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THE DANGEROUS PATIENT EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE: THE TARASOFF DUTY AND THE JAFFEE FOOTNOTE

George C. Harris*

Abstract: With the U.S. Supreme Court's 1996 decision in *Jaffee v. Redmond*, all U.S. jurisdictions have now adopted some form of evidentiary privilege for confidential statements by patients to psychotherapists for the purpose of seeking treatment. The majority of states, following the decision of the Supreme Court of California in *Tarasoff v. Regents of the University of California*, have also adopted some form of duty by psychotherapists to breach confidentiality and warn potential victims against foreseeable violence by their patients. Largely unresolved is whether there should be a dangerous patient exception to the evidentiary privilege parallel to the *Tarasoff* exception to confidentiality. This Article argues that exception to the evidentiary privilege should be evaluated separately from the exception to confidentiality. Whether or not a *Tarasoff* duty to warn existed at an earlier time, exception to the evidentiary privilege should be made only where psychotherapists' testimony is necessary to prevent future harm to patients or identified potential victims. Applying this standard, the dangerous patient exception generally would not apply in criminal actions against patients, but would apply only in proceedings for the purpose of protecting patients or third parties, such as restraining order hearings or proceedings to hospitalize patients.

A patient with a history of violence tells his psychotherapist in the course of treatment that his ex-girlfriend has gone too far this time and will regret it. Believing that the ex-girlfriend is in real danger and being heedful of the duty to protect a potential victim from foreseeable patient violence, the therapist breaches confidence and contacts the local police and the ex-girlfriend. Despite the warning, she is found murdered a week later. Circumstantial evidence points to the patient, who now is on trial. Should the therapist be compelled, despite the psychotherapist-patient evidentiary privilege, to testify about the patient's threat? Does the ethical and legal duty to breach confidence and warn also require exception to the evidentiary privilege? Or should the evidentiary exception be considered separately from the duty to warn; and, if so, is it similarly justified?

These and related questions arise from the collision of two doctrines, both recently developed but well-established, that regulate the confidentiality of the psychotherapeutic relationship. Beginning in the 1960s and culminating with the U.S. Supreme Court's 1996 decision in *Jaffee v. Redmond*,¹ every U.S. jurisdiction has recognized some form of

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evidentiary privilege for statements made by a patient to a psychotherapist for the purpose of obtaining treatment.² During roughly the same period of time, most states, either by case law or statute, adopted some form of a duty by therapists to breach confidentiality and warn or protect potential victims against foreseeable violence by their patients.³ Such a duty was first recognized by the Supreme Court of California in the seminal decision, *Tarasoff v. Regents of the University of California*.⁴ Largely unconsidered in case law or statute is how these two doctrines should be reconciled. Should there be a “dangerous patient” or “future crime” exception to the psychotherapist-patient evidentiary privilege where disclosure of the patient’s confidence is, or was at one time, necessary to prevent harm to the patient or others? If so, what parameters should define that exception?

The U.S. Supreme Court broached the issue cryptically in *Jaffee*. With apparent deference to the *Tarasoff* duty and without explanation or analysis, the Court predicted in footnote dicta that exceptions to the privilege would include the circumstance in which “a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.”⁵ The issue has been raised in one post-*Jaffee* federal decision. In *United States v. Glass*, the Tenth Circuit, relying on the *Jaffee* footnote, implicitly upheld the exception to the privilege anticipated by *Jaffee* and remanded the case for evidentiary findings as to whether the exception was appropriate in the circumstances of that case.⁶

Most state statutes establishing a psychotherapist-patient privilege are silent as to whether there is a dangerous patient exception to the privilege.⁷ Some states do, however, create statutory exception to psychotherapist-

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

2. See generally Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 242 (1972) [hereinafter *Proposed Rules*] (comment to proposed federal psychotherapist-patient privilege, citing 1966 Connecticut statute, 1961 Georgia statute, and 1967 Illinois statute as illustrative).

3. See Allison L. Almason, Comment, *Personal Liability Implications of the Duty to Warn Are Hard Pills to Swallow: From Tarasoff to Hutchinson v. Patel and Beyond*, 13 J. Contemp. Health L. & Pol’y 471, 477–78 nn.46–47 (1997).

4. The Supreme Court of California heard the *Tarasoff* case twice and issued two opinions: 529 P.2d 553 (Cal. 1974) (en banc) [*Tarasoff I*] and 551 P.2d 334 (Cal. 1976) (en banc) [*Tarasoff II*] (vacating *Tarasoff I*).

5. *Jaffee*, 518 U.S. at 18 n.19.

6. 133 F.3d 1356 (10th Cir. 1998). The author was amicus curiae by appointment of the court in *Glass*.

7. See *infra* notes 44–50 and accompanying text.

patient confidentiality, if not the privilege, for preventing harm.⁸ Other states define the psychotherapist-privilege as coextensive with the attorney-client privilege, which generally includes a “crime-fraud” or “future crime” exception.⁹ As on the federal side, little state case law addresses the dangerous patient exception. The Supreme Court of California, however, has applied a statutory exception to the evidentiary privilege to compel testimony by a psychotherapist against a patient in criminal proceedings against the patient.¹⁰ Oregon, which has no statutory exception, has rejected an implied exception and distinguished the evidentiary privilege from the duty to warn.¹¹

With the exception of the California and Oregon decisions, few courts or commentators have discussed the “dangerous patient” issue in an evidentiary context. In particular, very little commentary or analysis addresses whether exception to the evidentiary privilege should follow or be evaluated separately from the exception to confidentiality inherent in the *Tarasoff* duty. The *Jaffee* footnote appears to equate uncritically exception to the privilege with the *Tarasoff* exception to confidentiality. The social purposes and professional dynamics of the two exceptions are, however, significantly different. It is one thing for a psychotherapist to contact law enforcement or a potential victim to prevent a patient from carrying out dangerous, criminal intentions, and quite another to compel the therapist to testify to confidential conversations with the patient in a later criminal proceeding against the patient.

Part I of this Article reviews the history of the psychotherapist-patient privilege, the dangerous patient exception, and the *Tarasoff* duty to warn. Part II analyzes the dangerous patient exception in light of the foundations of the privilege and the justifications that have been or might be advanced for the exception, including the *Tarasoff* duty to warn, theories of waiver, and analogy to exceptions to the attorney-client privilege. Part III concludes that exception to the evidentiary privilege for psychotherapist-patient communications should be evaluated separately from the psychotherapist’s ethical or legal duty to take steps to prevent her patient from doing foreseeable harm to others. It argues that the *Jaffee* footnote dicta should be construed

8. See *infra* notes 47–49 and accompanying text.

9. See *infra* note 46 and accompanying text.

10. See *Menendez v. Superior Court*, 834 P.2d 786 (Cal. 1992) (en banc); *People v. Wharton*, 809 P.2d 290 (Cal. 1991) (en banc).

11. See *Oregon v. Miller*, 709 P.2d 225 (Or. 1985).

strictly to make exception to the evidentiary privilege only when disclosure through testimony in the proceeding at issue is necessary to prevent harm to the patient or others, without regard to whether there may have been a *Tarasoff* duty to warn at an earlier time. Part IV explores the application of the exception and concludes that it should apply only in proceedings with the specific purpose of protecting the patient or third parties, such as a restraining order hearing or a proceeding to hospitalize the patient.

I. THE HISTORY OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE AND THE DANGEROUS PATIENT EXCEPTION

During the past approximately thirty years, the psychotherapist-patient evidentiary privilege has been established by statute or case law in all U.S. jurisdictions. Whether there should be a dangerous patient exception to the privilege remains, however, largely undecided.

A. *The Federal Privilege*

1. *Proposed Rule 504*

In late 1972, the U.S. Supreme Court submitted to Congress proposed Rules of Evidence for the United States Courts and Magistrates (the Proposed Rules) that “had been formulated by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and by the Court.”¹² The Proposed Rules set forth nine specific privileges, including the lawyer-client privilege (Proposed Rule 503), the husband-wife privilege (Proposed Rule 505), the privilege for communications to clergymen (Proposed Rule 506), and the psychotherapist-patient privilege (Proposed Rule 504).¹³ Rather than adopting the specific proposed privileges, Congress enacted a single general rule, Federal Rule of Evidence 501, which provides that privileges “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.”¹⁴ While it rejected enumerating specific privileges in favor of an open-ended rule, “the Senate Judiciary Committee explicitly stated that its action

12. *Jaffee v. Redmond*, 518 U.S. 1, 9 n.7 (1996).

13. See *Proposed Rules*, *supra* note 2, at 235–47.

14. Fed. R. Evid. 501.

‘should not be understood as disapproving any recognition of a psychiatrist-patient . . . privileg[e] contained in the [proposed] rules.’”¹⁵

Proposed Rule 504 specified three exceptions to the psychotherapist-patient privilege, for communications that are: (1) relevant to proceedings to hospitalize the patient for mental illness, (2) made in the course of an examination of the mental condition of the patient ordered by the judge, and (3) relevant to an issue of the mental condition of the patient in a proceeding in which the patient relies on that condition as an element of a claim or defense.¹⁶ It made no exception for threats to third persons or communications regarding future crime.

That omission was deliberate. The exceptions allowed were patterned after those in the then-existing Connecticut statute.

While it has been argued convincingly that the nature of the psychotherapist-patient relationship demands complete security against legally coerced disclosure in all circumstances, the committee of psychiatrists and lawyers who drafted the Connecticut statute concluded that in three instances the need for disclosure was sufficiently great to justify the risk of possible impairment of the relationship. These three exceptions are incorporated in the present rule.¹⁷

The authors of the article cited by the Advisory Committee Notes, Professors Goldstein and Katz of Yale Law School, were members of the committee that drafted the Connecticut statute. They explained in the cited article the decision not to include a “future crime” exception:

It should be noted that our committee deliberately chose not to write a “future crime” exception into the bill. Its members were persuaded that, as a class, patients willing to express to psychiatrists their intention to commit crime are not ordinarily likely to carry out that intention. Instead, they are making a plea for help. The very making of these pleas affords the psychiatrist his unique opportunity to work with patients in an attempt to resolve their problems. Such resolutions would be impeded if patients were unable to speak freely for fear of possible disclosure at a later date in a legal proceeding.¹⁸

15. *Jaffee*, 518 U.S. at 14–15 (quoting S. Rep. No. 93-1277, at 13).

