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IN LIGHT OF REASON AND EXPERIENCE: AGAINST A CRIME FRAUD EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

Catherine Thompson Dobrowitsky*

This Note argues against the adoption of a crime fraud exception to the federal psychotherapist-patient privilege. Part I argues that the restrictive legal elements of the privilege adequately exclude fraudulent or criminal statements from protection. Part II addresses the needed distinction between the dangerous patient exception and the crime fraud exception to the psychotherapist-patient privilege and concludes that the adoption of a crime fraud exception would threaten a limited dangerous patient exception. Part III contends that the policies underlying the attorney-client and psychotherapist-patient privileges must be distinguished and do not merit a shared crime fraud exception. This Note concludes that careful examination and application of the elements of the psychotherapist-patient privilege will adequately protect "all rational means for ascertaining truth" in the courtroom, in consideration of the need for confidentiality in a psychotherapist-patient relationship.

In an adversarial judicial system, the examination of evidence by a fact finder is central to the determination of liability.¹ In some cases, however, the need to safeguard confidentiality in a professional relationship may outweigh the maxim that the jury has a right to hear "every man's evidence."² Before recognizing an evidentiary privilege, the need for protected disclosure between

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1. The Federal Rules of Evidence are constructed to justly ascertain truth through efficient administration. *See* FED. R. EVID. 102.

2. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)) (citations omitted) (holding that federal law recognizes a psychotherapist-patient privilege; therefore, statements that defendant police officer made regarding her involvement in a shooting to a licensed social worker in course of psychotherapy were protected from compelled disclosure); *see* FED. R. EVID. 501:

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.

practitioner and client is weighed against the harm of withholding potentially important facts from the jury or judge at trial.³

Federal courts recognize confidential communications between a psychotherapist and patient, which occur in the course of diagnosis or treatment, as privileged.⁴ The individuals able to invoke the privilege are the patient, a person authorized by the patient, or the psychotherapist.⁵ The patient may waive the privilege, either explicitly or impliedly, or by placing his mental condition at issue.⁶ The privilege presumptively survives the death of the patient.⁷

The psychotherapist-patient privilege "serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."⁸ Rooted in the need for confidence and trust between practitioner and client, effective psychotherapy depends upon an atmosphere in which the patient is

3. See *Jaffee*, 518 U.S. at 9 ("Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'") (citations omitted); *In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 74 (1st Cir. 1999) (noting the proper inquiry is "whether protecting a particular class of confidential communications 'promotes sufficiently important interests to outweigh the need for probative evidence'" (citations omitted); see also *Univ. of Pa. v. EEOC*, 493 U.S. 182, 201-02 (1990) (declining to recognize a peer academic review privilege); *Trammel v. United States*, 445 U.S. 40, 44-46 (1980) (recognizing a spousal privilege and explaining the history behind the privilege between priest and penitent, attorney and client, and physician and patient); *Couch v. United States*, 409 U.S. 322, 335-36 (1973) (declining to recognize an accountant-client privilege); *Clark v. United States*, 289 U.S. 1, 1 (1933) (declining to recognize privilege protecting juror deliberations when the relation is fraudulent); *In re Sealed Case (Rubin)*, 148 F.3d 1073, 1079 (D.C. Cir. 1998) (declining to recognize a Secret Service agent privilege), *cert. denied*, 525 U.S. 990 (1998). See generally *Nixon v. United States*, 418 U.S. 683, 710 (1974) (noting that testimonial privileges are recognized at the cost of "derogation of the search for truth").

4. See *Jaffee*, 518 U.S. at 11. Federal common law, all fifty states and the District of Columbia recognize the psychotherapist-patient privilege. See *id.* at 12. Although beyond the scope of this Note, state law governs the appropriate evidentiary privilege in federal diversity cases. See FED. R. EVID. 501. Similar to attorneys, psychotherapists have an ethical duty to maintain the confidences of their clients. See *Jaffee*, 518 U.S. at 13 n.12 (listing ethical codes of psychotherapists).

5. See *United States v. Hansen*, 955 F. Supp. 1225, 1226 (D. Mt. 1997). The party asserting the privilege has the burden of showing that the privilege applies. See *In re Grand Jury Proceedings (Violette)*, 183 F.3d at 73.

6. See *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Pa. 1997). Courts have split as to whether suing for damages for emotional distress waives the psychotherapist-patient privilege. See *Vasconcellos v. Cybex Int'l, Inc.*, 962 F. Supp. 701, 708-09 (D. Md. 1997) (privilege waived). *But see Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 631 (S.D. Cal. 1999) (privilege not waived); *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 230 (D. Mass. 1997) (privilege not waived).

7. See *Hansen*, 955 F. Supp. at 1226. Similar to the attorney-client privilege, confessions to a psychotherapist of past crimes are privileged and inadmissible. See *In re Grand Jury Proceedings (Violette)*, 183 F.3d at 76-77.

8. *Jaffee*, 518 U.S. at 11.

willing to make a frank and complete disclosure of facts, emotions, memories, and fears.⁹ Absent the protection a privilege provides, “confidential conversations between psychotherapists and their patients would surely be chilled.”¹⁰

Although adopted by federal courts, the psychotherapist-patient privilege is not absolute and its limits have yet to be fully determined.¹¹ Two possible exceptions have already been identified. First, the Supreme Court noted that the privilege might not apply “if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.”¹² Under this reasoning, the privilege may not apply if “the preservation and protection of the health and safety of innocent third parties outweighs the good achieved by maintaining the confidentiality of life-threatening communications.”¹³ California was the first state to recognize this dangerous patient exception to the psychotherapist-patient privilege. Its Supreme Court noted that once “a patient poses a serious danger of violence to others, [the psychotherapist] bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.”¹⁴

California is the only state in which breach of the professional duty of confidentiality between patient and psychotherapist constitutes a waiver of the evidentiary privilege.¹⁵ “[O]nce confidential ‘statements have been revealed to third persons in a communication that is not itself privileged . . . they are no longer confidential.’”¹⁶ Under this rationale, should the psychotherapist warn a potential victim of the danger posed by a patient, the disclosure of the threat to that third party waives the privilege.¹⁷ The psychotherapist is then able to testify in court proceedings

9. See *id.* at 10.

10. *Id.* at 11–12.

