Attorney—Client Privilege, Professions and the Common Law Tradition

By D.F. Partlett*

Introduction

I was prompted to write this essay when reflecting upon a recent decision of the High Court of Australia entitled *Baker v. Campbell*.[1] The case involved the privilege enjoyed by attorneys (solicitors in Australia) from compulsory disclosure of information given to them by clients, or generated in giving advice to clients. Justice Murphy of the High Court extensively referred to a Commentary published by the *Alabama Law Review*—"Search of the Lawyer's Office—Court—Sanctioned Threat to Confidential Communications."[2] The Commentary bemoaned the receding inviolability of the lawyer's office under a number of United States Supreme Court decisions refusing to vigorously extend Constitutional guarantees to their full panoply. The significant citation of United States law in *Baker v. Campbell* stresses the similarities of our societies, traditions and legal systems. We may learn a great deal one from the other. Common problems are ventilated in the law of privilege; for example, the special position of corporations[3] and the status of mistaken or inadvertent disclosure.[4]

Shared problems, however, are more profound. In the first place, we are faced in this sphere with the dilemma of the democratic state balancing, on the one hand, the protection of individual privacy and autonomy, and on the other, the public interest of law enforcement in the light of all available facts. Private information may, if unlocked, increase the efficiency of governmental police functions and hence make our communities safer and more secure.

Secondly, and allied to the first, we feel disquiet about over-

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1. 57 A.L. J.R. 749 (1983).

2. Commentary—Search of the Lawyer's Office—Court—Sanctioned Threat to Confidential Communications, 32 *Alabama L. Rev.* 92 (1980).

3. *See* note 23 *below.*

4. *See* notes 20, 39 *below.*

weening state power; often it has been used to oppress individual freedoms. George Orwell indicated in "Nineteen Eighty-Four",[5] that Oceania evolved from a Western capitalist model—an open society. Modern technology which overcomes the physical barriers to surveillance by Big Brother exacerbates our apprehension.

Thirdly, these forces arise in the context of our professionalizing societies. The issue is posed of the professional acting as the bulwark between the state and the individual. Lawyers have traditionally been seen as performing this function and hence, as a concomitant, the common law has developed the law of attorney-client privilege, or as Australian and English lawyers dubb it—legal professional privilege. In our modern and complex societies other professionals now lay claim to protect the individual. It is a large question whether the privilege should extend to protecting confidences entrusted to that wider range of professionals.[6]

My purpose is to trace, in short compass, these redoubtable issues. A subsidiary lesson will be to observe the capacity of the common law to protect individual rights in the absence, as in Australia, of constitutionally entrenched guarantees of individual freedoms. The courts finally guard individual freedom from the tyranny of the majority.[7]

1. *Attorney-Client Privilege in Commonwealth Law*

At the onset, it should be announced that Commonwealth law owes a great debt to Dean Wigmore whose erudite analysis has been accepted as faithfully describing the history and rationale of the privilege.[8]

A confidence given by a client to a lawyer in the course of professional advice or within a professional and client relationship is impressed with a duty of confidentiality.[9] Thus a lawyer may not disclose the confidence without the client's consent.[10] An exception to this is found where the lawyer or other professional is obliged to disclose the information under compulsion of law. Confidential in-

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5. G. Orwell, *Nineteen Eighty Four* (Martin Secker & Warburg, 1976).
6. *See* text at notes 95-95 *below.*
7. J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).
8. 8 J. Wigmore, *Evidence* paras. 2290 et seq.
9. *Parry-Jones v. Law Society* [1969] 1 Ch. 1, 7 per Lord Denning M.R.
10. *Rakusen v. Ellis, Munday and Clarke* [1912] 1 Ch. 831 (lawyer) *Minter v. Priest* [1930] A.C. 558 (H.L.) (lawyer); *Hunter v. Mann* [1974] Q.B. 767 (medical practitioner).

formation is not protected from discovery in judicial proceedings. Here the policy of arriving at true facts overrides the confidence. Lord Wilberforce in the House of Lords decision of *British Steel Corporation v. Granada Television*[11] stated the position:

> "[A]s to information obtained in confidence, and the legal duty, which may arise, to disclose it to a court of justice, the position is clear. Courts have an inherent wish to respect this confidence, whether it arises between doctor and patient, priest and penitent, banker and customer, between persons giving testimonials to employees, or in other relationships. A relationship of confidence between a journalist and his source is in no different category: nothing in this case involves or will involve any principle that such confidence is not something to be respected. But in all these cases the court may have to decide, in particular circumstances, that the interest in preserving this confidence is outweighed by other interests to which the law attaches importance. The only question in this appeal is whether the present is such a case."[12]

The House of Lords found that journalists had no special protection from disclosing the sources of his information—in this case, the source of leaked information from British Steel.

