.* at B1. Cox also told the witness, who was a former girl friend, that he found a bloody knife in his possession after the homicides and threw it into Long Island Sound. *Id.* at B5.

while they slept."³⁴

Cox's first trial ended in a hung jury, eleven voting for conviction and one for acquittal.³⁵ A second trial started November 2, 1994.³⁶ The same six AA members repeated their testimony to a new jury. Cox testified on his own behalf, relating his history as an alcoholic. According to Cox, he had abused alcohol since the sixth grade in response to his perceived indifference of his parents and six siblings.³⁷ Cox also recounted his heavy drinking in high school including secret stashes of vodka in his car for mid-morning drinks.³⁸ Cox stated he had no memory of the Chervus' slayings³⁹ but did admit to drinking five or six pitchers of kamikazes on New Year's Eve 1988, before wrecking his car.⁴⁰

At the close of the evidence, the trial judge instructed the jury that it could find Cox guilty of first degree murder, or they could find him guilty of the lesser included offense of manslaughter, if they believed that Cox had acted under extreme emotional distress at the time of the homicides.⁴¹ The jury subsequently found Cox guilty of manslaughter.⁴²

These two cases are the first recorded instances in which the prosecution obtained incriminating evidence from AA members under compulsory process. In each case, AA members gave evidence against the accused that was crucial to the State's case in chief. If the State invaded a constitutionally protected right to personal privacy by using the accused's admissions made in the course of AA meetings or after-meetings discussions, then the *Boobar* and the *Cox* courts committed errors of constitutional dimensions that justify reversal.⁴³

³⁴ *Id.* at B5.

³⁵ Joseph Berger, *Mistrial Declared in Case of Suspect in 2 Murders*, N.Y. TIMES, June 29, 1994, at B5.

³⁶ *See Retrial Begins in Murder Case Tied to Confession to A.A. Group*, *supra* note 2, at B7.

³⁷ *Suspect Says Mind Blank on Slayings*, N.Y. TIMES, Nov. 19, 1994, at 29.

³⁸ *Id.* Cox testified that a psychiatrist had diagnosed him as a person who suffered from fantasies centering on killing his parents. Debra West, *Accused's Words at Core of Insanity Defense*, N.Y. TIMES, Nov. 27, 1994, at 58.

³⁹ *Suspect Says Mind Blank on Slayings*, *supra* note 37, at 29; *No Memory of Stabbings, Carpenter Tells Jury*, N.Y. TIMES, Nov. 22, 1994, at B5.

⁴⁰ West, *supra* note 38, at 58.

⁴¹ *Jury Weighs Charges in Carpenter Murder Case*, N.Y. TIMES, Nov. 30, 1994, at B6. The jury was also given a not guilty by reason of insanity instruction.

⁴² *See Berger*, *supra* note 2, at B1.

⁴³ This comment holds true even though the Rebecca Pelky homicide was a gruesome heinous crime as was the homicide that took the lives of Drs. Chevru and

This Article reviews the history of the Twelve Step program and its place in the rehabilitation of alcoholics and drug addicts. It then examines the case for a judicially-recognized privilege for confidential communications made by members of Twelve Step recovery groups to other group members in the course of a recovery program. Ultimately, the only justification for recognizing such a privilege is the constitutionally-rooted right to personal privacy, the primary basis for the psychotherapist-patient privilege and the privilege extended to confidential communications between clergy and congregation members.

II. HISTORY OF TWELVE STEP ORGANIZATIONS

A. *Precursors of Alcoholics Anonymous*

The movement to curb excessive use of alcohol in the United States dates back to the late eighteenth century.⁴⁴ Prior to that time, beer, whiskey, rum, and brandy were omni-present at home and in the work place.⁴⁵ There were probably a significant number of people who fit the modern definition of alcoholics, persons unable to control their urge to drink,⁴⁶ but the social conse-

Chevru. The fact that it may have been expedient for the prosecution to use confidential communications against the accused, who may not have been convicted on the strength of other evidence, does not justify admission.

⁴⁴ MARK EDWARD LENDER & JAMES KIRBY MARTIN, *DRINKING IN AMERICA, A HISTORY* 34-40 (1982) (paralleling America's movement to reduce drinking with America's movement toward independence and resulting rebirth of "public virtue").

⁴⁵ *Id.* at 9-21. Colicky babies were given whiskey or rum in their milk or mush to calm them down. No gang of house carpenters could put up a barn or a house without a cask of spirits to shore up their strength. During the American Revolution, Continental Army and Navy enlisted men received a daily grog ration of a gill of watered down rum in order to inspire their military courage. JAMES S. BLOCKER, *AMERICAN TEMPERANCE MOVEMENTS: CYCLE OF REFORM* 4-7 (1989); LENDER & MARTIN, *supra* note 44, at 31-32.

⁴⁶ The definition of an alcoholic according to Alcoholics Anonymous is a person who is powerless to control the urge to drink. Alcoholics Anonymous literature still considers alcoholics to be persons who are allergic to alcohol. *See, e.g.*, ALCOHOLICS ANONYMOUS, *THE STORY OF HOW MANY THOUSANDS OF MEN AND WOMEN HAVE RECOVERED FROM ALCOHOLISM* xxiii-xxx (3d ed. 1976) [hereinafter ALCOHOLICS ANONYMOUS]. They follow the medical theory originated by Dr. William Silkworth, M.D., the director of Charles B. Townes Hospital in New York City between 1924 and 1934. Townes Hospital was one of the very few institutions that would accept chronic alcoholics as patients before World War II. Silkworth taught his patients that alcoholism is an allergic reaction brought on by genetic predisposition to react adversely to alcohol. He also impressed upon them the need for total abstinence from any form of alcohol. ERNEST KURTZ, AA, *THE STORY* 21-24 (2d ed. 1988). William Wilson, one of the original founders of Alcoholics Anonymous, had been Dr.

quences of alcoholism in a pre-industrial society were much less serious than in a highly complex post-industrial environment such as the late twentieth century United States. In general, eighteenth century North American colonists and their early United States descendants were heavy drinkers who were often intoxicated. Society tolerated widespread alcohol abuse, save for the pioneer Methodists who pledged to abstain from ardent spirits on religious and social grounds.⁴⁷

All this changed when Dr. Benjamin Rush, the first United States physician to write on mental illness, released *An Inquiry into the Effects of Ardent Spirits on the Human Mind and Body* in 1784.⁴⁸ Since 1772, Dr. Rush had campaigned against hard liquor on the ground that spirits were dangerous to human mental and physical health. *Inquiry* described alcohol addiction or chronic drunkenness as an addictive disease passing through progressively more acute phases or stages resulting in death or insanity.⁴⁹ Although Rush did not oppose moderate use of wine or beer, he opposed any use of whiskey, rum or brandy. Drunkenness was not simply a moral vice that could be overcome by will power, according to Rush, but an addictive condition beyond human control.⁵⁰ Dr. Rush was appalled by the social cost of drunkenness already apparent in the post-revolutionary United States: crime, degradation, broken families, and economic loss. He feared that political control of the republic would pass to politicians who were supported by whiskey drinking intoxicated voters.⁵¹ Dr. Rush's views were highly unpopular in his time, but his treatise served as the basis for later nineteenth century temperance reform movements. One hundred fifty years later, AA would adopt Dr. Rush's original description of alcoholism as an addictive disease.

Dr. Rush founded no societies to curb drunkenness. Al-

Silkworth's patient at Townes during the early 1930s. Modern medical theory does not support the notion that alcoholism is an allergic reaction. Alcohol addiction is a complex and baffling condition. Thanks to the work of Dr. Ernest Jellinek and the Yale (later Rutgers) Center of Alcohol Studies, most researchers accept the premise that alcoholism is a physical and mental disease or illness. LENDER & MARTIN, *supra* note 44, at 186-88.

⁴⁷ LENDER & MARTIN, *supra* note 44, at 34-36.

⁴⁸ Dr. Rush was a signer of the Declaration of Independence and the Surgeon General of the Continental Army. *Id.* at 36.

⁴⁹ *See id.* at 37.

⁵⁰ *See id.* at 36-38.

⁵¹ *See id.* at 38; *see also* BLOCKER, *supra* note 45, at 7-8.

though some Methodist and Baptist ministers advocated abstinence from hard liquor, it took sixty years for any organized effort to put Dr. Rush's principles into practice. In the mid-19th century, the Washingtonians and the Sons of Temperance were true historical precursors of AA.⁵²

In the late 1830s six Baltimore skilled tradesmen were drinking in a local tavern. They sent one worker to a local temperance meeting who came back from the meeting burning with desire to form a brotherhood that would provide mutual support for drinkers who wanted to stop drinking.⁵³ The Baltimore support group developed a unique program for mutual support: each member would be required to tell his or her own story relating to drinking problems as a "testimonial" in support of complete abstinence from all forms of alcohol. These testimonials would be directed toward prospective new members as a missionary device, and by Christmas 1840 the Baltimore group had dispatched missionaries to New York and Cincinnati to spread the good news.⁵⁴ The early Washingtonians, primarily recruited from working class heavy drinkers, spread their total abstinence message with surprising rapidity and effectiveness throughout the settled parts of the United States, establishing local societies for men and a women's auxiliary—the Martha Washingtons.

Typically, a visiting Washingtonian missionary would arrive in a community and rent a hall for a temperance lecture in which the missionary would describe with excruciating detail his own course as a heavy drinker. The missionary would then recount how he had been saved from death or insanity by the Washingtonians. He described the mutual support from others who had taken the total abstinence pledge and promised to support each

⁵² This Article will not attempt to summarize the history of coercive temperance reform and reformers such as Neal Dow and those responsible for the Anti-Saloon League, since the political drive to ban liquor sales does not relate to the objectives of Alcoholics Anonymous in any way. Alcoholics Anonymous decided early in its history not to become involved in partisan political fights over drug and alcohol sales. Its stance is embodied in the Sixth and Tenth Traditions of the program: "6. An AA group ought never endorse, finance or lend the AA name to any related facility or outside enterprise, lest problems of money, property and prestige divert us from our primary purpose. 10. Alcoholics Anonymous has no opinion on outside issues." ALCOHOLICS ANONYMOUS, *supra* note 46, at 564.

⁵³ BLOCKER, *supra* note 45, at 40-41. This occurred during the worst part of the Panic of 1837 where the usual high rates of alcohol consumption dramatically increased due to widespread unemployment.

⁵⁴ *Id.* at 40-41.

other financially and emotionally through what a later generation would call "recovery." Then the missionary called for those willing to start a local society. Usually the audience would respond with a wave of enthusiasm and a local society would be formed.⁵⁵ The new converts were invited to schedule weekly support meetings and members pledged to seek out other heavy drinkers to help them gain sobriety. Washingtonians combined support meetings with social gatherings such as picnics and group singing to provide a replacement social life for tavern frequenters.

Washingtonian groups had no internal or external structure, and no national association. Each organization functioned on its own with only fellowship ties to similar groups in nearby communities. The movement lasted less than ten years and although it was immensely successful at first, the Washingtonians clashed with politically-minded temperance reformers who wanted local option laws. As they had no spiritual basis for their movement, the Washingtonians were frequently reviled by orthodox temperance advocates for being irreligious. Finally, the loose organizational structure of autonomous groups with no internal controls on members' behavior led to two ultimately fatal wounds. First, some Washingtonians would backslide and begin drinking heavily. Since the society's membership was not a secret, the Washingtonians thus got a reputation for failure. Second, the Washingtonians had to compete with other better organized lodges for membership support.⁵⁶ Ultimately, many sober former Washingtonians became involved in the Sons of Temperance and other similar lodges that provided an institutional structure in which members systematically paid dues that supported the lodge's outreach work by funding the missionary work of the lodge.⁵⁷

⁵⁵ *Id.* at 40-43.

⁵⁶ *Id.* at 48-50. Blocker also claims that the Washingtonian movement was in part a response to the economic crisis brought on by the Panic of 1837, and as economic conditions improved in the mid to late 1840s, labor unions reasserted themselves as protectors of the working class, causing Washingtonians to abandon the temperance crusade for labor union assurances of mutual support. This argument is not logically compelling nor supported by much evidence.

⁵⁷ BLOCKER, *supra* note 45, at 48-49. Members also purchased burial insurance for themselves and their families to financially support the lodge. *Id.* at 40-41; see also LENDER & MARTIN, *supra* note 44, at 77-78 (noting that those interested in saving alcoholics joined more formal lodges such as Sons of Temperance, advancing point of view of secret society dedicated to mutual support). Lender and Martin also

The Sons of Temperance learned from the mistakes of the Washingtonians. Membership rolls were secret and new members were admitted by vote of the whole lodge. Five negative votes would exclude a new member. A rival temperance lodge, the Independent Order of Good Templars, founded in 1851, emulated the Sons of Temperance with regard to membership secrecy and membership by sponsorship, but deviated from the Sons of Temperance model by admitting women on an equal basis with men.⁵⁸

Alcoholics Anonymous would later adopt some of the leading principles of the temperance societies. It adopted the Washingtonian method of personal testimonials from heavy drinkers as an important means of recruiting members and building group solidarity.⁵⁹ It also adopted the Washingtonian's emphasis on total abstinence from all forms of alcohol, and its missionary activism, searching out alcoholics and talking them into attending meetings.⁶⁰ Alcoholics Anonymous borrowed membership secrecy from the lodges, realizing that anonymity would protect the organization from adverse publicity if a member relapsed into heavy drinking.⁶¹ It also admitted men and women on an equal footing.

Although nineteenth century temperance movement history explains some of the organizational measures adopted by AA, it does not explain its unique spiritual basis, since the Washingtonians and the Sons of Temperance were entirely secular movements that had no religious affiliation. Alcoholics Anonymous had its primary roots and in fact grew directly out of a twentieth century phenomenon, Moral Re-Armament.⁶²

Frank Buchman, a Lutheran minister, founded the Oxford

argue that the primary cause of the Washingtonian downfall was the withdrawal of support from churches and other temperance societies, due to disagreements over leadership and strategies regarding prohibition. See LENDER & MARTIN, *supra* note 44, at 76.

⁵⁸ BLOCKER, *supra* note 45, at 49-51; see also LENDER & MARTIN, *supra* note 44, at 78.

⁵⁹ See ALCOHOLICS ANONYMOUS, *supra* note 46, at 89-95; LENDER & MARTIN, *supra* note 44, at 183.

⁶⁰ See Bill Wilson, *The Three Legacies of Alcoholics Anonymous: Recovery, Unity, Service*, in ALCOHOLICS ANONYMOUS COMES OF AGE 49, 139 (Alcoholics Anonymous World Services, Inc. ed., 1957) [hereinafter ALCOHOLICS ANONYMOUS COMES OF AGE].

⁶¹ See BLOCKER, *supra* note 45, at 50-51.

⁶² See NAN ROBERTSON, *GETTING BETTER: INSIDE ALCOHOLICS ANONYMOUS* 58 (1988).

Groups and, later, Moral Re-Armament.⁶³ Pastor Buchman experienced a spiritual conversion during a vacation in the British Isles.⁶⁴ His personal conversion experience was the intuition that God could become real to anyone willing to believe. Men distance themselves from God through their own fault, as a result of moral compromise. Buchman found it necessary to re-examine his life against four absolute standards: honesty, purity, unselfishness and love,⁶⁵ and to first change his own moral life before he sought change in the moral life of society.⁶⁶ That change would be precipitated by sharing his moral failings with others, i.e., by public confessions.⁶⁷

Buchman believed that he was attempting to live as the

⁶³ TOM DRIBERG, *THE MYSTERY OF MORAL RE-ARMAMENT* 11-12 (1965); Alan Thornhill, *Frank Buchman*, in *REMAKING THE WORLD: THE SPEECHES OF FRANK N.D. BUCHMAN* ix, xi (1961) [hereinafter *BUCHMAN*]. In 1938, Dr. Buchman prepared a plan for "moral re-armament," a world-wide movement to revitalize social virtue using the principles of the Oxford Group. The organization took the name "Moral Re-Armament" and its United States groups participated in the war effort by galvanizing support for the allies. J. GORDON MELTON, *ENCYCLOPEDIA OF WORLD RELIGIONS* 1022 (4th ed. 1993).

⁶⁴ MELTON, *supra* note 63, at 1022. Pastor Buchman had been in charge of a poor Philadelphia parish and had started a youth hostel for underprivileged boys. He became embroiled in a battle with his trustees who removed him from his position as director. The fight with his board left him exhausted and depressed, and he went on a tour of the British Isles in 1908. In a chapel, Buchman experienced a spiritual conversion that freed him from resentment and hostility resulting from the failure of the youth hostel. *Id.*; see also BILL PITTMAN, *AA THE WAY IT BEGAN* 114-15 (1988). Buchman described the experience as follows:

I had entered the little church with a divided will, nursing pride, selfishness, ill-will, which prevented me from functioning as a Christian Minister should. The woman's simple talk personalized the Cross for me that day, and suddenly I had a poignant vision of the Crucified ... [i]t produced in me a vibrant feeling, as though a strong current of life had suddenly been poured into me, and afterwards a dazed sense of great spiritual shake-up. There was no longer the feeling of a divided will, no sense of calculation and argument, of oppression and helplessness; a wave of strong emotion following the will to surrender, rose up within me from the depths of an estranged spiritual life, and seemed to lift my soul from its anchorage of selfishness...

