Evidentiary Privileges and the Exclusion of Derivative Evidence: Commentary and Analysis

James J. Dalessio

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Invocation of an evidentiary privilege traditionally meant that the confidential communications of a holder were protected from disclosure during judicial, administrative, or legislative proceedings. This model of evidentiary privilege law does not take into account information gathered from unauthorized preproceeding disclosures of otherwise privileged communications. A minority of courts seem willing to exclude this derivative evidence with little or no explanation. These courts may unwittingly base their decisions on privacy concepts recently proposed as one of the modern justifications for the existence of evidentiary privilege law. Courts confronted with this issue analyze it in confusingly, and often contrastingly, different manners.

"The privilege is that the confidential matter be not revealed. . . ."¹

INTRODUCTION

Standard evidence law defines evidentiary privileges² as rules designed to protect confidential communications, revealed within cer-
tain defined relationships, from indiscriminate disclosure. The intended beneficiary of a privilege's protection is referred to as its holder. A holder may refuse to testify to the substance of a confidential communication without fear of contempt proceedings or other judicial sanctions. The privilege holder may also prevent the recipient of the communication, such as an attorney or physician, from testifying to its substance. The holder carries the burden of establishing that his or her confidence warrants the privilege's protection. Traditionally, privileges required a judicial, administrative,
or legislative proceeding as a condition precedent to their operation.\textsuperscript{8}

This model of evidentiary privilege law becomes strained when courts attempt to apply the privileges' protection to would-be privileged information, disclosed without the authorization of the holder, prior to the commencement of a judicial proceeding.\textsuperscript{9} The difficulty

person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

\textit{Id.} at 358-59. In addition, all privileges have exceptions limiting their scope. For example, the Uniform Husband-Wife Marital Privilege specifically exempts a spouse from its protection if the spouse is charged with a crime against a minor child, the spouses are adverse parties, or when another person residing in the household is the adverse party. \textsuperscript{10} See \textit{infra} note 31, for the entire text of Uniform Rule 504.

The concern raised by the attorney-client privilege is concealment of crime or fraud. \textit{See infra} note 29, \textsuperscript{11} UNIF. R. EVID. 502(d)(1) (1974) (amended 1986) (Model Attorney-Client Privilege Statute). The gist of the resulting exception is that statements made by a client seeking advice to aid in the commission of a crime or fraud are not protected by the attorney-client privilege. \textsuperscript{12} See generally Fried, Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds, 64 N.C. L. REV. 443 (1986).

There are many exceptions to the physician-patient privilege as well. Whalen v. Roe, 429 U.S. 589 (1977) (Court commented on the large number of exceptions to the physician-patient privilege).

8. This Commentator shall use "judicial proceeding" to signify all kinds of recognized proceedings. Federal Rule of Evidence 1101(c) states: "The rule with respect to privileges applies at all stages of all actions, cases, and proceedings." \textsuperscript{13} FED. R. EVID. 1101(c). For purposes of this Comment, proceeding is defined as "any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given." \textsuperscript{14} CAL. EVID. CODE \S 901 (West 1980).

For a more complete discussion of when privileges apply, see \textit{infra} notes 51-60 and accompanying text. \textit{See also} Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (privileges are a testimonial right); United States v. Rogers, 751 F.2d 1074, 1077 (9th Cir. 1985) (the attorney-client privilege is an "evidentiary rule designed to prevent the forced disclosure in a judicial proceeding of certain confidential communications between a client and a lawyer"); Halfacre v. Arkansas, 292 Ark. 331, 334, 731 S.W.2d 179, 180 (1987) (the husband-wife privilege is an evidentiary rule and applies only when a spouse testifies within a proceeding); State v. Cousin, 291 N.C. 413, 418, 230 S.E.2d 518, 521 (1976); State v. Kerr, 531 S.W.2d 536, 541 (Mo. Ct. App. 1975).

9. For example, consider the situation where confidences wrongfully revealed by a patient's psychotherapist lead police to evidence sufficient to convict the patient of murder. The issue then becomes whether this evidence, gathered solely as the result of the unauthorized disclosure by the psychotherapist, is subject to exclusion under the psychotherapist-patient privilege. Gruzen v. State, 267 Ark. 380, 591 S.W.2d 342 (1979). For a detailed discussion on this case, see \textit{infra} notes 126-49 and accompanying text.
occurs when the unauthorized disclosure leads to additional, derivative evidence then used against the privilege holder. This Comment focuses on decisions of courts confronted with the issue whether such derivative evidence may be excluded. Its primary focus is on three court decisions, each of which viewed the privileges and their roles from different analytical perspectives. Within this framework, this Comment will demonstrate that: (1) courts see a need to protect the privilege holder once an unauthorized, extrajudicial disclosure of a confidential communication occurs; and (2) utilization of evidentiary privileges as guardians for these interests leads to a distortion of traditional privileges, both in the requirements for their invocation and in the rationale which supports their justification.

Part I explores the impact and effect of modern privacy doctrine on evidentiary privilege law. The focus on privacy frames this Commentator’s explanation of the willingness of some courts to extend the privileges’ protection temporally back to the unauthorized extrajudicial disclosure, and to exclude all evidence from that point forward.

Part II concentrates on when a privilege’s protection is deemed to apply. Although a privilege requires a judicial proceeding as a condition precedent to its application, once invoked, the question remains whether the protection itself reaches back to before the commencement of the judicial process.

Part III presents a critical analysis of court decisions on this issue. The cases are broken down into two general categories: (1) those decisions by courts willing to exclude derivative evidence under ordinary privilege law, regardless of whether the disclosure is made during a judicial proceeding; and (2) those decisions in which courts associate the exclusion of evidence arising from an unauthorized dis-

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10. For the sake of clarity, the issue is not whether the communication itself is subject to exclusion under privilege theory. Excluding the confidence, unless authorized to be disclosed by the privilege holder, is the normal function of all confidential privileges. Instead, this Comment deals with exclusion of evidence derived as a result of the confidence’s disclosure.

11. None of the cases discussed in this Comment addressed whether excluding derivative evidence was consistent with the underlying purpose of the privilege statutes enacted by state legislatures. Most privilege statutes generally do not speak in terms of excluding items like a gun, State v. Cousin, 291 N.C. 413, 417, 230 S.E.2d 518, 521 (1976); stereo equipment, State v. Newman, 235 Kan. 29, 41, 680 P.2d 257, 266 (1984); or a diary, United States v. Franklin, 598 F.2d 954 (5th Cir. 1979). Rather, privileges are normally thought to exclude confidential communications.

For example, the language of the attorney-client privilege found in Uniform Rule of Evidence 502 states that “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications. . . .” UNIF. R. EVID. 502(b) (1974) (amended 1986). Excluding communications derived from an unauthorized disclosure of would-be privileged confidential communications may be less problematic than excluding a gun. Nevertheless, some courts still seem willing to discuss the possibility of excluding derivative evidence without first addressing whether this is the kind of evidence privileges were designed to exclude.
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closing of confidential matter with the “fruit of the poisonous tree”
document (normally discussed within the the context of the fourth,
fifth, and sixth amendments of the Constitution). These cases
demonstrate, albeit through markedly different analytical schemes,
the willingness of some courts to exclude evidence derived from an
unauthorized disclosure of a holder’s confidential communications.

I. POLICY JUSTIFICATIONS FOR EXCLUDING DERIVATIVE
   EVIDENCE

A. Introduction

For decades, evidentiary privileges have been the subject of consi-
derable debate in jurisprudence.\textsuperscript{12} Jeremy Bentham viewed them as
“one of the most pernicious and irrational notions that ever found its
way into the human mind.”\textsuperscript{13} Another commentator referred to them
as nothing more than barriers conceived out of professional jealous-
ies which greatly impede the fact finding mission of the courts while
serving no important societal goals.\textsuperscript{14} At the same time, others re-
gard privileges as significant protectors of human values and the re-
sultant exclusion of evidence as a merely “secondary and [an] inci-
dental feature of [their] vitality.”\textsuperscript{15}

This variation in privilege philosophy may stem from the very na-
ture of the privileges themselves. Other traditional evidentiary exclu-
sionary rules, for example the hearsay rule\textsuperscript{16} or the opinion rule,\textsuperscript{17}
promote the truth-seeking process by excluding unreliable evi-

\textsuperscript{12} Note, Privileged Communications, 98 HARV. L. REV. 1450, 1454 (1985)
[hereinafter Note] (stating: “Attacked as impediments to the search for truth, praised as
guarantors of individual privacy, evidentiary privileges have long been a subject of con-
troversy within American law.”); see also Louisell, Confidentiality, Conformity And

\textsuperscript{13} J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 193-94 (J. Mill ed. 1827).

\textsuperscript{14} Krattenmaker, Testimonial Privileges in Federal Courts: An Alternative to

\textsuperscript{15} Louisell, supra note 12, at 101.

\textsuperscript{16} FED R. EVID. art. VIII. Federal Rule of Evidence 802 states: “Hearsay is not
admissible except as provided by these rules or by other rules prescribed by the Supreme
Court pursuant to statutory authority or by Act of Congress.” \textit{FED. R. EVID.} 802. How-
ever, the testimony then would be excluded not because of the policy underlying the
privileges, but rather based on the inherent unreliability of the evidence. For a thorough
discussion on the hearsay rule, see generally M. LADD \& R. CARLSON, CASES AND
MATERIALS ON EVIDENCE 802 (1972) and MCCORMICK, supra note 2, §§ 244-53.