16. *See Proposed Rules*, *supra* note 2, at 241.

17. *Id.* at 243–44 (citing Abraham S. Goldstein & Jay Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 36 Conn. B.J. 175 (1962)).

18. Goldstein & Katz, *supra* note 17, at 188.

This logic was apparently persuasive to the federal Advisory Committee. As explained by one commentator: “[a]lthough some . . . have argued that the need for disclosure is paramount when possible harm is threatened, Standard 504 proceeds on the assumption that less harm will ensue if patients feel free to ventilate their intentions.”¹⁹

2. *Jaffee v. Redmond*

More than twenty years after the adoption of Rule 501, in *Jaffee* the Supreme Court held for the first time that “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.”²⁰ The Court was persuaded, in large part, by the adoption of the privilege in all fifty states and by the fact that the Advisory Committee had recommended a psychotherapist-patient privilege in Proposed Rule 504.²¹

In the decision below, the Seventh Circuit had upheld the psychotherapist-patient privilege but subject to case-by-case balancing.²² The privilege would not have applied under the Seventh Circuit’s holding if “in the interests of justice, the evidentiary need for the disclosure of . . . a patient’s counseling sessions outweigh[ed] that patient’s privacy interests.”²³ The Supreme Court rejected that qualification, reasoning that case-by-case balancing would “eviscerate the effectiveness of the privilege” by making its application unpredictable.²⁴

19. 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* § 504[05], at 504-27 (2d ed. 1996, Release No. 35-8/89) (citation omitted).

20. *Jaffee*, 518 U.S. at 15.

21. *Id.* at 14. In articulating the rationale for the privilege, the Court quoted at length from the Advisory Committee’s Note to Rule 504:

As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist’s ability to help her patients “is completely dependent upon [the patients’] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment.”

Id. at 10–11 (citing *Proposed Rules*, *supra* note 2, at 242) (quoting Group for Advancement of Psychiatry, Rep. No. 45, Confidentiality and Privileged Communication in the Practice of Psychiatry 92 (June 1960)) [hereinafter *Report No. 45*].

22. *Jaffee v. Redmond*, 51 F.3d 1346 (7th Cir. 1995), *aff’d*, 518 U.S. 1 (1996).

23. *Id.* at 1357.

24. *Jaffee*, 518 U.S. at 17.

The Supreme Court instead struck the balance categorically in favor of protecting the privilege, and against the competing evidentiary value that psychotherapist-patient communications might have in court proceedings. It found “the likely evidentiary benefit that would result from the denial of the privilege [to be] modest,” and that “[i]f the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation.”²⁵ The Court “agree[d] with the judgment of the state legislatures and the Advisory Committee that a psychotherapist-patient privilege will serve a ‘public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.’”²⁶

The Court declined to define the parameters of the privilege for all purposes, and instead left such definition for development on a case-by-case basis.²⁷ It did, however, offer in dicta the following prediction regarding potential limitations on the privilege:

Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.²⁸

The Court did not discuss or acknowledge that Proposed Rule 504 had rejected this dangerous patient exception, and offered no further gloss on the anticipated exception or the parameters of its application.

Most significantly, the *Jaffee* Court gave no guidance as to *when* the potential exception to the privilege—for a serious threat of harm that can be averted only by means of a disclosure—should apply.²⁹ Does a serious threat of harm communicated by a patient to a therapist that warrants disclosure to law enforcement authorities or the potential victim lose its privileged status and become admissible in later proceedings against the patient? Or should exception to the privilege be made only if disclosure in the later evidentiary proceeding is also necessary to avert a serious threat of harm? The Court left these questions unanswered.

25. *Id.* at 11–12.

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

27. *Id.* at 18.

28. *Id.* at 18 n.19.

29. *Id.*

The issue anticipated by the *Jaffee* footnote was taken up in *United States v. Glass*, a criminal prosecution under 18 U.S.C. § 871(a) for threatening to kill the President of the United States.³⁰ The defendant, Glass, upon voluntary admission to a psychiatric hospital, had told the examining psychotherapist that “he wanted to get in the history books like Hinkley [sic] and wanted to shoot Bill Clinton and Hilary [sic].”³¹ The therapist made no report of this threat to authorities, either at the time that Glass was admitted to the hospital or several days later when he was released after Glass had “agreed ‘to participate in outpatient mental health treatment while residing at his father’s home.’”³²

When an outpatient nurse, who was apparently privy to the statement made by Glass regarding the President, discovered that Glass had left his father’s home, she notified local law enforcement.³³ Secret Service agents subsequently interviewed the admitting psychotherapist, who disclosed to them the threatening statement made by Glass.³⁴ Glass was then charged under 18 U.S.C. § 871(a) with threatening to kill the President.³⁵

The anticipated testimony by the psychotherapist comprised the sole evidence that Glass had violated the statute. Glass moved to exclude that testimony as violating the psychotherapist-patient privilege, recently announced at that time for the federal courts in *Jaffee*.³⁶ Without benefit of an evidentiary hearing, the district court denied the motion, relying on the *Jaffee* footnote and concluding that “under such compelling circumstances as those presented here of ‘an express threat to kill a third party by a person with an established history of mental disorder,’ that the ‘broad privilege recognized by *Jaffee* is inapplicable.’”³⁷ Glass then made a conditional guilty plea, preserving the right to raise the privilege issue on appeal.³⁸

30. 133 F.3d 1356 (10th Cir. 1998). Section 871(a) provides in relevant part:

Whoever knowingly and willfully deposits for conveyance in the mail or for delivery . . . any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States . . . or knowingly and willfully otherwise makes any such threat against the President . . . shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 871(a) (1994).

31. *Glass*, 133 F.3d at 1357.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1357.

On appeal, the Tenth Circuit held that the privilege announced in *Jaffee*, a civil case, applied to the circumstances of *Glass*, a criminal case.³⁹ Implicitly accepting the dangerous patient exception anticipated by the *Jaffee* footnote, the Tenth Circuit remanded to the district court “to determine whether, in the context of this case, the threat was serious when it was uttered and whether its disclosure was the only means of averting harm to the President when the disclosure was made.”⁴⁰ The court apparently made no distinction between exception to confidentiality—whether the psychotherapist was justified in making disclosure to law enforcement authorities—and exception to the evidentiary privilege—whether the psychotherapist could be compelled to testify to confidential communications in later criminal proceedings against the patient.⁴¹ Under the terms of the remand, if the disclosure by the therapist to the Secret Service was warranted when made as “the only means of averting harm to the President,”⁴² the psychotherapist’s testimony relating to the patient’s confidential communications apparently also would be admissible in the criminal prosecution of the patient.

B. The Privilege as Adopted by the States

As noted by the Court in *Jaffee*, all fifty states have enacted some form of psychotherapist privilege.⁴³ A number of states have patterned their statutes after Proposed Rule 504.⁴⁴ Some states have created a balancing test

39. *Id.* at 1359.

40. *Id.* at 1360.

41. In remanding, the court focused on whether the therapist’s disclosure to the Secret Service was necessary to prevent harm to the President at the time of that disclosure, not on whether there was a similar need to compel the therapist’s testimony in later criminal proceedings. The court stated:

There is neither evidence of an affirmative effort by the psychotherapist to avert the threat of harm nor of how the Secret Service only averted the threat through its disclosure. That is, on the record before us, we have no basis upon which we can discern how ten days after communicating with his psychotherapist, Mr. Glass’ statement was transformed into a serious threat of harm which could only be averted by disclosure.

Id. at 1359.

42. *Id.* at 1360.

43. *Jaffee v. Redmond*, 518 U.S. 1, 12 & n.11 (1996).

44. See Alaska R. Evid. 504; Ark. R. Evid. 503; Del. Unif. R. Evid. 503; Haw. R. Evid. 504.1; Idaho R. Evid. 503; Ky. R. Evid. 507; Me. R. Evid. 503; Miss. R. Evid. 503; Neb. Rev. Stat. § 27-504 (1995); N.M. R. Evid. 11-504; N.D. R. Evid. § 503; Okla. Stat. tit. 12, § 2503 (1991); Or. R. Evid. 504; S.D. Codified Laws §§ 19-13-6 to 19-13-11 (Michie 1995); Tex. R. Civil Evid. 509; Utah R. Evid. 506; Vt. R. Evid. 503; Wis. Stat. § 905.04 (1993–94).

similar to that to which the Seventh Circuit adhered in *Jaffee*.⁴⁵ Other states have enacted statutes simply stating that the psychotherapist-patient privilege will be afforded the same protection as the attorney-client privilege.⁴⁶

A handful of states provide a statutory exception to psychotherapist-patient confidentiality for serious threats of imminent harm to the patient or third persons, although it is unclear whether or how these exceptions apply in evidentiary proceedings. Connecticut, whose failure to include a dangerous patient exception to its evidentiary privilege was a model for the proposed federal privilege, now provides that a patient's consent is not necessary for disclosure "[i]f the psychologist believes in good faith that there is risk of imminent personal injury to the person or to other individuals or risk of imminent injury to the property of other individuals."⁴⁷ Statutes in Rhode Island, South Carolina, Tennessee, West Virginia, and Wyoming provide similar exceptions of varying scope.⁴⁸ The Tennessee statute provides the most well-defined and rigorous conditions for disclosure. It requires that the "patient has made an actual threat to physically harm an identifiable victim or victims" and that "[t]he treating psychiatrist makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out the threat;" it allows disclosure only "to the extent necessary to warn or protect any potential victim."⁴⁹

45. Virginia, for example, allows for exception to the privilege when "a court, in the exercise of sound discretion, deems such disclosure necessary to the proper administration of justice." Va. Code Ann. § 8.01-400.2 (Michie 1998); *see also, e.g.*, W. Va. Code § 27-3-1(b)(3) (1997) (allowing disclosure if "information is sufficiently relevant to a proceeding before the court to outweigh the importance of maintaining the confidentiality established by this section").

46. *See, e.g.*, Ala. Code Ann. § 34-26-2 (Michie 1997); Ariz. Rev. Stat. Ann. § 32-2085 (West 1998); Kan. Stat. Ann. § 74-5323 (1992); Mont. Code Ann. § 26-1-807 (1997); N.Y. C.P.L.R. 4507 (McKinney 1992); Wash. Rev. Code § 18.83.110 (1998).

