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TOWARD UNIFORM APPLICATION OF A FEDERAL PSYCHOTHERAPIST-PATIENT PRIVILEGE

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Abstract: In federal courts, Federal Rule of Evidence 501 governs all privileges, including the psychotherapist-patient privilege. Unlike many state statutes that explicitly recognize the psychotherapist-patient privilege and define its scope through exceptions, Rule 501 merely directs courts to use their reason and experience to interpret common law principles. Under this vague standard, the federal circuits lack uniformity in their treatment of the psychotherapist-patient privilege. This Comment suggests that Congress should explicitly recognize the privilege and define its scope through exceptions. To support this conclusion, this Comment discusses the justifications for recognizing a psychotherapist-patient privilege, uses the paradigm of formal versus nonformal decisionmaking to examine the difficulties of applying Rule 501 to the privilege, and takes advantage of the specific factual context of state cases to support the establishment of certain exceptions.

Evidence rules serve multiple functions.[1] A primary function is to facilitate the search for truth, which is served by a general principle that permits courts to hold witnesses in contempt if they withhold evidence that is relevant to a litigated dispute.[2] Yet conflicting functions justify many exceptions to this general principle. The psychotherapist[3]-patient privilege is one such exception. The privilege conflicts with the truth-

1. Jack B. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 Colum. L. Rev. 223, 241–243 (1966). For example, evidence rules encourage people to take subsequent remedial measures, to compromise disputed claims, to obtain liability insurance, and through evidentiary privileges, to establish certain confidential relationships. Robert H. Aronson, *The Federal Rules of Evidence: A Model for Improved Evidentiary Decisionmaking in Washington*, 54 Wash. L. Rev. 31, 36 (1978).

2. *See* In re Lifschutz, 467 P.2d 557, 559 (Cal. 1970) (denying the writ of habeas corpus for an imprisoned psychiatrist whom the lower court adjudged in contempt of court for his refusal to provide information on a former patient).

3. This Comment uses the term "psychotherapist" broadly to include all occupations that treat emotional and mental illnesses. Some state statutes include occupations other than psychotherapists, psychiatrists, and psychologists under the "psychotherapist-patient privilege." Social workers; psychiatric nurses; counselors of rape victims; battered women; and drug and alcohol abusers; as well as school guidance counselors and marital and family counselors arguably perform the same functions as psychotherapists. *See* Catharina J.H. Dubbelday, Comment, *The Psychotherapist-Client Testimonial Privilege: Defining the Professional Involved*, 34 Emory L.J. 777 (1985). Whether or not a state extends a privilege to a particular profession commonly depends on whether the state has strict licensing requirements for that profession. *See, e.g.*, Mich. Comp. Laws Ann. § 33.18237 (West 1993) ("A psychologist licensed or allowed to use the title under this part . . . shall not be compelled to disclose confidential information . . . ."); Md. Cts. & Jud. Proc. Code Ann. § 9-109 (1993) (extending the psychiatrist-patient privilege to psychiatric nurses who are certified in psychiatric and mental health nursing by the American Nurses' Association).

finding process, but does so in order to promote two goals. One goal is to foster relationships between psychotherapists and their patients, thus promoting the effective treatment of mental and emotional conditions.[4] A second goal is to protect privacy. During litigation, the psychotherapist-patient privilege protects witnesses from the public disclosure of deeply personal thoughts and feelings communicated to psychotherapists for the purpose of treatment.[5] Patients who assert the privilege may refuse to testify about communications made within the course of treatment, and they may prohibit their psychotherapists from testifying about the communications.[6] As the patient's agent, the psychotherapist may claim the privilege on the patient's behalf.[7] In many jurisdictions the psychotherapist is ethically bound to do so.[8]

As enacted, Rule 501 reads in part:

> 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.*[9]

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4. Consistent with current methods of treatment, the definition for "mental or emotional condition" in some statutes includes addiction to drugs or alcohol. *See, e.g.*, Proposed Rule of Evidence 504 (Advisory Committee's Note) (including drug abuse in order to be consistent with the definition of "drug dependent person" in 42 U.S.C. § 201(q)).

5. Harvard Law Review Association, *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450, 1547 (1985).

6. *See* 8 John H. Wigmore, *Wigmore on Evidence* § 2381 (McNaughton rev. 1961) (stating that the objective behind the attorney-client, husband-wife, and physician-patient privileges is to forbid compulsory disclosure by the person to whom the confidential communication was made).

7. *Id.* § 2321 (explaining common law principles on privileges in the context of the attorney-client privilege).

8. *See, e.g.*, Cal. Bus. & Prof. Code § 2263 (Deering 1992); Calif. Evid. Code Ann. § 1014 (West 1994); *see also* Wash. Rev. Code § 18.83.121 (1994).

9. Fed. R. Evid. 501 (emphasis added). The remainder of Rule 501 addresses choice of law problems between state and federal courts: "However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." For an explanation of how Congress addressed choice of law issues in Rule 501, *see generally* 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* at 501-2–501-30 (1977).

Congress adopted a flexible, nonformal standard for Rule 501, and thus avoided the difficult choices between promoting the search for truth and granting privileges to select occupational groups.[10]

In contrast with state rules explicitly recognizing the psychotherapist-patient privilege,[11] Rule 501 fails to recognize any privilege explicitly, does not establish exceptions, and thus provides little guidance for the federal courts. Some circuits interpret Rule 501 as prohibiting them from recognizing any privilege not recognized in the common law during, or prior to, the time that Congress enacted the Federal Rules of Evidence. Rule 501, however, provides that privileges are to be governed by common law principles as they "may" be interpreted by the federal courts, rather than as they "have been" or "were" interpreted in the past. Therefore, other circuits interpret Rule 501 as empowering them to recognize new privileges, including the relatively recent psychotherapist-patient privilege.

This Comment discusses the federal circuits' inconsistent application of Rule 501 to the psychotherapist-patient privilege, and uses the paradigm of formal versus nonformal decisionmaking to conclude that Congress should enact a specific federal rule to encourage uniformity among the federal circuits. The provisions of a new federal rule should be based on the justifications for the privilege. These justifications support not only recognition of the privilege, but also the establishment of exceptions in certain circumstances.

I. JUSTIFICATIONS FOR THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

Two main theories justify the psychotherapist-patient privilege—the traditional theory formulated by an authority on evidence law, the late Professor John H. Wigmore, and the modern privacy theory.[12] Although some modern courts do not adhere strictly to Wigmore's justification for

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10. *See* William L. Hungate, *An Introduction to the Proposed Rules of Evidence*, 32 Fed. Bar J. 225, 229 (1975).

