

A “Shrink”-ing Privilege: *United States v. Romo* and the “Course of Diagnosis” Requirement of the Psychotherapist-Patient Privilege

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When the Supreme Court recognized a psychotherapist-patient privilege in *Jaffee v. Redmond*, it left the contours of the privilege open to definition by lower courts.¹ One requirement of the privilege not fully defined in *Jaffee* is the qualification that protected communications must occur “in the course of diagnosis or treatment.”² Recently, in *United States v. Romo*, the Ninth Circuit held statements made to a prison therapist to be outside the privilege and established a set of factors for determining which communications occur during the “course of diagnosis.”³ Through its interpretation of the words “course of diagnosis or treatment,” the Ninth Circuit substantially restricts the scope of the psychotherapist-patient privilege, a constraint that will disproportionately affect poor and underserved communities. In so doing, the court undermines the egalitarian protection of mental health care that is central to the Supreme Court’s decision in *Jaffee*.

I. HISTORY OF THE CASE

While incarcerated in a Montana correctional facility, Robert Romo confessed to writing a threatening letter to the President.⁴ He made this confession to Donald LaPlante, a licensed professional counselor who, when not preoccupied by a variety of other duties, offered psychological counseling to inmates.⁵ Romo had consulted with LaPlante in the past, but did not have a regularly scheduled appointment with the counselor when he requested a meeting with LaPlante in October 2002.⁶ Immediately after encountering LaPlante in a private visitation room, Romo confessed to writing a letter threatening the life of George W. Bush, despite

¹ 518 U.S. 1, 18 (1996) (“Because this is the first case in which we have recognized a psychotherapist privilege, it is neither necessary nor feasible to delineate its full contours in a way that would ‘govern all conceivable future questions in this area.’” (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981))).

² *Id.* at 15.

³ 413 F.3d 1044 (9th Cir. 2005).

⁴ *Id.* at 1045–46.

⁵ *Id.* at 1045. The majority argued that these other duties, including arranging social events and acting as a case manager, made Romo’s claim of privilege more suspect. *See id.* at 1049.

⁶ *Id.*

LaPlante's warning that he would have to report the act to law enforcement officials.⁷ Romo later reiterated to a Secret Service Agent that he had written this threatening letter, and admitted to writing a similar letter found in his cell.⁸

The United States District Court for the District of Montana convicted Romo of threatening the president.⁹ The court denied Romo's motion to suppress his conversation with LaPlante and held that the psychotherapist-patient privilege was inapplicable because Romo's conversation was not in the course of a "counseling, treatment, or therapy session."¹⁰ In his appeal, Romo challenged this denial¹¹ and the sufficiency of the government's evidence for conviction.¹²

The Ninth Circuit affirmed Romo's conviction.¹³ Writing for the court, Judge McKeown¹⁴ argued that LaPlante and Romo's meeting was not privileged, as there was no evidence that the session was related to therapy and diagnosis.¹⁵ Judge McKeown also held that the prosecution's evidence was sufficient for conviction.¹⁶

Judge McKeown based her holding on a deferential standard of review.¹⁷ She held that the lower court's decision about the nature of the session between Romo and LaPlante was a finding of fact to which the Ninth Circuit owed deference. Applying this standard of review, Judge McKeown affirmed the district court's holding that because Romo's meeting with LaPlante was not in the "course of diagnosis or treatment,"¹⁸ Romo was not entitled to invoke the psychotherapist-patient privilege.¹⁹

⁷ *Id.* at 1045–46.

⁸ *Id.* at 1046. The government never found the letter Romo mailed. It was likely lost during the White House's warehousing of mail during the 2001–2002 anthrax scare. *Id.*

⁹ *Id.* Threatening the life of the President of the United States by mail is a crime under 18 U.S.C. § 871(a) (2000).

¹⁰ *Id.* at 1046–47.

¹¹ *Id.* at 1046.

¹² *Id.* at 1050. Romo also objected to the testimony of an expert witness. The prosecution had called an expert to testify as to whether the White House mail office would have considered Romo's letter a threat. *Id.* at 1049.

¹³ *Id.* at 1052.

¹⁴ Judge Gould concurred in Judge McKeown's opinion; Judge Fletcher wrote a separate concurrence.

¹⁵ *See Romo*, 413 F.3d at 1049.