However, if the confidence falls within attorney-client privilege the courts will excuse disclosure of that information under discovery or in court proceedings.[13] Similarly, where a power of search and seizure is exercised, under statute by an administrative or executive officer, that statute will be construed as not to preclude the privilege. It is a "fundamental and general principle of the common law"[14] and it is to be "presumed that if Parliament intended to authorize the impairment or destruction of that confidentiality by administrative action it would frame the relevant statutory mandate in express and unambiguous terms."[15]

The scope of the privilege in Australia was enunciated by the

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11. [1981] A.C. 1096.

12. *Id.*, 1168-69. *But see Branzbury v. Hayes*, 408 U.S. 665 (1972) and *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

13. "Confidentiality is not a separate had of immunity. There are, however, cases when confidentiality is itself a public interest and one of these is where information is given to an authority charged with the enforcement and administration of the law . . .": *D. v. N.S.P.C.C.*, [1978] A.C. 171, 230 per Lord Hailsham.

14. *Baker v. Campbell, above* note 1, at 776.

15. *Id.*, 776.

High Court in *Grant v. Downs*.[16] A person is protected from disclosing oral or written confidential communications between himself and his lawyer made, or brought into existence, for the sole purpose of seeking or giving advise or for the sole purpose of use in existing or anticipated litigation.[17] The privilege protects the client and may be waived by him. The privilege does not protect communications which are in themselves part of a fraudulent or criminal proceedings or course of conduct or which constitute the whole or part of an actual dealing or transaction.[18] Privilege does not protect items lodged with a lawyer for safe-keeping.[19] Controversy surrounds the issue of whether the privilege is lost once the information becomes public even though unintentionally or inadvertently.[20]

There is a dissonance in the Commonwealth law. In England, unlike Australia, it suffices if the communication or document was made with the "dominant purpose" of legal advice or use in litigation.[21] This is less restrictive than the Australian "sole purpose" test.[22]

The Australian stance was taken in light of the difficulties in applying the privilege to corporations. These difficulties are the subject of close scrutiny at present in the United States.[23] In *Grant*

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16. 135 C.L.R. 674, 688 (H.C. 1976).

17. *Id.*, See also *O'Reilly v. the Commissioners of the State Bank of Victoria* 57 A.L.J.R. 130, 137 per Mason J. (1983).

18. *O'Reilly v. the Commissioners of the State Bank of Victoria, id.*, 138-139 per Mason J.; *R. v. Bell; Ex parte Lees* 146 C.L.R. 141 (1980); *Re Kearney: Re Jawoyn (Katherine Area) Land Claim: Ex parte Attorney-General for the Northern Territory* 55 A.L.R. 545, 553-556 per Woodward & Neaves J.J., 557-558 per Fisher J. (Full Fed. Ct. of Aust. 1984), (Special leave granted for appeal to H.C.).

19. *Re Packer v. Deputy Commissioner of Taxation* 53 A.L.R. 589 (S. Ct. Qld 1984).

20. *Calcraft v. Guest* [1898] 1 Q.B. 759; *R. v. Braham & Mason* [1976] V.R. 547; *R. v. Uljee* [1982] 1 N.Z.L.R. 561 (C.A.); *McCaskill v. Mirror Newspapers* [1984] 1 N.S.W.L.R. 66.

21. *Waugh v. British Railways Board* [1980] A.C. 521, 533 per Lord Wilberforce, 537 per Lord Simon, 543 per Lord Edmund-Davies.

22. *Grant v. Downs above* note 16, at 688, but compare at 678 per Barwick C.J. (prefering the "dominant" purpose test).

