
NOTE

THE EXPLOITATION OF TRUST: THE PSYCHOTHERAPIST-PATIENT PRIVILEGE IN ALASKA AS APPLIED TO PRISON GROUP THERAPY

*This Note examines the application of the psychotherapist-patient privilege under Rule 504 of the Alaska Rules of Evidence. The Note argues that the psychotherapist-patient privilege should be extended in Alaska to include communications made during prison group therapy. It begins with a general discussion of privileges and the psychotherapist-patient privilege in Alaska. It then argues, with reference to a leading Alaska Court of Appeals case, *Beaver v. State*, that the psychotherapist-patient privilege should apply to prison group therapy as a means of facilitating trust and rehabilitation in prison group therapy.*

The veneer of social trust is often thin. As lies spread—by imitation, or in retaliation, or to forestall suspected deception—trust is damaged. Yet trust is a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse.

—Sissela Bok¹

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1. Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 790 (1997) (quoting SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 28 (1978)).

I. INTRODUCTION

In 1997, the Alaska Court of Appeals decided *Beaver v. State*,² holding that communications made by an adjudicated juvenile sex offender, Patrick Beaver, were admissible as evidence even though the statements were made during group therapy at a juvenile correctional facility.³ When sentencing Beaver, the court relied on statements he made during his participation in rehabilitative group therapy sessions.⁴ These statements divulged past experiences and personal propensity to commit sexual abuse.⁵ The court concluded that the statements could be admitted at a subsequent hearing without violating Beaver's Fifth Amendment right against self-incrimination since he failed to affirmatively assert his right, even after he received a warning that his statements could be used against him.⁶ The court reasoned that participation in a prison rehabilitation group is voluntary, and therefore any statements made during the session constitute voluntary confessions.⁷

Since neither side referenced or argued the psychotherapist-patient privilege, the court did not consider the protections afforded by the privilege. This Note asserts that an additional argument should have been made that Patrick Beaver's statements were protected by the psychotherapist-patient privilege as set forth in Rule 504 of the Alaska Rules of Evidence. Additionally, this Note contends that the argument should have been raised and indeed, been successful. In light of Rule 504, allowing the statements into evidence was a conspicuous violation of Patrick Beaver's evidentiary rights.

There is no existing judicial opinion or legal precedent in Alaska interpreting Rule 504 in the context of group therapy. The only guidance provided is a commentary to the Rule, stating that "[p]articipants in group therapy programs in the presence of a psychotherapist may be covered under the definition of 'confidential communication.'"⁸ The sentence is followed by a citation to an article by Wayne Cross entitled "Privileged Communications Between Participants in Group Psychotherapy."⁹ This Note asserts that the reference in the Rule to the Cross article supports an ar-

2. 933 P.2d 1178 (Alaska Ct. App. 1997).

3. *Id.* at 1186.

4. *Id.* at 1180.

5. *Id.*

6. *Id.* at 1181-82.

7. *Id.* at 1183.

8. ALASKA R. EVID. 504 cmt. (2000).

9. Wayne Cross, *Privileged Communications Between Participants in Group Psychotherapy*, LAW AND THE SOCIAL ORDER (1970).

gument for the expansion in Alaska of the psychotherapist-patient privilege to cover group therapy.

The fact pattern of the *Beaver* case supports the contention that Alaska should apply the psychotherapist-patient privilege to prison group therapy sessions. This Note begins by discussing privileges generally and then explores the dynamics of the psychotherapist-patient privilege specifically. The Note then examines the meaning and purpose of Rule 504 of the Alaska Rules of Evidence and concludes that prison group therapy sessions should be included within the scope of the Rule.

II. THE ESSENCE OF PRIVILEGES GENERALLY AND THE NATURE OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

A. Privileges Generally

Generally, a privilege permits the non-disclosure of certain information by a witness in civil or criminal litigation.¹⁰ A privilege may be invoked outside the courtroom, in matters such as pretrial discovery requests and attempts to compel testimony, as well as during the trial itself.¹¹

Privileges are created to preserve values and relationships, the benefits of which are believed to outweigh the need for the evidence at trial.¹² Privileges are based on the belief that some relationships are necessarily founded on confidentiality and the supposition that the individual should sometimes be protected from intrusions by the government and the courts.¹³ Although privileges inevitably result in the suppression of otherwise probative evidence, the desideratum of a "perfect trial" is outweighed by the relationships and societal values that privileges preserve.¹⁴

In deciding whether a privilege exists, scholars often refer to the four-part test developed by Dean John Wigmore of Northwestern University School of Law.¹⁵ In order to warrant inclusion in a

10. STEVEN I. FRIEDLAND ET AL., EVIDENCE LAW AND PRACTICE 646 (2000).

11. *Id.* at 647.

12. *Id.*

13. S. Kay McNab, Note, *Criticizing the Self-Criticism Privilege*, 1987 U. ILL. L. REV. 675, 676-77 (1987).

14. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 9.1, at 381 (2d ed. 1987).