Id. at 114-15 (quoting ROBERT H. MURRAY, *GROUP MOVEMENTS THROUGHOUT THE AGES* 306 (1935)).

⁶⁵ These are the four absolute standards of Moral Re-Armament. See *BUCHMAN*, *supra* note 63, at 96.

⁶⁶ KURTZ, *supra* note 46, at 51; see *BUCHMAN*, *supra* note 63, at 24 ("[I]f you want an answer for the world today, the best place to start is with yourself.").

⁶⁷ PITTMAN, *supra* note 64, at 117. Buchman publicly confessed to the first Oxford Group house party held in the summer of 1918 that he had been involved in a dishonest transaction with a railroad company and had written a letter to the company admitting his sin together with full monetary restitution.

early Christians had. He understood that he was to share his conversion experience with others in order to influence the direction of social and political life.⁶⁸ Buchman organized the First Century Christian Fellowship, later called the Oxford Group,⁶⁹ consisting of those men and women who accepted the moral re-examination of life according to the four absolutes.⁷⁰

The Oxford Group had no formal organization. Group meetings were called "house parties" and were held in members' houses or in hotels. The house parties promoted group sharing of experience, strength and hope for a moral regeneration, i.e., confessions and messages of support for each member.⁷¹ Oxford Groups operated under six basic assumptions which played a significant role in formulating the program of AA:

⁶⁸ REV. CLAIR M. DINGER, *MORAL RE-ARMAMENT, A STUDY OF ITS TECHNICAL AND RELIGIOUS NATURE IN THE LIGHT OF CATHOLIC TEACHING* 27-29 (1961).

⁶⁹ PITTMAN, *supra* note 64, at 117. Some of the earliest adherents to the First Century Christian Fellowship happened to be Oxford University students, which led to Buchman groups being nicknamed "Oxford Groups." A First Century Christian Fellowship Group was also started at Princeton University in the 1920s. Outraged university administrators ordered the group off the campus because of the alleged embarrassment engendered by sharing sins at meetings. A commission appointed by the President of Princeton investigated the fellowship and gave it a clean bill of health, and the Fellowship was later admitted to the campus with the President's blessings. MELTON, *supra* note 63, at 1022.

⁷⁰ See *supra* note 65 and accompanying text; see also DINGER, *supra* note 68, at 7, 61-63.

⁷¹ For an explanation of the house party method of operation, see PITTMAN, *supra* note 64, at 117, 124-26. The first house party was held in the summer of 1918 in Kuling, China. A house party was a well organized event in which as many as 200 locally prominent people might be invited to a local hotel, resort or large private house for anywhere from a long weekend up to one or two weeks. The house party was managed by a team of Group people who were composed of local members and members from out of town who would relate their own personal testimonials of conversion to the spiritual life. Each day of the house party was organized around personal confessions or witnessing, bible study, informal group discussion and meals. Team members organized each day during the "quiet time" for meditation for the invitees each morning. The entire house party was informally arranged and conducted. During the marathon period, invitees invariably would become uncomfortable even though no pressure would be put on them to surrender to Christ. Eventually, many would make their own witnessing and surrender to Christ before the group or in small sessions.

Oxford Groups also held "open meetings" in which people who were not special invitees were permitted to attend a witnessing session. The meeting would be conducted by a team of anywhere from six to sixty group members who would relate their personal experiences to the audience. Supported by other group members, the open meeting was a way of reaching converts. To this day, Alcoholics Anonymous holds both "open" and "closed" meetings on the same plan as the Oxford Group. ROBERTSON, *supra* note 62, at 122-23.

- (1) men are sinners;
- (2) men can be changed;
- (3) confession is a prerequisite to change;
- (4) the changed soul has direct access to God;
- (5) the Age of Miracles has returned; and
- (6) those who have been changed must change others.⁷²

The assumptions described the path to a personal experience of conversion based on acceptance of Christ. Ultimately the Oxford Groups sought to change others, particularly celebrities and powerful persons, in order to change the world through personal evangelical action. In 1938, Dr. Buchman prepared a plan for "moral re-armament," a world-wide movement to revitalize social life using the principles of the Oxford Group. The organization took the name "Moral Re-Armament."

B. Alcoholics Anonymous

The relationship between the Oxford Group and AA goes back to 1934. In fact according to AA tradition, there are four founding moments that gave life to the program:

- (1) Rowland Hazard's conversation with Dr. Carl C. Jung relating to religious conversion as a cure for alcoholism;
- (2) Ebby Thatcher's November 1934 visit to Bill Wilson, introducing Wilson to the Oxford Groups;
- (3) Bill Wilson's conversion experience in December 1934; and
- (4) Bill Wilson's meeting with Dr. Bob Smith in June 1935.⁷³

Rowland Hazard, a Rhode Island investment banker and alcoholic, had gone to Zurich in 1930 to place himself under the care of Dr. Carl C. Jung, hoping that psychoanalysis would cure his desire to drink. Although Hazard spent more than a year of therapy, his craving to drink had not subsided and he went on a binge immediately after release from Jung's clinic. Hazard and Dr. Jung then had a conversation about sobriety. Jung told him

⁷² KURTZ, *supra* note 46, at 49. The six basic assumptions of the Oxford Groups were the antecedents of the Twelve Steps of Alcoholics Anonymous. See Bill W.'s description of the Twelve Steps of Alcoholics Anonymous in ALCOHOLICS ANONYMOUS, *supra* note 46, at 58-103, and the original 1938 version of the steps reprinted in PITTMAN, *supra* note 64, at 199.

⁷³ KURTZ, *supra* note 46, at 33.

that he had observed that some alcoholics had become sober through a religious conversion experience. In order to have such an experience, Jung said, Hazard would have to admit his general powerlessness over people, places and things, and place himself in the care of God.⁷⁴ Hazard joined an Oxford Group, experienced his own powerlessness and became sober. He also recruited Ebby Thatcher into the Calvary Oxford Group where Thatcher found sobriety.⁷⁵

In November 1934, William Wilson,⁷⁶ an alcoholic who later co-founded AA, received a visit from Thatcher, a friend from prep school days. Thatcher explained the Oxford Group's principles of reliance on a higher power, confession and inventory of individual defects character, and helping others to find a conversion experience. He convinced Wilson to attend an Oxford Group meeting in New York City.⁷⁷ This led to a final hospitalization for Wilson during which he experienced what he referred to as a "hot flash" of spiritual conversion.⁷⁸ Wilson became a regular member of the Calvary Oxford Group after his discharge from the hospital.⁷⁹ The Oxford Group's insistence on the four absolutes and the six principles of spiritual growth provided a life guide for alcoholics such as Wilson which would keep them sober.⁸⁰

⁷⁴ Baz Edmerdes, *Alcoholics Anonymous Celebrates Its 50th Year*, SATURDAY EVENING POST, July 1985, at 70.

⁷⁵ PITTMAN, *supra* note 64, at 155. Thatcher was an alcoholic who was considered hopelessly ill and condemned to death or insanity. The Oxford Group reached out to him, however, and took him to meetings where Thatcher experienced a spiritual conversion which removed the craving for alcohol from his life. ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 60, at 58-59.

⁷⁶ At the time, Wilson was out of work, depressed, and dependent on his wife's income for survival. He had become addicted to alcohol in the 1920s and had frequently been hospitalized for his addiction. ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 60, at 52-58.

⁷⁷ *Id.* at 58-59. The Oxford Group meetings were led by the Reverend Sam Shomaker, the United States Coordinator for Oxford Groups, at Calvary Church in New York City. See KURTZ, *supra* note 46, at 16-18; PITTMAN, *supra* note 64, at 151.

⁷⁸ PITTMAN, *supra* note 64, at 153. At first Wilson, drying out in a hospital in New York City, thought he was going insane until Dr. William Silkworth, the hospital's psychiatrist, assured him that some people were able to renounce alcoholism as a result of a spiritual event or conversion. See ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 60, at 63.

⁷⁹ ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 60, at 64. Wilson also acquired a copy of William James' *The Varieties of Religious Experience* which Wilson poured over searching for his new-found state of mind and spirit. See KURTZ, *supra* note 46, at 20-21; PITTMAN, *supra* note 64, at 154.

⁸⁰ See ROBERTSON, *supra* note 62, at 59. The Oxford Group's evangelism could

Early in 1935, Wilson started to recruit alcoholics for the Calvary Oxford Group. He also turned his house into a hostel for alcoholics, hoping to help them achieve sobriety and to learn more about the condition.⁸¹ He was unable to persuade any of his house guests to stop drinking by using the usual Oxford Group techniques, i.e., preaching and reliance on the four absolutes.⁸² Meanwhile, Wilson, who had been unemployed for more than two years, got a job in a proxy fight that required him to go to Akron to solicit proxies from shareholders in the spring of 1935.⁸³

During the trip to Akron, Wilson had to stave off a panic attack and the urge to drink.⁸⁴ Wilson called Henrietta Sieberling from the local Oxford Group who had been working to sober up Dr. Robert H. Smith, an Akron surgeon with a very serious drinking problem. Sieberling arranged a meeting between Dr. Smith and Wilson⁸⁵ during which each told the other the story of their alcoholism.⁸⁶ After the meeting both men determined to

be turned toward redeemed alcoholics, a plan Wilson conceived after sobriety. PITTMAN, *supra* note 64, at 155; ROBERTSON, *supra* note 62, at 45. Eventually, Wilson and his group of recovering alcoholics disaffiliated themselves from Rev. Shoemaker's Oxford Group, and established a separate identity as Alcoholics Anonymous, following the distilled essence of the Oxford Group's way of life as part of its recovery program. *Id.* at 66; ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 60, at 74-76.

⁸¹ See ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 60, at 73-74.

⁸² See *id.* 75 (noting difficulties were faced when trying to use Oxford Group methods with recovering alcoholics).

⁸³ See *id.* at 65-66.

⁸⁴ See ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 60, at 65-66. Wilson had become depressed over the proxy fight and separation from his wife Lois on Mother's Day, and strongly felt the urge to drink. *Id.* He knew that the only way to stay out of the hotel bar would be to find another alcoholic who needed conversion by spiritual experience. *Id.*

⁸⁵ *Id.* at 66-67; KURTZ, *supra* note 46, at 27-28.

⁸⁶ ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 60, at 67-70; KURTZ, *supra* note 46, at 29-31. Wilson and Smith spent the day in a private conversation in the Sieberling house. Wilson told Smith about his drinking to overcome feelings of separation and anxiety and loss of control over drinking, how it ruined his life and marriage, and about his spiritual experience that led to sobriety. For the first time, Smith heard someone who knew what it was like to be an alcoholic and who had passed through a gate out of the illness of alcoholism into a new life. Wilson did not preach nor did he give advice; he simply told Smith his story. Wilson admitted to Smith that he needed another alcoholic to tell his story to or he would have picked up a drink in the hotel bar. Wilson thanked him and got up to leave. However, Smith, overwhelmed by Wilson's honesty and his story, stopped him and began to open himself up to this stranger from New York. Smith told Wilson about his slide into alcoholism from experimenting with liquor in college through medical school into using false names to obtain medicinal alcohol during Prohibition. KURTZ, *supra*

continue to use the Oxford Groups. In June 1935, Dr. Smith and Wilson agreed to work together to find other alcoholics, tell them their own stories, and bring them into local Oxford Groups. This marked the actual beginnings of AA.⁸⁷

The program for alcoholics, as yet a fellowship without a name or a separate identity, had four core beliefs:

- (1) acknowledging personal powerlessness over alcohol, people, places and things;
- (2) as a result, the alcoholic's own understanding of the alcoholic's ability to control himself and others was deflated, i.e., the alcoholic "hit bottom";
- (3) necessity of conversion—turning the alcoholic's life and will over to a power greater than the alcoholic as a result of hitting bottom and admitting powerlessness; and
- (4) turning from a life involving oneself and drinking at its center to a life of sobriety, meaning fully human interaction with others.⁸⁸

By 1938, the group started by Smith and Wilson had already become a separate organization.⁸⁹ Bill Wilson undertook to put down the principles of the alcoholics' program in writing, putting

note 46, at 29-31. Smith decided to invite Wilson into his own home and intensively work the Oxford Group's absolutes and principles together with Wilson to achieve sobriety.

After two weeks of intensive group living, Dr. Smith went to Atlantic City to the AMA convention and came home drunk. Wilson and Dr. Smith's wife Anne, took him home from the railroad station where Dr. Smith's nurse had found him, put him to bed and started sobering him up. Smith was scheduled to perform an important operation in three days. ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 60, at 70-71. By the morning of the third day, he was well enough to do the procedure. Overcoming his fear, he went through with surgery and came away determined to live the Oxford Group principles in his own life, and to bring the message to other alcoholics. *Id.* at 32-33, 70-71.

⁸⁷ ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 60, at 71-74.

⁸⁸ KURTZ, *supra* note 46, at 34-35. Kurtz explained this core as an admission that the alcoholic was not God and could not control people, places and things at will. Instead, the alcoholic acknowledged that something else was God and that something else was what many people chose to call God. These core beliefs were in part derived from William James, from the Oxford Groups, and from Dr. Jung's conversation with Rowland Hazard.

⁸⁹ ALCOHOLICS ANONYMOUS COMES OF AGE, *supra* note 60, at 74. The alcoholics were deterred from membership in the larger group because of its aggressive evangelistic Protestant Christianity. *Id.* Wilson, in particular, feared that no Roman Catholic could participate in the program because the Roman Catholic Church appeared to be about to ban membership in Oxford Groups. Finally, the Oxford groups had a high level of visibility and used celebrities as members in order to attract new membership. *Id.* at 75.

together chapters on the program, interspersed with the individual stories of group members.⁹⁰ By 1939 the alcoholics had chosen a name for their groups: Alcoholics Anonymous. The AA program adopted two principles that differentiated it from the Oxford Group: personal anonymity and steadfast refusal to take any stand on public issues.⁹¹

The first edition of *Alcoholics Anonymous* contained the twelve principles of the program which Bill Wilson suggested that all fellowship members should follow in order to gain sobriety—the “Twelve Steps to Sobriety.”⁹² The Twelve Steps acknowledged the fellowship’s debt to the Oxford Group, Dr. Jung, and William James, but had a new and distinctive flavor unique to AA.⁹³ Alcoholics Anonymous, and all other programs that have received permission to use AA’s Twelve Steps as the basis for their program, highly recommend that members make moral evaluations of their conduct and confess their wrongdoing to

⁹⁰ The result, a 1,200 page manuscript thinned down to 400 pages by a professional editor, was printed and released in 1939.

⁹¹ KURTZ, *supra* note 46, at 68-77.

⁹² ALCOHOLICS ANONYMOUS, *supra* note 46, at 59.

⁹³ The Twelve Steps have been in the same form since 1939. They are:

1. We admitted we were powerless over alcohol—that our lives had become unmanageable.
2. Came to believe that a Power greater than ourselves could restore us to sanity.
3. Made a decision to turn our will and our lives over to the care of God *as we understood Him*.
4. Made a searching and fearless moral inventory of ourselves.
5. Admitted to God, to ourselves, and to another human being the exact nature of our wrongs.
6. Were entirely ready to have God remove all these defects of character.
7. Humbly asked Him to remove our shortcomings.
8. Made a list of all persons we had harmed, and became willing to make amends to them all.
9. Made direct amends to such people wherever possible, except when to do so would injure them or others.
10. Continued to take personal inventory and when we were wrong promptly admitted it.
11. Sought through prayer and meditation to improve our conscious contact with God *as we understood Him*, praying only for knowledge of His will for us and the power to carry that out.
12. Having had a spiritual awakening as the result of these steps, we tried to carry this message to alcoholics, and to practice these principles in all our affairs.

Id. at 59-60. See generally TWELVE STEPS AND TWELVE TRADITIONS (Alcoholics Anonymous World Services, Inc. ed. 1981) [hereinafter TWELVE STEPS]. Following these steps is known as “working the program” among AA members.

God, to themselves, and to another human being. Each year thousands of Twelve Step Group members take the Fourth and Fifth Steps, inventorying their wrongs and confessing them to other members.⁹⁴ These confessions take place in meetings, or more often outside of a regular meeting in a one on one session with another member.⁹⁵

In 1950, Wilson prepared the final version of organizational policy principles for AA known as the Twelve Traditions. The Twelve Traditions were not designed to guide individual efforts to attain sobriety, but to promote the welfare of AA itself.⁹⁶ They embodied the guiding principles of anonymity for all fellowship members and abstention from public political or social issues.⁹⁷

⁹⁴ These actions, derived from the Oxford Group, are made concrete in AA's Fourth and Fifth Steps. See ALCOHOLICS ANONYMOUS, *supra* note 46, at 59; see also TWELVE STEPS, *supra* note 93, at 42-63 (discussing Fourth and Fifth steps in detail).