23. *Cf. Upjohn Co. v. United States*, 449 U.S. 383 (1981); for recent commentary See Saltzburg, Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach, *Hofstra L. Rev.* 279 (1984). For earlier English and Australian law See *Anderson v. Bank of British Columbia* Ch. D. 644 (1876); *Jones v.*

v. Downs the defendant Psychiatric Hospital claimed privilege in respect of a report compiled for a number of purposes only one of which was to provide facts and commentary to the Hospital's legal representatives.[24] A corporation in the conduct of its affairs must act through its servants. It brings into existence "voluminous records and institutes systematic standing procedures calling for the preparation of reports and other documents which may serve a variety of purposes, included in which is the submission of document to a solicitor for the purpose of obtaining legal advice, or for use in existing or anticipated litigation."[25]

An individual is bound to disclose his knowledge of relevant facts. A corporation may only derive that knowledge through documents prepared by its servants. Unless the sole purpose requirements were employed a corporation would gain an advantage not enjoyed by an individual.[26]

Although *Grant v. Downs*[27] firmly entrenched the privilege in respect of court proceedings, the true limits were not tested until the privilege was sought to be employed in respect of police searches of law offices and powers of inspection under the *Income Tax Assessment Act.* In *O'Reilly v. Commissioner of the State Bank of Victoria*[28] a majority of the High Court applied the English Court of Appeal decision of *Parry-Jones v. Law Society.*[29] The majority in *O'Reilly* held that the privilege did not extend beyond judicial or quasi-judicial proceedings. In the words of Diplock L.J., in *Parry-Jones*, the privilege "refers to a right to withhold from a court, or tribunal exercising judicial functions, material which would otherwise be admissible in evidence."[30] *O'Reilly* was applied by the Full Federal Court of Australia in *Crowley v. Murphy.*[31] In the latter case the court found that privilege could not apply in respect of a search warrant granted to the Australian Federal Police to search the premises of the plaintiff's law firm. The common thread was that the rule was one of evidence only. Thus it

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Great Central Railway [1910] A.C. 4.

24. *See* note 16, at 679 *above.*
25. *Id.*, 686.
26. *Id.*
27. *Id.*
28. *See* note 18 *above.*
29. *See* note 9 *above.*
30. *Id.*, 9.
31. 52 F.L.R. 123 (1981).

appeared that the protection offered to the individual in the face of executive intrusion was severely curtailed.

However, the decision was inconsistent with strong New Zealand and Canadian decisions asserting that the privilege was a substantive principle of law. The New Zealand courts had long held this view. In *Commissioner of Inland Revenue v. West-Walker*[32] the Court of Appeal found that the general words of the New Zealand tax statute requiring the production of documents should be read as subject to the application of the privilege. In doing so it was pointed out[33] that although the privilege had hitherto been invoked as an immunity from production of evidence in court, its foundation was the public interest and hence it extended to protect all relevant communications from compulsory disclosure.[34]

The New Zealand Court of Appeal in *R. v. Uljee*[35] recently confirmed the broad base of the privilege. In this case the accused and his solicitor had a private conversation which was accidently overheard by a policeman stationed at the door. It was argued that the contents of the conversation were not protected since the conversation had lost its confidential nature once it had been communicated to a third party.[36] However, the Court saw the rationale in "the free flow of information" between solicitor and client.[37] The interest was in privacy.[38] To allow the contents of the conversation to be disclosed would undermine the ability to freely consult.[39]

In *Rosenberg v. Jaine*[40] Davison C.J. of the New Zealand High Court (a court inferior to the Court of Appeal) referred to the Australian cases in a fact situation requiring the determination of whether the privilege applied in respect of search warrants issued in respect of solicitor's offices. *Crowley v. Murphy*,[41] the Australian law office case, was rejected as out of line with New Zealand authority and principle.[42]

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32. [1954] N.Z.L.R. 191.
33. *Id.*, 206.
34. *Id.*
35. [1982] 1 N.Z.L.R. 561.
36. *Calcraft v. Guest above* note 20; *R. v. Braham & Mason above* note 20.
37. *See* note 35 at 572 per Richardson J. *above.*
38. *Id.*
39. *Cf.* Note, Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege, 82 *Mich. L. Rev.* 598 (1983).
40. [1983] 1 N.Z.L.R. 1.
41. *See* note 31 *above.*
42. *See* note 40, at 10-11 *above.*

A number of Canadian authorities also conflicted with *O'Reilly*.[43] In *Re Director of Investigation and Research and Shell Canada*[44] the Federal Court of Appeal considered s.10 of the Canadian *Combines Investigation Act* 1970. Here wide powers of investigation were invested in the relevant Director. The Court concluded that the section should not be construed as to derogate from the privilege. It was a "manifestation of a fundamental principle upon which our judicial system is based."[45] In *Solosky v. The Queen*[46] Dickson J. summed up the law and its rationale:

> "Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court-room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits."[47]

The Canadian Supreme Court in *Descoteaux v. Mierzwinski*,[48] involving a search warrant covering the premises of a legal aid bureau, expressly confirmed that the privilege was a substantive rule of law protecting confidentiality.

