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Confidential Communications in the Correctional Halfway House Setting

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CONFIDENTIAL COMMUNICATIONS IN THE CORRECTIONAL HALFWAY HOUSE SETTING

In *Kansas v. Kenney*,[1] A DISTRICT STATE COURT of Kansas held the director of a state-funded community-based correctional facility (the Manhattan House) in contempt of court for refusing to answer questions relating to communications between himself and residents of the program. Pursuant to a state statute, the county attorney initiated a drug inquisition, subsequently calling the director, Kenney, as a witness. Kenney was granted immunity and questioned regarding his general knowledge of drug activities in the county. When questions were propounded relating to information obtained from communications with residents, Kenney refused to answer. He claimed that the information was "privileged" in as much as it was gained subsequent to a guarantee of confidentiality extended by him to the residents. As a result of the contempt ruling, Kenney was to be confined in jail until he purged himself of contempt.

An appeal was filed by Kenney, during which time the Manhattan House was applying for renewal of program funding. The state funding agency informed the Board of Directors of the Manhattan House that refunding would not likely be forthcoming unless the director either answered the questions or "temporarily" resigned. The Board indicated that unless Kenney remained as director they would formally withdraw their application for refunding. Kenney remained as director and the refunding application was denied.

During the next year, a new county attorney was elected and, following a motion by the defendant's attorney to dismiss the appeal, the new county attorney informed the court that he had no interest in pursuing the matter and the case was dismissed entirely.

The outcome of this situation exemplifies the potential threat posed by the absence of legal protection of communications between the residents and staff of community-based correctional programs. Without legal protection, one of three undesirable results will occur when the issue is confronted in the courtroom: 1) the resident who, in good faith, communicated self-incriminating evidence to the staff will be incriminated, 2) an existing program will be terminated, or 3) the therapeutic process of a program will be abridged. Thus, a court's ruling in this matter could ultimately thwart the implementations of the philosophies and goals upon which community-based correctional programs are founded.

The author proposes that a legal testimonial privilege regarding confidential communications between the staff and residents of community-based correctional programs is necessary to insure the integrity of the therapeutic process and, ultimately, the success of the program itself. This note will examine the role of community-based correctional programs and the law in regard to testimonial privileges and will demonstrate that the extension of the privilege in this setting is *legally appropriate*.

[1] Kansas v. Kenney, No. 2668 (D. Kan. May 23, 1974).

I. The Halfway House — A Community-Based Correctional Program

Halfway houses or community treatment centers perform a wide variety of diverse functions. The target populations of the various halfway houses and community treatment centers in existence today include: "the psychiatric patient, the neglected child, the delinquent child. . . , the adult public offender — both misdemeanant and felon — . . . , the homeless adult with social or adjustment problems, and individuals with specialized problems such as drug abuse, alcoholism and mental retardation."[2] The scope of this note is limited to a discussion of those halfway houses which operate to serve adult felons and misdemeanants. Unless otherwise specified, the term halfway house or correctional halfway house will be utilized to describe those programs which serve adult felons or misdemeanants.

A. *The Historical Emergence of the Correctional Halfway House*

A proposal was submitted to the Massachusetts State legislature in 1817, recommending the establishment of a transitional "shelter" for the released offender to serve as a stepping stone for those re-entering the mainstream of society.[3] The proposal, for what would later come to be known as a "halfway house" facility, was rejected, and it was not until the 1960's that another such formal proposal was made.[4] However, during the interim, a number of privately operated halfway houses came into existence through the efforts of religious and humanistically-oriented volunteer groups.[5]

In the early 1960's the most significant advancement of the halfway house development occurred as the result of two significant events: first, the emergence of an era of cooperation between the halfway house administrators and the parole boards regarding parole placement; second, a shift in ideology by the halfway house personnel from what was previously simply a humanitarian philosophy to one which incorporated a correction treatment theme.[6] In 1964 the International Halfway House Association was formed.[7] A few years later the Safe Streets and Omnibus Crime Control Act of 1968[8] was passed and the Law Enforcement Assistance Administration (L.E.A.A.) was created.[9] The L.E.A.A. greatly aided the correctional halfway house cause by providing federal funding through state agencies to those interested in implementing a halfway house program.[10]

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[2] J. McCartt & T. Mangogna, Guidelines and Standards for Halfway Houses and Community Treatment Centers 6 (U.S. Dep't of Justice, L.E.A.A. 1973).

[3] Beha, *Halfway Houses in Adult Corrections: The Law, Practice, and Results*, 11 Crim L. Bull. 434, 438 (1975).

[4] *Id.* at 442.

[5] *See* J. McCartt & T. Mangogna, *supra* note 2, at 1, 2, 4. The authors cite the founding of St. Leonard's House, Dismas House, and 308 West Residence as being responsible for the revival of the movement. *Id.* at 4. *See also* N. Beran, H. Bowman, E. Carlson, J. Grandfield, & R. Seiter, Halfway Houses (U.S. Dep't of Justice, L.E.A.A. 1977) [hereinafter cited as Seiter].

[6] Beha, *supra* note 3, at 444.

[7] J. McCartt & T. Mangogna, *supra* note 2, at 5.

[8] 42 U.S.C. § 3701 *et seq.* (1976).

[9] Beha, *supra* note 3, at 5.

[10] Seiter, *supra* note 5, at 1. The report states that from the beginning of the L.E.A.A. until July of 1975, $24,837,512 of federal monies were matched with $12,300,710 of private and/or state monies to fund 348 grants to support residential inmate aftercare programs for adults.

It should be noted that during this time a movement was also underway in the field of corrections which sought to implement community-based alternatives to the "institutionalization" of offenders. A two year study conducted by the President's Commission on Law Enforcement and Administration of Justice resulted in a report being published in 1967 in which the Commission recommended that "correctional authorities should develop more extensive community programs providing special, intensive treatment as an alternative to institutionalization for both juvenile and adult offenders."[11] This report was the impetus for the Safe Streets and Omnibus Crime Control Act of 1968 and for the commitment of federal monies that followed. The correctional halfway house has become a key part in the recent shift toward community-based corrections.

B. *Types of Clients Served*

Although correctional halfway house programs initially were implemented to serve the released offender, today the halfway house model has been adopted to assist individuals at various stages along the criminal justice process.

1. Re-Integration

Re-integration is the traditional function of the correctional halfway house. The idea is to provide a decompression chamber for those who have been incarcerated and to assist the individual in re-integrating into the mainstream of society.[12] The recipients of this focus include: the mandatory releasee (released because his/her term has expired and who is no longer under the legal control of the court or the state), the pre-releasee (transferred to a halfway house prior to the time for mandatory release or parole), and the parolee (conditionally released before his/her sentence term has expired and who has been placed under the supervision of a parole officer).[13]

2. Alternative to Incarceration or Straight Probation

In recent years, those in the field of corrections have looked for alternatives to incarceration which the courts might have available at their disposal when confronted with the sentencing decision.[14] The alternative sentencing philosophy and the shift in corrections to a community-based orientation have prompted many halfway house organizations to accept persons who are placed on probation. These programs provide additional supervision for those who would be a probation risk and who, in the opinion of the court, do not need the intense custodial environment of a prison.

3. Diversion — Pre-Conviction Disposition

An extension of the alternative sentencing philosophy mentioned above is

[11] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 171 (1967).

[12] E. MILLER & R. MONTILLA, CORRECTIONS IN THE COMMUNITY 214 (1977).