\textsuperscript{17} The opinion rule vindicates the desire that a witness who testifies to a fact
must have personal knowledge of the fact. MCCORMICK, supra note 2, § 10, at 23. The
policy behind the rule is that courts want the most reliable source of information possi-
bile. \textit{Id}.
Privileges, on the other hand, may lead to the exclusion of potentially trustworthy and reliable evidence in order to protect interests unrelated to the truth-seeking function of courts. This explains the tendency among some courts and commentators to construe privileges narrowly, thus reducing the amount of evidence subject to exclusion. Despite such hostility, privileges are recognized in one form or another by nearly every state in the country.

The tendency to construe privileges narrowly calls into question the viability of excluding evidence derived from an unauthorized disclosure of a holder’s confidences. The proposition that courts may be willing to exclude even more evidence than traditionally excluded under the privilege umbrella may seem untenable, even fallacious. But, in certain instances, courts have expressed a willingness to do so. Perhaps this suggests that judicial disdain for privileges is declining. Alternatively, it may be a barometer of the confusion caused by retroactive application of an evidentiary exclusionary rule, whose invocation is conditioned on the commencement of a judicial proceed-

18. United States v. Nixon, 418 U.S. 683, 710 (1974); see McCormick, supra note 2, § 72.1, at 171 (observing that other exclusionary rules of evidence, for example the opinion rule and the hearsay rule, exclude evidence on the basis of the inherent unreliability of the evidence while privileges exclude evidence for reasons other than the facilitation of truth); see also Tacon, supra note 5, at 333. Tacon argues: The common law has evolved a number of doctrines to exclude information considered irrelevant (i.e., not tending to prove or disprove a fact in issue) or unreliable. The exclusion of hearsay and involuntary confessions, for example, is based on the supposedly unreliable nature of such evidence. The common law also has recognized that the judicial policy of full evidentiary disclosure conflicts at times with other policy considerations and might well require the subordination of the evidentiary process to such competing interests. This recognition forms the basis of the common law concept of privilege. . . .

Id.

19. McCormick, supra note 2, § 72, at 171.

20. Nixon, 418 U.S. at 710 (Burger, C.J., stating: “Whatever their origins, these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth. . . .”); Dennis v. United States, 384 U.S. 855, 870 (1966) (“disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice”); United States v. __________,, 748 F.2d 871, 875 (4th Cir. 1984) (party name under seal); In re Grand Jury Proceedings, 727 F.2d 1352, 1358 (4th Cir. 1984) (arguing “the [attorney-client] privilege itself is not ‘favored’ and is to be ‘strictly confined within the narrowest possible limits’ ”); In re Grand Jury Proceedings, 604 F.2d 798, 802 (3rd Cir. 1979); United States v. Omni Int’l Corp., 634 F. Supp. 1414, 1421 (D. Md. 1986).

21. See McCormick, supra note 2, § 75, at 181 (stating: “Until very recently, the heavy consensus of opinion among commentators has favored the narrowing the field of privilege, and attempts have been made, largely without success, to incorporate this view into the several 20th century efforts to codify the law of evidence.”); 8 J. Wigmore, supra note 2, § 2192, at 73; De Parcq, The Uniform Rules of Evidence: A Plaintiff’s View, 40 Minn. L. Rev. 301, 322 (1956) (observing that privileges “are on the way out” and this result is “entirely desirable”); Krattenmaker, supra note 14, at 85.

22. McCormick, supra note 2, § 76.2, at 183-84 (observing: [A]ll states possess some form of husband-wife, and attorney-client privilege. All afford some protection to certain government information. Most, though not all, allow at least a limited privilege to communications between physician and patient.”).
ing, to promote and protect the interests of the holder violated prior to the initiation of such proceeding.\textsuperscript{23}

A cursory review of the two most common theories underlying privileges, the traditional privilege rationale of encouraging certain relationships (the utilitarian view) and the more modern privacy justification, is warranted as a prelude to any discussion of the derivative evidence issue.\textsuperscript{24} Although no court has used the derivative evidence issue to directly incorporate privacy concepts into privilege law, this Commentator believes that privacy lays the foundation for courts to do just that. Before addressing the privacy justification, however, the traditional rationale of encouraging relationships is considered.

\textbf{B. Privilege Rationales}

Traditionally, privileges were justified by courts\textsuperscript{25} and commenta-

\begin{itemize}
\item \textsuperscript{23} Louisell, \textit{supra} note 12, at 107 (arguing "[i]t is believed... that the major hurdles in federal cases to correct analyses of the privileges center around current misconceptions as to their nature, justification, and sociological, psychological and moral importance").
\item \textsuperscript{24} These are not the only rationales commentators have used to explain the existence of privileges. Commentators have asserted that privileges may be based on political motivations of elite classes of professionals. Note, \textit{supra} note 12, at 1494 (arguing that "[t]he very word 'privilege' suggests the protection of a favored elite... Those enjoying privileges today constitute some of the most politically powerful professions and institutions in America: lawyers, doctors, the Church, the news media, and the government."). Privileges have also been recognized as a means of preserving the image and legitimacy of the legal system. \textit{Id.} at 1498. This has been aptly termed the "Image Theory" because it is understood as preserving the legitimacy of the courts by minimizing potential embarrassment to the legal system. \textit{Id.} at 1498-1500.
\item \textsuperscript{25} Upjohn Co. v. United States, 449 U.S. 383 (1981); Hammonds v. Aetna Casualty & Sur. Co., 243 F. Supp. 793, 801 (N.D. Ohio 1965) (held imperative that the individual disclose all information, regardless of how embarrassing, disgraceful, incriminating, for the doctor to apprise the means of recovery); City of San Francisco v. Superior Ct., 37 Cal. 2d 227, 235, 231 P.2d 26, 30 (1951) (en banc) ("[a]dequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney."). At issue today is confidential testing of individuals potentially infected with the Acquired Immune Deficiency (AIDS) virus. Arguably, the high mortality rate suggests that full and free disclosure should be allowed by a doctor once the patient is found to have the AIDS antibody in order to reduce the chance of the spread of the AIDS virus. However, allowing a doctor the liberty to disclose results of the test could deter other individuals from seeking medical advice and treatment for the disease. This in turn could lead to an increase in the spread of the disease by persons who failed to seek medical treatment because of their fear of disclosure. Implicit within the AIDS issue is the conflict between protecting a person's rights to seek medical attention without fear that the results will be disclosed and protecting the public's right to disclosure of individuals infected with the AIDS virus. \textit{See generally}, Dunne & Serio, \textit{Confidentiality: An Integral Component of AIDS Public Policy}, 7 \textit{St. Louis U. Pub. L. Rev.} 25 (1988).
tors as devices to encourage communication within certain special relationships. Consider, for example, that a psychotherapist was unable to assure his or her patient that communications during their therapy session would remain confidential. This might inhibit the patient from disclosing information vital to successful treatment. Hence, the existence of privilege law is based on society’s recognition that certain relationships, such as that between the psychotherapist and patient, attorney and client, priest and penitent, or husband and wife, as devices to encourage communication within certain special relationships.

Wigmore, supra note 2, § 2285, at 527. Wigmore sets forth four conditions necessary for the establishment of a privilege:

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 thereby gained for the correct disposal of litigation.

Id. (emphasis in original).

Wigmore found that all the requisites existed for establishing the privileges within the attorney-client, id. § 2291, at 545; husband-wife, id. § 2332, at 642; and priest-penitent relationships. Id. § 2396, at 877-78. He did not think the physician-patient relationship justified privilege status. Id. § 2380(a), at 829. However, Dean Wigmore never applied his balancing test to the psychiatrist-patient privilege. Tacon, supra note 5, at 338. Application of Wigmore’s test in this relationship was attempted by Professor Tacon:

[T]he essence of psychiatry requires extensive revelations of “hidden” emotions, fantasies, frustrations and such-like. It is difficult to conceive of individuals entering into a psychiatric relationship except on the implicit understanding that such confidences would be respected. The first condition [of Wigmore’s] is thus satisfied. Is confidentiality essential to the relationship? The answer here must be affirmative. . . . The third condition is obviously satisfied for psychiatrists as it is for physicians generally—the community has a real interest in encouraging individuals to seek professional help in resolving mental health problems. . . . The fourth condition is somewhat more difficult to fulfill. Indeed, some have maintained that the primary consideration must remain the correct disposal of the litigation; privilege would operate to thwart the just and fair administration of justice.

Id. at 338.

27. Fisher, The Psychotherapeutic Professions And The Law of Privileged Communications, 10 WAYNE L. REV. 609, 611 (1964) (arguing that the one justification for testimonial privileges is that “the relationship is rendered ineffective either because a person is deterred from entering into it or because the person is frightened into non-disclosure” during the existence of the relationship); see also Shuman & Weiner, The Privilege Study: An Empirical Examination Of The Psychotherapist-Patient Privilege, 60 N.C.L. REV. 893, 898 (1983) (where the authors posit five premises for a psychotherapist-patient privilege). One study by psychiatrists stated:

Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality, and indeed, privileged communication. . . . A threat to secrecy blocks successful treatment.

GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT No. 45, 92 (1960).

28. The Uniform Rules of Evidence, with respect to privileges, were patterned after the proposed Federal Rules of Evidence. For a more detailed discussion on the
Uniform Rules, see Note, supra note 12, at 1462. A typical physician or psychotherapist-patient privilege statute is Uniform Rule of Evidence 503. It states:

(a) Definitions. As used in this rule:

(1) A “patient” is a person who consults or is examined or interviewed by a 
[physician or] psychotherapist.

(2) A “physician” is a person authorized to practice medicine in any state 
or nation, or reasonably believed by the patient so to be.