11. See *id.* at 18 (“[I]t is neither necessary nor feasible to delineate its full contours in a way that would ‘govern all conceivable future questions in this area.’”) (quoting *Upjohn v. United States*, 449 U.S. 383, 386 (1981)).

12. *Id.* at 18 n.19.

13. *United States v. Hayes*, 227 F.3d 578, 583 (6th Cir. 2000).

14. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 345 (Cal. 1976).

15. See, e.g., *Hayes*, 227 F.3d at 585. See CAL EVID. CODE § 1024 (West 1995) (codification of this rule). See also *People v. Wharton*, 809 P.2d 290, 306 (Cal. 1991) (en banc). Federal circuits have split as to whether breach of the professional duty of confidentiality waives the evidentiary privilege. Compare *Hayes*, 227 F.3d at 586 (rejecting federal dangerous patient exception as waiver of privilege), with *United States v. Glass*, 133 F.3d 1356, 1356–57 (10th Cir. 1998) (recognizing limited federal dangerous patient exception as waiver of the privilege).

16. *Wharton*, 809 P.2d at 307 (citations omitted).

17. See *id.* at 307–08.

concerning “only those communications that triggered or caused the warning.”¹⁸

Second, the First Circuit Court of Appeals has recognized a crime fraud exception to the psychotherapist-patient privilege akin to that which exists under the attorney-client privilege.¹⁹ To invoke the crime fraud exception, it must be shown that the client was engaged or acting in furtherance of criminal or fraudulent activity at the time the communications were made.²⁰ The crime fraud exception then permits a psychotherapist to testify in court concerning statements made in therapy if the client’s purpose was to plan or commit a crime.²¹ Since communications that are intended to further a crime or fraud will rarely be allied with genuine psychotherapy, protecting such statements would frustrate the purpose of the privilege.²²

This Note argues against the adoption of a crime fraud exception to the federal psychotherapist-patient privilege. Part I argues that the restrictive legal elements of the privilege adequately exclude fraudulent or criminal statements from protection. Part II addresses the needed distinction between the dangerous patient exception and the crime fraud exception to the psychotherapist-patient privilege and concludes that the adoption of a crime fraud exception would threaten a limited dangerous patient exception. Part III contends that the policies underlying the attorney-client and psychotherapist-patient privileges must be distinguished and do not merit a shared crime fraud exception. This Note concludes that careful examination and application of the elements of the psychotherapist-patient privilege will adequately protect “all rational means for ascertaining truth”²³ in the courtroom, in

18. *Id.* at 313 (emphasizing “that not every statement a patient makes in therapy can be revealed simply because a warning was given”).

19. *See In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 74 (1st Cir. 1999) (holding that a crime fraud exception to the federal psychotherapist-patient privilege applies when patient’s communications were made as part of a scheme to defraud lenders and disability insurers). The attorney-client privilege generally applies:

- 1) where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal advisor, (8) except [if] the protection be waived.

United States v. Bein, 728 F.2d 107, 112 (2d Cir. 1984) (quoting *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961)).

20. *See In re Grand Jury Proceedings (Violette)*, 183 F.3d at 75.

21. *See id.* at 79.

22. *See id.* at 77.

23. *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

consideration of the need for confidentiality in a psychotherapist-patient relationship.

I. THE THREE ELEMENTS OF THE PSYCHOTHERAPIST-PATIENT
PRIVILEGE EXCLUDE STATEMENTS MADE IN
FURTHERANCE OF A CRIME OR FRAUD

The psychotherapist-patient privilege attaches only if communications are made (1) confidentially, (2) between a licensed psychotherapist and his patient, and (3) in the course of diagnosis or treatment.²⁴ Each element may be used to limit the application of the psychotherapist-patient privilege and exclude criminal or fraudulent statements from its protection, without recognition of a crime fraud exception. Should a patient consult a psychotherapist in furtherance of a crime, the privilege is not available for failure to meet the prima facie elements.²⁵

First, a patient must intend for his statements to be held in confidence by the psychotherapist at the time they are made for the statements to be privileged.²⁶ Although secure communications are an essential part of the psychotherapist patient relationship,²⁷ psychotherapists must inform patients of the limits on confidentiality

24. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996).

25. See Lynda Womack Kenney, Note, *Role of Jaffee v. Redmond's "Course of Diagnosis or Treatment" Condition in Preventing Abuse of the Psychotherapist-Patient Privilege*, 35 GA. L. REV. 345, 362 (2000); *Recent Cases, Evidence-Evidentiary Privilege-First Circuit Recognizes Crime-Fraud Exception to Psychotherapist-Patient Privilege*.—In re Grand Jury Proceedings (Gregory P. Violette), 183 F.3d 71 (1st Cir. 1999), 113 HARV. L. REV. 1539, 1542–43 (2000) [hereinafter *Recent Cases*]; see also George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote*, 74 WASH. L. REV. 33, 61 (1999).

26. See *Kamper v. Gray*, 182 F.R.D. 597, 599 (E.D. Mo. 1998); *Barrett v. Vojtas*, 182 F.R.D. 177, 179 (W.D. Pa. 1998); see also *Scott v. Edinburg*, 101 F. Supp. 2d 1017, 1020–21 (N.D. Ill. 2000); *Caver v. City of Trenton*, 192 F.R.D. 154, 161–62 (D.N.J. 2000); *Phelps v. Coy*, 194 F.R.D. 606, 608 (S.D. Ohio 2000); *Revelle v. Darbe Borough Police Officer Trigg*, No. CIV.A.95-5885, 1999 WL 80283, at *6 (E.D. Pa. Feb. 2, 1999); *Williams v. District of Columbia*, No. CIV.A.96-0200-LFO, 1997 WL 224921, at *2 (D.D.C. Apr. 25, 1997); *Greet v. Zagrocki*, No. CIV.A.96-2300, 1996 WL 724933, *1–2 (E.D. Pa. Dec. 16, 1996).