15. RALPH SLOVENKO, PSYCHOTHERAPY, CONFIDENTIALITY, AND PRIVILEGED COMMUNICATION 10 (1966). "The first edition of Wigmore's work on evidence appeared in 1904, the second in 1923, and the third in 1940." *Id.* at 39.

class of privileged communications, the communication must meet these four criteria:

- (1) Does the communication in the usual circumstances of the given professional relation originate in a confidence that it will not be disclosed?
- (2) Is the inviolability of that confidence essential to the achievement of the purpose of the relationship?
- (3) Is the relation one that should be fostered?
- (4) Is the expected injury to the relation, through fear of later disclosure, greater than the expected benefit to justice in obtaining the testimony?¹⁶

Both federal and state legislatures consider these four factors in deciding whether a privilege exists. The type of evidence protected by privileges, however, may vary among different states, and between federal and state courts.¹⁷ These differences arise in part from the various methods of creating a privilege—through the adoption of common law, by legislative acts, and in the recognition of constitutional rights.¹⁸ The Federal Rules of Evidence do little to promote uniformity. Although Congress enumerated a list of privileges included in the “Proposed Federal Rules of Evidence,”¹⁹ Rule 501 ultimately replaced these rules, providing that all privileges are 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.”²⁰

Many states have adopted privileges similar to those specified in the Proposed Rules, but almost all have adjusted the wording or added and subtracted from the provisions.²¹ The legislatures of most states have codified the privileges developed in common law in various forms.²²

16. *Id.* at 10.

17. FRIEDLAND ET AL., *supra* note 10, at 647.

18. *Id.* at 648. Constitutional privileges include the privilege against self-incrimination as set forth in the Fifth Amendment and the implied privilege of executive immunity. *Id.*; *see also* U.S. CONST. amend V.

19. FRIEDLAND ET AL., *supra* note 10, at 641-45. The Proposed Rules of Evidence include the following: Rule 503, lawyer-client privilege; Rule 504, psychotherapist-patient privilege; Rule 505, husband-wife privilege; Rule 506, communications to clergymen (not enacted); Rule 507, privilege to refuse to disclose political vote (not enacted); Rule 508, trade secrets (not enacted), Rule 509, secrets of state and other official information (not enacted); Rule 510, identity of informer (not enacted). *Id.*

20. LILLY, *supra* note 14, at 384.

21. *Id.* at 385. Although the state laws are not necessarily uniform, Lilly indicates that the laws are generally consistent. *Id.*

22. FRIEDLAND ET AL., *supra* note 10, at 648.

Neither federal nor state privileges are automatic or fixed. By contrast, privileges can be waived both impliedly and expressly. Implied waivers may occur when protected information is communicated to a third party; express waivers may occur when individuals overtly decline to invoke the privilege, such as through a signed writing.²³ Express waivers must be made “voluntarily, knowingly and intelligently.”²⁴ The waiver must occur in the absence of any threat, coercion or duress.²⁵

B. The Psychotherapist-Patient Privilege

The psychotherapist-patient privilege was first recognized in federal courts after the pioneering decision by the United States Supreme Court in *Jaffee v. Redmond*.²⁶ In *Jaffee*, the court suppressed statements made by a police officer to her social worker in a civil action that occurred after the officer shot and killed a man.²⁷ The court held that the psychotherapist-patient privilege falls under Rule 501 because such a privilege serves a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”²⁸ The case extended the privilege from communications to licensed psychiatrists and psychologists to confidential communications made to licensed social workers in the course of psychotherapy, and the court reasoned that all of these have significant roles in mental health treatment.²⁹ The court highlighted the utilitarian benefit of the psychotherapist-patient privilege, stating that it “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.”³⁰

Two justifications for the psychotherapist-patient privilege exist today.³¹ The first is the fundamental recognition of a patient’s

23. *Id.* at 649.

24. *Colorado v. Spring*, 479 U.S. 564, 572 (1987) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)).

25. *Parker v. North Carolina*, 397 U.S. 790, 801-02 (1970).

26. 518 U.S. 1 (1996).

27. *Id.* at 5.

28. *Id.* at 15 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

29. *Id.* at 15-16.

30. *Id.* at 11.

31. PAUL M. SMITH, *The Physician-Patient, Psychotherapist-Patient and Related Privileges*, in TESTIMONIAL PRIVILEGES 377, 382 (Scott N. Stone & Ronald S. Liebman eds., 1983).

interest in the privacy of therapeutic matters.³² The second is based on the belief that confidentiality is essential to the practice and efficacy of psychotherapy.³³ In 1960, the Group for the Advancement of Psychiatry stated that “[a]mong physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely.”³⁴ Psychologists as early as Freud recognized that “[t]he whole undertaking becomes lost [labor] if a single concession is made to secrecy.”³⁵ Communications are likely to be repressed if patients are concerned that their words may be used against them in a future lawsuit.³⁶

The psychotherapist-patient privilege has been codified in some form by all 50 states and the District of Columbia.³⁷ The general public believes that communications to a therapist are confidential, that confidentiality is essential to the achievement of the purpose of the relationship, and that its benefits outweigh the injury to justice.³⁸ It has been suggested that the confidentiality provided by the psychotherapist-patient privilege may be even more important than that ensured by the doctor-patient privilege since disclosure of private thoughts can be even more painful to the individual than disclosure of certain physical ailments.³⁹ The psychotherapist-patient privilege has been recognized as a class of protected communication under the Wigmore test because of the importance of complete communication in psychotherapy, the natural resistance of individuals to fully disclose information, and the individual’s magnified reluctance to make full disclosures when there is a threat of future criminal prosecution.⁴⁰

C. The Psychotherapist-Patient Privilege and Group Therapy

Group therapy is an increasingly common method of treating patients.⁴¹ As in individual treatment, members of the group di-

32. *Id.*

33. Ralph Slovenko, *Foreword* to DANIEL W. SHUMAN & MYRON F. WEINER, *THE PSYCHOTHERAPIST-PATIENT PRIVILEGE: A CRITICAL EXAMINATION* vii (1987).