[13] Beha, *supra* note 3, at 448.

[14] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS (TASK FORCE ON CORRECTIONS), CORRECTIONS 569-70 (U.S. DEP'T OF JUSTICE, L.E.A.A. 1973). Standard 16.8 provides a list of sentencing alternatives (including referral to a halfway house) with the recommendation that each state enact the proposed legislation.

the practice of diverting the individual from the criminal justice process prior to an actual adjudication of the case. Thus, at some point *after* arrest but *prior* to conviction, the judge, under the law of the state, will refer the individual to a halfway house as a ward of the court. Upon successful completion of the program, the charges against the individual will be dismissed.[15]

It should be noted that, in practice, some halfway houses are a hybrid of the above-described models, operating to serve a mixed population. This is particularly true where the halfway house is located in a geographical area in which population size makes this an economic necessity.

C. *Organization and Operation of Correctional Halfway House Programs*

The typical correctional halfway house operates to serve anywhere from ten to thirty residents.[16] The staff includes a director, assistant director, live-in counselors (usually two), cook, and secretary (usually part-time).[17] The program is generally initiated by a group of citizens who incorporate and ultimately serve as the board of directors pursuant to the articles of incorporation and by-laws.[18] In addition, a board of trustees is sometimes utilized to lend the program the credibility needed to elicit community involvement. Community involvement is a key aspect of the correctional halfway house inasmuch as one of its major functions is that of directing the resident to the variety of resources existing in the community.[19] Thus, every successful program includes in its organizational strategy the available resources within the macro-environment.

While referral to available community resources is an important feature of the program, of no less importance is the in-program counseling provided to the residents by the staff. The type of counseling offered will depend in part on the philosophical preferences of the board of directors who presumably engage the services of persons who are similarly inclined. The treatment models which are most often adopted in the correctional halfway house setting are: counseling and advocacy, psychoanalytic treatment, guided group interaction, therapeutic community, reality therapy, and differential treatment.[20] The ultimate aim of all these models, in whatever variation, is to aid the resident in a process of internalizing the norms of society to the extent that he/she will want to conform to the laws upon his/her completion of the program (usually ninety days). In addition to the socio-psychological counseling, the resident is usually provided with financial, vocational and educational counseling. Thus, correctional halfway house programs propose to provide an environment which precipitates self-change while at the same time directing the resident to needed community resources. All this occurs within a structured setting whereby the resident learns to operate within the framework of the rules and regulations established by the staff.

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[15] Beha, *supra* note 3, at 451.

[16] 1 D. THALHEIMER, COST ANALYSIS OF CORRECTIONAL STANDARDS: HALFWAY HOUSES 8 (U.S. DEP'T OF JUSTICE, L.E.A.A. 1975).

[17] *Id.* at 9.

[18] J. MCCARTT & T. MANGOGNA, *supra* note 2, at 77.

[19] Beha, *supra* note 3, at 459.

[20] *Id.*

D. *Present Status of the Correctional Halfway House Movement*

There are currently four hundred correctional halfway house programs serving approximately ten thousand offenders.[21] The vast majority of these programs have come into existence since 1965.[22] What is even more amazing is that if these programs operated at full capacity, the number of offenders served would at least triple.[23]

Correctional halfway houses are still being funded primarily by public financial resources. These include "block funds from L.E.A.A., H.E.W. or state planning agencies, contracts with the Federal Bureau of Prisons and Division of Probation, state departments of corrections, and probation and parole authorities."[24] The large expenditures of tax dollars in this area has prompted the establishment of the Commission on Accreditation for Corrections. This Commission has published a *Manual of Standards for Adult Community Residential Services*.[25] These standards are the yardstick for the Commission in its determinations regarding accreditation of a given program. Accreditation by the Commission is essential inasmuch as it is a prerequisite for federal and ultimately state contract agreements.[26]

The International Halfway House Association (I.H.H.A.) was formed in 1964. It has provided the correctional halfway house movement with the means for national unification, and in addition it publishes a newsletter, handbooks, and a directory of halfway houses. Furthermore, I.H.H.A. conducts workshops and training seminars, as well as providing consultant services and hosting national and international conferences.

While the present status of the correctional halfway house movement suggests the "arrival" of correctional halfway house programs, ultimately the programs must be judged in terms of how they measure up to claims made by their proponents. The three most common arguments advanced by supporters of correctional halfway houses are first, that these programs provide a more humane method of dealing with the problem of crime, second, that the cost of a community-based correctional program is significantly less than that of a more intense custodial institution, and finally, it is asserted that the recidivism rate is significantly lower for those released from correctional halfway houses than it is for those released directly from an institution.[27] Obtaining reliable evaluations from the programs so that an actual comparison could be made as to the cost differential and the recidivism rates has been a problem.[28] However, in 1977, the National Institute of Law

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[21] SEITER, *supra* note 5, at ix.

[22] Beha, *supra* note 3, at 435.

[23] SEITER, *supra* note 5, at ix. The occupancy rules vary from a low of 21% of capacity to a high of 76%. "If halfway houses were to operate at full capacity, a projected 30,000 to 40,000 offenders could be served each year." *Id.*

[24] D. THALHEIMER, *supra* note 16, at 7. In fiscal year 1973, 26% of the total released federal population participated in community-based programs, while in fiscal year 1976 the percentage increased to 54%. The projection for fiscal year 1979 and thereon is 65%. Interview with Gerald Farkas, Northeast Regional Director of the Bureau of Prisons, International Halfway House Association News, June-August 1977, at 3, col. 3.

[25] International Halfway House Association News, June-August 1977, at 2, col. 1.

[26] *Id.*

[27] Beha, *supra* note 3, at 454-62.

[28] *Id.* at 473.

Enforcement and Criminal Justice published a national evaluation of correctional halfway houses. The following summarizes the findings:

> . . . it appears that halfway houses are meeting several important goals. One is economy. At full capacity, halfway houses cost no more — and probably less — than incarceration in jail or prison, even though they provide more services. They are at least as effective as other forms of release, and probably more so. There is some evidence that halfway houses do reduce the recidivism rates of former residents, compared to ex-offenders released directly into the community. Halfway house residents also seem to be more successful in locating employment, although not necessarily in maintaining it after release. Finally, community security and property values do not seem to be jeopardized by the presence of a halfway house.[29]

These findings acknowledge the present importance of the halfway house program in the American correctional system and should provide an added impetus for even greater national and state government commitment in this area in the future.

Today, correctional halfway house programs perform a vital function in providing an alternative for both the offender and the corrections system at various stages of the criminal justice system. These programs serve the larger interests of society through the rehabilitation of the offender. Communications between staff and residents of community-based correctional programs must be protected if the goals and philosophies of such programs are to be implemented.

II. Current Testimonial Privileges

A. *Background Considerations*

The law, in its desire to foster certain confidential relationships, has seen fit to protect the communications of persons in such relationships by designating their communications as privileged against compelled disclosure in court.[30] Authority for this testimonial protection may arise out of common law or statutory enactment. These privileged communications are excluded from evidence notwithstanding the fact that justice is deemed best served when all the relevant facts are made available during the course of litigation.[31] Testimonial privileges differ from other exclusionary rules in that the latter group arises out of a recognition that certain evidence tends to hinder the ascertainment of truth.[32] Privileged communications are for the most part reliable evidence which is excluded because, although it would aid the search for truth, it would at the same time do significant damage to the confidential relationships which the law deems worthy of protection.[33]

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[29] Seiter, *supra* note 5, at ix.