11. *See, e.g.*, Ariz. Rev. Stat. Ann. § 32-2085 (1993); Ark. Code § 17-96-105 (Michie 1987); Calif. Evid. Code Ann. § 1014 (West 1994); Md. Code Ann., Cts. & Jud. Proc. § 9-109 (1993); Ohio Rev. Code Ann. § 4732.19 (Anderson 1993); 42 Pa. Cons. Stat. Ann. § 5944 (1994); S.C. Code Ann. § 40-75-160 (Law. Co-op. 1991); Wilson v. Bonner, 303 S.E.2d 134, 142 (Ga. App. 1983); Carson v. Jackson, 466 So. 2d 1188, 1190 (Fla. Dist. Ct. App. 1985); Matter of Atkins, 316 N.W.2d 477, 483–484 (Mich. Ct. App. 1982); Usen v. Usen, 269 N.E.2d 442, 444 (Mass. 1971).

12. *See generally* Harvard Law Review Association, *supra* note 5, at 1472–1486 (critiquing Wigmore's theory and discussing alternative modes of analysis).

privileges, his influence remains.[13] Professor Wigmore formulated a test to determine whether a privilege should be adopted. The test is made up of four conditions that focus on societal, in addition to individual, interests.[14] According to Wigmore's test, a relationship must meet all four conditions before the parties to the relationship should be permitted to withhold relevant evidence:[15]

> (1) The communications must originate in a *confidence* that they will not be disclosed. (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties. (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.* (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[16]

In most situations, the relationship between psychotherapists and patients satisfies the first three factors of Wigmore's test. First, patients expect their psychotherapists to maintain the privacy of their communications; second, the successful treatment of mental and emotional conditions depends upon confidentiality because treatment often requires patients to reveal socially unacceptable thoughts and feelings;[17] and third, society should foster the treatment of mentally ill

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13. *See, e.g.*, In the Matter of D.D.S., 869 P.2d 160, 164 (Alaska 1994) (holding that the statutory alcohol treatment privilege is inapplicable in judicial proceedings related to reports of suspected child abuse or neglect because, in that context, the privilege fails the fourth criterion of Wigmore's test); State v. Post, 118 Wash. 2d 596, 612, 826 P.2d 172, 181, *amended*, 837 P.2d 599 (Wash. 1992) (en banc) (citing the first criterion of Wigmore's test for the proposition that a person may claim a privilege only for communications that originate in the confidence that they will remain undisclosed).

An example of how legislators use Wigmore's "systemic" theory is found in the explanatory notes of a Florida statute: "Because of the serious nature of commitment proceedings, *the harm to the psychotherapist-patient relationship* is outweighed by the harm *to society in general* if relevant information is excluded from them." 1976 Law Revision Council Note to Fla. Stat. Ann. § 90.503(4) (West 1994) (emphasis added).

14. Harvard Law Review Association, *supra* note 5, at 1472.

15. Wigmore, *supra* note 6, § 2285 ("That [the four conditions] are present in most of the recognized privileges is plain enough; and the absence of one or more of them serves to explain why certain privileges have failed to obtain the recognition sometimes demanded for them.").

16. *Id.*

17. Sidney Jourard, *Some Psychological Aspects of Privacy*, 31 Law & Contemp. Prob. 307, 311 (1966).

persons because of the potential harm that they pose to themselves and to others.[18]

The fourth condition of Wigmore's test requires a balancing of harms and benefits. Although disclosure of communications between a psychotherapist and patient could benefit society by assisting in the search for truth, the harmful effect on the treatment of mental and emotional conditions would outweigh the benefit in many cases.[19] If patients learn that their statements could be disclosed in legal proceedings, they may become less willing to participate in psychotherapy. Assurances of nondisclosure[20] make patients more likely to seek treatment, to communicate openly during psychotherapy, and thus to obtain effective treatment.[21] In turn, the privilege benefits society because people who are mentally and emotionally healthy are more likely to be productive members of society and are less likely to endanger others.

In some situations, however, the psychotherapist-patient relationship fails one or more of the requirements of Wigmore's four-part test. For example, the relationship may fail to meet Wigmore's fourth condition when a patient, during treatment, tells a psychotherapist that he intends to kill his father.[22] The benefit of disclosing this statement would outweigh the possible harm of impairing the relationship of trust between the psychotherapist and the patient.[23]

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18. *See* Bader v. State, 43 Wash. App. 223, 227–28, 716 P.2d 925, 928 (1986) (recognizing that a mentally disturbed person with known dangerous propensities foreseeably may cause injury to a member of the general public).

19. Ralph Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 Wayne L. Rev. 175, 193 (1960).

20. The assurance of nondisclosure is never absolute because it is qualified with exceptions. *See infra* part III.

21. Jourard, *supra* note 17, at 312. Some argue that the establishment of privileges does little to influence behavior. *See* Schuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. Rev. 893, 900–04 (1982). In response to this argument, Schuman and Weiner compiled interviews of a small sample of 121 nonprofessionals. They found that although people were equally willing to talk regardless of whether they knew that a privilege existed, people were significantly less willing to disclose information that could create legal liability once told that they had no privilege. *Id.* at 919–20.

22. This example comes from State v. Rawland, 199 N.W.2d 774 (Minn. 1972). Rawland fatally stabbed his father in the back with a butcher knife because he believed that his parents were part of a large-scale plot to take his life.

23. *See infra* part III.B.1 for a discussion of the dangerous patient exception to the psychotherapist-patient privilege.

Although Wigmore required that a relationship meet all four conditions in order to merit a privilege,[24] Congress should not reject the privilege merely because the psychotherapist-patient relationship fails to meet Wigmore's fourth condition in some circumstances. All privileges require exceptions in some circumstances.[25] Wigmore himself endorsed the well-established attorney-client privilege, while acknowledging that it was disputable whether the relationship met his fourth condition.[26] Therefore, Congress should establish exceptions for commonly occurring situations.[27]

While Wigmore's traditional theory justifies privileges by considering primarily the benefits and harms to society, a modern privacy theory justifies privileges because they protect the interests of the individual.[28] According to the privacy theory, the right to privacy includes the right to be free from unnecessary intrusions into one's personal life.[29] The psychotherapist-patient privilege protects this right by preventing unnecessary intrusion into litigants' or witnesses' psychotherapeutic histories. Courts and legislatures use both the modern and the traditional theories to justify recognition of the psychotherapist-patient privilege.[30] The coexistence of the two justifications supports the theory that the rise of the privacy rationale supplements Wigmore's traditional analysis.[31]

Rulemakers should consider these justifications when creating rules on the psychotherapist-patient privilege. One paradigm that explains the

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24. Wigmore, *supra* note 6, § 2286.