27. See *Jaffee*, 518 U.S. at 14–15. Freud believed that “the fundamental rule of analysis . . . is to tell [the therapist] not only what [the patient] can say intentionally and willingly, what will give [the patient] relief like a confession, but everything else as well that [the patient’s] self-observation yields him, everything that comes into [the patient’s] head, even if it is disagreeable . . . to say it, even if it seems to him unimportant or actually nonsensical.” Sigmund Freud, *An Outline of Psycho-Analysis*, in 23 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 144, 174 (James Strachey et al. eds., trans., 1964) (italics in original).

at the outset of their relationship.²⁸ For example, the privilege does not apply to consultations with a psychotherapist for purposes of litigation,²⁹ nor to employer-ordered psychological examinations.³⁰

The statements must also be held in confidence by the patient himself to be privileged. Disclosing statements made in therapy to others, such as employers or friends, constitutes a waiver of the privilege.³¹ A psychotherapist who knows his patient intends to share his communications with others cannot reasonably expect that the patient intended for those statements to remain confidential.³² In addition, a patient who is not seeking treatment does not have a reasonable expectation of confidentiality at the time he makes the statement; consequently, he is estopped from invoking the privilege.³³ Criminal or fraudulent statements may be inadmissible if a patient does intend to keep the statements confidential. Thus, examination of whether a patient had a reasonable expectation of confidentiality can limit the application of a psychotherapist-patient privilege without the need for a crime fraud exception.

Second, psychotherapists must be licensed under state law.³⁴ Although many professionals conduct psychotherapy, the federal psychotherapist-patient privilege is limited to state licensed psychiatrists, psychologists, and social workers.³⁵ For example, statements made to volunteer telephone operators at an Alcoholics Anonymous office were not protected by the psychotherapist-patient privilege because the volunteers failed to qualify as the type of counselors entitled to the privilege.³⁶ They were not licensed or

28. *Jaffee*, 518 U.S. at 13 n.12; *see also infra* notes 52–75 and accompanying text (discussion of confidentiality).

29. *See United States v. Alvarez*, 519 F.2d 1036, 1046 (3d Cir. 1975) (distinguishing between relationship for purposes of diagnosis and relationship for purposes of litigation).

30. *See Kamper*, 182 F.R.D. at 599 (“Since [the employee] was aware that his evaluations would be reported to his employer, [the employee] had no reasonable expectation of confidentiality regarding his communications with [the evaluators].”).

31. *Id.* at 599; *Barrett*, 182 F.R.D. at 179–81.

32. 182 F.R.D. at 179.

33. *United States v. Schwensow*, 151 F.3d 650, 657–58 (7th Cir. 1998) (finding defendant’s request to use a telephone at a counseling center for the purpose of locating a detoxification center did not relate to diagnosis or counseling and therefore was not a confidential communication).

34. *See Jaffee v. Redmond*, 518 U.S. 1, 16–17 (1996).

35. *See id.* “[S]ocial workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist.” *Id.* at 15–16 (citations omitted). *But see Oleszko v. State Comp. Ins. Fund*, 243 F.3d 1154, 1157 (9th Cir. 2001) (extending psychotherapist-patient privilege to non-licensed employer assistance program personnel who conducted therapy sessions in the workplace).

36. *Schwensow*, 151 F.3d at 657.

trained in counseling and did not act or hold themselves out as counselors.³⁷ The scope of communications protected by the privilege may be further limited by examining the credentials of a psychotherapist.³⁸

Last, fraudulent or criminal communications are unlikely to be made within the course of diagnosis or treatment.³⁹ The privilege is available only when a genuine therapeutic relationship exists, since the privilege only applies when the patient intends to improve his mental or emotional health through therapy.⁴⁰ “[C]ommunications that are intended to further a crime or fraud will rarely, if ever, be allied with bona fide psychotherapy and, thus, protecting such communications will not promote mental health.”⁴¹ In those instances in which a patient’s purpose in consulting with a psychotherapist is to further a crime or fraud, rather than to pursue treatment, the communications should not be privileged, because they do not occur within the course of diagnosis or treatment.⁴²

While at least one court has stated that fraudulent and criminal statements will rarely be aligned with treatment, these statements are not automatically excluded from falling within the scope of the course of diagnosis or treatment requirement.⁴³ Unlike seeking legal advice, patients who desire to break the law seek psychotherapy because they recognize such desire as a problem they hope to correct.⁴⁴ A patient may seek therapy to end his destructive behavior, hoping to “reveal these dangerous, criminal impulses to the therapist for the very purpose of overcoming and not acting upon them.”⁴⁵ For a client, “communications regarding

37. *Id.*

38. *See id.*

39. *See In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 77 (1st Cir. 1999); *Recent Cases*, *supra* note 25, at 1542–43.

40. *See Jaffee*, 518 U.S. at 11; *Recent Cases*, *supra* note 25, at 1543.

41. *In re Grand Jury Proceedings (Violette)*, 183 F.3d at 77.

42. *Recent Cases*, *supra* note 25, at 1543 (“[W]hen the relationship is in fact nontherapeutic, any communication will fail the initial *Jaffee* test, having not been made ‘in the course of diagnosis or treatment.’”). *But see In re Grand Jury Proceedings (Violette)*, 183 F.3d at 78–79 (recognizing a crime fraud exception to the psychotherapist-patient privilege although client’s purpose in consulting with a psychotherapist was in furtherance of health care fraud).

43. *In re Grand Jury Proceedings (Violette)*, 183 F.3d at 74 (“For simplicity’s sake, we therefore assume (without deciding) that *Violette*’s communications can be said to have been made presumptively in the course of diagnosis or treatment.”).

44. *Recent Cases*, *supra* note 25, at 1543.