[30] 3 S. Gard, Jones on Evidence § 21.1 (6th ed. 1972).

[31] *Id.*

[32] The hearsay rule, for example, is aimed at excluding evidence which is difficult or impossible to examine for reliability.

[33] R. Wigmore, Code, Rules and Other Privileged Communications (1967).

It is precisely the loss of such reliable evidence which has led some legal scholars to heavily criticize the recognition of testimonial privileges at all.[34] But many others in the legal field have resisted efforts to cut back on testimonial privileges, asserting that the right of privacy and security in confidential relationships are more valuable than the convenience of those engaged in litigation.[35]

Before any communications are deemed worthy of protection from compelled disclosure, there are four canons which must first be satisfied. As listed in Professor Wigmore's treatise on evidence, the canons 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 parties.
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
(4) The injury that would happen to the relation by disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[36]

It is generally accepted that any testimonial privilege, whether recognized at common law or enacted by statute, must meet the conditions of these canons. In fact, any person asserting a testimonial privilege must show the court that his/her situation in fact meets these conditions.[37]

Whether the courts should be permitted to independently recognize a confidential communication as privileged has been the subject of debate for more than a century.[38] Until recently, instances of independent recognition by a court of a testimonial privilege have been rare.[39] However, Rule 501 of the

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[34] 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961) (discussion of "public's right to everyman's evidence"). "When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private." Dubois v. Gibbons, 2 Ill. 2d 392, 416, 118 N.E.2d 295, 308 (1954).

[35] C. MCCORMICK, LAW OF EVIDENCE § 77 (2d ed. 1972); *see* Sinclair v. United States, 279 U.S. 263, 292 (1929) (right to be exempt from unreasonable inquiries and disclosures with respect to personal and private affairs); Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) (wiretapping); Mullen v. United States, 263 F.2d 275, 281 (D.C. Cir. 1958) (Edgerton, J., concurring) (communication made in reasonable confidence that it will not be disclosed).

[36] 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961).

[37] *See, e.g.*, Re Clear, 58 Misc. 2d 699, 296 N.Y.S.2d 184 (Fam. Ct. 1969) (holding that communications by a mother to a social worker were not privileged because there was no evidence that the communications between the mother and the certified social worker originated in the confidence that they would not be disclosed); *see also* Lindsey v. People, 66 Colo. 343, 181 P. 531, *appeal dismissed for want of jurisdiction*, 255 U.S. 560 (1919). In *Lindsey*, a boy's statement to a juvenile court judge that he killed his father was not a privileged communication during the trial of his mother for murder of the father. The court held that the benefit to be gained by the correct disposition of the litigation was greater than any injury that could inure to the relation by disclosure of the communication. Thus, the communication was not privileged under Wigmore's fourth canon.

[38] C. MCCORMICK, LAW OF EVIDENCE § 77 (2d ed. 1972). The development of judge-made privileges virtually halted a century ago. In more recent times, the attitude of commentators, whether from the bench, the bar, or the schools, has tended to view privileges from the standpoint of the hindrance to litigation resulting from their recognition. *Id.*

[39] *See* Mullen v. United States, 263 F.2d 275, 277-80 (D.C. Cir. 1958) (Fahy, J., concurring). Judge Fahy argued for recognition of clergyman-pentinent privilege, even though the privilege is not supported by either common law or statutory law. The majority never reached the issue. *Cf.*

new Federal Rules of Evidence allows the federal courts to independently recognize such privileges.[40] *Weinstein's Evidence*[41] highlights three salient features of the rule as amended by Congress. First, the common law privileges as well as statutory and constitutional privileges are to be applied. Second, the federal courts are given authority to continue to develop existing privileges, as well as formulate new privileges on a case by case basis. Finally, under specified circumstances, state privileges are recognized.[42] Thus, the Congress of the United States has given the federal courts the authority to test current confidential relationships against the general principles that common law judges relied upon.[43]

It is important to note, however, that in civil, non-federal question cases, the federal courts are limited to applying the appropriate state law regarding any sought-after privilege.[44] But, in a federal question case, not only are the federal courts free to recognize a privilege where no recognition is provided for under state law or rule, they may properly refuse to protect confidential communications which are recognized by the state court as being privileged.[45]

State courts have, with few exceptions, exercised complete judicial restraint in cases where a sought-after privilege did not already exist at common law or by way of statutory enactment.[46] Recently, however, the New Mexico supreme court has taken the unconventional position that privileges are procedural rather than substantive in nature and as such are subject to the domain of the New Mexico state courts and not the state legislature.[47]

State v. Evans, 104 Ariz. 434, 454 P.2d 976 (1969) (holding that although there was no privilege by way of statutory enactment and the physician-patient privilege was inapplicable communications were privileged between a criminal defendant and a court-appointed psychiatrist); Saucerman v. Saucerman, 170 Colo. 318, 461 P.2d 18 (1969) (recognizing a united privilege as to communications with a court probation officer where public interest demands that the confidentiality of the communication be preserved); *but see* Davidson v. St. Paul Fire & Marine Ins. Co., 75 Wis. 2d 190, 248 N.W.2d 433 (1977) where, pursuant to WIS. STAT. ANN. § 905.01 (West 1975) restricting recognition of privileges, any sought-after privilege, whether or not previously recognized at common law, must be adopted either by state supreme court rule or by statutory enactment before it may be given effect.

[40] 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 *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.* 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.
FED. R. EVID. 501 (emphasis added).

[41] 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 501-2 (1977).

[42] *Id.*

[43] Kattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613 (1976).

[44] FED. R. EVID. 501; see Sterk, *Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems*, 61 MINN. L.R. 461 (1977) for a discussion of when state law should apply regarding the issue of privilege in a federal court under Rule 501.

[45] Lora v. Board of Educ., 74 F.R.D. 565 (E.D.N.Y. 1977).

[46] *See* note 39 *supra.*

[47] Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976). In striking down a statute granting a newsperson a privilege as to his/her source, the supreme court stated that privileges are strictly procedural.

Thus, when confronted with the question of whether one is better served by taking one's fight for a sought-after privilege not previously recognized to the court or to the legislature, the following guidelines may prove helpful: (1) in a federal court case with a federal question at issue, whether criminal or civil in nature, the federal courts have congressionally granted authority to evaluate the issue on a case-by-case basis, unrestricted by pre-existing common law privileges or statutory enactments; (2) in any other federal court case, the law of the appropriate state will apply; (3) in a case being decided in a state court, there is little chance of the state court independently recognizing a privilege which has not previously been recognized at common law or provided for by statutory enactment. The single exception to this is the State of New Mexico, the supreme court of which has held that the issue of recognizing privileges is one which is to be left solely to the courts of the state to decide, as it involves procedural rule and not substantive law.

The obvious conclusion is that any sought-after privilege is best approached in terms of legislative resolution rather than court recognition. Therefore, the ensuing review of current testimonial privileges and legal analysis is directed toward legislative and not judicial reform.

B. *Traditional Privileges*

Of the testimonial privileges currently recognized, four are the most common and widely accepted. With few exceptions, these four are recognized either at common law, by statutory enactment, or by court rule in every state.