34. *Id.*

35. *Id.* (quoting Freud).

36. SLOVENKO, *supra* note 15, at 41.

37. *Jaffee v. Redmond*, 518 U.S. 1, 12 (1996).

38. SLOVENKO, *supra* note 15, at 40-50 (arguing that the psychotherapist-patient privilege passes the four-part Wigmore test).

39. SMITH, *supra* note 31, at 386.

40. *See Jaffee*, 518 U.S. at 10; *see also* SMITH, *supra* note 31, at 386.

41. *See* SLOVENKO, *supra* note 15, at 119.

vulge past experiences, emotions, and thoughts to both the trained therapist and the other members of the group.⁴² Dr. Jacob L. Moreno introduced group therapy as a method of treating patients in the United States during the 1930s.⁴³ Today, group therapy is often the preferred mode of treatment by individuals who feel that the interaction among group members has a therapeutic effect unavailable in individual psychotherapy.⁴⁴

There are two theoretical approaches to group therapy. The first concerns itself with the separate individuals of the group, employing the group as a medium by which the therapist can deal with each individual patient more effectively.⁴⁵ Individual patients feel freer to express their thoughts because they are in a setting similar to the real world, but without societal constraints, and are free to discuss their thoughts and emotions with impunity.⁴⁶ The second approach views the group as one individual, a functioning social unit which works together to solve the group's problems.⁴⁷ Both approaches require each member of the group to become a therapeutic agent of the others.⁴⁸

Although all 50 states have recognized the psychotherapist-patient privilege for individual therapy, not all explicitly extend the privilege to group therapy.⁴⁹ Some states have assumed an expansive privilege, covering both individual and group therapy, while other state statutes are silent on the issue of group therapy.⁵⁰

42. Jessica G. Weiner, "And the Wisdom to Know the Difference": Confidentiality vs. Privilege in the Self-Help Setting, 144 U. PA. L. REV. 243, 249-50 (1995).

43. Cross, *supra* note 9, at 191 n.3.

44. SAMUEL KNAPP & LEON VANDECREEK, PRIVILEGED COMMUNICATIONS IN THE MENTAL HEALTH PROFESSIONS 75 (1987).

45. *Id.*

46. *See id.*

47. Cross, *supra* note 9, at 196.

48. *See id.*

49. *See* KNAPP, *supra* note 44, at 75.

50. *Id.* Although a comprehensive list of states that protect communications under the psychotherapist-patient privilege offered in group therapy has never been compiled, the research for this Note revealed that group therapy is protected by the privilege in California, Colorado, Kansas, Minnesota, and New Jersey. For the specific provisions, see part VI of this Note.

III. ALASKA LAW AND THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

A. The General Privilege

Alaska codified the psychotherapist-patient privilege in Rule 504 of the Alaska Rules of Evidence.⁵¹ The privilege is fairly expansive, including statements to a person who the patient had reasonable grounds to believe was a physician, psychotherapist, or psychologist.⁵² The first case to address the privilege was *Allred v. State*,⁵³ in which the Alaska Supreme Court refused to consider statements made by a defendant to a psychotherapist in a first-degree murder case.⁵⁴ The court evaluated Professor Wigmore's four factors to determine whether a privilege existed, and held that the psychotherapeutic relationship satisfied each of the factors.⁵⁵ The Court noted that a patient's statements to a therapist are "inherently confidential" and that "confidence is essential to achievement of the psychotherapeutic goal."⁵⁶ The court did not extend the privilege to therapists who are not licensed psychologists or psychiatrists, and extended it only to those treatments that "require confidentiality for [their] success."⁵⁷

The psychotherapist-patient privilege was examined again by the Alaska Court of Appeals in *State v. Wetherhorn*.⁵⁸ The court held that Alaska Statutes section 47.67.060 abrogated the psychotherapist-patient privilege to communications with psychologists in child abuse civil trials.⁵⁹ However, the court noted that the statute did not apply to criminal proceedings.⁶⁰ The court emphasized the sensitivity of criminal cases and held that the privilege should apply more narrowly in criminal proceedings than in civil cases.⁶¹

B. Group Therapy

Despite the distinctions made between licensed practitioners and counselors, and between civil and criminal proceedings, the

51. ALASKA R. EVID. 504 (2000).

52. *Id.* at 504(a)(3).

53. 554 P.2d 411 (Alaska 1976).

54. *Id.* at 422.

55. *Id.* at 417.

56. *Id.*

57. *Id.* at 420.

58. 683 P.2d 269 (Alaska Ct. App. 1984).

59. *Id.* at 277.

60. *Id.*

61. *Id.* at 281.

scope of the privilege with regard to group therapy in Alaska is still brimming with ambiguity. The commentary to Rule 504 states that “participants in group therapy programs in the presence of a psychotherapist *may* be covered under the definition of ‘confidential communication.’”⁶² There is no other reference to group therapy in the rule and the only clarification offered is a citation to a 1970 article by Wayne Cross in a journal entitled *Law and the Social Order*.⁶³ Since the commentary to Rule 504 offers no other supportive citations, it suggests that the Cross article is the appropriate authority to consult in determining when group therapy should be included under the psychotherapist-patient privilege.