Highlighting that the law is seen to rest on substantive and widely observed principle is the decision of the European Court of Justice in *A.M. & S. Europe Ltd. v. Commission of the European Community*.[49] It is there stated that the doctrine of "legal professional privilege" constituted a general principle or rule which protects privileged documents from production and seizure in the course of administrative inquiry. The rule was not confined to evidence in judicial or quasi-judicial proceedings.[50] It was said:

> [T]here exists in all the member states a recognition that the public interest and the proper administration of justice demand as a general rule that a client should be able to speak freely, frankly and fully to his lawyer."[51]

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43. *See* note 17 *above*.
44. 55 D.L.R. (3d) 713 (1975).
45. *Id.*, 722 per Jackett C.J.
46. 105 D.L.R. (3d) 745 (1979).
47. *Id.*, 757.
48. 70 C.C.C. (2d) 385 (1982).
49. [1983] 3 W.L.R. 17.
50. *Id.*, 28.
51. *Id.*

2. *Baker v. Campbell and the Privilege's Rationale*

Against this background the High Court of Australia repudiated its decision in *O'Reilly*.[52] In *Baker v. Campbell*[53] a majority[54] of the Court decided that the privilege was one of substantive law. A warrant was duly issued under the provisions of the *Crimes Act*, 1914 pursuant to which a police constable attempted to seize documents held by a firm of solicitors (attorneys), which documents, it was agreed for the purposes of the stated case, had been brought into existence for the sole purpose of obtaining and giving legal advice to a client. The Court held that the privilege ranged beyond judicial or quasi-judicial proceedings to all forms of compulsory disclosure of evidence. Accordingly, it followed that the relevant provision of the *Crimes Act* should be construed in light of that principle. In coming to this conclusion the Justices expressed important views about the rationale of the privilege. In Australia these views constitute a watershed in the protection of individual privacy and autonomy from the intrusive state.

The rationale may be articulated at two levels. First, at an instrumental level, it is seen as fostering the functioning of the legal system, especially an adversary legal system. Without the privilege the legal system would be a weak tool in vindicating legal and hence individual rights. At the same time it protects a person's, or his lawyer's, investment in legal advice.[55] But a more fundamental level is to be found in the protection of privacy and individual autonomy.[56]

Thus the privileges' scope will vary. If the entity claiming the privilege is a governmental body[57] or a corporation[58] it will be sufficient to formulate a rule based on the first level. But an individual claiming privilege should attract an amplitude of protection commensurate with the second and more fundamental level.[59] In *Baker*

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52. *See* note 17 *above*.

53. 57 A.L.J.R. 749 (1983).

54. Murphy, Wilson, Deane and Dawson J.J.; Gibbs C.J., Mason & Brennan JJ., dissenting.

55. Posner, *The Economics of Justice* 244 (1981).

56. *Cf.* The Law Reform Commission Report, *Privacy*, Vols. 1 & 2 (1983).

57. *Cf. Re Kearney above* note 18.

58. *See* note 23 *above*.

59. For an article developing a similar theme see Saltzburg, Privileges and Professionals: Lawyers and Psychiatrists, 66 *Va. L. Rev.* 597 (1980).

v. Campbell[60] the majority of the Justices saw the privilege as grounded upon facilitating the functioning of the legal system.[61] Professional guidance in the complex processes of the law should be uninhibited by the possibility that what is said to enable advice to be sought or given might later be used against the person seeking advice.[62] The principle is to be found in the 19th century case of *Greenough v. Gaskell*[63] and in United States authorities.[64] It is that the privilege is necessary for access to justice. Lord Brougham in *Greenough* said confidentiality alone did not suffice; rather it was necessary in "the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence."[65]

This must be so much more the case in the 1980's where complexity of the law and the demands of the regulatory welfare state intrude upon the individual.[66]

Moreover, Wilson J. adopted the view that:

> "The freedom to consult one's legal adviser in the knowledge that confidential communications will be safeguarded will often make its own contribution to the general level of respect for the observance of the law within the community."[67]

A number of Justices recognized the deeper rights based rationale. Wilson J. who had recanted his view in *O'Reilly*,[68] saw that the "adequate protection according to the law of the privacy and liberty of the individual is an essential mark of a free society."[69] The "common law privilege attaching to the relationship of solicitor and client is an important element in that protection."[70]

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60. See note 53 *above.*

61. *Id.*, 780; see also *R. v. Bell; ex parte Lees* 146 C.L.R. 141, 152 per Stephen J. (1980).