⁹⁵ See TWELVE STEPS, *supra* note 93, at 60-61 (suggesting AA members may choose to confess their wrongs to sponsor).

⁹⁶ See ALCOHOLICS ANONYMOUS, *supra* note 46, at 563 ("The '12 Traditions' of Alcoholics Anonymous are, we A.A.'s believe, the best answers that our experience has yet given to those urgent questions, 'How can A.A. best function?' and, 'How can A.A. best stay whole and so survive?'").

⁹⁷ The current version of the Twelve Traditions are:

1. Our common welfare should come first; personal recovery depends upon A.A. unity.
2. For our group purpose there is but one ultimate authority—a loving God as He may express Himself in our group conscience. Our leaders are but trusted servants; they do not govern.
3. The only requirement for A.A. membership is a desire to stop drinking.
4. Each group should be autonomous except in matters affecting other groups or A.A. as a whole.
5. Each group has but one primary purpose—to carry its message to the alcoholic who still suffers.
6. An A.A. group ought never endorse, finance or lend the A.A. name to any related facility or outside enterprise, lest problems of money, property and prestige divert us from our primary purpose.
7. Every A.A. group ought to be fully self-supporting, declining outside contributions.
8. Alcoholics Anonymous should remain forever nonprofessional, but our service centers may employ special workers.
9. A.A. as such, ought never be organized; but we may create service boards or committees directly responsible to those they serve.
10. Alcoholics Anonymous has no opinion on outside issues; hence the A.A. name ought never be drawn into public controversy.
11. Our public relations policy is based on attraction rather than promotion; we need always maintain personal anonymity at the level of press, radio, television and films.
12. Anonymity is the spiritual foundation of all our Traditions, ever reminding us to place principles before personalities.

Id. at 564; see also TWELVE STEPS, *supra* note 93, at 129-189 (examining Twelve

According to AA General Services, as of 1987 the AA fellowship consisted of more than 73,000 autonomous AA groups with more than 1,500,000 members.⁹⁸ AA membership continues to grow world-wide. In the past decade, the criminal justice system has taken notice of AA by imposing mandatory attendance at AA meetings for persons convicted of alcohol related offenses, such as driving under the influence.⁹⁹ This use of AA has made it an integral part of the larger state administered system of rehabilitation for offenders.

The AA program rests on a shared basis of principles that requires absolute confidentiality between members, or the program would fail. The Fourth Step, "searching and fearless moral inventory," is a means for the group's members to derive an accurate self-assessment.¹⁰⁰ The Fifth Step confession of wrongdoing is a spiritual and psychological necessity for personal growth out of addiction into a serene and whole life.¹⁰¹ If all of a member's wrongdoings, as identified and confessed to other members could be discovered by compulsory legal process, the risk involved in taking the Fifth Step would be too great for most individuals to accept. If AA is to function effectively, it must do so as originally intended—anononymously and confidentially. Before the confidentiality of Twelve Step Groups' communications can be recognized legally, however, the relative benefit of such programs must be weighed against the social cost to the litigation process.

C. *The Social Value of Alcoholics Anonymous and Other Twelve Step Groups*

According to the Utilitarian calculus applied to confidential

Traditions in depth).

⁹⁸ KURTZ, *supra* note 46, at 172.

⁹⁹ See Sean P. Murphy, *Alternative Sentence Program Models Prisoners; Many States Study Connecticut's Work Plan*, BOSTON GLOBE, Aug. 1, 1994, at 13 (explaining Connecticut program requiring offenders on probation attend Alcoholics Anonymous meetings); Sean P. Murphy, *Lynn Company to Run Md. County's Program for Drunk Drivers*, BOSTON GLOBE, Aug. 7, 1994, at 74 (detailing Maryland alternative sentencing program requiring substance abuse offenders attend Alcoholics Anonymous or other counseling meetings); see also Elisabeth Wells-Parker, *Mandated Treatment; Lessons from Research with Drinking and Driving Offenders*, ALCOHOL HEALTH & RES. WORLD, Sept. 22, 1994, at 302-06 (studying effectiveness of mandatory alcohol treatment programs).

¹⁰⁰ See ALCOHOLICS ANONYMOUS, *supra* note 46, at 64-71; TWELVE STEPS, *supra* note 93, at 42-55.

¹⁰¹ See ALCOHOLICS ANONYMOUS, *supra* note 46, at 72-75.

communications privileges claims in other areas, if confidential communications between AA members and among members of other Twelve Step Groups are to enjoy legally protected confidentiality, then the activities of these groups must be socially valuable.¹⁰² It is useful to look at the social policy values supported by other confidential communications privileges in order to understand this rationale.

The attorney-client privilege, the only confidential communication privileged universally recognized at common law, was in part the product of rules that made parties to litigation and those interested in the outcome incompetent to testify.¹⁰³ It also reflected recognition of the social value of absolute confidentiality between attorney and client.¹⁰⁴ The courts justify the existence of this privilege based on Utilitarian calculus and the belief that it is more important to society's good as a whole to promote free exchange of communications between attorney and client than it is to compel discovery.¹⁰⁵ While this policy assumption has not been tested under controlled experimental conditions, it reflects the accumulated historical wisdom of the profession collected in anecdotal fashion over several centuries.¹⁰⁶ The relationship between attorney and client requires special protection from compulsory disclosure if it is to operate effectively.¹⁰⁷ Based on his understanding of the attorney client privilege, Dean Wigmore derived four general conditions for the judicial creation of a confidential communication which new confidential communications privileges must meet in order to withstand judicial scru-

¹⁰² For an extended discussion of the traditional Utilitarian justification for privileged communications, see Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597 (1980). See also MCCORMICK ON EVIDENCE § 72, at 171 (Edward W. Cleary ed., 3rd ed. 1984) [hereinafter MCCORMICK] (explaining utilitarian justification for privilege).

¹⁰³ Saltzburg, *supra* note 102, at 603 n.13. For a detailed history of the historical underpinnings of the attorney client privilege, see 8 WIGMORE ON EVIDENCE § 2290 (3rd ed. 1940) [hereinafter WIGMORE ON EVIDENCE].

¹⁰⁴ See Saltzburg, *supra* note 102, at 605-09 (demonstrating chilling effect on client communication due to theoretical absence of privilege).

¹⁰⁵ See MCCORMICK, *supra* note 102, § 72; WIGMORE ON EVIDENCE, *supra* note 103, § 2291; see also Saltzburg, *supra* note 102, at 604 (stating that key modern purpose of privilege is to promote communication between attorney and client).

¹⁰⁶ See David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 112 (1956) ("The theory that this privilege is necessary to ensure that the attorney gets all essential information, inevitably rests ultimately on sheer speculation.").

¹⁰⁷ See generally MCCORMICK, *supra* note 102.

tiny.¹⁰⁸

These criteria have been applied judicially to recognize other confidential communications privileges which have not been established by legislation.¹⁰⁹ The Federal Rules of Evidence do not specifically provide for any confidential communication privileges.¹¹⁰ The attorney-client privilege is recognized by federal courts because of its origins in the common law before the formation of the United States.¹¹¹ The husband-wife privilege also has been recognized, protecting confidential communications made between spouses and preventing compulsory disclosure of facts learned during marriage.¹¹² Other confidential communications privileges have not been judicially recognized, although state statutes and court rules have recognized them.¹¹³

¹⁰⁸ Wigmore's four essential criteria for judicial establishment of a confidential relationship privileges are:

- (1) The communications must originate in a *confidence* that they will not be disclosed[;]
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties[;]
- (3) The *relation* must be one which in the opinion of the community to be sedulously *fostered*[; and]
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

WIGMORE ON EVIDENCE, *supra* note 103, at § 2285. Of course, the legislature may pass statutes granting confidential communications privileges to professionals which the courts must follow, even if they fail to meet Wigmore's criteria.

¹⁰⁹ See *In re Grand Jury Investigation*, 918 F.2d 374, 383-84 (3d Cir. 1990) (applying Wigmore's four tests to clergy-communicant privilege); *In re D.D.S.*, 869 P.2d 160, 164 (Alaska 1994) (applying Wigmore's test to confidentiality of alcohol treatment records).

¹¹⁰ Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

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¹¹¹ See, e.g., *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (stating that attorney-client privilege is necessary "in the interest and administration of justice"); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950).

¹¹² See *Trammel v. United States*, 445 U.S. 40, 44 (1980) (noting that spousal privilege is firmly established).

¹¹³ See, e.g., WIGMORE ON EVIDENCE, *supra* note 103, § 2380 (physician-patient

The United States Court of Appeals for the Sixth Circuit, however, has recognized a confidential communication privilege for psychotherapists and patients based upon the Utilitarian calculus.¹¹⁴ In *In re Zuniga*, two Michigan psychiatrists received *subpoenae duces tecum* to testify before a federal grand jury investigating medical insurance fraud.¹¹⁵ The subpoenae instructed them to bring their client files and billing records to the hearing.¹¹⁶ The two psychiatrists resisted disclosure of the names, addresses, and diagnoses of their patients, claiming that such information was privileged due to the confidential relationship of psychotherapist and patient.¹¹⁷ After the district court denied their motion to quash the subpoenae, they appealed to the Sixth Circuit.¹¹⁸ Although prior attempts to assert a federal psychotherapist-patient privilege had not been successful,¹¹⁹ the Sixth Circuit recognized that Rule 501 of the Federal Rules of Evidence enables it to establish new common law privilege rules.¹²⁰ The court took judicial notice of *Report No. 45 for the Advancement of Psychiatry*,¹²¹ and granted the privilege, recognizing the significance of confidentiality in psychotherapy and its necessity in effective treatment of mental diseases or disor-

privilege); 26 CHARLES A. WRIGHT & KENNETH GRAHAM JR., *FEDERAL PRACTICE AND PROCEDURE—EVIDENCE* § 5427 (1980) (accountant-client privilege); *id.* § 5429 (social worker privilege); *id.* § 5431 (nurses, probation officers and stenographers privilege).

¹¹⁴ See *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983).

¹¹⁵ *Id.* at 634.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 634-35.

¹¹⁸ *Id.* at 636.

¹¹⁹ See *United States v. Lindstrom*, 698 F.2d 1154, 1167 n.9 (11th Cir. 1983); *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir. 1976); *United States v. Witt*, 542 F. Supp. 696, 699 (S.D.N.Y.), *aff'd*, 697 F.2d 301 (2d Cir. 1982); *United States v. Layton*, 90 F.R.D. 520, 525 (N.D. Cal. 1981). But see *Ramer v. United States*, 411 F.2d 30, 39 (9th Cir. 1969) (assuming that psychotherapist-patient privilege is enforceable); *Flora v. Hamilton*, 81 F.R.D. 576, 578-79 (M.D.N.C. 1978) (limited privilege recognized).

¹²⁰ *In re Zuniga*, 714 F.2d at 637 (citing *Trammel v. United States*, 445 U.S. 40, 48 (1980)) ("The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of the testimonial privilege in federal criminal trials 'governed by the principles of the common law as they may be interpreted ... in light of reason and experience.'").

¹²¹ *Id.* at 638 (quoting Advisory Committee Note to Proposed Federal Rule of Evidence 504, 56 F.R.D. 183, 242 (1973)). The Note stated that "confidentiality is the *sine qua non* for successful treatment." *Id.* at 639 (quoting the Note, 56 F.R.D. 183, 242).

ders.¹²² The court also recognized that most states have adopted rules or statutes granting a privilege to confidential communications between patient and psychotherapist.¹²³ The court further recognized that mental illness may interfere with a citizen's ability to participate in the political process, and the privilege therefore furthered public policy goals.¹²⁴ Weighing these interests against the tribunal's interest in discovering information, the court concluded that communications intended to be confidential between psychotherapist and patient were privileged. The court, however, permitted disclosure of the patient's identity and length of treatment noting that such information generally is not protected by the attorney-client privilege.¹²⁵

Zuniga demonstrates that courts can establish new privileged communications rules when Dean Wigmore's four prerequisites are satisfied. Alcoholics Anonymous can be subjected to the same type of judicial scrutiny to determine whether confidential communications made by members should be shielded from compulsory disclosure. Although utilitarian calculus is an uncertain basis for any major social policy rule excluding otherwise relevant and reliable evidence, unlike other sources for such rules, it is widely accepted by lawyers, judges, and scholarly literature.

Any proponent of the establishment of a new rule creating a privilege for confidential communications between AA members must answer three questions. First, does AA perform a socially useful function? Does its program help to sober up alcoholics? Second, if AA does work, what is the social cost involved in legally recognizing a privilege for confidential communications between AA members? Finally, does the social benefit of a legally recognized privilege outweigh the social cost of the privilege?

It is difficult to employ empirical output measurement techniques to quantify the social value of AA and other Twelve Step Groups. Alcoholics Anonymous does not publish statistics on sobriety. The scientific community has no generally accepted definition of sobriety. There is no simple way of comparing the

¹²² *Id.* at 639.

¹²³ *Id.* at 638-39 & n.3.

¹²⁴ *In re Zuniga*, 714 F.2d at 639. For further argument on why psychotherapist-patient privilege serves to protect individual's constitutional rights, see Steven R. Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 27 (1980).

¹²⁵ *In re Zuniga*, 714 F.2d at 639-40.

number of alcoholics who come into AA, become sober, and remain sober for a specified period of time against those who attend AA meetings and drop out without achieving sobriety. The scholars who have examined AA's effectiveness in this fashion have been unable to agree on sufficient common grounds to permit comparison.¹²⁶ However, no scholar contends that AA participation is worthless to alcoholics seeking recovery.¹²⁷

¹²⁶ Alcoholics Anonymous is not an easy organization to evaluate with common scientific tools. See EDGAR P. NACE, *THE TREATMENT OF ALCOHOLISM* 240 (1987) (noting methodological problems in evaluating AA's effectiveness). First, although Alcoholics Anonymous World Service reports regularly on meeting attendance, not every person who goes to an AA meeting is sober. *Id.* at 241. Second, controlled studies of AA groups are nearly impossible to achieve because an AA group is anonymous, and has no structural limitation on membership other than a common desire to stop drinking. *Id.* at 242. Third, although compulsory AA meeting attendance is a regular feature of some state-sponsored DUI alternative dispositions, recidivism studies on first time DUI offenders sent to AA under compulsion have not been completely satisfactory from a scientific point of view. This is because no diversion programs have seen fit to use a control group of carefully matched first timers who were not sent to AA. Clinical studies of AA groups have been undertaken, however, and some scholars report positive results for alcoholics achieving long-term sobriety from AA participation. See, e.g., GREGORY BATESON, *The Cybernetics of Self: A Theory of Alcoholism, in STEPS TO AN ECOLOGY OF MIND* 309, 310 (1972); NORMAN K. DENZIN, *THE ALCOHOLIC SOCIETY* 62 (1993); G. Edwards, et al., *Alcoholics Anonymous, the Anatomy of a Self-Help Group*, 1 *SOCIAL PSYCHIATRY* 195 (1967); Benjamin Kassin, *Theory and Practice in the Treatment of Alcoholism in TREATMENT AND REHABILITATION OF THE CHRONIC ALCOHOLIC* 1 (Benjamin Kassin & Henri Begleiter eds., 1977); Barry Leach & John L. Norris, *Factors in the Development of Alcoholics Anonymous, in TREATMENT AND REHABILITATION OF THE CHRONIC ALCOHOLIC, supra*, at 441; NACE, *supra*, at 240. However, other scholars have reported little behavioral modification in problem drinkers that can be traced to AA participation. See, e.g., J.M. BRANDSMA, ET AL., *THE OUTPATIENT TREATMENT OF ALCOHOLISM: A REVIEW AND COMPARATIVE STUDY* (1980); Keith S. Ditman, et al., *A Controlled Experiment on the Use of Court Probation for Drunk Arrests*, 124 *AM. J. PSYCHIATRY* 160 (1967); Barbara J. Powell, et al., *Comparison of Three Outpatient Treatment Interventions: A Twelve Month Follow-up of Men Alcoholics*, 46 *J. STUD. ON ALCOHOL* 309 (1985); B. Stimmel, et al., *Is Treatment of Alcoholism Effective in Persons on Methadone Maintenance?*, 140 *AM. J. PSYCHIATRY* 862 (1983). The authors all point to studies that have found no beneficial treatment effect from Alcoholics Anonymous participation. William R. Miller, however, reports that no single form of treatment for alcoholism is necessarily better for every alcoholic. See William R. Miller, *Alcohol Treatment Alternatives: What Works?*, in HARVEY B. MILKMAN & LLOYD I. SEDERER, *TREATMENT CHOICES FOR ALCOHOLISM AND SUBSTANCE ABUSE* 253 (1990) (suspecting all four studies reporting no significant benefits from working Alcoholics Anonymous program to be methodologically flawed and suspect).