In his article, Cross explores the dynamics of group therapy, stating that “[the] reliance on third parties, which is the central feature of group therapy, acquires obvious significance when one attempts an evaluation of the propriety of granting a privilege to group communications.”⁶⁴ Dr. Jacob L. Moreno, the pioneer of group therapy in the United States, is mentioned several times in the article.⁶⁵ Dr. Moreno believed that uninhibited expression was essential to the success of group therapy.⁶⁶ Cross elaborates on Dr. Moreno’s position writing that “[n]o group participant would make himself vulnerable . . . by placing his most secret thoughts before the group, unless he could be assured of confidentiality.”⁶⁷ Cross notes that many patients are likely to discontinue therapy and many others will be unwilling to make necessary contributions to the group if trust is not established.⁶⁸

Cross emphasizes the need for trust in group therapy where individuals feel particularly vulnerable. A group therapist must set a goal of helping the participants overcome anxieties because it is necessary to collapse the natural resistance of those who feel vulnerable.⁶⁹ According to Cross, the task would be insurmountable if the group members were aware that all communications could be disclosed at a later time.⁷⁰

Lastly, Cross advocates expanding the psychotherapist-patient privilege to group therapy. He states that society, in accord with public policy, should encourage the treatment of the mentally ill

62. ALASKA R. EVID. 504(a)(4) cmt. (2000) (emphasis added).

63. Cross, *supra* note 9.

64. Cross, *supra* note 9, at 197.

65. *Id.* at 198.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 198-99.

70. *Id.* at 199.

and the emotionally troubled.⁷¹ Society should support group therapy because the process focuses on helping individuals enhance their relationships with their outside environment, thus improving society as a whole.⁷² Cross argues that society should be even more interested in protecting group therapy than individual therapy because group therapy explores the individual's social relationships, and can better treat problems in advance of any future harm to those relationships.⁷³ This rationale may be of particular relevance with regard to individuals seeking treatment within a correctional setting because incarceration implies noncompliance with social norms. Because group therapy is necessary for the treatment of individuals for both intrinsic and pragmatic reasons, Cross argues that society should foster the maintenance and development of group relationships.⁷⁴

Since the commentary to Alaska Rule 504 does not reference any other authority besides the Cross article, the drafters of Rule 504 must have intended for the Cross article to be the governing authority in determining whether group therapy should be included within Alaska's psychotherapist-patient privilege. As stated above, the Cross article ardently advocates for the extension of the privilege to group therapy, especially when there is a particularly vulnerable population whose progress depends on confidentiality.

IV. GROUP THERAPY IN THE PRISON SYSTEM

A. The Alaska Goal of Rehabilitation

The fact pattern of the *Beaver* case serves as an interesting basis on which to examine the benefits of the psychotherapist-patient privilege for individuals participating in group therapy in prison in Alaska. Beaver made his statements during group therapy in a juvenile correctional facility. This is precisely the type of setting for which Cross asserts the importance of confidentiality.

Nowhere is the psychotherapist-patient privilege more essential than in the context of prison group therapy. The prison population is filled with individuals wary of admitting to past experiences.⁷⁵ The individuals are particularly vulnerable to the

71. *Id.*

72. *Id.* at 200.

73. *Id.*

74. *Id.*

75. See SLOVENKO, *supra* note 15, at 128. Slovenko states:

[P]risoners are usually distrusting souls. They feel there is no privacy or confidence, and so they do not even want to talk to a therapist, individually or in a group. The therapeutic situation

consequences of revealing personal information, an issue of singular importance because they are arguably the population most in need of the rehabilitation that therapy may help provide. Since prisoners are generally more distrustful than the average individual, it is essential that the therapist demonstrate that she or he is trustworthy.⁷⁶ Some prison authorities have observed the reluctance of prisoners to trust other individuals, and feel that betraying such hard-earned trust would undermine the efficacy of group therapy altogether.⁷⁷ When asked his opinion on the subject, one prison administrator asserted, "It is my personal conviction that it is not the role of the psychiatrist to uncover . . . information under the guise of therapy, if he expects to expose it to the warden. I cannot help feeling that disclosure under these circumstances is sort of a 'psychological entrapment.'"⁷⁸

The efficacy of group therapy should be of particular value in Alaska because both the Alaska legislature and the Alaska judiciary have emphasized the importance of rehabilitation among the convicted. In *Hansen v. State*,⁷⁹ the Alaska Supreme Court stated that "[t]he twin goals of penal administration in Alaska, reformation of the offender and the need to protect the public would be best served by a sentence that accommodates treatment as well as protects society and reaffirms societal norms."⁸⁰ Article I, section 12 of the Alaska Constitution also states that "multiple goals encompassed within these broad constitutional standards include rehabilitation of the offender into a noncriminal member of society."⁸¹

hopefully will demonstrate to the prisoner that not all persons are to be mistrusted. Confidentiality is of utmost importance when treating individuals who are basically distrustful of others.

Id.

76. *See id.* at 128.

77. *Id.* at 129. Norman Fenton, a counselor with extensive experience in leading group therapy sessions in prison states:

It is obvious that if a group leader reported unfavorably on an inmate, the feelings that would arise among others in the group, even though they agreed with the appraisal, might undermine the group counseling program. The spontaneity of the procedure would be lost after a report of any kind from the group leader.

Id.

78. *Id.*

79. 582 P.2d 1041 (Alaska 1978).

80. *Id.* at 1047 (quoting *Mattern v. State*, 500 P.2d 228, 235 (Alaska 1972)).