62. *Id.*, 781 per Dawson J.; see also 8 J. Wigmore *Evidence above* note 8, para. 2291.

63. 1 My & K. 98 (1833); 39 E.R. 618.

64. *Fisher v. United States*, 425 U.S. 391 (1976).

65. *See* note 63 at 103, 621 *above.*

66. *Cf.* Stigler, *The Citizen and the State: Essays on Regulation* (1975), 16.

67. *Id.*, see also *Upjohn Co. v. United States* 449 U.S. 383, 392 (1981), Miller, The Challenges to the Attorney-Client Privilege, 49 *Va. L. Rev.* 262, 269-270.

68. 57 A.L.J.R. 130, 139-143 (1983).

69. 57 A.L.J.R. 749, 766 (1983).

70. *Id.*

Deane J. stressed both instrumental and individual rights concerns:

> "That general principle represents some protection of the citizen—particularly the weak, the unintelligent and the ill-informed citizen—against the leviathon of the modern state. Without it, there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it without the risk of prejudice and damage by subsequent compulsory disclosure on the demand of any administrative officer with some general statutory authority to obtain information or seize documents."[71]

Mason J. strongly dissented. In essence he described the two public interests involved: that of free communication and that of "facilitating the availability of all relevant materials for production in litigious disputes."[72] This balance, he would propose, is better served by the previous *O'Reilly* rule. Underlying Justice Mason's reasoning is a sanguine attitude towards the machinery of the state and an underemphasis on the client's rights of privacy and autonomy.

Justice Mason's dissent, however, contained some penitent comments, given the majority opinion, about the application of the privilege to other professions. As mentioned at the outset, our's are professionalizing societies and the claim of the lawyer as an exclusive bulwark against the state may have weakened. I shall discuss this matter below.[73]

It will surprise American readers that these issues have only recently surfaced. He or she will be accustomed to the application of privilege and the debates it has spawned about privacy and state interference. Here the Commentary in this *Review* mentioned above is but one distinguished example. But for Australians with only common law protections and a judiciary steeped in a legalistic approach to the law[74] the *Baker v. Campbell*[75] decision is a wel-

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71. *See* note 69, at 777 *above.*

72. *Id.*, 757.

73. See p. 000 *below.*

74. *Cf. South Australia v. Commonwealth* 65 C.L.R. 373, 429 per Latham C.J. (1942); Zines, *The High Court and the Constitution* 282-309 (1981); Evans, The Most Dangerous Branch? The High Court and the Constitution in a Changing Society, in Hambly & Goldring (eds) *Australian Lawyers and Social Change* 13 et seq. (1976); Partlett, Benign Racial Discrimination: Equality and Aborigines,

come breath of fresh air. It is an early sign that the High Court is not barren in offering judicial protection to the individual.[76] However, the Court betrays its lack of familiarity in dealing with issues of individual rights and liberties. A vice, it should be added, which is to be found also in the English, Canadian and New Zealand authorities in this area.

The instrumental justification is the court's primary focus; the rights based protection of individual autonomy and privacy is but faintly perceived. It is, however, in the protection of such rights that the privilege finds its most convincing and enduring rationale. Privacy and individual autonomy are vague terms. Privacy especially has been attacked as having no non-utilitarian moral foundation.[77] However, the combination of term "privacy and individual autonomy" gives a clue to the moral content of privacy. No-one has a right to keep all information about himself private. But a person does have a right to develop his personality and identity. It would be possible to employ the rhetoric of liberty[78] but privacy conveys the important idea that a zone of exclusivity is part of individual liberty or autonomy.[79] Professionals in modern complex society reinforce that moral right. Lawyers, as professionals, have an obligation to aid individuals who seek their counsel in exerting moral rights.[80] In their professional role, lawyers are not answerable to the collective morality of society but to the individual moral right of a client. Professor Charles Fried analogizes the lawyer-client relation to that of a person who may show special concern to his friends above the interests of others.[81]

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10 *Federal L. Rev.* 238, 282-284.