¹²⁷ DENZIN, *supra* note 126, at 51. Denzin believes that Alcoholics Anonymous' success lies in the group's rejection of Cartesian dualism and the objectivity of the external and measurable world, and its preference in adopting an intersubjective and oriental worldview in support of achieving sobriety stating that:

The clinical community, however, supports AA participation for in-patient and out-patient treatment regimes for recovering alcoholics.¹²⁸ The therapeutic relationship between AA members depends upon absolute confidentiality.¹²⁹ It is possible to construct a justification for legal recognition of a privilege to protect confidentiality based upon Utilitarian calculus. However, Utilitarian analysis is an inherently weak way to support a privileged communication because the balance of forces can shift with pre-

... [u]nlike science in the following critical respects. First the essential structures of the AA traditions exist and are passed on through an oral tradition ... AA does not rely on upon the printed page for the transmission of its knowledge as science does.

Second, unlike science ... AA affirms what it denies proof to, although denying what it rigorously affirms. That is, although arguing that a scientific proof for the existence of God can never be given, AA proposes a belief in a power greater than the individual ... It asks individuals to make a leap of faith and come to believe in a power greater than themselves ...

Similarly, doubting but not denying that recovery from alcoholism can occur if the 12 steps are not taken, AA strongly urges each individual to follow its suggested steps to recovery. Hence AA affirms what it says cannot be proven, although denying ... the possibility of what it affirms.

Third, unlike science, which can establish nothing that is not based directly or indirectly [on records and statistical analysis] AA moves forward without records, regularly kept statistics, or information on whether or not its methods and assumptions do in fact work.

Fourth, much of modern behavioral science ... builds upon the Cartesian dualism that posits an objective world that can be studied, interpreted and controlled by the methods of modern inquiry. Alcoholics Anonymous denies this dualism. It denies also an objective view of the world, locating the alcoholic subject, instead, in a world that is intersubjective, noncausal, spiritual, collective, and distinctly oriental, as opposed to western and occidental.

Id.

¹²⁸ For example, Dr. Eugene Nace includes AA meeting attendance as part of his comprehensive therapy program for recovering alcoholics. *See NACE, supra* note 126, at 162-63 (treatment regime) and 249. Nace's treatment approach is also recommended by Denzin, a sociologist and research specialist. *See DENZIN, supra* note 126. Denzin goes even further to state that recovery mandates AA meeting attendance as well as participation in Adult Children of Alcoholics programs. *Id.* at xvii. Denzin describes a comprehensive five week treatment program at three rehabilitation centers using the first five steps of Alcoholics Anonymous as the basis for group therapy conducted by licensed counselors. *Id.* Most of the counselors were chosen because they had professional credentials and were persons in recovery themselves who followed the Twelve Steps of AA. *Id.* at 211-244.

¹²⁹ This principle was recognized by Bill W. who made the following observation on taking the fourth and fifth steps:

"Rightly and naturally, we think well before we choose the person or persons with whom to take this intimate and confidential step ... It is important that he be able to keep a confidence ..."

ALCOHOLICS ANONYMOUS, *supra* note 46, at 74.

vailing social values. The calculus that once supported a privilege will work against the privilege as social objectives change.

D. Judicial Invasion of Privacy

Judicial inquiry cannot proceed without relevant information. Rule 402 of the Federal Rules of Evidence succinctly states that "all relevant evidence is admissible" unless excluded by some specific exclusionary rule.¹³⁰ Privileged communication rules reflect extrinsic social policy decisions made by judges or legislatures that the court should not invade a person's privacy to obtain relevant information for an inquiry.¹³¹

Historically, the courts have been unfriendly to a witness' claims of privilege to resist compulsory disclosure of confidential communications.¹³² Dean Wigmore declared more than eighty years ago that the courts should not freely grant privileges to witnesses to not respond to questions.¹³³ Modern case law has followed Wigmore's policy. Courts seldom recognize new claims of privilege unless the privilege has been established by the legislature.¹³⁴

¹³⁰ FED. R. EVID. 402.

¹³¹ MCCORMICK, *supra* note 102, §§ 72 & 75.

¹³² See *supra* note 102 (discussing traditional utilitarian justification for privileged communications).

¹³³ WIGMORE ON EVIDENCE, *supra* note 103, § 2192. Dean Wigmore states that: For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule:

* * * * *

From the point of view of society's *right* to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole—from justice as an institution and from law and order as indispensable elements of civilized life ... It follows, on the one hand, that *all privileges of exemption from this duty are exceptional* ...

Id. (citations omitted).

¹³⁴ See *Trammel v. United States*, 445 U.S. 40, 53 (1980) (limiting right of non-witness spouse to claim privilege and prevent spouse's adverse testimony); *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (rejecting news reporter's First Amendment claim of privilege for confidential sources); *United States v. Burzynski*, 819 F.2d 1301, 1311 (5th Cir. 1987) (denying physician-patient privilege exists in context of criminal investigation in spite of state law establishing privilege); *In re Grand Jury Subpoena*, 750 F.2d 223, 225 (2d Cir. 1984) (questioning existence of privilege

Of course, as Dean Wigmore recognized, this viewpoint sets the judicial system in conflict with many persons' expectations of privacy rights.¹³⁵ Wigmore believed, however, that every citizen had a duty to present evidence, and that judicial inquiries that took precedence over all claims of privilege which, if recognized at all, should be narrowly construed.¹³⁶ Consequently, the social obligation to testify nearly always outweighs claims of a person to respect for the person's privacy.

Most courts follow the four part test given by Dean Wigmore in evaluating original claims of privilege.¹³⁷ Since Wigmore's test requires application of utilitarian calculus to the claim of privilege, the balance of forces usually, but not always, favors denial of a new privilege unless that claim is supported by a statute the court is obligated to apply. Even then, the court is justified in construing the statute narrowly.

This judicial attitude seems to be based on the jurisprudential position that individual human persons are inherently social animals that owe their existence to their society, and have no greater destiny than to live out their lives within the context of that society. Therefore, every right an individual may claim must yield to societal claims of necessity.¹³⁸ In the context of compelling testimony, the greatest good for the greatest number will be derived when claims of privilege are ignored and testi-

for scholarly work); *Robinson v. Magovern*, 83 F.R.D. 79, 89 (W.D. Pa. 1979) (rejecting claim of privilege for peer review reports); *State v. LaRoche*, 122 N.H. 231, 233 (1982) (denying extension of doctor-patient privilege to communication made to an emergency medical technician); *People v. Delph*, 156 Cal. Rptr. 422, 424-25 (1979) (denying extension of marital privilege to cohabitants in marriage-like relationship); see also Saltzburg, *supra* note 102, at 598 (espousing similar views on judicial reluctance to establish new privileged communications rules).

¹³⁵ "From the point of view of the *duty* here predicated, it emphasizes the sacrifice which is due from every member of the community [T]he sacrifice may be of his privacy, of the knowledge which he would preferably keep to himself because of the disagreeable consequences of disclosure. WIGMORE ON EVIDENCE, *supra* note 103, § 2192.

¹³⁶ "The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice." WIGMORE ON EVIDENCE, *supra* note 103, § 2192 (citations omitted).

¹³⁷ MCCORMICK, *supra* note 102, § 72, n.7 (noting that Dean Wigmore's test, *supra* note 103, has been particularly influential).

¹³⁸ Such a presupposition is motivated by classical utilitarianism. See JOHN RAWLS, A THEORY OF JUSTICE 183-89 (1971) (comparing classical utilitarianism with impartiality and benevolence principles of justice).

mony is compelled from a reluctant witness, unless the resulting harm to other socially valuable relationships resulting from compulsory testimony is exceptionally great.¹³⁹

This analysis shows that the foundation for judicial invasion of personal privacy has been based on an individual's implicit social duty to testify in judicial inquiries, forcing the person claiming privilege to demonstrate that the harm resulting from disclosure to other socially valuable relationships will exceed the benefits of disclosure. At common law, the claim of privilege was sustained for the attorney-client and spouses on the sole ground that disclosure of these confidential communications would destroy the established socially valuable relationship.¹⁴⁰ In each instance, judicial policy strongly favored the relationship's continued existence.

In order to appreciate the apparent judicial disregard of personal privacy, it is necessary to look at a third privileged relationship having no common law origin due to its emergence at the end of the nineteenth century—the relationship between mental health worker and patient. In the past few decades, there have been limited situations in which courts have recognized the confidentiality of communications between mental health workers and patients in the absence of a statute.¹⁴¹ The

¹³⁹ See *Minnesota v. Andring*, 342 N.W.2d 128, 132-33 (Minn. 1984). When compulsory testimony is ascertained from group therapy members, the resulting harm may include the patient's reluctance to divulge information, which would negatively effect therapy by inhibiting an integral and necessary part of the patient's diagnosis and treatment. *Id.* at 134; see also *Farrell v. People*, 203 Cal. App. 3d 521, 527 (Ct. App. 1988) (noting presence of each person within group is designed to facilitate patient's treatment).

¹⁴⁰ "In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisor must be removed; hence the law must prohibit such disclosure except on the client's consent." WIGMORE ON EVIDENCE, *supra* note 103, § 2291.

The only argument against recognition of the [husband-wife] privilege is based on the proposition that the fourth condition is not in truth fulfilled—that the occasional compulsory disclosure in court of even the most intimate marital communications would not in fact affect to any perceptible degree the extent to which spouses share confidences. Whether this argument is well founded is not, and probably cannot be, known. However, since the other three conditions are so fully satisfied and since the compulsory disclosure of marital secrets at least might cast a cloud upon an essential aspect of the institution of marriage, the present privilege should be recognized. *Id.* § 2332.

¹⁴¹ See *United States v. D.F.*, 857 F. Supp. 1311, 1319-20 (E.D. Wisc. 1994) (federal common law determined existence of privilege concerning statements made to mental health counselors), *aff'd*, 63 F.3d 671 (7th Cir. 1995), *vacated*, 116 S. Ct. 1872 (1996).

mental health worker-patient relationship is the closest analogy to the relationship of AA members and is worth considerable review as an analogy to gauge the need for a privilege for AA members.

III. THE CASE FOR A PRIVILEGE

A. *Similar Privileges: Mental Health Worker-Patient Privilege*

Two generally recognized privileges—the mental health worker-patient privilege and the clergy's privilege—resemble the proposed privilege for Twelve Step programs.

Forty-nine states and the District of Columbia have adopted a confidential communications privilege for one or more classes of mental health workers and their patients.¹⁴² All fifty states provide confidential communications privileges for psychologists and patients.¹⁴³ Psychiatrists have a similar confidential communications privilege recognized under broadly drafted statutes and rules for a psychotherapist-patient privilege and under the aegis of a statutory physician-patient privilege.¹⁴⁴ At least seven states have a separate confidential communication privilege for social workers, six have a generic "mental health professional" privilege covering social workers, nurses and counselors, and five provide for an explicit marriage counselor's privilege.¹⁴⁵ Fur-

¹⁴² See *infra* note 146.

¹⁴³ See *Jaffee v. Redmond*, 116 S. Ct. 1923, 1929 (1996) (listing psychotherapist privilege from all fifty states and District of Columbia).

¹⁴⁴ See generally WIGMORE ON EVIDENCE, *supra* note 103, § 2380 (discussing physician-patient privilege).

¹⁴⁵ The following states have adopted the psychotherapist-patient privilege by statute or court rule:

Alabama: ALA. CODE §§ 34-8A-21 (counselors); 34-26-2 (psychiatrists & psychologists) (1996). *Alaska*: ALASKA R. EVID. 504 (psychiatrists & psychotherapist) (West 1996). *Arizona*: ARIZ. REV. STAT. §§ 12-2291 (medical records); 32-2085 (psychologists); 32-3238 (behavioral health professionals) (1995). *Arkansas*: ARK. CODE ANN. § 17-97-105 (psychologists) (Michie 1995); ARK. R. EVID. 503 (physician & psychotherapist). *California*: CAL. EVID. CODE §§ 1010-1027 (psychotherapists) (West 1995). *Colorado*: COLO. REV. STAT. § 13-90-107(d) (physicians); (g) (psychotherapists & social workers) (1996). *Connecticut*: CONN. GEN. STAT. § 52-146(c) (psychologist); (d) (psychiatrists) (1995). *Delaware*: DEL. UNIF. R. EVID. 503 (psychotherapist). *District of Columbia*: D.C. CODE ANN. § 14-307 (1996) (physicians and mental health professionals). *Florida*: FLA. STAT. ANN. § 90.503 (psychotherapist) (West 1996). *Georgia*: GA. CODE ANN. § 24-9-21 (psychiatrists & psychotherapist) (1996). *Hawaii*: HAW. R. EVID. 504 (physicians); 504.1 (psychologists) (1996). *Idaho*: IDAHO CODE § 54-2314 (psychologists) (1996); IDAHO R. EVID. 503 (physician/psychotherapist-patient) (1996). *Illinois*: 225 ILL. COMP. STAT.

thermore, the psychotherapist-patient version of the privilege has been recognized as a "common law" privilege by one state

15/5 (clinical psychologists); 55/70 (marriage counselor); 60/45 (physicians) (1993); 735 ILL. COMP. STAT. 5/8-802 (physicians); 5/8-802.1 (rape crisis counselors); 8-802.2 (victim assistance counselors) (West 1996). *Indiana*: IND. CODE §§ 25-33-1-17 (psychologists); 34-1-14-5 (physicians) (1996). *Iowa*: IOWA CODE § 622.10 (physician & mental health professional). *Kansas*: KAN. STAT. ANN. §§ 60-427 (physician/psychiatrist); 74-5323 (psychologists); 74-5372 (master's level psychologists) (1995). *Kentucky*: KY. R. EVID. 506 (counselors); 507 (psychotherapists) (1996). *Louisiana*: LA. REV. STAT. ANN. § 13:3734 (health care providers) (West 1995). *Maine*: ME. EVID. R. 503 (physicians & psychotherapists). *Maryland*: MD. CODE ANN., CTS. & JUD. PROC. §§ 9-109 (psychiatrists & psychologists); 9-109.1 (psychiatric mental health nursing specialist) (1995 & Supp. 1996). *Massachusetts*: MASS. GEN. LAWS ANN. ch. 233, § 20B (psychotherapists only) (1986 & Supp. 1996). *Michigan*: MICH. COMP. LAWS §§ 17078 (physician's assistant); 18237 (psychologists); 2157 (physician) (1994). *Minnesota*: MINN. STAT. ANN. § 595.02(d) (physicians); (g) (nurses/psychologists); (k) (sexual assault victim counselors) (West 1996). *Mississippi*: MISS. CODE ANN. §§ 73-30-17 (licensed professional counselors); 73-31-29 (psychologists) (1995). *Missouri*: MO. ANN. STAT. §§ 337.540 (professional counselors); 337.055 (psychologists); 491.060(5) (physician & psychiatrist) (West 1995). *Montana*: MONT. CODE ANN. §§ 26-1-805 (physician); 26-1-807 (psychologists) (1994). *Nebraska*: NEB. REV. STAT. § 27-504 (physician, psychologist & professional counselor) (1995). *Nevada*: NEV. REV. STAT. § 49.215 (psychiatrist, psychologist, psychiatric counselor & social worker) (1995). *New Hampshire*: N.H. REV. STAT. ANN. §§ 329:26 (physician); 330-A:19 (psychologist) (1995). *New Jersey*: N.J. STAT. ANN. §§ 45:8B-29 (marriage counselors); 45:14B-28 (psychologists) (West 1996); N.J. R. EVID. 506 (physician); 510 (marriage counselor) (West 1996). *New Mexico*: N.M. STAT. ANN. § 504, 561-9-18 (Michie 1995). *New York*: N.Y. C.P.L.R. 4504 (physician/psychiatrist); 4507 (psychotherapist); 4508 (social worker) (McKinney 1992). *North Carolina*: N.C. GEN. STAT. §§ 8-53 (physician); 8-53.3 (psychotherapist); 8-53.5 (marital & family counselor); 53.7 (social worker); 53.8 (counselor) (1996). *North Dakota*: N.D. R. EVID. 503 (physicians & psychotherapists). *Ohio*: OHIO REV. CODE ANN. §§ 2317.02(B) (physicians/psychiatrists); 2317.02(G) (guidance counselors & social workers); 2317.02(H) (family mediators); 4732.19 (psychologist) (Banks-Baldwin 1995). *Oklahoma*: OKL. STAT. ANN. tit. 12, § 2503 (psychologist) (West 1995). *Oregon*: OR. REV. STAT. §§ 40.230 (psychologist); 40.240 (nurse practitioner); 40.245 (school employee); 40.250 (clinical social worker) (1995); OR. R. EVID. 504 (psychotherapist); 504(1) (physician/psychiatrist). *Pennsylvania*: 42 PA. CONS. STAT. ANN. §§ 5929 (physicians), 5944 (psychologists) (West 1996). *Rhode Island*: R.I. GEN. LAWS § 5-63-17 (marriage counselor & mental health counselor) (1995). *South Carolina*: S.C. CODE ANN. § 19-11-95 (mental health professional) (Law Co-op. 1995). *Tennessee*: TENN. CODE ANN. §§ 24-1-207 (psychiatrist); 63-11-213 (psychologist) (1995). *Texas*: TEX. R. EVID. 509(b)(1) (physician/psychiatrist); 510(b) (mental health professional) (1995). *Utah*: UTAH R. EVID. 506 (physician & social worker) (1995). *Vermont*: VT. R. EVID. 503 (physicians & mental health professionals) (1995). *Virginia*: VA. CODE ANN. § 8.01-399 (physician) (Michie 1995). *Washington*: WASH. REV. CODE ANN. §§ 18.83.110 (psychologist); 18.19.180 (counselors) (West 1995). *West Virginia*: W. VA. CODE § 30-30-12 (1996) (social worker). *Wisconsin*: WIS. STAT. ANN. § 905.04 (physician, nurse practitioner, chiropractor, psychologist, social worker, marriage therapist, professional counselor) (West 1995). *Wyoming*: WYO. STAT. ANN. §§ 33-27-123 (psychologist); 33-38-109 (social worker) (Michie 1995).