(3) A “psychotherapist” is (i) a person authorized to practice medicine in 
any state or nation, or reasonably believed by the patient so to be, while en-
gaged in the diagnosis or treatment of a mental or emotional condition, includ-
ing alcohol or drug addiction, or, (ii) a person licensed or certified as a psychol-
gist under the laws of any state or nation, while similarly engaged.

(4) A communication is “confidential” if not intended to be disclosed to 
third persons, except persons present to further the interest of the patient in the 
consultation, examination, or interview, persons reasonably necessary for the 
transmission of the communication, or persons who are participating in the di-
agnosis or treatment under the direction of the [physician or] psychotherapist, 
including members of the patient’s family.

(b) General rule of privilege. A patient has a privilege to refuse to disclose and 
to prevent any other person from disclosing confidential communications made 
for the purpose of diagnosis or treatment of his [physical,] mental or emotional 
condition, including alcohol or drug addiction, among himself, his [physician 
or] psychotherapist, and persons who are participating in the diagnosis or treat-
ment under the direction of the [physician or] psychotherapist, including mem-
bers of the patient’s family.

(c) Who may claim the privilege. The privilege may be claimed by the patient, 
his guardian or conservator, or the personal representative of a deceased pa-
tient. The person who was the [physician or] psychotherapist at the time of the 
communication is presumed to have authority to claim the privilege but only on 
behalf of the patient.

(d) Exceptions.

(1) Proceedings for hospitalization. There is no privilege under this rule for 
communications relevant to an issue in proceedings to hospitalize the patient 
for mental illness, if the psychotherapist in the course of diagnosis or treatment 
has determined that the patient is in need of hospitalization.

(2) Examination by order of court. If the court orders an examination of the 
[physical,] mental[,] or emotional condition of a patient, whether a party or a 
wor(1) witness, communications made in the course thereof are not privileged under 
this rule with respect to the particular purpose for which the examination is 
decided unless the court orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under 
this rule as to a communication relevant to an issue of the [physical,] mental[,] or 
emotional condition of the patient in any proceeding in which he relies upon 
the condition as an element of his claim or defense or, after the patient’s death, 
in any proceeding in which any party relies upon the condition as an element of 
his claim or defense.


29. A typical attorney-client privilege statute is Uniform Rule of Evidence 502. It 
is followed in substance by approximately 19 states. G. JOSEPH & S. SALZBURG, Evi-
dence in America: The Federal Rules in the States ch. XXIV, at 1-3 (1987) [here-
inafter Evidence in America]. It provides:

(a) Definitions. As used in this rule:

(1) A “client” is a person, public officer, or corporation, association, or other 
organization or other entity, either public or private, who is rendered profes-
sional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.

(2) A representative of the client is (i) one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client or (ii) any other person who, for the purpose of effecting legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.

(4) A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer's representative, (2) between his lawyer and the lawyer's representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients;

(6) Public officer or agency. As to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.


A typical priest-penitent privilege statute, adopted by approximately 15 states is Uniform Rule of Evidence 505. EVIDENCE IN AMERICA, supra note 29, ch. XXVII, at 1-2. Uniform Rule of Evidence 505 provides:
and wife,\textsuperscript{31} are to be encouraged and are of sufficient importance to justify excluding potentially relevant evidence from the truth-seeking process. To determine whether information is privileged under this rationale, courts balance the benefit society derives from protecting the relationship against the privilege's detrimental effect on the search for truth.\textsuperscript{32}

\textbf{UNIF. R. EVID. 505 (1974).}

\textbf{31.} An example of a typical husband-wife marital privilege statute is Uniform Rule of Evidence 504. \textit{UNIF. R. EVID. 504 (1974).} Uniform Rule 504 was amended in 1986 to comport with the Supreme Court's decision in \textit{Trammel v. United States}, 445 U.S. 40 (1980), \textit{EVIDENCE IN AMERICA, supra note 29, ch. XXVI, at 1.} Nearly 20 states had adopted a privilege statute similar to the original 1974 Uniform Rule 504. \textit{Id.} The new 1986 version is as follows:

\begin{itemize}
  \item[(a)] \textbf{Marital communications.} A person has a privilege to refuse to testify or to prevent his or her spouse or former spouse from testifying as to any confidential communication made by the person to the spouse during their marriage. The privilege may be waived only by the person holding the privilege or by the guardian, conservator, or personal representative of the holder. A communication is confidential if it is made privately by a person to his or her spouse and is not intended for disclosure to any other person.
  \item[(b)] \textbf{Marital facts.} The spouse of an accused in a criminal proceeding has a privilege to refuse to testify against his accused spouse.
  \item[(c)] \textbf{Exceptions.} There is no privilege under this rule in any civil proceeding in which the spouses are adverse parties, in any criminal proceeding in which a prima facie showing is made that the spouses acted jointly in the commission of the crime charged, or in any proceeding in which one spouse is charged with a crime or tort against the person or property of (i) the other, (ii) a minor child of either, (iii) a person residing in the household of either, or (iv) a third person if the crime or tort is committed in the course of committing crime or tort against any of the persons previously named in this sentence. The court may refuse to allow invocation of the privilege in any other proceeding if the interests of a minor child of either spouse may be adversely affected.
\end{itemize}


\textbf{32.} \textit{See supra note 26, (Wigmore balancing test); Elkins v. United States, 364 U.S. 206, 234 (1960) (privileges justified "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth");}
Although the utilitarian rationale is still viewed as the primary justification behind privileges, commentators have begun to focus on an individual's privacy interests as an alternative justification. It bases protection of confidences, not on utilitarian values where all of society has an interest, but, on the dignity of the individual and the right of the individual to “unfettered freedom” (within) certain narrowly prescribed relationships. Privacy preserves an individual's control over highly personal information by assuring it will not be randomly disclosed without that person's authorization.

A prime example of how privacy interests have influenced privilege law is modern court decisions involving the admissibility of testimony by persons who "happen" to overhear privileged matter. Previously, courts held that an eavesdropper could testify to the confidential information overheard and that a privilege should pre-
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Exude only the participants in the confidential relationship from giving testimony. However, with the increased use of modern electronic surveillance equipment, a majority of courts now prevent the eavesdropper from testifying to the confidence unless interception of the communication should reasonably be anticipated by the privilege holder. Interestingly, the standard now adopted by courts to determine "reasonable anticipation" is whether the holder had a reasonable expectation of privacy at the time the confidence was disclosed. Necessarily, this inquiry now requires courts to center the privilege within a holder's privacy expectation.

The privacy standard may also force courts to analyze with greater precision whether a communication should ever be elevated to the level of privilege status. Under the privacy rationale, rights as well as interests are personal to the holder of the privilege. This will force courts to more accurately delineate the interests of the privilege holder. In making such a determination, courts must now balance the need for the evidence against the holder's loss of personal dignity and privacy if the confidence is disclosed. This is unlike the traditional rationale which describes the interests at stake in vague terms such as "public policy" and "societal interests," and which does not see the protection of any one particular relationship.

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41. McCormick, supra note 2, § 74, at 175-76.
42. See Cantu, Privacy, 7 St. Louis Pub. L. Rev. 313, 315-16 (1988). In discussing a citizen's privacy rights, the author states that privacy must be redefined due to: [T]he emergence of the electronic data processing industry as an integral part of the daily life of every man, woman, and child on the face of the earth. The electronics age has arrived, and in so doing has changed our lives as well as our outlook to the future. America has become a nation wherein the dissemination of information is big business, and as a result individuals need protection now more than ever before to insure their right of privacy. Id. at 315-16.
44. McCormick, supra note 2, § 74, at 175-76 n.5.
45. Id. at 175-76 (observing that a "number of cases upholding admissibility on the facts before them state or imply that a reasonable expectation of privacy will bar the eavesdropper's testimony").
46. Id. at § 77, at 186-87.
47. Even within the privacy standard there must be a balancing of interests. See Note, supra note 12, at 1482-83 ("A decision to recognize a privacy interest in no way determines whether a confidence will ultimately be protected by a privilege. The privacy interest must always be balanced against society's interest in ascertaining the truth."); United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980) (employee medical records are entitled to privacy protection but the protection is not absolute).
This notion of privacy is key in another respect. As noted above, activating the privileges' protection requires the commencement of a judicial proceeding. However, privacy interests are not temporally confined to a judicial proceeding. Indeed, the would-be privilege holder's privacy interests are frustrated the instant confidences are wrongfully disclosed, regardless of whether a judicial proceeding has commenced. The question then becomes whether courts are willing to separate a privilege's remedial feature, the exclusion of evidence, from its evidentiary requirement, the commencement of a judicial proceeding, to make it address the holder's privacy interests when they were initially thwarted. In fact, the issue of whether courts will exclude evidence generated as a result of a violation of a confidential communication hinges on when a privilege's protection is held to apply.