¹⁶ *See id.* at 1052. Further, Judge McKeown held that the district court erroneously admitted expert testimony, but that the error was harmless. Judge McKeown explained that expert testimony is not admissible to prove whether a "reasonable person" would have foreseen a communication as threatening. *See id.* at 1049–50 (citing *United States v. Hanna*, 293 F.3d 1080, 1086 (9th Cir. 2002)).

¹⁷ *Id.* at 1047 (citing *United States v. Bynum*, 362 F.3d 574, 578 (9th Cir. 2004)). Under Ninth Circuit law, a court must hold a "definite and firm conviction that a mistake has been committed" to overturn a factual finding. *United States v. Doe*, 155 F.3d 1070, 1074 (9th Cir. 1998) (en banc).

¹⁸ *Romo*, 413 F.3d at 1049.

¹⁹ According to the *Romo* court, the "course of diagnosis or treatment" test is one of three requirements that must be met to invoke the psychotherapist-patient privilege. The other two requirements, which the *Romo* court extracted from the opinion in *Jaffee*, are

Judge McKeown established a “totality of the circumstances” test with a set of constituent factors to determine whether Romo’s confession was made in the course of diagnosis: the historical nature of the relationship between confider and confidante; the patient’s purpose in making the communication; the nature of the contact; the timing and location of the communication; objective data, such as medical records; and mental health services requested during the communication.²⁰ Ostensibly, these factors cumulatively determine whether the therapist is “practic[ing] his craft.”²¹

In application, Judge McKeown ignored the enumerated factors²² and limited her inquiry to only three questions: What was the therapist’s intent? Was the therapist presented to the patient as someone delivering treatment? Was actual treatment provided?²³

Judge McKeown held that under clear error review, the district court could conclude that LaPlante had no intention to give therapy, had not presented himself as providing therapy, and had not provided actual therapy. Judge McKeown argued that these conclusions were supported by the number of duties that LaPlante conducted at the prison, any of which could have been the reason for the meeting; moreover, LaPlante did not have a regularly scheduled meeting with Romo; and, finally, Romo blurted out his confession instead of responding to questions.²⁴

Judge Fletcher concurred, but spiritedly denounced Judge McKeown’s interpretation of the psychotherapist-patient privilege. Judge Fletcher explained that, as a threshold matter, the court did not need to consider the admissibility of LaPlante’s testimony: other, overwhelming evidence of Romo’s guilt, including another confession, sufficiently supported Romo’s conviction.²⁵ Moreover, Judge Fletcher disagreed with Judge McKeown’s application of the “course of diagnosis” test: Romo’s statements were

(1) that the communications be confidential, and (2) that the communications be made to a licensed psychotherapist. *See id.* at 1047 (citing *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996)). Although this language comes from *Jaffee*, it is questionable whether the Supreme Court intended an explicit three-part test. Such an interpretation is unlikely, given that the *Jaffee* court articulated that it would protect statements made to social workers in addition to licensed psychotherapists. *See Jaffee*, 518 U.S. at 15–17.

²⁰ *Romo*, 413 F.3d at 1044.

²¹ *See id.* at 1047–48. Judge McKeown extrapolates this question from the language of Proposed Federal Rule of Evidence 504, which Congress rejected in favor of the more general privilege protections under Federal Rule of Evidence 501. *See Proposed Fed. R. of Evid.* 504, 56 F.R.D. 183, 240 (1972). Despite their rejection by Congress, the proposed evidentiary privileges have been treated as influential by courts. *See Romo*, 413 F.3d at 1047–48 (citing *United States v. Chase*, 340 F.3d 978, 981 (9th Cir. 2003) (en banc) (quoting WEINSTEIN’S FEDERAL EVIDENCE (1997) § 504.02, at 504–07)); *see also Jaffee*, 518 U.S. at 8 n.7 (1996); *Trammel v. United States*, 445 U.S. 40, 47 (1980).

²² As an example, Judge McKeown did not weigh Romo’s “purpose in communicating” with LaPlante, finding the inquiry “of no help because we know nothing about his specific intentions.” *Romo*, 413 F.3d at 1048.

²³ *Id.* The first two questions are borrowed from *Oleszko v. State Comp. Ins. Fund*, 243 F.3d 1154, 1157 (9th Cir. 2001).

²⁴ *See Romo*, 413 F.3d at 1048–49.