1. Attorney-Client Privilege

This privilege existed at common law as early as the sixteenth century.[48] However, unlike today, the theory for excluding testimony regarding attorney-client communications was "point of honor", the focus being on deference to the oath and honor of the attorney who had a duty to keep the secrets of his clients.[49] Eventually, the theory shifted to protect the client in order that the client would remain uninhibited while consulting with his attorney.[50] The belief is that justice is best served when each party to the adversarial proceeding is effectively represented, and such effective representation can occur only when the attorney has received the whole set of facts from his client. Were the attorney to later be put in the position of using these facts against the client, there would be a reluctance on the part of future clients to fully disclose to their attorneys all the facts as they know them to be.

Although this privilege is not without criticism,[51] today the privilege is recognized in all jurisdictions.[52] In most states the attorney-client privilege is in statutory form and enjoys the broadest reach of all privileged communications in that it has the fewest exceptions.[53]

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[48] 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961).

[49] *Id.*

[50] *Id.*

[51] *Id.* at § 2291.

[52] 3 S. GARD, JONES ON EVIDENCE § 21:8 (6th ed. 1972).

[53] *See, e.g.*, CAL. EVID. CODE § 940 (West 1966); N.Y. CIV. PRAC. LAW § 4503 (McKinney 1970); OHIO REV. CODE ANN. § 2317.02(A) (Page Supp. 1977).

2. Marital Privilege

This husband-wife privilege was enforced at common law on the theory that the marital relationship was not to be jeopardized by testimony compelled from one spouse against another regarding communications made in confidence.[54] Both the husband and wife are deemed to be holders of the privilege and thus each can effectively veto the other's waiver of his or her own privilege.[55] Most states have replaced the common law privilege with statutory enactments[56] which contain a number of exceptions to the privilege.[57]

3. Physician-Patient Privilege

While there was no physician-patient privilege at common law, in 1828 the State of New York enacted a statute granting such a privilege and many other states followed suit.[58] The reason offered for establishing the privilege was similar to that of the attorney-client privilege, a desire to insure full disclosure by the patient so that the physician could perform his duties with the aid of all the necessary information.[59]

Today the majority of states have enacted the physician-patient privilege,[60] but the number of exceptions and limitations have significantly reduced the protection that the privilege might otherwise afford.[61] The general trend is to grant the privilege in civil cases but not in criminal cases.[62]

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[54] 8 J. WIGMORE, EVIDENCE §§ 2333-34 (McNaughton rev. 1961). The author points out that the marital privilege was for a time incorrectly confused with the incompetency rule which precluded one from testifying against his/her spouse if such spouse was a party or had an interest in the suit. The disqualification of the spouse as a witness is absolute notwithstanding a waiver by the other spouse.

[55] C. MCCORMICK, LAW OF EVIDENCE § 83 (2d ed. 1972).

[56] *See, e.g.*, CAL. EVID. CODE § 970 (West 1966); N.Y. CIV. PRAC. LAW § 4502 (McKinney 1970); OHIO REV. CODE ANN. § 2317.02(D) (Page Supp. 1977); *but see* 3 S. GARD, JONES ON EVIDENCE § 21:3 (1972), where the author states that federal rules of evidence recognize no marital privilege in civil cases.

[57] The California code discusses the following exceptions: commitment or similar proceedings; proceedings between spouses; certain criminal proceedings; juvenile court proceedings; and communication offered by a spouse who is a criminal defendant. *See* CAL. EVID. CODE §§ 981-87 (West 1966).

[58] 8 J. WIGMORE, EVIDENCE § 2380 (McNaughton rev. 1961).

[59] As noted in Metropolitan Life Ins. Co. v. Ryan, 237 Mo. App. 464, 172 S.W.2d 269 (1943), the rationale for the privilege is that without the confidentiality it ensures, a patient might fail to make full disclosure to a physician about his/her symptoms, thus inhibiting proper treatment.

[60] Most of those states have enacted the privilege outright. However, some have implicitly recognized a physician-patient privilege by statutorily providing for exceptions to it while not explicitly enunciating the privilege. *See, e.g.*, ME. REV. STAT. ANN. tit. 17A, § 1108 (West 1978).

[61] Most states have provided for specific situations where the privilege is inapplicable. Commonly, there is no physician-patient privilege in situations where either the patient has by some act constructively waived the privilege, or a conflicting social policy is deemed of greater importance than those which gave rise to the privilege. Thus, there may be no privilege where the patient is suing the physician for malpractice, COLO. REV. STAT. § 13-90-107 (1973), has offered himself or the physician as a witness to testify about his physical condition, HAW. REV. STAT. § 621-20.5 (1976), or where the patient's physical condition is an element of his claim or defense, OKLA. STAT. ANN. tit. 12, § 2503 (West Supp. 1978); where the validity of a will, KAN. STAT. § 60-427 (1976), or a writing affecting an interest in property, CAL. EVID. CODE § 1001 (West 1966), is at issue; where the patient has fraudulently obtained drugs from a physician, NEV. REV. STAT. § 49.245 (1973); where the trial is for homicide, WIS. STAT. ANN. § 905.04 (West 1975), or an insanity plea has been entered, D.C. CODE § 14-307 (1973); in an incompetency hearing, N.J. STAT. ANN. § 2A:84A-22.3 (West 1976), or one for delinquency, D.C. CODE § 14-307 (1973); where there is a

4. Clergyman-Penitent Privilege

There was no privilege for communications between a clergyman and penitent at common law.[63] However, most states have enacted statutes protecting the communications between clergy and penitents.[64] The recognition of the privilege is predicated on a perceived need to tolerate the practice of religion by its citizens. This privilege was originally limited to confessional communications,[65] but most statutes have extended the privilege to communications made to spiritual advisors, even though not confessional in nature, as long as the communicant intended them to be in confidence.[66]

C. *Recent Extensions*

The function of the testimonial privilege is to protect certain confidential relationships which are deemed crucial to the perpetuation of the community's social well-being. As society becomes more complex and sophisticated, a variety of new relationships arise to meet the sociological, psychological, and professional needs of its membership. The law has adjusted to the changing times by willingly recognizing those new relationships which render a valuable service to society. The following relationships have been accorded protection to some degree by way of a testimonial privilege.

1. Psychiatrist-Patient Privilege

There are relatively few states that have specific psychiatrist-client privilege statutes,[67] but this is because the majority of states have included the psychiatrist within the definition of "physician" in their physician-client statutes.[68] Still other states include the psychiatrist within the definition of "psychotherapist," thereby providing protection by way of a psycho-

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question of child abuse, FLA. STAT. ANN. § 827.07 (West 1976); or where a crime or tort has allegedly been committed, N.J. STAT. ANN. § 2A:84A-22.6 (West 1976).

[62] California, Hawaii, Idaho, Missouri, New Jersey, New York, North Carolina, Oklahoma, Oregon, Texas, Utah, Virginia, Washington, and Wyoming limit the privilege to civil cases; Kansas also applies it to misdemeanor cases, KAN. STAT. § 60-427 (1976); anomalously, Arizona limits its invocation to criminal cases, ARIZ. REV. STAT. § 13-4062 (1978).

[63] 8 J. WIGMORE, EVIDENCE § 2394 (McNaughton rev. 1961).

[64] C. MCCORMICK, LAW OF EVIDENCE § 77 (2d ed. 1972).