47. Conn. Gen. Stat. Ann. § 52-146c(c)(3) (West 1991).

48. *See* R.I. Gen. Laws Ann. § 5-37.3-4 (Michie 1997) (no consent necessary for disclosure by "health care provider to appropriate law enforcement personnel, or to a person if the health care provider believes that person or his or her family to be in danger from a patient"); S.C. Code Ann. § 19-11-95(C)(3) (West Supp. 1997) ("provider may reveal . . . the intention of the patient to commit a crime or harm himself and the information necessary to prevent the crime or harm"); W. Va. Code Ann. § 27-3-1(b)(4) (Michie 1992) ("Confidential information may be disclosed . . . [t]o protect against a clear and substantial danger of imminent injury by a patient or client to himself or another . . ."); Wyo. Stat. Ann. § 33-27-123(a)(iv) (Michie 1997) (psychologist may disclose without express waiver "[w]here an immediate threat of physical violence against a readily identifiable victim is disclosed to the psychologist").

49. Tenn. Code Ann. § 24-1-207(c) (West 1998).

Only California makes an exception to the psychotherapist-patient privilege for threats of harm a part of its evidentiary code.⁵⁰ The scope of the California exception was litigated in *People v. Wharton*.⁵¹ The defendant and amici curiae argued in that case that the California statute should be interpreted to “permit therapists to warn potential victims in order to avert potential danger, ‘but to forbid any other use of such disclosures.’”⁵² The Supreme Court of California rejected that interpretation based on the language of the statutory exception, which provides:

There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.⁵³

The court reasoned that for communications meeting these conditions, no privilege ever came into existence.⁵⁴ As a result, there was no privilege at the time of later proceedings, even though disclosure was no longer necessary to prevent the threatened danger.⁵⁵

The *Wharton* holding was reaffirmed by the Supreme Court of California a year later in a decision regarding the celebrated murder trial of the Menendez brothers. Applying the dangerous patient exception, despite the fact that the psychotherapist had made no *Tarasoff* warning to an intended victim, the court in *Menendez v. Superior Court* emphasized that application of the dangerous patient exception to the evidentiary privilege did not depend on actual disclosure having been made.⁵⁶ Instead, the court held that application depended only upon the existence of the factual predicate for disclosure—“reasonable cause for belief by the psychotherapist in the dangerousness of the patient and the necessity of disclosure.”⁵⁷ The *Menendez* court fortified that conclusion with reference to the *Tarasoff*

50. See Cal. Evid. Code § 1024 (West 1995).

51. 809 P.2d 290 (Cal. 1991) (en banc).

52. *Id.* at 313.

53. Cal. Evid. Code § 1024 (emphasis added).

54. *Wharton*, 809 P.2d at 312–13 (en banc).

55. *Id.*; accord *Menendez v. Superior Court*, 834 P.2d 786, 794–95 (Cal. 1992) (en banc). Relying on its earlier decision in *People v. Clark*, 789 P.2d 127 (Cal. 1990), the *Wharton* court also held that “once confidential communications are revealed by a therapist to a third party, such communications lose their confidential status.” 809 P.2d at 313.

56. *Menendez*, 834 P.2d at 796.

57. *Id.*

decision, stating: "Plainly, the policies of the common law [enunciated in *Tarasoff*] are similar to those of the 'dangerous patient' exception [to the evidentiary privilege]."58

Whether or not one accepts the logic of the California decisions, given the particular structure and language of the California statute, it is not clear that the same result would obtain in other states. In West Virginia, for example, the statute merely provides that "[c]onfidential information may be disclosed . . . [t]o protect against a clear and substantial danger of imminent injury by a patient or client to himself or another."⁵⁹ Testimony by the psychotherapist in a later civil or criminal proceeding against the patient where the threatened harm has occurred and is the basis of the prosecution,⁶⁰ unlike disclosure to law enforcement authorities or a potential victim at the time of the threat, would not serve the purpose of protecting against imminent injury. Thus, excluding California, it is not clear that even those states that make exception for disclosure to prevent harm to third persons would allow testimony by the therapist in a later criminal proceeding against the patient. Indeed, if the distinction between confidentiality and privilege is maintained, the existing statutes in states other than California do not appear to compel such testimony.

Conversely, those states that make no explicit statutory exception for testimony regarding danger to third persons could do so by judicial construction. An implied exception was urged in *Oregon v. Miller*⁶¹ by the prosecution, which attempted to introduce the testimony of a psychiatrist regarding a phone call in which the defendant admitted to having just strangled a victim. Relying on a psychotherapist's "ethical obligation to divulge a patient's confidences whenever it might be possible to render aid to a victim of the patient's violence," the trial court allowed the testimony.⁶² Distinguishing between the psychotherapist's ethical duties and the

58. *Id.*

59. W. Va. Code Ann. § 27-3-1(b) (Michie 1992). This provision is contained in chapter 27 of the West Virginia Code, which is entitled "Mentally Ill Persons."

60. Exceptions would include a hospitalization proceeding, which is separately excepted under Proposed Rule 504 and most state statutes, or a restraining order proceeding. *See infra* notes 67, 95 and accompanying text. Arguably, the peculiar circumstance faced by the Tenth Circuit in *United States v. Glass*, where the statute at issue made the threat itself a crime, would also be excepted. *See supra* notes 30-38 and accompanying text.

61. 709 P.2d 225 (Or. 1985).

62. *Id.* at 236.

evidentiary privilege, however, the Supreme Court of Oregon held that it was error to admit the therapist's testimony.⁶³

The Supreme Court of Oregon's holding in *Miller* was based largely on the fact that the state rule at issue was modeled after federal Proposed Rule 504.⁶⁴ Noting that the legislature had specifically provided for such an exception to the attorney-client privilege but not to the psychotherapist-patient privilege, the court concluded that the legislature had considered and rejected a future crimes exception to the psychotherapist-patient privilege.⁶⁵

The Oregon court did not discuss the fact that the statute's enumeration of exceptions to the privilege is specifically described as "a nonexclusive list of limits on the privilege."⁶⁶ Because the *Miller* case involved a criminal prosecution against the patient, the court also had no occasion to consider whether a different result would obtain in a proceeding designed specifically for protection of the patient or a potential victim.⁶⁷

II. *TARASOFF* AND THE PSYCHOTHERAPIST'S DUTY TO DISCLOSE

The now universal establishment of the psychotherapist-patient privilege is founded primarily on acceptance of the social value of the therapeutic relationship and the belief that confidentiality is essential to the effectiveness of that relationship.⁶⁸ The perceived social value of the

63. *Id.* The court further held, however, that admission of the psychotherapist's testimony was harmless error. *Id.* at 240. The court therefore affirmed the patient's conviction. *Id.* at 245.

64. *Id.* at 236-37.

65. *Id.*; cf. *Shaw v. Glickman*, 415 A.2d 625 (Md. App. 1980) (dismissing claim against psychiatrist for failure to warn on grounds that disclosure would have violated privilege statute); *State v. Beatty*, 770 S.W.2d 387 (Mo. App. 1989) (distinguishing breach of confidentiality from evidentiary privilege and holding no violation of state's evidentiary patient-physician privilege when defendant's psychiatrist called private crime reporting agency to report defendant's crime).

66. Or. R. Evid. 504(4).

67. Unlike Proposed Rule 504, the Oregon statute makes no specific exception for hospitalization proceedings. Compare *Proposed Rules*, *supra* note 2, at 241 (Proposed Rule 504(d)(1)), with Or. R. Evid. 504(4).

68. See *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) ("Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. . . . [T]he mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."); *Proposed Rules*, *supra* note 2, at 242 ("Among 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.

therapeutic relationship includes protecting potential victims of dangerous patients, based on the belief that a patient's opportunity to vent dangerous intentions coupled with the therapist's opportunity to intervene may be the most effective of means to prevent threatened violence from occurring.⁶⁹ Concern for potential victims of dangerous psychiatric patients has, however, also given rise to a competing doctrine that compels disclosure of patient confidences. At the same time that state legislatures, and now the federal courts, have established an evidentiary privilege to protect the confidentiality of the therapeutic relationship, tort law in a growing number of states, following *Tarasoff*, has given therapists a duty to breach confidence and warn and/or protect foreseeable victims of their patients' violence.

The Supreme Court of California heard the *Tarasoff* case twice and issued two opinions. *Tarasoff I*, issued at the end of 1974, held that a therapist has a duty to warn a potential victim when "in the exercise of his professional skill and knowledge, [the therapist] determines, or should determine, that a warning is essential to avert danger arising from the medical or psychological condition of his patient."⁷⁰ *Tarasoff II*, which was issued eighteen months later, replaced the duty to warn with a broader duty to protect.⁷¹ The court held that "[w]hen a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger."⁷² This duty to protect could be discharged in a number of ways, including "warn[ing] the intended victim or others likely to apprise the victim of the danger, . . . notify[ing] the police, or . . . tak[ing] whatever other steps are reasonably necessary under the circumstances."⁷³

Inherent, of course, in the duty to warn or protect is an exception to the therapist's ethical and legal duties of confidentiality. In holding that a

This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication.") (quoting *Report No. 45, supra* note 21, at 92).

69. See Goldstein & Katz, *supra* note 17, at 188 (stating that patients' expressions of intent to commit crime "affords the psychiatrist his unique opportunity to work with patients in an attempt to resolve their problems"); 2 Weinstein & Berger, *supra* note 19, § 504[05], at 504-27 (noting that Proposed Rule 504 "proceeds on the assumption that less harm will ensue if patients feel free to ventilate their intentions").

70. *Tarasoff v. Regents of the Univ. of Cal.*, 529 P.2d 553, 555 (Cal. 1974) (en banc) [*Tarasoff I*], *vacated*, 551 P.2d 334 (Cal. 1976) (en banc) [*Tarasoff II*].

71. Compare *Tarasoff II*, 551 P.2d at 340, with *Tarasoff I*, 529 P.2d at 555.

72. *Tarasoff II*, 551 P.2d at 340.

