"AND THE WISDOM TO KNOW THE DIFFERENCE": CONFIDENTIALITY VS. PRIVILEGE IN THE SELF-HELP SETTING

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INTRODUCTION

On New Year's Eve of 1988, Paul Cox drank beer and kamikazes at a bar called Garry's Barleycorn in New Rochelle, New York. On the way home he was involved in a car accident and walked 2 1/2 miles to the house where he used to live with his parents. He broke in, got a knife from the kitchen, went up to the bedroom where his mother and father once slept, and murdered Shanta and Lakshman Rao Chervu. Cox stole nothing—he just slashed the throats of the two innocent victims. Cox then went to his parents' house in Larchmont, New York, and went to sleep. When he woke up, he remembered nothing from the night before. The police found fingerprints at the scene, but since Cox had never before been arrested, there was nothing to match.

Four years later, Cox joined Alcoholics Anonymous ("A.A."). "It is part of the 12 steps of the AA [process] to search for somebody and start telling him your past, to admit guilt." At the time, Cox was rooming with a young man and woman, both A.A. members. He told them and other A.A. members that he dreamed he had committed a crime. Later, he said that "he believed he had done it, but he had no real recollection of the night. He remembered finding a bloody knife and throwing it in the water." One member of A.A. went to the police via an intermediary. That member gave the names of other A.A. members who had been privy to the

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1 Jimmy Breslin, Without a Shield, A.A. May Not Survive, NEWSDAY (N.Y.), June 14, 1994, at A2.
2 Id.
information and informed the police that Cox had been having dreams or dream fragments of killing the Chervus.  

Cox was charged with double homicide in 1993. In June 1994, seven A.A. members were compelled by subpoena to testify. Judge Cowhey, the presiding judge, refused to allow the A.A. members to claim a privilege as an extension of either the priest-penitent or the spousal privileges. Instead, he held that New York law does not extend a testimonial privilege to self-help groups. Although the A.A. members maintained that they were bound by A.A. principles to protect Cox’s confidences, all seven were ordered to testify. They were not required to disclose their full names, and no press pictures of the seven witnesses were allowed.  

The trial resulted in a deadlock. All but one woman, who held out for a lesser manslaughter charge, voted to convict for second-degree murder. On December 6, 1994, after the second trial, Cox was convicted of manslaughter. The jury found that Cox “had been affected by extreme emotional disturbance.” The defendant admitted to the killings but claimed he had done so in an alcoholic blackout. Judge Cowhey gave Cox the maximum sentence on March 14, 1995.  

Numerous self-help groups have expressed outrage at the ruling. A.A. has not taken an official stand on the decision because of its desire to remain focused solely on the problem of alcoholism without taking political stances on any outside issues;  

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6 See infra note 65 and accompanying text.  
8 See Rosen, supra note 4, at 69.  
9 Berger, supra note 3, at B1.  
10 The sentence was 16½ to 50 years in prison. See West, supra note 7, at B8.  
11 See Jan Hoffman, Faith in Confidentiality of Therapy Is Shaken, N.Y. TIMES, June 15, 1994, at A1; Rosen, supra note 4, at 69. The breach of A.A.’s code of secrecy unsettled members of A.A. and therapists around the country. Frank Riessman, director of the National Self-Help Clearinghouse, reported that his office received over 70 calls per week regarding the ruling and that people were very disturbed by it. See id.  
12 See ALCOHOLICS ANONYMOUS WORLD SERVS., INC., TWELVE STEPS AND TWELVE
however, various members of A.A. have talked to the press. One member stated that A.A. was not "above the law," and another stated that part of the A.A. process is taking responsibility for one's actions. At least one member felt otherwise:

The first time my wife made me go to the meeting in our neighborhood in Brooklyn, I go [sic] to the corner bar and stand pat all night. . . . But [eventually,] I went back. The place gave me my life back. I must have sent a thousand people there. If one of them ever heard that anything they say gets repeated, and don't give them any reasons, then they'd never come back. The same for me.

Another member, who is a priest, explained:

The confidentiality at AA is almost the same as the confessional . . . . [If] you don't have [confidentiality] at an AA meeting, then we are all threatened. As I understand it, they subpoenaed people for a double homicide. That's rare. But once you make Alcoholics Anonymous people talk about one thing, what is to stop the authorities from deciding that they can come around for anything, an income tax case. Therefore, is a double murder more important than the confidentiality of AA? There had to be a better way to solve this case.

One member, who felt that A.A.'s promise of confidentiality is not inviolable, admitted that he had "heard numerous confessions to crimes from petty theft to burglary to drunken driving," and admitted that it is "a matter of individual conscience what you ought to do when you hear such things." Finally, one member of Cocaine Anonymous, irate about the fact that privileges are extended to psychotherapists but not to peer counselors, exclaimed, "This just points out another middle-class hypocrisy—money buys privacy. . . . If you have the money, you can have the protection. A lot of people in [Cocaine Anonymous] can't afford a fancy shrink."

TRADITIONS 176-79 (1981) [hereinafter TWELVE STEPS] (explaining Tradition Ten—the policy that A.A. should never become involved in public controversies because that might cause dissension within the group); see also infra note 65 (listing the Twelve Steps of behavioral change and the Twelve Traditions of A.A.)

15 Breslin, supra note 1, at A2.
14 See Confidentiality & Crime, USA TODAY, June 10, 1994, at 10A.
15 Breslin, supra note 1, at A2.
16 Id.
17 Baum, supra note 4, at E7.
18 Id.
Interestingly, the name of the A.A. member who told on Cox was not revealed to the press. That person breached not only Cox's anonymity but also the anonymity of the other persons who were later forced to testify. Although the full names of the A.A. witnesses were withheld from the people attending the trial, their identities were readily apparent to the judge and to the jurors at both trials.

The reaction to the trial indicates the general expectation that people will not breach the confidence that exists within the self-help group. Although no explicit contractual obligation exists between members of A.A. or other self-help groups, there is an assumption that some kind of legal protection exists for members of A.A. One woman, when asked if she thought a court could gain access to information disclosed at an A.A. meeting answered quite certainly, "Oh no, it all stays here. . . . They can't make me testify about what someone shared at a meeting." But, in fact, unless she is willing to go to jail to defend that position, she can be compelled to testify.

The decision to turn to self-help groups for assistance is becoming more and more common. People are turning to self-help or mutual aid groups as a means of dealing with various problems ranging from dealing with drug and alcohol addiction to contending with life after divorce or the death of a loved one. As part of the "treatment" provided by these mutual aid groups, members of the group share details of their lives and experiences

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19 See Breslin, supra note 1, at A2.
20 See Rosen, supra note 4, at 69.
21 See Baum, supra note 4, at E7; see also Paul S. Appelbaum & Alexander Greer, Confidentiality in Group Therapy, 44 Hosp. & Community Psychiatry 311, 312 (1993) (explaining that courts would have difficulty imposing obligations of confidentiality on group members unless the group members had signed a contract "binding them to maintain the confidentiality of the group and imposing financial penalties for noncompliance").
22 Hoffman, supra note 11, at A1.
23 The use of the term "self-help" has been rejected in some psychological circles in favor of the term "mutual aid," because of the emphasis the latter places on the importance of peer support. See, e.g., Harry Wasserman & Holly E. Danforth, The Human Bond: Support Groups and Mutual Aid 22-23 (1988). This Comment, however, uses these terms interchangeably.
24 See Celestine Bohlen, Support Groups Are Offering Embrace to Cocaine's Victims, N.Y. Times, Jan. 29, 1989, at 1 (noting that drug and alcohol support groups have proliferated across the country).
25 For example, many divorcees turn to groups like Parents Without Partners. Widowed Persons is a self-help group for people who have lost their spouses. See Alan Gartner & Frank Riessman, Help: A Working Guide to Self-Help Groups 156-57 (1980).
in dealing with a particular problem. Most of the self-help groups serve as a private place where people divulge their innermost thoughts and secrets, secure in the knowledge that what they reveal within the group is not disclosed outside of the group, even to a court of law. The sense of security is misplaced. Under the current law, only certain communications are protected from discovery sought during litigation and communications made in the mutual aid context do not qualify.

The evidentiary rules of privilege, unlike most rules of evidence, "operate to exclude relevant, nonprejudicial and nonconfusing evidence." The system of privileges does not operate to aid in the quest for truth but rather to create and protect a realm of privacy thought necessary to protect and allow for the adequate functioning of certain relationships. The successful functioning of those relationships within our society is deemed more important than the availability of evidence for the administration of justice.

This Comment advocates extending a legal privilege to those highly focused self-help groups that require anonymity and confidentiality in order to provide effective treatment for their members. Part I of this Comment discusses self-help groups generally, compares them to other forms of therapy or counseling,

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See infra notes 105-24 (noting that confidentiality is a foundational element of the self-help therapeutic process and that this confidentiality is essential to the success of such programs).

Not all relationships that are private or even confidential are granted "privileged" status. Many people confuse confidentiality with privilege. "Confidentiality" is a moral construct, whereas "privilege" is a legal construct created by ad hoc policy judgments. "Privilege is an exception to the general rule that the public has a right to every man's evidence." Confidentiality is not enough to support a privilege. Catharina J.H. Dubbelday, Comment, The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved, 34 EMORY L.J. 777, 780-81 (1985) (footnotes omitted). For a discussion of those communications that are protected with a legal privilege, see infra notes 155-204 and accompanying text.

See infra notes 155-204 and accompanying text (describing currently recognized privileges).

See ERIC D. GREEN & CHARLES R. NESSON, PROBLEMS, CASES AND MATERIALS ON EVIDENCE 689 (2d ed. 1994) (discussing how privilege law impedes the truth-finding process).

See id. at 692; see also Hoffman, supra note 11, at A1 (extracting the principle behind privilege law that "certain relationships should remain off limits to courts").

and addresses the importance of confidentiality within the self-help setting. Self-help groups are vital to certain segments of the population. Their success rates are unsurpassed for certain types of treatment, and they make the experiential model of therapy available to those who might not benefit from more traditional methods of treatment. Part II discusses the different rationales underlying privilege rules, and explains the current state of privilege law. Part III of this Comment demonstrates the application to the self-help context of the various theories used to explain modern privilege law. Part IV addresses the counterarguments made by critics of the expansion of privilege law, explains why they are inapplicable or misguided in the self-help setting, and describes, in light of the counterarguments, the nature of the privilege suggested. This Comment concludes with a plea to the courts and the legislatures to create such a privilege so that members of these support groups can continue to utilize self-help groups with the assurance that their statements will be protected.

I. The Self-Help Group

A. Defining Self-Help Groups: A Therapeutic Necessity

Although no one can give an exact number, there are at least 500,000 self-help groups operating in the United States with at least 10 million members. Self-help groups provide an alternative to other types of therapy. As defined by Alfred Katz and Eugene Bender, self-help groups are voluntary, small group structures for mutual aid and the accomplishment of a special purpose. They are usually formed by peers who have come together for mutual assistance in satisfying a common need, overcoming a common handicap or life-disrupting problem, and bringing about desired social and/or personal change. The initiators and members of such groups

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52 See infra notes 42-52 and accompanying text.
54 Alfred H. Katz and Eugene I. Bender are two well-respected professors who have cowritten two very influential books about the self-help movement. See ALFRED H. KATZ & EUGENE I. BENDER, HELPING ONE ANOTHER: SELF-HELP GROUPS IN A CHANGING WORLD (1990); ALFRED H. KATZ & EUGENE I. BENDER, THE STRENGTH IN US: SELF HELP GROUPS IN THE MODERN WORLD (1976) [hereinafter KATZ & BENDER, THE STRENGTH IN US].
perceive that their needs are not, or cannot be, met by or through existing social institutions. Self-help groups emphasize face-to-face social interactions and the assumption of personal responsibility by members. They often provide material assistance, as well as emotional support; they are frequently "cause" oriented, and promulgate an ideology or values through which members may attain an enhanced sense of personal identity.  

People choose to attend self-help group meetings instead of seeking professional assistance for numerous reasons. First, private professional counseling is more costly than group therapy and many insurance plans do not cover psychological treatment. Self-help groups, like A.A., are known as "the white middle class therapy" or the "poor man's [sic] psychotherapy." Most support groups do not charge fees for the right to participate and, if they do, those fees are normally quite nominal. Self-help programs "fill the gaps left by the shortage of space available in publicly financed treatment programs." Because groups like A.A. are inexpensive, if not free, they provide a welcoming alternative to costly professional private treatment. This means that a person who is looking for treatment but who has limited resources might turn to a mutual aid group because of her economic circumstances.

Second, depending on the kind of problem one confronts, self-help may be the most effective means of coping. Self-help organizations claim a better track record than professionals for detoxifying substance and alcohol abusers and for helping people cope with intense grief reactions or emergency panic situations. Further-

\[\text{\cite{Wasserman & Danforth, supra note 23, at 25 (quoting Katz & Bender, The Strength in Us, supra note 34, at 9).}}\]
\[\text{\cite{See Dubbelday, supra note 27, at 810 (noting that group therapy is much more cost effective).}}\]
\[\text{\cite{See Nicholas A. Cummings, Mental Health and National Health Insurance: A Case History of the Struggle for Professional Autonomy, in Psychology and National Health Insurance: A Sourcebook 1, 14-15 (Charles A. Kiesler et al. eds., 1979) (describing the struggle of psychologists to obtain insurance-industry recognition).}}\]
\[\text{\cite{Telephone Conversation with Public Information Department Representative, Alcoholics Anonymous Worldwide Services (Jan. 3, 1995); see also Linda F. Kurtz, Twelve-Step Programs, in Working with Self-Help, supra note 33, at 93, 116.}}\]
\[\text{\cite{See Daniel Remine et al., Self-Help Groups and Human Service Agencies: How They Work Together 16 (1984) (stating that self-help groups are usually free).}}\]
\[\text{\cite{Bohlen, supra note 24, at 34.}}\]
\[\text{\cite{See Thomas J. Powell, Self Help Organizations and Professional}}\]
more, the decision to attend self-help may be a result of individual, private, professional treatment. Although professional counselors may help a troubled individual to cope with a problem, a self-help group may be more beneficial for long-term, ongoing support.

Third, the decision to join a self-help group may be prompted by a desire for experiential, instead of professional, therapy. Experiential knowledge is defined as "information and wisdom gained from lived experience." Experiential knowledge has two critical components: specific, pragmatic wisdom "gained through reflection upon personal lived experience," and belief in the value of the knowledge obtained from that experience and its worth to others dealing with a common problem. Experiential knowledge differs from lay knowledge and professional knowledge. Experiential knowledge focuses on the practical means of dealing with a problem by people who themselves have experienced the problem, whereas lay knowledge focuses on second-hand information and professional knowledge on academic theories of behavioral responses. Depending on the individual and the problem, the person may be better served by the assistance of a mutual aid group than by someone with professional knowledge.

Finally, the role of the client is very different in each of the settings. In the self-help context, the participant is both helping and being helped. She views the others in the group as peers and

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43 See id. at 139; see also ALCOHOLICS ANONYMOUS WORLD SERVS., 1992 MEMBERSHIP SURVEY PAMPHLET (stating that 80% of members who received counseling before coming to A.A. said their previous counseling experiences directed them to A.A.).
44 Marsha A. Schubert & Thomasina Borkman, Identifying the Experiential Knowledge Developed Within a Self-Help Group, in UNDERSTANDING THE SELF-HELP ORGANIZATION, supra note 39, at 227, 228.
45 Id.
46 See id.
47 Lay knowledge is knowledge learned incidentally, learned second-hand from professionals, family members, the mass media, common sense, or logic. See id.
48 Professional knowledge is defined as "information, knowledge, and skills developed, applied, and transmitted by an established specialized occupation" to those who have fulfilled the requirements of a profession. Thomasina J. Borkman, Experiential, Professional, and Lay Frames of Reference, in WORKING WITH SELF-HELP, supra note 33, at 3, 6.
49 See id. at 8-21, 29 (explaining that self-help groups provide experiential knowledge that involves a special understanding between people with similar problems and that cannot be gained by professional help); see also POWELL, supra note 42, at 132-34 (noting that some people prefer self-help groups because of the solidarity they feel with persons in similar situations).
knows that she will be welcomed and not told what to do. In the professional context, the participant is fully aware that she is paying someone to listen to her. She has different expectations. The relationship is not mutual, and the therapist, no matter how empathetic, is not going through the same experience as the patient. Some people might prefer to pay a fee in order to free themselves from the responsibility of helping others, and those people will choose to see a professional therapist. Others, however, are uncomfortable with what they perceive as "paying for a friend." Self-help serves a valuable function for individuals who might forgo therapy altogether if the only alternative is professional help. This is especially true if these same individuals are not reluctant to discuss personal issues in a group setting.

Self-help groups may, therefore, be the best, or the only, alternative for certain segments of society. They serve an important function by providing therapeutic help or "treatment" to people who might otherwise be unable or unwilling to seek professional assistance.