[65] 8 J. WIGMORE, EVIDENCE § 2395 (McNaughton rev. 1961). Although a distinct minority, a few jurisdictions still explicitly require that the communication have been a confession. *E.g.*, N.Y. CIV. PRAC. LAW § 4505 (McKinney 1970); UTAH CODE ANN. § 78-24-8 (1953).

[66] *E.g.*, LA. REV. STAT. ANN. § 15.477 (West 1967); N.M. STAT. ANN. § 20-1-2 (1953); OR. REV. STAT. § 44.040 (1977); WASH. REV. CODE ANN. § 5.60.060 (1963); see also Annot., 50 A.L.R.3D 563 (1973) for a discussion of the situation where the role of the clergy overlaps with the functions of those engaged in social work. The issue is whether the privilege regarding one's role as a clergyman will extend to communications made to him as he likewise operates in the capacity of a social worker. The inverse issue may also be raised — whether communications made to a clergy which fall outside the protection of the clergyman-penitent privilege are nonetheless protected by the virtue of his/her functioning in the capacity of a social worker.

[67] Connecticut, Georgia, Illinois, and Kentucky specifically recognize a psychiatrist-patient privilege. This privilege may be limited to civil actions, similar to that of physician and patient communications. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-146 (West 1979).

[68] This inclusion is by implication other than specifically stated, as psychiatrists are by definition licensed physicians, and most statutes extend the privilege to "doctors of medicine," persons authorized to practice "physic or surgery," or simply "physicians," without defining the terms. *E.g.*, OHIO REV. CODE ANN. § 2317.02 (Page 1954); WASH. REV. CODE ANN. § 5.60.060 (1963).

therapist-client statute.[69] Finally, in rare instances, some state courts have recognized a psychotherapist privilege in the absence of any statutory enactment, deriving the privilege from common law.[70]

The reasoning behind the psychiatrist-patient privilege is similar to the reasoning which underlies the recognition of a privilege for other disciplines specializing in mental diseases — the encouraging of open communications by the patient in order that the psychiatrist might have sufficient relevant information to effectuate the diagnosis and treatment of the mental disease.[71] However, this privilege is also subject to many of the same exceptions as the general physician-patient privilege.[72]

2. Psychologist-Client Privilege

A majority of states now recognize the psychologist-client privilege. Some states have enacted a separate and distinct statute for the privilege,[73] while other states define psychologist either within the psychotherapist privilege [74] or within the physician-patient privilege.[75]

Those states granting a privilege to psychologists invariably have limited the privilege to those psychologists who are registered and/or certified under the state's licensing scheme.[76] Some statutes can be broadly construed in favor of the patient and some courts have viewed the privilege accordingly.[77] The privilege is founded on the assumption that confidentiality is indispensable to the diagnosis and treatment of the patient.

3. Clinical Social Worker-Client Privilege

Six states have enacted statutes creating a privilege as to communications

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[69] *E.g.*, CAL. EVID. CODE § 1014 (West 1966); OKLA. STAT. ANN. tit. 12, § 2503 (West Supp. 1978).

[70] In State v. Evans, 104 Ariz. 434, 454 P.2d 976 (1969), the Arizona Supreme Court deemed it fundamentally unfair to allow the psychiatrist of an alleged rapist to testify about inculpatory statements made by the defendant. However, this case is quite unique. *See generally* Annot., 44 A.L.R.3D 24 (1972).

[71] In Taylor v. United States, 222 F.2d 398 (D.C. Cir. 1955), the court found a testimonial privilege to be especially compelling in the case of psychiatrists because "[m]any physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him." *Id.* at 401.

[72] Where psychiatrist privilege arises from licensure to practice medicine, the exceptions are obviously applicable. However, even where statutorily enacted, similar limitations may be imposed. *See, e.g.*, CAL. EVID. CODE §§ 1016-1026 (West 1966).

[73] *E.g.*, ALA. CODE tit. 34, § 26-2 (1975); GA. CODE ANN. § 84-3118 (1979); ILL. ANN. STAT. ch. 91 1/2, § 406 (Smith-Hurd 1966); MD. CTS. & JUD. PROC. CODE ANN. § 9-109 (1974); N.C. GEN. STAT. § 8-53.3 (1969); UTAH CODE ANN. § 58-25-9 (1953).

[74] *E.g.*, CAL. EVID. CODE § 1010 (West 1966); OKLA. STAT. ANN. tit. 12, § 2503 (West Supp. 1978); S.D. COMP. LAWS ANN. § 19-13-7 (1979).

[75] *E.g.*, NEV. REV. STAT. § 49.225 (1973); VA. CODE § 8.01-399 (1973) (clinical psychologist only).

[76] *E.g.*, IDAHO CODE § 54-2314 (1979); IND. CODE ANN. § 25-33-1-17 (Burns 1974); LA. REV. STAT. ANN. § 37:2366 (West 1974); N.M. STAT. ANN. § 67-30-17 (1953); OHIO REV. CODE ANN. § 4732.19 (Page 1954); TENN. CODE ANN. § 63-1117 (1976).

[77] *See* Roberts v. Superior Court, 9 Cal. 3d 330, 508 P.2d 309, 107 Cal. Rptr. 309 (1973), where the court cited Griswold v. Connecticut, 381 U.S. 479 (1965), and the constitutional right to privacy as the reason for liberally construing the privilege in favor of the patient. *See also* Application of Queen, 233 N.Y.S.2d 798 (Sup. Ct. 1962), where the court also reached the result of liberal construction but by using the model of attorney-client privilege.

made to clinical social workers.[78] Additionally, one state court has held that the psychotherapist privilege was a common law privilege and that it applied to the field of psychiatric social work.[79] The statutory recognition of the social worker privilege is part of a regulatory licensing scheme whereby the state has set out to protect the client by restricting the practice of social work to those who qualify under the statute.[80] The definition of social work as provided under the various state statutes is fairly detailed. For example, the Utah statute defines social work as:

> The professional activity of helping individuals, groups, or communities enhance or restore their capacity for social functioning and creating societal conditions favorable to this goal. Social work practice consists of the professional application of social work values, principles, and techniques to one or more of the following ends: helping people obtain tangible services; counseling with individuals, families, and groups; helping communities or groups provide or improve social and health services; and participating in relevant legislative processes. The practice of social work requires knowledge of human development and behavior; of social, economic, and cultural institutions; and of the interaction of all these factors.[81]

Perhaps the most significant point regarding the social worker privilege is that for the most part it offers protection to a class of clients who are dependent upon state-supported facilities and state-employed staff. Because these clients are in dire need of the services sought, and because they are not in a financial position which would allow them to engage the services of a private psychiatrist or psychologist (to whom communications made are privileged), the privilege removes a barrier to open communications that might otherwise thwart the servicing of the client's needs.[82]

4. Teacher-Student Privilege

Six states have to some degree or another recognized a privilege regarding communications made by students to teachers.[83] Some state statutes extend the privilege to all communications that are made in confidence,[84] while others limit the privilege to communications concerning alcohol or drug

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[78] CAL. EVID. CODE § 1014 (West Supp. 1978); IDAHO CODE § 54-3213 (Supp. 1977); LA. REV. STAT. ANN. § 37-2714 (West 1974); MICH. COMP. LAWS ANN. § 338.1764 (Supp. 1977-78) N.Y. CIV. PRAC. LAW § 4508 (McKinney Supp. 1978-79); UTAH CODE ANN. § 58-35-10 (1974).

[79] Allred v. State, 554 P.2d 411 (Alas. 1976).