²⁵ *See id.* at 1052 (Fletcher, J., concurring).

made in the course of diagnosis or treatment, as his meeting with LaPlante “mirror[ed] the characteristics of a counseling session.”²⁶

II. DISCUSSION

A. *Legal Errors*

Judge Fletcher correctly identified the two primary mistakes in the *Romo* decision. First, a review of the psychotherapist-patient privilege was not necessary to sustain Romo’s conviction. Second, the court improperly determined Romo’s meeting with LaPlante to be outside the “course of diagnosis or treatment.”

As to the first point, Judge McKeown unnecessarily addressed the scope of the psychotherapist-patient privilege: the other evidence against Romo alone supported his conviction.²⁷ Expanding its holding beyond the issues necessary to decide *Romo*, Judge McKeown overextended the court’s authority.²⁸

Judge McKeown’s “course of diagnosis or treatment” analysis is more troubling. The analysis undermines the availability of the psychotherapist-patient privilege and disproportionately limits protection for poor and underserved communities—communities where therapists are least likely to conduct treatments in formal sessions.

Judge McKeown mistakenly determined that Romo’s meeting with LaPlante was not an instance of a therapist “practicing his craft.”²⁹ Facilitating this error, Judge McKeown held that the “course of diagnosis” inquiry was a question of fact³⁰ that can only be overturned by a “definite and firm conviction.”³¹

Contrary to Judge McKeown’s holding, the “course of diagnosis” inquiry is not a question of fact, but rather, a mixed question of law and fact.³² The Supreme Court has explained that a mixed question applies

²⁶ *Id.* at 1053. Judge Fletcher argued that Romo was discussing a problem he was having with his therapist: writing letters threatening the life of George W. Bush.

²⁷ *See id.* at 1052. The evidence included “the testimony of a Secret Service Agent that Romo confessed to sending a threatening letter and a signed transport sheet on which Romo repeated his threat against the President, signed his name, and stamped his thumb print.” *Id.*

²⁸ *See* Gregory Mitchell, *Against “Overwhelming” Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335, 1365–66 (1994) (contending that lax standards for harmless error provide appellate courts opportunities for judicial activism). *See also* Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 37–39 (1994) (arguing that strict application of the harmless error doctrine undermines protections for criminal defendants). Additionally, by creating new law in a case where the court would have decided as it did regardless of whether the parties raised the topic at hand, judges may evade political opposition inside and outside the courts.

²⁹ *Romo*, 413 F.3d at 1047–48.

³⁰ *Id.* at 1048.

³¹ *Id.* at 1047.

³² Under Ninth Circuit law, mixed questions of law and fact are reviewed de novo. *See*

where “[t]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] . . . standard”³³ Rather than applying a pure factual inquiry, Judge McKeown applied agreed-upon facts to her set of legal criteria to determine whether *Jaffee*’s requirements had been met. Other circuits recognize that review of similar privilege issues are mixed questions of law and fact.³⁴

Likely, Judge McKeown labels the “course of diagnosis” inquiry as a question of fact only to employ the deferential “definite and firm conviction” standard of review. This conclusion-oriented approach is itself problematic. Future courts can use the *Romo* opinion to support denials of the psychotherapist-patient privilege in cases with similar fact patterns, even though the *Romo* court may have ruled differently had it considered the case de novo.

In addition to incorrectly stating the standard of review, Judge McKeown erred in her application of her stated standard. The evidence clearly supported the conclusion that Romo’s confession was made “in the course of diagnosis or treatment.”

Judge McKeown’s misapplication begins when she misinterprets the “in the course of” language of *Jaffee*.³⁵ As an individual’s relationship with a therapist does not begin and end at the clinic’s door, the *Jaffee* court expanded the privilege beyond those statements made in a formal, diagnostic setting.³⁶ Thus, the Supreme Court substituted the phrase “in the course of” for the “while engaged in” phrase used in Proposed Rule 504,³⁷ a substitution designed to reflect the ongoing nature of psychotherapy.

The factors that Judge McKeown found compelling—that Romo did not have a regularly scheduled meeting with LaPlante and that there was not any treatment in the meeting before Romo’s confession³⁸—are less

In re Bammer, 131 F.3d 788, 792 (9th Cir. 1997). *But see Ornelas v. United States*, 517 U.S. 690, 700–02 (1996) (Scalia, J., dissenting) (arguing that in some cases, mixed questions are given deferential review).