B. Self-Help Groups: A Typology

Self-help groups differ significantly from one another. There are primarily two different ways of classifying self-help groups: by methodology or by primary focus. Katz and Bender differentiate groups on the basis of their focus, having either an "inner focus" or an "outer focus." An inner-focused group is centered on its members and devoted to their concerns. An outer-focused group stresses societal goals. Leon Levy classifies self-help groups into

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50 See POWELL, supra note 42, at 119-28 (explaining the differences in the process of group therapy as compared with the process of professional counseling).
51 Id. at 125-27 (describing how the self-help relationship is more mutual in nature and, thus, clients seeking autonomy and mutuality will choose self-help over professional counseling).
52 See id. at 120, 132-34 (explaining that self-help leaders are unpaid and that the groups provide a level of acceptability not experienced by some people in a professional environment).
53 Classifying self-help groups is important because understanding the differences and the overlap between groups makes it clearer why only certain self-help groups merit the protection of a legal privilege.
54 See REMINE ET AL., supra note 40, at 12 (explaining the Katz and Bender approach); supra note 34 (same).
55 See REMINE ET AL., supra note 40, at 12 (explaining that welfare reform and acceptance of alternative lifestyles are just some of the goals stressed by outer-focused groups).
four categories according to the group's purpose and composition.\textsuperscript{56} “Type I groups emphasize conduct reorganization or behavioral control.”\textsuperscript{57} Type II groups are those that strive to help members ameliorate, not change, a stressful predicament. Type III groups are survival-oriented, comprised of those against whom society discriminates or whom society labels deviant.\textsuperscript{58} “Members of Type IV groups share goals of personal growth, self-actualization, and enhanced effectiveness in life.”\textsuperscript{59}

There are primarily two types of self-help group methodologies: the twelve-step and the non-twelve-step paradigms.\textsuperscript{60} Levy's four types of groups overlap with both methodologies; a twelve-step group may be a Type I behavioral modification group like A.A. or a Type II stress amelioration group like Cancer Anonymous.\textsuperscript{61} Furthermore, all four types can fit into the non-twelve-step model.\textsuperscript{62}

1. Alcoholics Anonymous and the Twelve-Step Paradigm

A.A. is the prototype for all twelve-step groups.\textsuperscript{63} The organization, founded in the late 1930s, has the largest number of members of any self-help group, and its success has prompted the

\textsuperscript{56} See id. at 13 (explaining Leon Levy's four-part typology of self-help groups).
\textsuperscript{57} Id.
\textsuperscript{58} See id. at 13-14.
\textsuperscript{59} Id. at 14.
\textsuperscript{60} Researchers have categorized or classified self-help groups in many different ways. For an extensive discussion of a breakdown by missions of self-help organizations, see Powell, supra note 42, at 147-247, app. I. For purposes of organizational convenience, this Comment delineates only the two primary categories. Not all self-help groups can be so easily categorized. In order to fully understand the mission, goals, and types of assistance provided by each group, it is important to make a group-by-group assessment. See generally Gartner & Riessman, supra note 25 (providing a helpful guide of self-help groups for such an assessment). The classification of self-help groups is important for purposes of this Comment in order to ascertain which self-help groups merit a privilege and which can successfully function without such legal protection. See infra part IV.A.
\textsuperscript{62} This Comment advocates extension of a privilege only to those groups that are Type I, twelve-step self-help groups. For a more complete discussion of why the privilege should be limited to these groups, see infra part II.A (discussing the rationales for current privilege doctrine); infra part IV.A (discussing the proposed privilege).
\textsuperscript{63} See Kurtz, supra note 38, at 93 (discussing how A.A. serves as a model for many other organizations).
formation of other groups designed to deal with various addictions, including Overeaters Anonymous ("O.A.") (founded in 1965), Gamblers Anonymous ("G.A.") (in 1970), Narcotics Anonymous ("N.A.") (in 1953), and Cocaine Anonymous ("C.A.") (in 1979). A.A.'s founders formed a twelve-step and twelve-tradition developmental strategy designed to help each member overcome the urge to drink. Meetings customarily begin with the Serenity Prayer.

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64 See KATZ, supra note 33, at 10.
65 The Twelve Steps are:

Step One
"We admitted we were powerless over alcohol—that our lives had become unmanageable."

Step Two
"Came to believe that a Power greater than ourselves could restore us to sanity."

Step Three
"Made a decision to turn our will and our lives over to the care of G[-]d as we understood Him."

Step Four
"Made a searching and fearless moral inventory of ourselves."

Step Five
"Admitted to G[-]d, to ourselves, and to another human being the exact nature of our wrongs."

Step Six
"Were entirely ready to have G[-]d remove all these defects of character."

Step Seven
"Humbly asked Him to remove our shortcomings."

Step Eight
"Made a list of all persons we had harmed, and became willing to make amends to them all."

Step Nine
"Made direct amends to such people wherever possible, except when to do so would injure them or others."

Step Ten
"Continued to take personal inventory and when we were wrong promptly admitted it."

Step Eleven
"Sought through prayer and meditation to improve our conscious contact with G[-]d as we understood Him, praying only for knowledge
of His will for us and the power to carry that out."

Step Twelve
"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."

TWELVE STEPS, supra note 12, at 5-8. The Twelve Traditions are:

Tradition One
"Our common welfare should come first; personal recovery depends upon A.A. unity."

Tradition Two
"For our group purpose there is but one ultimate authority—a loving G[-]d as He may express Himself in our group conscience. Our leaders are but trusted servants; they do not govern."

Tradition Three
"The only requirement for A.A. membership is a desire to stop drinking."

Tradition Four
"Each group should be autonomous except in matters affecting other groups or A.A. as a whole."

Tradition Five
"Each group has but one primary purpose—to carry its message to the alcoholic who still suffers."

Tradition Six
"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."

Tradition Seven
"Every A.A. group ought to be fully self-supporting, declining outside contributions."

Tradition Eight
"Alcoholics Anonymous should remain forever non-professional, but our service centers may employ special workers."

Tradition Nine
"A.A., as such, ought never be organized; but we may create service boards or committees directly responsible to those they serve."

Tradition Ten
"Alcoholics Anonymous has no opinion on outside issues; hence the A.A. name ought never be drawn into public controversy."

Tradition Eleven
"Our public relations policy is based on attraction rather than promotion; we need always maintain personal anonymity at the level of
followed by a formal statement defining the group and its goals which usually includes a general statement that "whatever is said in the room stays in the room" and a discussion of the importance of anonymity and confidentiality. The meeting continues with new member "introductions," a reading from the A.A. "Big Book," and the "pitches" from various members who share stories of their problems and how they are dealing with their addictions.

The twelve-step programs are prominent and well-publicized. Twelve-step groups emphasize a strong ideology based on the concept that personal change can only be achieved through spiritual belief or conversion. Members need to relinquish control in order to adopt new empowering behaviors. Overcoming addiction is the singular goal within the twelve-step program. The focal concern is "the members' obsessive preoccupation with something to the point where that focus takes over a major part of their lives. . . . One reaches bottom when one becomes so defeated in the obsession that one can no longer continue it without suffering grave emotional, social, or physical consequences." A.A.'s goal is to deal with that preoccupation.

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The Serenity Prayer is: "G[-]d, grant me the serenity to accept the things I cannot change, the courage to change the things I can and the wisdom to know the difference." Kurtz, supra note 38, at 100.

See KATZ, supra note 33, at 27.

The "Big Book," as it is commonly referred to, is one of the two books group members are asked to purchase. The Big Book tells of A.A.'s founding and then lists several stories of people who recovered by embracing the twelve-step principles. See ALCOHOLICS ANONYMOUS WORLD SERVS., INC., ALCOHOLICS ANONYMOUS (3d ed. 1976) [hereinafter ALCOHOLICS ANONYMOUS]. The other book members are asked to buy is TWELVE STEPS and Twelve Traditions. See TWELVE STEPS, supra note 12; cf. Overeaters Anonymous, Orientation for New Sponsors (n.d.) (unpublished document, on file with author) (assigning readings in O.A.'s Big Book).

See KATZ, supra note 33, at 13 (noting A.A.'s worldwide recognition).

See Kurtz, supra note 38, at 116 (stating that "[t]welve-[s]tep groups hold in common the idea of spiritual growth as an antidote to unhealthy and obsessive efforts to control pain and anxiety").

See TWELVE STEPS, supra note 12, at 21 (discussing Step One, which requires one to admit that she is powerless over the problem of alcoholism).

Kurtz, supra note 38, at 97-98.

See TWELVE STEPS, supra note 12, at 150 (describing Tradition Five and A.A.'s singular purpose to help the suffering alcoholic).
Another important tenet of the twelve-step program is the specific prohibition against taking action on political or outside issues.74 Twelve-step groups take no position on public issues or legislation, even if the legislation relates to the addiction;75 the rationale is that the group is designed solely to help each individual with her addiction. The treatment is highly specific. For the members of most twelve-step programs, the goal is sobriety. In this context, sobriety does not mean mere abstinence from alcohol or other compulsions, but rather refers to abstinence coupled with a fundamental change in behavior.76 Once the member concedes she has no control over her habit, she surrenders to it and learns to live a moderate and serene life. The twelve-step programs are part of an ongoing process.77 One does not conquer the addiction, and a change in behavior does not mean that the person is cured. The person is always in a continuous process of learning about herself and recovering.78 There is no judgment involved when one "falls off the wagon." Failure is an expected and accepted part of the growth process. The amount of time spent in the program varies considerably by person.79 Many people who leave the twelve-step program return to it at a later point in their lives.80

A.A. is strongly influenced by religion since it incorporates much of the Protestant Oxford Group methodology into its program.81 The A.A. growth process requires "self-disclosure of personal failures and transgressions, making restitution to the people one ha[s] wronged, and so forth. Taking personal responsi-

74 See id. at 176 (discussing Tradition Ten and A.A. 's reluctance to take stances on outside issues).
75 See id. at 176-77.
76 See Kurtz, supra note 38, at 98 (explaining that the term "sobriety" is commonly misunderstood in the twelve-step context).
77 See KATZ, supra note 33, at 20 (stating that membership in a twelve-step program can be a lifelong commitment).
78 See Kurtz, supra note 38, at 98 (describing the continuous nature of the "healing" process).
79 See KATZ, supra note 33, at 20 (stating that there is no known average length of membership in twelve-step programs).
80 See id. (describing the reality that people who drop out of A.A. often return to the group when they need it).
81 The Oxford Group was an evangelical Christian group. Many alcoholics, including Bill Wilson, founder of A.A., had been attending Oxford Group meetings with the hope of resolving their alcoholism through spiritual healing. But in 1937, Wilson, along with other alcoholics, split from the Oxford Group and formed a group aimed solely at helping recovering alcoholics. The group later became A.A. See Kurtz, supra note 38, at 94-95.
bility in such ways has a long history in the Christian tradition of confession, and self-disclosure in self-help groups does have a confessional aspect.\textsuperscript{32}

Twelve-step programs have been successful for many people seeking to deal with their obsessions. A.A. and other programs, however, are not without their critics. For many, A.A.'s religious orientation is alienating. Some medical professionals have criticized A.A. "as being cultlike and unscientific and as having a middle-class white male bias."\textsuperscript{33} This criticism could stem partially from the fact that many professionals are displeased with A.A.'s refusal to allow professionals to lead twelve-step programs.\textsuperscript{34} Despite the criticism, twelve-step programs have helped thousands to deal with their addictions and do serve as an important outlet for many down-and-out individuals.\textsuperscript{35} Many of those people who have been helped see no other way of remaining "clean." One member of N.A. who had passed through a number of detoxification rehabilitation centers said: "It is the only way I found that works."\textsuperscript{36}

2. Non-Twelve-Step Programs

As A.A. developed, other self-help groups formed to meet various needs. These new, largely parent-organized groups banded together to publicize the problems with which they dealt, to demand that professionals pay more attention to their problems, and to influence government spending and policy.\textsuperscript{37} The Association for Retarded Children is just one example of the myriad of groups that formed in the 1950s and 1960s.\textsuperscript{38} Although non-twelve-step groups

\textsuperscript{32} Katz, supra note 33, at 27.
\textsuperscript{33} Kurtz, supra note 38, at 116.
\textsuperscript{34} Tradition Two states that there is no leader other than the Higher Power, and Tradition Eight requires that A.A. remain free from professional influence. See Twelve Steps, supra note 12, at 132, 166. A.A., however, does not disparage professionals. Quite to the contrary, 56\% of members of A.A. do receive some sort of outside assistance with their addiction. See Alcoholics Anonymous World Servs., Inc., supra note 43.
\textsuperscript{35} Concerned academics have argued that twelve-step programs have not empirically been proven effective, and that the blind acceptance of the twelve-step strategy coupled with a failure to search for alternative treatment is problematic. A.A. has been evaluated extensively and, although outcomes from the studies conflict, the general consensus is that A.A. offers an effective method of recovery for those who continue beyond a few meetings. See Kurtz, supra note 38, at 107-08.
\textsuperscript{36} Bohlen, supra note 24, at 34.
\textsuperscript{37} See Katz, supra note 33, at 14.
\textsuperscript{38} Other groups that were formed later include Parents for Parents, designed to help parents cope with their child's illness, and SHARE, a support group for women
have been created for many similar reasons and share many features with twelve-step groups, non-twelve-step programs differ in some significant ways. The most prominent difference between the two methodologies is that the non-twelve-step paradigm does not have an underlying spiritual ideology. The twelve-step groups, unlike the non-twelve-step groups, have a very rigid step-by-step plan on how to treat addictions and compulsions; non-twelve-step groups reject such rigidity. The twelve-step program structure takes its form from its spiritual underpinnings. Non-twelve-step programs, by contrast, are often less structured and do not necessarily have a prescribed strategy towards "growth."

Non-twelve-step programs do not require any admission of powerlessness. Indeed, many groups actively reject such a notion as defeatist. Instead, non-twelve-step self-help groups emphasize "learning and sharing coping skills through group process, mutual support, practical information and advice, role examples, and so forth."

The amount of time a member spends in a non-twelve-step self-help group is often short since her involvement with the group is temporary. Once her crisis is resolved, that member leaves the group. Unlike A.A. or other twelve-step programs, there is no

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89 See id. at 14-15.
90 See id. at 19.
91 Recall, for example, that A.A. begins each meeting with a recitation of the Serenity Prayer. See supra note 66 and accompanying text; see also supra note 81 and accompanying text (discussing the Protestant origins of A.A.).
92 Without the religious background to center the organization, non-twelve-step groups use other means of unifying in order to achieve their end goals. Act-Up and the Association for Retarded Children, for example, use politics as a center around which to structure their groups; however, differences in political ideologies require flexibility, thus contributing to less structure in non-twelve-step groups. See KATZ, supra note 33, at 19-21 (describing the "free-wheeling discussion and interchanges" that occur in the non-twelve-step setting).
93 See id. at 19 (stating that non-twelve-step groups are usually nonideological and further explicating that "non-12-step groups do not include a more or less prescribed meeting structure: they do not normally expect their members to pursue a phased path of personal growth and change"); see also KATZ & BENDER, THE STRENGTH IN US, supra note 34, at 120-21 (contrasting "highly ideologized organizations . . . [with] those which do not have such a strong set of enforced beliefs and procedures" and concluding that "the style of the latter type of organization is freer and more open to individual variation and influence than the A.A. type").
94 See KATZ, supra note 33, at 19-20 (stating that "[s]ome non-12-step groups are concerned that accepting the idea of powerlessness" could be inhibiting and may ultimately prevent people from "gain[ing] greater control over their own bodies and therefore over their day-to-day living").
95 Id. at 19.
stigma attached to moving on from the group; non-twelve-step members are expected to make it on their own.\(^5\)

Non-twelve-step programs are often led by professional counselors or leaders.\(^6\) Nonetheless, group therapy sessions may be termed "self-help" despite the presence of a professional since members of the group need the presence of their peers to help them deal with their own problems.

Sociopolitical action is an important part of the non-twelve-step group.\(^7\) This is because non-twelve-step groups, like professional therapy, focus more on the underlying cause of the problem, rather than the problem itself.\(^8\) Groups that do not espouse the twelve-step paradigm are often organized as lobbying organizations or political action groups. Often, they will support political candidates or specific legislation.\(^9\) By contrast, twelve-step programs avoid publicity.\(^10\)

Although both twelve-step groups and non-twelve-step groups can fit into any one of Levy's four-part "primary focus" typology,\(^1\) twelve-step groups tend to be Type I groups, striving to modify behaviors, not merely to socialize or support their members. Non-twelve-step groups focus on the "bigger picture" and help members look at what might be causing the problematic behavior. Twelve-step groups do not provide that same level of support; they focus singularly on treatment of the addiction, without attempting to address the underlying causes.\(^2\)

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\(^5\) For example, a person in Parents Without Partners may join the group after recently divorcing. She may need to make new divorced friends, to discuss feelings of rejection and fears about being a single parent. After a few months, the parent has usually adjusted to the single life. The group may not be needed any longer, and the group is happy for that person, because she has learned to cope with the underlying stress. *See id.* at 20.