45. *Harris*, *supra* note 25, at 61–62.

intentions or desires to commit future crime are at the very heart of why a patient may seek psychotherapeutic care.”⁴⁶

Further support that fraudulent or criminal statements should not be automatically excluded from the protection of the privilege is found in Proposed Federal Rule of Evidence 504 (psychotherapist-patient privilege). The proposed Rule was rejected by Congress in favor of the broad directive of Federal Rule of Evidence 501. The Senate Judiciary Committee explicitly stated that its rejection of the proposed Rule “should not be understood as disapproving any recognition of a psychiatrist-patient . . . privileg[e] contained in the [proposed] rules.”⁴⁷ In fact, the Supreme Court cited proposed Rule of Evidence 504 as a justification for its adoption of a federal psychotherapist-patient privilege.⁴⁸

The proposed Rule did not contain a crime fraud exception and fraudulent or criminal statements would not necessarily have been excluded from the privilege.⁴⁹ The Judicial Conference Advisory Committee, which authored the Rule in 1972, believed that the inclusion of an exception would threaten the heightened confidentiality concerns vital to the psychotherapist-patient relationship. “It should be noted that our committee deliberately chose not to write a ‘future crime’ exception into the bill. Its members were persuaded that, as a class, patients willing to express to psychiatrists their intention . . . are making a plea for help.”⁵⁰ They believed the number of instances of genuine fraud in the context of a psychotherapist-patient relationship would be so few that it did not merit giving the courts any loophole through which to pierce the privilege.⁵¹ The framers of proposed Rule of Evidence 504 rejected a crime fraud exception to the psychotherapist-patient privilege because the particular nature of the psychotherapist-patient relationship rendered such an exception unnecessary.⁵²

The content of communications made in therapy, therefore, cannot be a conclusive indicator in determining whether the communications are admitted or excluded. To admit all statements

46. *Id.* at 61.

47. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (quoting S. REP. NO. 93-1277, at 13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059) (alterations in *Jaffee*).

48. *See id.* at 13-15.

49. *See* FED. R. EVID. 504(d)(3) (proposed Nov. 20, 1972). The privilege would have recognized three enumerated exceptions: in proceedings for hospitalization, in examinations pursuant to court order, and in litigation if the patient's mental condition is an element of the patient's claim or defense. *Id.*

50. *Harris*, *supra* note 25, at 37 n.43 (quoting Abraham S. Goldstein & Jay Katz, *Psychiatrist-Patient Privilege: the GAP Proposal and the Connecticut Statute*, 36 CONN. B.J. 175, 188 (1962)).

51. *See id.*

52. *See Recent Cases*, *supra* note 25, at 1544.

regarding a crime or fraud, without consideration of the patient's purpose and circumstances, would not adequately protect patient confidentiality.⁵³ Where it is clear, however, that the statements in question were not made in the course of diagnosis or treatment, the privilege cannot attach for failure to meet the legal elements. In this way, the privilege is available only when a genuine therapeutic relationship exists between psychotherapist and patient.

The three legal elements of the psychotherapist-patient privilege may be used to exclude fraudulent or criminal statements from its protection. Unless a communication is made (1) confidentially, (2) between a licensed psychotherapist and her patient, and (3) in the course of diagnosis or treatment, the privilege is not available for failure to meet the prima facie elements.⁵⁴ Examination of each element should limit application of the psychotherapist-patient privilege, rendering unnecessary the recognition of a crime fraud exception.

II. A CRIME FRAUD EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE SERIOUSLY UNDERMINES PATIENT CONFIDENTIALITY AND THREATENS A THERAPIST'S ETHICAL DUTY TO WARN

Generally, psychotherapists are bound by an ethical and legal duty of confidentiality to their clients in all circumstances.⁵⁵ Confidentiality plays an important role in the psychotherapist-patient relationship because therapy requires patients to fully disclose their emotions and thoughts.⁵⁶ The duty of confidentiality owed to a patient by a psychotherapist is markedly different from that which attorneys owe to their clients.

Under Rule 1.6 of the Model Rules of Professional Conduct, attorneys have discretion as to whether they should breach the confidentiality of their clients in cases where the client poses a risk

53. See *id.* at 1543.

54. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996).

55. See, e.g., AM. PSYCHIATRIC ASS'N, THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY § 4 (2001) ("A physician shall respect the rights of patients . . . and shall safeguard patient confidences within the constraints of the law."); see also *Jaffee v. Redmond*, 518 U.S. 1, 13 n.12 (listing ethical codes of psychotherapists); Am. Psychological Ass'n, *Ethical Principles of Psychologists and Code of Conduct*, 47 AM. PSYCHOLOGIST 1598, 1606 at § 5.05(a) (1992) ("Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose . . .") [hereinafter *APA Ethics Code*].

56. See *Jaffee*, 518 U.S. at 10; *Recent Cases*, *supra* note 25, at 1543.

of danger to others.⁵⁷ For example, an attorney is not required to warn or protect possible victims. "A lawyer *may* reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm"⁵⁸ The ethical obligation imposed by Rule 1.6 is extremely narrow, and applies only when the attorney "reasonably believes" a third party to be at risk of "imminent death or substantially bodily harm."⁵⁹ If a lawyer fails to warn or protect a third party from harm, a lawyer is not subject to discipline, nor liable for damages to his client or the third party, because Rule 1.6 does not create a mandatory duty to breach the confidence of a client in dangerous client cases.⁶⁰

Unlike attorneys, however, a psychotherapist must breach the duty of confidentiality when the client threatens himself or others, since protecting the safety of third parties, or the client himself, outweighs a completely confidential psychotherapist-patient relationship.⁶¹ Should a patient pose a serious danger of violence to others, the psychotherapist must breach the confidence of the client and take action to warn, or even protect, the intended victim.⁶² Failure to do so may breach state law and have serious consequences for the psychotherapist, including malpractice actions and personal liability to any victims.⁶³

57. See Irma S. Russell, *Cries and Whispers: Environmental Hazards, Model Rule 1.6 and the Attorney's Conflicting Duties to Clients and Others*, 72 WASH. L. REV. 409, 423 (1997) (noting that "disclosure is permissive"); see also Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U.L. REV. 199, 205 (2001).

58. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1999) (emphasis added).