81. ALASKA CONST. art. I, § 12.

Article I, section 12 of the Alaska Constitution serves as the basis for the predominant Alaska case law. The Alaska Constitution consistently emphasizes the dual goals of protection of the public and rehabilitation of the criminal.⁸² The Alaska Constitution has been interpreted as granting incarcerated inmates the right to access rehabilitative programs.⁸³ The legislature acted accordingly, passing Alaska Statutes section 33.30.020, requiring “programs for the treatment, care, rehabilitation and reformation of prisoners.”⁸⁴ The Alaska Supreme Court limited this right significantly in *Rust v. State*, holding that the right to psychiatric care depends upon the determination of a physician or other health care provider that a prisoner exhibits a serious disease or injury, and that the disease is curable.⁸⁵ Despite this limitation, the argument for the protection of prison therapy groups is strengthened by the analysis of the Alaska Supreme Court in *Rust*. After *Rust*, prisoners who are granted access to psychiatric care are likely to be those who are considered treatable. Since most inmates who are allowed access to psychological and psychiatric care are treatable, an effective means of providing care is in the best interest of both the prisoner and society. Although Alaska Statutes section 33.30.020 has been repealed, it is important to evaluate the limitations imposed by *Rust* in the event that Article I, section 12 of the Alaska Constitution is interpreted as having similar confines.

B. Ethical and Economic Benefits of Rehabilitation

Rehabilitation is a means of reducing crime induced by the pathologies of individual offenders.⁸⁶ The normative argument for rehabilitation generally focuses on the rights of prisoners. The Alaska Constitution actualizes this normative view in Article I, section 12: “Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the

82. *Nelson v. State*, 619 P.2d 480, 481 (Alaska Ct. App. 1980).

83. *Smith v. State*, 790 P.2d 1352, 1354 (Alaska 1990).

84. *Rust v. State*, 582 P.2d 134, 143 (Alaska 1978) (quoting ALASKA STAT. § 33.30.020 (repealed 1986)). Although Alaska Statutes section 33.30.020 has since been repealed, Alaska courts still interpret the Alaska Constitution as providing a fundamental right to rehabilitation. See *Brandon v. State, Dep’t of Corrs.*, 938 P.2d 1029, 1032 (Alaska 1997) (stating “[t]he Department of Corrections correctly concedes that there is a fundamental right to rehabilitation” in Alaska Constitution, Article I, section 12).

85. *Rust*, 582 P.2d at 143.

86. RICHARD J. BONNIE ET AL., CRIMINAL LAW 27 (1997).

offender, and the principle of reformation.”⁸⁷ The Alaska Constitution does not place prisoners’ rights above retributive punishment, but classifies the two values as equal in importance.⁸⁸

Critics of the retributive model censure analyses of the costs/benefits of incarceration versus rehabilitation.⁸⁹ Perhaps in an ideal society, the costs of rehabilitating prisoners would be a concern secondary to the normative goal of helping inmates become better members of society. However, since fiscal concerns are often in the forefront of policy decisions, advocates of rehabilitation are beginning to replace normative arguments with economic ones.

The current cost of maintaining prisoners is compounded by a high recidivism rate.⁹⁰ Since 1998, almost 1,600 prisoners are released each day from state and federal prisons.⁹¹ The state of Alaska is not immune. The Alaska prison system has an 87% recidivism rate.⁹² In other words, almost nine out of ten persons who are placed in the custody of the Alaska Department of Corrections will return to prison once released from custody.⁹³ Seemingly, incarceration is not a sufficient deterrent for a majority of former inmates. The high percentage of rearrests combined with the con-

87. ALASKA CONST. art. I, §12.

88. *See id.*; *see also* State v. Chaney, 477 P.2d 441, 444 (Alaska 1970). Within the ambit of this constitutional phraseology are found the objectives of rehabilitation of the offender into a noncriminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.

Chaney, 477 P.2d at 444.

89. *See* ANN CHIH LIN, REFORM IN THE MAKING: THE IMPLEMENTATION OF SOCIAL POLICY IN PRISON 19 (2000); *see also* Michael K. Greene, *Show Me the Money! Should Taxpayer Funds Be Used to Educate Prisoners Under the Guise of Reducing Recidivism?*, 24 NEW ENG. J. CRIM. & CIV. CONFINEMENT 173 (1998) (arguing that taxpayer money should not be spent on the rehabilitation of prisoners).

90. *See* LIN, *supra* note 89, at 3.

91. The Sentencing Project, at <http://www.sentencingproject.org/brief/pub1036.pdf>.

92. Anthony Lee Brown, *From the Inside*, at <http://www.eclectica.org/v2n4/inside.html>.

93. *Id.*

stant influx of new prisoners causes problems of overcrowding and an inflated prison population.⁹⁴ The rising prison population will require either increased spending to build more prisons or the release of prisoners before their sentences have ended.⁹⁵

Simply avoiding recidivism does not make a former prisoner a productive member of society. In addition to the cost of the revolving door in the current prison system, studies show that those prisoners who manage to stay out of prison are not self-sufficient. Between 1984 and 1987, only 63% of individuals released from federal prison were employed after one year.⁹⁶ Effective rehabilitative and vocational programs are a means of combating the fiscal burdens that arise from maintaining repeat offenders and caring for prisoners who lack the skills and emotional faculties to find employment upon their release.