25. *See, e.g.*, In the Matter of D.D.S., 869 P.2d 160, 163 n.4 (Alaska 1994) (recognizing that neither the physician-patient nor the husband-wife privilege is applicable in judicial proceedings related to reports of child abuse or neglect).

26. Wigmore, *supra* note 6, § 2286.

27. *See infra* part III.

28. The United States Supreme Court has held that the U.S. Constitution protects the right to privacy in certain situations. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (holding that the right of personal privacy is constitutionally protected); *see also* Commonwealth v. Kobrin, 479 N.E.2d 674 (Mass. 1985) (holding that a court should consider the privacy concerns of the psychotherapist-patient privilege even during an investigation under the Medicaid False Claim Act); People v. Caplan, 238 Cal. Rptr. 478 (Cal. Ct. App. 1987) (noting the victim's constitutional right to privacy in her communications with a treating psychotherapist).

29. Kenneth S. Broun et al., *McCormick on Evidence* § 77 (John W. Strong ed., 4th ed. 1992) [hereinafter *McCormick*].

30. *See, e.g.*, Fla. Stat. Ann. § 90.503(4) (West 1976) (establishing exceptions for the psychotherapist-patient privilege when disclosing the communications "better serves the interests of the patient and society"); *see also* Menendez v. Superior Court, 834 P.2d 786, 794 (Cal. 1992) (explaining that the privilege permits the patient to bar evidence in order to "protect his right to privacy and promote the psychotherapeutic relationship").

31. Harvard Law Review Association, *supra* note 5, at 1484.

choices available to rulemakers is formal versus nonformal decisionmaking. This paradigm is useful for analyzing how the psychotherapist-patient privilege has fared under Rule 501.

II. AN ANALYSIS OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE UNDER RULE 501

A. Formal Versus Nonformal Decisionmaking

All rulemakers must choose between formal and nonformal decisionmaking.[32] The formal approach takes the form of inflexible, specific rules, which demand a particular result according to how the facts of a case "fit" the fact patterns addressed by the rules.[33] This approach is called formal decisionmaking because the form of the rule itself, rather than the policies behind the rule, determines the decision. By contrast, nonformal decisionmaking permits the decisionmaker to consider relevant policies and interests on a case-by-case basis. Both approaches have their advantages and disadvantages.[34]

By permitting the decisionmaker to consider all relevant factors in each case, the nonformal approach has the advantage of minimizing the unjust results that strict rules sometimes produce.[35] Yet the case-by-case approach of nonformal decisionmaking can lead to unpredictable results. For example, the nonformal approach creates opportunities for judges' biases to influence decisions. Furthermore, the nonformal approach requires a decisionmaker to consider more information, making his or her task more complex and time-consuming.

The advantages of formal rules are numerous. Formal rules minimize alternatives and reduce the likelihood that a judge will make an erroneous decision "in the heat of battle."[36] Unlike the nonformal approach, formal decisionmaking permits judges to consider only those factors that the rules address.[37] Formal rules also promote predictability by increasing the likelihood that similar cases will be decided similarly, and they promote freedom from the arbitrary exercise of power by

32. William Powers, *Formalism and Nonformalism in Choice of Law Methodology*, 52 Wash. L. Rev. 27, 28–37 (1976).

33. *Id.* at 28.

34. *Id.* at 37.

35. *Id.* at 28.

36. Powers, *supra* note 32, at 28.

37. *Id.*

decisionmakers.[38] Furthermore, formal rules are simpler to apply than nonformal rules; this characteristic permits attorneys, as well as laypersons, to predict how judges will apply the rules and to modify their actions according to those predictions.[39]

Although one advantage to formal rules is that they permit rulemakers to enforce their values,[40] this characteristic can be a drawback if societal values change before rulemakers can agree on amendments.[41] Whether rulemakers are trying to establish or amend formal rules, they may have difficulty reaching a consensus on specific and detailed provisions. Congress enacted the current Rule 501 in part because the legislators were unable to agree on the specific rules that the Supreme Court's Advisory Committee proposed.[42] Furthermore, formal rules can produce results contrary to the policies that rulemakers intended to promote.[43]

At the same time, the drafters of formal rules may consider all relevant facts and policies in order to achieve results that approximate those of nonformal decisions.[44] Congressional rulemakers should take advantage of the substantial body of state case law that now exists in order to determine which formal rules have produced just outcomes.

B. The Role of Congress in Achieving Uniformity

One of the benefits that rulemakers hoped to attain by codifying the Federal Rules of Evidence was uniformity.[45] Rule 501's inability to foster uniformity has made it the target for criticism by legal

38. *Id.* at 29–30.

39. Aronson, *supra* note 1, at 34.

40. For example, in order to reinforce the legitimacy of a legal rule, a judge will apply a Statute of Frauds to find that a contract was not formed because the parties did not write out their agreement even though the facts of the particular case make this outcome seem unjust. Powers, *supra* note 32, at 29.

41. *Id.* at 28.

42. Hungate, *supra* note 10, at 229.

43. This problem with formal rules can be seen with narrow, formal hearsay exceptions. Aronson, *supra* note 1, at 41. The underlying theory of excluding hearsay is that such statements are generally untrustworthy. *Id.* Nevertheless, strict application of hearsay exceptions may gain the benefit of predictability, but at the expense of excluding trustworthy statements that do not fall under the listed exceptions. *Id.*

44. Powers, *supra* note 32, at 29.

45. Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 Hofstra L. Rev. 255, 264 (1984); Hungate, *supra* note 10, at 228.

commentators.[46] To remedy this lack of uniformity, Congress should take advantage of state case law to discover how state statutes on the psychotherapist-patient privilege function. State courts have had the opportunity to test specific statutory provisions on the privilege.[47] If Congress were to recognize explicitly the psychotherapist-patient privilege and its exceptions, the federal circuits would become much more uniform in their application of the privilege.

Congress is better equipped than the courts to make informed decisions about how to foster effective treatment for mental conditions. Congressional committees hold hearings, receive comments from interested parties, discuss their findings, and reach conclusions. By contrast, trial judges must make immediate decisions. Additionally, one of the traditional justifications for privileges requires that society consider a relationship worthy of being fostered before the relationship can merit an evidentiary privilege. Elected members of Congress, rather than unelected federal court judges, should make these types of policy decisions.[48]

Although in theory the Supreme Court could impose uniformity on the circuits,[49] it is unlikely that the Supreme Court will resolve the many issues that trail the psychotherapist-patient privilege anytime soon.[50] Years could pass before the Supreme Court may address these issues one-by-one as individual cases move through the appellate system.[51]

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46. *See, e.g.*, Berger, *supra* note 45, at 275; Irving Younger, *Introduction to a Symposium on the Federal Rules of Evidence*, 12 Hofstra L. Rev. 251, 252 (1984).