supreme court and three federal circuit courts.¹⁴⁶

The protection afforded by the mental health worker-patient privilege includes protection of statements made for the purposes of mental treatment or drug rehabilitation. Such communications are generally recognized by courts as non-compulsory. Commentators have declared that there was no common law psychotherapist-patient privilege, and for such a privilege to exist, it must be granted by the legislature or by a court rule.¹⁴⁷

The American Psychiatric Association advanced a confidential communications statute for psychotherapists in the 1950s, which gave birth to the more comprehensive statutes and rules seen today in nearly all states.¹⁴⁸ Prior to that time, there were no statutes or court rules authorizing a confidential communications privilege for the psychotherapeutic process. The privilege was based on the notion that one-on-one talk therapy between the psychoanalyst and patient necessarily probed the patient's deepest inner recesses.¹⁴⁹ According to privilege advocates, exposing the patient's subconsciously repressed desires to public

¹⁴⁶ Alaska recognized a common-law version of the psychotherapist-patient privilege in 1976. *Allred v. State*, 554 P.2d 411, 418 (Alaska 1976). The Second, Sixth, and Seventh Circuits have recognized a common law psychotherapist-patient privilege. *In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992); *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983); *Jaffee v. Redmond*, 51 F.3d 1346, 1357 (7th Cir. 1995), *aff'd*, 116 S. Ct. 1923 (1996).

¹⁴⁷ See MCCORMICK, *supra* note 102, § 98 (stating that common law did not recognize physician-patient privilege and departure from this rule occurred in 1828 when New York enacted statute prohibiting physicians from revealing information disclosed to him by patient); WIGMORE ON EVIDENCE, *supra* note 103, § 2285 (noting fundamental conditions to establishment of privilege and denial by common law of physician-patient privilege rests on assumption that certain conditions are not met); see also David E. Louisell, *The Psychologist in Today's Legal World: Part II.*, 41 MINN. L. REV. 731, 737 (1957) (stating that attorney-client privilege existed at common law while physician-patient privilege did not).

¹⁴⁸ See GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION IN THE PRACTICE OF PSYCHIATRY 89 (1960) (primary written vehicle for advancement of confidential communications privilege for psychotherapists).

¹⁴⁹ For a contemporary justification for the psychotherapist-patient privilege based on a Freudian model of psychotherapy, see Ralph Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 184-94 (1960) (illustrating need for unique structure and different rules within psychotherapeutic relationship); Manfred S. Guttmacher & Henry Weihofen, Comment, *Privileged Communications Between Psychiatrist and Patient*, 28 IND. L.J. 32, 44 (1952) (asserting that specific types of physician-patient relationships should be afforded different treatment and psychiatrist relationship deserves greatest privilege due to trust and confidence required).

scrutiny would destroy the therapeutic relationship.¹⁵⁰ Thirty-five or forty years ago, scholars and judges did not have the benefit of psychotherapeutic models that employed a cooperative team effort between psychiatrist, psychologist, social worker, counselor and nurse that were developed after the Vietnam War. Consequently, they did not anticipate the need for a comprehensive mental health worker's privilege. Further, they had no idea that drug and alcohol dependence and abuse would become a national pandemic after 1965. Consequently, it follows that the initial psychotherapist-patient privilege rules and statutes did not include protection for subsidiary workers unless they were directly employed by and working under supervision of the psychiatrist or psychologist. Nor did the early statutes provide any protection for confidential communications between group therapy participants and psychotherapists.¹⁵¹

By 1973, the draft version of what was to become Uniform Evidence Rule 503 included a more comprehensive privileged communications rule for licensed psychiatrists and psychologists. This draft summarized and restated several existing state statutes. Uniform Rule 503 has since been adopted by twenty-six states.¹⁵² The rule is the paradigm for the contemporary psychotherapist-patient privilege, and was the pattern for proposed Federal Rule 504.

Uniform Rule 503 defines a "patient" as one "who consults or is examined or interviewed by a [physician or] psychotherapist."¹⁵³ In turn, it defines "psychotherapist" to include the traditional analytic psychiatrist and all types of licensed psychologists, but it does not explicitly provide for ancillary mental health workers such as social workers, counselors and nurses.¹⁵⁴

¹⁵⁰ See Slovenko, *supra* note 149, at 185-86 (noting that inviolability of psychiatrist-patient confidence is essential for achievement of therapeutic goal).

¹⁵¹ See Wayne Cross, *Privileged Communications Between Participants in Group Psychotherapy*, 1970 L. & SOC. ORDER 191, 193.

¹⁵² UNIF. R. EVID., 13 U.L.A. §§ 101-1102 (Supp. 1995) (indicating that 39 states have adopted the Uniform Rules of Evidence). Thirteen of the 39 (Arizona, Colorado, Iowa, Michigan, Minnesota, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Washington, West Virginia, and Wyoming) have not adopted Rule 503. See *id.* at 585-593 & Supp. at 96.

¹⁵³ UNIF. R. EVID. 503(a)(1). This broad based definition of "patient" may include the family members of a primary care patient undergoing family therapy, as well as the traditional model of one-on-one patient.

¹⁵⁴ UNIF. R. EVID. 503(a)(2)-(3). Reflecting the early phases of the war on drugs, the rule specifically describes the psychotherapist as a person authorized to practice

A "confidential communication" is defined to include a communication between patient and psychotherapist made for purposes of psychotherapeutic diagnosis and treatment that is not intended to be disclosed to third persons other than those who are part of the patient's therapy program.¹⁵⁵ Psychotherapeutic diagnosis and treatment, for purposes of obtaining a privilege under Uniform Rule 503, also includes drug and alcohol dependency treatment programs and group therapy sessions, in addition to more traditional one-on-one therapy.¹⁵⁶ The privilege belongs to the patient, not to the psychotherapist. The psychotherapist is bound to make a provisional claim of privilege for the patient when confronted with compulsory disclosure, until the patient's wishes can be ascertained.¹⁵⁷ The privilege survives the patient's death and can be claimed by the patient's personal representative.¹⁵⁸

Although the psychotherapist-patient privilege is cast in absolute language, it is qualified by three exceptions. First, communications between a patient and a psychotherapist are not deemed confidential when the therapist determines that a patient must be involuntarily committed to a hospital due to mental illness.¹⁵⁹ Second, communications between a patient and a court appointed psychotherapist in order to determine mental competency are not privileged due to the need for the psychotherapist's testimony.¹⁶⁰ Third, when the patient bases a claim

psychiatric medicine or psychology "while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction." *Id.* at 503(a)(3).

¹⁵⁵ UNIF. R. EVID. 503(a)(4). Rule 503(a)(4) describes the kinds of third persons to whom a confidential communication between patient and psychotherapist may be disclosed without making the communication non-confidential:

A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the [physician or] psychotherapist, including members of the patient's family.

Id. Thus, a confidential communication does not change if disclosed to third persons present at the therapy session, or if made to third party co-patients who may communicate the patient's confidential matter to the psychotherapist, or to other patients or family members who are participating in the patient's therapy. *Id.*

¹⁵⁶ UNIF. R. EVID. 503(b) (defining scope of privilege as including persons participating in diagnosis or treatment).

¹⁵⁷ UNIF. R. EVID. 503(c).

¹⁵⁸ *Id.*

¹⁵⁹ UNIF. R. EVID. 503(d)(1).

¹⁶⁰ UNIF. R. EVID. 503(d)(2). This exception is limited to the particular purpose

for relief or defense to liability on a mental, physical or emotional condition, communications between a patient and a psychotherapist, relative to the condition that gives support to the claim or defense, are not confidential.¹⁶¹

Uniform Rule 503 was comprised of most of the beneficial provisions of certain state statutes in effect from 1973-75 and some of the more enlightened federal statutes that granted qualified privileges to psychotherapy patients.¹⁶² Uniform Rule 503 was included as draft Rule 504 in the 1975 edition of the Federal Rules of Evidence. Congress, however, did not see fit to adopt the rule. Through the adoption of Rule 501 of the Federal Rules of Evidence, Congress left the role of defining a psychotherapist-patient privilege to the courts, which were guided by "the light of reason and experience."¹⁶³

Since the federal courts have recognized a common law psychotherapist-patient privilege, the history of the federal common law psychotherapist-patient privilege closely parallels what Boobar's counsel asked the Maine Supreme Judicial Court to do, that is, suppress of the alcoholic's statements to fellow AA members on the grounds of a psychotherapist-patient privilege. Although as early as 1955 at least one federal appellate court had recognized a common law psychotherapist-patient privilege, the Supreme Court has reminded us that the Federal Rules of Evidence "occupy the field," leaving no room for prior decisional law

for which the examination is ordered. *Id.*; see *Ramer v. United States*, 411 F.2d 30, 40 (9th Cir. 1969) (finding that psychiatric examination to determine mental competency is not within physician-patient privilege).

¹⁶¹ UNIF. R. EVID. 503(d)(3). This exception is based upon the principle of waiver.

¹⁶² The Advisory Committee's notes accompanying proposed Federal Rule 504 show that the rule was drawn from work done by California Law Revision Commission in 1964 that supported §§ 990-1007 of the 1967 California Evidence Code. FED. R. EVID. 504 advisory committee's note, *reprinted in* 56 F.R.D. 183, 240-44 (1973). The Committee's notes also cite privilege statutes from Illinois, New York, North Carolina, and 42 U.S.C. § 3419, which provide a limited privilege for confidential communications between patient and psychotherapist in drug treatment programs with respect to criminal prosecutions of the patient. *Id.* Section 4244 of 18 U.S.C., which grants a qualified privilege to communications between patient and examining psychotherapist made during a mental competency examination, precluding its use in the guilt phase of a subsequent criminal prosecution, was also cited by the Advisory Commission. *Id.*

¹⁶³ FED. R. EVID. 501. Rule 501 genuflects to compelling state interests by providing a clause that requires federal courts to apply state-established privilege rules in diversity of citizenship cases. *See id.*

privileges.¹⁶⁴ Consequently, the federal courts have had to work within the structure of Rule 501 to find a psychotherapist-patient privilege after the Federal Rules of Evidence became effective in 1976. However, Rule 501 has offered no helpful guidance to courts in deciding claims of psychotherapist-patient privilege so courts looked to pre-1975 decisional law for aid in interpretation.¹⁶⁵

The first appellate court to analyze a claim of a privileged communication between psychotherapist and patient rejected it on the ground that the privilege was unknown to the common law and not provided for by Congress.¹⁶⁶ This was the prevailing view among the federal circuits.¹⁶⁷ However, that view was initially challenged at the district court level;¹⁶⁸ appellate decisions from three circuits later followed suit and set forth a contrary

¹⁶⁴ *Huddleston v. United States*, 485 U.S. 681, 687-89 (1988) (relying solely on text and legislative history of rules to determine admissibility of evidence).

¹⁶⁵ Rule 501 established a standard to be applied by courts: "the privilege of a witness, person ... shall be governed by the principles of the common law as they may be interpreted by the courts in light of reason and experience." FED. R. EVID. 501. The Supreme Court analyzed the standard in Rule 501 for the first time and noted the legislative purpose was not to enact a rigid rule, but rather to "provide the courts with greater flexibility in developing rules of privilege on a case-by-case basis." *United States v. Grillock*, 445 U.S. 360, 367 (1979). The Senate Report accompanying the 1975 adoption of the Rules indicates that Rule 501 "should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship ... should be determined on a case-by-case basis." *Jaffe v. Redmond*, 116 S. Ct. 1923, 1927 (1996) (citations omitted). The Court had previously noted that Rule 501 directs courts to "continue the evolutionary development of testimonial privileges." *Trammel v. United States*, 445 U.S. 40, 47 (1980).

¹⁶⁶ *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir. 1976).

¹⁶⁷ See, e.g., *United States v. Burtrum*, 17 F.3d 1299, 1302 (10th Cir.), cert. denied, 115 S. Ct. 176 (1994); *In re Grand Jury Proceedings*, 867 F.2d 562, 564 (9th Cir. 1989); *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988) (stating that circuit refused to recognize psychotherapist-patient privilege in criminal trials).

¹⁶⁸ The district court cases began with Judge Weinstein's opinion in *Lora v. Board of Educ.*, 74 F.R.D. 565, 574-76 (E.D.N.Y. 1977), which recognized the strong policy reasons for granting a psychotherapist-patient privilege and analyzed the privilege under a constitutionally based privacy interest. The Court balanced the interests of the privilege against the interests of disclosure. *Id.* Other district courts later adopted a similar rationale by holding that a constitutionally-based psychotherapist-patient privilege existed in federal litigation. See, e.g., *Covell v. CNG Transmission Corp.*, 863 F. Supp. 202, 204-06 (E.D. Pa. 1994) (recognizing claim of privilege, but finding that disclosure interests outweigh interests of privilege); *United States v. D.F.*, 857 F. Supp. 1311, 1320, 1322 (E.D. Wis. 1994) (recognizing privilege in homicide case, but denying privilege on grounds that confidential matter involved child sexual abuse, which was excluded from privilege), vacated, 116 S. Ct. 1872 (1996); *In re Grand Jury No. 91-1*, 795 F. Supp. 1057, 1059 (D. Colo. 1992) (recognizing psychotherapist-patient privilege).

rule.¹⁶⁹

The United States Supreme Court has recently affirmed the decision of the United States Court of Appeals for the Seventh Circuit in *Jaffee v. Redmond*, providing further support for the recognition of this privilege.¹⁷⁰ Jaffee, the administrator of Ricky Allen's estate, sued Hoffman Estates Village Police Officer Mary Lu Redmond for damages arising out of Allen's death.¹⁷¹ Allen was shot down by Officer Redmond as he allegedly fled the scene of an altercation at an apartment house in Hoffman Estates.¹⁷² Following the shooting, Officer Redmond was suspended from duty and attended counseling sessions with Karen Beyer, a licensed clinical social worker employed by the Hoffman Estates Police Department to counsel officers.¹⁷³ When Redmond was deposed by the plaintiff, she refused to answer questions about her counseling sessions with Beyer, claiming that the conversations were privileged.¹⁷⁴ Plaintiff scheduled a deposition for Beyer.¹⁷⁵ Defendants moved to quash the subpoena on the ground that the matter sought was privileged, but the court denied the motion.¹⁷⁶ Beyer refused to answer any questions about Redmond's counseling sessions at her deposition and she was cited for contempt.¹⁷⁷ The district court punished Redmond and Beyer by refusing to let Redmond testify at trial.¹⁷⁸ The district court also instructed the jury that it was entitled to presume that Karen Beyer's undisclosed notes on the interviews with Officer Redmond were unfavorable to Officer Redmond and to Hoffman Estates.¹⁷⁹ The jury returned a verdict against Red-

¹⁶⁹ See *Jaffee v. Redmond*, 51 F.3d 1346, 1355 (7th Cir. 1995) (recognizing psychotherapist-patient privilege under Federal Rules of Evidence), *aff'd*, 116 S. Ct. 1923 (1996); *In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992) (recognizing psychotherapist-patient privilege under Federal Rules of Evidence Rule 501); *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983) (holding that disclosure of identity of patients and submission of claims to insurance company is not within scope of psychotherapist and patient privilege).

¹⁷⁰ *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996).

¹⁷¹ *Redmond*, 51 F.3d at 1348.

¹⁷² *Id.* at 1349.

¹⁷³ *Id.* at 1350.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1351.