59. *Id.*, Russell, *supra* note 57, at 423-24.

60. See *id.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66 (1998) ("A lawyer who takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or third person."). Other ethical rules may force attorneys to breach the confidences of their clients. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (1999) (requiring attorneys to disclose confidential information otherwise protected so as to prevent fraud upon the court).

61. *United States v. Hayes*, 227 F.3d 578, 583 (6th Cir. 2000); APA *Ethics Code*, *supra* note 55, at § 5.05(a) ("Psychologists disclose confidential information . . . to protect the patient or client or others from harm . . ."). *But see* MODEL RULES OF PROF'L CONDUCT R. 1.6 (1999) (granting complete confidentiality in attorney-client relationship with no duty to warn victim of imminent danger).

62. *Hayes*, 227 F.3d at 583; *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 345 (Cal. 1976); Harris, *supra* note 25, at 42.

63. Allison L. Almason, Comment, *Personal Liability Implications of the Duty to Warn are Hard Pills to Swallow: From Tarasoff to Hutchinson v. Patel and Beyond*, 13 J. CONTEMP. HEALTH L. & POL'Y 471, 495-96 (1997).

Despite wide recognition of the dangerous patient exception to the psychotherapist's duty of confidentiality,⁶⁴ few courts or legislatures have clarified how to reconcile it with the evidentiary privilege,⁶⁵ and federal recognition of a crime fraud exception may cloud the distinction. Although the duty of confidentiality applies in all circumstances, federal privileges apply only to the introduction of communications into evidence during a court proceeding.⁶⁶ If breach of the duty of confidentiality were to constitute a waiver of the psychotherapist-patient privilege, it would force psychotherapists to comply with their ethical duty to warn potential victims at the cost of breaching client confidence and testifying against their clients in federal court.⁶⁷ "It is one thing to inform a patient of the 'duty to protect'; it is quite another to advise a patient that his 'trusted' confidant may one day assist in procuring his conviction and incarceration."⁶⁸

Despite this potential dilemma, however, the Supreme Court has suggested that a dangerous patient exception applies to the psychotherapist-patient privilege. The text of footnote 19 in *Jaffee v. Redmond* reads, "we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of disclosure by the therapist."⁶⁹ The only two circuit courts of appeal that

64. Most states recognize a dangerous patient exception to the psychotherapist-patient privilege, often referred to as a duty to protect third parties from serious threats. *Hayes*, 227 F.3d at 583; *Harris*, *supra* note 25, at 47.

65. California is the only state in which breach of the professional duty of confidentiality between patient and psychotherapist constitutes a waiver of the evidentiary privilege. *Hayes*, 227 F.3d at 585; *see also Harris*, *supra* note 25, at 48. The Oregon Supreme Court, by contrast, has held that *Tarasoff* disclosures do not vitiate Oregon's psychotherapist-patient privilege. *State v. Miller*, 709 P.2d 225, 236-37 (Or. 1985). *See generally Recent Cases, Evidence-Sixth Circuit Holds That Tarasoff Disclosures Do Not Vitate Psychotherapist-Patient Privilege*.-*United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000), 114 HARV. L. REV. 2194 (2001) (discussing the split in the federal courts of appeal regarding the interaction of the psychotherapist-patient privilege and the *Tarasoff* duty).

66. *See, e.g., Brennan's, Inc. v. Brennan's Rests., Inc.*, 590 F.2d 168, 172 (5th Cir. 1979) (noting that an attorney's ethical duty of confidentiality is broader than the evidentiary privilege and involves all "information" gained in representation, as opposed to "confidence" or "secret"); *see also Harris*, *supra* note 25, at 52.

67. *See, e.g., Toni Pryor Wise, Note, Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165, 177 (1978). In a study of 1272 psychotherapists one year after the second ruling in *Tarasoff*, one-fourth "reported observing in their patients some reluctance to discuss their violent tendencies when the patients learned that the therapist might in some circumstances breach confidentiality." *Id.* One-fourth of the psychotherapists had lost patients because of the fear that the psychotherapist would breach confidentiality. *Id.* at 177 n.67.

68. *Hayes*, 227 F.3d at 586.

69. 518 U.S. at 18 n.19.

have ruled on this issue are split in their interpretations of the scope of footnote 19. The Tenth Circuit has held that when a psychotherapist warns a potential victim of danger posed by a patient, the evidentiary privilege is waived.⁷⁰ Hence, the psychotherapist may be forced to testify against his patient in court.

The Sixth Circuit, however, refused to pierce the evidentiary privilege in dangerous patient cases.⁷¹ It noted that the ethical duty to warn exists independently of the evidentiary privilege.⁷²

We see only a marginal connection, if any at all, between a psychotherapist's action in notifying a third party (for his own safety) of a patient's threat to kill or injure him and a court's refusal to permit the therapist to testify about such threat (in the interest of protecting the psychotherapist/patient relationship) in a later prosecution of the patient for making it.⁷³

The court read the language of footnote 19 as "an aside . . . to the effect that the federal psychotherapist/patient privilege will not operate to impede a psychotherapist's compliance with the professional duty to protect identifiable third parties from serious threats of harm."⁷⁴

Under this analysis, psychotherapists are able to comply with their ethical duty of confidentiality without waiving the evidentiary privilege of their clients.⁷⁵ The psychotherapist may alert the potential victim to the danger posed by his patient, but avoid giving testimony in court regarding the threatening or alarming statements by invoking the privilege.

Recognition of a crime fraud exception to the psychotherapist-patient privilege could render the dangerous patient exception irrelevant. Courts currently interpret the dangerous patient exception in a narrow manner. The Sixth Circuit refused to recognize a dangerous patient exception to the evidentiary privilege, and the Tenth Circuit limited its holding to the facts of the case.⁷⁶ Should a crime fraud exception be adopted, however, many more statements concerning a potential victim would be admissible. The

70. See *United States v. Glass*, 133 F.3d 1356, 1357 (10th Cir. 1998).

71. See *Hayes*, 227 F.3d at 583. The Sixth Circuit did recognize that a psychotherapist may be forced to testify in narrowly limited circumstances, such as in involuntary commitment proceedings. See *id.*

72. See *id.*

73. *Id.* at 583-84.