73. *Id.*

therapist has a duty to protect foreseeable victims of her client's violence despite the therapist's duty of confidentiality, the Supreme Court of California relied on the fact that the State's therapist-patient evidentiary privilege, enacted in 1965,⁷⁴ provided a "dangerous patient" exception.⁷⁵ The *Tarasoff* decisions did not, however, address evidentiary issues that might arise as a result of the newly recognized duty and its interaction with the psychotherapist-patient privilege.⁷⁶

As noted above, a majority of states now follow *Tarasoff*, either by statute or case law.⁷⁷ Decisions following *Tarasoff* are divided on the scope of the duty.⁷⁸ For example, *Lipari v. Sears, Roebuck & Co.*, a 1980 federal district court decision applying Nebraska law, held broadly that a psychotherapist has a duty to warn whenever he can "reasonably foresee that the risk engendered by his patient's condition would endanger other persons."⁷⁹ That same year, in *Thompson v. County of Alameda*, the Supreme Court of California itself held to the contrary that the *Tarasoff* duty applies only when there is a threat to a specific, identifiable victim.⁸⁰

74. Cal. Evid. Code § 1024 (West 1995).

75. The California Legislature has undertaken the difficult task of balancing the countervailing concerns. In Evidence Code section 1014, it established a broad rule of privilege to protect confidential communications between patient and psychotherapist. In Evidence Code section 1024, the legislature created a specific and limited exception to the psychotherapist-patient privilege:

There is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

Tarasoff II, 551 P.2d at 346–47.

76. For example, assuming that no warning was made, a victim's estate might sue a therapist who treated the perpetrator and seek to discover confidential communications between the perpetrator and therapist establishing that the therapist knew or should have known that the perpetrator posed a danger to the victim. The therapist presumably would object on the basis of the privilege. Whether the section 1024 exception applied would depend on whether "the patient [was] in such mental or emotional condition as to be dangerous to [the victim]" and if "disclosure of the communication [was] necessary to prevent the threatened danger." Cal. Evid. Code § 1024. Resolution of those evidentiary questions would also largely determine whether the therapist was liable to the victim under the *Tarasoff* standard.

77. See *supra* notes 44–46 and accompanying text.

78. See generally Jonathan Baumel, Comment, *The Beginning of the End for the Psychotherapist-Patient Privilege*, 60 U. Cin. L. Rev. 797, 806–12 (1992) (discussing post-*Tarasoff* case law developments).

79. 497 F. Supp. 185, 194 (D. Neb. 1980).

80. 614 P.2d 728 (Cal. 1980) (en banc); see also *Brady v. Hopper*, 570 F. Supp. 1333, 1338 (D. Colo. 1983), *aff'd*, 751 F.2d 329 (10th Cir. 1984) (reaching similar result applying Colorado law). Three years after *Thompson*, however, in *Hedlund v. Superior Court*, the California court held that the therapist's

California and other states have taken steps to limit the scope of the *Tarasoff* duty. Through a 1985 addition to its Civil Code, California now provides that a therapist cannot be liable for “failing to warn of and protect from a patient’s threatened violent behavior or failing to predict and warn of and protect from a patient’s violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.”⁸¹ The statute goes on to create a safe harbor for the therapist whose patient has made such a threat, providing that, “[i]f there is a duty to warn and protect . . . the duty shall be discharged by the psychotherapist making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency.”⁸² Most states that have adopted the *Tarasoff* duty have, like California, limited the therapist’s duty to instances in which the patient has identified a specific victim.⁸³

While all states have enacted some form of a therapist-patient privilege and most have recognized a *Tarasoff* duty to warn or protect foreseeable victims, few have indicated how to reconcile the privilege with the duty. Only a handful of states make statutory exception to psychotherapist-patient confidentiality for threats of harm to the patient or to third persons, and even in these states it is unclear whether and how those exceptions apply in an evidentiary context. With the exception of *People v. Wharton* in California and *Oregon v. Miller* in Oregon, there is little if any guidance on whether a therapist will be compelled or allowed to testify in a proceeding against the patient regarding threats of harm confided by the patient to the therapist.

III. SEPARATING THE DUTY TO DISCLOSE FROM THE EVIDENTIARY EXCEPTION

While the Supreme Court in *Jaffee v. Redmond* predicted a dangerous patient exception to the psychotherapist-patient privilege, it did not articulate a rationale for such an exception. The Court concluded in *Jaffee*

duty extends to close family members injured during an assault on the foreseeable and identifiable victim. 669 P.2d 41 (Cal. 1983).

81. Cal. Civ. Code § 43.92(a) (West Supp. 1998).

82. Cal. Civ. Code § 43.92(b) (West Supp. 1998).

83. See Vikram S. Mangalmurti, *Psychotherapists’ Fear of Tarasoff: All in the Mind?*, 22 J. Psychiatry & L. 379, 384 (1994); see also, e.g., Ariz. Rev. Stat. Ann. § 36-517.02 (West 1997) (threat of immediate serious harm or death to clearly identified or identifiable victim); Utah Code Ann. § 78-14a-102 (Michie 1996) (actual threat of physical violence against reasonably identifiable victim).

that the value of protecting the confidentiality of the therapist-patient relationship⁸⁴ should not be weighed on a case-by-case basis against the truth-finding value of allowing disclosure, and instead struck the balance universally in favor of the privilege.⁸⁵ The Court agreed with the judgment of the state legislatures and the Advisory Committee that a psychotherapist-patient privilege will serve a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”⁸⁶ Given those conclusions, exception to the evidentiary privilege must be justified by some value other than truth-finding.

Three rationales for a dangerous patient exception to the privilege could be advanced: (1) where the conditions of the *Tarasoff* exception to confidentiality and corresponding duty to prevent harm to third parties are met, there should be a parallel exception to the evidentiary privilege; (2) once a therapist discloses patient communications to third parties, the communications should lose their privileged status; and (3) exception to the therapist-patient privilege should be made by analogy to the crime-fraud or future crime exceptions to the attorney-client privilege. This section considers each of these rationales. It concludes that exceptions to the

84. The case for protecting the confidentiality of therapist-patient communications has been made elsewhere and will not be repeated here. *See, e.g.*, Goldstein & Katz, *supra* note 18; Jennifer Sawyer Klein, Note, “*I’m Your Therapist, You Can Tell Me Anything*”: *The Supreme Court Confirms the Psychotherapist-Patient Privilege in Jaffee v. Redmond*, 47 DePaul L. Rev. 701 (1998).

85. *See Jaffee v. Redmond*, 518 U.S. 1, 18 (1996); *supra* notes 24–25 and accompanying text.

86. *Jaffee*, 518 U.S. at 15 (citation omitted). While *Jaffee* emphasized the social utility of protecting effective therapist-patient relationships, some commentators have suggested that patients have a constitutionally protected privacy interest or even a Fifth Amendment interest in the confidentiality of the therapeutic relationship. *See, e.g.*, Carolyn Peddy Courville, Comment, *Rationales for the Confidentiality of Psychotherapist-Patient Communications: Testimonial Privilege and the Constitution*, 35 Hous. L. Rev. 187, 204–13 (1998) (reviewing privacy interests protected by privilege and arguing that “statements made by the patient to his therapist that are then introduced in court by the therapist should be regarded as coming from the patient himself” for Fifth Amendment purposes); *Developments in the Law—Privileged Communications*, 98 Harv. L. Rev. 1450, 1480–83 (1985) (explaining privacy rationale for privilege); *see also* United States v. D.F., 857 F. Supp. 1311 (E.D. Wis. 1994), *aff’d*, 63 F.3d 671 (7th Cir. 1995), *vacated*, 518 U.S. 1231 (1996) (holding that admission of adolescent’s “confession” made in course of psychiatric treatment and observation in government mental health care facility would violate due process clause of Fifth Amendment).

There is some empirical research calling into question whether the effectiveness and utilization of psychotherapy depends on protecting confidentiality. *See* Daniel W. Shuman & Myron F. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. Rev. 893 (1982) (concluding that absence of privilege does not deter or delay therapy because most patients are unaware of its existence); Daniel W. Shuman & Myron F. Weiner, *The Psychotherapist-Patient Privilege: A Critical Examination* (1987) (presenting further empirical studies with similar conclusions).

evidentiary privilege can and should be analyzed separately from exceptions to confidentiality, and that a dangerous patient exception to the evidentiary privilege is justified only when the psychotherapist's testimony in the proceeding at issue is necessary to prevent future harm to an identifiable victim or the patient.

A. *The Tarasoff Rationale*

Many jurisdictions, consistent with the *Tarasoff* decision, have concluded that protecting third parties from foreseeable violence by a patient warrants disclosure by the therapist of otherwise confidential patient communications to law enforcement authorities or the potential victim.⁸⁷ Interpreting California's unique statutory structure, the Supreme Court of California has held that communications subject to this exception to confidentiality are also not protected by the therapist-patient evidentiary privilege. Relying chiefly on the language of its Evidentiary Code—that “[t]here is no privilege . . . if [the criteria for disclosure to protect the patient or third parties are met]”⁸⁸—the Supreme Court of California in *People v. Wharton* held that for communications that meet the criteria of disclosure, no evidentiary privilege ever comes into existence.⁸⁹ Indeed, in California, the exception to the evidentiary privilege was the forerunner to the duty to warn or protect. The *Tarasoff* decision, in announcing the therapist's duty to protect foreseeable victims, relied on the previously enacted exception to the evidentiary privilege as a declaration of public policy that therapist-patient confidentiality must yield in the face of danger to third parties.⁹⁰

Although cryptic, the *Jaffee v. Redmond* footnote can be read, similarly, to treat the exception to confidentiality and the exception to the evidentiary privilege as a single issue. It asserts that “the *privilege* must give way . . . if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.”⁹¹ Presumably, the U.S. Supreme Court meant, as the Supreme Court of California concluded in *Wharton* and *Menendez*, that if the conditions for disclosure are met at any time, the

87. See *supra* Part I.B.

88. Cal. Evid. Code § 1024 (West 1995) (emphasis added).

89. 809 P.2d 290, 312–13 (Cal. 1991) (en banc); see also *supra* notes 51–55 and accompanying text.

90. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 346–47 (Cal. 1976); see also *supra* notes 70–76 and accompanying text.

91. 518 U.S. at 18 n.19 (emphasis added).

privilege is defeated. Under these conditions, the therapist could be compelled to testify regarding the subject of the disclosure in all future evidentiary proceedings, including criminal proceedings against the patient for having carried out the threatened harm. This is the apparent holding of the Tenth Circuit in *United States v. Glass*,⁹² following *Jaffee*.