[80] UTAH CODE ANN. § 58-35-1 (1974).

[81] *Id.* at § 58-35-3(2).

[82] For a discussion of this point, see Comment, *Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers*, 61 CAL. L. REV. 1050 (1973).

[83] CONN. GEN. STAT. ANN. § 10-154(A) (West Supp. 1979); MICH. COMP. LAWS ANN. § 600.216 (Supp. 1978-79); MONT. REV. CODES ANN. § 93-701-4 (Supp. 1977); OKLA. STAT. ANN. tit. 70, § 6-115 (West 1972); PA. STAT. ANN. tit. 24, § 13-1319 (Purdon Supp. 1977).

[84] MICH. COMP. LAWS ANN. § 600.2165 (Supp. 1978-79).

abuse.[85] Usually, the student is the holder of the privilege and disclosure is prohibited absent a waiver by the student, or his parent or legal guardian if he has not attained majority.[86] However, in the State of Connecticut, disclosure is left to the teacher's discretion.[87] In three other states, there are statutory enactments creating a privilege for communications by a student to his school counselor.[88] This privilege does not extend to a teacher unless the teacher is designated to perform the function of counselor by the school administration and is acting in that capacity. These privileges are aimed at encouraging students to share their personal problems with their teachers and counselors in the hope that the latter may assist the student in constructively dealing with his/her problems.

5. Accountant-Client Privilege

There are sixteen states which have statutes providing for protection of the communications between a client and his accountant via a testimonial privilege.[89] Some of the statutory provisions limit the privilege to certified public accountants,[90] while others include a wide range of personnel acting in the professional capacity of accountant as permitted by state law.[91] In addition, there are significant variances among the statutes regarding the extent of the privilege. The various statutes are classified as broad, typical or narrow.[92] The four "broad" statutes [93] require only that the communications be made in confidence. The "typical" statutes[94] restrict the reach of the

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[85] CONN. GEN. STAT. ANN. § 10-154(A) (West Supp. 1979).

[86] *See* note 84 *supra.*

[87] *See* note 85 *supra.*

[88] IDAHO CODE § 9-203 (Supp. 1977); N.C. GEN. STAT. § 8-53.4 (Supp. 1977); N.C. CENT. CODE § 31-01-06.1 (1976).

[89] ARIZ. REV. STAT. ANN. § 32-749 (1976); COLO. REV. STAT. ANN. § 13-90-107(f) (1973); FLA. STAT. ANN. § 473.741 (West Supp. 1979); GA. CODE ANN. § 84-216 (1970); ILL. ANN. STAT. ch. 110 1/2, § 51 (Smith-Hurd 1966); IND. CODE ANN. § 25-2-1-23 (Burns 1974); IOWA CODE § 116.15 (1971); KY. REV. STAT. ANN. § 325.440 (Baldwin 1969); LA. REV. STAT. ANN. § 37.85 (West 1974); MD. CTS. & JUD. PROC. CODE ANN. § 9-110 (1974); MICH. COMP. LAWS § 338.523 (Supp. 1977-78); MO. REV. STAT. ANN. § 326.151 (Vernon Supp. 1979); NEV. REV. STAT. § 49.125-205 (1971); N.M. STAT. ANN. § 20-1-12(c) (Supp. 1975); PA. STAT. ANN. tit. 64, § 9.11a (Purdon Supp. 1977); TENN. CODE ANN. § 62-143 (1976).

[90] *See, e.g.*, COLO. REV. STAT. ANN. § 13-90-107(f) (1973).

[91] Typical of this broad categorization is the Pennsylvania statute, which includes:

> . . . a certified public accountant, public accountant, partnership or corporation, holding a permit to practice under this act, or a person employed by a certified public accountant, public accountant, partnership, or a director of or a person employed by a professional corporation holding a permit to practice under this act, or an associate of or a person employed by a professional association holding a permit to practice under this act . . . .

PA. STAT. ANN. tit. 63, § 9.11a (Purdon Supp. 1977).

[92] Jentz, *Accountant Privileged Communications: Is it a Dying Concept Under the New Federal Rules of Evidence?*, 11 AM. BUS. L.J. 149 (1973).

[93] GA. CODE ANN. § 84-216 (1970) (note that under this statute, communications made to an accountant in expectation of engaging his services are assumed to be confidential); ILL. ANN. STAT. ch. 110 1/2, § 51 (Smith-Hurd 1966); KY. REV. STAT. ANN. § 325.440 (1969); N.M. STAT. ANN. § 20-1-12(c) (Supp. 1975).

[94] The states having "typical" statutes are: Arizona, Colorado, Florida, Indiana, Iowa, Louisiana, Maryland, Michigan, Missouri, Nevada, and Tennessee. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.2165 (Supp. 1978-79).

testimonial privilege to those communications made to the accountant in the course of his professional employment, and in addition provide one or more of the following limitations: "(1) that invocation of the privilege can be waived by the client; (2) that the privilege does not apply in criminal or bankruptcy proceedings; (3) that the privilege can be waived when the information is material to the defense of an action against the accountant."[95] Pennsylvania is the sole state that has a "narrow" statute. In addition to all of the restrictions and limitations found in the "typical" statutes, the Pennsylvania provision precludes assertion of the privilege by the accountant against third persons who have relied on the accountant's audit, or when the audit is at issue in an action wherein the accountant is a party.[96]

The Federal Rules of Evidence do not include a recognition of the accountant-client privilege. Consequently in both criminal and federal question cases, the federal courts are not required to recognize a privilege in this area. However, in non-federal question, civil cases, the privilege will be recognized if, under conflict of law principles, the apposite state law provides for the testimonial privilege.[97]

The policy basis for recognizing an accountant-client privilege is based on the sophisticated nature of modern day bookkeeping. The need for the professional services of an accountant is crucial, and full disclosure to the accountant is equally necessary in order that the product of the accountant accurately reflect the true financial picture of the client.[98]

6. Drug Rehabilitation Programs: Staff-Client Privilege

A number of states have statutes which authorize and/or regulate drug rehabilitation programs designed to constructively deal with society's drug abuse problem. Ten states have incorporated provisions which insure the confidentiality of the records and/or communications of the clients of such programs.[99] While all except the Tennessee enactment extend the privilege to communications as well as records kept, two states do allow disclosure of the communications and/or records upon a showing of good cause to a court.[100] Although most of the states limit the privilege to those communications which concern the treatment or rehabilitation of drug-dependent clients,[101] a Georgia statute extends the privilege to an authorized employee of a licensed

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[95] Jentz, *supra* note 92, at 153.

[96] PA. STAT. ANN. tit. 63, § 9.11a (Purdon 1978-79).

[97] For a discussion of the forum shopping problem that arises in these circumstances, plus consideration of the positive and negative aspects of the accountant-client privilege, see Note, *Evidence: The Accountant-Client Privilege Under the New Federal Rules of Evidence — New Stature and New Problems*, 28 OKLA. L. REV. 637, 645-48 (1975).

[98] *Id.* at 647.

[99] GA. CODE ANN. § 38-418 (Supp. 1978); MD. ANN. CODE art. 43B, § 22 (1971); N.H. REV. STAT. ANN. § 318-B 12-a (Supp. 1977); N.M. STAT. ANN. § 54-10-12 (Supp. 1975); OHIO REV. CODE ANN. § 5122.53 (Page Supp. 1977); OKLA. STAT. ANN. tit. 43A, § 657 (West Supp. 1978-79); PA. STAT. ANN. tit. 71, § 1690.108 (Purdon Supp. 1978-79); TENN. CODE ANN. § 33-813 (1977); TEX. CRIM. PRO. CODE ANN. tit. 38, § 101 (Vernon Supp. 1977); WIS. STAT. ANN. § 51-30 (West Supp. 1978-79).