³³ *Ornelas*, 517 U.S. at 696–97 (second set of brackets in original text) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)). In *Romo*, the law that privileged communications must be in the course of diagnosis or treatment was not at issue.

³⁴ *See, e.g., In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 78 (1st Cir. 1999) (citing *United States v. Reeder*, 170 F.3d 93, 106 (1st Cir. 1999)) (holding that, in its interpretation of the “course of diagnosis” clause of *Jaffee*, holdings on the crime-fraud exception are reviewed for abuse of discretion, not clear error).

³⁵ *See Romo*, 413 F.3d at 1046–48.

³⁶ *See Jaffee v. Redmond*, 518 U.S. 1, 17–18 (1996) (holding that the psychotherapist-patient privilege must be broad in order to predictably encompass interactions with one’s therapist so as not to lose the benefits of confidentiality and trust).

³⁷ *See Romo*, 413 F.3d at 1048 (citing Proposed Fed. R. of Evid. 504(a)(2)(A), 56 F.R.D. 183, 240 (1972)).

³⁸ *Id.* at 1048–49 (“That LaPlante previously provided Romo with therapy does not mean that every interaction between the two constituted a therapy session, and this particular meeting involved no therapy.”).

persuasive given the Supreme Court's alteration of Rule 504's language in *Jaffee*. The Supreme Court wanted to privilege an ongoing, even informal, relationship between a patient and her psychotherapist or social worker. The Court's broader "in the course of" phrase permits this protection.

In addition, Romo's actions strongly suggest those of a patient in a counseling relationship. Romo had approached LaPlante in the past for voluntary counseling sessions. In the instant case, he requested a meeting with LaPlante, who met Romo in a private visitation room. Romo then divulged behavior that was troubling his conscience—writing a letter stating that he would put a bullet in the President's head.³⁹ The fact that Romo ignored LaPlante's warning that he would have to report this letter to law enforcement officials should not have mitigated Romo's expectation of privilege. Rather, this action illustrates the truly therapeutic assistance Romo was seeking; he expected the trusting psychotherapist-patient relationship the Court so valued in *Jaffee*.⁴⁰

B. Implications

Romo sets dangerous precedent for interpreting the psychotherapist-patient privilege. *Romo*'s model for "course of diagnosis" determinations grants district courts broad discretion to deny a defendant's motion to suppress evidence under the privilege. As it rests on a nebulous "totality of the circumstances" test, *Romo*'s "course of diagnosis" definition leaves no strictures on future judges. The "relevant factors"⁴¹ Judge McKeown identified as components of the "totality of the circumstances" are hardly limiting, especially when, as in *Romo*, a court declines to apply many of the considerations to the instant case. For instance, even if a court goes beyond the factors considered in *Romo* and evaluates the parties' intents, the broad course of diagnosis inquiry established in *Romo* leaves much room for judicial divination. In *Romo*, the Ninth Circuit declined to consider Romo's intent for lack of evidence (presumably, his testimony was insufficient or not given) and glossed over LaPlante's intent, simply noting that LaPlante did not know why Romo wanted to meet with him.⁴² Any privilege that is left after *Romo* is unpredictable, as it depends on which particular factors a court chooses to emphasize.

Romo threatens to undermine the privilege that the Supreme Court established in *Jaffee*. First, *Romo* provides other courts with an example of how to deny the psychotherapist-patient privilege. Even prior to *Romo*,

³⁹ *Id.* at 1045–46.

⁴⁰ *See Jaffee*, 518 U.S. at 10–11.

⁴¹ *See supra* note 21 and accompanying text.

⁴² *See Romo*, 413 F.3d at 1045. The court did not mention the possibility that LaPlante intended to meet Romo for a counseling session, even if he did not know what Romo wanted to discuss.

several lower courts applied a balancing test when reviewing the psychotherapist-patient privilege,⁴³ despite the Supreme Court's admonition that the privilege should not depend on a balancing of public and private interests.⁴⁴ However, the psychotherapist-patient privilege remained largely intact before *Romo*. The courts ignoring *Jaffee's* directive that the privilege not be conditional were outnumbered by those following the Court's command.⁴⁵ Courts following the Ninth Circuit's lead in *Romo* now have a new way to circumvent the absolute privilege created in *Jaffee*.⁴⁶ Instead of confronting the Supreme Court's explicit rejection of balancing public harm and private benefit in individual cases, courts can adopt a *Romo* "course of diagnosis" inquiry. In large part, judges applying *Romo's* open-ended "totality of the circumstances" test will be able to deny or recognize the psychotherapist-patient privilege at their discretion.