The *Jaffee* footnote is ambiguous enough, however, to support another reading. It can be interpreted, consistent with the decision of the Supreme Court of Oregon in *Oregon v. Miller*, to apply the standard for an exception—“if a serious threat of harm . . . can be averted only by means of disclosure”—*at the time of the proceeding* that raises the evidentiary issue.⁹³ If so read, even if the conditions for breach of confidentiality and disclosure were met at an earlier time, there would be no exception to the evidentiary privilege in later proceedings once the imminent threat of harm had passed.

Should, then, exception to the evidentiary privilege and exception to confidentiality consistent with the *Tarasoff* duty to warn be linked or separated? Stated slightly differently, should application of the psychotherapist-patient privilege to a patient’s statements made for the purpose of obtaining treatment depend, for all time, on whether the statements represented a serious threat of harm *when made by the patient*? Or should exception to the privilege be allowed only if justified to prevent harm *at the time of the psychotherapist’s testimony*?

Given the utilitarian balance already struck by *Jaffee* in creating the privilege, the starting point of the analysis is straightforward. If the value of maintaining the confidentiality of the therapeutic relationship justifies any consequent loss of relevant evidence, an exception to the privilege should not be allowed unless it would serve some other, overriding purpose.

In attempting to justify the dangerous patient exception to the evidentiary privilege, in *Menendez v. Superior Court* the Supreme Court of California sought to identify its social purpose with the purpose justifying *Tarasoff* disclosure: “[p]lainly, the policies of the common law are similar to those of the ‘dangerous patient’ exception.”⁹⁴ The *Tarasoff* policy purpose—the prevention of harm to third parties—supports allowing, or even requiring, that the therapist breach confidentiality to contact law enforcement

92. 133 F.3d 1356, 1359–60 (10th Cir. 1998); see also *supra* notes 39–42 and accompanying text.

93. 709 P.2d 225, 236–37 (Or. 1985); see also *supra* notes 61–67 and accompanying text.

94. 834 P.2d 786, 796 (Cal. 1992).

authorities and/or the intended victim at the time of a serious pending threat. It also provides a rationale for allowing the therapist to testify to confidential communications for the purpose of hospitalizing the patient,⁹⁵ where the purpose is protecting both the patient and the general public, or restraining order proceedings that seek to prevent the patient from contacting the potential victim.

The *Tarasoff* rationale breaks down, however, when it is used, as in *Menendez* and *Wharton* and as apparently contemplated by *Jaffee*, to justify compelling the therapist to testify to confidential communications in criminal proceedings against a patient who has carried out or attempted to carry out a threat. Such after-the-fact testimony is not necessary to protect the victim or potential victim, and the primary purpose of the proceeding is punishment of the patient rather than protection of others.⁹⁶ The social utility of the therapist's testimony in a criminal proceeding against the patient simply does not compare to the social utility of a *Tarasoff* warning. As one pair of commentators put it, in an article anticipating the *Tarasoff* decision, "[S]ociety's interest in preventing threatened violence is infinitely greater than its interest in making it easier to prove the commission of a crime already committed."⁹⁷

One could disagree with that assessment and argue that, at least in cases involving defendant/patients who make credible threats of bodily harm, there is great social utility in being able to prove the commission of crimes in order to exact appropriate punishment and deter similarly situated

95. Proposed Rule 504 and many state statutes make explicit exception to the privilege for hospitalization proceedings. Proposed Rule 504 makes exception for "communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psycho-therapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization." See *Proposed Rules*, *supra* note 2, at 241; see also Alaska R. Evid. 504(d)(4); Ark. R. Evid. 503(d)(1); Del. Unif. R. Evid. 503(d)(1); Fla. Stat. Ann. § 90.503(4)(a) (West 1998); Haw. R. Evid. 504.1(d)(1); Idaho R. Evid. 503(d)(1); Ky. R. Evid. 507(c)(1); La. Code. Evid. Ann. art. 510(B)(2)(g) (West 1995); Me. R. Evid. 503(e)(1); Md. Code Ann., Cts. & Jud. Proc. § 9-109(d)(1) (Michie 1997); Mass. Ann. Laws ch. 233 § 20B(a) (Law. Co-op. 1986); Miss. R. Evid. 503(d)(1); Neb. Rev. Stat. Ann. § 27-504(4)(a) (Michie 1995); N.J. Stat. Ann. § 45:14B-28 (West 1998); N.M. R. Evid. 11-504(D)(1); N.D. R. Evid. § 503(d)(1); S.D. Codified Laws § 19-13-9 (Michie 1995); Tex. R. Civil Evid. 509(e)(6); Utah R. Evid. 506(d)(2); Vt. R. Evid. 503(d)(1); Wis. Stat. Ann. § 905.04(4)(a) (West 1993); Wyo. Stat. Ann. § 33-27-123(a)(v) (Michie 1997).

96. As articulated by the Supreme Court of Oregon in *Oregon v. Miller*, the *Tarasoff* duty does not "justify a full disclosure [of client confidences] in open court, long after any possible danger has passed." 709 P.2d at 236.

97. John G. Fleming & Bruce Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 Cal. L. Rev. 1025, 1066 (1974) (making quoted comment in context of distinguishing psychotherapist's duty to give patient warning regarding possible disclosure of patient confidences from police interrogator's *Miranda* duty).

perpetrators. Consider, for example, the hypothetical with which this Article began—the patient who has made threats of violence against his ex-girlfriend to his therapist and is now on trial for her murder based solely on circumstantial evidence. Evidence of a credible threat made before the murder might well make the difference in whether the jury finds guilt beyond a reasonable doubt. Assuming the patient's guilt, one might argue that the social utility in bringing a murderer to justice is as high or nearly as high as the protective purpose of the *Tarasoff* warning. Or what if the therapist's testimony could exculpate another defendant on trial for the murder of the ex-girlfriend by identifying the therapist's patient as the true perpetrator? Admitting the testimony in either situation could be considered of high social value.

This punishment/deterrence argument merely reiterates, however, the argument that the truth-finding value of compelling the therapist's testimony should outweigh, in some circumstances, the value of protecting the therapeutic relationship. The punitive/deterrence argument is consistent with the balancing test adopted by the Seventh Circuit but rejected by the Supreme Court in *Jaffee*. The Court correctly concluded in *Jaffee* that “[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the . . . evidentiary need for disclosure would eviscerate the effectiveness of the privilege.”⁹⁸

Even assuming that one could avoid case-by-case balancing and declare, for example, an evidentiary exception for credible threats of violence in murder cases, the rationale would still be that the evidentiary value of psychotherapist-patient communications outweighs the value of protecting patient confidentiality in certain circumstances. Such an exception would be contrary to the policy judgments made by the Supreme Court in *Jaffee* and the Advisory Committee in Proposed Rule 504—that the truth-finding value of confidential psychotherapist-patient communications does not justify compelling the therapist to testify in proceedings against the patient.⁹⁹

Any argument based on the importance of obtaining convictions in cases involving violent crimes is not, in any event, based on the protective rationale of the *Tarasoff* duty unless the proceeding is one that will result

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

99. See *supra* notes 15–19, 25–26 and accompanying text.

in affirmative steps to protect an identifiable potential victim.¹⁰⁰ To the contrary, central to the reasoning of the Advisory Committee, adopted by the Court in *Jaffee*, was the conclusion that protecting the psychotherapist-patient relationship would also protect potential victims. Both the Court and the Advisory Committee assumed that a patient who knows or ethically must be informed that the therapist may later be compelled to testify to an expression of violent intent will be much less likely to vent such intent and allow for therapeutic intervention to prevent the threatened behavior. Looked at from a slightly different perspective, compelling the therapist's testimony would punish those suspects (guilty or not) who seek professional help to deal with their dangerous thoughts and intentions.

The protective rationale of the *Tarasoff* duty supports a general exception to the evidentiary privilege, applied without regard to the purpose of the proceedings, only if the original circumstances of the dangerous patient's communications to the therapist cannot be separated from the later proceedings against the patient. But why not consider exception to the evidentiary privilege separately from the therapist's ethical or legal duty to breach confidence and warn law enforcement authorities or potential victims of threats made by a patient? Medical commentators who are cognizant of the ethical duty to protect potential victims but horrified by the prospect of becoming witnesses against their patients have urged this distinction.¹⁰¹ There is no apparent reason why exception to the evidentiary privilege cannot be considered in the context of the proceeding without regard to whether there was or could have been an earlier breach of confidence justified by exigent circumstances.

The Supreme Court of California in *Wharton* concluded that exception to the evidentiary privilege should not be limited to circumstances or proceedings with a protective function. The court reasoned that such a limit would reward the patient for having carried out a murderous intent—"a

100. See discussion *infra* Part IV.

101. See, e.g., Gregory B. Leong et al., *The Psychotherapist as Witness for the Prosecution: The Criminalization of Tarasoff*, *Am. J. Psychiatry* 149:8, at 1011, 1014 (Aug. 1992) (concluding that possibility of being called as witness in criminal prosecution "will likely further distance psychotherapists from treating difficult and dangerous patients" and that while "[i]t may be acceptable to warn potential victims in an attempt to avert tragedy, . . . it may well prove intolerable for therapists to assume a prosecutorial rule long after the danger has dissipated"); Michele Smith-Bell & William J. Winslade, *Privacy, Confidentiality, and Privilege in Psychotherapeutic Relationships*, *Am. J. Orthopsychiatry* 64(2), at 180, 192 (Apr. 1994) (concluding in child abuse reporting context that "confidentiality should be breached only to prevent current or potential danger to a child" and "[t]herapists who report suspected child abuse by their patients should . . . not be required to testify against them in any subsequent criminal proceedings related to the past abuse").

dangerous patient could regain the protection of the privilege by simply killing his victim, certainly an absurd result.”¹⁰² Insofar as the court was suggesting that a patient, having uttered homicidal intentions to her psychotherapist, would then carry out those intentions quickly to foreclose the therapist’s right to reveal them, the court’s suggestion seems absurd. The *Wharton* court appears to assume both that the patient will use quasi-logical process and will make the proper distinction at the proper time between breach of confidence and exception to the evidentiary privilege. Given those assumptions, it seems highly unlikely that the patient would take on the burden of the crime itself and the attendant danger of detection merely to avoid the therapist revealing the confidential threats. Making threats in confidence to a therapist is by itself no crime,¹⁰³ and a logical patient will perceive much greater jeopardy in carrying out the crime. Insofar as the *Wharton* court was merely asserting that a patient who carries out a crime should receive no more evidentiary protection than one who threatens to do so, the simple answer is that both should be treated equally. Unless exception to confidentiality is conflated with exception to the evidentiary privilege, however, neither would lose protection of the evidentiary privilege except in proceedings necessary to protect a potential victim.