[100] PA. STAT. ANN. tit. 71, § 1690.108 (Purdon Supp. 1978-79); TENN. CODE ANN. § 33-813 (1977).

[101] States having statutes with such limitations are Maryland, New Hampshire, New Mexico, Ohio, Oklahoma, Texas, and Wisconsin.

program.[102] An additional distinction is found in an Ohio statute which provides that a patient of a program who is there as a condition of probation or parole, or in lieu of conviction, is deemed to have consented to the release of records and information relating to treatment, and, if the patient refuses to allow disclosure, he will be deemed in violation of his probation, parole or preconviction disposition agreement.[103]

This privilege is premised on the notion that society's interest in encouraging the therapeutic process of these drug programs outweighs society's interest in having access to potential evidence.

III. Extension of the Testimonial Privilege to Halfway House Staff-Resident Communications

Having reviewed the current status of the law regarding testimonial privileges, and having reviewed the historical development of the correctional halfway house to its present state, it is necessary to address the issue of whether a testimonial privilege for halfway house staff-resident communication is legally appropriate. In doing so, the analysis will focus on applying Wigmore's four canons to the relationship in question (in the context of the *Kenney* decision), comparing the staff-resident relationship with other relationships protected under the law, and examining the treatment and rehabilitation theory as it relates to the right of privacy.

A. *Applying Wigmore's Test Against the* Kenney *Backdrop*

Any privilege, whether statutory or otherwise, must meet the conditions of the four canons set forth by Professor Wigmore.[104] In *Kenney*, the defendant argued that Wigmore's four conditions had indeed been met. Kenney contended that:

> (1) The staff of the halfway house had given the residents the assurance that any communication made in confidence to their counselors or advisors would be kept confidential.
>
> (2) If communications made by the residents of the halfway house are not kept confidential and are subject to disclosure in a criminal proceeding, the residents will not confide in the staff and the therapeutic process of the program will be destroyed.
>
> (3) There is a strong public interest in the rehabilitation of offenders as evidenced by the growing number of community-based correctional programs in addition to the extensive utilization of rehabilitative programs in state correctional institutions. The staff-resident interaction being the foundation of these rehabilitative programs, it follows that it would be in the public interest to protect such interaction.
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> . . . .
>
> (5) . . . If clients of a rehabilitation program know that their

[102] Ga. Code Ann. § 84-6319 (1975).

[103] Ohio Rev. Code Ann. § 5122.53(C) (Page Supp. 1977).

[104] *See* note 36 *supra* and accompanying text.

> disclosure will be used against them in a criminal proceeding, they will refrain from making such disclosures.[105]

While the *Kenney* court did not specifically address Wigmore's test in its opinion, the defendant's argument regarding these canons was implicitly rejected. The court observed:

> A project such as a halfway house is organized for the purpose of protecting society through rehabilitation of the offender. Where that offender violates a law designated as a serious crime by the prescribed penalty, his communication of such fact to the director must bow to the public need to ferret out the truth so as to protect itself.[106]

The question not answered is how a project such as a halfway house — organized for the purpose of protecting society through rehabilitation — can protect society if the means by which it is to do so (*i.e.*, the rehabilitative process) is rendered useless, because disclosure is compelled in the interest of the protection of society. The *Kenney* decision must be interpreted as meaning that society is better protected by a single disclosure in the pursuit of the administration of justice than it is by the ongoing rehabilitation of the many residents — both present and future — who are a part of the correctional halfway house programs in operation today.

Since the *Kenney* decision was rendered, the defendant's assertion that the conditions of Wigmore's canons had been met has only been strengthened. The findings of the National Institute of Law Enforcement and Criminal Justice reveal that the halfway house program may serve to benefit the public both in terms of economics and rehabilitation.[107] Furthermore, the increasing rate at which communities become involved in implementing correctional halfway houses serves to further support the contention that the relationship between the staff and the residents is one which ought to be sedulously fostered.[108]

B. *Comparing the Staff-Resident Relationship with Other Relationships Protected Under the Law*

Perhaps the strongest argument against extending the testimonial privilege to halfway house staff-resident communications is that some or all of the critical staff members may lack the professional credentials historically presumed to be a prerequisite necessary to deem a relationship worthy of legal protection.[109] With the exception of the marital privilege,[110] every

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[105] Brief for defendant at 4-5, Kansas v. Kenney, No. 2668 (D. Kan. May 7, 1974). Filed with the defendant's brief was a letter from the International Halfway House Association which proffered the organization's support to the Manhattan House and Kenney in their effort to persuade the court to recognize the communications between halfway house staff members and residents as privileged.

[106] Kansas v. Kenney, No. 2668 (D. Kan. May 23, 1974).

[107] SEITER, *supra* note 5, at ix, 35.

[108] *Id.* at 1. The report indicates that community security and property values have generally been unaffected by the presence of a halfway house nearby. *Id.* at 33.

[109] Critical staff members include those whose functions are directly related to the rehabilitative process, *viz.*, the director, the assistant director, and the counselors.

[110] See notes 54-57 *supra* and accompanying text.

statutorily protected relationship involves practicing professionals of a recognized academic discipline who hold advanced degrees in their respective fields. Additionally, some states granting a testimonial privilege require the professional involved to be either certified or licensed by the state.[111] These statutory requirements are designed to ensure that a person dispensing these professional services is both competent and responsible, and thereby deserving of the public trust which underlies the legal protection afforded his profession.

Unfortunately, the nature of the halfway house program realistically precludes the critical staff members of such a program from meeting the statutory standards of any presently protected professional relationship. This is because the rehabilitative model used in a halfway house program necessitates a multi-disciplinary approach which requires the critical staff member to function as a "jack of all trades"; he must be competent in all areas but not necessarily a master of any.[112] Consequently, to provide socio-psychological, financial, vocational, educational and drug counseling, it is necessary for the critical staff members to act in a collective capacity not unlike that of a social worker, a psychologist, an accountant, a clergyman, a teacher, and a drug counselor. It would be unrealistic, from an academic standpoint, to expect a single critical staff member to possess all of these credentials as required by each respective discipline in order that he may qualify for the testimonial protection afforded to professionals of these various disciplines. Keeping in mind the critical staff-resident ratio of a typical program,[113] it is economically unrealistic to expect that *all* critical staff members of a halfway house program would individually hold the statutorily required credentials of any single privileged discipline which would be of a practical value in protecting *generally* the confidential communications between that staff member and a resident.[114]

It should be emphasized that although the halfway house is distinguishable from a majority of the presently protected professional relationships, because it offers the resident a full spectrum of counseling services in the context of a live-in environment, the services provided are essentially the same.

The same rationale that is repeatedly enunciated in justifying the grant of a testimonial privilege to those presently protected relationships is likewise applicable to the staff-resident relationship in the halfway house setting. Specifically, the privilege serves to remove a barrier to open communications that might otherwise thwart the servicing of the resident's needs. The barrier

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[111] *See, e.g.*, OHIO REV. CODE ANN. § 4732.19 (Page Supp. 1978).