\(^6\) *See* Alan Gartner & Frank Riessman, *Introduction to The Self-Help Revolution* 17, 22 (Alan Gartner & Frank Riessman eds., 1984) (discussing how, although many self-help groups, including A.A. and its offshoots, are antagonistic to professionals, most self-help groups involve professional participation).

\(^7\) *See* KATZ, *supra* note 33, at 20-21 (describing the differences between twelve-step and non-twelve-step groups relating to their opinions on outside issues).

\(^8\) *See* REMINE ET AL., *supra* note 40, at 15 (stating that therapy might explore "deep seated issues").

\(^9\) *See* KATZ, *supra* note 33, at 19-21.

\(^10\) *See supra* notes 12, 65 (explaining Tradition Ten). For a more detailed discussion of the differences between the two methodologies, *see* KATZ, *supra* note 33, at 19-21.

\(^1\) *See supra* notes 56-59 and accompanying text.

\(^2\) *See* POWELL, *supra* note 42, at 158 (describing the "highly singular purpose" of N.A. by quoting a brochure that states, *"Narcotics Anonymous does not . . . provide
Different self-help groups are designed to serve different needs. Despite their varying methodologies and goals, some significant overlap exists among self-help groups generally. Self-help groups rely on the group dynamic to help members improve self-esteem and overcome feelings of isolation, loneliness, and victimization. The groups support their members' changes in attitude, behavior, and role in society. This growth contributes to the development of an improved self or to the formation of a mechanism to cope with a society unsympathetic to certain behaviors, beliefs, or lifestyles.\textsuperscript{103} These groups provide continuing acceptance, tolerance, and support even if the behaviors described are shameful or abhorrent.\textsuperscript{104}

C. The Importance of Confidentiality Within the Self-Help Setting

Anonymity and confidentiality are vital to the functioning of certain self-help groups.\textsuperscript{105} For example, because only about twenty members attend a typical G.A. meeting:

People notice newcomers right away, ask them how they got there, and tell them that they do not have to speak if they do not want to. A chairperson calls the meeting to order and says, "Anything said in the room stays in the room." New members are introduced. Members are asked, in turn, to read from the meeting booklet. The chairperson then begins the meeting asking for "therapy."

Therapy frequently proceeds according to the following formula: "I am [Joe or Joan].\textsuperscript{106} I am a compulsive gambler." The person then says how long it has been since he or she made the last bet and tells the story of how gambling interfered with his or her past life (for example, "I lied to my wife and my kids. I

\textsuperscript{103} See generally KATZ, supra note 33, at 24-28 (noting that self-help groups provide their members with emotional support and the opportunity to learn adaptive skills that can help them cope with their problems and deficiencies).

\textsuperscript{104} See id. (describing the function of self-help group support).

\textsuperscript{105} See supra note 65 (reciting Traditions Eleven and Twelve which describe the importance of anonymity in the A.A. context). This Comment advocates giving a privilege to certain self-help groups. Not all self-help groups require a privilege in order to function. For a discussion of how to determine which groups should be accorded a privilege, see infra part IV.A.

\textsuperscript{106} Last names are not used in order to preserve confidentiality. See KATZ, supra note 33, at 27 (explaining that confidentiality is symbolized by the word "anonymous" in the group's name and by identifying members only by their first names).
stole from my boss. When I came into the room, I owed everybody. I was on the verge of suicide

The information disclosed at self-help group meetings is highly personal in nature. People are willing to share their experiences in order to overcome their problems and help others. However, in order for these types of programs to function, anonymity and confidentiality are crucial. Every meeting for A.A., G.A., and N.A. begins with the chairperson's statement that what is discussed in the room should never be revealed outside of it. At meetings, members stand up and speak, but reveal only their first names; moreover, once they leave, they rarely disclose their status as members. At G.A., this confidentiality is especially important, because many compulsive gamblers have lied to family and friends about "finances and financially related illegal activities, such as check forgery, fraud, and theft and embezzlement at the workplace." Discussion of these illegal activities is an important part of treatment. The expectation, or even mere possibility, that the information could be introduced against them in a court of law would inhibit open discussion. Although the example is especially clear in the G.A. context, the same holds true for many other treatment programs. To support their habit, alcoholics steal, drive drunk, assault people, and sometimes even kill

107 Henry R. Lesieur, Working with and Understanding Gamblers Anonymous, in WORKING WITH SELF-HELP, supra note 33, at 237, 238 (alteration in original) (footnote added).

108 See, e.g., KATZ, supra note 33, at 27 (stating that "[m]embers disclose to other members very personal experiences, thoughts, emotions, or fantasies that they normally would not reveal to other people").

109 See Borkman, supra note 48, at 23-24 (stating that one of the hallmarks of a self-help group is the telling of individual stories which enables members to share their strengths and hopes with each other, thus helping them to overcome their difficulties).

110 See KATZ, supra note 33, at 27 (describing the "compact of confidentiality").

111 See supra note 105.

112 See Breslin, supra note 1, at A2 (stating that members seldom reveal their A.A. membership status to the outside world); see also KATZ, supra note 33, at 27 (stating that personal revelation in the self-help setting is bolstered by the anonymity feature of these groups).

113 Lesieur, supra note 107, at 243 (emphasis added).

114 See, e.g., KATZ, supra note 33, at 27 (stating that mutual support and aid in the face of shocking and shameful revelations are key features of support groups); TWELVE STEPS, supra note 12, at 55 (describing Step Five which requires alcoholics to admit "to G[-]d, to ourselves, and to another human being the exact nature of our wrongs").
in bouts of alcoholic rage. Drug addicts illegally possess and use drugs. Funding the habit can be very costly, leading people to beg, borrow, and steal. The efficacy of self-help groups would undoubtedly be diminished if members’ disclosures were made public.

No empirical studies assessing the importance of confidentiality within the strictly nonprofessional self-help setting have been conducted. Numerous studies, however, have been conducted in the individual therapy and group therapy contexts. For example, Ralph Slovenko, while conducting a discussion with members of a psychotherapy group, became keenly aware of the extent to which patients valued confidentiality. Most members of a group therapy session stated that they would refuse to testify, or would try to find some legal loophole that would enable them not to testify, about disclosures made to them by other members. One

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115 See, e.g., supra notes 1-10 and accompanying text (discussing the Cox case).
116 See infra notes 118-22 and accompanying text (surveying various studies which find that lack of confidentiality in therapy has a negative effect on participants' willingness to disclose information).
117 Ralph Slovenko is a psychiatrist, professor, and author of numerous works and studies on confidentiality in the therapeutic context.
118 See Ralph Slovenko, Group Psychotherapy: Privileged Communication and Confidentiality, 5 J. Psychiatry & L. 405, 405 (1977). Professor Slovenko talked with members of a group therapy session in Grosse Pointe Park, Michigan. In meeting with them, he asked them about the importance of confidentiality. All members expressed their belief that everything that was revealed in the therapy session was held in confidence among members. Professor Slovenko asked the group how they would react if a group member admitted to killing someone. One woman responded that she “would think the responsibility would be for the therapist to do what she thought was necessary. I wouldn’t feel that I was responsible.” Id. at 444.

When asked what they would do if called to testify against one another, one man responded: “For any group to function they must do so with trust and confidence in what the members say. Therefore I would not say anything. I would try not to answer any questions.” Id. at 450. That same man suggested raising competency issues, hearsay exceptions, and the Fifth Amendment as potential ways of precluding his testimony. A different man stated:

I might be closer to W-3 [a female member of the group] than to my own wife in some ways. Here it is possible for me to go very, very deep and have a very deep attachment and relationship with this woman who is not my wife . . . . I therefore wouldn’t be competent to testify against her.

Id. at 450-51. When Slovenko explained that a spousal privilege exists for husbands and wives but not for members of self-help groups, one woman stated: “I would tell them to go to hell. I would not testify against anyone in here. I wouldn’t care if I was mad at them or not. I just wouldn’t do it.” Id. at 451. Although this experiment was conducted in a professional group therapy context, similar issues and feelings arise in the self-help context. There is a clear expectation, stated at the beginning of every meeting, that “what is said in the room remains in the room.” See
member stated, "I would feel as with anything else brought up here, that it is confidential within the group. The main thing for us is to feel free to express ourselves and have confidence in each other to do that." Although not dispositive, the various studies indicate that potential candidates for therapy and current therapy patients would be substantially less inclined to reveal certain aspects about themselves, particularly those with legal ramifications, if confidentiality could not be guaranteed.

Another empirical study, conducted in Texas, ascertained the importance of confidentiality and privilege between therapists and their patients. The study, conducted after Texas passed a psychotherapist-patient privilege, revealed some pertinent conclusions. The study indicated that patients do not rely directly on privilege laws in deciding whether to seek psychotherapy or make disclosures. They do, however, rely on the therapist's ethical "promise" to

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120 See Robert G. Meyer & Steven R. Smith, *A Crisis in Group Therapy*, 32 AM. PSYCHOL. 638, 639-40 (1977) (finding that 81.8% of respondents to a questionnaire on confidentiality indicated that they would refuse to enter group therapy or would be substantially less inclined to speak freely without the assurance of confidentiality); Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 916, 919-20, 929 (1982) (showing that although people indicated no greater willingness to talk when they knew confidentiality was assured, they did indicate dramatically reduced willingness to talk about sensitive subjects with legal consequences once told that no legal privilege existed); Deborah E. Willage & Robert G. Meyer, *The Effects of Varying Levels of Confidentiality on Self-Disclosure*, 2 GROUP 88, 94-95 (1978) (finding that subjects were more open in answering personality inventories when confidentiality was assured than when they thought the results of the survey might be released); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1262 (1962) [hereinafter Note, *Functional Overlap*] (suggesting that many people are unaware of current privilege law but that a substantial number of people felt that they would be much less willing to disclose personal information in therapy if they knew that a psychotherapist was legally obligated to release information learned during a therapy session); Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165, 183 (1978) (noting that one quarter of therapists found that patients were reluctant to discuss violent tendencies when patients were informed of the possibility of the breach of the confidence); see also David J. Miller & Mark H. Thelen, *Knowledge and Beliefs About Confidentiality in Psychotherapy*, 17 PROF. PSYCHOL.: RES. & PRAC. 15, 18 (1986) (finding that 42% of the study's subjects maintained that if they were told that the information they revealed was not kept completely confidential, they would exhibit reluctance and discretion before speaking to a therapist); Howard B. Roback et al., *Guarding Confidentiality in Clinical Groups: The Therapist's Dilemma*, 42 INT'L J. GROUP PSYCHOTHERAPY 81, 81 (1992) (indicating that therapists who had not discussed confidentiality with their patients were likely to view such discussions as having an inhibiting effect on group process).
remain silent regarding their disclosures. 121 Therefore, "if as a result of a change in the law, therapists did disclose some confidential information, and if many actual or potential patients learned of these disclosures, people might indeed be deterred from confiding in psychotherapists." 122 Although this study may not be generalizable to the self-help context, there is no reason to assume that members would act any differently if their confidences were revealed by fellow members rather than by a professional. The member is concerned with confidentiality, after all, not with who is making the disclosure.

The data derived from these studies are difficult to evaluate. 123 Nevertheless, the studies support the common sense notion that people, though unaware of their legal rights, expect confidentiality from their therapists and their peers in group therapy. Members are unconcerned with how or why the confidentiality is maintained, but deem it essential in order to assure free disclosure and proper group functioning.

II. THE THEORETICAL PERSPECTIVE: WHAT IS PRIVILEGED AND WHY?

The law generally favors disclosure of all relevant and material information. 124 However, because certain relationships have his-

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121 See Robert Weisberg & Michael Wald, Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform, in PSYCHOTHERAPY AND THE LAW 157, 193 (Louis Everstine & Diana S. Everstine eds., 1986) (stating that patients rely on ethical conduct and not privilege law for assurances of confidentiality).

122 Id. The Texas study was conducted by a lawyer and a psychiatrist. It was distributed to therapists, psychotherapy patients, judges, and a random group of university students who could represent potential psychotherapy patients in the state. Interestingly, the psychotherapists themselves revealed that they were ignorant as to the status of confidentiality and privilege under Texas law. Instead of focusing on legal issues, most patients seemed certain that therapists would not reveal confidences because of their personal ethics. See id. Similarly, members of a self-help group expect that the moral promise not to reveal what occurs at a meeting will prevent disclosure of any statements revealed regarding anything ranging from thoughts and feelings to illegal acts. See Slovenko, supra note 118, at 450 (quoting group members' observations about revealing information that is stated with the expectation of confidentiality).

123 Many of the samples were not representative. Most subjects were college students, who are generally more aware of their rights, and of the legal system and who might not represent the average potential member of group therapy.

124 See JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 264-65 (Boston, Little, Brown & Co. 1896) (stating that evidentiary laws presuppose the admission of all relevant evidence). Therefore, courts consistently
torically been highly valued in our society, the courts and legislatures have been willing to make certain exceptions to protect the sanctity of those relationships. Thus, it is useful to consult court decisions and statutory law to understand when and why a privilege has been recognized. According to Federal Rule of Evidence 501, the federal courts may develop privilege doctrine by applying the common law "in light of reason and experience." Congress approved Rule 501 with the intention of allowing federal and state courts to develop the privilege laws on a case-by-case basis.

Recognize that privileges are an exception to the presumption of disclosure. See, e.g., United States v. Nixon, 418 U.S. 683, 710 (1974) ("Whatever their origins, these exceptions [privileges not to testify in court] to the demands for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

See Green & Nesson, supra note 29, at 689-90 (discussing rationales for privilege law); see also Hoffman, supra note 11, at A1 (noting that the principle behind privilege law is the protection of certain relationships).

Rule 501 provides:

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.

FED. R. EVID. 501.


Before approving the rules, Congress deleted nine nonconstitutionally required (but not unconstitutional) privileges proposed by the Court and instead chose to maintain the status quo. See Proposed Fed. R. Evid. 502-510, 56 F.R.D. 183, 234-56 (1972). The proposed rules would have created specific privileges for communications made in the context of certain activities or relationships, including: required reports, lawyer-client, psychotherapist-patient, husband-wife, priest-penitent, political vote, trade secrets, secrets of state, and identity of informers. Since Congress could not agree to pass all of the proposed privileges, and the disagreement threatened to prevent acceptance of the entire Rules package, Congress adopted Rule 501. See S. REP. NO. 1277, 93d Cong., 2d Sess. 6 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7053. The action of Congress in approving this general rule on privileges should not be understood as a categorical disapproval of the aforementioned proposed statutory
A. The Rationales Behind Privilege Law

There are various rationales espoused for determining when and how a privilege is obtained. This Comment identifies three rationales, namely the utilitarian, privacy, and functionalist rationales, and discusses how each has been applied to justify privileges that are accepted as part of modern jurisprudence.

1. The Utilitarian Approach

"The utilitarian approach theorizes that the protection of confidentiality is justified because the benefits to society are greater than the costs associated with confidentiality." In determining whether a relationship ought to be deemed privileged, rather than merely confidential, John Henry Wigmore posits four con-

privileges. Rather, Congress's "action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis." Id. at 11, reprinted in 1974 U.S.C.C.A.N. at 7059.

A fourth justification, the power rationale, also exists. Some argue that the reason certain privileges exist in our society is because a power elite has determined that the relationships in which they participate are worthy of special protection. See Green & Nesson, supra note 29, at 696; 23 Charles A. Wright & Kenneth W. Graham, Evidence § 5422, at 673-79 (1980). For example, doctors, lawyers and religious leaders all hold a great deal of power within modern day political structures. As a result, they enjoy certain benefits that are not granted to all people. The choice of the word "privilege" connotes the essence of this rationale. See 23 id. at 675-76.

Although the power theory has some merit, it does not justify privileges or suggest a means for determining when privileges should be granted. Instead, the power theory articulates why any privileges exist when privileges impede the judicial process. See Developments in the Law—Privileged Communications, 98 Harv. L. Rev. 1450, 1493 (1985) [hereinafter Developments] (explaining that the power rationale provides merely a theory, and not a justification, as to why so few privileges exist). Nor does the rationale explain why teachers, social workers, and rape crisis counselors, three groups that are traditionally comprised of minorities and women, have been recently extended privileges in many states. See J. Alexander Tanford & Anthony J. Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. Pa. L. Rev. 544, 592 (1980) (indicating that all but five states have passed some form of rape shield law). Furthermore, the theory does not provide any sort of test for creating new privileges. Because the power rationale does not enjoy widespread support, it will not be discussed further in this Comment. For a more complete description of the Power Theory, see 23 Wright & Graham, supra, § 5422, at 673-79.

Steven R. Smith, Medical and Psychotherapy Privileges and Confidentiality: On Giving with One Hand and Removing with the Other, 75 Ky. L.J. 473, 477 (1987) (discussing the utilitarian rationale and the Wigmore criteria as applied to both a class of communications and an individual).