47. *See infra* part III.

48. Unfortunately, the fact that legislators depend on votes for their jobs also makes it difficult for them to grant evidentiary privileges only to a few, well-chosen occupational groups, when many clamor for the privilege of maintaining the privacy of clients' communications. The difficulty of this task, in part, led to Congress's decision to eliminate the specific rules on privileges drafted by the Advisory Committee in 1969 as part of the Proposed Federal Rules of Evidence. *See* Hungate, *supra* note 10, at 229. It is important to note, however, that state legislatures have been able to surpass this difficulty and enact rules that recognize specific privileges. On the other hand, one could argue that recognition of privileges for an increasing number of occupations by state legislatures is due more to the fear of losing elections than to a well-reasoned evaluation of the benefits and detriments of privileges. *See* Wigmore, *supra* note 6, § 2380a (arguing against recognition of the physician-patient privilege by stating that "the real support for the privilege seems to be mainly the weight of professional medical opinion pressing upon the legislature").

49. McCray v. Illinois, 386 U.S. 300, 309 (1962).

50. *See* part III for a discussion of how some states address issues that commonly arise in disputes about the applicability of the psychotherapist-patient privilege.

51. Before contributing to the Federal Rules of Evidence, the Supreme Court added little to the law of evidence, primarily because few cases presenting evidentiary issues reached the Supreme Court. Justice Jackson commented, "It is obvious that a court which can make only infrequent

Therefore, Congress should enact more specific rules to resolve the inconsistencies among the circuits when judges apply the psychotherapist-patient privilege.

C. *Inconsistent Treatment of the Psychotherapist-Patient Privilege under Rule 501*

In enacting Rule 501, Congress chose a nonformal approach to decisionmaking that has resulted in inconsistent treatment of the psychotherapist-patient privilege in the federal courts.[52] The Fifth, Ninth, and Eleventh Circuits interpret Rule 501 as prohibiting them from recognizing any privilege, including the psychotherapist-patient privilege, which the courts rejected when evidence rules were determined under the common law. By contrast, the Second and Sixth Circuits hold that Rule 501 authorizes them to use reason and experience to decide whether to recognize privileges, even those previously rejected in the common law.[53] The differing interpretations of Rule 501 by the circuits

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sallies into the field cannot recast the body of case law on this subject in many, many years even if it were clear what the rules should be." Michelson v. United States, 335 U.S. 469, 486 (1948).

52. When the Proposed Rules were submitted for congressional approval, Congress replaced the thirteen rules of proposed Article V with the current Rule 501. For various reasons, critics had fiercely challenged proposed Article V in congressional hearings. For a comprehensive discussion of the criticisms of Article V, see Harvard Law Review Association, *Developments in the Law: Privileged Communications*, 98 Harv. L. Rev. 1450, 1466–69 (1985). Many critics argued that proposed Article V invalidated state-established rights of the individual. Hungate, *supra* note 10, at 229. The Committee on the Judiciary received a flood of letters from psychiatric organizations and psychiatrists after it deleted Rule 504, which proposed a psychotherapist-patient privilege, from Article V. The Committee responded:

> It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient . . . or any other of the enumerated privileges [of proposed Article V] . . . . Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis.

Fed. R. Evid. 501 (Notes of Committee on the Judiciary Senate Report No. 93-1277).

53. At the time that Congress enacted the Federal Rules of Evidence, courts were rejecting a psychotherapist-patient privilege. The privilege was not well-established in the common law because psychotherapy did not gain recognition as a legitimate field of medical practice until the 1950s. Jonathan Baumoel, Comment, *The Beginning of the End for the Psychotherapist-Patient Privilege*, 60 U. Cin. L. Rev. 797, 802 (1992); *The Age of Psychology in the United States*, Life, Jan. 7, 1957, at 68. Because society was skeptical about the effectiveness of psychotherapy, judges probably believed that little could be gained from promoting this new form of treatment.

The Tenth Circuit has not yet had occasion to decide the question of whether to recognize the psychotherapist-patient privilege. Dixon v. City of Lawton, 898 F.2d 1443, 1450 (10th Cir. 1990). See also In Re Pebsworth, 705 F.2d 261, 262–63, (7th Cir. 1983) (declining to decide whether to recognize the psychotherapist-patient privilege). Similarly, the First, Third, Fourth, and Eighth Circuits have not yet addressed the issue.

shows the difficulty of applying nonformal standards. Problems in interpreting Rule 501 could also be caused by the tension between two competing concerns: the interest in maintaining flexibility in the law of privileges,[54] and the interest in limiting the creation of new privileges, which hinder the search for truth.[55]

In *United States v. Meagher*[56] and *United States v. Corona*,[57] the Fifth and Eleventh Circuits, respectively, rejected a psychiatrist-patient privilege because the common law had never recognized a physician-patient privilege.[58] By rejecting outright any doctor-patient privilege, the *Meagher* and *Corona* courts never had occasion to distinguish between treatment for mental and physical conditions. The courts, however, neglected to note that the success of psychoanalysis and other forms of therapy for mental conditions depends on uninhibited communication.[59] Psychiatric patients are unwilling to communicate freely unless they can feel confident that their revelations will remain private.[60]

By contrast, physicians generally can treat patients with physical illnesses without the assurance of nondisclosure.[61] Therefore, the need for an evidentiary privilege is stronger for relationships in the mental health field than it is in the physical health field.[62] Although Congress learned about this distinction from psychiatric organizations when it considered the Proposed Rules of Evidence,[63] the nonformal language of Rule 501 fails to convey this knowledge to the courts. The lack of guidance in Rule 501 thus required the Fifth and Eleventh Circuits to make decisions that Congress was better equipped to make.

In addition to its failure to distinguish between two types of treatment, the Fifth Circuit applied a restrictive view of the common law. The court

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54. United States v. Trammel, 445 U.S. 40, 47 (1980).

55. United States v. Nixon, 418 U.S. 683, 710 (1974).

56. 531 F.2d 752 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976).

57. 849 F.2d 562 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989).

58. *Meagher*, 531 F.2d at 753; *Corona*, 849 F.2d at 567.

59. Weinstein, *supra* note 9, at 504-4 (Report No. 45, Group for the Advancement of Psychiatry 92). Through Report No. 45, psychiatrists advocated the recognition of a privilege for communications between psychiatrists and their patients.