¹⁷⁶ *Redmond*, 51 F.3d at 1351.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1351-52. The pertinent part of the court's instruction was as follows: During Ms. Beyer's testimony she referred to herself as a "therapist," al-

mond and Hoffman Estates, and defendants appealed. The Seventh Circuit reversed.¹⁸⁰

On appeal, Redmond's lawyers argued that the adverse instruction called for a reversal. The Seventh Circuit acknowledged that the existence of a common-law confidential communications privilege for social workers was a case of first impression.¹⁸¹ Turning to the results in other circuits where the issue of a psychotherapist-patient privilege had been raised, the court determined that two circuits had found a common law privilege whereas four had rejected it. The four circuits that had rejected a claim of privilege, however, had done so under circumstances not remotely related to Karen Beyer's situation.¹⁸² The court observed that much had changed within the mental health field since 1976 when the Fifth Circuit first rejected the common-law psychotherapist-patient privilege. Recognizing an increased public demand for psychotherapy, particularly when one has witnessed a violent crime, the court found, as a matter of legislative judicial notice, that "[t]hese unfortunate individuals, who include not only law enforcement personnel, but also students, school and hospital employees, postal workers, and members of the general public, need and deserve the help, support, and emotional release provided by confidential counseling."¹⁸³

The court found a socially-driven policy rationale for encour-

though she is not a psychiatrist or psychologist—she is a social worker. This Court has ruled that there is no legal justification in this lawsuit, based as it is on a federal constitutional claim, to refuse to produce Ms. Beyer's notes of her conversations with Mary Lu Redmond, and that such refusal was unjustified.

Under these circumstances, you are entitled to presume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates.

Id. at 1351-52 n.9 (emphasis omitted).

¹⁸⁰ *Redmond*, 51 F.3d at 1355, 1358 (reasoning that unique relationship between patients and psychotherapists requires ability to communicate freely without fear of public disclosure).

¹⁸¹ *Id.* at 1354. Illinois has statutorily provided for a confidential communications privilege between licensed social worker and client; consequently, the conversation and the resulting therapy notes would have been confidential in a diversity case. See 225 ILL. COMP. STAT. 20/1b (West 1993).

¹⁸² See *Redmond*, 51 F.3d at 1355. The court discussed the changing social conditions in the five years subsequent to the previous decisions rejecting the psychotherapist-patient privilege. *Id.* The court reasoned that the serious increase in crime and violence in the United States precipitated the need to provide for confidential counseling. *Id.*

¹⁸³ *Id.* at 1355.

aging and supporting psychotherapy administered by social workers to violent crime witnesses, recognizing a privilege logically followed. If the purpose of victim-witness therapy was socially laudable, then confidential communications between witness and therapist should be treated as privileged on the ground that the witness had a constitutionally protected privacy interest in such communications. Further, because the psychotherapist-patient privilege is accepted in all fifty states, the federal courts should adopt such a privilege out of a spirit of comity.¹⁸⁴ Finally, at least three states in addition to Illinois extend the benefit of the psychotherapist-patient privilege to licensed clinical social workers.¹⁸⁵ These influences persuaded the court to recognize a common law qualified privilege for confidential communications between licensed clinical social worker and client. However, the court stated that the privacy interests of the patient had to outweigh the evidentiary need for disclosure of the communications before the privilege would be recognized and applied to any particular situation, thus treating the privilege almost on a par with the work-product rule.¹⁸⁶ The United States Supreme Court rejected this formula and cast the privilege in absolute language.¹⁸⁷

The earlier Second and Sixth Circuit decisions recognizing the confidential communication privilege, applied a similar logic in determining that this privilege should exist with regard to conversations between patient and psychotherapist. *In re Doe*¹⁸⁸ dealt with a civil contempt citation issued to a key witness and

¹⁸⁴ See *Redmond*, 51 F.3d at 1356. The court stated that:

We are cognizant of the fact that *all fifty states have recognized the need for and have adopted varying forms of the psychotherapist-patient privilege*. . . Although federal common law governs our recognition of privilege in this case, . . . the law of privilege as developed by the states is not irrelevant as the Supreme Court "has taken note of state privilege laws in determining whether to retain them in the federal system"

Id. (emphasis added); see also *Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981) ("[A] strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy."). The widespread recognition of the psychotherapist/patient privilege in all fifty states is strong evidence that "experience with [the privilege] has been favorable." *In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992).

¹⁸⁵ See *Redmond*, 51 F.3d at 1356 n.17. These states, according to the court, were California, Florida, and Virginia. *Id.*

¹⁸⁶ *Id.* at 1357.

¹⁸⁷ *Jaffee v. Redmond*, 116 S. Ct. 1923, 1932 (1996).

¹⁸⁸ *In re Doe*, 964 F.2d at 1326.

his psychotherapist. Steven Diamond was indicted for extortion, largely on the strength of the witness' grand jury testimony.¹⁸⁹ The government notified Diamond's counsel that John Doe, the key witness, suffered from depression and had consulted a psychiatrist.¹⁹⁰ The trial judge requested in camera review of the witness' psychotherapeutic records, and subsequently ordered the records turned over to the defendant, despite Doe's insistent claim of privilege.¹⁹¹ The records disclosed that Doe had a long history of mental illness and had been diagnosed as "paranoid" and suffering from "narcissistic trends."¹⁹² Doe refused to answer questions about his mental health during a pre-trial hearing and was held in contempt.¹⁹³ He appealed the contempt citation, and the Second Circuit affirmed.¹⁹⁴ The court held that Rule 501 controlled, necessitating the determination of whether a privilege should be extended to confidential communications between psychotherapist and patient in federal courts as a matter of common law.¹⁹⁵ The court recognized that forty-nine states, including New York, had adopted a similar privilege.¹⁹⁶ After recognizing the existence of the privilege, it held that the defendant was still entitled to discover the key witness's psychological history prior to trial at an in camera hearing, reserving the right to grant a protective order forbidding disclosure. The court felt that this sufficiently protected the witness' privacy rights.¹⁹⁷ The *Doe* decision appeared to be rooted less in constitutional concerns over the right to privacy than in a concern for unequal recognition of the privilege in New York state and federal courts.¹⁹⁸

Zuniga also involved compulsory disclosure of patient information.¹⁹⁹ Two psychiatrists were subpoenaed to testify before a

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1326-27.

¹⁹² *Id.* at 1327.

¹⁹³ *In re Doe*, 964 F.2d at 1327.

¹⁹⁴ *Id.* at 1329.

¹⁹⁵ *Id.* at 1328-29.

¹⁹⁶ See, e.g., *Ex parte* United Serv. Stations, Inc., 628 So. 2d 501, 505 (Ala. 1993) (according same level of protection as attorney-client privilege to psychotherapist-patient privilege); District Attorney for Norfolk Dist. v. Magraw, 628 N.E.2d 24, 26 (Mass. 1994) (describing policy reasons supporting psychotherapist-patient privilege which includes fostering open communication resulting in more effective assistance).

¹⁹⁷ *In re Doe*, 964 F.2d at 1329.

¹⁹⁸ *Id.* at 1328.

¹⁹⁹ See *In re Zuniga*, 714 F.2d 632 (6th Cir. 1983).

Michigan grand jury investigating health insurance fraud. They were served with subpoenae duces tecum calling for "[p]atient files, progress notes, ledger cards, copies of insurance claim form and any other documents supporting dates of service rendered" to a list of people insured through Blue Cross/Blue Shield.²⁰⁰ Both psychiatrists refused to comply with the subpoenae on the grounds that providing the patient records would violate the patients' psychotherapist-patient privilege. The district court rejected the argument and cited both psychiatrists for contempt. Their appeals were consolidated and heard by the Sixth Circuit, which affirmed.²⁰¹

The Sixth Circuit, however, chose to adopt the psychotherapist-patient privilege. The court explained its rationale by noting that Rule 501 instructs the courts that privileges "shall be governed by the principles of the common law as ... interpreted by the courts ... in light of reason and experience."²⁰² Examining the rejected Rule 504 that provided for a psychotherapist-patient privilege,²⁰³ the Sixth Circuit held that it had the authority to recognize a psychotherapist-patient privilege. The court referred to *Report No. 45 for the Advancement of Psychiatry*²⁰⁴ and *Taylor v. United States*²⁰⁵ as policy sources for the psychotherapist-patient privilege.²⁰⁶ The policy supporting the privilege proved compelling to the Sixth Circuit, which held that the psychotherapist-patient relationship is socially valuable and cannot be successfully maintained unless the patient is assured that her innermost feelings and thoughts are free from compulsory exposure. The interests that the privilege furthers include effective treatment for the mentally ill, and the ability to seek psychotherapy.²⁰⁷ The court explained that mental illness prevented people from understanding religious and political ideas and hindered the ability to communicate ideas to others. The court ac-

²⁰⁰ *Id.* at 634.

²⁰¹ *Id.* at 642.

²⁰² *Id.* at 636.

²⁰³ *Id.* at 636-37 (explaining why Congress' refusal to adopt proposed Rule 504 does not preclude recognition of psychiatrist-patient privilege).

²⁰⁴ Report No. 45, Group for the Advancement of Psychiatry 92 (1960), quoted in Advisory Committee's Notes to Proposed Rules, 56 F.R.D. at 242.

²⁰⁵ 222 F.2d 398 (D.C. Cir. 1955) (holding that policy underpinning psychiatrist-patient privilege is "clear and strong").

²⁰⁶ *In re Zuniga*, 714 F.2d 632, 638 (6th Cir. 1983).

²⁰⁷ The ability to seek psychotherapy is likely supported by "many fundamental freedoms, particularly those protected by the First Amendment." See *id.* at 639.

cepted Professor Stephen Smith's thesis that a threshold level of mental health is required for any citizen to form a belief and value system and to engage in political discourse.²⁰⁸

For reasons best understood by the panel, the court did not support its conclusion with a constitutional law analysis, which would likely identify the right to personal privacy as the source of the privilege. This appears to conflict with the essence of Professor Smith's article which devoted a great deal of space to examining the privilege as it related to the constitutionally recognized right to privacy.²⁰⁹ In affirming the psychiatrists' contempt citations, the court weighed the privacy interests of the patients involved against the need for compulsory disclosure. The court reasoned that minimal harm would be done to the patients if their records were disclosed to verify billings to insurance companies. The court accepted the assertion that the grand jury's cloak of secrecy would adequately protect the patients' privacy rights.²¹⁰

The history of the psychotherapist-patient privilege in federal practice supporting a privilege for confidential communications between patient and mental health worker rests on pragmatic social policy grounds. If society values psychotherapy and wants to encourage citizens to utilize psychotherapists in order to improve mental health, then society should provide a privilege preventing compulsory disclosure. Since the privilege is rooted in pragmatic evaluation of the competing interests of a patient's well-being and society's need for information, the privilege is qualified rather than absolute. Some confidential communications between patient and psychotherapist will be protected when the societal need for disclosure is less than the patient's need for protection of confidential information.

²⁰⁸ *Id.*; see also Smith, *supra* note 124.

²⁰⁹ See Smith, *supra* note 124, at 15-32. Professor Smith espouses a persuasive argument for a constitutionally-rooted psychotherapist-patient privilege derived from *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Whalen v. Roe*, 429 U.S. 589 (1977), and *Doe v. Bolton*, 410 U.S. 179 (1973), among other privacy cases. *Id.* Professor Smith notes that therapy is impossible if the patient does not trust the therapist. Professor Smith also argues that a constitutionally protected right to informational privacy, similar to the rights protected by tort law, is found in existing case law, including *Fisher v. United States*, 425 U.S. 391 (1976), which acknowledged a taxpayer's privacy interest in information used to prepare tax returns. *Id.* at 28-29.

²¹⁰ See *In re Zuniga*, 714 F.2d at 642.

B. Clergy-Communicant Privilege

Confidential communications between members of a congregation and a clergy person are analogous to confidential communications between members of Twelve Step Groups. All Twelve Step programs acknowledge the existence of a power greater than the individual who provides spiritual guidance to program members and encourage prayer and meditation as a means of establishing contact with the higher power.²¹¹ Although all Twelve Step programs are careful to assure members that they are not "religious" programs, each recognizes the importance of spirituality as a way of coping with an addiction, and each insists that a great portion of one's personal recovery be devoted to spiritual growth through prayer and meditation. Like the Society of Friends, the Twelve Step Groups have no ordained clergy. Spiritual guidance may be provided by any member who is moved to share her experience, strength and hope during a meeting. Each Twelve Step Group also insists that part of the recovery program includes a confidential admission of one's "defects of character" to God, to oneself, and to another member.²¹² Consequently, a brief examination of the clergy-communicant privilege may be helpful.

All fifty states and the District of Columbia recognize a privilege for confidential communications between a member of a congregation and a clergy member.²¹³ Although many scholars

²¹¹ The Eleventh Step of AA states that members should improve their "conscious contact with God" through prayer and meditation to recover from alcoholism, "praying only for knowledge of His will for us and the power to carry that out." See ALCOHOLICS ANONYMOUS, *supra* note 46, at 59.

²¹² *Id.*; see *supra* notes 84-101 and accompanying text; see also *supra* notes 45-54 and accompanying text (development of moral re-armament movement infusing spiritual context into alcoholic recovery program); notes 54-61 and accompanying text (adoption of spiritual conversion and confession by Oxford Groups).

²¹³ Alabama: ALA. CODE § 12-21-166 (1996); Alaska: ALASKA R. EVID. 505; Arizona: ARIZ. REV. STAT. § 12-2233 (1996); Arkansas: ARK. CODE ANN. § 16-41-101 (Michie 1995); California: CAL. EVID. CODE §§ 1030-34 (West 1996); Colorado: COLO. REV. STAT. § 13-90-107(1)(c) (1996); Connecticut: CONN. GEN. STAT. § 52-146b (1995); Delaware: DEL. R. EVID. 505 (West 1996); District of Columbia: D.C. CODE ANN. § 14-309 (1981); Florida: FLA. STAT. ANN. § 90.505 (West 1995); Georgia: GA. CODE ANN. § 24-9-22(1996); Hawaii: HAW. REV. STAT., § 626-1 (1996); Idaho: IDAHO CODE § 9-203 (1996); Illinois: 735 ILL. COMP. STAT. ANN. 5/8-803 (West 1995); Indiana: IND. CODE ANN. § 34-1-14-5 (West 1996); Iowa: IOWA CODE ANN. § 622.10 (West 1995); Kansas: KAN. STAT. ANN. § 60-429 (1995); Kentucky: KY. R. EVID. 505 (Michie 1995); Louisiana: LA. CODE EVID. ANN. Art. 511 (West 1995); Maine: ME. R. EVID. 505 (1996); Maryland: MD. CODE ANN., CTS. & JUD. PROC. § 9-111 (1996); Massachusetts: MASS. GEN. LAWS ANN. ch. 233, § 20A (1996); Michigan: MICH.

insisted that the common law after the Reformation did not recognize the seal of the confessional and rejected pleas that communications between priest and penitent were privileged,²¹⁴ the privilege was recognized in the Court of Appeals for the District of Columbia without benefit of statute in 1958,²¹⁵ and followed in other circuits from 1958 to 1977.²¹⁶ The priest-penitent privilege was ultimately recognized by the United States Supreme Court in 1980 in *Trammel v. United States*.²¹⁷ Since *Trammel*, federal courts continued to recognize a judge-made clergy-communicant privilege.²¹⁸

COMP. LAWS ANN. § 767.5a(2) (West 1996); Minnesota: MINN. STAT. ANN. § 595.02(c) (West 1996); Mississippi: MISS. CODE ANN. § 13-1-22 (1995); Missouri: MO. ANN. STAT. § 491.060(4) (West 1995); Montana: MONT. CODE ANN. § 26-1-804 (1995); Nebraska: NEB. REV. STAT. § 27-506 (1995); Nevada: NEV. REV. STAT. § 49.255 (1995); New Hampshire: N.H. REV. STAT. ANN. § 516:35 (1995); New Jersey: N.J. STAT. ANN. § 2a:84A-23 (West 1996); New Mexico: N.M. R. EVID. 11-506 (1996); New York: N.Y. C.P.L.R. 4505 (McKinney 1996); North Carolina: N.C. GEN. STAT. § 8-53.2 (1995); North Dakota: N.D. R. EVID. 505 (1992); Ohio: OHIO REV. CODE ANN. § 2317.02 (Banks-Baldwin 1996); Oklahoma: OKLA. STAT. ANN. tit. 12, § 2505 (West 1995); Oregon: OR. REV. STAT. § 40.260 (1995); Pennsylvania: 42 PA. CONS. STAT. ANN. § 5943 (West 1996); Rhode Island: R.I. GEN. LAWS § 9-17-23 (1995); South Carolina: S.C. CODE ANN. § 19-11-90 (Law Co-op 1995); South Dakota: S.D. CODIFIED LAWS § 19-13-16 (Michie 1996); Tennessee: TENN. CODE ANN. § 24-1-206 (1996); Texas: TEX. R. EVID. 505 (1996); Utah: UTAH CODE ANN. § 78-24-8 (1996); Vermont: VT. STAT. ANN. tit. 12, § 1607 (1995); Virginia: VA. CODE ANN. § 19.2-271.3 (Michie 1996); Washington: WASH. REV. CODE ANN. § 5.60.060 (West 1995); West Virginia: W. VA. CODE § 57-3-9 (1996); Wisconsin: WIS. STAT. ANN. § 905.06 (West 1995); Wyoming: WYO. STAT. ANN. § 1-12-101 (Michie 1996).