II. WHEN PRIVILEGES ATTACH TO CONFIDENTIAL COMMUNICATIONS

The question of "when" privileges apply may seem moot. After all, privileges are just one of many evidentiary rules and like all evidentiary rules, privileges necessarily require the existence of an evidentiary proceeding as a condition to their application. Federal Rule of Evidence 1101(c) states: "The rule with respect to privileges applies at all stages of all actions, cases, and proceedings." One court summed up the policy behind 1101(c) as follows: "Rule 1101 supports the view that confidentiality once destroyed cannot be restored, and that a privilege is effective only if it bars all disclosures at all times." California Evidence Code section 901, representing the emerging view in the United States, defines a proceeding as "any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, administrator, legislative body, or any other persons authorized by law) in which, pur-

49. Id.
50. This may be the case under the utilitarian rationale as well. That is, under this justification, societal interests in promoting specific relationships do not magically spring up once a judicial proceeding is initiated. Nevertheless, in the privacy context, the interest itself is individuated to the holder so that, when this interest is frustrated, a court may fashion a remedy designed to alleviate the specific injury to the holder.
51. FED. R. EVID. 1101(c); see United States v. Mackey, 405 F. Supp. 854, 857 (N.D. Cal. 1975) (arguing there is "no question that under the Federal Rules of Evidence privileges apply to grand jury proceedings"); K. DAVIS, ADMINISTRATIVE LAW § 144, at 457 (1951) (discussion on the application of privileges to administrative adjudications).
52. Mackey, 405 F. Supp. at 864.
53. R. CARLSON, supra note 2, at 604.
The difficulty faced by those courts which attempt to apply privileges to exclude derivative evidence is that, technically, no "action, case, or proceeding" may have existed when the extrajudicial disclosure was made. However, as noted, disclosure of a confidence frustrates the privacy interest of the holder regardless of the existence of a judicial proceeding. Thus, the question becomes whether privileges are a viable tool to remedy the resulting harm (which is derivative evidence that would not have been discovered but for the unauthorized disclosure) to the would-be privilege holder. The remedy might be the exclusion of most or even all evidence produced as a result of the unauthorized disclosure.

If courts treat the privilege as attaching the moment the offending disclosure is made, then derivative evidence, generated as a result of that unauthorized disclosure, may come within the privilege's exclusionary rule. In that case, the privilege's protection would attach prior to any derivative evidence's discovery. On the other hand, if courts do not attach the privilege's protection to confidences until a judicial proceeding has commenced, then there is less chance that derivative evidence will be excluded.

From a privacy standpoint, the individual's interests do not arise at the "proceeding" stage, but rather when the communication is initially disclosed without the holder's permission. To protect those privacy interests, it seems reasonable for courts to apply privileges as if they had existed at the time the privacy interests were initially frustrated.

For instance, when an individual consults his psychotherapist and in confidence discloses highly sensitive and inflammatory "stuff," the patient's privacy expectation is that the "stuff" will remain confidential forever. Assume the psychotherapist reveals these confidences

54. CAL. EVID. CODE § 901 (West 1980).
55. R. CARLSON, supra note 2, at 604 (from the "perspective of the communicating parties, the nature of the proceeding in which disclosure occurs makes no difference; the thing that will chill their communication is disclosure, in whatever context it occurs").
56. United States v. Rogers, 751 F.2d 1074 (9th Cir. 1985). For an extended discussion on this case in this specific topic, see infra notes 111-24 and accompanying text.
57.See Louisell, supra note 12, at 113 (... "privileges are guarantees for the benefit of their holders; they exist from the moment of their inception in the confidential communication; they normally survive all the vicissitudes of life save only waiver by the owner; they survive even his death. The law will protect them at all stages of their existence.").
58. The facts in this "hypothetical" are not unlike those found in the case of
to police officers without the holder's permission and the police then use this information to gather evidence sufficient to convict the patient of a crime. A court may treat the privilege (and its remedy of exclusion) as if it applied at the moment the unauthorized disclosure was made. This then effectively places the protection afforded by the psychotherapist-patient privilege outside the confines of a judicial proceeding. The patient-holder may now assert that the privilege extends back to the time of the unauthorized disclosure. The confidence is now protected as of its initial disclosure by the psychotherapist, rather than being fair game until the opposition first sought to introduce it into evidence. Accordingly, all derivative evidence generated from the confidence after the privilege was established is also protected.

The above analysis reveals an inherent tension within privilege law. Although rules of evidence, privileges protect interests extrinsic to the truth-seeking function of the adjudicatory process. The tension is generated because such interests transcend the context in which they apply. As noted, a patient has a privacy interest in preventing the disclosure of confidential information shared with the psychotherapist during a consultation, regardless of whether a judicial proceeding has commenced against the patient. Some courts appear willing to use privileges to protect that interest and aid in the prevention of unauthorized, extrajudicial disclosure of confidential communications. The following section analyzes decisions by courts confronted with this issue. It addresses the requirements these courts impose as conditions to the exclusion of derivative evidence. It also offers criticism of these decisions as they attempt to justify using privileges to exclude derivative evidence.


60. See People v. Todd Shipyards Corp., 192 Cal. App. 3d 20, 29-30, 238 Cal. Rptr. 761, 766 (1987) (court applied the privilege to suppress all documents falling within the attorney-client relationship as well as any fruits thereof); United States v. Boffa, 513 F. Supp 517, 523 (D. Del. 1981) (court was willing to apply the attorney-client privilege to bar all confidential communications and any fruits flowing therefrom); United States v. Seiber, 12 C.M.A. 520, 31 C.M.R. 106 (1961). In Seiber, the court stated:

We are not unmindful "of the public advantage that accrues from encouraging free communication" between spouses... Like the board of review, we believe the rule insulating such privileged communications should be jealously guarded. Yet, at the same time, before giving our imprimatur to an exclusionary rule which extends the marital privilege to non-testimonial evidence, we must weigh other considerations in the balance.

Id. at 109 (citing United States, Manual for Courts Martial § 1516(2) (1951)).
III. Courts' Treatment of Privileges and Derivative Evidence

A. Background

There are three possible sources of an exclusionary rule of law permitting courts to exclude derivative evidence: (1) state law; (2) the Supreme Court doctrine known as "fruit of the poisonous tree"; and (3) a federal statute.\textsuperscript{61} The first, in the privilege context, would be the state's own privilege statutes.\textsuperscript{62} The second, the "fruit of the poisonous tree", is a facet of the exclusionary remedy most often associated with search and seizure violations of the fourth amendment.\textsuperscript{63} That exclusionary rule is not a constitutional right, but rather "a judicially created remedy designed to safeguard fourth amendment rights generally through its deterrent effect. . . ."\textsuperscript{64} The purpose of the exclusionary rule is to deter unconstitutional conduct by law enforcement.\textsuperscript{65} However, not all evidence obtained from a

\textsuperscript{61} Welch v. Butler, 835 F.2d 92, 94 (5th Cir. 1988). The federal statutory exclusionary rule is not considered here because there are no federal evidentiary privilege statutes. For a discussion on federal privilege statutes, see infra note 62.

\textsuperscript{62} An attempt by the Supreme Court to adopt 13 proposed rules for a uniform, codified law of privilege was unsuccessful. A copy of these rules is set out in 56 F.R.D. 183 (1972). For a complete discussion on privilege law in the federal courts, see Note, supra note 12, at 1463-71. Instead, Congress enacted a single general provision, Federal Rule of Evidence 501. 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.

Congressional belief in the importance of the interests the privileges serve meant that the Supreme Court could not alone adopt and reject privileges. Because of the Court's attempt to codify privilege law, Congress passed 28 U.S.C. § 2076 (1975), which now requires Congressional approval before any change in the law of privileges.

The import of Federal Rules of Evidence 501 is that state privilege law generally applies in diversity cases. In criminal cases, on the other hand, courts are guided by "reason and experience" and are not required to follow state privilege law.

\textsuperscript{63} The "fruits doctrine" was conceived in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The doctrine gained its name in Nardone v. United States, 308 U.S. 338 (1939).


\textsuperscript{65} United States v. Leon, 468 U.S. 897 (1984). A case often associated with the "poisonous tree" doctrine is Wong Sun v. United States, 371 U.S. 471 (1963), where the Supreme Court excluded "fruits" obtained as a result of an unlawful arrest. The Court
fourth amendment violation is suppressed under the "poisonous tree" doctrine. Rather, the test is whether evidence was discovered as a result of intentional exploitation of governmental misconduct.\(^6\) Also, if such evidence would have been "inevitably discoverable"\(^6\) the exclusionary rule does not bar it, even though it actually was wrongfully obtained. The constitutional context in which the "poisonous tree" doctrine has developed complicates its application by courts\(^6\) to standard evidentiary problems.\(^6\)

Court decisions in this area offer little guidance for any meaningful framework in which to analyze these cases.\(^7\) This may be indicative of courts' views about the plausibility of this particular remedy as a means to rectify the injury suffered by the privilege holder.\(^7\) Alternatively, it may stem from courts' confusion about which exclusionary rule they are applying. For example, an "evidentiary" exclusionary rule approach is taken in United States v. Boffa,\(^7\) a federal district court case from Delaware. Although this case focused pri-


The United States Supreme Court currently enforces an exclusionary rule in state and federal criminal proceedings as to four major types of violations: searches and seizures that violate the fourth amendment, confessions obtained in violation of the fifth and sixth amendments, identification testimony obtained in violation of these amendments, and evidence obtained by methods so shocking that its use would violate the due process clause. The exclusionary rule is the Supreme Court's sole technique for enforcing these vital constitutional rights.\(^6\)


71. For example, the court in Lefkowitz, 618 F.2d at 1318 n.8 held: "[W]e doubt that a secondary source of information obtained through information protected by the confidential marital communications privilege would in any way be 'tainted.'"

marily on interests related to evidentiary privilege law, it was not entirely devoid of principles commonly associated with the judicially created exclusionary rule used to protect constitutional rights.