74. *Id.* at 585.

75. *Id.*

76. See *id.* at 587; see also *United States v. Glass*, 133 F.3d 1356, 1356-57 (10th Cir. 1998).

legal standard for admissibility would no longer be whether the psychotherapist warned a third party of harm, but merely whether the statement could be interpreted as "made in furtherance of a crime or fraud."⁷⁷ Such analysis would give courts a broad sword with which to pierce the evidentiary privilege where current federal case law regarding a dangerous patient exception would not.

This broad sword could even more seriously undermine the psychotherapist-patient relationship.

[R]ecognition of a 'dangerous patient' exception surely would have a deleterious effect on the 'atmosphere of confidence and trust' in the psychotherapist/patient relationship. While early advice to the patient that, in the event of the disclosure of a serious threat of harm to an identifiable victim, the therapist will have a duty to protect the intended victim, may have a marginal effect on a patient's candor in therapy sessions, an additional warning that the patient's statements may be used against him in a subsequent criminal prosecution would certainly chill and very likely terminate open dialogue.⁷⁸

Absent assurances of confidentiality, psychotherapist-patient communication would be chilled, and public mental health would suffer.⁷⁹

When a psychotherapist warns a potential victim of harm, although he breaches his ethical duty of confidentiality, he acts in furtherance of a greater good by protecting the public from injury.⁸⁰ In contrast, after a crime or fraud has already been executed, a psychotherapist's testimony against her patient is principally used to punish that patient as it is no longer needed to protect potential victims from the patient.⁸¹ "State law requirements that psychotherapists take action to prevent serious and credible threats from being carried out serve a far more immediate function than the proposed 'dangerous patient' [evidentiary] exception."⁸² The social utility of a therapist's testimony in a court

77. See *Hayes*, 227 F.3d at 584 (criticizing the Tenth Circuit's standard by stating that "conditioning the applicability of the proposed 'dangerous patient' exception on the standard of care exercised by a treating psychotherapist is unsound in theory and in practice"); see also *Harris*, *supra* note 25, at 52.

78. *Hayes*, 227 F.3d at 584-85 (citations omitted).

79. See *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996).

80. *Hayes*, 227 F.3d at 583.

81. *Harris*, *supra* note 25, at 52.

82. *Hayes*, 227 F.3d at 584.

proceeding against his patient is minimal once the psychotherapist has prevented specific harm by warning an intended victim.⁸³

In addition, the Supreme Court noted that “the likely evidentiary benefit that would result from the denial of the privilege is modest.”⁸⁴ Absent the protection of the privilege, the court maintained, patients would not only suffer their secrets in silence, but also be less likely to seek out help.⁸⁵ “Without a privilege, much of the desirable evidence to which litigants . . . seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken ‘evidence’ will therefore serve no greater truth-seeking function than if it had been spoken and privileged.”⁸⁶

Given the nature of statements made in therapy, application of the privilege does not deprive the fact finder of probative evidence in a judicial proceeding.⁸⁷ Statements made in therapy are often inaccurate or misleading, and express deeply buried fears and inadequacies.⁸⁸ As a result, they may not be accurate or reliable in the fact-finding sense.⁸⁹ Unlike legal representation, the goal of psychotherapy is not to ascertain objective truth about events in the client’s life, but to promote individual and public mental health.⁹⁰

Federal recognition of a crime fraud exception to the psychotherapist-patient privilege may cloud the distinction between the dangerous patient exception to the duty of confidentiality and the evidentiary privilege.⁹¹ To blur these two independent concepts jeopardizes a therapist’s compliance with his ethical duties and the confidential relationship between patient and client which justifies the privilege.⁹² “[R]eason and experience’ teach us that a ‘dangerous patient’ exception which

83. See *id.*; Harris, *supra* note 25, at 52.

84. Jaffee, 518 U.S. at 11; see Catharina J.H. Dubbelday, Comment, *The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved*, 34 EMORY L.J. 777, 802 (1985) (“Certainly, a court has no interest in allowing an individual’s case to be prejudiced by narrations of his fantasies.”).

85. See Jaffee, 518 U.S. at 11–12.

86. *Id.* at 12.

87. See *id.*

88. See *id.* at 10.

89. See Brief of Amici Curiae George R. Caesar, M.D., Joseph E. Lifschutz, M.D. and San Francisco Psychoanalytic Institute and Society in Support of Respondents at 2, Jaffee v. Redmond, 518 U.S. 1 (1996) (No. 95-266) [hereinafter Brief for SFPIS].

90. See Jaffee, 518 U.S. at 10; *In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 76 (1st Cir. 1999); Harris, *supra* note 25, at 61–62; see also Brief for SFPIS, *supra* note 89, at 1.

91. See *supra* note 65 and accompanying text (discussing whether a breach of confidentiality constitutes a waiver of the evidentiary privilege).

92. United States v. Hayes, 227 F.3d 578, 586 (6th Cir. 2000).

would allow a psychotherapist to testify against a patient in criminal proceedings should not become part of the federal common law.⁹³ This important distinction must be made to preserve the underlying policy goal of the privilege, which is to promote public mental health through individual therapy.⁹⁴

III. DIVERGENT RATIONALES FOR THE ATTORNEY-CLIENT AND PSYCHOTHERAPIST-PATIENT PRIVILEGE AND INCONSISTENT APPLICATION OF THE CRIME FRAUD EXCEPTION DO NOT MERIT AN ANALOGOUS EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

The Supreme Court has long recognized an exception to the attorney-client privilege where the client uses the attorney to further a crime or fraud.⁹⁵ The attorney-client privilege recognizes the necessity of counsel to fair representation in an adversarial proceeding, and encourages clients to fully disclose past wrongdoing with the confidence that their communications will not be used against them in court.⁹⁶ By allowing clients to obtain "the aid of persons having knowledge of the law and skilled in its practice,"⁹⁷ the privilege "promote[s] broader public interests in the observance of law and administration of justice."⁹⁸ When the client

93. *Id.*

94. *See Jaffee*, 518 U.S. at 11.