60. *Id.*

61. Slovenko, *supra* note 19, at 180. *See also McCormick*, *supra* note 29, § 98 (discussing favorably the argument that the treatment of mental illness involves considerations not encountered in other medical contexts).

62. *Id.* at 184.

63. When the Judiciary Committees of the House and Senate considered the Proposed Rules of Evidence, they considered reports from psychiatric organizations. *See, e.g.*, Weinstein, *supra* note 9, at 504-4 (quoting a report submitted by the Group for the Advancement of Psychiatry).

interpreted Rule 501 as requiring the rejection of any privilege that had not yet been recognized in the common law at the time that the Federal Rules of Evidence were enacted.[64] Yet a central characteristic of the common law is its capacity for growth and adaptation.[65] Furthermore, the language of Rule 501 provides that privileges are to be governed by common law principles as they "may" be interpreted by the federal courts, rather than as they "have been" or "were" interpreted in the past.

Although Congress has the power to enact statutes that override the common law,[66] Congress deferred to the courts when it enacted Rule 501 and asked judges to apply their reason and experience to evaluate common law rules on privileges. Neither policy nor precedent justifies the restrictive view of the common law adopted by the Fifth Circuit. In *Trammel v. United States*, the Supreme Court stated that Rule 501 "manifested an affirmative intention [on the part of Congress] not to freeze the law of privilege."[67]

Like the Fifth Circuit, the Ninth Circuit in *In re Grand Jury Proceedings*[68] rejected a psychotherapist-patient privilege because the privilege had developed in state statutes, rather than in the common law.[69] The court acknowledged that Congress intended Rule 501 to promote flexibility by permitting the law of privileges to develop on a case-by-case basis.[70] However, the court stated that Rule 501's command to interpret the principles of the common law prohibited courts from recognizing any privilege not previously recognized in the common law. The court stated, "if such a privilege is to be recognized in federal criminal proceedings, it is up to Congress to define it, not this court."[71]

Although the court rejected the psychotherapist-patient privilege, it recognized a conditional constitutional right of privacy in medical

64. United States v. Meagher, 531 F.2d 752,753 (5th Cir. 1976) (citing United States v. Harper, 450 F.2d 1032 (5th Cir. 1971), to justify its rejection of a psychiatrist-patient privilege because "[a]t common law, no physician-patient privilege existed.").

65. Hurtado v. California, 110 U.S. 516, 530 (1884) (recognizing that personal rights had been secured by adopting rules to fit new circumstances, and holding that the Fourteenth Amendment's due process clause does not require a grand jury indictment before the accused can be tried for murder where the state provides other procedural protections that satisfy the requirements of due process).

66. *Id.* at 533.

67. 445 U.S. 40, 47 (1980).

68. 867 F.2d 562 (9th Cir.), *cert. denied*, 493 U.S. 906 (1989).

69. *Id.* at 565.

70. *Id.* at 564.

71. *Id.*

records, thus preventing disclosure of certain records during civil litigation.[72] Perhaps reluctant to commit itself to a clear rule until it garnered more experience with other cases, the court rejected the predictability that a clear privilege rule could promote, in favor of a less clear constitutional right of privacy. The court cited its own precedent for the common law rule that a constitutional right of privacy prevented the disclosure of communications between psychotherapists and their patients during civil litigation.[73] Yet the court held that the right to privacy was conditional in criminal cases, and directed its district courts to balance the state's interest in investigating crimes against the patient's right to privacy in his or her medical records.[74]

In contrast to the Fifth, Ninth, and Eleventh Circuits, the Second and Sixth Circuits recognize a qualified psychotherapist-patient privilege through Rule 501.[75] In *In re Doe*,[76] the Second Circuit recognized the psychotherapist-patient privilege by exercising its "reason and experience."[77] The court reasoned that communications between a patient and a psychiatrist involve far more intensely personal information than communications to other kinds of doctors.[78] The court then referred to the experience of the forty-nine states that had recognized the psychotherapist-patient privilege.[79] Such widespread recognition suggested to the *Doe* court that experience with the privilege had been favorable.[80]

The *Doe* court nevertheless admitted evidence of a witness's psychiatric history because the court found that the need for the evidence outweighed privacy interests.[81] In *Doe*, because the witness initiated the criminal investigation, the witness's credibility was a central issue in the case. Moreover, the court noted from the record that expert psychiatrists had testified that the witness's history of emotional illness affected his credibility. The court also found that to prohibit any inquiry into a

72. *Id.* at 565 (citing Caesar v. Mountanous, 542 F.2d 1064, 1067 n.9 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977)).

73. *Id.*

74. *Id.*

75. In re Doe, 964 F.2d 1325 (2nd Cir.); In re Zuniga, 714 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983).

76. 964 F.2d at 1325.

77. *Id.* at 1328.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1329.

witness's psychiatric history in a criminal case would violate the confrontation clause and vitiate a conviction.[82]

The Sixth Circuit recognized the psychotherapist-patient privilege in *In re Zuniga*.[83] Citing the Supreme Court,[84] the *Zuniga* court found that Rule 501 authorized the federal circuits to develop the law of privileges on a case-by-case basis.[85] Having recognized the privilege, however, the *Zuniga* court then determined that the privilege was inapplicable in the instant case.[86] Rather than attempt to define the scope of the privilege, the court stated that "just as the recognition of privileges must be undertaken on a case-by-case basis, so too must the scope of the privilege."[87]

Although both the Second and the Sixth Circuits recognize the psychotherapist-patient privilege, they permit courts to decide in individual cases whether the need for evidence outweighs the need for privacy. The Second Circuit held that the privilege only required that a court consider a witness's privacy interest as an important factor to weigh against the interest in eliciting relevant evidence from psychiatric histories.[88] Even though the opinions of courts in the Second and Sixth Circuits may be well-reasoned in the context of a particular case, litigants must prepare their cases amidst a high degree of uncertainty.

Although the psychotherapist-patient privilege is likely to remain unrecognized in the Fifth, Ninth, and Eleventh Circuits, the contours of the privilege will continue to gain definition in the Second and Sixth Circuits. The chasm between the circuits will thus continue to deepen with time unless Congress enacts specific rules on the psychotherapist-patient privilege. If Congress enacts new rules, it should decide whether to make the privilege applicable in certain commonly occurring situations.

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82. Davis v. Alaska, 415 U.S. 308, 315–16 (1974) (holding that refusing to allow the defendant to cross-examine the key prosecution witness to show his probation status following a hearing on juvenile delinquency violated the defendant's Sixth Amendment right to confront witnesses, even considering the state's policy of shielding juvenile records from public disclosure); Olden v. Kentucky, 488 U.S. 227 (1988) (holding that the trial court's refusal to permit the defendant to cross-examine the complainant about her motive to lie violated the defendant's right of confrontation).