In contrast, the Arkansas Supreme Court based its opinion in *Gruzen v. State*\(^{73}\) on the judicially created "poisonous fruit" exclusionary rule. The court did not look to the interests underlying evidentiary privilege law to guide its decision whether or not to exclude derivative evidence. Instead, the court focused on whether excluding evidence generated from a wrongful disclosure of a holder's confidence would deter wrongful government conduct, as required under *Wong Sun v. United States*.\(^{74}\)

Finally, a Louisiana appellate court, in *State v. Welch*,\(^{75}\) seemed to take an "intermediate" approach, somewhere between *Boffa* and *Gruzen*. It utilized a *Gruzen* style of analysis when it sought to apply the exclusionary rule normally reserved for constitutional violations of the fourth, fifth, and sixth amendments, to exclude derivative evidence generated from an unauthorized disclosure. Yet, when deciding the issue, the court did not base its analysis on the exclusionary rule's rationale of deterring unlawful government action, as did the court in *Gruzen*. Rather, like the *Boffa* court, it focused on the interests underlying privileges in determining whether to apply the exclusionary rule.

These three cases are representative of the ways in which some courts deal with this issue. In light of their analytically distinct approaches, each case shall be discussed separately. This Comment does not purport to embrace any one of these three decisions as the "correct" one. Rather, its purpose is to highlight the confusion surrounding the various analyses by these courts on the issue of whether to exclude derivative evidence, with hopes that future judicial decisionmaking will be more precise on this issue.

**B. Exclusion of Derivative Evidence Under a State Created Exclusionary Rule**

In *United States v. Boffa*,\(^{76}\) a "con-man" named Leroy Frank Holman, a/k/a Robert Morgan (Morgan), fraudulently held himself out as an attorney to defendants Eugene Boffa, Sr., Robert Boffa,

\(^{73}\) 267 Ark. 380, 591 S.W.2d 342 (1980).


\(^{75}\) 448 So. 2d 705 (La. Ct. App. 1984).

Sr., and Frank Sheeran. Morgan had been previously incarcerated for approximately fifteen years for various criminal offenses. While jailed, he had acquired a working knowledge of the legal profession. Although he never received any formal legal training, earlier in his "career" he had performed some legal research for attorneys representing Jimmy Hoffa. While Morgan was out of jail, pending an appeal, he began assisting defendants in their legal representation. Apparently Morgan and Sheeran had met during the Hoffa trial.

For several months Morgan performed various legal services for all three men. Shortly thereafter, Morgan disappeared with a car given to him by Boffa. Subsequently, Boffa reported the vehicle stolen. Two months later, Morgan was arrested in California for possession of stolen property. In the impounded vehicle police found several cartons of documents belonging to the defendants. Morgan was charged with obstructing a criminal investigation by holding himself out as an attorney and making a false statement of fact to a federal agent. In return for a plea bargain agreement with the F.B.I., Morgan engaged in monitored phone conversations with his "clients," the defendants.

Subsequently, defendants were charged with violations of the criminal provisions of the Taft-Hartley Act, the mail fraud statute, and the Racketeer Influenced and Corrupt Organizations Act (RICO). In their pretrial motion, defendants sought to suppress all evidence having as its source certain disclosures made by Morgan to the government, on the grounds that it was protected from disclosure by the attorney-client privilege. The defendants claimed that Morgan had received from them confidential communications that he, in
turn, disclosed to the government and that these disclosures led the
government to additional information against defendants.\(^\text{94}\)

The Boffa court began its opinion by dismissing any constitutional
basis for the defendants' position.\(^\text{95}\) The court next set out guidelines
each defendant was required to meet in order to qualify for suppres-
sion of "all" evidence under the attorney-client privilege statute.\(^\text{96}\)

The first three criteria went to the establishment of the privilege it-
self.\(^\text{97}\) Next, the defendants would have the burden of demonstrating:
1) that Morgan disclosed to the government the confidential commu-
nications he received from the defendants; and 2) that the govern-
ment used these disclosures as a source for obtaining other evidence
that it intended to use at the defendants' trial.\(^\text{98}\) Once defendants
met this burden, the government would then have the ultimate bur-
den of establishing that its proof at trial had an independent origin,
untainted by any improperly obtained evidence.\(^\text{99}\)

Unfortunately, the court found it unnecessary to expound in any
greater detail on this particular issue. Instead, the court decided the
defendants had failed to clear the first hurdle and establish a foun-
dation for the attorney-client privilege's application;\(^\text{100}\) the court
stated that defendants were required to establish through more defi-
nite and particularized proof that their "attorney-client privileges
were breached."\(^\text{101}\) The court also held that the defendants failed to

\(^{94}\) Although Morgan was not a member of the bar at the time he purportedly
represented the defendants, the rationale supports extending the privilege to those who
make disclosures under a mistaken, though genuine, belief. 8 J. WIGMORE, supra note 2,
§ 2302; Dabney v. Investor Corp. of Am., 82 F.R.D. 464, 465 (E.D. Pa. 1979). The
Uniform Rules of Evidence, a model statute set out in note 29, supra, also supports
extending the privilege to those who make a good faith mistake. UNIF. R. EVID.

governmental intrusion into the defendants' attorney-client relationship occurred long
before any of the defendants were indicted and thus before their sixth amendment right
to assistance of counsel had attached); see also Brewer v. Williams, 430 U.S. 387, 398
(1977); Kirby v. Illinois, 406 U.S. 682, 688 (1972); Massiah v. United States, 377 U.S.
201, 205 (1964).

\(^{96}\) Boffa, 513 F. Supp. at 523.

\(^{97}\) Id.

\(^{98}\) Id.

\(^{99}\) Id.

\(^{100}\) Id. at 525.

\(^{101}\) Id. at 526 (emphasis added). The court's finding on this particular point illus-
trates a point made earlier: the burden is on the defendant-holder to establish the privi-
eged nature of the confidence in order to successfully invoke its protection. See supra
note 7. The court also held defendants failed to demonstrate they made confidential com-
munications to Morgan, and that these same communications were revealed to the F.B.I.
Id. at 525-26. Finally, the court found that many of the disclosures made by Morgan to

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establish that the government used any information obtained from Morgan as a source for other evidence which it intended to use at trial. In fact, the court held Morgan’s information to be “relatively worthless” to the F.B.I. Thus, the court found it unnecessary to discern what evidence was subject to exclusion under the attorney-client privilege.

Nevertheless, Boffa demonstrates unequivocally a willingness by a court to exclude evidence, under the right circumstances, derived through a breach of confidence. This is not uncommon. Courts have intimated that exclusion of derivative evidence arising from a breach of confidence is a possibility under narrowly defined conditions. Although the Boffa court did not expressly delineate a rationale for its willingness to exclude this kind of evidence, earlier in the opinion the court stated that the attorney-client privilege was created in order to foster full and frank communication between attorneys and their clients. Further, the court held that “such confidences are at the instance of the client permanently protected from outside intrusion.”

In Boffa, the court referred to a violation of the sanctity of a confidential communication as a breach of privilege. Failure to distinguish between the terms “violation of a confidential communication” and “breach of privilege” may appear relatively insignificant. However, the fallacy of failing to do so is twofold.

First, at the time the confidence was initially disclosed (without the holder’s authorization), there simply was no judicial proceeding in which the attorney-client privilege could apply. If evidence scholars are correct in defining privileges as evidentiary rules of exclusion, arising only at the time of a judicial proceeding, then it is difficult to discern how evidentiary rules could possibly apply (or privileges exist) before any judicial proceeding had commenced.

In addition, placing an unauthorized confidential disclosure on the same level as a “breach of privilege” is problematic. Assume for a moment that a court requires the commencement of a judicial proceeding as a condition to the application of any privilege’s protection.

the F.B.I. indicated that if Morgan was consulted by the defendants, in many instances it was not with respect to past wrongdoing but to future illegal activity and therefore the crime-fraud exception to the attorney-client privilege might apply. Id. at 527; see McCormick, supra note 2, §§ 72-72.1, at 171-73.

103. Id.
104. See supra notes 60, 68 and accompanying text.
106. Id. (emphasis added).
107. Id. at 526.
108. See 8 J. WIGMORE, supra note 2, §§ 2192, 2197, 2285; McCormick, supra note 2, §§ 72-72.1, at 171-73.
In this situation, a court may then choose to hold either that the confidences are worthy of privilege status, or, in the alternative, that no privilege applies, allowing testimony of the "confidence" into evidence. However, using the terminology "breach of privilege" leads inescapably to the conclusion that privileges are not just rules limited to evidentiary proceedings. Indeed, "breach" is defined as a failure to comply with a duty owed to another. The question thus becomes: Where is the duty in the evidentiary privilege context? Certainly the privilege holder, incident to a professional relationship, is owed a duty based on the professional's own respective ethical code.

In terms of evidentiary privilege rules, however, it is difficult to envision the duty concept, unless, of course, a court finds there is a duty, under the attorney-client evidentiary privilege, to keep matters confidential. If so, it follows, a fortiori, that courts may apply the privilege's exclusionary effect as if it existed at the time the "duty" was first violated, thereby expanding the privilege net to encompass all evidence derived from the extrajudicial disclosure. That is, under the Boffa approach, the taint develops at the time the attorney-client privilege is "breached."

The importance of the perspective a court takes in viewing privileges and the interests they serve is crystallized by comparing Boffa to the Ninth Circuit's United States v. Rogers decision. A comparison of these two cases demonstrates that the outcome turns on: (a) when courts hold the privileges to apply; and (b) what purpose is served by evidentiary privileges. Are privileges merely a device which prevent disclosure of confidential communications within a "judicial proceeding?" Or do they have a more prophylactic function as a buttress to protect an individual's confidences regardless of whether a "proceeding" has commenced?