See supra note 27 (explaining the difference between confidentiality and privilege).
tions. These four conditions comprise the "utilitarian" approach, because they are designed to determine the utility of providing a privilege in light of the importance of the truth-finding function of the court.\textsuperscript{132} Wigmore's principles have been cited by other legal authorities and currently enjoy widespread judicial support as the \textit{sine qua non} of determining whether a privilege should obtain.\textsuperscript{133} Wigmore's criteria are:

(1) The communications must originate in a \textit{confidence} that they will not be disclosed.

(2) This element of \textit{confidentiality must be essential} to the full and satisfactory maintenance of the relation between the parties.

(3) The \textit{relation} must be one which in the opinion of the community ought to be sedulously \textit{fostered}.

(4) The \textit{injury} that would inure to the relation by the disclosure of the communications must be \textit{greater than the benefit} thereby gained for the correct disposal of litigation.\textsuperscript{134}

2. The Privacy Rationale

A second approach to justifying certain privileges has been to invoke the constitutionally recognized right to privacy.\textsuperscript{135} "This

\textsuperscript{132} The utilitarian rationale has been used to justify various privileges, including the attorney-client, husband-wife, priest-penitent, and doctor-patient privileges. See infra part II.B; see also 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2332, at 642 (John T. McNaughton ed., rev. ed. 1961) (discussing the spousal privilege); 8 id. § 2396, at 878 (justifying a priest-penitent privilege); 8 id. § 2380a, at 829-30 (opposing a doctor-patient privilege because of the relationship's failure to meet all four prongs of the test). But see Trammel v. United States, 445 U.S. 40, 51 (1980) ("[T]he physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.").

\textsuperscript{133} See CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 72, at 171 (Edward W. Cleary ed., 3d ed. 1984). Most courts considering testimonial privileges have relied extensively on Wigmore's test. See, e.g., In re Doe, 711 F.2d 1187, 1193 (2d Cir. 1983) (applying the Wigmore test and rejecting the proposed psychotherapist-patient privilege); Garner v. Wolfinbarger, 430 F.2d 1093, 1100-03 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971) (applying Wigmore's criteria to recognize a qualified attorney-client privilege for a corporate client).

\textsuperscript{134} 8 WIGMORE, supra note 132, § 2285, at 527.

\textsuperscript{135} The right to privacy may be characterized as the right of the individual to be free in his private affairs from governmental surveillance and intrusion[,] . . . the right of an individual not to have his private affairs made public by the government[,] . . . [and t]he right of an individual to be free in action, thought, experience, and belief from governmental compulsion.

is a conception of privacy that stands apart both from the calculating Hobbesian self and from calculating utilitarian society. The protection of privacy through the grant of a testimonial privilege is not meant as a means of assuring competent treatment, but rather as an end in itself. Privacy proponents argue that Wigmore's analysis overlooks important human values such as privacy, dignity, intimacy, anonymity, and individuality.

Privacy permits people to share intimacies and ideas upon their own terms, and thus to establish those mutual reciprocal relinquishments of the self that underlie the relations of love, friendship, and trust. . . . The ability to shield ourselves from public view permits the exchange of intimate confidences necessary to establish a secure love or trust.

Preserving some degree of privacy in certain relationships in order to protect these values is as significant as, and perhaps more significant than, appropriate fact-finding in litigation. Therefore, a privilege should be accorded to these relationships.

Kurland, The Private I: Some Reflections on Privacy and the Constitution, U. CHI. MAC., Autumn 1976, at 7, 8. The constitutionally recognized right to privacy includes due process rights under the Fifth and Fourteenth Amendments, as well as the Fourth Amendment protection against illegal searches and seizures. See U.S. CONST. amends. IV, V, XIV. The Supreme Court has crafted the right to privacy in numerous cases. See, e.g., Stanley v. Georgia, 394 U.S. 557, 567-68 (1969) (concluding that the right to privacy includes the right to receive information and ideas regardless of their social worth); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (concluding that prohibiting the use of contraception unconstitutionally infringes on the right to marital privacy); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (describing the Fourth Amendment right to privacy as protecting the "right to be let alone"). See generally Jed Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737 (1989) (summarizing the development of the right to privacy doctrine).

Sanford Levinson, Testimonial Privileges and the Preferences of Friendship, 1984 DUKE L.J. 631, 643 (arguing for a "privilege-ticket" in which thereby enabling each person could choose which of her communications should be privileged).

See GREEN & NESSON, supra note 29, at 692.


Although many courts have been reluctant to justify testimonial privileges on the basis of the right to privacy, some courts have done so. See, e.g., In re Zuniga, 714 F.2d 632, 640-42 (6th Cir. 1983), cert. denied, 464 U.S. 983 (1984) (noting the existence of a constitutional right to privacy in the psychologist-patient relationship, but stating that it was not absolute and would not protect certain information such as patient identity, dates of treatment, and length of treatment); Caesar v. Mountanos, 542 F.2d 1064, 1068 (9th Cir. 1976), cert. denied, 430 U.S. 954 (1977) (stating that the psychotherapist-patient privilege can be justified under the constitutional right to privacy); Roberts v. Superior Court, 508 P.2d 309, 313 (Cal. 1973) (holding that the psychotherapist-patient privilege should be broadly construed in light of the constitutional right to privacy); In re Lifschutz, 467 P.2d 557, 567 (Cal. 1970) (holding
In *Griswold v. Connecticut*, the Supreme Court struck down a statute prohibiting the use of contraception as an unconstitutional invasion of this right to privacy. Certain relationships, by virtue of their depth and intimacy, fall within constitutionally delineated zones of privacy, and therefore merit special protection and should be accorded a privilege. The Supreme Court extended the right to privacy to information in *Whalen v. Roe*. In *Whalen*, the Court considered a state law requiring physicians to disclose the names of patients to whom they had prescribed dangerous drugs. A group of patients and doctors challenged the statute because they believed it would discourage patients from seeking necessary medical care for fear of negative reputational repercussions. The Court refused to extend a privilege to the specific information requested in the case. Nevertheless, the Court seized *Whalen* as an opportunity to redefine and clarify the right to privacy, and asserted that the right to privacy did encompass the “individual interest in avoiding disclosure of personal matters” as well as a second interest in making certain kinds of fundamental decisions.

Analysis under the privacy rationale raises many difficulties, especially in light of the Court’s recent reluctance to expand individual rights under due process, Fourth Amendment, and general privacy rationales. Still, the privacy interest has been that a patient’s right to confidentiality with his psychotherapist is protected by the zone of privacy created in *Griswold*; *In re “B”*, 394 A.2d 419, 424-26 (Pa. 1978) (holding, in a child custody dispute based on the privacy right embodied in the Pennsylvania Constitution and United States Constitution, that a doctor would not be held in contempt of court for refusing to release a patient’s psychiatric records).

140 381 U.S. 479 (1965).

141 See id. at 485-86.


143 429 U.S. 589, 599-600 (1977) (stating that the two-pronged constitutional right to privacy protects the right of an individual not to have her private affairs made public by the government and to be free from governmental compulsion with regard to decision-making).

144 See id. at 600.

145 See id. at 603-04.

146 Id. at 599.

147 See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (stating that liberty interests must be fundamental and traditional to be protected by the right to privacy);
invoked as a justification for various legal interests, and should be accorded weight in the context of testimonial privileges as well.¹⁴⁸

3. The Functionalist Rationale

Functionalists maintain that privilege law, if it is to be consistent, must accord similar protections to relationships that are functionally alike.¹⁴⁹ "Principally, functional arguments attack normative distinctions made between functionally similar relations. The success of this type of argument depends upon persuading the

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¹⁴⁸ Bowers v. Hardwick, 478 U.S. 186, 192-96 (1986) (refusing to accord a privacy right to protect homosexual sodomy); In re Search Warrant (Sealed), 810 F.2d 67, 71-73 (3d Cir.) (employing a balancing test and concluding that the seizure of medical records pursuant to a warrant that offered confidentiality protections constituted a valid intrusion and was not a violation of Whalen privacy), cert. denied, 483 U.S. 1007 (1987); J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981) (holding that although the Supreme Court recognizes a right to privacy, such a right does not extend to "the general right to nondisclosure of personal information"). The Fourth Amendment privacy component is distinct from Griswold and its progeny and from the Whalen two-pronged right to privacy which relied on due process rights. The Court has been trying to narrow Fourth Amendment privacy as well as due process and informational privacy. See, e.g., Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451-53 (1990) (concluding that the degree of subjective intrusion imposed by checkpoints on motorists is minimal); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 671-72 (1989) (stating that the nature of public employment may lessen expectations of privacy). The Court embraced "the right to be let alone" as the dominant principle of the Fourth Amendment. This made privacy the dispositive factor of how and when the amendment would be applied. See Scott E. Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?," 94 COLUM. L. REV. 1751, 1757-63 (1994) (describing the demise of individual rights and differentiating between Fourth Amendment privacy and due process privacy). Nonetheless, the privacy rationale still presents a compelling argument for privilege law. Although privacy doctrine is constantly fluctuating, it consistently protects and encourages the development and maintenance of important relationships.

¹⁴⁹ The "right to be let alone" and the right to a degree of intimacy in certain relationships are rights encompassed within the right to privacy. Privacy, therefore, provides a compelling justification for according a testimonial privilege to relationships that fall within the zone the Court has delineated as private. For a more extensive discussion of the privacy rationale, see Thomas G. Krattenmaker, Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence, 62 GEO. L.J. 61, 85-94 (1973) (analyzing the argument that testimonial privileges serve to protect important individual privacy interests); David W. Louisell, Confidentiality, Conformity and Confusion: Privileges in Federal Court Today, 31 TUL. L. REV. 101, 110-15 (1956) (discussing privileges rooted in common law and stating that privacy is necessary to preserve these relationships); Louisell & Sinclair, supra note 142, at 51-53 (critiquing and defending the psychotherapist-patient privilege as falling under the zone of privacy protected by the Constitution).

¹⁴⁹ See Note, Functional Overlap, supra note 120, at 1234-46 (explaining that an attorney assumes many functions and arguing for an attorney-client privilege from a functionalist perspective).
legal decision-maker to adopt a social vision that makes the normative distinction appear arbitrary and unfair."150 The functionalist rationale cuts across lines of professional orientation and protects only the function, not the profession itself.151

Determining what functions deserve protection rests in part on an assessment of societal values and priorities. If society has chosen to protect certain functions, then fairness requires that all people performing that function ought to be afforded the same privileges that attach to it. For example, a spouse is someone with whom one shares love, for whom one will care, and in whom one will confide and trust. In fact, however, most family members serve a similar function. Parents and children, as well as siblings, also provide each other with love, care, and trust. Thus, to the extent the parent-child or sibling relationship is analogous to the spousal bond, functionalists have argued for a privilege protecting all family members rather than just one’s spouse.152

Similarly, communications between professionals who provide "treatment" and their clients or patients have historically been privileged. When a person goes to an attorney, the attorney-client communications are made in the context of seeking a "cure" for the problem, in the form of legal assistance. Likewise, a person goes to a clergymen to find spiritual "healing," to a doctor for medical "assistance," and to a psychotherapist for mental-health "treatment." Communications for which protection is sought must relate to the necessary treatment of a type of ailment, dilemma, or addiction. Social workers and counselors perform a treatment role that is functionally indistinguishable from those played by professionals already enjoying a legal privilege.153 Thus, extending the privilege

150 Developments, supra note 129, at 1491.
151 See Robert M. Fisher, The Psychotherapeutic Professions and the Law of Privileged Communications, 10 WAYNE L. REV. 609, 612 (1964) (advocating the creation of a privilege to protect specific functions within a relationship rather than to protect a profession).
152 See, e.g., In re Agosto, 553 F. Supp. 1298, 1325 (D. Nev. 1983) (arguing that there is no rational reason for distinguishing the marital relation from the parent-child relation); see also Ausburn, supra note 135, at 195-200 (presenting arguments for family testimonial privileges).
153 See, e.g., Allred v. State, 554 P.2d 411, 425-26 (Alaska 1976) (Rabinowitz, J., concurring) (focusing on the function of therapy in determining whether to grant a privilege to counselors and stating that "[i]t is not necessarily relationships with psychiatrists or licensed psychologists that ought to be sedulously fostered; rather, what should be fostered is the therapeutic relationship which looks toward improvement of mental health").
to these groups is both proper and consistent in light of society’s recognition of their importance and their functional similarity to doctors, attorneys, clergymembers, and others who already enjoy legally privileged communications.\textsuperscript{154}

\textbf{B. Currently Recognized Evidentiary Privileges and Their Supporting Rationales}

Having discussed the underlying rationales for granting a privilege, it is useful to understand how these rationales are applied in practice. Thus, this section will discuss some of the more widely accepted evidentiary privileges and their underlying rationales.

1. Attorney-Client Privilege

"Confidentiality between lawyer and client is a privilege established in legal history, written in the code of professional responsibility for the American Bar Association and adopted as law in 48 of the 50 states. The oath of admission to the bar—proposed by the ABA and adopted in many states—requires lawyers to 'solemnly swear' that 'I will maintain the confidence and preserve inviolate the secrets of my client.' Violation of the oath can lead to disbarment."\textsuperscript{155}

\textsuperscript{154} Critics of the functionalist perspective argue that almost any relationship could be included in this rationale. They contend that the privilege is overbroad. When one speaks to a friend, for example, one is seeking “counseling.” However, a distinction may be drawn between friends and counselors. When one turns to a friend, one is not seeking the assistance of the friend \textit{qua} counselor; one is seeking the support of a friend \textit{qua} friend. This distinction is crucial. The protected function is the counseling function—the \textit{treatment}—not merely support or advice one derives from a listening friend. Furthermore, the friendship can serve its function even without complete disclosure, whereas relationships for which treatment is the primary function require unfettered disclosure in order to serve their intended purpose.

In any case, this Comment advocates extension of a privilege only to groups that merit such status under all three rationales. This limitation mitigates against the overbreadth weakness of the functionalist rationale and responds to the slippery-slope concern. \textit{See infra} notes 302-03 and accompanying text (addressing the counter-argument that extending the privilege to self-help groups would create a slippery-slope). For a more complete discussion of the functionalist rationale, see Fisher, \textit{supra} note 151, at 637-41 (discussing how present legislation is both overinclusive and underinclusive with regard to certain privileges); \textit{see also} Note, \textit{Functional Overlap}, \textit{supra} note 120 (exploring the results of a survey that indicate that there is substantial overlap between the functions of attorneys and other professionals).

\textsuperscript{155} \textsc{TOM ALIBRANDI \\ \\ \\ \\ \& \textsc{FRANK H. ARMANI}, PRIVILEGED INFORMATION 4 (1984)} (quoting Bryce Nelson, \textit{Ethical Dilemma: Should Lawyers Turn in Clients?}, \textsc{L.A. TIMES}, July 2, 1974, at 1, 15).
"[T]he attorney-client privilege may be invoked . . . with respect to: (1) A communication (2) Made between privileged persons (3) In confidence (4) For the purpose of obtaining or providing legal assistance for the client."156

Confidentiality enhances client-lawyer communications and hence the effectiveness of the services provided because of three interlocking assumptions.157 First, complying with legal obligations and vindicating rights are assumed to be matters too complicated for a person without legal training. Second, it is assumed that in order for a client to know the full extent of her rights and obligations, she must fully disclose to her lawyer all of the facts known to her.158 Finally, it is assumed that "clients would be unwilling to disclose personal, embarrassing, or unpleasant facts, . . . unless they could be assured that neither they nor their lawyers could be called later to testify" regarding such communications.159

When these underlying assumptions are put in the framework of Wigmore's criteria, it is clear that the attorney-client privilege is primarily based on the four-part utilitarian/Wigmore analysis. First, the attorney-client communication originates in confidence—those who come to attorneys anticipate that their conversations will not be disclosed. In fact, lawyers have a professional duty to safeguard confidential client information.160

Second, the confidence between attorney and client is necessary in order for the relationship to function properly.161 The American system of justice is an adversarial one.162 In order for justice to be done under an adversarial system, each side must have effective assistance of counsel.163 In order to represent his client effectively

157 See id. § 118 cmt. c at 75.
158 Full disclosure by clients also serves a clear public interest by contributing to the efficient adjudication of trials and other proceedings. See id. at 75-76.
159 Id. at 76.
160 See id. § 111 cmt. a.
161 See id. § 118 cmt. c at 75 (asserting that it is widely assumed that clients would not be as candid with their lawyers if they suspected their communications might expose the “client[s] to adverse evidentiary risks”).
and assist the client in making informed decisions, a lawyer must know all facts relevant to his client's case. By providing a privilege, the client is encouraged to communicate fully and frankly with the lawyer even as to legally damaging subject matter. For example, if the attorney is not certain of his client's guilt or innocence, he cannot effectively represent the client, thus burdening judicial resources.