²¹⁴ See, e.g., MCCORMICK, *supra* note 102, § 76.2, at 184; WIGMORE ON EVIDENCE, *supra* note 103, § 2394; HON. JACK WEINSTEIN & MARILYN BERGER, FEDERAL RULES OF EVIDENCE ¶ 505.01[01] (1995); WRIGHT & GRAHAM, *supra* note 113, § 5611, at 14-15.

²¹⁵ See *Mullen v. United States*, 263 F.2d 275, 277 (D.C. Cir. 1958) (Fahy, J. concurring) (finding confession is privileged and not competent evidence).

²¹⁶ *United States v. Luther*, 481 F.2d 429, 432 (9th Cir. 1973) (priest-penitent privilege could not be used to protect disclosure of church financial records); *United States v. Wells*, 446 F.2d 2, 4 (2d Cir. 1971) (privilege recognized but letter from defendant to priest held outside privilege); *In re Verplank*, 329 F. Supp. 433, 435-36 (C.D. Cal. 1971) (draft counseling within scope of priest-penitent privilege); *Cimijotti v. Paulsen*, 219 F. Supp. 621, 624-25 (N.D. Iowa 1963) (applying state priest-penitent privilege in diversity case).

²¹⁷ 445 U.S. 40 (1980) (dicta) (defining marital privilege as broader in scope than priest-penitent privilege). "The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return." *Id.* at 51.

²¹⁸ See, e.g., *In re Grand Jury Investigation*, 918 F.2d 374, 377 (3d Cir. 1990) (defining scope of privilege); *United States v. Dubé*, 820 F.2d 886, 890 (7th Cir. 1987) (holding that conversation regarding tax evasion was not confidential); *United States v. Gordon*, 655 F.2d 478, 486 (2d Cir. 1981) (stating that business communi-

The outline of the judge made clergy-communicant privilege is clear from federal case law. The substance and limitations of the clergy privilege were clearly delineated in *In re Grand Jury Investigation*.²¹⁹ Lutheran Pastor Ernest Knoche was involved in family counseling with four people implicated in a fire-bombing incident in his community.²²⁰ The federal grand jury issued a subpoena to Pastor Knoche requiring him to appear and testify about matters discussed in the group counseling session. The pastor moved to quash the subpoena on the ground that the communications were made to him in his pastoral capacity and were privileged. The district court granted the motion to quash, holding that Pastor Knoche had standing to claim the privilege on behalf of his communicants.²²¹ On appeal the Third Circuit reversed and remanded for an evidentiary hearing on whether the four suspects had consulted Pastor Knoche in his spiritual capacity, and had done so with a reasonable expectation of confidentiality.²²²

Noting that Rule 501 was a mandate to the courts to develop judge-made privilege law on a case-by-case basis, the panel turned to Uniform Rule 506 which had been proposed to Congress as a starting point.²²³ Uniform Rule 506 provided a privilege for confidential communications²²⁴ made to the clergyman²²⁵

cations with priest not privileged); *Griffin v. Coughlin*, 743 F. Supp. 1006, 1027 (N.D.N.Y. 1990) (indicating privacy as basis of privilege); *Miranda v. Consol. Rail Corp.*, 571 F. Supp. 1255, 1257 (E.D. Mich. 1983) (dicta) (recognizing priest-penitent privilege); *Eckmann v. Board of Educ.*, 106 F.R.D. 70, 72 (E.D. Mo. 1985) (indicating that spiritual advisor is sufficient conduct to invoke privilege); *Deuterium Corp. v. United States*, 4 Cl. Ct. 361, 364 (1984) (dicta) (privilege recognized); *Long v. Comm'r*, 54 T.C.M. (C.C.H.) 1642 (1985) (recognized but not applicable to tax records of church).

²¹⁹ 918 F.2d 374 (3d Cir. 1990).

²²⁰ Two suspects, a husband and wife, were members of his congregation. *Id.* at 378.

²²¹ See *id.* The court further held that the presence of the adult son's fiancé did not destroy the confidential nature of the counseling session. *Id.* at n.4.

²²² *Id.* at 387.

²²³ See *In re Grand Jury Investigation*, 918 F.2d at 378-81. The court was careful to point out that Congress did not disapprove of proposed Rule 506 but, in light of *Erie* and Rule 501, wanted the scope of the privilege to be decided on a case-by-case basis. *Id.* at 380.

²²⁴ "A communication is 'confidential' if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication." *Id.* at 380.

²²⁵ "Clergyman" is defined in Rule 506 as a "minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him." *Id.*

in his professional capacity as a spiritual advisor. The privilege belonged to the person who made the confidential communication, but the clergyman had the right and obligation to assert the privilege conditionally on behalf of the communicant.²²⁶ After noting that federal courts had recognized the privilege before and after the adoption of the Federal Rules of Evidence, the court asked whether the clergy-communicant privilege met Dean Wigmore's four conditions for a confidential communications privilege.²²⁷ Upon finding that the clergy-communicant privilege met Wigmore's test, the court announced that the privilege was recognized in the Third Circuit.²²⁸ The court also established that the presence of third persons other than the communicants and the clergy member, would not destroy the privileged nature of the transaction so long as the communicants and the clergy member had a reasonable expectation of confidentiality.²²⁹

United States courts, therefore, currently recognize two privileges, the hybrid of which should be applicable to confidential communications between members of Twelve Step Groups. The psychotherapist-patient privilege extends to confidential communications between psychotherapist and patient made for the purpose of furthering the socially laudable goal of obtaining mental health. The privilege extends to drug and alcohol counseling, including group therapy, provided by psychotherapists to addicts. Although the privilege is qualified and may not rest on constitutional grounds, the patient's interest in confidentiality, which aids therapy, generally outweighs the public need for information in grand jury proceedings and at trial. The clergy-communicant privilege includes confidential communications between communicant and clergy member. It furthers the constitutionally-protected right of free exercise of religion, since pastoral counseling is a part of religious practice.²³⁰ The privilege is

²²⁶ See *id.* The court observed that the clergy-communicant privilege was one of the least controversial privileges in the selection proposed by the authors of the Federal Rules of Evidence. It further observed that nearly every U.S. jurisdiction had recognized the clergy-communicant privilege by rule or statute. *Id.* at 381.

²²⁷ WIGMORE ON EVIDENCE, *supra* note 103, § 2285; see *supra* notes 108-09 and accompanying text (Dean Wigmore's criteria).

²²⁸ *In re Grand Jury Investigation*, 918 F.2d at 383-84.

²²⁹ See *id.* at 385-86. The privilege was said to be "indelibly ensconced" in American common law. *Id.* at 381. As for the policy basis, the court cited *Trammel v. United States*, 445 U.S. 40 (1980), with favor and noted the substantial public benefit of spiritual guidance fostered by trust and confidence. 918 F.2d. at 384.

²³⁰ See *In re Grand Jury Investigation*, 918 F.2d at 383. The court noted that the

not qualified; therefore, matters communicated to a clergy member under the privilege may not be subject to the balancing of public need for information against private need for confidentiality. Finally, the clergy-communicant privilege has been held to apply to group discussions and is not limited to statements made to a priest.²³¹

Both privileges provide support for recognizing a confidential communications privilege within Twelve Step Groups. These groups combine elements of group psychotherapy with spiritual counseling as an integral part of their operating procedures.

C. Utilitarian Justification For Privilege For Twelve Step Groups

Assuming that Dean Wigmore's four part test for a confidential communications privilege represents the most commonly accepted, pragmatic and Utilitarian method for recognizing a new privilege, the successful application of the test to the operations of Twelve Step Groups should provide strong support for judicial recognition and adoption of a group therapy privilege.

1. The Communications Must Originate in a Confidence That They Will Not Be Disclosed

On the table at every AA, Narcotics Anonymous, Al-Anon, and other Twelve Step Groups, there is a blue card with white printing that reads: "What you see here, what you hear here, when you leave here, let it stay here." The suggested closing to every AA or Al-Anon meeting contains the following statement: "The things you heard were spoken in confidence and should be treated as confidential. Keep them within the walls of this room and the confines of your mind."

People attend Twelve Step Group meetings and communicate with sponsors believing that their confidential secrets, including their defects of character, will not be disclosed to anyone outside the meeting or sponsor relationship without their consent. Confidentiality also protects members' anonymity, which is one of the cardinal principles of any Twelve Step program. Anonymity cannot be preserved unless meetings and sponsorship contacts are deemed confidential.

proposed Rule 506 "would have extended the clergy-communicant privilege to group discussions." *Id.* at 380.

²³¹ See *supra* notes 215 & 217.

2. This Element of Confidentiality Must Be Essential to the Full and Satisfactory Maintenance of the Relation Between the Parties

Anonymity is also an integral means of protecting the reputation, job security and lives of group members. The Eleventh and Twelfth Traditions of AA and other Twelve Step groups underscores the importance of personal anonymity.²³² To Al-Anon members, who may be living with a violent alcoholic who will retaliate physically if the alcoholic finds out the other person is attending Al-Anon, anonymity could be a matter of life and death.²³³ For Twelve Step Group members, however, there is another overriding reason for maintaining personal anonymity at all costs. Anonymity is deemed to be the spiritual foundation of every Twelve Step Group program. As the official commentary on Al-Anon's Twelfth Tradition puts it:

²³² The eleventh tradition states that "Our public relations policy is based on attraction rather than promotion; we need always maintain personal anonymity at the level of press, radio, TV and films." MILTON A. MAXWELL, PH.D., *THE ALCOHOLICS ANONYMOUS EXPERIENCE: A CLOSE UP VIEW FOR PROFESSIONALS* 141 (1984). Al-Anon adds the following: "We must guard with special care the anonymity of all AA members." The Twelfth Tradition says that "Anonymity is the spiritual foundation of all our Traditions, ever reminding us to place principles above personalities." *Id.*; AL-ANON FAMILY GROUP HEADQUARTERS, INC., *ONE DAY AT A TIME IN AL-ANON* 18, 66, 230 (1970) [hereinafter *ONE DAY AT A TIME*]. *ONE DAY AT A TIME* is a daily guide for Al-Anon members containing three hundred and sixty-five pages of inspirational messages tied to specific AA traditions. Three sections deal specifically with anonymity:

I belong to Al-Anon in order to learn how to live at peace with myself and others. To this end I have a responsibility to my group members never to reveal anyone's secrets. I must protect the anonymity of my fellow members and their families. Only in this way can I help my group grow in its capability to help others. Above all, I will never identify a story by a personal name. Just as I want to be assured that others will not repeat what I say at meetings or what I tell another member in confidence, so I will guard against indiscretion.

Id. at 18.

²³³ See *ONE DAY AT A TIME*, *supra* note 232, at 230.

[W]e are reassured to discover that Al-Anon has a protective cloak of anonymity for us. Every member understands that no word of the proceedings must ever go beyond the meeting room, and especially that no names should ever be mentioned ... The newcomer to Al-Anon immediately feel comforted and safe when she learns that she can talk freely without fear of having anything repeated. We owe her this assurance. We are committed to it by our own Traditions, as well as by our personal need for protection against careless gossip ... I will remind myself daily that I must guard against revealing anything concerning Al-Anon or an Al-Anon member.

Id. (Twelfth Tradition).

Anonymity is the spiritual foundation of all our traditions, ever reminding us to place principles above personalities. This Twelfth Tradition by which we try to live should be kept in mind by all of us, at all times. It is the secret of success in the Al-Anon way of life What we hear in an Al-Anon meeting, and privately from our Al-Anon friends, is meant to help *us*. It must be kept locked in our hearts, just as we want to be sure others are keeping locked up what we tell them ... outside our fellowship, I will allow myself to speak only of Al-Anon principles, never of personalities. My success with the program depends on each person's discretion.²³⁴

If anyone who attends an AA or Al-Anon meeting can be required to disclose the fact that another person was present at the meeting, anonymity is breached and the program's effectiveness is seriously impaired.

3. The Relation Must Be One Which in the Opinion of the Community Ought to be Sedulously Fostered

Alcoholics Anonymous and allied Twelve Step programs enjoy widespread support among alcohol and drug treatment counselors, psychotherapists, law enforcement agencies and the general public.²³⁵ Public concern over drug and alcohol abuse, and

²³⁴ *Id.* at 66, 230 (quoting Twelfth Tradition).

²³⁵ Widespread support for Alcoholics Anonymous and its companion groups is readily documented from a variety of literary sources. See, e.g., DENNIS C. DALEY, *SURVIVING ADDICTION: A GUIDE FOR ALCOHOLICS, DRUG ADDICTS AND THEIR FAMILIES* (1988); MAXWELL, *supra* note 232; C.L. WHITFIELD, *ALCOHOLISM AND SPIRITUALITY* (Baltimore: The Resources Group, Inc., 1985); Edward M. Read, *Twelve Steps to Sobriety: Probation Officers "Working the Program"*: FED. PROBATION, Dec. 1990, at 34; John J. Rumbarger, *The "Story" of Bill W: Ideology, Culture, and the Discovery of the Modern American Alcoholic*, 20 CONTEMP. DRUG PROBS. 759 (1993). The fall 1990 issue of LIFE featured Bill W., the founder of Alcoholics Anonymous as one of its choices for the most influential men of the Twentieth Century. Alcoholics Anonymous, however, is not without its detractors. See CHARLES BUFE, *ALCOHOLICS ANONYMOUS: CULT OR CURE?* (1991) (asserting that AA has serious cult-like tendencies); see also HERBERT FINGARETTE, *HEAVY DRINKING, THE MYTH OF ALCOHOLISM AS A DISEASE* (1988) (attacking spiritual foundation of AA—that alcoholics are powerless over alcohol and cannot stop drinking without intervention from higher power). Alcoholics Anonymous believes that the compulsion to drink is incurable and only total alcohol abstinence can free the alcoholic from the compulsion to drink. "For [members] Alcoholics Anonymous often becomes an alternative way of life This passionate and complete reorientation is not a unique phenomenon; it is rather like what critics of sects would call ideological re-education or a modest form of elective brainwashing." *Id.* at 3 & 18. According to Fingarette, alcoholics can be cured by a treatment regimen that conditions them to be normal social drinkers. See *id.* at 114-29. Fingarette's clinical findings are based

by-products of these conditions such as drug related crime, domestic violence and child abuse is at an all time high. Alcohol and drug addiction in particular, cost society billions of dollars each year. First, there are the direct costs of arrest, prosecution, defense and incarceration of drug and alcohol offenders, the two largest groups of offenders in the criminal justice system.²³⁶ Second, there are the direct costs of drug and alcohol dependency treatment facilities, born in part by public agencies and increasingly by group medical insurance programs. Third, there are the indirect costs to society, such as increased dependency on public assistance for the families of addicts, lost work time, industrial accidents, and traffic accidents resulting from addictions. The Twelve Step programs do lead some members to remission of symptoms of addiction to alcohol, narcotics, food, sex and other types of obsessive behavior. Alcoholics Anonymous, Narcotics Anonymous, and allied Twelve Step Groups are self-supporting, low-cost alternatives to this massive, costly infrastructure that provides support for those who are addicted and their families.

4. The Injury That Would Inure to the Relation by the Disclosure of the Communications Must Be Greater than the Benefit Thereby Gained for the Correct Disposal of Litigation

Wigmore's final principle requires the courts to work a calculus equation to decide whether to grant privileged status to a particular communication. Intuitively, it seems disclosure of some confidential communications would do little harm to the person making the communication and would greatly assist the courts in reaching a correct resolution in a particular situation. This seems to be the case when grand juries investigate Medicare, Medicaid, and health insurance fraud involving psycho-

on a behaviorist understanding of human activity. *Id.* at 118. An appropriate combination of positive operant conditioning and negative conditioning can modify an alcoholic's drinking behavior from abuse to socially acceptable drinking levels. *See id.* at 118-29. Fingarette's claims have been disputed by other researchers because he has no long-term follow-up data on his patients. *See, e.g.,* William Madsen, *The Alcoholism Controversy: Thin Thinking About Heavy Drinking*, 95 PUB. INTEREST 112, 118 (Spring 1989); Gene Kasma, *Addictions as Diseases*, STAR TRIB. (Minneapolis), Aug. 1, 1990, at 10A (characterizing Fingarette's work as "sensationalism and short on substance").

²³⁶ *See generally* ROBERT NASH PARKER & LINDA ANNE REBHOAN, *ALCOHOL & HOMICIDE: A DEADLY COMBINATION OF TWO AMERICAN TRADITIONS* (1995) (comprehensive study of correlation between alcohol and crime and effect of treatment programs supported by justice system).

therapists. When a psychotherapist who has previously billed services to a health insurance company stating the patient's name and diagnosis is ordered to turn over that information to a grand jury, which itself is a secret ex-parte proceeding, the patient suffers little, if any, harm from this disclosure.²³⁷ In this instance, the grand jury's need for information in order to indict offenders is substantial and courts usually suspect that the psychotherapist has spuriously raised the claim of privilege in order to avoid indictment.