In Rogers, the IRS was investigating defendant's activities in a

111. 751 F.2d 1074 (9th Cir. 1985).
motion picture tax shelter.112 Agents of the IRS visited defendant’s former attorney at the attorney’s office and questioned him on defendant’s activities.113 The issue before the court was whether a government agency’s contact with defendant’s former attorney required dismissal of the indictment against defendant.114 In refusing to dismiss the indictment, the court said:

Although the district court’s decision and the briefs of the parties deal principally with the issue of whether the questions and answers would be covered by the attorney-client privilege, the question is actually whether the questions and answers involved a breach of the attorney’s professional obligation of confidentiality.

The attorney-client privilege is an evidentiary rule designed to prevent the forced disclosure in a judicial proceeding of certain confidential communications between a lawyer and a client. In this case, there has not been any forced disclosure of a confidential communication in a judicial proceeding...

The central question in this case is whether [investigators] improperly induced an attorney to breach his ethical duty of confidentiality. . . .

In Rogers, the court does not attempt to apply privilege law to out of court statements made by the defendant’s attorney. Unlike the Boffa court, which spoke of the disclosure as a breach of the attorney-client privilege, the Rogers court addressed the issue as one of a breach of an attorney’s professional ethical duty.116 The Rogers court refused to apply evidentiary privileges prior to the commencement of a judicial proceeding.117 This substantially diminishes the chances of excluding derivative evidence generated from the attorney’s unauthorized disclosure. Under the reasoning of Rogers, a court would have to find the violation of an ethical obligation, imposed on the attorney only by the attorney’s own profession, as a sufficient basis for excluding derivative evidence.118

112. Id. at 1075.
113. Id. at 1077-78.
114. Id. at 1077.
115. Id. (emphasis added). The court reversed the lower court’s ruling which had dismissed the indictment against the defendants on the ground of governmental misconduct. In doing so, the court held that merely inducing a witness to violate an ethical obligation of confidentiality to a client would not require the dismissal of the indictment. Id. at 1078.
116. Id. at 1077.
117. Id. at 1078.
118. The disclosure is also grounds to sue the attorney for a tortious breach of trust. See Beal v. Mars Larsen Ranch Corp., 99 Idaho 662, 667-68, 586 P.2d 1378, 1383-84 (1978) (the relationship of client and attorney is one of trust and good faith and the breach or violation of the attorney’s professional duty to the client could result in a cause of action against the attorney); Note, Breach of Confidence: An Emerging Tort, 82 COLUM. L. REV. 1426 (1982). This commentator noted that “[t]hough still in rudimentary form, a breach of confidence tort appears to be emerging from the case law to provide a basis for recovery where existing law is deficient.” Id. at 1426. In addition, the commentator distinguished the “breach of confidence” remedy from the testimonial privilege right: “[T]he immediate concern in testimonial privilege cases is different. The party
Given the different approaches in Boffa and Rogers to the issue of when a privilege protection is deemed to attach, it is possible to read Boffa as confusing evidentiary privileges with the ethical "privilege" imposed on attorneys by the profession itself. According to Canon 4-4 of the Model Code of Professional Responsibility, the ethical precept is broader than the evidentiary attorney-client privilege and "exists without regard to the nature or source of information or the fact that others share the knowledge." Reference by the court in Boffa to the unauthorized disclosure as a "breach of privilege" may be illustrative of the confusion created from using the word "privilege" to refer to both ethical and evidentiary rules; the court in Boffa may have applied the broad ethical "privilege" rather than the more narrow evidentiary privilege. Unlike the evidentiary privilege, the ethical "privilege" creates an affirmative duty to keep confidences communicated, incident to the relationship, confidential.

This is one plausible explanation of the divergence in treatment between the courts in Boffa and Rogers of the issue of "when" an evidentiary privilege's protection applies. Another distinction between the cases is the view of each court of the purpose served by the privileges. In Rogers, the court found the privilege to be "an evidentiary rule designed to prevent the forced disclosure in a judicial proceeding of certain confidential communi-

seeking suppression is concerned with the unfavorable impact the disclosure will have on his or her case, and may not be concerned about the extrajudicial effect of the disclosure." Id. at 1432 n.20. Breach of confidence in this Comment refers to the unauthorized disclosure and not to the tort flowing therefrom.

119. See S. GILLERS & N. DORSEN, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 287-88 (1985) (the authors state: "[I]nformation protected by the law of evidence is traditionally called 'privileged,' although the word 'privileged' is sometimes loosely used to refer to the information protected under the rules of ethics."). Compare, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980) (setting out the ethical guidelines an attorney must follow) with UNIF. R. EVID. 502 (1974) (amended 1984) (full text at note 29, supra) (setting out standards imposed by the law of evidence).

120. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1980); see also In re January 1976 Grand Jury, 534 F.2d 719, 728 (7th Cir. 1976) (the "ethical obligation of a lawyer to guard the confidences and secrets of his client is broader than the attorney-client privilege").

121. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1980); T. MORGAN & R. ROTUNDA, 1987 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 32 n.1 (1987) (quoting from ABA Comm. on Ethics and Professional Responsibility, Formal Op. 250 (1943): "to permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance").
cations between a client and a lawyer." In Boffa, the court did not seem to limit the privilege to evidentiary proceedings. It said:

The central issue in this proceeding rests solely on the firmly embedded common-law rule that an attorney cannot disclose confidences entrusted to him by his client without the client's permission. . . . Accordingly, it has long been recognized that such confidences are at the insistence of the client permanently protected from outside intrusion.

Therefore, the court in Boffa arguably did not restrict the protection afforded by the attorney-client privilege to a judicial proceeding, but instead found the attorney-client privilege to be a permanent protection of confidential statements.

C. Evidentiary Privileges and the "Fruit of the Poisonous Tree" Doctrine

1. Fruit of the Poisonous Tree under Gruzen v. State

In contrast to the evidentiary approach used by the Boffa court, some courts analyze the derivative evidence issue in terms of the exclusionary rule commonly associated with violations of the fourth, fifth, and sixth amendments to the Constitution. The Arkansas Supreme Court, in Gruzen v. State, framed the issue in terms of the "fruit of the poisonous tree" doctrine. It required a showing of governmental misconduct as a condition precedent to the exclusion of evidence generated from an unauthorized disclosure of a holder's confidential communications.

The defendant in Gruzen had been under the care of a private psychiatrist, Dr. Pusin, for nearly seventeen years. After experiencing severe difficulties, defendant Gruzen left home for a time to unravel his problems. Upon returning, Gruzen immediately contacted his psychiatrist and, during the counseling session, intimated that while away he may have murdered a young woman. Unsure whether defendant was suffering from delusions, Dr. Pusin sent him to see a forensic psychotherapist, Dr. Revitch, who participated in the diagnosis. Dr. Revitch concluded the story was factual, that

122. United States v. Rogers, 751 F.2d 1074, 1077 (9th Cir. 1985).
124. See supra note 68 for those courts which discuss the "fruit of the poisonous tree" doctrine in the privilege context.
125. Welch v. Butler, 835 F.2d 92 (5th Cir. 1988). The court held that the "fruit of the poisonous tree" exclusionary rule applied "primarily to violations of the Fourth, Fifth, and Sixth Amendments, although the Supreme Court has not explicitly limited its scope to constitutional violations." Id. at 95.
126. 267 Ark. 380, 591 S.W.2d 342 (1979).
127. Id. at 393, 591 S.W.2d at 350.
128. Id. at 391, 591 S.W.2d at 349.
129. Id. at 384, 591 S.W.2d at 345.
130. Id. at 391, 591 S.W.2d at 348.
131. Id.
Gruzen was psychotic and potentially suicidal.\textsuperscript{138} Tormented by knowing the details of a murder, Revitch decided to call his long time friend, Captain Vallatt of the prosecutor's office.\textsuperscript{134} Revitch asked Vallatt whether there had been any murders or reports of missing women in Arkansas within the last few days.\textsuperscript{135} Vallatt discovered that a woman was murdered in Arkansas in the manner Gruzen had described.\textsuperscript{136}

Either Revitch or his wife suggested that Gruzen’s parents, who were concerned about their son, call Vallatt for more information on Gruzen’s whereabouts.\textsuperscript{137} When the Gruzens called Vallatt, he remembered his conversations with Revitch and realized Gruzen was a suspect in the Arkansas murder.\textsuperscript{138} Vallatt forwarded this information to police in Arkansas who, in turn, applied for a search warrant, using Vallatt’s communications to establish the necessary probable cause.\textsuperscript{139} Items uncovered during the subsequent search of Gruzen’s New Jersey home enabled police to place him in Arkansas at the time of the murder.\textsuperscript{140} Prior to Revitch’s disclosures, the police had no clues whatsoever as to the identity of the woman’s slayer.\textsuperscript{141}

On appeal, Gruzen sought to have \textit{all} evidence connecting him to

\begin{itemize}
  \item \textsuperscript{132} \textit{Id.} at 392, 591 S.W.2d at 349.
  \item \textsuperscript{133} \textit{Id.}
  \item \textsuperscript{134} \textit{Id.} The court does not delve into any of the ethical obligations imposed on a psychiatrist in Arkansas under these circumstances. Many state psychotherapist privilege statutes have narrow and limited exceptions. For example, California Evidence Code section 1024 states:

  There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger. \textsuperscript{135}