Third, the community believes that the relationship is important because it allows for the better functioning of the judicial process upon which the community relies. Despite the fact that the attorney-client privilege unquestionably results in the exclusion of certain evidence that might be highly probative, society has determined that this is a relationship worthy of protection.

Lastly, the benefit to society outweighs the injury. A guilty individual would have no incentive to share the confidence with his attorney, if there were no guarantee that the communication would be protected. If no protection existed, the attorney would not have the information. He would be unable to assist in the fact-finding inquiry as in the case in which the privilege prevented him from disclosing the information he had obtained by virtue of his professional position. Thus, society would lose very little by providing the privilege since the attorney would not be able to provide any assistance either to society or to the client without knowledge of the event.

164 See Restatement, The Law Governing Lawyers § 118 cmt. c at 75 (stating that the general assumption is that "in the absence of such full disclosure by a client . . . a sufficiently full measure of legal assistance cannot be realized"); United States v. Narciso, 446 F. Supp. 252, 272 (E.D. Mich. 1976) (stating in a discovery order that counsel needs to know certain information to be effective).

165 See Model Rules of Professional Conduct Rule 1.6 cmt. 4 (1994) (explaining that confidentiality helps to promote the full disclosure between attorney and client that is necessary for competent representation).


167 In addition to society's reliance on the effective functioning of the judicial system, another reason why society may view the privilege as valuable is that it may make clients more inclined to discuss their putative activities before taking action. Society has not only an interest in the efficient operation of the judicial system, but also an arguably stronger interest in deterrence. See Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 10 (2d ed. 1986) (noting that one aim of the criminal law is to prevent harm to society). Society's interest in granting the privilege, then, may actually outweigh the probative value of the evidence. Thus, by granting this "safe harbor," an attorney can provide advice that might prevent future crimes from occurring.
Because of its historic underpinnings and the clear rationale for providing a privilege, all jurisdictions have some form of attorney-client privilege, whether by statute, common law, or evidence code.

2. Spousal Privilege

The spousal, or husband-wife, privilege is another privilege that was recognized at common law. The early privilege was premised on the concept that a husband and wife were one and the same—a woman at that time was not considered to have a legal existence separate from her husband's.

In *Hawkins v. United States*, the Supreme Court addressed the privilege and held that a wife could not testify against her husband. More recently, however, the Supreme Court, in *Trammel v. United States*, held that the rationale behind *Hawkins* was outdated and that the privilege swept too broadly:

No other testimonial privilege sweeps so broadly. The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communications. These privileges are rooted in the imperative need for confidence and trust. 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. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if

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168 The attorney-client privilege may also be justified under the functionalist rationale discussed in *supra* part II.A.3. Attorneys wear numerous hats, one of which is that of counselor. As a counselor, an attorney is engaging in a function society has deemed valuable, that of counseling for treatment of a problem.

169 *See* RESTATEMENT, THE LAW GOVERNING LAWYERS tit. A, introductory note at 72 (noting that in every American jurisdiction neither a client nor a client's attorney can be made to testify to reveal the contents of their confidential communications). For further discussion of the history of the attorney-client privilege, see MCCORMICK, *supra* note 133, § 87, at 204; 8 WIGMORE, *supra* note 132, § 2290, at 542; Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 CAL. L. REV. 1061 (1978).

170 *See* Trammel v. United States, 445 U.S. 40, 52 (1980) (describing the foundation of spousal privileges as premised on the concept that women were chattel and thus were denied legal status); Hawkins v. United States, 358 U.S. 74, 75 (1958) (stating that there was a prevailing fiction that a husband and wife were one person).


172 *See* id. at 78-79.

the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.174

Until Trammel, the husband-wife privilege protected not merely confidential but all communications between spouses. This broad exclusion, the Court held, was unacceptable given the predominant role accorded to truth-finding in the judicial process. The end result was a narrowing of the spousal privilege. Instead of vesting the privilege in the hands of the spouse revealing the information, the privilege was granted to the spouse who was told the information.175 Therefore, it was the choice of the listener to decide whether or not to testify. The spouse who was told the damaging information could not be precluded from testifying by the spouse who revealed the information.176

The privacy rationale provides a compelling justification for the husband-wife privilege. The proponents of the rationale do not provide any clear test for determining whether a relationship falls within the "zone of privacy" except to say that "the scope of [the] private sphere includes those highly personal relationships and activities whose just moral independence requires special protection from a hostile public interest."177 One may, however, gain insight from the Supreme Court's holding in Griswold v. Connecticut.178 The Griswold Court dealt specifically with privacy in the marital context. The Court explained that "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."179 Since marriage is an association clearly coming within the zone of privacy protection, the husband-wife privilege is easily justified under this rationale.180

174 Id. at 51.
175 See id. at 53.
176 See id.
178 381 U.S. 479 (1965).
179 Id. at 486.
180 Note that there is also an argument for applying a utilitarian rationale to this privilege. In order for the marital relationship to be successful, each spouse must feel certain that he or she can trust the other. Marriage is unquestionably a relationship that is highly valued by our society. Furthermore, the injury created by extending the privilege is outweighed by the benefit. This is so for two reasons. First, the harm inflicted on society as a result of the breakup of the family would likely be greater
3. Priest-Penitent Privilege

It is generally agreed that there was no priest-penitent privilege at common law. The privilege does, however, arise by statute. The priest-penitent privilege is now firmly rooted in modern jurisprudence.

It should first be noted that the priest-penitent privilege is justifiable under the privacy rationale. For example, the court in Keenan v. Gigante explained that the priest-penitent privilege must be construed to "encourage uninhibited communications between persons standing in a relation of confidence and trust." Additionally, the Communion Office from the Anglican Church illustrates the important role privacy plays in its church: "And if
there be any of you whose conscience is troubled or grieved in anything, lacking comfort or counsel, let him come to me... and confess and open his grief secretly....\textsuperscript{187} The information being shared is highly personal in nature. The relationship is not simply a private one, it is a sacred one. Thus, this communication should be privileged under a privacy rationale. "[S]ociety's interest in assuring the development of religious institutions would be damaged if the privacy of penitential communications were not respected."\textsuperscript{188}

The priest-penitent privilege may also be justified from a functionalist perspective. In \textit{Trammel v. United States},\textsuperscript{189} a case that dealt with spousal privilege, the Supreme Court stated that there is a "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."\textsuperscript{190} Under most laws, in order for communications to spiritual advisors to be deemed privileged, the statements must be "(1) made to ministers, priests or rabbis; (2) in their professional character; (3) in the course of discipline enjoined; (4) by the rules of practice of the denomination to which they belong."\textsuperscript{191} More importantly, some privilege laws require that the communication be penitential in nature.\textsuperscript{192} The scope of the privilege, although often questioned, is usually held to include communications made in "pursuance of that church discipline which gives rise to the confessional relation."\textsuperscript{193}

The fact that the priest’s role is to console and treat the penitent and that the communication must be penitential in nature cuts in

\textsuperscript{187}JOHN T. MCNEILL, A HISTORY OF THE CURE OF SOULS 220 (1951).

\textsuperscript{188}Dubbelday, supra note 27, at 790 n.91 (quoting Jacob M. Yellin, The History and Current Status of the Clergy-Penitent Privilege, 23 SANTA CLARA L. REV. 95, 113-14 (1983)).

\textsuperscript{189}445 U.S. 40 (1980).

\textsuperscript{190}Id. at 51.

\textsuperscript{191}BUSH & TIEANN, supra note 183, at 102.

\textsuperscript{192}See id.

\textsuperscript{193}In re Estate of Socder, 220 N.E.2d 547, 568 (Ohio Ct. App. 1966) (stating that the priest-penitent privilege only applies when made in pursuance of the discipline enjoined); see also Ball v. State, 419 N.E.2d 137, 139-40 (Ind. 1981) (holding that no privilege attaches if confession and confidentiality are not tenets of the church). Numerous statutes have made the "discipline enjoined" language part of their statutory requirement for a priest-penitent privilege. See, e.g., ALA. CODE § 12-21-166 (1986 & Supp. 1994) (stating that not all communications with clergy are privileged, and that "[t]o be privileged, the communication must be penitential in character and must be made to the clergyman in his professional capacity").
favor of finding a privilege under the functionalist rationale. The priest is providing counseling and treatment, functions that could not be served unless secrecy is inviolable. Since these are functions society has chosen to protect, communications between priest and penitent, made in pursuance of those functions, ought to be privileged.

4. Doctor-Patient Privilege

Like the priest-penitent privilege, the doctor-patient privilege arises by statute rather than as a result of common law. Nevertheless, it is one of the most widely recognized privileges. The privilege between a doctor and patient was enacted because of a realization that a "physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment."
Patients may be deterred from seeking medical treatment altogether if they fear betrayal.\textsuperscript{200} The doctor-patient privilege, justifiable under the functionalist rationale, rests on the premise that the responsibilities involved by virtue of the professional position, counseling and treatment, mandate that some kind of confidentiality be maintained and that any threat to that confidentiality would hinder the ability of the professional in her functional role of treating and counseling.\textsuperscript{201} In order to narrow the scope of the physician-patient privilege, many courts have limited the privilege to communications made in the course of seeking treatment.\textsuperscript{202} This limitation fits neatly with the functionalist rationale.\textsuperscript{203} Only those communications made in the course of seeking treatment for an ailment, which is the function society seeks to protect, are meant to be protected.\textsuperscript{204}

\begin{footnotesize}
\begin{enumerate}
\item See State v. George, 575 P.2d 511, 515 (Kan. 1978) (holding that the doctor-patient privilege is necessary for adequate medical treatment). Empirical support for this proposition is uncertain. For this reason, critics argue that the doctor-patient privilege should not obtain under the utilitarian rationale’s second and fourth prong. Indeed, Wigmore was a vigorous opponent of the physician-patient privilege. \textit{See} 8 \textit{WIGMORE, supra} note 132, \S\ 2380a, at 830; \textit{see also} United States v. University Hosp., 575 F. Supp. 607, 611 (E.D.N.Y. 1983) (“There is . . . no doctor-patient evidentiary privilege in a federal court proceeding except with respect to an element of a claim or defense as to which state law supplies the rule of decision.”), \textit{aff’d}, 729 F.2d 144 (2d Cir. 1984). Though proponents disagree, \textit{see} Whalen v. Roe, 429 U.S. 589, 595 (1977) (stating that withholding the privilege would be damaging because people would refuse to go to doctors to receive necessary narcotic treatments if identifying information were released), justification under the utilitarian rationale is suspect.

\item See People v. Deadmond, 683 P.2d 763, 769 (Colo. 1984) (en banc) (holding that the privilege encourages patients to disclose all information which is necessary in order to secure adequate medical treatment).

\item \textit{See}, \textit{e.g.}, Hinote v. Aluminum Co. of Am., 463 N.E.2d 531, 534 (Ind. 1984) (holding that to be privileged, the communications must be necessary for treatment or diagnosis); State v. Mayhew, 170 N.W.2d 608, 615 (Iowa 1969) (same); Beasley v. Grand Trunk W.R.R., 282 N.W.2d 401, 410 (Mich. 1979) (holding that information necessary for a “fruitful and complete” examination was encompassed within the doctor-patient privilege).

\item \textit{See}, \textit{e.g.}, Binder v. Ruvell, No. 52C2535, (Ill. Cir. Ct. June 24, 1952), \textit{reported in}, 150 \textit{JAMA} 1241 (1952), \textit{quoted in} Fisher, \textit{supra} note 151, at 639 (distinguishing between the functions of a physician and a psychiatrist and noting that a privilege should only be afforded to the latter).

\item This limitation is also in accord with the privacy rationale. Not all aspects of the relationship are private, but conversations dealing with one’s health have often been deemed within the private sphere. \textit{See}, \textit{e.g.}, Whalen v. Roe, 429 U.S. 589, 598 (1977) (noting that individuals have an interest in avoiding disclosure of personal matters as well as an interest in the independence to make certain kinds of important decisions).
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C. The Psychotherapist-Patient Privilege: A Parallel

The psychotherapist-patient relationship is, in many ways, similar to the therapeutic relationship that exists between members of a self-help group. In scrutinizing the rationales given in support of the psychotherapist-patient privilege, the need for some kind of self-help privilege becomes more apparent.

Psychotherapy enables a patient or client to discuss fears and anxieties in order to overcome them and cope with them. In order for a psychotherapist-patient relationship to flourish, it is imperative that a client be able "fully to disclose the nature and details of his illness . . . without fear of later revelation by one in whom he placed his trust and confidence." The Supreme Court, when it endorsed the Proposed Federal Rules of Evidence on privilege (which were eventually rejected by Congress), agreed that there was a need for a psychotherapist-patient privilege. As one federal district court judge explained, "[t]he commentators have recognized [that a] . . . psychotherapist's capacity to help her patients is completely dependent on their willingness and ability to talk freely.

1. The Psychotherapist-Patient Privilege Is Justifiable Under Wigmore's Utilitarian Analysis

Approaching the law of privilege from a utilitarian perspective, it is clear that communication made in the context of the psychotherapist-patient relationship should be protected. First, the

205 See Louis Everstine, Law and Psychotherapy: The State of the Relationship, in PSYCHOTHERAPY AND THE LAW, supra note 121, at 3, 3 (stating that psychotherapy consists of talking for the purpose of alleviating emotional distress); see also Fisher, supra note 151, at 619 (describing the nature of the psychotherapeutic relationship).
208 The Advisory Committee for the Supreme Court's Proposed Rules of Evidence in its comments on the psychotherapist-patient privilege noted that "there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment. . . . A threat to secrecy blocks successful treatment." Proposed Fed. R. Evid. 504 advisory committee's note, 56 F.R.D. at 242 (quoting GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT NO. 45, CONFIDENTIALITY AND PRIVILEGED COMMUNICATIONS IN THE PRACTICE OF PSYCHIATRY 92 (1960)).
communication arises in confidence—patients tell their psychotherapists their most intimate of secrets.

Second, confidentiality is necessary for the success of the relationship. It is imperative that the patient be able to discuss her problems fully. Since people will be less willing to talk if they are aware that their confidences will not be legally protected from compelled disclosure, the relationship cannot survive without confidentiality. The relationship between a psychotherapist and her patient is premised on the ability of the two to communicate. Without communication, there is no relationship. The connection between client and professional would be nonexistent without the promise of full confidentiality.

Third, the relationship is one that should be fostered since society is better off when its citizens are mentally healthy. Furthermore, society should foster the relationship because the client is seeking to heal herself. To the extent that one of the goals of the criminal justice system is to reform criminals so that they will not desire or need to commit further crimes, litigation becomes unnecessary since rehabilitation is already occurring as a result of the relationship.

Finally, the injury to the relationship from compelled disclosure outweighs the benefit to the litigation from such a disclosure. As noted above, society benefits to the extent that clients use the psychotherapist relationship to heal themselves and prevent themselves from committing future crimes. If the primary purpose of the justice system is either rehabilitation or protecting society from criminals, then society's benefit from granting the privilege clearly outweighs the cost to the litigation, since the benefits of the

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210 See Donald Schmid et al., Confidentiality in Psychiatry: A Study of the Patient's View, 34 HOSP. & COMMUNITY PSYCHIATRY 353-54 (1983) (stating that a study of 30 patients revealed that a statistically significant number of the patients would be upset and less likely to share information if their confidences were released to a court); Shuman & Weiner, supra note 120, at 894 (arguing that individuals would hesitate to consult psychotherapists if no privilege existed); Note, Functional Overlap, supra note 120, at 1262. But see Ralph Slovenko, Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope, 23 CATH. U. L. REV. 649, 650 (1974) (arguing that there has been no showing that privilege is necessary for the effective functioning of the relationship).


212 See LAFAVE & SCOTT, supra note 167, at 24 (describing rehabilitation as one of the theories behind punishment and criminal law).
litigation—rehabilitation and protecting society from dangerous criminals—are already being realized.

2. The Psychotherapist-Patient Privilege
   Is Justifiable Under the Privacy Rationale

Some commentators have argued that the psychotherapist-patient privilege is justified not through the utilitarian rationale, but as a legitimate privacy concern. The Supreme Court has recognized that the due process right to privacy encompasses an individual's right to control the dissemination of information about herself. Also included within this right is the right to the inviolability of the body, and the right to make decisions about one's body free from governmental interference. Since the right to privacy has been applied most often in the context of decisions regarding one's bodily health, autonomy, and reputation, it seems that information regarding those same types of decisions (treatment for mental and physical ailments) should also be protected within this zone of privacy. Some courts have agreed. The patient's privacy interest is legally relevant and should be accorded weight when determining whether or not to grant a privilege to a psychotherapist-patient relationship.

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214 See Rochin v. California, 342 U.S. 165, 173-74 (1952) (holding that forcible pumping of a suspect's stomach violated his Fourteenth Amendment due process right).