95. *See Clark v. United States*, 289 U.S. 1, 15 (1933) (discussing the exception to the attorney-client privilege that arises when that relationship is abused by the client's request for advice that would further a fraud or crime); *see also United States v. Zolin*, 491 U.S. 554, 562-63 (1989) (discussing the type of evidence that may be used to show the crime fraud exception applies). The crime fraud exception attaches when "[(1) the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, [or] that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice . . . [(2) that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it." *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir. 1987) (citations omitted). The quantum of evidence needed to make this showing is "something to give colour to the charge; there must be 'prima facie evidence that [the fraud] has some foundation in fact.'" *Clark*, 289 U.S. at 15 (citations omitted); *see also Kendall C. Dunson, The Crime Fraud Exception to the Attorney-Client Privilege*, 20 J. LEGAL PROF. 231, 232-33 (1996).

96. *See Zolin*, 491 U.S. at 562 (noting that absent protection from disclosure, the public would be discouraged from seeking legal advice and would not receive competent representation, which is essential to the adversarial system); *Fisher v. United States*, 425 U.S. 391, 403 (1976).

97. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

98. *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

seeks the services of an attorney to enable or aid the client to commit what the client knew or reasonably should have known to be a crime or fraud, the crime fraud exception is triggered.⁹⁹ Since the client's intentions are contrary to the purpose of the attorney-client privilege, the privilege is forfeited and the attorney is able to testify against his client in court.

A crime fraud exception to the attorney-client privilege is necessary since attorneys can be valuable participants in the execution of a fraud. The legal knowledge and advice given by an attorney may assist clients in illegal conduct.¹⁰⁰ Removing these communications from privilege protection, therefore, should promote compliance with the law.¹⁰¹

In one case, for example, a client disclosed to his attorney that he had stolen more than \$1 million in an insurance scam.¹⁰² The client then sought legal advice from his attorney to assist in concealing the money, stating, "I thought maybe you could come up with some idea."¹⁰³ The court applied the crime fraud exception to the attorney-client privilege, and admitted the conversation in defendant's wire fraud trial because it found the defendant sought the attorney's services to assist him in what he knew or reasonably should have known to be fraud.¹⁰⁴

Attorneys have also been ordered to testify pursuant to the crime fraud exception when a corporate counsel knew of possible tax evasion by an employee,¹⁰⁵ or when an attorney was aware that his client was systematically destroying evidentiary documents before trial.¹⁰⁶ The crime fraud exception to the attorney-client privilege polices clients with illegitimate motives and protects the attorney-client relationship from abuse.¹⁰⁷

Unlike the attorney-client relationship, however, the link between psychotherapy and compliance with the law is unclear.¹⁰⁸ "By contrast, the public interest that the psychotherapist-patient privi-

99. *In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 75 (1st Cir. 1999); Dunson, *supra* note 95, at 234.

100. *See Zolin*, 491 U.S. at 562-63.

101. *See In re Grand Jury Proceedings (Violette)*, 183 F.3d at 76; Dunson, *supra* note 95, at 232.

102. *United States v. Reeder*, 170 F.3d 93, 106 (1st Cir. 1999).

103. *Id.*

104. *Id.* at 106-07.

105. *See In re Grand Jury Proceedings (Corporation)*, 87 F.3d 377, 379 (9th Cir. 1996) (compelling corporate counsel to testify regarding an employee under investigation for tax evasion and illegal immigration even though the counsel was unaware of the specific crime).

106. *See In re Sealed Case (Synanon)*, 754 F.2d 395, 398, 403 (D.C. Cir. 1985).

107. *See United States v. Zolin*, 491 U.S. 554, 563 (1989).

108. *See Recent Cases*, *supra* note 25, at 1542-43.

lege protects is in mental health. No easy correlation exists between help for mental and emotional problems and compliance with the law.¹⁰⁹ The rationale for the psychotherapist-patient privilege is not to protect an adversarial judicial process, but rather to promote the public mental health through individual therapy.¹¹⁰ It is difficult to imagine a situation where a therapist would further a crime or fraud by assisting in its execution, especially if confessions to past crimes are privileged. Only in rare cases will the patient use therapy in furtherance of a crime or fraud.¹¹¹

In addition to the disparate rationales underlying the two privileges, the legal elements of the crime fraud exception under the attorney-client privilege have been inconsistently applied in practice. If adopted as an exception to the psychotherapist-patient privilege, the crime fraud exception would remove assurances of psychotherapist-patient confidentiality, threatening the trust between client and therapist which "is a *sine qua non* for successful psychiatric treatment."¹¹²

Once the multiple elements needed to invoke the attorney-client privilege are satisfied, courts are generous in their application of the crime fraud exception. First, the federal circuits are split and have loosely interpreted what constitutes the "prima facie showing" needed to apply the fraud exception.¹¹³ In their decisions, the First, Second, and Sixth Circuits have required a showing of probable cause that the elements were met.¹¹⁴ The Third, Eleventh, and D.C. Circuits require evidence that, "if believed," would be sufficient to support a finding that the elements of the crime fraud exception

109. *Id.* at 1542.

110. *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996).

111. *See In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 79 (1st Cir. 1999); *see also supra* Part II.

112. *Jaffee*, 518 U.S. at 10 (quoting Judicial Conference Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972)); *see also* Brief of Amicus Curiae of the American Psychological Association in Support of Respondents at 12, *Jaffee v. Redmond*, 518 U.S. 1 (1996) (No. 95-266) (stating that confidentiality "has been deemed so essential by some that it has been argued that psychotherapy is rendered worthless in its absence") (internal quotations marks and citations omitted) [hereinafter Brief of APA].

113. *See In re Grand Jury Proceedings (Violette)*, 183 F.3d at 78 (discussing the varying interpretations of the standards applied by the Courts of Appeal in application of the crime fraud exception).