[112] For descriptions of the academic qualifications recommended for the various critical staff members, see J. MCCARTT & T. MANGOGNA, *supra* note 2, at 173-98.

[113] Generally there is one staff member for every five residents. *See* D. THALHEIMER, *supra* note 16, at 8-9.

[114] Although it is true that an individual possessing the statutorily required credentials of a psychiatrist, psychologist, or certified social worker would be entitled to a much broader protection regarding confidential communications in the halfway house setting, considering the pay scale of halfway house directors, there is a likelihood that even that position would be difficult to fill with a person holding such credentials. A 1975 study showed the director's annual average low salary to be $12,085 and the annual average high salary to be $15,970. The salaries of assistant directors and counselors were found to be even less. *See id.* at 9.

may be a fear by the resident of a loss of personal privacy or exposure to criminal prosecution. Thus the inhibitions of the resident are not unlike those experienced by persons who seek counseling from specialists of the presently protected professions.

Generally, the residents of a correctional halfway house program are financially unable to secure the needed counseling services on their own. Consequently, the argument advanced on behalf of those dependent upon the services of a social worker[115] is equally applicable to the halfway house resident. The resident should not be denied the protection presently provided to the clients of the professionals in the private sector merely because he or she cannot afford the "purchase price" of the services of such professionals.

It is not the author's intent to suggest that the skills of the critical staff members are of the same caliber as those of professionals who specialize in the various medical, psychiatric, sociological, and educational services which are currently provided with legal protection. However, the distinction as to the level of expertise should not operate as a basis for denying the grant of a testimonial privilege inasmuch as the target population of the correctional halfway house program is such that the higher level of expertise is not required. Notably, a review of the typical selection criteria adopted by the resident screening committee of halfway house programs shows that those offenders who need the treatment of a specialist are denied admission.[116]

The Guidelines and Standards published by the United States Department of Justice set out detailed intake procedures and policies which are intended to limit the halfway house population to those offenders whose personal needs can be attended within the framework of the halfway house setting.[117] Those who demonstrate a pattern of violence; those who are significantly mentally retarded (I.Q. of 70 or below); those who are psychotic; those who are currently addicted to drugs; and those who manifest deviant sexual behavior are as a matter of policy automatically denied admission.[118] Therefore, the degree of expertise necessary to deal with individuals who suffer severe emotional, physical, or mental disturbance is not required of halfway house personnel. Also, the halfway house program has at its disposal a number of community resource persons, qualified experts in their respective fields, who make themselves available to the halfway house staff on a consultation basis, as well as meeting one-on-one with the residents when the situation dictates. This supervision, along with the carefully defined selection process, operates to ensure that the critical staff members are dispersing their services both competently and responsibly.

The Commission for Accreditation for Corrections has undertaken the process of accrediting a number of halfway house programs. Inasmuch as the Federal Bureau of Prisons has indicated that such accreditation will be necessary for referrals and funding, a similar approach could be taken by a

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[115] *See* notes 78-82 *supra* and accompanying text.

[116] Each prospective resident's history is reviewed by a screening committee, comprised of staff members, members of the house's board of directors, and various other professionals.

[117] J. McCartt & T. Mangogna, *supra* note 2, at 136-41.

[118] Available to the house's screening committee are the results of a battery of diagnostic tests performed on the prospective resident, as well as a social history of the individual and other valuable data. *Id.* at 136-37.

state legislature regarding the extension of the testimonial privilege to the halfway house setting. This statutory requirement of accreditation could be used instead of the licensing and certification procedures adopted for the legally protected professions.[119]

C. *Right to Privacy*

The real importance of the testimonial privilege in the correctional halfway house context is founded in the protection it affords the resident's right to privacy, notwithstanding the protection it may afford a resident regarding the compelled disclosure of incriminating communications made to a staff member. This is (1) because the resident's privacy, entailing the voluntary and secure control he holds over communication of information about himself,[120] is an essential element in the development of a positive relationship with the staff members as well as fellow residents, and (2) because recent Supreme Court decisions regarding the right to privacy appear to leave little hope that this right will receive absolute constitutional protection.[121]

1. Privacy and the Staff-Resident Relationship

It may safely be stated that regardless of which treatment model is used, the staff-resident interactions are designed as a catalyst for positive self-change on the part of the resident. This interaction often takes the form of personal and private communications between the resident and a staff member. It is in this setting of privacy that expressions of trust are exchanged and constructive relationships are formed. As long as the resident has a right to privacy and a voluntary and secure control over the communication of his personal beliefs, ideas, values, fears, and hopes, he has the means by which to select what he wishes to share, and with whom. It is the right to privacy that provides the resident with a choice regarding the staff-resident relationship, without which the relationship could not exist.[122]

2. Right to Privacy Not Absolute

Although all private communications, as well as evidence integrally related to private, individual rights or interests recognized by the Supreme Court as fundamental, come within the protection of the Constitution,[123] recent decisions have rejected any notion of an absolute right to privacy under the fourth and fifth amendments.

In *Fisher v. United States*[124] the Court, relying heavily on a prior decision

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[119] Alternatively, a state could develop its own accreditation scheme if it so desired in order to exercise some regulatory control over the correctional halfway houses operating within its boundaries.

[120] Krattenmaker, *supra* note 43, at 649.

[121] *See* notes 124 and 125 *infra* and accompanying text.

[122] *See* Fried, *Privacy*, 77 YALE L.J. 475, 477 (1967-68).

[123] Note, *Formalism, Legal Realism and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 988 (1977).

[124] 425 U.S. 391 (1976).

in *Couch v. United States*,[125] held that a summons directing a third party to surrender the defendant's private papers would not violate the fifth amendment because of the lack of compulsion against the accused himself.[126] The consequence of the *Fisher* decision is that unless a relationship is recognized as privileged by statute or the common law, a third person (such as a halfway house staff member) cannot avoid complying with a valid subpoena requiring the production of private papers and recollections of private communications involving the accused (a halfway house resident) because of a lack of compulsion against the accused himself.[127] Given the Court's present position, "that all individual claims to right are relative to other societal interests,"[128] the only practical solution to the problem of protecting the privacy right of the residents of a correctional halfway house program is the granting of a testimonial privilege.

IV. Conclusion

The testimonial privilege renders a valuable service to society by protecting a variety of relationships which evolve to meet the sociological, psychological, and professional needs of its members. To date, no such privilege has been extended to afford protection to the confidential communications of the correctional halfway house staff and residents. The author has proposed specific legal and policy arguments to support his contention that such a testimonial privilege is both necessary and legally appropriate. Given the reluctance of state courts to independently recognize a confidential communication between halfway house staff members and residents as privileged, it appears the issue is best resolved by the legislative body.

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[125] 409 U.S. 322 (1973). The *Couch* decision prompted much discussion in the literature. *See, e.g.*, Note, Couch v. United States — *Protection of Taxpayers' Records*, 23 De Paul L. Rev. 810 (1973-74); 1 Fla. St. L. Rev. 506 (1973); 62 Ky. L.J. 263 (1973-74); 1973 Utah L. Rev. 106.

[126] 425 U.S. at 396-98. For an in-depth consideration of the *Fisher* decision, *see* Note, *Fifth Amendment Protection Against Self-Incrimination in Tax Records*: Fisher v. United States, 30 Sw. L.J. 788 (1976).

[127] Note, *supra* note 123, at 979.

[128] *Id.* at 985.