75. *See* note 68 *above.*

76. The High Court has also recently given the privilege against self-incrimination substantive content see *Sorby v. The Commonwealth of Australia* 57 A.L.J.R. 248 (1983); see also *Pyneboard Pty Ltd v. The Trade Practices Commission* 57 A.L.J.R. 236 (1983).

77. Posner, *The Economics of Justice above* note 55, 252-253.

78. Hirshleifer, Privacy: Its Origin, Function and Future, 9 *J. of Leg. Stud.* 649 (1980).

79. *See* Gavison, Privacy and the Limits of Law, 89 *Yale L.J.* 421 (1980) (discussing the moral foundations and legal limits of privacy).

80. Fried, The Lawyer as Friend: the Moral Foundations of the Lawyer-Client Relation, 85 *Yale L.J.* 1060, 1066 (1976); *see also, Sidaway v. Bethlem Royal Hospital*, London Times Feb. 22, 1985 (H.L.): "The doctors duty [to disclose risks] arose from his patient's rights." per Lord Scarman.

81. *Id.*, 1066; *but cf.* Levinson, Testimonial Privileges and the

Attorney-client privilege may be characterized, then, as supporting the integrity of moral rights and making them inviolable to arguments based upon wider societal purposes and interests.

3. *The Professionalizing Society and Privilege*

The professionalization of Western societies is a hallmark of modern post industrial societies.[82] The old institutions of the professions have been co-opted to the difficulties of modern social organization. The professions bring to society bodies of highly developed information. Yet their integration in modern society is often not regarded as satisfactory.[83] Prevailing social ideals of equality and egalitarianism are often in tension with the power and privileges of the professions.[84] But the professions, particularly the legal profession, has been stoutly defended, as a force for moral good,[85] as a place for the growth of "educated expressions of freedom and self realization,"[86] as a bulwark against the encroachment of the modern state[87] and as a protection against incompetence and unethical conduct.[88] This ground early claimed by lawyers is not now

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82. *See*, Carr-Saunders and Wilson, *The Professions* (1933); Bell, *The Coming of Post-Industrial Society* (1973); Goode, "Encroachment, Charlatanism, and the Emerging Professions: Psychology, Sociology and Medicine" (1968) *Amer. Soc. Rev.* 903: "an industrial society is a professionalizing society;" Moore, *The Professions: Roles and Rules* (1970), 53 asserts that professions have grown along with increasing affluence and the service sector of the economy. This seems confirmed in Australia: *Changes in the Occupational Structure of the Australian Workforce 1971 to 1976*, Bureau of Industry Economics, Research Report 6 (A.G.P.S., 1981).

83. *See*, Pemberton & Boreham, "Towards a Reorientation of Sociological Studies of the Professions" in Boreham, Pemberton &
Wilson (eds) *The Professions in Australia: A Critical Appraisal* (1976) 13, 16; Abel, "The Rise of Professionalism" (1979) 6 *Brit. J. of Law Society* 82; Larson, *The Rise of Professionalism; A Sociological Analysis* (1977), p. 145, *but cf.* Parsons, "Research with Human Subjects and the Professional Complex", *Daedalus*, Spring 1969, 325 at 330-35.

84. *See generally*, Partlett, *Professional Negligence* (forthcoming, 1985) Ch. 1; for the medical profession Katz, *The Silent World of Doctor and Patient* (1984).

85. Halmos, "Sociology and the Personal Service Professions" (1971) 14 *American Behavioral Scientist* 583.

86. Bledstein, *The Culture of Professionalism*, 142 (1978).

87. Tawney cited in Campbell, "Lawyers and Their Public" in MacCormick (ed.), *Lawyers in Their Social Setting* (1976), pp. 195, 199.

88. *ABA Model Code of Professional Responsibility* (1980), "Lawyers, as

their exclusive plot. Accountants claim a large area in legal business advise.[89] Psychiatrists, psychologists and welfare workers claim a growing area in health and mental wellbeing of individuals.[90] If the rationale, at bottom, for the privilege in lawyer and client communications is individual privacy and autonomy, it becomes difficult to restrict the categories of professionals. Those professionals who in modern society require, even at the utilitarian level, a guarantee of confidence for frank communications are not limited to lawyers.[91]

It is here that Justice Mason's dissent in *Baker v. Campbell* becomes salient. He could not see how the majority's basic rationale would allow the privilege to be limited to lawyers.