There is, however, an argument more powerful than that made by the *Wharton* court for linking the *Tarasoff* exception to confidentiality with exception to the evidentiary privilege. It might be argued that, whatever importance confidentiality has for maintaining the integrity and consequent social utility of the therapeutic relationship, once exception has been made for warning in exigent circumstances, maintaining the evidentiary privilege with regard to the same communications has reduced value. That is, once a confidence is or can be revealed in one context, the remaining value to the therapeutic relationship in protecting the confidence in other contexts diminishes significantly. That diminished interest in partial protection of the confidence, one might conclude, no longer outweighs the public interest in truth-finding during a trial against the patient. Because any chilling effect resulting from a *Tarasoff* warning would not be significantly increased by the further loss of the evidentiary privilege, why sacrifice the evidentiary value of the therapist’s testimony regarding her patient’s confidential communications? This argument turns, however, on what amounts

102. *People v. Wharton*, 809 P.2d 290, 308 (Cal. 1991).

103. Or, at least, it should not be. See *infra* notes 133–44 and accompanying text.

essentially to a fact-specific, case-by-case balancing of the value of therapeutic confidence against evidentiary truth finding—once again, the very kind of balancing rejected by the Supreme Court in *Jaffee*.

Even assuming, contrary to *Jaffee*, that this case-by-case balancing is appropriate, the assumption that loss of the evidentiary privilege adds little to the chilling effect on the therapeutic relationship already exacted by the *Tarasoff* disclosure duty appears faulty when examined from the perspective of an incipient therapeutic relationship. On the one hand, there would be what has presumably become a commonplace of ethical disclosure, a *Tarasoff* warning that, while the patient's communications will be generally kept in strictest confidence, there could be circumstances under which the therapist would have a duty to reveal those confidences to the extent necessary to protect the patient or another person. On the other hand, if exception to the evidentiary privilege is coupled with the *Tarasoff* duty, one can imagine a quite different and more chilling warning: "while our conversations will generally be kept in confidence, you should know that, if you reveal to me an intention to harm another person, I may have a duty to take steps to protect that person and might also be forced to testify in later court proceedings to what you said." Commentators from the psychotherapeutic community, not surprisingly, find a substantial difference in those two scenarios.¹⁰⁴

The explicit limits placed on the psychotherapist-patient privilege in most jurisdictions negate the rationale for linking the *Tarasoff* duty with the exception to the evidentiary privilege. As noted above, Proposed Rule 504 makes exception to the privilege for hospitalization proceedings, mental examinations ordered by a judge, and any proceeding where the patient's mental or emotional condition is an element of a claim or defense raised by the patient.¹⁰⁵ Nearly all states make these and/or other exceptions to the privilege.¹⁰⁶ If the fact that there are exceptions to confidentiality and

104. See *supra* note 101.

105. See *supra* note 16 and accompanying text.

106. See Alaska R. Evid. 504(d); Ariz. Rev. Stat. Ann. § 32-2085(A) (West 1997); Ark. R. Evid. 503(d); Colo. Rev. Stat. § 13-90-107(3) (West 1998); Conn. Gen. Stat. Ann. § 52-146c(c) (West 1991); Del. Unif. R. Evid. 503(d); D.C. Code Ann. § 14-307(b) (Michie 1998); Fla. Stat. Ann. § 90.503(4) (West 1999); Haw. R. Evid. 504.1(d); Idaho R. Evid. 503(d); 225 Ill. Comp. Stat. Ann. 15/5 (West 1998); Iowa Code Ann. § 622.10 (West 1998); Ky. R. Evid. 507(c); La. Code Evid. Ann. art. 510(B)(2) (West 1995); Me. R. Evid. 503(e); Md. Code Ann., Cts. & Jud. Proc. § 9-109(d) (Michie 1997); Mass. Ann. Laws ch. 233, § 20B(a) (Law. Co-op. 1986); Miss. R. Evid. 503(d); Neb. Rev. Stat. Ann. § 27-504(4) (Michie 1995); N.J. Stat. Ann. § 45:14B-28 (West 1998); N.M. R. Evid. 11-504(D); N.C. Gen. Stat. § 8-53.3 (Michie 1997); N.D. R. Evid. § 503(d); Ohio Rev. Code Ann. § 2317.02(B)(1) (Anderson 1995); R.I. Gen. Laws § 5-37.3-4(b) (Michie 1997); S.C. Code Ann. § 19-11-95(C) (West 1997); S.D.

privilege, including the *Tarasoff* disclosure duty, defeats the value of the privilege, there would be no reason to maintain the privilege in the first place. The legislatures for the fifty states and the Supreme Court in *Jaffee* have, however, made a policy judgment that a privilege with conditions and exceptions is worth having, despite the consequent loss to the truth-finding function of the courts.

An additional distinction between the *Tarasoff* exception to confidentiality and exception to the evidentiary privilege should be taken into account before the two are equated. While the Supreme Court in *Jaffee* emphasized the utility of the evidentiary privilege to the effectiveness of the therapeutic relationship, the privilege also implicates the patient's privacy interests.¹⁰⁷ Exception to the evidentiary privilege would exact a much greater burden on that privacy interest than does the therapist's *Tarasoff* duty to breach confidentiality. A therapist's *Tarasoff* warning typically entails notification only to law enforcement authorities and/or the potential victim that the patient poses a danger. It does not typically require a repetition of the patient's confidential statements to the therapist, but merely private notice that the patient may be a threat to the potential victim's safety. Exception to the evidentiary privilege, on the other hand, would entail the therapist's public testimony to the most intimate details of the patient's dangerous thoughts that have been shared with the therapist. Sharing of such thoughts is, of course, encouraged by the therapeutic process in an atmosphere of utmost confidence and safety for the very purpose of allowing the therapist to intervene and help the patient successfully manage those thoughts. Hearing those thoughts played back in a public courtroom and used to create a criminal case against the patient would be a drastic infringement on the patient's legitimate expectation of privacy.¹⁰⁸

The benefits and burdens of the *Tarasoff* exception to confidentiality and the dangerous patient exception to the evidentiary privilege are dramatically

Codified Laws §§ 19-13-9 to 19-13-11 (Michie 1995); Tex. R. Civil Evid. 509(e); Utah R. Evid. 506(d); Vt. R. Evid. 503(d); Va. Code Ann. § 8.01-400.2 (Michie 1992); W. Va. Code § 27-3-1(b) (1992); Wis. Stat. Ann. § 905.04(4) (West 1993); Wyo. Stat. Ann. § 33-27-123(a) (Michie 1997); *see also supra* note 46 and accompanying text (some state statutes afford psychotherapist-patient privilege same protection as attorney-client privilege, which is subject to exceptions).

107. *See supra* note 86.

108. One commentator has even argued that "statements made by the patient to his therapist that are then introduced in court by the therapist should be regarded as coming from the patient himself" for Fifth Amendment purposes. Courville, *supra* note 86, at 205.

different. There is simply no compelling reason to equate or inseparably link them. Unfortunately, without analyzing or even acknowledging the significant distinctions between the two exceptions, the *Jaffee* footnote appears to have done just that. As demonstrated in *United States v. Glass*,¹⁰⁹ the footnote has at least left itself open to that interpretation. When the dangerous patient exception to the evidentiary privilege is analyzed separately, it finds support in the *Tarasoff* protective rationale only where disclosure of the confidential client communications during the evidentiary proceeding proves necessary to avert a serious, future threat of harm to an identifiable potential victim or the patient.

B. *The Waiver Rationale*

An alternative justification for exception to the evidentiary privilege, related to the *Tarasoff* disclosure rationale and accepted by the Supreme Court of California in *Wharton*, provides that once confidences are disclosed to prevent harm (or presumably for any other reason), any attendant privilege has been waived for evidentiary purposes thereafter. Relying on its previous opinion in *People v. Clark*,¹¹⁰ the *Wharton* court held that once confidential communications are revealed by the therapist to a third party, such communications lose their confidential status.¹¹¹ This waiver rationale is narrower than the *Tarasoff* rationale because it would apply only where disclosure was actually made rather than where it could have been made.

The waiver rationale articulated in *Wharton* ignored, however, the fact that in California, as elsewhere, the patient rather than the therapist holds the privilege.¹¹² Only the holder of a privilege can waive that privilege.¹¹³

109. 133 F.3d 1356, 1359–60 (10th Cir. 1998).

110. 789 P.2d 127 (Cal. 1990) (en banc).

111. *People v. Wharton*, 809 P.2d 290, 307 (Cal. 1991) (en banc) (quoting *Clark*, 789 P.2d 127).

112. See Cal. Evid. Code § 1013 (West 1995); *Proposed Rules*, *supra* note 2, at 241 (Proposed Rule 504(c): “The privilege may be claimed by the patient, by his guardian or conservator, or by the personal representative of a deceased patient. The person who was the psychotherapist may claim the privilege but only on behalf of the patient.”).

113. See 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* § 511.04[1], at 511-6 (Joseph M. McLaughlin ed., 2d ed. 1998) (“The holder of a privilege can waive the privilege by voluntarily disclosing the privileged information.”) (emphasis added); *Proposed Rules*, *supra* note 2, at 258 (Proposed Rule 511: “A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication.”) (emphasis added).

Without specifically rejecting its holding in *Wharton*, the Supreme Court of California, in *Menendez*, criticized the lower court for relying on the waiver rationale and neglecting this basic concept. The *Menendez* court stated:

[T]he superior court's reading of *Clark* suggests that the patient's privacy is breached and the psychotherapeutic relationship destroyed as soon as any communication loses its "confidential" status in any degree. Such a proposition is unsupported. . . . [O]nly the patient has the power to cause the privilege to go out of existence in its entirety.¹¹⁴

Indeed, even if the therapist were considered a joint holder of the privilege, the therapist's voluntary disclosure of a confidential communication would not waive the patient's continuing privilege.¹¹⁵ Moreover, unlike an attorney, who although not the holder of the privilege may waive the attorney-client privilege as the client's agent, the therapist is not the patient's agent.