The application of *Romo* will substantially increase defendants' difficulty in invoking the psychotherapist-patient privilege. Judge McKeown's practice of balancing "relevant factors" will deny the privilege's protection to many statements made throughout the course of therapy. The *Romo* court declined to consider the defendant's possible motives for scheduling a meeting with LaPlante because it knew "nothing about his specific intentions."⁴⁷ Requiring a defendant to provide circumstantial evidence of his intent in meeting with a therapist will nullify the privilege in many instances. Judge McKeown also opined that *Romo's* statement should not be protected, as he "simply blurted out the information about the threat and seemed to understand that LaPlante would not keep his confession a secret."⁴⁸ This type of passionate revelation of one's concerns is precisely the type of statement that a psychotherapeutic relationship attempts to elicit. If courts follow *Romo's* balancing of factors, the conversations in many therapy sessions will not be privileged.

⁴³ See, e.g., *United States v. Mazzola*, 217 F.R.D. 84 (D. Mass. 2003) (holding that the need for effective cross-examination justifies breaching the privilege); *Barrett v. Vojtas*, 182 F.R.D. 177 (W.D. Pa. 1998) (holding that some statements made by a patient, even ordered to see a therapist, are not privileged).

⁴⁴ See *Jaffee*, 518 U.S. at 17–18. Although *Jaffee's* infamous footnote 19 raises the possibility of creating exceptions to the privilege for situations such as averting serious harm to the patient, the basic psychotherapist-patient privilege was intended to be absolute. For an argument supporting exceptions under footnote 19, see *Recent Case*, 117 HARV. L. REV. 996 (2004).

⁴⁵ See, e.g., *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003) (holding that a "dangerous patient exception" to the privilege should not be created); *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000) (same).

⁴⁶ The psychotherapist-patient privilege is not automatic; statements must be made to a licensed psychotherapist or social worker, they must be confidential, and they must be in the course of diagnosis or treatment. See *supra* note 19. However, once these criteria have been met, the privilege created is absolute, except as qualified by possible "footnote 19" exceptions.

⁴⁷ *Romo*, 413 F.3d at 1048.

⁴⁸ *Id.*

In this manner, *Romo* provides a blueprint for how to restrict the psychotherapist-patient privilege. This restriction will not be felt equally. Eschewing *Jaffee*'s egalitarian emphasis, *Romo* will discourage individuals in poor, underserved communities from receiving mental health care. The course of diagnosis requirement prioritizes therapy that is conducted in a formal, scheduled setting. Invariably, this will have the greatest effect on those who receive their mental health treatment in less traditional circumstances. Undermining *Jaffee*, which protected statements made to social workers in addition to licensed therapists,⁴⁹ *Romo* disproportionately removes protections from mental health care provided to poor, underserved communities and prisoners. Without the assurance of confidentiality that is fostered by the psychotherapist-patient privilege, it may be very difficult to conduct successful psychiatric treatment in these populations.⁵⁰

Jaffee attempted to make the psychotherapist-patient privilege more available by offering protections to all patients, regardless of whether they were counseled by licensed psychotherapists or licensed social workers.⁵¹ By establishing a stringent "course of diagnosis" requirement, *Romo* recreates the same obstacles poor and underserved patients faced in receiving mental health care before *Jaffee* extended the psychotherapist-patient privilege to include social workers.⁵² The "relevant factors" established by *Romo* are found primarily in classic relationships with licensed psychotherapists. A patient with a regular psychotherapist is more likely to have a "historical . . . relationship between the individual and his confidante" than someone who receives mental health care from a clinic or social worker.⁵³ In addition, the "timing and location of the communication" favor patients who meet with a psychotherapist in a medical office at a prescheduled time.⁵⁴ Poor patients are also less likely to have the "objective data, such as medical records, which corroborate the counsel-

⁴⁹ *Jaffee*, 518 U.S. at 15–16.