On the other hand, in cases where the disclosure of the identity of the communicator would lead to arrest or to joining the communicator as a party defendant to civil litigation, and the recipient is a psychotherapist or a clergy member, the value of non-disclosure rises because the risk of substantial harm to the communicator is greater. In such cases, where the need to know remains relatively constant, the courts uphold claims of privilege.²³⁸

Courts can apply these principles to a Twelve Step Group member's claim of privilege with relative ease. An illustration from *People v. Cox* may help: Paul Cox apparently was identified as the perpetrator of the homicide with which he was charged because of a statement he made during an AA meeting or to an AA sponsor about the crime. At trial, the same individual, testifying without losing his personal anonymity, identified Cox as the person who had vague recollections about committing a horrible crime.²³⁹ Had the court recognized a Twelve Step Group member's claim of privilege, it would have balanced society's need to identify the perpetrator of a homicide against an AA member's need for anonymity. Since the loss of anonymity destroys the program for that AA member, the harm done to the AA member is immeasurable, not to mention the harm done to

²³⁷ See, e.g., *In re Zuniga*, 714 F.2d 632, 640 (6th Cir. 1983) (finding that disclosure of patient's name does not fall within privilege); *Doe v. United States*, 711 F.2d 1187, 1193 (2d Cir. 1983) (refusing to recognize privilege).

²³⁸ See, e.g., *Simpson v. Tennant*, 871 S.W.2d 301, 308-09 (Tex. Ct. App. 1994) (holding that identity of communicator is privileged where clergy member received confidential communication about identity of probable wrong-doer in bus accident). The court found the benefit of preserving the privilege greatly overshadowed "the possible benefit of permitting litigation to prosper at the expense of the ... spiritual rehabilitation of a penitent." *Id.* at 309 (citation omitted).

²³⁹ See *Berger*, *supra* note 2, at B1; *Killings of Larchmont Doctors Described at Trial*, N.Y. TIMES, June 10, 1994, at B1.

the AA meeting where the disclosure occurred.²⁴⁰ Further, once AA members or AA candidates learn of the compulsory disclosure the program will collapse. Society has other means to identify the perpetrator of the crime which apparently were not well used in the *Cox* case.²⁴¹

The foregoing discussion demonstrates that there is a sound, pragmatic basis for a privileged communication claim to be asserted for confidential communications made by AA members in meetings, or in conversations with a sponsor. Here the communication is intended to be confidential, and involves important social interests such as fostering and encouraging Twelve Step Groups in their mission to provide self-help treatment for addicts and their obsessive behavior.

D. Justification Founded on Constitutional Right to Privacy

The previous discussion leading to a pragmatic justification for a Twelve Step privilege sets forth a legal justification for a qualified privilege. In each instance, the court had to weigh the relative merits of disclosure against the relative merits of non-disclosure from the subjective and fact bound viewpoint that leads to inconsistent and varying results.²⁴² Unless inconsistent decisions regarding privileged communication status is a value that society wishes to protect, a better foundation for a claim of privilege should be sought.

There is a stronger justification for an unqualified Twelve Step privilege than expediency and the working of calculus equations in fact-bound cases. Disclosure of confidential communications between Twelve Step Group members is an invasion of the privacy of the communicator and the listener. Both the communicator and the listener have a reasonable expectation

²⁴⁰ See *infra* note 232 and accompanying text.

²⁴¹ To be sure, no AA member would countenance Paul Cox making a disclosure that he had committed a serious crime either in sharing at a meeting or in a talk with a sponsor. Indeed, Cox would quickly find out that the Fourth, Fifth, Eighth, and Ninth Steps of AA required him to contact the police and voluntarily turn himself in. See *supra* note 93.

²⁴² It is precisely the inherent fallibility of the pragmatic justification for the psychotherapist-patient privilege in federal practice that has led to a split among the circuits on the mere existence of a psychotherapist-patient privilege, and its application to concrete fact situations. For that reason, the matter has now been thrown into the U.S. Supreme Court to resolve the competing demands for privileged protection for effective psychotherapy and the public's need to have access to information for resolution of serious disputes.

that their participation in the communication will be kept confidential. Otherwise, both will lose their anonymity. The right to privacy is constitutionally-protected. In at least one instance, a state court has recognized that, with certain exceptions, the psychotherapist-patient relationship is protected by state established constitutional rights to privacy.²⁴³ This generalization inspired a well reasoned article by Professor Steven R. Smith entitled, *Constitutional Privacy in Psychotherapy*, demonstrating that the psychotherapist-patient relationship is protected by the United States Constitution.²⁴⁴ Professor Smith also relies on Judge Hufstetter's ground-breaking opinion in *Caesar v. Mountanos*²⁴⁵ supporting a federally-recognized psychotherapist-patient privilege rooted in the line of United States Supreme Court cases beginning with *Griswold v. Connecticut*.²⁴⁶

The particular understanding of the constitutionally-protected right to privacy followed by Professor Smith can be traced to *Roe v. Wade*, which ties the right to privacy to fundamental rights protected by the liberty interests of the Fourteenth Amendment²⁴⁷ including privacy in marriage, procreation and child rearing.²⁴⁸ Professor Smith places the right to effective psychotherapy among these fundamental rights.

Smith presents a compelling analysis of constitutionally-based privacy rights supporting the psychotherapist-patient privilege. First, Smith identifies the right to be free of governmental intrusions in areas of fundamental concern, or the right of autonomy, as a constitutionally-protected privacy right.²⁴⁹ A

²⁴³ See *In re Lifschutz*, 467 P.2d 557 (Cal. 1970) (finding privilege is grounded in patient's constitutional right to privacy and case falls within patient-litigant exception).

²⁴⁴ See Smith, *supra* note 124.

²⁴⁵ 542 F.2d 1064 (9th Cir. 1976); see Smith, *supra* note 124, at 7-10.

²⁴⁶ See *Caesar v. Mountanos*, 542 F.2d 1064, 1071-72 (9th Cir. 1976). The court tracks the development of the relevant privacy jurisprudence from *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding that married couples have constitutional right to privacy guaranteeing right to use contraceptives), to *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (stating constitutional right to privacy in physician-patient relationship).

²⁴⁷ See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (stating constitutional right to privacy may be found in concept of liberty guaranteed by Fourteenth Amendment); Smith, *supra* note 124, at 18-21.

²⁴⁸ Smith relied on Justice Brennan's explanation of the basis for a woman's right to choose to carry or to abort a fetus. See Smith, *supra* note 124, at 18-21; see also *Roe*, 410 U.S. at 152-53.

²⁴⁹ See Smith, *supra* note 124, at 21.

person may invoke the autonomy aspect of the right to privacy when the government intrudes upon a vital matter of personal concern without a compelling governmental interest, or when the governmental action is not narrowly tailored to advance the state interest.²⁵⁰ The right to be free of governmental interference in regard to mental health, Smith argues, is such a fundamental right. The state, therefore, cannot place a direct burden on the right to pursue mental health through psychotherapy which would disrupt the therapeutic relationship. Consequently, subpoenae directed to psychotherapists compelling them to give evidence before a grand jury in a deposition or in open court on the symptoms related to them by patients would be direct burdens on the right to mental health therapy and may be found unconstitutional. Compulsory disclosure or production of patient billing records to insurance companies already authorized for release by the patient to the insurer, however, are indirect burdens on this right and probably constitutional.²⁵¹

Professor Smith also recognizes the right to prevent disclosure of personal matters as another fundamental aspect of the constitutional right to privacy. This interest in freedom from compulsory disclosure of information is less well articulated in case law than the right of personal autonomy.²⁵² Relying on *Whalen v. Roe*²⁵³ and *Planned Parenthood v. Danforth*,²⁵⁴ Professor Smith identifies four characteristics that must be met before any information is constitutionally-protected by the right to privacy: first, the information must be highly sensitive and meant to be confidential; second, the information has to be private; third, it must be shown that dissemination of the information outside a limited number of governmental officials is impossible to control, or the information is so sensitive that collection of the information by the state offends right to privacy; and fourth, there must be no compelling state interest in obtaining the information, or less invasive method of advancing the state's le-

²⁵⁰ *Id.* at 21.

²⁵¹ *See id.* at 22, 24-27.

²⁵² *See id.* at 27.

²⁵³ 429 U.S. 589 (1977) (holding that New York statute requiring physicians to file patient's prescription with state was not unconstitutional); *see* Smith, *supra* note 124, at 28, 41-43.

²⁵⁴ 428 U.S. 52 (1976) (challenging constitutionality of Missouri abortion statute containing reporting and record keeping requirements); *see* Smith, *supra* note 124, at 38, 41-43.

gitimate interest.²⁵⁵ Professor Smith asserts that no matter is more personal than information revealed during psychotherapy. Exchanges between patient and psychotherapist are not generally available to the public. The government cannot provide protection against dissemination of such information if the information is disclosed at trial or during a civil deposition. If no compelling state interest requires disclosure, then disclosure is privileged. Professor Smith further asserts that only three generally recognized compelling state interests justify invasion of privacy: (1) preventing violent overthrow of the government; (2) preserving democracy; and (3) resolving or accommodating conflicts between fundamental rights.²⁵⁶ Professor Smith also notes that some rights are so fundamental that they are described as "essential" and not subject to invasion by any compelling state interest. Typically, these rights flow from the First and Fifth Amendments.²⁵⁷

This non-disclosure aspect of the right to privacy is acknowledged by Professor Smith as creating only a qualified privilege. He acknowledges the common exceptions for a patient who makes his own mental condition an issue in litigation, an exception for reporting an imminent threat of harm to a third person at the hand of a patient or imminent criminal behavior, a Sixth Amendment exception for psychiatric information on state's witnesses in criminal prosecutions, reporting child abuse, court ordered psychiatric evaluations, and civil commitment cases.²⁵⁸

Professor Smith's taxonomic description of a constitutionally-rooted psychotherapist-patient privilege is strikingly similar to proposed Federal Rule 506. What Smith's article contributes is a firm basis for this privilege in the Fourteenth Amendment due process and equal protection clauses. The right to personal autonomy and freedom from disclosing confidential information is protected against state intrusion by the Fourteenth Amendment. Communications between patient and psychotherapist for the purpose of seeking mental health treatment can be categorized as protected under either the personal autonomy freedom from compulsory disclosure of confidential information aspects of the constitutional right of privacy.

²⁵⁵ See Smith, *supra* note 124, at 28.

²⁵⁶ See *id.* at 32-33.

²⁵⁷ See *id.* at 34-35.

²⁵⁸ *Id.* at 48-59.

The same argument supports a confidential communications privilege for Twelve Step Group members. Communications at AA and Al-Anon meetings are often as deeply personal and confidential as communications between psychotherapist and patient in the traditional one-on-one office setting. Personal autonomy protects the identity of the anonymous persons at meetings from compulsory disclosure. Rarely will the state have a compelling interest in forcing compulsory disclosure because confidential communications at Twelve Step meetings almost never involve plots to overthrow the government or conflicts between fundamental rights. Avoiding death and serious injury to the public, however, may be a compelling state interest that would invite invasion of the privacy of a Twelve Step Group member. Indeed, the need for all information necessary to the proper resolution of a civil action or criminal prosecution might well be considered a compelling state interest. If so, the rationale for a Twelve Step Group privilege based on constitutional right to privacy is neither stronger than nor significantly different from the rationale described by Dean Wigmore based on pragmatic concerns.

However, the Twelve Step Group program is more than self-help psychotherapy or a brand of "tough-love." It is a spiritual discipline that abstracts universal principles relating to the relationship between a higher power and human beings from all the world's religious views.²⁵⁹ Its members accept the spiritual discipline which is spelled out in the Twelve Steps. Since freedom of conscience is an essential right guaranteed by the First Amendment, compulsory disclosure of communications between Twelve Step Group members necessarily involves concerns virtually identical to those involving compulsory disclosure of the internal spiritual affairs of an organized religious denomination. The First Amendment guarantees of free exercise of one's beliefs and freedom of association inhibit governmental interference in

²⁵⁹ See ERNST KURTZ, NOT-GOD: A HISTORY OF ALCOHOLICS ANONYMOUS 175-98 (1979). The author notes that AA is "spiritual rather than religious." Members of AA "tend to enforce this distinction vigorously." This is said to "bear . . .

vivid witness to A.A.'s authentic modernity, especially as a religious phenomenon," as AA has managed to collapse the essence of all religions into one "spiritual" message. *Id.* at 175; see also MARY C. DARRAH, SISTER IGNATIA: ANGEL OF ALCOHOLICS ANONYMOUS (1992). It is stated that "A.A.'s entire philosophy and program was spiritual . . . To miss the spiritual angle was to have missed the thrust of the entire program." *Id.* at 97.

the confidential affairs of Twelve Step Groups. Compulsory disclosure of confidential Fifth Step admissions of wrongdoing made in meetings or under confidential conditions outside of meeting invade the members' First Amendment liberties.

Consequently, a confidential communications privilege for Twelve Step Groups that is rooted in the rights of personal autonomy, confidentiality of personal information, and freedom of association has a much stronger base than does the psychotherapist-patient privilege. Confidential communications between psychotherapist and patient pertain to a secular, non-spiritual topic, the patient's mental health. Confidential communications in Twelve Step programs pertain to the member's spiritual discipline.

CONCLUSION

The failure of the *Cox* and the *Boobar* courts to recognize a confidential communications privilege for Twelve Step members was likely due to the general unfamiliarity with the internal operating processes of Twelve Step Groups. Because Twelve Step programs lack leaders who possess clergy status or publicly ratified credentials such as licenses, examinations, or degrees, jurists may be reluctant to extend privileged communication status to such groups. Privileges are not favored by the law because they are perceived as obstacles to full disclosure of the truth and to a just resolution of dispute settlement. Although privileged communications statutes and rules are frequently passed by legislatures, judges are loath to create a new privilege where none existed before, or to extend an existing privilege rule beyond its narrow limits. Of course, any state legislature is free to do so by adding a privilege statute to the state's body of statutory law. The Appendix is a suggested statute of a court rule recognizing a privilege for Twelve Step Group members.

The social ramifications of compulsory disclosure of confidential communications among AA members, however, provide compelling arguments in favor of the adoption of such privilege. The principle of anonymity in Twelve Step programs would be jeopardized, and with it the eventual spiritual wellness of all present and future members. Members frequently speak at AA meetings at events that amount to confessions of guilt relating to criminal activity. They admit actionable civil wrongs, such as adultery, fraud, and child neglect that would affect their charac-

ter, fitness for custody and visitation rights in marital dissolution proceedings. They also admit actions that would cost them their jobs. The same observation can be made about the sharing at Al-Anon meetings. Anonymity permits members to take the Fifth Step; to confess their defects of character and get on with life and recovery. It is this recovery that puts an end to the socially unacceptable or even criminal behavior that government seeks to eliminate. Anonymity cannot survive in a climate of compulsory disclosure. If Twelve Step Groups do not enjoy a confidential communications privilege, there is nothing to prevent the police from sending "moles" to AA, Narcotics Anonymous, and Al-Anon meetings to identify present and former drug dealers, spousal abusers or bad check artists in order to obtain incriminating information from meetings. Such moles could pose as experienced members willing to be sponsors for newcomers to gain new members' confidence. Such infiltration could have occurred in the case of Paul Cox.

Although a trial judge is free to rule that confidential communications among Twelve Step Group members are privileged by analogy to existing case law, the likelihood of a trial judge or an appellate judge doing so is extremely low. Only a judge who was a member of a Twelve Step Group herself would understand the compelling necessity for such a privilege. Further, new privilege rules generally come from the legislature or from the general rule making process of the court of last resort in the jurisdiction.

APPENDIX

TWELVE STEP GROUP MEMBER'S PRIVILEGE

(a) Definitions. As used in this rule [act]:

(1) A "Twelve Step Group member" is any person affiliated with Alcoholics Anonymous or a fellowship that has officially received permission to use the Twelve Steps and Twelve Traditions of Alcoholics Anonymous from Alcoholics Anonymous World Service Organization such as Al-Anon, Al-Ateen, Narcotics Anonymous, Narc-Anon, Overeaters Anonymous, Sex Addicts Anonymous or other like fellowships, or an individual reasonably believed to be so affiliated by the person consulting the individual.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other Twelve Step Group members in furtherance of the purposes of the communication.

(b) General Privilege Rule. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a member of a Twelve Step Group when the person or the fellow member are participating in a group meeting or the fellow member is acting in the capacity of spiritual advisor.

(c) Who may claim the privilege. The person, the person's guardian, conservator or personal representative, if deceased, may claim the privilege. The fellow member who received the communication has the authority to claim the privilege provisionally on behalf of the person who made the communication.