83. 714 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983).

84. United States v. Gillock, 445 U.S. 360, 368 (1980).

85. *Zuniga*, 714 F.2d at 637.

86. *Id.* at 640.

87. *Id.* at 639.

88. In re Doe, 964 F.2d 1325, 1329 (2d Cir. 1992).

III. EXCEPTIONS TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

Assuming that Congress adopts a psychotherapist-patient privilege, it should define the scope of the privilege by adopting exceptions. The following discussion of state statutes and case law illustrates the wisdom of establishing certain exceptions. Section A examines the exceptions that are based on common law principles of privileges. Specifically, it examines the exception for court-ordered examinations,[89] which is based on the principle that a confidential relationship must exist before a privilege is recognized. Section A also discusses the common law principle of waiver, which justifies the exception for patient-litigants who introduce their mental or emotional conditions as part of a claim or defense.[90] The formulation of specific rules to address these common situations simplifies decisionmaking for courts. Section B examines exceptions that simplify the task of reconciling the competing policies behind the psychotherapist-patient privilege and other statutes.[91] Specifically, the section focuses on the policies justifying the dangerous patient and child abuse exceptions.

A. Exceptions Based on the Requirement of a Confidential Relationship and Common Law Principles of Waiver

1. Exception for Court-Ordered Examinations [92]

Assuming that Congress adopts a specific psychotherapist-patient privilege, it should also create an exception for statements made during court-ordered examinations. Court-ordered examinations fail to meet two basic requirements of Wigmore's theory. Specifically, a defendant who submits to a court-ordered mental examination neither communicates for the purpose of treatment, nor enters into a confidential relationship. The usual purpose of a court-ordered examination is to enable the psychiatrist to inform the court of the defendant's mental condition.[93]

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89. *See infra* notes 92–100 and accompanying text.

90. *See infra* notes 101–06 and accompanying text.

91. *See infra* notes 107–29 and accompanying text.

92. *See, e.g.*, Mass. Gen. Laws Ann. ch. 233, § 20B(b) (West 1994); Conn. Gen. Stat. Ann. § 52-146f(4) (West 1994).

93. *See* Cal. Evid. Code § 1017 (West 1994) (Law Revision Commission Comment).

The need for this exception was evident in *Massey v. State*.[94] In *Massey*, a psychiatrist, whom the court appointed to determine the defendant's sanity, testified about the statements that the defendant made during the examination. The defendant attempted to claim the statutory psychiatrist-patient privilege,[95] but the court held that the privilege did not apply. In this instance, the psychotherapist-patient relationship did not exist because no treatment was given or contemplated.[96] The court held that psychiatrists ordered to examine defendants may testify as to the defendants' sanity because they act as witnesses for the court, rather than for the prosecution.[97]

Because a criminal defendant's right against self-incrimination protects statements that show guilt or innocence, psychiatrists may disclose only a defendant's statements that are relevant to the issue of sanity.[98] The aim of a mental examination for a criminal defendant is to resolve the question of sanity, not to determine guilt or innocence.[99] In states that recognize the exception for court-ordered examinations, courts advise defendants of their right against self-incrimination and notify defense counsel before the examination takes place.[100]

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94. 177 S.E.2d 79 (Ga. 1970), *cert. denied*, 401 U.S. 964 (1971); *see also* In re Henderson, 29 Wash. App. 748, 630 P.2d 944 (1981) (concluding that a patient could not have reasonably expected to have confidential relationships with two psychologists who evaluated her psychological condition at the request of the court and the Department of Vocational Rehabilitation); Commonwealth v. Lamb, 311 N.E.2d 47 (Mass. 1974) (declining to uphold the psychotherapist-patient privilege to suppress the testimony of a court-appointed psychiatrist who communicated with a person in custody at a treatment center for sexually dangerous persons; however, the psychiatrist could testify only to those communications that revealed the patient's mental condition, not guilt or innocence).

95. Ga. Code Ann. § 43-39-16 (Harrison 1993).

96. Massey v. State, 177 S.E.2d 79, 81 (Ga. 1970) (citing Lifsey v. Mims, 20 S.E.2d 32 (Ga. 1942)); *see also* State v. Post, 118 Wash.2d 596, 613, 826 P.2d 172, 182, *amended*, 837 P.2d 599 (Wash. 1992) (en banc) (finding no psychologist-patient relationship when the psychologist informed the criminal defendant that the interview would not be confidential because its purpose was to enable the psychologist to make a recommendation to the Department of Corrections).

97. *Massey*, 177 S.E.2d at 81 (citing Jackson v. State, 171 S.E.2d 501 (Ga. 1969)).

98. *See, e.g.*, Commonwealth v. Martin, 461 N.E.2d 1244 (Mass. App. Ct. 1984), *aff'd*, 473 N.E.2d 1099 (Mass. 1985) (holding that the defendant's right against self-incrimination was violated when a psychiatrist submitted to the prosecution a full account of the defendant's statements made during a court-ordered examination, and the prosecution used these statements to show guilt).

99. Parkin v. State, 238 So. 2d 817, 821 (Fla. 1970), *cert. denied*, 401 U.S. 974 (1971).

100. *Id. See also* Christenson v. State, 402 S.E.2d 41 (Ga.), *cert. denied*, 112 S. Ct. 166 (1991) (holding that the court order for a psychiatric examination of the defendant did not violate the defendant's right against self-incrimination because the court notified the defendant's counsel and advised the defendant of his rights).

2. *Patient-Litigant Exception*[101]

Congress should also recognize a patient-litigant exception, which is justified by the principle that a litigant waives the psychotherapist-patient privilege by introducing his or her mental condition as an element of a claim or defense.[102] State cases illustrate the need for strictly limiting this exception to instances in which a litigant actively waives the privilege. For example, in the child support and child custody proceeding of *Peisach v. Antuna*,[103] the husband tried to depose the psychiatrist who had treated his ex-wife seven years earlier, claiming that his ex-wife waived the psychotherapist-patient privilege by denying his allegations of mental instability and by stating that short-term therapy seven years earlier had enabled her to be a better parent.[104] Contrary to the husband's claims, the court held that not only was the wife's therapy seven years earlier irrelevant to the issue of her present ability to care for the children, but also the wife did not waive the privilege by merely denying allegations of mental instability.[105] The court reasoned that the privilege would offer no protection for confidential communications if a litigant could overcome the privilege simply by alleging mental instability.[106]

B. *Exceptions Based on Policy Choices*

In contrast to the exceptions for court-ordered examinations and patient-litigants who place their mental or emotional conditions in issue,

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101. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3993 (1993); Mass. Gen. Laws Ann. ch. 233, § 20B(c) (West 1994); Minn. Stat. Ann. § 20.02 (West 1994); Fla. Stat. Ann. § 90.503 (West 1994).