  \textbf{CAL. EVID. CODE} § 1024 (West 1966); \textit{see also} Mavroudis v. Superior Ct., 102 Cal. App. 3d 594, 599, 162 Cal. Rptr. 724, 729 (1980) (Evidence Code section 1024 held to be applicable if the court finds that prior to the injury of plaintiff the therapist determined the patient’s propensity toward violence); Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 441-42, 551 P.2d 334, 347, 131 Cal. Rptr 14, 27 (1976) (a psychotherapist’s disclosures held not to be a breach of trust or a violation of professional ethics if the disclosure was necessary to avert danger to others). Arkansas’ psychotherapist privilege statute is adopted from Uniform Rule of Evidence 503 without modification. \textit{Evidence in America, supra} note 29, ch. XXV, at 7; \textit{Ark. R. EVID.} 503, \textit{Ark. Stat. Ann.} § 16-41-101 (1987).
  \item \textsuperscript{135} \textit{Gruzen}, 267 Ark. at 392, 591 S.W.2d at 349.
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} \textit{Id.}
  \item \textsuperscript{139} \textit{Id.}
  \item \textsuperscript{140} \textit{Id.}
  \item \textsuperscript{141} \textit{Id.} at 392-93, 591 S.W.2d at 349.
\end{itemize}
the state of Arkansas obtained as a result of the "breach of the psychotherapist-patient privilege" excluded.¹⁴² Unlike the Boffa court, which framed the issue almost entirely in terms of principles grounded in standard privilege law, the Gruzen court saw the issue as involving the "fruit of the poisonous tree" doctrine. That is, the court applied the exclusionary rule normally associated with violations of the fourth amendment rather than with the privileges' evidentiary exclusionary rule. The court found that no police misconduct had occurred in discovering Gruzen's identity and denied his motion. It seems implausible, however, to view Gruzen as supporting the proposition that the unauthorized disclosure of confidential material may involve a violation of the fourth amendment right against unreasonable search and seizure.

By invoking the general judicial exclusionary rule, the Gruzen court focused on the conduct giving rise to the breach of confidence. The Boffa court, on the other hand, focused on the nature of the injury to the defendants once the "attorney" had revealed the substance of their communications. The difference in analysis between Gruzen and Boffa demonstrates an important distinction between the purposes served by the evidentiary privilege exclusionary rule and the judicially created exclusionary rule. In the former, the real issue is the unauthorized, nonconsentual disclosure of confidential matter. Exclusion of evidence is not to deter wrongful government conduct, as is the case in the general exclusionary rule, but rather to protect and promote interests underlying the privileges, for example, privacy. In the latter, a court's inquiry is geared toward answering the question of how the disclosure of the confidence comes about. When applying the judicially created exclusionary rule, courts ignore the real injury flowing from the disclosure, which is the loss of privacy interests related to the control of confidential, personal information.

¹⁴² Id. at 391, 591 S.W.2d at 348. Although commentators have suggested that the doctor-patient relationship does not warrant privilege status (see, e.g., 8 J. Wigmore, supra note 2, § 2285, at 528), nevertheless, many states have enacted doctor-patient privileges. Whalen v. Roe, 429 U.S. 589 (1977). Of particular importance is the psychotherapist and psychiatrist-patient relationships. Here, especially, potentially sensitive and volatile information must be openly communicated with the assurance of confidentiality for treatment to be successful. See generally Tacon, supra note 5, at 338 ("[T]he essence of psychiatry requires extensive revelations of 'hidden' emotions, fantasies, frustrations and such like. It is difficult to conceive of individuals entering into a psychiatric relationship except on the implicit understanding that such confidences would be respected"). In addressing whether confidentiality was essential to the relationship, Tacon quotes Freud: "The whole undertaking is lost labour if a single concession is made to secrecy." Id. (quoting from 2 S. Freud, Collected Papers (1959)); see also In re Lifschutz, 2 Cal. 3d 415, 431-32, 467 P.2d 557, 567, 85 Cal. Rptr. 829, 839 (1970) (quoting from a reference to M. Guttmacher, Psychiatry and the Law 272 (1952): a psychiatric patient must expose "his entire self, his dreams, his fantasies, his sins, and his shame."). For a general review of the physician-patient privilege, see McCormick, supra note 2, § 98, at 243 and supra note 28 for a sample provision.
about oneself.

This is not to suggest that Boffa was devoid of any principles normally associated with the judicially created exclusionary rule. For example, after the defendants had met their burdens of proof on the formation of the attorney-client privilege, the court in Boffa stated "the government would then have. . .the ultimate burden of establishing that its proof at trial had an independent origin, untainted by the improperly obtained evidence." The court, in essence, applied the "independent source" doctrine, normally associated with the fourth amendment exclusionary rule. The doctrine requires evidence shown to be obtained from sources independent of the illegal conduct of government officials not to be excluded. The Boffa court grafted concepts from the fourth amendment onto evidentiary principles of law, without mentioning the "fruit of the poisonous tree" doctrine in its opinion. Implicit in its use of this doctrine is its recognition that some wrongful governmental conduct must have occurred. This is one way to reconcile Boffa with Gruzen.

The Arkansas Supreme Court does not grapple with the issue of defining what exactly is meant by "governmental intrusion" in an evidentiary privilege context. Given the terms of the fourth amendment, a police officer knows that all individuals have a constitutional right against unreasonable searches and seizures. However, this analysis becomes strained when applied to evidentiary privileges. How could a police officer, without clairvoyance or advance knowledge, know that a particular line of questioning intrudes into some holder's protected confidential communications? And who, at that moment, is the final decisionmaker on whether these confidences will enjoy privileged status?

For example, when a police officer questions a spouse regarding the whereabouts of the other spouse, wanted in connection with a burglary, chances are the spouse is not aware of the marital privilege

145. See Rakas v. Illinois, 439 U.S. 128 (1978). In Rakas, the issue was whether defendants had standing to object to an allegedly unlawful search and seizure. The Court held: "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Id. at 143; see also Warden v. Hayden, 387 U.S. 294, 304 (1967) (privacy held to be the principal value upheld by the fourth amendment right to be free from unreasonable searches and seizures). Privacy is also a principal rationale for the fifth amendment privilege against self incrimination. Schmerber v. California, 384 U.S. 757, 760-63 (1966).
Preventing the police officer from questioning one spouse on the other's whereabouts for fear of intruding on the other spouse's confidences could unduly hamper law enforcement. In addition, unlike ethical duties imposed on professionals, there is no obligation imposed on a spouse, as an incident to the marriage, to keep communications of the other spouse confidential. As one court said, "it does not appear to be illegal for a spouse to speak to or 'tip' law enforcement authorities even where confidential communications may be involved." However, it is more probable to hold that police questioning a professional on matters likely to be held in confidence may lead to either an abrogation of the respective professional's ethical duties, or under some courts' interpretations to a breach of an evidentiary privilege.

Addressing the feasibility of applying the general exclusionary rule to deter a professional from disclosing confidences, one court said:

In a case in which a government agency innocently learns of privileged information from a person who rightfully possesses that information, there is no conduct to deter unless it is the delivery of that information by a person who, although rightfully in possession of it, was not authorized to disclose it. Even then, the only deterrent value would be to reduce the incentive for such disclosure by barring the government's use of the information disclosed. . . . Such a holding would place . . . [the attorney-client] privilege on a higher plane than the fourth amendment protected privacy. Plainly stating this result reveals that the reasoning path that leads to it is a gossamer.

Thus, it is unlikely that a court would invoke the exclusionary rule to deter nongovernmental intrusion. It appears equally unlikely that a court would exclude derivative evidence discovered as a result of police investigation, in the absence of a showing by a defendant that police had advance knowledge of the information's privileged status. Yet, even if police had such prior knowledge, it seems untenable to

146. Note, supra note 12, at 1475 (the relevant question is not whether too few people know of a privilege, but rather whether enough would become aware of its absence).
148. S.E.C. v. OKC Corp., 474 F. Supp. 1031, 1039-40 (N.D. Tex. 1979). The court rejected OKC's argument that the SEC was precluded from using a privileged report prepared by a law firm for OKC to develop independent unprivileged information. The court stated:

OKC's argument is flawed. The remedy that it requests will not further the purpose of the privilege. The privilege's goal is protection—to shield against compelled disclosure. OKC, however, does not seek to avoid the disclosure of privileged information. Rather, it seeks to prevent the SEC from using the privileged information to frame demands for information that are not privileged but that may corroborate or explain information contained in an allegedly privileged but already disclosed report.

Id. at 1039.
say police may no longer question the defendant regarding the information. After all, the privilege is not a self-executing right. It requires the holder to invoke its protection. Therefore, in the privilege context governmental conduct wrongful enough to invoke the exclusionary rule may be defined as intentional governmental intrusion, combined with the government's prior knowledge of the information's privileged status, which interferes with the holder's privacy interests without his or her prior consent. The proof required to meet this burden would forever preclude a defendant from excluding derivative evidence.

Finally, Gruzen is indistinguishable from Boffa in one important way. Each court appears willing to protect the privacy interests of the holder, regardless of whether a judicial proceeding had commenced when the unauthorized disclosures were made. As did the Boffa court, the Gruzen court addressed the exclusion of evidence by considering the privacy interest frustrated the instant the unlawful disclosure occurred. Although the court in Gruzen did not exclude "fruits" generated from the unauthorized disclosure, by addressing the issue in terms of the "fruit of the poisonous tree," the court implicitly found the privacy interests worthy of significant protection although no judicial proceeding had yet commenced.

2. Fruit of the Poisonous Tree under State v. Welch

The Louisiana Court of Appeal, in State v. Welch, also addressed the issue in terms of the "fruit of the poisonous tree" doctrine. However, the court chose not to follow standard "fruit" exclusionary law; instead, it found the doctrine inapplicable without a showing of an attempt by the prosecutor to admit the defendant holder's confidences into evidence during the defendant's trial. Unlike the Gruzen court, the court in Welch did not require a showing of governmental misconduct as a condition for invoking the doctrine.