One might argue, nonetheless, that the patient has impliedly consented to the psychotherapist's *Tarasoff* disclosure. Such disclosure is arguably in the patient's interest, because it is made to prevent the patient from doing or suffering harm. Indeed, the therapist, in the course of good practice, may well have informed the patient that such disclosure might be required. Considering a doctrine of implied consent merely points out once again, however, the significant difference between a *Tarasoff* breach of confidentiality and exception to the evidentiary privilege. It is one thing to infer that a patient has consented to the psychotherapist taking steps to prevent harm and quite another to infer that the patient, the holder of the privilege, has consented to the psychotherapist testifying to the patient's confidential communications in criminal proceedings against the patient after harm has occurred.

C. *The Attorney-Client Analogy*

As noted above, several states have defined their psychotherapist-patient privilege as co-extensive with the attorney-client privilege. It might be argued in those jurisdictions and elsewhere, by analogy to the attorney-

114. *Menendez v. Superior Court*, 834 P.2d 786, 794 (Cal. 1992).

115. See *In re Scranton Corp.*, 37 F.R.D. 465, 469-70 (M.D. Pa. 1965); 3 Weinstein & Berger, *supra* note 113, § 511.08[1], at 511-10 ("When two or more persons are joint holders of a privilege, the case law in most jurisdictions finds that a waiver by one holder does not waive the privilege as to other holders.") (citing *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 555-56 (8th Cir. 1990)).

client privilege, that there should be a “crime-fraud” or “future crime” exception to the psychotherapist-patient privilege.¹¹⁶

The federal “crime-fraud” exception to the attorney-client privilege exempts from protection any “communications ‘made for the purpose of getting advice for the commission of a fraud’ or crime.”¹¹⁷ The rationale behind the exception is that a criminal or fraudulent purpose perverts the legitimate purposes of the attorney’s services. The conditions of this exception, if applied by analogy in the psychotherapist-patient context would, one suspects, rarely be met. A patient who expresses criminal intent to a psychotherapist would rarely be doing so for the purpose of soliciting advice or aid in carrying out that desire; rather, the patient would typically do so for the opposite purpose—to get help in dealing with the desire so as not to carry it out.

Some jurisdictions recognize, in addition to the crime-fraud exception, a broader exception for “conversations regarding the contemplation of a future crime.”¹¹⁸ The California Evidence Code, for example, in addition to providing a crime-fraud exception¹¹⁹ provides that:

There is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to

116. The majority of federal circuits have also recognized an exception to the husband-wife privilege that “will permit a witness-spouse to testify about confidential communications involving present or ongoing crimes in which both spouses were joint participants at the time the communications were made.” 3 Weinstein & Berger, *supra* note 113, § 505.11[2][a], at 505-18; *see also* Murl A. Larkin, *Federal Testimonial Privileges* § 4.02[5], at 4-19 (*Release No. 21-1/96*) (“There is some authority that the privilege is lost to even the witness spouse when the spouses were joint participants in ongoing or future criminal activity.”) (citations omitted).

Whether there is an exception to the clergy-communicator privilege for prevention of harm, like the dangerous patient exception to the therapist-patient privilege, remains undecided. As stated by the Third Circuit in upholding the existence of the clergy-communicator privilege: “The precise scope of the privilege and its additional facets, such as whether a clergy-person should be required to disclose confidential communications when harm to innocent parties is threatened and imminent, are . . . most suitably left to case-by-case evolution.” *In re Grand Jury Investigation*, 918 F.2d 374, 385 (3d Cir. 1990); *see also* 3 Weinstein & Berger, *supra* note 113, § 506.10, at 506-17 (quoting *Grand Jury Investigation* as demonstration of “unsettled issues” with regard to clergy-communicator privilege).

117. *United States v. Zolin*, 491 U.S. 554, 563 (1989) (quoting *O’Rourke v. Darbishire*, [1920] A.C. 481, 604 (P.C.)); *see also* 3 Weinstein & Berger, *supra* note 113, § 503.31[1], at 503-91 (“[T]he lawyer-client privilege does not extend to communications between a client and the client’s attorney that are in furtherance of future or ongoing criminal or fraudulent conduct.”).

118. *State v. Hansen*, 102 Wash. 2d 712, 720, 862 P.2d 117, 121 (1993) (en banc) (allowing testimony of attorney regarding threat by potential client against judge in prosecution under statute prohibiting intimidation of judge). In *Hansen*, the court also held that there was no privilege because no attorney-client relationship had ever been established. *Id.*

119. *See* Cal. Evid. Code § 956 (West 1995).

representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.¹²⁰

This broader exception has apparently not been applied as a matter of federal law.¹²¹

Because the attorney-client privilege protects only confidential communications relevant to the legitimate purpose of giving legal advice, a broad exception for communications regarding future crime makes some sense. As noted by the Supreme Court in enunciating the crime-fraud exception in *Zolin*: “[T]he reason for the protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—‘ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but *future wrongdoing*.’”¹²² At that point, attorney-client communications no longer serve the legitimate professional purpose of the attorney-client relationship.

Even if one accepts this broader “future-crime” exception as efficacious in the attorney-client context, there are significant differences between the psychotherapist-patient and attorney-client relationships that make the analogy suspect.¹²³ “Future crime” is a legitimate subject of legal advice only to the extent that the lawyer may be consulted to determine what is and what is not a crime. Beyond that, communications regarding future crime are outside the scope of the attorney’s professional purpose. By contrast, communications regarding intentions or desires to commit future crime are at the very heart of why a patient may seek psychotherapeutic care. A

120. Cal. Evid. Code § 956.5. The exception applied by the California Evidence Code in the attorney-client context is similar to that which it articulates in the psychotherapist-patient context. See discussion of Cal. Evid. Code § 1024 (West 1995), *supra* Part II.B. It is also similar to Model Rule of Professional Conduct 1.6(b)(1), which allows but does not require an attorney to reveal confidential client information “to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.” This exception to the lawyer’s ethical duty of confidentiality is a separate issue, and would not control the question of whether the same confidences would be protected by the evidentiary privilege in criminal or civil proceedings against the client.

121. See Paul R. Rice, *Attorney-Client Privilege in the United States* §§ 8:1 to 8:16 (1993) (“Exceptions to the Privilege”); 3 Weinstein & Berger, *supra* note 113, §§ 503.01–.18 (“Lawyer-Client Privilege”) (failing to note future crime exception).

122. 491 U.S. at 562–63 (quoting 8 John H. Wigmore, *Wigmore on Evidence*, § 2298, at 573 (J. McNaughton ed. 1961)).

123. The Advisory Committee that drafted the Federal Rules of Evidence noted that “[t]he exceptions [to Proposed Rule 504] differ substantially from those of the attorney-client privilege, as a result of the basic differences in the relationships.” *Proposed Rules*, *supra* note 2, at 243–44.

patient may reveal these dangerous, criminal impulses to the therapist for the very purpose of overcoming and not acting upon them.¹²⁴

Whether or not the patient is truly seeking help to overcome these impulses (a determination that would, in any event, be excruciatingly difficult if not impossible to make), revealing them to the therapist creates an opportunity for intervention that is central to the psychotherapist's professional purpose. As the drafters of the Connecticut statute concluded, a patient's expression to a psychiatrist of the intent to commit a crime is usually "a plea for help" and "[t]he very making of these pleas affords the psychiatrist his unique opportunity to work with patients in an attempt to resolve their problems."¹²⁵ Examined from this perspective, protecting the dangerous patient's ability to obtain confidential professional help protects the potential victim as well as the patient. As one commentator has noted, the drafters of Proposed Rule 504 assumed "that less harm will ensue if patients feel free to ventilate their intentions."¹²⁶

There is no compelling reason to equate the psychotherapist's duty to breach confidentiality to protect potential victims with the dangerous patient exception to the evidentiary privilege. Nor is the evidentiary exception properly analogized to the crime-fraud or future crime exceptions to the attorney-client privilege. The dangerous patient exception should, therefore, be evaluated separately and the terms of the *Jaffee* footnote strictly applied. That is, exception to the evidentiary privilege should be made only if "a serious threat of harm to the patient or others can be averted only by means of disclosure by the therapist" *in testimony at the time of the proceeding*.

IV. APPLYING THE EXCEPTION: PROTECTIVE PROCEEDINGS AND THE PROSECUTION OF THREATS

When, if ever, should the dangerous patient evidentiary exception apply? Unlike a criminal prosecution against a patient who has allegedly carried out a threat confided to a psychotherapist, certain evidentiary proceedings

124. One might argue that some clients will make revelations to an attorney for the same reason—they want to be talked out of it. If so, the client is not seeking legal advice from the lawyer so much as counseling or therapy, which is the explicit purpose of the psychotherapeutic relationship. Some might contend that the attorney-client relationship should be broadly conceived to include such counseling as part of its legitimate purpose. That contention would merely support, however, an argument that there should be no future crime exception to the attorney-client privilege, as appears to be the case in the federal courts and most state jurisdictions.

125. Goldstein & Katz, *supra* note 17, at 188.

126. 2 Weinstein & Berger, *supra* note 19, § 504[04], at 504-27.

may have a protective purpose akin to that of the *Tarasoff* disclosure duty. A restraining order proceeding, by which the potential victim attempts to get a court order preventing contact by the dangerous patient, may be a direct outgrowth of a *Tarasoff* warning from the therapist. For the same reasons that justify the warning, it makes sense that the therapist be compelled to testify in proceedings by which the victim seeks court and law enforcement protection in response to notification of the threat. Proceedings to hospitalize a dangerous patient, although perhaps not focused on a specific victim, have a similar protective purpose to prevent harm to potential victims and/or the patient herself. Proposed Rule 504 and many state statutes make exception to the therapist-patient privilege for hospitalization proceedings.¹²⁷ Testimony by a therapist in a restraining order or hospitalization proceeding will often meet the terms of the *Jaffee* footnote as strictly applied. It may well be that “a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist”¹²⁸ in that proceeding.

It might be argued that criminal proceedings against a patient that punish threats of violence have a similar protective purpose. Unlike prosecuting a completed crime, prosecuting threats presumably serves the purpose, not only of punishment or general deterrence, but of prevention of the specific threat from being carried out. The threatener is disabled through incarceration.