Retribution and public safety undoubtedly play meaningful roles in prison sentencing. This Note is not advocating a weak stance on justice—prisoners should be confined when they have committed an illegal act. A policy facilitating rehabilitation does not mean shorter sentences. Rather, rehabilitation is a means of making a responsible effort to return prisoners to society as productive citizens. If the Alaska prison system has an effective rehabilitation program, recidivism may be reduced, saving the state money. Since confidentiality is absolutely necessary for effective rehabilitation, the psychotherapist-patient privilege should be extended to cover group therapy sessions in a prison setting for both normative and fiscal reasons.

Neither justice nor the goal of rehabilitation is furthered by the absence of a psychotherapist-patient privilege. Opponents of extending the psychotherapist-patient privilege so that group therapy in prison can be truly effective may emphasize the importance of discovering the truth, which may be lost by the exclusion of statements made by a prisoner in group therapy. However, when prisoners are not assured of confidentiality, they are deterred from participating in group therapy altogether. Prisoners will not share confidential communications with the therapist, ensuring that their states of mind will remain hidden from the therapist and society. The statements are just as unavailable to the justice system if prisoners do not participate in group therapy as they are if the prisoners' statements are protected by the privilege.⁹⁷

94. LIN, *supra* note 89, at 4.

95. *Id.*

96. *Id.*

97. *See* Weiner, *supra* note 42, at 291-92.

V. THE TENOR OF TRUST

A. The Importance of Trust in Effective Rehabilitation

The psychotherapist-patient privilege is built on a principle of trust. The efficacy of therapy depends upon the individual's ability to trust the therapist.⁹⁸ Similarly, the success of group therapy depends upon each individual's ability to trust the therapist and the other members of the group.⁹⁹ As a result, therapy sessions are structured to make individuals feel secure so that they are less likely to conceal vulnerabilities. The therapist attempts to provide an environment that feels confidential, encouraging each individual to share secrets, memories, and emotions. As a result of the intimate nature of group therapy, individuals commonly assume that their communications will not be disclosed outside of the group, even if individuals are not assured that their statements will remain confidential.¹⁰⁰

Betrayal of trust, even when the trust is misplaced, does not further the policy goal of rehabilitation. When statements are used against a prisoner in subsequent proceedings, there is a twofold deterrent to rehabilitation: first, other prisoners will not participate in rehabilitation programs lest their statements be treated as voluntary confessions; second, the effectiveness of the therapy session on those who do participate will be minimal since the individuals will not feel free to disclose incriminating information. Simply stated, free communication is essential to effective group therapy, and it is lost under threat of punitive penalty.¹⁰¹

B. Reciprocal Trust Between the Citizenry and the State

The trust endangered by the disclosure of confidential communications reaches beyond prisoners and therapists. There is also a threat of diminished trust between the government and the citizenry. In an article on the Fourth Amendment, Scott Sundby defines trust in the context of a constitutional value.¹⁰² He wrote that "government action draws its legitimacy from the trust that the

98. See Cross, *supra* note 9, at 198 ("The therapeutic virtue of groups lies in their potential for uninhibited expression.").

99. *Id.* ("It would seem that a mutual trust is inherent in the sort of multilateral soul-baring that occurs in group sessions. No group participant would make himself vulnerable . . . unless he could be assured of confidentiality.").

100. Weiner, *supra* note 42, at 247.

101. Cross, *supra* note 9, at 198.

102. Scott E. Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?", 94 COLUM. L. REV. 1751 (1994).

electorate places in its representatives by choosing them to govern.”¹⁰³ To him, this trust between the electorate and the government is imperiled when the government endangers the citizenry’s ability to give its consent in an “informed and free manner.”¹⁰⁴

Sundby argues that the role of trust is reciprocal, and that its existence is essential for citizens to feel that they have the opportunity to participate meaningfully in society.¹⁰⁵ Those who feel that the government does not recognize their individual beliefs and concerns perceive the government as lacking legitimacy, resulting in an increased feeling of alienation.¹⁰⁶ Trust diminishes when the government acts coercively, deceitfully or contrary to promulgated public policy. Citizens elect officials for the purposes of executing constitutional and legislative decrees fairly and equitably.

In an article evaluating deceptive tactics used by law enforcement officials, Christopher Slobogin concluded that

routine deceit coarsens the liar, increases the likelihood of exposure, and when exposed, maximizes the loss of trust. When the deceptive practice is carried out by an agent of the government, it is even more reprehensible, both because the liar wields tremendous power and because government requires trust to be effective.¹⁰⁷

Margaret Paris also advocates for rules against deceitful tactics used in interrogations of suspects.¹⁰⁸ Paris emphasizes the government’s role in inculcating values, contending that citizens mimic those values upheld by the government, making trustworthy behavior exceptionally important.¹⁰⁹ She asserts that the role of trust is even more essential in the criminal process and advocates standard legal rules that guide governmental agents.¹¹⁰ Furthermore, she states that establishing legal rules minimizes the discretion of governmental agents, ensuring that interrogatories will be executed fairly and in accordance with public policy.¹¹¹ Finally, Paris argues

103. *Id.* at 1777.

104. *Id.*

105. *Id.* at 1778.

106. *Id.* at 1779.

107. Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 815 (1997). The author explores the nature of investigative lies and deception, employing the work of moral philosopher Sissela Bok and her framework for evaluating deception as the basis for his analysis.

108. Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL’Y & L. 3, 7 (1995).

109. *Id.* at 31.

110. *Id.* at 6-7.