> "It is one thing to say that the privacy or secrecy of lawyer-client communications made in aid of litigation, especially in aid of the litigation in which the privilege is claimed, shall prevail over an obligation to produce or disclose all materials relevant to the issues in the litigation. To take but one example: to compel the parties to disclose such communications made in the conduct of that litigation would be unfair to them, hamper the preparation of their cases and protract the determination of the litigation. But it is quite another thing to say that communications for advice, the purpose of which is unrelated to actual or prospective litigation, shall prevail over an objection to produce or disclose materials relevant to the issues in litigation. Why such communications should be privileged, when communications for advice between client and accountant or marriage counsellor, which have taken place with litigation in

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guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct." *id.*, Preamble p. 1.

89. *See*, Gilson, Value Creation by Business Lawyers: Legal Skills and Asset Pricing, Stanford Law School, Law and Economics Program, Working Paper No. 18, July 1984 (competition from public accounting and investment banking reducing role for business lawyers); *but cf. U.S. v. Huberts* 637 F.2d 630 (9th Cir. 1980) (business advice per se is not privileged).

90. Saltzburg, Privileges and Professionals: Lawyers and Psychiatrists *above* note 59; Note, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 *Yale L.J.* 1226 (1962); Bullock, The Helping Professions—Law and Social Work, 58 *Aust. L.J.* 333, 336-337.

91. Note, Functional Overlap Between the Lawyer and Other Professionals, *Id.*

> view, are not privileged, does not admit of convincing explanation. There is also the striking contrast between privileged lawyer-client communications made for the purpose of obtaining and giving advice and the non-privileged doctor-patient and priest-penitent communications. Each of the three relationships is highly confidential and in each the need for candour is a necessary element. The need for preservation of doctor-patient and priest-penitent confidentiality seems to be as strong as the need for preservation of lawyer-client confidentiality in the area of advice. Consequently, the public interest in preserving the secrecy of the latter seems to be no stronger than the public interest in preserving the secrecy of the former."[92]

The majority recognized this argument but strained mightily against it. Dawson J. said:

> "The restriction of the privilege to the legal profession serves to emphasize that the relationship between a client and his legal adviser has a special significance because it is part of the functioning of the law itself. Communications which establish and arise out of that relationship are of their very nature of legal significance, something which would be coincidental in the case of other confidential relationships. It has been found necessary that professional guidance in the complex processes of the law should be uninhibited by the possibility that what is said to enable advise to be sought or given might later be used against the person seeking the advice."[93]

Moreover, the attempt of the majority to limit the scope of the privilege to lawyers is highlighted in Justice Deane's opinion. He gave as a reason for extending the privilege beyond judicial or quasi-judicial proceedings, the difficulty of explaining why the lawyer should, beyond the context of such proceedings, continue to enjoy immunity from prosecution for misprision of a felony.[94] Paradoxically, however, parity of reasoning takes privilege beyond lawyers to other professionals, for it is clear that communications of wrongdoings made within professional relationships need not be disclosed to avoid the crime of misprision. In other words, the confidentiality outweighs the public interest in disclosure of wrongdoing.

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92. *See* note 68, at 757-758 *above.*
93. *Id.*, 781.
94. *Id.*, 775.

Lord Denning in *Sykes v. D.P.P.*[95] stated that to fail to disclose a felony may be excused or justified. He gave as an example:

> "[I]f a lawyer is told by his client that he has committed a felony, it would be no misprision in the lawyer not to report it to the police, for he might in good faith claim that he was under duty to keep it confidential. Likewise with doctor and patient, and clergyman and parishioner. There are other relationships which may give rise to a claim in good faith that it is in the public interest not to disclose it."[96]

The communication must be in the normal course of professional advice. Privilege would not attach where, for example, advice was sought in order to facilitate the commission of a crime, fraud or civil offense.[97]

The majority of the High Court in *Baker v. Campbell*[98] would certainly cavil at such an extension. They would see it as crimping the search for truth in proceedings. The logic of the extension of the privilege to other professions, however, is unimpeachable, although, in practice, to limit the privilege to lawyer and client relationship has the appeal of certainty.[99]

If the privilege were to be extended, the courts would, of necessity, exercise a close supervisory role so that the privilege conformed with its rationale[100] and was not abused for nefarious ends.[101]

It follows that the privilege should not be accorded where denial of the privilege would not hamper freedom of communica-

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95. [1962] A.C. 528.