215 See Paul v. Davis, 424 U.S. 693, 713 (1976) (holding that matters relating to procreation, contraception, and family relationships are protected from governmental interference by the privacy interest); Roe v. Wade, 410 U.S. 113, 152-54 (1973) (determining that the decision to have an abortion falls within the right to privacy).

216 See Caesar v. Mountanos, 542 F.2d 1064, 1068 n.9 (9th Cir. 1976) (holding that the constitutional right to privacy protects the confidentiality of psychotherapist-patient relations), cert. denied, 430 U.S. 954 (1977); In re Lifschutz, 467 P.2d 557, 567-68 (Cal. 1970) (stating that a patient's right to preserve the confidentiality of communications made to a psychotherapist is based on both the California Evidence Code and the right of privacy embodied in the federal Constitution); In re "B", 394 A.2d 419, 425 (Pa. 1978) (concluding that the psychotherapist-patient privilege is rooted in the Pennsylvania and United States Constitutions).

217 For a more extensive discussion on the right to privacy and its application to the psychotherapist and physician privileges, see Developments, supra note 129, at 1545-48 (discussing the Supreme Court's recognition of privacy interests).
3. The Psychotherapist-Patient Privilege Is Justifiable Under the Functionalist Rationale

Those who argue from the functionalist perspective maintain that since psychotherapists perform a counseling function in aid of treatment, a function that has been deemed worthy of legal protection, the psychotherapeutic relationship merits a privilege. Most functionalists agree that the psychotherapist is not being given a privilege because of her professional occupation. Instead, the privilege is accorded only to those therapists who are acting in a counseling capacity. Similarly, the scope of the privilege should be limited to communications made in the context of the counseling relationship. In *Binder v. Ruvel* the court recognized that confidentiality is vital for the functioning of the psychotherapeutic relationship. Functionalists argue that a privilege should be accorded to those relationships that exist solely to serve a counseling function, and where confidentiality is necessary for that counseling to be effective.

* * *

The federal courts are in conflict regarding whether a psychotherapist-patient privilege exists. Despite the courts' confusion,
some form of psychotherapist-patient privilege has been adopted in the majority of states whether by statute or by the courts of

no psychotherapist-patient privilege exists because none was recognized at common law and stating that the courts should not create new privileges lightly). The Corona court’s refusal to create a new privilege could be a result of the Supreme Court’s muddled stance regarding whether and when federal courts may create noncommon law privileges. For an extensive discussion of the confusion, see Daniel J. Capra, *Psychotherapist-Patient Privilege and Federal Rules*, N.Y. L.J., Jan. 8, 1993, at 3; see also University of Pa. v. EEOC, 493 U.S. 182, 188-95 (1990) (reasoning that there should not be a privilege for information derived from a university’s confidential peer review process).

223 See, e.g., ALA. CODE § 34-26-2 (1975) (stating that confidential communications between licensed psychotherapists and clients are afforded the same privilege as those between attorney and client and explaining that disclosure of such communications is not mandated by law); ALASKA STAT. § 08.86.200 (1991 & Supp. 1994) (stating that a psychologist may not reveal communications with her client made in a professional capacity unless authorized in writing by the client or under other limited circumstances); ARIZ. REV. STAT. ANN. § 32-2085 (1992) (stating that licensed psychologists must not disclose confidential communications with their clients unless otherwise mandated by law); ARK. CODE ANN. § 17-96-105 (Michie 1992) (same as ALA. CODE § 34-26-2); COLO. REV. STAT. § 13-90-107(g) (1987 & Supp. 1994) (stating that a licensed psychologist, her staff, and persons who have participated in psychological therapy shall not testify regarding confidential communications without licensee’s consent); CONN. GEN. STAT. ANN. § 52-146c (West 1991 & Supp. 1995) (stating that, except as otherwise provided, “all communications shall be privileged and a psychologist shall not disclose any such communications unless the person or his authorized representative consents to waive the privilege”); FLA. STAT. ANN. § 90.503 (West 1979 & Supp. 1995) (stating that a patient may refuse to disclose and prevent others who are participating in the diagnosis or treatment of the patient from disclosing confidential communications arising out of such diagnosis or treatment); GA. CODE ANN. § 43-39-16 (1994) (same as ALA. CODE § 34-26-2); IDAHO CODE § 54-2314 (1994) (explaining that a licensed psychologist may not be examined in court about confidential communications with her client without written consent and that the psychologist-client relationship is afforded the same privilege as the attorney-client relationship); ILL. COMP. STAT. ANN. ch. 740, para. 110/10 (Smith-Hurd 1993) (stating that a therapist and her client have the privilege to refuse to disclose and prevent the disclosure of the client’s record or communications unless the patient introduces his mental condition as an element of the claim or defense and such testimony is not unduly prejudicial or inflammatory); IND. CODE ANN. § 25-33-1-17 (West 1993 & Supp. 1995) (preventing psychologists from revealing communications with their clients unless the communication relates directly to a homicide trial, a mental competency proceeding, a mental competency defense, a malpractice proceeding against a psychologist, or a proceeding to determine the validity of a will, or unless the psychologist has the express consent of the client); IOWA CODE ANN. § 622.10 (West Supp. 1995) (stating that a mental health professional may not testify about confidential communications with her client unless the client waives the privilege, or if the testimony is taken in a civil action in which the mental condition of the person in whose favor the privilege is given puts mental condition in issue); KAN. STAT. ANN. § 74-5323 (1992) (same as ALA. CODE § 34-26-2); MD. CODE ANN., CTS. & JUD. PROC. § 9-109 (1995) (applying a privilege unless, inter alia, the patient or her representative introduces her mental condition as a claim or defense, makes a claim of malpractice against the psychotherapist, or
waives the privilege); 

MASS. ANN. LAWS ch. 233, § 20B (Law. Co-op. 1986 & Supp. 1995) (stating that a patient may refuse to disclose and may prevent witnesses from disclosing any communications between the patient and psychotherapist relating to the patient's diagnosis or treatment); 

MICH. COMP. LAWS ANN. § 330.1750 (West 1992) (stating that a psychotherapist shall not disclose privileged communications about her client except in specified circumstances); 

MINN. STAT. ANN. § 595.02(g) (West Supp. 1995) (stating that a psychologist may not disclose professional conversations with a patient without the patient's consent); 

MISS. CODE ANN. § 73-31-29 (1995) (stating that a psychologist may not be examined regarding confidential patient information without the patient's consent); 

MO. ANN. STAT. § 337.055 (Vernon 1989) (stating that a licensed psychologist may not be examined or made to testify about privileged communications with her client); 

MONT. CODE ANN. § 26-1-807 (1993) (same as ALA. CODE § 34-26-2); 

NEB. REV. STAT. § 27-504 (1989 & Supp. 1994) (stating that a patient may prevent disclosure of confidential communications among herself, her psychologist, and other persons participating in diagnosis or treatment except where the information is relevant to a trial issue raised by the patient, to a proceeding to hospitalize the patient for her condition (where a judge orders that the patient's condition be analyzed), or to a proceeding regarding injuries to children or the unlawful acquisition of a controlled substance); 

NEV. REV. STAT. ANN. §§ 49-225 to -245 (Michie 1986 & Supp. 1993) (providing a patient with a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications regarding diagnosis and treatment); 

N.H. REV. STAT. ANN. § 330-A:19 (1995) (carving an exception to the privilege in cases in which involuntary emergency admissions to mental health institutions are at issue); 

N.J. STAT. ANN. § 45:14B-28 (West 1995) (linking the psychotherapist-patient relationship to an attorney-client relationship and preventing disclosure except in competency hearings, will validity hearings, and intestate succession disputes); 

N.M. STAT. ANN. § 61-9-18 (Michie 1993) (affording a privilege to communications made to a licensed psychologist and her staff); 

N.Y. CIV. PRAC. L. & R. 4507 (McKinney 1992) (placing the confidential communications and relations between a psychologist and her client on the same basis as those provided by law between attorney and client); 

N.C. GEN. STAT. § 8-53.3 (Supp. 1992) (giving the judge discretion to compel disclosure for the necessary administration of justice); 

OHIO REV. CODE ANN. § 4732.19 (Anderson 1994) (giving the same protection to communications between psychologist and patient as between physician and patient); 

OKLA. STAT. ANN. tit. 12, § 2503 (West 1993) (identifying exceptions to the physician-and psychotherapist-patient privilege for proceedings to hospitalize the patient for mental illness, court-ordered examination of the physical, mental, or emotional condition of the patient, and for proceedings in which the condition of the patient is an element of the claim or defense); 

OR. REV. STAT. § 40.230 (1988) (allowing the patient, guardian, conservator, or personal representative of the patient or the psychotherapist to claim the psychotherapist-patient privilege); 

R.I. GEN. LAWS § 5-37.3-4 (Supp. 1994) (providing that a psychologist may not disclose patient communications except in certain enumerated circumstances); 


UTAH CODE ANN. § 58-61-602 (Supp. 1995) (providing that a psychologist may not disclose confidential communications unless authorized by the client or mandated by state or federal law regarding child abuse reporting, abuse of disabled adults, reporting of a communicable disease, or other relevant laws); 

Vt. STAT. ANN. tit. 12, § 1612 (Supp. 1995) (providing that a mental health professional cannot disclose information acquired from a patient in a professional capacity, including joint and group counseling sessions); 

VA. CODE ANN.
those states. Thus, it is clear that the privilege should apply in the psychotherapist-patient relationship.

III. APPLICATION OF THE PRINCIPLE: THE NEED FOR A PRIVILEGE IN THE SELF-HELP CONTEXT

Having established the importance of confidentiality in the self-help setting, and having looked at the rationales for currently recognized privileges, this Comment will now turn to the question whether a privilege should be accorded in the self-help setting and whether such a privilege can be justified under the recognized rationales.

A. The Utilitarian Rationale

In applying the utilitarian rationale to the mutual aid context, many of the reasons for granting a privilege in the psychotherapist-patient context are applicable. Wigmore's four criteria demonstrate that a self-help privilege should be recognized.

§ 8.01-400.2 (Michie 1992) (providing a privilege for counselors, social workers, psychologists and their clients except in certain circumstances); WASH. REV. CODE ANN. § 18.83.110 (West Supp. 1995) (same as ALA. CODE § 34-26-2); W. VA. CODE § 27-3-1 (1992) (providing a privilege for information that may identify a patient except, inter alia, where there is a need for the information to be conveyed to medical staff for effective treatment or prevention of imminent danger or where the court finds that the information is sufficiently relevant to outweigh the need for confidentiality); WIS. STAT. ANN. § 905.04 (West 1993 & Supp. 1994) (providing for psychologist-patient confidentiality except in certain circumstances); WYO. STAT. § 33-27-123 (Supp. 1993) (providing for confidentiality for information exchanged among patient, psychologist, and her staff); CAL. EVID. CODE § 1014 (West 1995) (stating that a psychotherapist's patient (whether or not she is a party) has a privilege to refuse to disclose confidential communications); HAW. R. EVID. 504.1 (same as FLA. STAT. ANN. § 90.503); LA. CODE EVID. ANN. art. 510 (West 1995) (allowing a patient to refuse to disclose a confidential communication made for the purpose of advice, diagnosis, or treatment of a condition). Note that these statutes differ widely in scope. The definition of who is included within the term "psychotherapist" varies, as does the extent of the protection.


See supra part II.A (discussing the rationales). In applying the rationales to the self-help context, this Comment applies the rationales as if dealing with a self-help group like A.A. A discussion of which groups should be accorded a privilege and which are not so deserving follows. See infra part IV.A.
1. The Communication Is Made with the Expectation of Privacy

The first of Wigmore's criteria is certainly met because the communication is made with the expectation of absolute confidentiality. In many self-help group meetings, confidentiality is not only expected, it is demanded. Members are reminded at the beginning of each meeting that what they hear and discuss must never leave the confines of the discussion room. In group therapy where a professional is present, the professional explains to members of the group that confidentiality is expected.

Critics of the privilege argue that once a confidential communication is made in front of many people, the communication loses its secret character. In the context of therapy, however, people expect their secret to remain in the “magic room” despite the presence of large numbers of people. Although an A.A. meeting might be quite large, the expectation of one who steps into that room and participates in the discussion is that the revelations made are meant to be shared only with those in the group. Indeed, despite the size of some of these groups, confidentiality has been maintained in the twelve-step context. The fact that confidentiality is expected in the context of therapy is bolstered by the fact that the members of these groups are made aware of the confidentiality present in the discussion. In therapy, the confidentiality is maintained even when the professional is present.

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226 See supra part I.C (explaining how anonymity and confidentiality are vital to the functioning of certain self-help groups).
227 Most group leaders discuss issues of confidentiality with their groups. In group therapy, 87% of therapists reported discussing confidentiality. See Roback et al., supra note 120, at 89. At the beginning of all twelve-step group meetings, there is some mention of confidentiality when members are informed that “[a]nything said in the room stays in the room.” See Lesieur, supra note 107, at 238 (discussing a typical G.A. meeting).
228 See supra text accompanying note 67; see also supra part I.C (examining the centrality of confidentiality to self-help/twelve-step programs).
229 See Slovenko, supra note 118, at 407 (“Usually, group leaders make explicit the expectation of confidentiality, and they repeat it during the course of therapy.”).
230 See Appelbaum & Greer, supra note 21, at 311 (explaining that oftentimes the presence of a third party vitiates the expectation of confidentiality and thus the protection afforded by the privilege).
231 Slovenko, supra note 118, at 407 (using the term “magic room,” as did a patient, to describe the understanding that what goes on in the group therapy room remains separate and confidential).
232 Cf. Lesieur, supra note 107, at 238 (noting that the chairperson of G.A. meetings reminds the participants at each meeting that their revelations should be kept confidential); Slovenko, supra note 118, at 407 (reporting that members of a group therapy organization in Michigan believed that their confidences were kept within the group).
233 See, e.g., Slovenko, supra note 118, at 406 (explaining that the executive director of the National Commission on Confidentiality of Health Records noted that no
ality is maintained, despite the large number of people listening to the revelation, is an indication of just how important trust and secrecy are to members of the group.\(^{234}\)

Furthermore, the belief that the communication loses its status as confidential when made in front of the group reflects a profound misunderstanding of the way mutual aid therapy works.\(^{235}\) The very name provides some insight. Mutual aid works because people are sharing their problems with similarly situated people and in doing so are helping themselves. If these "third parties" were not there to listen, the therapy would be ineffective.\(^{236}\) Thus, the fact that the secret is shared within the group does not indicate a

incidents of group therapy breaches of confidentiality were reported to the Commission. Specifically in the twelve-step context, only two cases have been reported discussing breaches of confidentiality for statements made in the A.A. context. One of those cases is the Cox case discussed supra notes 1-10. The other case is State v. Boobar, 637 A.2d 1162 (Me. 1994). Ronald Boobar was found guilty of murdering a 14-year-old girl. Boobar challenged the admissibility of the statements of two witnesses, members of A.A., who \(voluntarily\) came forward to testify as to certain statements made by Boobar to them. One member testified that he tried to discourage Boobar from telling him about the events leading up to the murder because they did not relate to the A.A. program. \(See id.\) at 1169 n.6. But Boobar insisted. He maintained that his conversations with both members of A.A. were inadmissible pursuant to Maine's evidentiary privileges which protect disclosures made to licensed counselors and therapists. \(See id.\) at 1169. Boobar conceded that the A.A. members were not licensed counselors but argued that they were functionally similar and thus a privilege should obtain. \(See id.\) In making his functionalist argument, Boobar pointed to a statute that specifically stated that "the counsel and therapist licensure statute shall not be construed to prevent peer groups or self-help groups from performing counseling." \(Id.; see also ME. REV. STAT. ANN. tit. 32, § 13856(6)\) (West Supp. 1994) (providing that the licensure statute should not serve to hinder other counseling groups). The court stated that despite the language of the statute, it would be unreasonable to conclude that "the legislature intended to sweep information disclosed to peer counselor or self-help groups like AA within the privilege." \(Boobar, 637 A.2d at 1169\) (discussing the Maine privilege statute protecting counselors, ME. REV. STAT. ANN. tit. 32, § 13862 (West Supp. 1994)). The court also refused to draw a parallel to the evidentiary privilege governing disclosure to psychotherapists or to spiritual advisers. \(See id.; see also ME. R. EVID. 503(b) (psychotherapists), 505(b) (spiritual advisers).\) Although the court agreed that the A.A. members did serve some of the same functions that a therapist or member of the clergy might serve, the court refused to extend the evidentiary privilege to Boobar's disclosures to his fellow A.A. members. \(See Boobar, 637 A.2d at 1170.\)

\(^{234}\) \(See Slovenko, supra note 118, at 406 ("[W]ith so many people involved, such secrecy is remarkable.").\)

\(^{235}\) Many people believe that once a communication is made in the presence of "third parties," the communication loses its privileged status. Some have even gone so far as to say that the psychotherapist's privilege is also invalidated in the group-therapy context. \(See Appelbaum & Greer, supra note 21, at 311.\)

\(^{236}\) \(See KATZ, supra note 33, at 33 (stating that a "major factor in the effectiveness of self-help groups is the group process itself").\)
willingness to tell the secret to every person in the world, but rather to share it with people who can help the teller understand and deal with her problem. Therefore, Wigmore’s first criterion, that the communication be made with the expectation of confidentiality, is met.