102. *See, e.g.*, Critchlow v. Critchlow, 347 So. 2d 453 (Fla. Dist. Ct. App. 1977) (applying the exception to the psychiatrist-patient privilege where the wife, who suffered from emotional problems at the time of the proceeding, alleged in her petition for dissolution that she was a fit and proper person to have custody of the children); Wigmore, *supra* note 6, § 2327.

103. 539 So. 2d 544 (Fla. Dist. Ct. App. 1989).

104. *Id.* at 546.

105. *Id.*

106. *Id.*; *see also* Davidge v. Davidge, 451 So. 2d 1051 (Fla. Dist. Ct. App. 1984) (holding that a husband waived the privilege when he presented the testimony of psychiatrists to show that he was mentally and emotionally incapacitated when he entered into a settlement agreement with his ex-wife, and thus he could not prevent his ex-wife from presenting the testimony of a psychiatrist who had treated him contemporaneously with the execution of the agreement); *but see* Redding v. Virginia Mason Med. Ctr., 75 Wash. App. 424, 428–429, 878 P.2d 483, 487 (1994) (holding that patient-litigants waive the psychologist-patient privilege with respect to communications made during joint counseling sessions if the communications are relevant to a litigated dispute between the two).

the dangerous patient and child abuse exceptions are based on the need to further policies that conflict with the psychotherapist-patient privilege. Congress should recognize the dangerous patient and child abuse exceptions in order to protect threatened victims from foreseeable harm and to protect children from abuse.

1. Dangerous Patient Exception[107]

The dangerous patient exception to the psychotherapist-patient privilege furthers the policy of preventing imminent physical harm. In *Menendez v. Superior Court*,[108] the court found that the facts of the case called for application of the dangerous patient exception. First, the Menendez brothers threatened their psychotherapist, his wife, and his lover with physical harm.[109] Second, the psychotherapist had reasonable cause to believe, according to the standards of the psychotherapeutic community, that disclosing the defendants' communications was necessary to prevent imminent harm.[110] Because the psychotherapist disclosed the patients' threats to his wife and his lover under the dangerous patient exception, he was also able to testify to those statements on the witness stand. Once the statements were disclosed, they lost their privileged status.[111]

A possible drawback to the dangerous patient exception is that during psychiatric sessions patients may commonly make statements that could lead their psychiatrists to believe that disclosure is necessary to prevent imminent harm. Some fear that this exception could thus be applied to so many statements that the dangerous patient exception would effectively destroy the privilege.[112]

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107. *See, e.g.*, Mass. Gen. Laws Ann., ch. 233, § 20B(a) (West 1994).

108. 834 P.2d 786 (Cal. 1992).

109. *Id.* at 791.

110. *Id.* at 795. *See also* Tarasoff v. Regents of the Univ. of California, 551 P.2d 334, 346–47 (Cal. 1976) (justifying holding psychotherapists liable for failing to warn victims whom patients threatened with serious physical harm, by citing the statutory dangerous patient exception to the psychotherapist-patient privilege and by referring to the Principles of Medical Ethics of the American Medical Association, which permits psychotherapists to reveal communications if required to do so by law or if the situation requires disclosure in order to protect an individual or a community).

111. *Menendez*, 834 P.2d at 795. *See also* Wigmore, *supra* note 6, at § 2327.

112. *See* People v. Memro, 700 P.2d 446, 480 (Cal. 1985) (Grodin, J., concurring and dissenting) (accusing the majority of sanctioning "wholesale invasion of privacy" by failing to insist upon a threshold showing before applying the dangerous patient exception).

Despite this possibility, state case law suggests that situations arise in which the dangerous patient exception is necessary to protect threatened persons from harm. In *Oringer v. Rotkin*,[113] a patient told a psychotherapist of his plans to kill his son's schoolmate. The trial court invoked the exception because it found that the psychotherapist's records supported the conclusion that the patient presented a serious and imminent danger. Similarly, in *People v. Hopkins*,[114] the court held that the defendant could not claim the privilege because the psychiatrist had reasonable cause to believe that the defendant was dangerous and that disclosure was necessary to prevent harm. In *Hopkins*, the defendant told his psychiatrist, as well as nurses at the mental health facility, that he had participated earlier that day in a violent and abusive robbery of an 89-year-old woman.[115] These two cases illustrate how the dangerous patient exception sacrifices the objectives behind the psychotherapist-patient privilege—privacy and the promotion of treatment for mental and emotional illnesses—but does so in order to prevent foreseeable harm.

2. *Child Abuse Exception*[116]

Congress should establish a child abuse exception to the psychotherapist-patient privilege, which can be considered a subset of the dangerous patient exception. Although society wishes to protect all persons from foreseeable harm, it views the protection of children as a particularly compelling interest that justifies abrogating the privilege. Although many states establish an exception for cases of suspected child abuse or neglect, the scope of the exception varies. Some state statutes limit the exception to communications between the child and psychologist;[117] others extend the exception to communications between a psychologist and an alleged child abuser.[118]

The first approach, which limits the exception to communications made by abused children, offers the advantage of protecting the privacy

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113. 556 N.Y.S.2d 67 (App. Div. 1990).

114. 119 Cal. Rptr. 61 (Cal. Ct. App. 1975).

115. *Id.* at 63. *See also* People v. Gomez, 185 Cal. Rptr. 155 (Cal. Ct. App. 1982). Gomez was convicted of murdering a man who Gomez believed had destroyed his marriage. Previously, Gomez had threatened to kill his victim during sessions with psychology students working as interns. The court held that even if the psychotherapist-patient privilege extended to his communications with the students, the dangerous patient exception permitted disclosure. *Id.* at 158–159

116. *See, e.g.*, Miss. Code Ann. § 43-21-353 (1994); Wash. Rev. Code § 26.44.030 (1994).

117. *See infra* notes 119–21 and accompanying text.

118. *See infra* notes 122–23 and accompanying text.

of communications made by persons falsely accused of child abuse. In addition, this approach may encourage child abusers to seek help by maintaining the privileged status of statements that they make during psychotherapeutic sessions. The disadvantage of this approach is that it may prevent psychotherapists from revealing known cases of abuse.