⁵⁰ See *id.* at 10–11. See also Ellen S. Soffin, *The Case For a Federal Psychotherapist-Patient Privilege That Protects Patient Identity*, 1985 DUKE L.J. 1217, 1225 (1985) (contending that confidentiality is essential to effective psychotherapy). Other studies have shown that patients are largely unaware or uninfluenced by privilege laws. See, e.g., Daniel A. Cantu, *When Should Federal Courts Require Psychotherapists To Testify About Their Patients? An Interpretation of Jaffee v. Redmond*, 1998 U. CHI. LEGAL F. 375, 385–88 (1998) (citing DANIEL W. SHUMAN & MYRON F. WEINER, *THE PSYCHOTHERAPIST PATIENT PRIVILEGE: A CRITICAL EXAMINATION* 49 (Charles C. Thomas ed., 1987)). This debate is beyond the ambitions of this Recent Development.

⁵¹ See *Jaffee*, 518 U.S. at 16 ("[Social workers'] clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals." (citation omitted)).

⁵² Although many states recognized a psychotherapist-patient privilege by the time the Supreme Court ruled in *Jaffee*, the states were only incrementally extending this protection to social workers. See *Jaffee*, 518 U.S. at 16–17 n.17.

⁵³ *Romo*, 413 F.3d at 1047.

⁵⁴ *Id.*

ing contact” called for in *Romo*.⁵⁵ By emphasizing the form of treatment over its substance, *Romo* establishes a two-tiered psychotherapist-patient privilege test that guarantees protection for statements made on a psychotherapist’s couch and employs an unpredictable “totality of the circumstances” evaluation for statements made elsewhere.⁵⁶

Without the benefit of protected communications, individuals unable to engage in traditional therapeutic relationships may be discouraged from receiving mental health care.⁵⁷ This is especially troubling given the lack of treatment currently available in poor and minority areas⁵⁸ and the ever-growing segment of the population that receives therapeutic services from social workers.⁵⁹ In addition, *Romo* will be especially influential in prisons, where there will be a presumption against privileging statements made to prison therapists who, like LaPlante, split their time between mental health care and other duties.⁶⁰ This harm is particularly deleterious, as the adversarial nature of prisons creates a heightened requirement of trust and confidentiality in psychotherapy.⁶¹ Furthermore, given the broad segments of the population receiving “informal” mental health care, any disincentives *Romo* creates to receiving this type of therapy will have widespread effects.⁶² After *Romo*, communities already underserved by psychotherapists will now face the added burden of a patient population even more reluctant to bestow its trust in neighborhood clinics and counselors.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See, e.g., *Jaffee*, 518 U.S. at 10–11; Soffin, *supra* note 50, at 1225.

⁵⁸ See U.S. DEP’T OF HEALTH AND HUMAN SERVS., MENTAL HEALTH: CULTURE, RACE, AND ETHNICITY 3–4, 28–29 (2001), available at <http://www.surgeongeneral.gov/library/mentalhealth/cre/sma-01-3613.pdf> (noting that mistrust and insensitivity are problems in providing mental health care to minorities and that poor communities have less access to and greater need for treatment); Matt Boucher, *Turning a Blind (White) Eye in Legislating Mental Health Parity: The Unmet, Overlooked Needs of the Working Poor in Racial and Ethnic Minority Communities*, 19 J. CONTEMP. HEALTH L. & POL’Y 465, 465–67, 471–72 (2003) (discussing the Surgeon General’s findings that poor and minority communities have less access to mental health care than whites).

⁵⁹ The portion of mental health care provided by public hospitals is decreasing, while that served by outpatient clinics, partial care organizations, multiservice groups, and social workers continues to rise. See U.S. DEP’T OF HEALTH AND HUMAN SERVS., MENTAL HEALTH, UNITED STATES 244–49, 270 (2002), available at <http://www.mentalhealth.samsa.gov/publications/allpubs/SMA04-3938/default.asp>.

⁶⁰ See *Romo*, 413 F.3d at 1049.

⁶¹ See Christina L. Lewis, *The Exploitation of Trust: The Psychotherapist-Patient Privilege in Alaska as Applied to Prison Group Therapy*, 18 ALASKA L. REV. 295, 304–05 (2001) (noting that the fear that statements will be used against prisoners creates a need for heightened trust).

⁶² Mental illness is already a widespread problem, accounting for over fifteen percent of the burden of disease in established market economies, including the United States. See NAT’L INST. OF MENTAL HEALTH, THE IMPACT OF MENTAL ILLNESS ON SOCIETY (2001), available at <http://www.nimh.nih.gov/publicat/burden.cfm>.