111. *Id.* at 6.

that standard legal rules may reduce costs associated with obtaining and monitoring the trust of the citizenry.¹¹²

Just as there should be legal rules prohibiting the use of lies and deception during interrogations, so should legal rules exist to facilitate trust inside the prison walls. If society perceives the government as acting deceitfully, and contrary to the stated goals of the state constitution, the general trust of the government is diminished. The government should be viewed by the citizenry as an enforcer of public policy, not as an infringer of societal values. Rehabilitation is an enumerated goal of the state, and the citizenry trusts the government to carry out its purported goal truthfully, diligently, and free of suspicion or coercion. Evidentiary privileges that further Alaska's goal of rehabilitation will promote the citizenry's trust that the government will carry out constitutional policies effectively. By contrast, if the government undermines constitutional mandates, especially by divulging communications that are perceived to be confidential, the citizenry will view the government as an entity of impropriety, replacing trust with dissatisfaction and suspicion.

A particularity to the *Beaver* case may provide fuel to critics. In *Beaver*, the defendant was allegedly warned that his statements could be used against him in future proceedings.¹¹³ There is a legitimate question regarding how the use of the statements against Beaver could inspire distrust in the government if Beaver was told that they could be used against him. His awareness of this possibility normally would constitute a waiver of any privilege and would be sufficient to allow his statements into evidence. However, a waiver must not fall in the wake of duress or coercion.¹¹⁴ The prison staff where Beaver was incarcerated encouraged him to rehabilitate, but only if he willingly signed a waiver acknowledging that his statements could be used against him.¹¹⁵ In fact, the court emphasized that Beaver was "not compelled to make incriminatory disclosures (and [was] in fact warned against doing so)."¹¹⁶ A warning of this sort is tantamount to giving a prisoner a choice between attempting to rehabilitate meaningfully and effectively or not making an effort at rehabilitation at all. An ultimatum of this sort not only resembles coercion, it further impedes the goal of effective rehabilitation as established by the Alaska Constitution.¹¹⁷

112. *Id.* at 41-43.

113. *Beaver*, 933 P.2d 1179, 1180 (Alaska Ct. App. 1997).

114. *Parker v. North Carolina*, 397 U.S. 790, 794 (1970).

115. *Beaver*, 933 P.2d at 1180.

116. *Id.* at 1182.

117. *See* ALASKA CONST. art. I, § 12.

Beaver was placed in group therapy, asked to speak about personal events and emotions, and asked to listen to others do the same. Despite the context in which his statements were made, his efforts to rehabilitate were used against him in another proceeding.¹¹⁸

If meaningful trust between prisoners and the therapist is to be established, the psychotherapist-patient privilege should not be so easily waived. First, an ultimatum that a prisoner must waive his rights to confidentiality before participating in group therapy undermines the efficacy of rehabilitation by discouraging participation and impeding open communication. Second, since prisoners are encouraged to share in group therapy, and the therapist operates by breaking down any resistance to open communication, using statements made in group therapy in future proceedings is coercive, contrary to public policy, and improper. The Alaska Constitution delineates rehabilitation as a laudable goal of the prison system, and the citizenry trusts that the government will facilitate constitutional goals. The trust of the body politic is damaged when therapy sessions are used as a forum to uncover evidence of criminality rather than as a means to effectuate rehabilitation.

An extension of the psychotherapist-patient privilege to group therapy in prisons would facilitate trust between the prisoner and the group, making rehabilitation more effective.¹¹⁹ Extending the privilege to group therapy sessions removes the deceptive element from the rehabilitation process. Additionally, the privilege would further Alaska's constitutional goal of effectively rehabilitating prisoners. Furthering established public policy and removing any chance that prisoners will be misled into sharing incriminating information in group therapy conveys to the citizenry that the government takes seriously the principles of respect and concern.¹²⁰

VI. STATES THAT INCLUDE GROUP THERAPY IN THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

Several states have already explicitly included group therapy in the scope of their evidentiary rule regarding the psychotherapist-patient privilege or have otherwise addressed this issue. Although a comprehensive survey to compare states that do include group therapy and those that do not is beyond the scope of this Note, even preliminary research reveals several states with comprehen-

118. *Beaver*, 933 P.2d at 1180.

119. *Cross*, *supra* note 9, at 198.

120. *Id.*

sive privileges that may serve as a model for Alaska in interpreting Rule 504.

New Jersey is exceptional in that the legislature did more than simply expand the psychotherapist-patient privilege to include group therapy. Instead of interpreting the privilege broadly to encompass prison group therapy, the New Jersey legislature passed a statute affirmatively protecting communications made by an inmate in group therapy. The New Jersey Administrative Code title 10A, section 16-4-4, entitled "Inmate/Therapist Confidentiality," states: "Confidential relations between and among mental health practitioners and individuals or groups in the course of practice are privileged communications and not to be disclosed to any person."¹²¹ Although the provision contains a list of exceptions to confidentiality, they are "applicable only in situations which present a clear and imminent danger to the inmate or others."¹²²

Other states have preferred to address the issue by means of an existing psychotherapist-patient privilege rule. For example, the Kansas legislature, although it has not addressed the prison population directly, has explicitly included group therapy under the psychotherapist-patient privilege for patients in treatment facilities.¹²³ The provision states that the privilege of confidentiality "extends to individual, family or group therapy under the direction of the treatment personnel and includes members of the patient's family."¹²⁴ It also states that confidential communications "shall extend to those persons present to further the interests of the patient in the consultation, examination or interview."¹²⁵

The Minnesota rules of evidence have also been interpreted broadly. In *Minnesota v. Andring*,¹²⁶ the Minnesota Supreme Court held that the Minnesota psychotherapist-patient privilege should be construed to encompass statements made in group psychotherapy.¹²⁷ The court reasoned that

[t]he participants in group psychotherapy sessions are not casual third persons who are strangers to the psychiatrist/ psychologist/nurse-patient relationship. Rather, every participant has such a relationship with the attending professional, and, in the

121. N.J. ADMIN. CODE tit. 10A, § 16-4.4 (a) (2001). This section was examined by the Superior Court of New Jersey in *In re Inmate-Therapist Confidentiality*, 540 A.2d 212 (N.J. Super. Ct. App. 1988).