In Welch, defendant's wife taped two telephone calls she had with him. During the last call defendant confessed to murdering a store clerk with a tire tool. Defendant's wife turned these taped conversations over to the police. Defendant was picked up for questioning and quickly confessed after being informed the police had knowledge of his involvement in the murder. In a pretrial motion, defendant as-

149. McCormick, supra note 2, § 73, at 173 (noting that the rules of privilege are not self-executing and "must be asserted to be effective, and if not asserted promptly will ordinarily be waived"); see also 8 J. Wigmore, supra note 2, § 18 n.1.
serted that all his statements to the police resulted from his wife’s violation of the husband-wife marital privilege statute. Defendant sought to exclude all the evidence against him as “fruit” of his wife’s taping of their confidential communications.\footnote{Welch, 448 So. 2d at 711.}

The \textit{Welch} court began its analysis by discussing the “fruit of the poisonous tree” doctrine set forth by the Supreme Court in \textit{Wong Sun v. United States}.\footnote{371 U.S. 471 (1963). For a review on the “fruit of the poisonous tree doctrine,” see \textit{supra} notes 63-69 and accompanying text.} The court reasoned that \textit{Wong Sun} required “a finding that discovery of the evidence is the direct result of some primary illegality or taint” to invoke the “poisonous tree” doctrine.\footnote{Welch, 448 So. 2d at 711.} Thus, the main issue was whether any “taint” originated when Mrs. Welch hand delivered tapes containing confidential conversations between her and her husband to the police department.

The court held that no “taint” or illegality occurred when Mrs. Welch handed the tapes over to the police officials.\footnote{Id.} It decided that the husband-wife marital privilege prevented only disclosure at trial of their confidential communications made during the marriage.\footnote{Id. at 712.} Since none of the taped conversations between Welch and his wife had been introduced into evidence, the court refused to apply the “fruit of the poisonous tree” doctrine to bar evidence generated from Mrs. Welch’s disclosures to the police.\footnote{Id. at 712.} The “taint” could not come into existence until after defendant’s confidences were admitted into evidence.

The practical effect of requiring the admission of confidential communications, as a condition precedent to the invocation of the “poisonous tree” doctrine, is to foreclose all hope of excluding derivative evidence. On closer examination, the court’s reasoning is circular. For example, the “fruits” gathered as a result of Mrs. Welch’s disclosure are subject to exclusion during the trial of the defendant only if the taped conversations which contain the confidential communications are first admitted into evidence at the defendant’s trial. This means that before the “poisonous tree” doctrine may take hold to exclude derivative evidence, the confidences must be introduced into evidence. Viewed pragmatically, this places Welch’s ability to exclude “fruits” in the control of the prosecutor.\footnote{Id. at 712.}

\footnote{Id. at 711. The statute in question, LSA-R.S. 15:461, created two distinct husband-wife privileges regarding the competency of one spouse to testify against the other in a criminal proceeding. The first privilege is the confidential husband-wife privilege, while the second is the so called “anti-marital” privilege. See \textit{supra} note 2 for a review on these two marital privileges.}

\footnote{Id. at 712.}

\footnote{If the defendant is the one who is introducing the testimony, it is no longer a privileged communication but, rather, falls under the waiver doctrine. See \textit{infra} note 159}
the prosecutor in *Welch* inadvertently attempted to introduce statements made by Welch to his wife during his case-in-chief, then, under the court’s ruling, the “taint” necessary for invoking the “poisonous tree” doctrine would be created. This leads to a devastation of the privilege.

First, a prosecutor may have already introduced all the “fruits” flowing from the unauthorized disclosure into evidence before attempting to introduce the confidential statements made between defendant and his spouse. Other than declaring a mistrial, how can a court undo that which is already done? Second, assuming fortuitously that no “fruits” have yet been introduced into evidence, under the court’s reasoning, a defendant must now permit confidential statements to be admitted into evidence to retain any hope of later excluding any derivative evidence. However, in this second scenario the court may find that defendant waived the right to assert the privilege. Indeed, privileges are not self-executing but must be asserted in a timely manner or else the holder may be denied their protection.

The court in *Welch* would not have intended such an anomalous result. Indeed, the court never confronted the issue directly and may not have fully understood the ramifications of its reasoning. However, this case does exemplify the confusion engendered by mixing the fourth amendment exclusionary rule with evidentiary privileges. The court sought to apply *Wong Sun*, despite the lack of any constitutional violation. Additionally, the court did not require a showing of governmental misconduct, a precursor to the invocation of the “poisonous tree” under *Wong Sun*, as a condition to the exclusion of derivative evidence.

The court might easily have dispensed with Welch’s derivative evidence claim by finding it not illegal for a spouse to “tip off” law

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158. See supra note 149.

159. The waiver doctrine is not merely limited to words, but also encompasses conduct which manifests an intent to disclose. 8 J. WIGMORE, supra note 2, §§ 2327-29, at 639-41. An example of a waiver statute is Uniform Rule of Evidence 510. It states:

> A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

Unif. R. Evid. 510 (1974). See MCCORMICK, supra note 2, § 93, at 223-27 (discussion of waiver in the attorney-client relationship); id. at § 103, at 254-57 (waiver issues under the physician-patient privilege); id. at § 83, at 197-98 (enforcement and waiver issues under the husband-wife privilege).
enforcement authorities even if confidential communications are involved. The reasoning required to reach this result would be strikingly facile: privileges are testimonial in character and only the confidences themselves communicated between Welch and his wife would be inadmissible in evidence. Such an approach seems more in line with traditional notions of evidentiary privilege law.

The above cases reveal an alarming asymmetry in analysis on whether to exclude derivative evidence arising from an unauthorized disclosure of a holder's confidential communications. Gruzen and Welch framed the issue in terms of the "fruit of the poisonous tree" doctrine; each court, however, saw the "taint" which poisoned the tree as arising in different contexts. In comparison, Boffa utilized principles associated with both the state privilege exclusionary rule and the "fruits" doctrine of Wong Sun; although, Boffa did not expressly mention the "poisonous tree" doctrine in its analysis. Nevertheless, as diverse as these cases appear, a thread of consistency emerges: the interests underlying the law of privileges are deemed significant and worthy of more protection than traditionally accorded to them. This philosophy parallels that of commentators viewing privilege interests in terms of individual privacy rights. Justice Douglas, dissenting in Lewis v. United States, aptly summed up the importance of privacy interests in our modern society:

We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government. . . .

Secret observation booths in government offices and closed television circuits in industry, extending even to rest rooms, are common. Offices, conference rooms, hotel rooms, and even bedrooms . . are "bugged" for the convenience of government. Peepholes in men's rooms are there to catch homosexuals. . . . Personality tests seek to ferret out a man's innermost thoughts on family life, religion, racial attitudes, national origin, politics, atheism, ideology, sex, and the like. . . .

These examples and many others demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. . . .

The issue remains whether privileges are the right tool to protect these interests. It may well be that the cases recognizing privileges' ability to exclude derivative evidence are isolated incidents merely signaling the confusion surrounding the application and purpose of the privileges. More likely, they are the probable result of the diffi-

160. See State v. Kerr, 531 S.W.2d 536, 541 (Mo. Ct. App. 1976) (rejecting the "poisonous tree" doctrine asserted by the defendant after his wife had gone to the police with information about defendant's involvement in a murder). The court stated that the marital privilege is "only. . . a testimonial privilege; . . it does not appear to be illegal for a spouse to speak to or 'tip' law enforcement authorities even where confidential communications may be involved." Id.
161. Id.
163. Id. at 340-43.
cult situations facing these courts. Certainly, in *Gruzen*, the defendant's privacy interests were violated when his psychotherapist disclosed his confidences to the police. And yet, it may be unthinkable for a court to exclude tangible evidence connecting Gruzen to the murder of an innocent young woman. It would be particularly shocking to exclude this kind of evidence under a mere evidentiary rule of law. It is unlikely, and undesirable, for courts to exclude already acquired tangible evidence which links a defendant to a murder, to protect privacy interests in the absence of governmental wrongdoing.

However, in some cases it still may be patently unfair to allow use of the derivative evidence against a defendant. For example, in cases like *Boffa* there is an argument that courts should exclude derivative evidence where the defendants were deceived by their "attorney" with the aid of the government. It may well be that the element of governmental intrusion into the privileged relationship, missing in the *Gruzen* case, is the element necessary to justify excluding derivative evidence.

**Conclusion**

The exclusion of derivative evidence arising from an unauthorized disclosure of confidential communications is subject to various analyses by courts. The confusion in this area may stem from privileges' protection of interests extrinsic to the truth-seeking process. Once the confidence is disclosed, some courts treat privileges as if they applied at that instant, regardless of the requirement of an evidentiary proceeding. Having passed the first hurdle, courts apply exclusionary rules from various sources. For instance, in its analysis, *Boffa* applied the evidentiary privilege rule of exclusion. *Gruzen* and *Welch*, however, saw the issue to involve the nonevidentiary, general exclusionary rule associated with the fourth, fifth, and sixth amendments. Significantly, all three courts recognized that an interest of the defendant-holder was violated by unlawful disclosure of the holder's confidential communications, regardless of whether a judicial proceeding had commenced. Taken together, these decisions, with their varying requirements, stand for the proposition that some courts may be willing to expand the protective net of the privileges. As this Comment demonstrates, however, whether the privileges are the proper means to protect these interests remains in serious doubt.

JAMES J. DALESSIO