Arguments in favor of *Romo*'s restriction of the psychotherapist-patient privilege are ultimately unpersuasive.⁶³ One contention is that the privilege should be limited to traditional psychotherapy so that probative evidence is admissible in court.⁶⁴ This overlooks the fact that absent a privilege, many communications to therapists would not occur in the first place.⁶⁵ In addition, other language from *Jaffee* could be used effectively to limit the psychotherapist-patient privilege. The "licensed psychotherapist" clause, which includes licensed social workers, restricts the privilege to recognized therapists, while the "confidentiality" requirement excludes non-private communications.⁶⁶ Neither of these restrictions disproportionately affects mental health care among underserved communities to the same extent that the *Romo* decision does. Limiting the privilege through either the confidentiality or licensing requirements, or even a less nebulous "course of diagnosis" test, would allow greater access to psychotherapy in underserved communities and would create a more coherent foundation for future jurisprudence.

Romo's supporters may also argue that ignoring the "course of diagnosis" clause nullifies the language of the *Jaffee* holding. However, courts could employ a test that does not ignore the "course of diagnosis" language but rather interprets it differently than Judge McKeown does. For example, the court could have used the wording to require an ongoing relationship between a patient and a therapist or clinic instead of narrowly focusing on the specific encounter at issue.⁶⁷ Although this would probably exclude some one-time therapy sessions from protection, it would still include a broader range of informal treatment, such as *Romo*'s meetings with LaPlante,⁶⁸ while continuing to exclude cases where people approach therapy-related institutions or individuals for non-therapeutic purposes.⁶⁹

⁶³ For arguments in favor of restricting the privilege, see generally Stacy Aronowitz, *Following the Psychotherapist-Patient Privilege Down The Bumpy Road Paved by Jaffee v. Redmond*, 1998 ANN. SURV. AM. L. 307 (1998) (supporting Scalia's dissent in *Jaffee* that argued the majority's use of state law was too nebulous to effectively limit the privilege); Lynda Womack Kenney, *Role of Jaffee v. Redmond's "Course of Diagnosis or Treatment" Condition in Preventing Abuse of the Psychotherapist-Patient Privilege*, 35 GA. L. REV. 345 (2000) (arguing that the "course of diagnosis" language should be used to limit the privilege).

⁶⁴ See *Jaffee v. Redmond*, 518 U.S. 1, 18–19, 28 (1996) (Scalia, J., dissenting).

⁶⁵ Justice Stevens makes this argument in the *Jaffee* opinion. *Id.* at 12. See also *United States v. Chase*, 340 F.3d 978, 990–92 (9th Cir. 2003) (arguing, among other claims, that much privileged evidence is duplicative and that treatment will prevent future crime).

⁶⁶ See *United States v. Romo*, 413 F.3d 1044, 1047 (9th Cir. 2005) (citing *Jaffee*, 518 U.S. at 15) (outlining the prerequisites needed to establish the psychotherapist-patient privilege).

⁶⁷ This interpretation is supported by the *Jaffee* Court's substitution of "course of diagnosis" for "while engaged in." See *Jaffee*, 518 U.S. at 15.

⁶⁸ The regular meetings between *Romo* and LaPlante, coupled with *Romo*'s request for a meeting and their conversation in a private visitation room, would probably meet this standard.

⁶⁹ See, e.g., *United States v. Schwensow*, 151 F.3d 650, 656–58 (7th Cir. 1998) (deny-

III. CONCLUSION

The Ninth Circuit's greatest fault in *United States v. Romo* is its undermining of the Supreme Court's social and jurisprudential intentions in *Jaffee*. The Supreme Court emphasized that a clear, predictable privilege is necessary to generate the trust needed for effective psychotherapy.⁷⁰ *Romo* eviscerates this certainty by encouraging courts to divine a decision from a collection of "relevant factors" that lack any quantification for sufficiency. *Romo* also undermines *Jaffee*'s promise of increased access to psychotherapy through the protection of statements made to social workers. By adopting a test that limits privileges available for less formal therapy sessions, *Romo* constructs one more barricade to providing mental health care among the poor, underserved, and incarcerated.

ing a privilege for statements made to workers at an Alcoholics Anonymous office when the defendant initially entered the office in order to obtain an address for a detoxification center).

⁷⁰ See *Jaffee*, 518 U.S. at 18 ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981))).