114. *See United States v. Reeder*, 170 F.3d 93, 106 (1st Cir. 1999); *Marc Rich & Co. A.G. v. United States (In re Richard Roe, Inc.)*, 68 F.3d, 38, 40 (2d Cir. 1995); *Advance Publication, Inc. v. United States (In re Antitrust Grand Jury)*, 805 F.2d 155, 165-66 (6th Cir. 1986). Probable cause is defined as reasonable grounds to believe that a crime has been committed by a person and is proven by actual knowledge or information from a reliable source. *See Illinois v. Gates*, 462 U.S. 213, 238-39 (1983).

were satisfied.¹¹⁵ The Fifth and Ninth Circuits apply other variants.¹¹⁶ The Supreme Court has not yet reconciled the conflicting standards.

Second, courts have inconsistently ruled on what qualifies as “in furtherance” of a crime or fraud.¹¹⁷ For some courts, the fraud in question need not be illegal,¹¹⁸ the fraud need not succeed, and the communications need not assist the client in committing unlawful acts for the privilege to be suspended.¹¹⁹

Given the confusion under the attorney-client privilege, if the crime fraud exception were extended to the psychotherapist-patient privilege, the unpredictable legal standards would seriously threaten the psychotherapist-patient relationship, and therefore public mental health, by removing assurances of patient confidentiality. As noted by the Supreme Court, the psychotherapist-patient privilege is not subject to a case-by-base balancing test. “Making the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.”¹²⁰ If adopted, a uniform standard would be essential.¹²¹

[I]f the purpose of the privilege is to be served, the participants in the confidential conversation “must be able to predict with

115. See *Haines v. Liggett Group Inc.*, 975 F.2d 81, 95–96 (3d Cir. 1992); *In re Grand Jury Investigation* (Schroeder), 842 F.2d 1223, 1226 (11th Cir. 1987); *In re Sealed Case* (Synanon), 754 F.2d 395, 399 (D.C. Cir. 1985). Under this standard, the prosecutor does not have to prove the likelihood of the fraud, but only has to show evidence that “if believed” would meet the two elements of the exception. See *Haines*, 975 F.2d at 96.

116. See *In re Grand Jury Proceedings* (Corporation), 87 F.3d 377, 381 (9th Cir. 1996) (“reasonable cause to believe”); *In re Grand Jury Proceedings* (Fine), 641 F.2d 199, 203 (5th Cir. 1981) (relying upon “the definition of prima facie contained in Black’s Law Dictionary (4th ed. 1968): ‘[s]uch as will suffice until contradicted and overcome by other evidence . . . [a] case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded.’”).

117. See *Reeder*, 170 F.3d at 106 (soliciting attorney for advice on tax evasion met “in furtherance” standard). But see *In re Grand Jury Proceedings* (Fine), 641 F.2d at 203–04 (soliciting attorney for advice in registering suspicious purchase of yacht to a questionable corporation did not meet the “in furtherance” standard).

118. See *Marc Rich & Co. A.G. v. United States* (*In re Grand Jury Subpoena Duces Tecum* Dated Sept. 15, 1983), 731 F.2d at 1039 (“If the advice was sought in furtherance of a fraud that is not necessarily a violation of the criminal code, the communication is nonetheless unprivileged.”).

119. See *In re Grand Jury Proceedings* (Corporation), 87 F.3d at 381.

120. *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996).

121. One critic observed that “[o]ne reason for disenchantment with the judicial approach is the confusing, divergent trends, which collectively do not provide helpful guidance for the psychiatrist wishing to practice ethically and legally.” Almason, *supra* note 63, at 471 n.3 (1997) (quoting Alan R. Felthous, M.D., *The Ever Confusing Jurisprudence of Psychotherapist’s Duty to Protect*, 17 PSYCHIATRY & L. 575, 576 (1989)).

some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."¹²²

CONCLUSION

In sum, the federal courts should reject the adoption of a crime fraud exception to the psychotherapist-patient privilege and instead carefully examine the elements of and justifications behind the privilege to protect the critical individual and public interests at stake. The restrictive elements inherent in the privilege, the needed distinction between the dangerous patient exception and the crime fraud exception, and the policies underlying the attorney-client and psychotherapist-patient privilege, all counsel against recognition of a crime fraud exception.

While many Americans openly seek legal advice, many shun therapy as it still carries a social stigma.¹²³ If clients do not perceive that the confidentiality of their communications will be protected, they will be more likely to prematurely terminate their treatment, or avoid seeking treatment at all.¹²⁴ "[T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."¹²⁵ A crime fraud exception to the psychotherapist-patient privilege threatens honest and full disclosure necessary to successful therapy. The crime fraud exception, as applied to psychotherapist-patient communications, should be rejected by courts so that, in light of reason and experience, "a psychotherapist-patient privilege will serve a 'public

122. *Jaffee*, 518 U.S. at 18 (quoting *Upjohn v. United States*, 449 U.S. 383, 393 (1981)).

123. *See id.* at 10; *see also* Anne Bowen Poulin, *The Psychotherapist-Patient Privilege After Jaffee v. Redmond: Where Do We Go From Here?*, 76 WASH. U.L.Q. 1341, 1368 (1998); Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249, 259 (1996).

124. Brief of APA, *supra* note 112, at 15 (citing Jacob Jay Lindenthal & Claudewell S. Thomas, *Psychiatrists, the Public and Confidentiality*, 170 J. NERVOUS & MENTAL DISEASE 319, 321 (1982) (33% of non-patients in survey said they would avoid seeing a psychiatrist if the psychiatrist might divulge their information and 22% of the patient group surveyed said they would avoid seeing a psychotherapist because of disclosure concerns)).

125. *Jaffee*, 518 U.S. at 10; *United States v. Diamond (In re Doe)*, 964 F.2d 1325, 1328 (2d Cir. 1992) ("Disclosure of communications to psychotherapists and their diagnoses would frequently be embarrassing to the point of mortification for the patient.").

good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'¹²⁶

126. See *Jaffee*, 518 U.S. at 15 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980) (citation omitted)).