2. Confidentiality Is Essential to the Satisfactory Maintenance of the Relationship

In order to prove the second of Wigmore’s criteria, that the confidentiality must be essential to the satisfactory maintenance of the relationship, more research must be conducted.297 Although no study has been conducted regarding the importance of confidentiality in the purely nonprofessional self-help setting, the studies conducted regarding confidentiality in the professional context have indicated a reluctance on the part of patients to disclose fully when aware that the information could be revealed to a court.298 This reluctance is equally applicable in the self-help context, if not more applicable. In the professional context, patients believe that at the very least professional ethical obligations will prevent disclosure of their communications.299 In the nonprofessional self-help context, no such professional responsibility exists and only the confidence members have in each other provides any protection. This common-sense notion, coupled with the few studies that have been conducted in the professional group therapy context, indicate that confidentiality is essential to certain self-help relationships.

3. The Community Believes that the Self-Help Group Should Be Fostered

The third criterion set forth by Wigmore is that the community must believe that the relationship is worth fostering. Twelve-step groups have enjoyed profound acceptance in the United States and the world over.240 The number of groups that emulate A.A.

297 For a discussion of studies regarding the importance of confidentiality in the therapeutic setting, see supra notes 118-22 and accompanying text.
298 See supra notes 118-22 and accompanying text.
299 See Smith, supra note 130, at 480-83 (listing ethical obligations for psychologists and social workers regarding breach of confidentiality); Weisberg & Wald, supra note 121, at 159 (arguing that most professions believe that confidentiality of information is ethically required); id. at 193 (stating that patients rely on ethical conducts for assurances of confidentiality).
240 See KATZ, supra note 33, at 1-3.
demonstrates society's endorsement of such organizations. Society has an interest in assuring that people are healthy as well as productive, stable members of society. Self-help groups have demonstrated their ability to help people control their antisocial behaviors. Gamblers, alcoholics, and drug addicts come to these meetings to talk about past acts of stealing, robbing, hurting people, and driving while intoxicated or under the influence of alcohol and drugs. Many of these people have seen psychologists in the past with little success. The self-help program is what gets them back on their feet. It is unquestionably in society's best interest to have an emotionally stable and physically healthy citizenry. Self-help groups are a cost-efficient means of achieving this goal.

4. The Injury to the Relationship from Disclosure Would Outweigh the Benefits to the Litigation Process

The fourth criterion asks if the injury to the relationship is greater than the benefit to the litigation. Given the number of calls that flooded the National Self-Help Clearinghouse after the reporting of the Cox case, it is clear that people are concerned about the lack of legal protection for their disclosures in the self-help setting.

Without the assurance of confidentiality, people will not share their secrets, especially revelations that may have legal ramifications. In the self-help context, this presents a very difficult problem. Part of the self-help process involves admitting past bad acts, and in the context of addiction, this will often mean admitting illegal bad acts. The healing process is thus profoundly affected if there is a reluctance to share information regarding past illegal behavior. Therefore, the decision not to accord a privilege

241 See supra text accompanying note 64.
242 See ALCOHOLICS ANONYMOUS, supra note 68, at 353-55 (telling the story of a teenager who went to A.A. after a drunk driving incident); supra notes 1-10 and accompanying text (discussing the Cox case).
243 See generally Bohlen, supra note 24, at 34 (discussing the benefits of self-help groups for cocaine addicts who cannot get medical treatment or for whom medical treatment was not successful).
244 See supra note 11 and accompanying text.
245 See supra note 210 and accompanying text.
246 See TWELVE STEPS, supra note 12, at 55-62 (discussing Step Five and the requirement to admit and take responsibility for past wrongs).
247 See Meyer & Smith, supra note 120, at 639-40 (concluding from the results of a questionnaire that in the absence of confidentiality, individuals would be less likely
results in the refusal of members to share information. If the information is not disclosed to the group, the information is just as unavailable as if a privilege were granted, yet the members receive none of the therapeutic benefits from mutual aid. Thus, we are thwarting the healing process and obtaining no benefit in terms of truth and justice! Furthermore, to the extent the benefit derived from the litigation is rehabilitation and prevention of future injury, the self-help relationship achieves these goals without the cost of litigation. The goal of the relationship is to control the behavior that led to the illegal acts. By fostering this relationship, rather than impeding it, some of the benefits of the criminal law process are still realized.

B. The Privacy Rationale

In applying the privacy rationale, it is again apparent that a privilege should be granted for certain self-help groups. People joining self-help groups are sharing intimate details of their lives. The Supreme Court, in recognizing zones of privacy, has specifically focused on relationships within the family and the sanctity of the human body. Membership in a group is like membership in a family, and some group members feel closer to each other than to their families. “The central citadels of privacy are said, by many, to be marriage, the relation of client and attorney, penitent and priest, and patient and physician; and if the law does not protect them, then, a fortiori, it is claimed, little of human privacy has warrant to claim protection.” The group therapy relationship is substantially similar to those relationships that the commentators believe fall within these “zones of privacy.” The mutual aid relationship is private in that it requires anonymity, to enter therapy and/or communicate certain information.

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248 See supra note 212 and accompanying text.
249 See Slovenko, supra note 118, at 407 (explaining that psychotherapy encourages the patient “to let down his guard and to reveal his inmost thoughts and feelings”).
250 See, e.g., Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (upholding the right to choose to use contraception in the marriage context).
251 See, e.g., Roe v. Wade, 410 U.S. 113, 154 (1973) (upholding a woman's right to an abortion).
252 See Slovenko, supra note 118, at 450 (relating a group therapy member's conversation in which the member stated that "I might be closer to W-3 [a member of the group] than to my own wife").
253 Id. at 423.
the disclosures made are often of an intimate and personal nature, and it is based on trust and mutual understanding.

The case law relating to the right to privacy has supported privileges for physicians and therapists. In *Whalen v. Roe*, the Supreme Court stated that people have a right to privacy that protects intimate and private details of their lives from being revealed. This right to informational privacy, if it protects any communications at all, should protect those communications made in the course of therapy. The California Supreme Court held just that in *In re Lifschutz*. Although the court was considering individualized professional therapy in *Lifschutz*, there is no difference between expectations of privacy for communications made in the course of individual therapy and those made in the group setting. Disclosures in both settings merit protection under the right to privacy.

Critics of the privacy rationale argue that disclosures made in the presence of large numbers of persons are, by definition, not private. Despite the large number of people present at these meetings, participants in group therapy expect that their relationships will remain confidential and private. Therefore, the relationship retains its private nature.

Critics of the privacy rationale also note that privacy doctrine has been narrowed, especially in Fourth Amendment cases.

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254 See supra notes 139-46 and accompanying text.
256 See id. at 599.
257 467 P.2d 557, 567 (Cal. 1970) (holding that a patient's right to confidentiality with her psychotherapist is protected within the zone of privacy recognized in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)).
258 See supra notes 231-34 and accompanying text.
259 See supra note 230 and accompanying text.
260 See supra notes 227-32 and accompanying text.
261 Only one case has addressed this issue. In *State v. Andring*, 342 N.W.2d 128, 134 (Minn. 1984), the Minnesota Supreme Court found that staff personnel who were present during group therapy could exercise the privilege. The court noted that "participants in group psychotherapy sessions are not casual third persons who are strangers to the...relationship. Rather, every participant has such a relationship with the attending professional..." Id. at 133. A handful of courts have utilized a similar rationale in cases involving family therapy. See, e.g., *Sims v. State*, 311 S.E.2d 161, 165-66 (Ga. 1984) (holding that the trial court correctly held that statements made by the victim in the course of marital therapy were privileged because "the victim was a necessary participant in the psychiatric sessions"); *Daymude v. State*, 540 N.E.2d 1263, 1268 (Ind. Ct. App. 1989) (holding that the psychotherapist-patient privilege extends to statements made by a defendant to his doctor in the course of court-ordered family counseling sessions).
262 See, e.g., *United States v. Miller*, 425 U.S. 435, 442 (1976) (finding that there is
Whalen's articulation of the informational privacy right, however, is premised not on Fourth Amendment privacy rights but on substantive due process privacy rights, an outgrowth of Griswold and its progeny.\textsuperscript{263}

Decisions regarding what information or which activities merit protection under a right-to-privacy rationale have been inconsistent and do not provide a bright line test\textsuperscript{264} to determine when the right to privacy outweighs other state interests. Without such a bright line test, the relationship between members of a self-help group—similar in many ways to a confessional or to a conversation between a doctor and patient—should be deemed private and thus protectable.

C. The Functionalist Rationale

The functionalist's perspective probably presents the strongest case for affording a privilege to those self-help groups that counsel their members. Society, by approving a privilege for attorneys, priests, doctors, and therapists, has made it clear that it places value on the counseling function. There are various ways in which the self-help group functions as a counselor to its members. The group provides:

1. Peer or primary group reference identification.
2. Learning through action; attitude and knowledge change through experience and action.
3. Facilitation of communication because members are peers.
4. Enhanced opportunities for socialization.
5. Emotional and social support of members by one another; reduction of social distance among them as compared with the distance traditionally maintained from agency staff or professionals.\textsuperscript{265}


\textsuperscript{264}But see United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980) (identifying eight factors to consider in making the privacy right determination: the type of record requested, the information contained therein, the harm in nondisclosure, the injury to the relationship generating the information, the adequacy of safeguards to prevent unauthorized disclosure, the need for access, statutory mandate, and public policy or public interest).

\textsuperscript{265}Katz, supra note 33, at 84.
There can be no doubt that functionally, self-help groups and psychotherapist-patient relationships are very similar. Both serve to achieve the same end—providing emotional relief in the form of counseling in aid of treatment to their patients. Although the self-help mechanism utilizes a different therapeutic process than the professional setting, the former process is effective for many people. Members of the group are counselors for one another just as much as a trained therapist is a counselor for her individual patient.

Critics argue that members of the self-help group are not serving the same function as professionals because they, unlike professional psychiatrists and psychologists, lack adequate training. The functionalist rationale, however, is not concerned with credentials; rather, those who advocate a privilege from the functionalist perspective are primarily concerned with the counseling and healing function itself. Furthermore, even though they lack formal training, members of self-help groups are able to counsel each other because they possess experiential training, an asset which professional therapists lack. This training, although different from the professional's, enables the self-help member to counsel other members just as effectively as a professionally trained therapist. The relationship is premised solely on its “curative” aspect.

Other critics argue that self-help members are not serving the same function as therapists, because those present at meetings are there to undergo treatment for themselves, not to help others. These critics miss the mark. Participants in group therapy serve a dual function—they are helping themselves by helping others. By sharing their stories with others, people are being empowered. No participant in group therapy is a mere bystander; rather, she is acting as both therapist and patient. The success of group therapy is in part due to the helping function. Thus, a patient can only treat herself by treating others. Just because the self-help member

266 See Kurtz, supra note 38, at 107-08 (reporting the general consensus that A.A. is an effective means to recovery for those who attend meetings over time); Meyer & Smith, supra note 120, at 639-41 (arguing that group therapy is effective and deserves to be accorded the same privilege as private psychotherapy); Bohlen, supra note 24, at 34 (documenting the triumphs of self-help groups for cocaine addicts).

267 See Fisher, supra note 151, at 612; Developments, supra note 129, at 1491.

268 See supra notes 44-49 and accompanying text (discussing experiential training).

269 See Powell, supra note 42, at 33-37 (discussing the effectiveness of autonomous self-help organizations based on various studies).

270 See id. at 127 (explaining that in the self-help context, “helping and receiving
is not serving a singular function is no reason to deny a privilege. Even though some members may be more functional than others, it is the group as a whole that provides the experiential insight which doctors often lack and which makes group therapy so successful.\textsuperscript{271}

* * *

Although few of the currently recognized privileges can be justified under all three rationales, a privilege for certain self-help groups\textsuperscript{272} is merited under the utilitarian, privacy, and functionalist rationales. Nevertheless, no state has been willing to provide such a blanket privilege.\textsuperscript{273}

IV. THE SELF-HELP GROUP PRIVILEGE: COUNTERARGUMENTS, LIMITATIONS, AND SUGGESTIONS

A. The Proposed Solution

There are some significant problems with according a privilege to all self-help groups. Some self-help groups are not designed to provide counseling. Other self-help groups do not require confidentiality in order to function effectively. Thus, not all self-help groups meet the criteria necessitated by the utilitarian, privacy, and functionalist rationales.

help, to an important extent, are inseparable\textsuperscript{\textendash}).

\textsuperscript{271} Also under the functionalist rationale, it may be noted that to the extent self-help groups serve a confessional function, they serve a function similar to priests. The self-help group meeting, like a confessional, is a place where one can talk of her transgressions without fear of ostracism or judgment.

\textsuperscript{272} This Comment does not advocate creating a privilege for all self-help groups. Only those groups that require confidentiality and that provide treatment for behavioral problems or addictions (Type I groups) are meant to be included within the privilege. For a discussion regarding which groups should be afforded a privilege, see infra part IV.A.

\textsuperscript{273} Only one state has explicitly provided a privilege for members of group therapy. See COLO. REV. STAT. § 13-50-107(g) (1987 & Supp. 1994) (stating that a licensed psychologist, her staff, and persons who have participated in psychological therapy shall not testify regarding confidential communications without consent). However, the statute only allows for the privilege to obtain when a licensed professional is present. The privilege is viewed as an extension of the psychotherapist-patient privilege. Requiring a professional's presence hardly seems justifiable given the similarity between professional and nonprofessional group therapy. It is the relationship of the parties involved, not the degree of education, that determines whether the relationship should be privileged. Nevertheless, the Colorado statute requires that a professional be present.
Providing a privilege in the group context would be a rare extension of a privilege to a relationship in which more than two people are involved. Because this extension could potentially represent a significant expansion of the law of privilege, the self-help privilege should only be afforded to those groups that merit a privilege under all three rationales.

To be accorded a privilege under the utilitarian rationale, the group would have to show that its members expect confidentiality and that confidentiality is an essential aspect of that group’s therapeutic process. The group would be required to demonstrate that the greater community deems self-help group relationship worthy of special protection. Finally, the group would have to show that disclosure would be so detrimental to its successful functioning as to overcome the presumption in favor of complete disclosure in litigation proceedings.\(^{274}\)

The privacy rationale would require the group to show that its purpose is to enable its members to share personal, intimate feelings and issues. An outer-focused group\(^{275}\) whose goal is to raise public awareness could not invoke a privilege under the privacy rationale. Only those groups that require the formation of an intimate relationship and only those communications made in confidence as part of this relationship would be protected.\(^{276}\)

Finally, the group would have to meet the functionalist rationale requirements. In order to be accorded a privilege under the functionalist rationale, the self-help organization would have to serve a counseling function that requires disclosure of, and provides treatment for, some type of behavioral problem. Only those communications made solely in pursuance of the therapeutic relationship would be privileged under the functionalist rationale.\(^{277}\)

\(^{274}\) See 8 WIGMORE, supra note 132, § 2285, at 527 (setting forth the utilitarian rationale).  
\(^{275}\) See supra notes 54-55 and accompanying text (describing differences between inner- and outer-focused groups).  
\(^{276}\) See Trammel v. United States, 445 U.S. 40, 51 (1980) (requiring communications to be confidential in nature in order for them to merit a privilege); TWELVE STEPS, supra note 12, at 65 (listing Traditions Eleven and Twelve which require anonymity in the A.A. relationship).  
\(^{277}\) See supra note 221 and accompanying text; supra note 202 (listing cases in which the doctor-patient privilege was accorded only when the communications were made in the course of seeking counseling or treatment); cf. supra text accompanying note 192 (requiring the priest-penitent communication to be functionally pertinent in order to obtain a privilege).
1. To Whom Does the Privilege Belong?