Although it did not require or discuss a protective purpose as a predicate to applying a dangerous patient exception to the psychotherapist-patient privilege, the Tenth Circuit’s decision in *United States v. Glass*¹²⁹ could be rationalized in this way. Unlike a typical criminal proceeding against a patient, where the government may seek to introduce a patient’s threat communicated confidentially to a therapist as evidence of intent or plan to commit the charged crime, in *Glass* the confidential threat was itself the crime.¹³⁰ It could be argued that the statute at issue in *Glass*, 18 U.S.C. § 871, and prosecutions for violation of that statute serve a protective

127. See *supra* note 95. Proposed Rule 504(d)(1) provides: “There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.” *Proposed Rules*, *supra* note 2, at 241.

128. *Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996).

129. 133 F.3d 1356 (10th Cir. 1998); see *supra* Part I.A.

130. See *supra* text accompanying notes 34–35.

purpose that justifies exception to the privilege—the purpose of protecting the President by locking up those who would threaten him or her. The legislative history of the statute, scant though it is, supports this conclusion.¹³¹

Applying the dangerous patient exception in threat cases like *Glass* would present the anomaly that proof of the charged threat would not depend on the circumstances of the alleged crime, but on the circumstances prevailing at the time of trial. Compelling the psychotherapist's testimony would be justified only if the defendant posed a serious threat to an identifiable victim at the time of trial. However, depending on the penal statute at issue, the charged crime typically would consist of a threat that was serious when made whether or not there was a continuing danger at the time of trial. Indeed, 18 U.S.C. § 871, the statute at issue in *Glass*, has been interpreted as not requiring that the defendant ever had a serious intention to carry out the threat or the means to do so.¹³²

It is, however, unnecessary to confront this dilemma, at least where, as in *Glass*, the allegation of a “threat” is based solely on statements made in confidence to a psychotherapist. One should first ask whether the statements at issue are “threats” or evidence of threats at all. The pertinent question in *Glass*, not addressed by the Tenth Circuit, should have been whether, even without regard to the privilege, a patient's statements made only to a psychotherapist in confidence are admissible as the sole evidence of a threat in violation of 18 U.S.C. § 871.

Examining 18 U.S.C. § 871 and the meaning of “threat” as interpreted in that statute is instructive. The original statute upon which section 871 is based was enacted by Congress in 1917.¹³³ One year later, it was interpreted in *United States v. Stobo* to include oral threats whether or not actually

131. See H.R. Rep. No. 652, 64th Cong., 1st Sess. (1916) (“This bill is designed to *restrain* and punish those who would threaten to take the life of, or inflict bodily harm upon, the President of this Republic. It is the first and highest duty of a Government to *protect* its governmental agencies, in the performance of their public services . . .”) (emphasis added); 1916 Cong. Rec. at 9377 (“I can say to my friend that for 25 years threatening letters have come in the White House mail, and something ought to be done in the way of protecting the Chief Executive of this great Republic, if possible, from this kind of annoyance.”).

132. See, e.g., *United States v. Dysart*, 705 F.2d 1247, 1256 (10th Cir. 1983) (approving jury instruction stating that “it is not necessary to show that the defendant intended to carry out the threat, nor is it necessary to prove that the defendant actually had the apparent ability to carry out the threat”).

133. See 39 Stat. 919, ch. 64. The original statute was virtually identical to the current statute except that it punished only threats against the President whereas the current statute has been amended to include threats against the Vice President, the President-elect and others in the line of succession to the presidency. See 18 U.S.C. § 871(a) (1994).

communicated or intended to be communicated to the President.¹³⁴ *Stobo* also held, however, that “[a]n oral threat against the President, unheard by any one, cannot constitute the threat denounced by the statute.”¹³⁵ The court went on to explain the requirements of the statute regarding oral threats:

In an oral threat contemplated by the statute there are two essential elements: First, the utterance of the words, and, secondly, the hearing of the words by some person or persons other than the utterer. *The use of the threatening words in an unheard soliloquy, whatever may be the intent or purpose with which they are uttered, is not an offense punishable under the act. Its manifest purpose was to punish the use by one of threatening words calculated to inflame or have a sinister influence upon the minds of others, and in the case of an oral threat the offense is not complete unless the words are uttered in the hearing of some other person or persons.*¹³⁶

This explanation of the statute’s purpose is consistent with statements by the legislation’s sponsors in congressional debates, who emphasized the effect on listeners of a public threat.¹³⁷

The Tenth Circuit, in decisions prior to *Glass*, consistent with the legislative purpose of the statute, had approved jury instructions defining “[t]he term ‘threat’ [to mean] an avowed present determination or intent to injure presently or in the future.”¹³⁸ As explained in *United States v. Smith*:

The key word used in the instruction, “avowed,” means “openly acknowledged or declared.” We believe a fair reading of the instruction requires the jury to find that the defendant had openly declared a present intention to injure the President—which is nothing more than requiring the jury to find that defendant declared to others an “apparent determination” to injure the President, language this Court has previously approved. *Requiring that the defendant’s*

134. 251 F. 689, 691–92 (D. Del. 1918).

135. *Id.* at 695.

136. *Id.* (emphasis added).

137. The Congressional Record states:

A bad man can make a public threat, and put somebody else up to committing a crime against the Chief Executive, and that is where the harm comes. The man who makes the threat is not himself very dangerous, but he is liable to put devilment in the mind of some poor fellow who does try to harm him.

53 Cong. Rec. 9377 (1916) (statement of Rep. Webb).

138. *United States v. Smith*, 670 F.2d 921, 922–23 (10th Cir. 1982); *accord* *United States v. Dysart*, 705 F.2d 1247, 1256 (10th Cir. 1983).

*intention be “apparent” or “avowed” is intended to preclude conviction if the defendant keeps secret an intention to harm the President.*¹³⁹

The Third Circuit found similarly, in *United States v. Kosma*, that “section 871 would not punish a person who writes a threatening letter to the President and places it in his desk with no intention of sending it.”¹⁴⁰

A prosecution for a threat that is, as in *Glass*, based solely on a confidential statement made by a patient to a psychotherapist, presents the question of whether such a statement is one that is “avowed” or “openly acknowledged or declared” such that it can constitute a “threat” within the meaning of the statute. Or is such a statement a secret intention that is—like an unheard soliloquy, a journal entry, or a letter never sent—not punishable under the statute? As noted by the Tenth Circuit in an earlier decision presenting similar facts, *United States v. Crews*, prosecution of a patient for confidential communications to his therapist presents the anomaly of making criminal “verbal communication of the type that may be expected or even encouraged in a psychiatric setting, because the treating physician needs to know what the patient is thinking or feeling.”¹⁴¹

Prosecutions based on confidential statements to a psychotherapist come perilously close to prosecuting the patient for having bad thoughts or a mental illness. To do so would not fulfill the purpose of 18 U.S.C. § 871, to punish those who communicate threats directly to the President or to others who may be incited against the President. Rather, such prosecutions would discourage those with dangerous secret thoughts from seeking professional help to defuse them.¹⁴² The statement by Glass to his psychiatrist¹⁴³ did not constitute “threatening words calculated to inflame or have a sinister influence upon the minds of others.”¹⁴⁴ Glass made his statement in a confidential, therapeutic setting, not for the purpose of inciting the admitting psychotherapist, but rather in a voluntary effort to obtain help in managing his emotions and impulses.¹⁴⁵

139. *Smith*, 670 F.2d at 923 (citations omitted) (emphasis added).

140. 951 F.2d 549, 558 (3d Cir. 1991).

141. 781 F.2d 826, 831 (10th Cir. 1986).

142. *Cf. Leong et al.*, *supra* note 101, at 1014 (noting that possibility of being called as witness in criminal prosecution “will likely further distance psychotherapists from treating difficult and dangerous patients”).

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

144. *United States v. Stobo*, 251 F. 689, 695 (D. Del. 1918).

145. *See supra* notes 31–32 and accompanying text.

Because statements to a therapist like those in *Glass* are private and confidential, not openly acknowledged or declared, they should not be considered “threats” or relevant evidence of threats within the meaning of 18 U.S.C. § 871 or similar statutes. For that reason, the privilege issue with regard to such statements should not arise, and it should be unnecessary to consider whether prosecutions for threats have a protective purpose sufficient to justify a dangerous patient exception to the psychotherapist-patient privilege.

V. CONCLUSION

The *Jaffee* footnote and the decisions of the Supreme Court of California in *Wharton* and *Menendez* appear to equate exception to the evidentiary privilege with exception to confidentiality incident to the psychotherapist’s *Tarasoff* duty to prevent patients from doing foreseeable harm to others. The justification for allowing or requiring a psychotherapist to disclose client confidences to law enforcement authorities or potential victims when a serious threat is pending—protection of the potential victim or the patient—will not normally pertain, however, in later court proceedings against the patient. Exception to the evidentiary privilege is justified for testimony in a restraining order proceeding or in a proceeding to hospitalize the patient, the purposes of which are to protect the potential victims, the patient, or the public. No similar justification exists, however, for compelling a therapist to testify against her patient in a criminal proceeding after the threat of harm has been carried out or is no longer viable.

There is also no compelling reason why the two exceptions must be linked. The burdens on the therapeutic relationship of the two exceptions are substantially different as is their social utility, and allowing or requiring *Tarasoff* disclosure does not render insignificant the remaining protection of the evidentiary privilege. Moreover, unlike in the attorney-client context, where communications regarding future crime are outside the legitimate scope of the attorney’s professional purpose, communications regarding a patient’s violent intentions or desires are crucial to effective psychotherapeutic care and protect the potential victim as well as the patient. The *Jaffee* footnote should, therefore, be strictly construed, and the dangerous patient exception to the psychotherapist-patient privilege should apply only where harm to an identifiable victim can be averted by compelling the therapist to testify in the proceeding at issue.

The Supreme Court in *Jaffee*, following the lead of the Federal Rules Advisory Committee and state legislatures, made a policy judgment that the

value of protecting the confidentiality of the psychotherapist-patient relationship outweighs the evidentiary value of admitting a patient's confidential statements for the purpose of proving criminal conduct by the patient. The powerful and salutary impulse to protect potential victims that gave rise to the *Tarasoff* duty to warn should not be allowed to distort the consistent application of that policy judgment. Indeed, the rationale supporting that judgment includes the belief that protection of the therapeutic relationship will result in less patient violence.