96. *Id.*, 564.

97. *R. v. Cox* (1884) 14 Q.B.D. 153.

98. *See* Note 68 *above.*

99. *Upjohn Co. v. United States above* note 67 at 393; an uncertain rule will increase the likelihood of judicial error and hence dampen the production of information within the confidence.

100. There is a strong injunction in modern Commonwealth law that immunities and privileges are to be strictly limited to their rationale, *see e.g. Sankey v. Whitlam* 142 C.L.R. 1, 43 per Gibbs, C.J., 60 per Stephen J., 96 per Mason J. (1978) (executive privilege confined to that "necessary in the public interest"); *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198 (H.L.) (immunity of barristers from liability in negligence for court related tasks).

101. See *Re Kearney above* note 18 (discussing the scope of the exception to the privilege on communications criminal in themselves or designed to facilitate crime or fraud; holding that the privilege may be displaced in the public interest).

tion,[102] or impinge on privacy or autonomy of the individual. Information given to the medical practitioner for the purpose of supporting a claim for personal injuries should not be subject to the privilege. The shield of the privilege is necessary neither to stimulate the production of that information, nor to underpin the moral rights of the client. Implicit here is the important assumption that the privilege in this wider guise should be limited to protecting the confidences of individuals. Governmental bodies and corporations[103] should not usually be regarded as falling within the mantle of the wider privilege. Confidential information in the hands of government attracts a different standard than that in the hands of private individuals.[104]

This suggestion puts a great deal of faith in the ability of our courts to weigh relevant interests and protect fundamental values. Often these tensions are difficult to reconcile. This is well exemplified in the celebrated California Supreme Court decision of *Tarasoff v. Regents of the University of California*.[105] It will be recalled that the court was required to make a judgment on the part of the court of whether the public importance of safeguarding the confidential character of the "psychotherapeutic communication" was outweighed by "the public interest in safety from violent attacks."[106]

Inevitably the task is delicate and courts may well be prone to error where they find themselves guessing about the individual's rational responses to legal rules.[107] But the rule of law demands

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102. Saltzburg, Privileges and Professionals: Lawyers and Psychiatrists, *above* note 59, at 648.

103. The position of small closely held corporations (in Australia private companies) necessitate separate attention since often the issues raised are identical to those ventilated when an individual is involved. An individual should not be prejudiced merely because he has chosen to conduct affairs via a corporate structure. The instrumental claims for according corporations a zone of privacy should not be discounted. *See* Posner, The Economics of Justice, *above* note 55, 249.

104. *Commonwealth of Australia v. John Fairfax & Sons* 147 C.L.R. 39, 51 per Mason J. (1980) *but cf. Waterford v. Treasury* Unreported Feb. 15, 1985, Full Fed. Ct. of Australia, No. ACTGIO of 1984, (privilege available to government to the measure of its availability to the individual).

105. 551 P. 2d 334 (1976).

106. *Id.*, 339 per Tobriner J.

107. *Cf.* Givelber, Bowers & Blitch, *Tarasoff*, Myth and Reality: An Empirical Study of Private Law in Action, 1984 *Wisconsin L. Rev.* 443 (empirical exami-

that the courts take responsibility for such questions upon which individual liberties depend.

Conclusion

Unlike the courts, scholars need not provide an answer to dilemmas. Speculation is one of the joys of academic life. My endeavor is not to provide an answer but to open paths of investigation. Our problems and their solutions are remarkably similar and our respective jurisprudence should be availed of to enrich one another. The Alabama Law Review Commentary relied on in *Baker v. Campbell* is a fine example of that process. Let me predict on the basis of this essay, that the attorney-client should be closely guarded in order to nurture the effectiveness of our legal systems in protecting individual rights and to protect the privacy and autonomy of individuals. Let me further predict that in our professionalizing societies privilege claims will be made by other professions. It will fall to the courts, within our shared common law tradition, to resolve the tensions that arise between the state's demand for information and the individual's rights to privacy and autonomy.

The focus of the privilege will move from testimonial privilege and privilege in discovery, to privilege from disclosure of professional confidences in respect of state, executive and police, action. It is here that the moral rights of individuals are most threatened and deserving of judicial protection.

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nation of the impact of the *Tarasoff* decision).