The privilege should lie with the self-help group member whose confidence is sought to be disclosed. It is not the role of another group member to determine when a confidence may or may not be betrayed. If one member has stated something in the therapeutic context, it is that member who may choose when and if that confidence may be revealed, not those to whom she entrusted her revelation.278

2. The Privilege Itself

The privilege advocated could be enacted by a legislature in the following form:

A privilege vests in a member of a self-help group, to prevent other members of that group from testifying about disclosures made in the context of the group relationship, when and only when:

1. The self-help group meets the utilitarian rationale set forth by Wigmore:
   "(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 ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit

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278 This is the way most courts have traditionally extended privileges. There is a reluctance on the part of many courts to accord the privilege to the professional rather than the person disclosing the information. See, e.g., In re Lifschutz, 467 P.2d 557, 572-73 (Cal. 1970) (providing a privacy rationale justification for creating a psychotherapist-patient privilege in the patient but refusing to extend a privilege directly to the therapist). Only the priest-penitent privilege and the husband-wife privilege vest the privilege in the hands of the listener, and this is so only in some states and/or in certain types of cases. See, e.g., FLA. STAT. ANN. § 90.504(3) (West 1979) (stating that there is no privilege in cases brought by one spouse against another or in certain criminal proceedings); KY. REV. STAT. ANN. § 209.060 (Michie 1991) (stating that the husband-wife privilege does not exclude evidence in cases regarding abuse, neglect, or exploitation of an adult); VA. CODE ANN. § 63.1-248.11 (Michie 1995) (stating that the husband-wife privilege does not apply in child abuse cases).
thereby gained for the correct disposal of litigation";\textsuperscript{279} and

2. The disclosure is made in the context of seeking treatment, counseling or a similar function for a disease, addiction or compulsion that impairs the member's judgment; and

3. The very purpose of the relationship is solely the treatment of that disease, addiction or compulsion; and

4. The disclosure was made with the expectation of privacy and confidentiality and the relationship cannot survive without the disclosure.

The privilege vests in the member who disclosed the information.

Reasonable courts will differ about the purposes of various groups. Case-by-case analysis will inevitably result in some confusion. The National Self-Help Clearinghouse\textsuperscript{280} might be a useful resource for understanding how each self-help group perceives itself and its functions and goals. With the help of the Clearinghouse, the legislature could formulate more concrete guidelines in order to define which groups should be accorded a privilege.\textsuperscript{281}

B. Feasibility of Extending the Privilege: Limitations and Extensions of Current Privilege Law

Courts and legislatures are very reluctant to create or extend privileges since testimonial privileges result in the exclusion of relevant and material evidence. Nevertheless, the courts have extended privileges when faced with compelling arguments to do so.\textsuperscript{282}

One of the largest areas in which courts and legislatures have been willing to extend the privilege is in the context of rape crisis

\textsuperscript{279} Wigmore, \textit{supra} note 132, § 2285, at 527.

\textsuperscript{280} For a discussion of the National Self-Help Clearinghouse, see Gartner \& Riessman, \textit{supra} note 25, at viii.

\textsuperscript{281} The guidelines might include more precise instructions on how to meet the requirements set forth in each rationale. For example, Wigmore's third prong, the requirement of community acceptance, might be more clearly defined in terms of group recognition by the Self-Help Clearinghouse, number of members, treatment effectiveness rates, etc. The formulation of such explicit definitions is left to policymakers and is beyond the scope of this Comment.

\textsuperscript{282} See, e.g., People v. District Court, 719 P.2d 722, 727 n.3 (Colo. 1986) (en banc) (holding that communications made to rape crisis counselors are absolutely privileged); \textit{In re} Kryschuk, 14 D.L.R.2d 676, 677 (Sask. Magis. Ct. 1958) (concluding that a privilege should be accorded to social workers under a strict application of the utilitarian rationale); see also Ayala \& Martyn, \textit{supra} note 182, at 166 (stating that courts are reluctant to create new privileges).
counseling. Court decisions and statutory law have made it very difficult for rape defendants to obtain access to records of rape victims' conversations with rape counselors.\(^2\) Although the psychotherapist-patient privilege has often been construed to apply only to licensed therapists, courts and legislatures have also been willing to extend the privilege to unlicensed counselors in rape cases.\(^3\)

Extension of the privilege has been justified under both the privacy and functionalist rationales. The privacy rationale argues that a woman who has been raped has been intimately violated. To subject her discussions with a counselor to scrutiny by the alleged rapist is allowing the victim to be raped twice, as her privacy is being invaded for the second time.\(^4\) From the functionalist perspective, a rape crisis counselor serves a function similar to a doctor or psychotherapist.\(^5\)

As a result of these functionalist and privacy rationales, many states have passed rape shield laws which grant either a qualified or absolute privilege to rape crisis counselors.\(^6\) The same privacy and functionalist rationales have recently been invoked to extend privileges to social workers, teachers, and marital counselors.\(^7\)

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\(^2\) See, e.g., People v. District Court, 719 P.2d at 727 n.3 (holding that communications between rape victims and counselors are absolutely privileged); infra note 287 and accompanying text (discussing the prevalence of rape shield laws).

\(^3\) See, e.g., Ky. R. EVID. 506 (including sexual assault counselors in counselor-client privilege); People v. District Court, 719 P.2d at 727 n.3 (holding that communications between rape victims and counselors are absolutely privileged); see also In re Pittsburgh Action Against Rape, 428 A.2d 126, 146 (Pa. 1981) (Larsen, J., dissenting) (stating that it is not the individual therapist but the therapeutic function that the privilege is designed to protect). The result in Pittsburgh Action was statutorily overruled by 42 PA. CONS. STAT. ANN. § 5945.1 (1982 & Supp. 1995), which provides an absolute privilege to rape crisis counselors.

\(^4\) See George McEvoy, Rape Rulings Allow Victims to Be Attacked, PALM BEACH POST, Sept. 5, 1994, at 17A.

\(^5\) See Developments, supra note 129, at 1549-51 (discussing the lack of coherence in current privilege law given the similarity of functions between certain professionals).

\(^6\) All but five states have passed rape shield statutes. See Tanford & Bocchino, supra note 129, at 592 (showing that as of 1980, Arizona, Connecticut, Maine, Utah, and Virginia have not passed rape shield statutes).

It may seem as though privileges are on the rise; however, the practical application of many privileges has been hampered as more statutes are passed that place limits on the scope of the available privileges. Many states have determined that the privilege must be overridden in cases of child abuse and elder abuse. Courts and legislatures have also narrowed the doctor-patient privilege by requiring disclosure in certain situations. Thus, in recent years, privilege law has been narrowed.

This inconsistency, extending privileges in some cases and narrowing it in others, makes it difficult to predict whether courts

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290. For example in Kentucky, a statute requires that anyone who knows of child abuse must report it to the local or state authorities. See KY. REV. STAT. ANN. § 620.030 (1), (2) (Michie 1990). Similar reporting laws exist in many other states, rendering the privilege a nullity in many cases.

291. See, e.g., Ark. Code Ann. § 12-12-602 (Michie 1987) (requiring disclosure of medical information when dealing with gun and knife wounds); N.Y. Civ. Prac. L. & R. 4504(b) (McKinney 1992) (eliminating the privilege where a patient under 16 years of age has been the victim of a crime); State v. Efird, 309 S.E.2d 228, 230-31 (N.C. 1983) (holding that a defendant could not assert a privilege to conceal a venereal disease in the case of a child abuse accusation).

292. A fuller discussion of the limitations on the scope of the privileges and the practical problems that arise as a result of these limitations is beyond the scope of this Comment. For a more detailed discussion of the difficulties inherent in limiting privileges, see Smith, supra note 130, at 502-22.
and legislatures will be willing to create a self-help privilege. A close examination of the criticisms surrounding the self-help privilege, however, will reveal that the privilege should obtain.

C. Some Criticisms and Responses

1. They’ve Survived So Far . . .

The first question critics pose is: if this privilege is so vital, how is it that self-help groups have survived until now without any such privilege? There are two responses to this criticism.

First, many people were unaware that such a legal privilege was lacking. Few cases have received the same amount of publicity as the Cox case has received. The reaction to the Cox case makes it clear that people were shocked that no legal protection was afforded to the group. As most of the studies indicate, people are unaware of and indifferent to the origin of the protection of communications, so long as the protection is there. They are not well-versed in the legal difference between privilege and confidentiality. This partially explains why self-help groups have survived without the privilege. However, therapists are concerned that "one celebrated case, should it arise, would create a great deal of anxiety about group therapy." Cox could be such a case. The reaction to the Cox case demonstrates that members of self-help groups believed that their disclosures were untouchable. As a result of the decision, people may now be less willing to disclose personal information necessary for treatment.

The second reason that self-help has survived until now without the privilege has to do with two factors inherent in the interaction of the group. The first factor may be called "positive pressure." Despite the large numbers of people participating in self-help

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293 In fact, there is only one other case that raised the issue whether A.A. conversations were privileged information. See supra note 233 (discussing the Boobar case). This case received relatively little publicity and, therefore, probably did not have a profound effect on group members' attitudes and beliefs.

294 See supra notes 17-26 and accompanying text (explaining that people turn to self-help groups as a place to discuss personal secrets because they believe that their confessions will be held inviolable).

295 See supra note 239 and accompanying text; see also supra note 122 and accompanying text (explaining a study which found that patients, and even psychotherapists, were ignorant of the law on privilege for their communications and that patients expected the "moral promise" of confidentiality in group therapy to prevent disclosure).

296 Slovenko, supra note 118, at 429.
groups, breaches of confidentiality are rare. People realize that a trust is being placed in them. They appreciate the importance of the confidence because at some point they may need that outlet themselves and they would have felt betrayed if their confidences were disclosed. Because members of these groups have such a strong trust in each other, they may believe, correctly, that their co-patients will generally not disclose their confidences.

The second interactive force may be referred to as "negative pressure." "What protects confidentiality among group members, more than anything else, is that each group member has something on the other, and that is a deterrent against disclosure. . . . She has something on him and he has something on her. They keep their secrets." Similarly, in the course of an interview, one patient of a psychotherapy group stated, "If anyone in the group would say anything about me, I'd talk about them. I mean, it's worked since I was in grade school. You shut up about me, I shut up about you."

Thus, it is apparent that the interaction of both positive and negative pressure within the group context makes people very secure that their confidences will not be revealed. When these interactive forces are combined with people's ignorance of the law of privilege, group members' assurances of confidentiality are understandably strong. In other words, people justifiably place faith in the other group members not to reveal their confidences. Indeed, they may be completely correct that under almost any circumstance the members will not reveal these confidences.

They may not know, however, that absent a privilege, other group members can be compelled by a court to reveal these confidences. Therefore, the combination of the patients' trust in each other with their imperfect knowledge of the legal system's ability to compel disclosure of these confidences, may have allowed self-help groups, which rely on confidentiality for their very existence, to survive without an actual legal privilege. After the Cox case, and the publicity it received, the functioning of self-help groups may be seriously impaired due to participants' increased

297 See id. at 409 (describing the overwhelming number of therapists reporting no knowledge of breaches of confidentiality within the group therapy context).
298 See id. at 428-29 (recognizing that group members are not likely to reveal confidences because they understand the importance of confidentiality in the process of therapy).
299 Id. at 428.
300 Id. at 441.
awareness that their confidences may be revealed despite their trust in fellow patients.  

2. It's a Slippery Slope

A second criticism of the mutual aid group's privilege is that if courts are to allow self-help groups to receive an evidentiary privilege, where will the line be drawn? There is unquestionably a problem in determining which groups are worthy of protection. The simple answer to this criticism is that a firm line has been drawn by the proposal set forth in this Comment—in applying all three rationales, groups that should not receive a privilege will not.

Indeed, there will be some legitimate groups that do not require confidentiality for their survival that will not be accorded protection because they fail to meet the rationales' requirements. For example, a group like the National Gay and Lesbian Task Force, a self-help group designed to combat discrimination against gays and lesbians, would not be protected. Since the goal of the Task Force is advocacy for social change, the group necessarily is public rather than private. Therefore, it fails to meet the test set forth in the privacy and utilitarian rationales regarding the expectation of confidentiality and privacy.

Similarly, speaking with a best friend might be entitled to a privilege under the privacy rationale, but it fails under a functionalist rationale since, when seeking the advice of a friend, one is seeking just that—advice. The sole function of the friendship is not counseling or treatment for the problem. The treatment is only one aspect of the relationship and thus fails to meet part three of the proposed statute. Furthermore, disclosure is not necessary for the adequate functioning of that relationship. Thus, such a disclosure would fail to gain protection under the utilitarian rationale.

A case-by-case analysis will certainly be required to determine whether the self-help privilege will obtain. Such an analysis,

501 See Leila M. Foster, Group Psychotherapy: A Pool of Legal Witnesses?, 25 INT'L J. GROUP PSYCHOTHERAPY 50, 50 (1975) (providing a hypothetical example of why members of group therapy would not attend therapy if they thought confidentiality was at issue).

502 See supra part II.A. (discussing the rationales for granting an evidentiary privilege).

503 See POWELL, supra note 42, at 321 (describing the goals of various "lifestyle" organizations).
however, is required not only among self-help groups but also among all relationships that serve purposes similar to those currently protected. When the privilege is analyzed under each of the three rationales, not meeting one of the three will usually preclude the granting of a privilege to an illegitimate group. Although it may seem inefficient, if concrete guidelines are proffered, the case-by-case analysis will be fairly straightforward and not very time-consuming, certainly no more inefficient than the examination that occurs when courts determine whether any currently recognized privilege applies to confidential communications.

3. There's No Duty to Warn

Professionals have a duty to disclose if their client is planning to harm someone else. Currently, there is no similar duty imposed upon laypeople or members of self-help groups. Therefore, if a member discloses a plan to commit future harm at a self-help group meeting, there is no duty imposed upon the other self-help members to protect the person who might potentially be harmed. Since there is no responsibility imposed upon group members, there is a reluctance to accord them any privilege.

Self-help groups focus on changes in behavior. People who come to self-help groups are admitting past events. They are there to prevent themselves from recommitting past bad acts, not to plan future ones. Furthermore, a privilege would not prevent a group member from disclosing information to a threatened individual. The decision whether to inform someone who may be in danger is in no way affected by the presence or absence of a privilege. The privilege only prevents testimony in a court of law but would not preclude disclosure to threatened individuals.

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504 See Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 340 (Cal. 1976) (requiring a psychotherapist to disclose information if the therapist discovers that her client may pose a serious threat of danger to another).

505 See id. (requiring only professionals to disclose but imposing no similar duty on laypersons).

506 See supra note 65 and accompanying text (describing the twelve steps of admitting past mistakes and controlling negative behavior).

507 See Appelbaum & Greer, supra note 21, at 312 (noting that "[n]o state has a law requiring patients to protect the confidentiality of their fellow patients, and we know of no court decision establishing such a duty").
4. Other Evidentiary Rules Will Take Care of It

Some critics argue that a privilege is not necessary because other evidentiary rules will prevent the disclosure of the revelation.\textsuperscript{308} Oftentimes, the information sought to be revealed can be precluded on other grounds such as relevance, materiality,\textsuperscript{309} or competence.\textsuperscript{310} Although the privilege may overlap with these other grounds in some cases, it does not do so in all cases.\textsuperscript{311} Furthermore, if other rules will prevent the disclosure, then the presence of the privilege is not problematic; if the privilege is duplicative, then society should provide the privilege merely to show its support and belief in the importance of the self-help movement.

5. Law and Order

Finally, critics argue that the value of the truth-finding process outweighs any benefit obtained from self-help group treatment. This criticism is essentially a question of fundamental values, and in today's society where law and order is paramount, it can be very compelling. The truth-finding process, however, is not significantly impeded by the presence of a privilege. The people who witnessed the crime are not being silenced. Self-help group members are aware of the crime only because of the confidential nature of the discussion within the group. Without the promise of confidentiality, the information regarding the illegal act would likely not be shared.\textsuperscript{312} Furthermore, since "[t]he broad aim of the criminal law is . . . to prevent harm to society,"\textsuperscript{313} fostering, rather than impeding the relationship designed to control the crime-causing behavior would better serve society's goal of preventing future harm.\textsuperscript{314}

\textsuperscript{308} See Slovenko, supra note 210, at 672-73.
\textsuperscript{309} See FED. R. EVID. 402-403 (setting forth the standards for the admissibility of relevant evidence).
\textsuperscript{310} See generally FED. R. EVID. art. VI (providing guidelines regarding exclusion of testifying witnesses due to incompetency).
\textsuperscript{311} See generally GREEN & NESSON, supra note 29, at 689 (stating that privilege rules exclude relevant evidence and that there will thus be cases in which the information is relevant and can only be excluded by virtue of the privilege).
\textsuperscript{312} See supra note 210 and accompanying text (explaining that group members will be less likely to reveal personal information if those revelations are not legally protected).
\textsuperscript{313} See id. at 24.
\textsuperscript{314} See supra note 167, at 10.
CONCLUSION

Certain relationships in our society—attorney-client, priest-penitent, doctor-patient, and psychotherapist-patient—have been accorded special protection in the eyes of the law. Various rationales explain why these relationships have been deemed privileged. The creation of a self-help group privilege for those self-help groups that require confidentiality and that provide counseling treatment comports with current privilege law doctrine. The self-help group is a modern phenomenon that has helped large numbers of people overcome serious behavioral problems. By granting a privilege to this relationship, society would be expressing a belief in the efficacy of these groups. Refusal to grant a privilege could seriously impair the functioning of self-help groups and would not result in any significant gain for the truth-finding process. Therefore, the courts and legislatures, in line with current privilege rationales, should work to create clear guidelines to determine the scope and applicability of a self-help group privilege. Self-help groups are a wonderful resource for so many people. Granting them a privilege will ensure their continued success and efficacy.