122. N.J. ADMIN. CODE tit. 10A, § 16-4.4(b).

123. KAN. STAT. ANN. § 65-5602 (2000).

124. *Id.*

125. *Id.*

126. 342 N.W.2d 128 (Minn. 1984).

127. *Id.* at 133.

group therapy setting, the participants actually become part of the diagnostic and therapeutic process for co-participants.¹²⁸

The court concluded that

[a]n interpretation which excluded group therapy from the scope of the psychotherapist-patient privilege would seriously limit the effectiveness of group psychotherapy as a therapeutic device. This would be particularly unfortunate because group therapy is a cost-effective method of psychotherapy in that it allows the therapist to treat a number of patients at the same time.¹²⁹

California has also afforded protection to statements made in group therapy in section 1012 of the California Evidence Code.¹³⁰ Although it did not originally include an explicit reference to group therapy, section 1012 was amended in 1970 to include “other patients present at joint therapy.”¹³¹ The amendment incorporates only those communications that are “made ‘in confidence’ and ‘by means which . . . [disclose] the information to no third persons other than those . . . to whom disclosure is reasonably necessary for . . . the accomplishment of the purpose for which the psychotherapist is consulted.’”¹³²

Colorado Statutes section 13-90-107 is entitled “Who may not testify without consent” and includes group therapists.¹³³ Section (g) of the statute expressly states:

Nor shall any person who has participated in any psychotherapy, conducted under the supervision of a person authorized by law to conduct such therapy, including but not limited to group therapy sessions, be examined concerning any knowledge gained during the course of such therapy without consent of the person to whom the testimony sought relates.¹³⁴

128. *Id.*

129. *Id.* at 134.

130. CAL. EVID. CODE § 1012 (West 1995).

131. *Id.*

132. *Id.* (quoting California Law Revision Commission, *Annual Report*, 9 CAL. L. REVISION COMM'N REP. 113, app. 3, at 152 (1969)). The amendment is located under “Law Revision Commission Comments.” *But see* *In re Pedro M.*, 96 Cal. Rptr. 2d 839 (Cal. Ct. App. 2000). In this case, a California appellate court created the following caveat: if a juvenile is attending rehabilitation as a condition of probation, the therapist can be called to testify as to the patient’s progress. *Id.* at 841. This is solely to assist the court in determining whether the patient is in compliance with the terms of his probation. *Id.* However, this exception has not been explicitly applied to individuals who participate in group therapy voluntarily. Rather, it most likely applies only when group therapy is court-mandated as a condition to probation.

133. COLO. REV. STAT. ANN. § 13-90-107(g) (West 2000).

134. *Id.*

The Alaska Constitution emphasizes rehabilitation and public safety as dual goals,¹³⁵ providing an unambiguous incentive to follow precedent set by other states in including group therapy, especially prison group therapy, under the psychotherapist-patient privilege. Although the courts have not decided the issues directly, the commentary to Rule 504 of the Alaska Rules of Evidence references the article written by Cross, a clear endorsement of the expansion of the privileges to group therapy.¹³⁶ The Cross article provides support for protecting statements made in the context of a prison group therapy session, and there is no legal precedent in Alaska to undercut its conclusions.

VII. CONCLUSION

Group therapy is becoming an increasingly common form of treatment.¹³⁷ Some therapists predict a time when patients will be treated primarily in a group setting.¹³⁸ Almost every study on group therapy, including the Cross article cited by the commentary to Rule 504 of the Alaska Rules of Evidence, indicates that confidentiality is essential to effective treatment. Several states have responded by regarding group therapy as a protected form of communication. This Note asserts that Alaska should follow suit by including communications made in group therapy, specifically communications made in prison group therapy, as part of the psychotherapist-patient privilege.

The Alaska Constitution mandates that Alaska law further the goals of public safety and rehabilitation of prisoners. Classifying prison group therapy as an evidentiary privilege furthers both of these purported goals. Interpreting Alaska law in a manner that encourages effective rehabilitation of incarcerated persons also has the benefits of reducing the fiscal burdens associated with a high rate of recidivism and ensuring that the state's constitutional goal of rehabilitation is not undermined. Perhaps more importantly, protecting confidential communications fosters trust between inmate and therapist and between the citizenry and government. The participant in group therapy trusts that the communications will be kept confidential, and the citizenry trusts that the government will further public policy without engaging in practices that can be construed as deceptive. Including group therapy in the psy-

135. ALASKA CONST. art. I, § 12.

136. See discussion, *supra* Part III.B.

137. See SLOVENKO, *supra* note 15, at 119.

138. *Id.*

chotherapist-patient privilege is not simply good public policy—it is an essential guard against the exploitation of trust.

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