For example, in *Everett v. State*,[119] the applicable statute permitted only the disclosure of communications between abused children and their psychotherapists.[120] In *Everett*, the defendant told his psychotherapist that he was participating in therapy because he felt remorse for sexually abusing his stepdaughter. Even though the victim had written a note to her mother about the abuse, the mother testified in court that the defendant had sought therapy merely to obtain help in controlling his temper. Despite the statutorily limited exception, the court was able to permit disclosure because the defendant waived his privilege when he asked his psychotherapist to tell the judge that he felt sincere remorse for committing the crime.[121] A statute that limits the exception to permit only the disclosure of statements made by abused children, rather than by abusers, thus presents the problem that known cases of abuse may go unreported.

The second approach, which extends the child abuse exception to communications from child abusers, as well as from abused children, ensures that known cases of abuse are disclosed. An advantage to this approach is that the psychotherapist in *Everett* would have been able to expose the sexual abuse even if the defendant had not waived the privilege. A disadvantage is that the exception may discourage abusers from seeking therapy.[122] Thus, a legislature that permits a psychotherapist to disclose the communications of child abusers chooses to protect children by discovering child abusers and removing children from their reach rather than by encouraging child abusers to seek treatment.[123]

The second, more expansive approach is the wiser of the two. Despite the possible effectiveness of psychotherapy, treatment may fail to reform

119. 572 So. 2d 838 (Miss. 1990).

120. *Id.* at 839 (applying the child abuse exception established in Miss. Code Ann. § 43-21-353 (Supp. 1989)).

121. *Id.* at 840.

122. *Id.* at 839.

123. Carson v. Jackson, 466 So. 2d 1188, 1190–91 (Fla. Dist. Ct. App. 1985) (applying Fla. Stat. ch. 415.512 (1983), which abrogates the privilege in any situation involving known or suspected child abuse or neglect).

the child abuser's behavior. In contrast, reporting the abuse and removing the child from the reach of the abuser will almost certainly protect the child from further harm. Without the child abuse exception, a defendant who tells his psychotherapist that he engaged in sexual conduct with his minor child could successfully use the privilege to prevent his psychotherapist from testifying against him.[124]

In addition to the policy of protecting children, the enactment of statutes that require health care professionals to report child abuse justifies establishing a child abuse exception.[125] When legislatures explicitly recognize this exception, they relieve courts of the need to reconcile the competing policies behind the psychotherapist-patient privilege and mandatory reporting of child abuse. The exception thus makes adjudication of child abuse claims more reliable and more efficient.[126]

Other issues arise when the person who wishes to disclose communications is not the psychotherapist who suspects child abuse, but is instead the defendant charged with child abuse who wants to disclose the psychiatric files of the alleged victim. State courts have attempted to apply the psychotherapist-patient privilege in conjunction with other rules of evidence in a way that is fair to both the defendant and the victim. If a defendant fails to prove that the accuser's psychiatric record is relevant to credibility, then courts respect the accuser's privacy and refuse to review the record *in camera*.[127] In some cases, however, the criminal defendant's constitutional right of confrontation under the Sixth Amendment overrides the victim's psychotherapist-patient privilege. For

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124. *See* People v. Bowman, 812 P.2d 725 (Colo. Ct. App. 1991). *Bowman* was decided before Colorado established a child abuse exception to the psychotherapist-patient privilege. The defendant told an alcohol facility social worker that he had engaged in sexual conduct with his minor stepdaughter. The court held that the communications were privileged, and that the trial court had erred in admitting the statements. However, the error was harmless because of the overwhelming evidence against the defendant. *Id.* at 729.

125. *See, e.g.*, Cal. Penal Code § 11166 (West 1994) ("Child Abuse and Neglect Reporting Act").

126. *See, e.g.*, People v. Caplan, 238 Cal. Rptr. 478, 485 (Cal. Ct. App. 1987) (referring to a lower court's comments on the difficulty in understanding the scope of the privilege in light of the child abuse reporting statute).

127. *See, e.g.*, People v. Manzanillo, 546 N.Y.S.2d 954 (N.Y. Crim. Ct. 1989) (rejecting the defendant's request for permission to search the victim's psychological evaluations for information that could harm the victim's credibility because the defendant failed to show that the records were likely to be relevant); *see also* People v. Tissois, 516 N.Y.S.2d 314 (App. Div.), *aff'd*, 526 N.E.2d 1086 (N.Y. 1987) (denying the defendant's request for access to a social worker's notes, which she made after visiting the children who accused the defendant of sexually abusing them, because the defendant failed to show that the notes were likely to be relevant to the issue of the children's credibility.)

example, in *People v. Caplan*, the prosecution presented the testimony of two psychiatrists who had treated the ten-year-old victim, and the defendant explained why he needed the notes of another psychiatrist who had treated the child to prepare and present a defense.[128] Under these facts, the lower court erred in failing to review *in camera* the psychiatric records subpoenaed by the defendant.[129]

Subsequent to a sufficient showing by the defendant, an *in camera* examination seems to be a compromise between the interests of defendants and accusers. When courts examine psychiatric records *in camera*, rather than in a public courtroom, the infringement upon patients' privacy is minimal. At the same time, courts can determine whether the psychiatric histories of the accusers affect the credibility of their accusations.

IV. CONCLUSION

Congress should adopt an explicit psychotherapist-patient privilege to promote uniform, efficient application of the psychotherapist-patient privilege in the federal courts. Rulemakers now have a substantial body of state statutes and case law on the privilege that they can use as models for a federal rule. Furthermore, Congress will soon be considering amendments to the current rules based on a comprehensive study by the Judicial Conference of the United States Advisory Committee on the Federal Rules of Evidence.[130]

The above discussion of exceptions to the psychotherapist-patient privilege in the state courts has attempted to show that four situations, in particular, arise frequently enough to justify establishing clear exceptions for them. These situations arise when a judge believes that a litigant may be mentally incapable of standing trial, a litigant introduces a mental or emotional condition as part of a claim or defense, a patient presents a grave and imminent physical threat to a specific victim, and a psychotherapist learns that a patient is abusing a child.

The best way for rulemakers to develop prudent guidelines for applying the psychotherapist-patient privilege is to refer to the experiences of state courts that apply statutory provisions. These provisions help define the contours of the psychotherapist-patient

128. 238 Cal. Rptr. 478 (Ct. App. 1987).

129. *Id.* at 486.

130. Anthony E. DiResta, *Committee to Evaluate Basis for Evidentiary Privileges*, Litigation News, Oct. 1993, at 2.

privilege by establishing specific exceptions, and these contours are further defined when courts apply the provisions in specific factual contexts.