

The University of New Hampshire Law Review

Volume 9
Number 3 *University of New Hampshire Law
Review*

Article 3

May 2011

From Trusted Confidant to Witness for the Prosecution: The Case Against the Recognition of a Dangerous-Patient Exception to the Psychotherapist-Patient Privilege

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From Trusted Confidant to Witness for the Prosecution: The Case Against the Recognition of a Dangerous-Patient Exception to the Psychotherapist-Patient Privilege

DEBORAH PARUCH^{*}

TABLE OF CONTENTS

I.	INTRODUCTION	328
II.	INTRODUCTION TO THE LAW OF PRIVILEGES	331
III.	THE DEVELOPMENT OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE.....	337
	A. <i>Early Recognition of the Privilege</i>	338
	B. <i>The Proposed Federal Rule of Evidence 504</i>	340
	C. <i>A Therapist's Ethical Duty of Confidentiality and the California Supreme Court's Decision in Tarasoff v. Regents of the University of California</i>	344
	D. <i>The U.S. Supreme Court's Recognition of the Psychotherapist- Patient Privilege: Jaffee v. Redmond</i>	347
IV.	THE DANGEROUS-PATIENT EXCEPTION TO THE PSYCHOTHERAPIST- PATIENT PRIVILEGE: THE FEDERAL CIRCUIT COURT DECISIONS	352
	A. <i>The Tenth Circuit: United States v. Glass</i>	352
	B. <i>The Sixth Circuit: United States v. Hayes</i>	353
	C. <i>The Ninth Circuit: United States v. Chase</i>	357
	D. <i>The Fifth Circuit: United States v. Auster</i>	360
V.	THE CHASE AND HAYES CASES WERE CORRECTLY DECIDED.....	362
	A. <i>Footnote 19 and the Legislative History of Proposed Rule 504</i> ..	362
	1. <i>Jaffee's Footnote 19</i>	362
	2. <i>The Legislative History of Proposed Federal Rule of Evidence 504</i>	366
	B. <i>The Sixth and Ninth Circuits Employed the Correct Legal Analysis</i>	370
	C. <i>Federal Rule of Evidence 501: The Reason and Experience Requirement</i>	374
	1. <i>The States' Experience</i>	374

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328 UNIVERSITY OF NEW HAMPSHIRE LAW REVIEW Vol. 9, No. 3

2. “Reason and Experience”—The Other Communication Privileges.....	381
a. The Attorney-Client Privilege.....	382
b. The Marital Privileges.....	387
c. The Clergy-Penitent Privilege.....	389
VI. CIRCUMSTANCES WARRANTING ABROGATION OF THE PRIVILEGE ..	393
A. The Psychotherapist-Patient Privilege Should Be Abrogated Only In Certain Narrowly Prescribed Circumstances.....	393
B. The Appropriate Procedures and Burden of Proof.....	399
VII. CONCLUSION.....	405

I. INTRODUCTION

In 1996, in *Jaffee v. Redmond*,¹ the U.S. Supreme Court, pursuant to the authority set forth in Federal Rule of Evidence 501, recognized a psychotherapist-patient privilege in the federal courts.² In doing so, the Court acknowledged the essential role that confidentiality plays in a therapist-patient relationship and also recognized the important role that psychotherapy plays in the mental health of the American citizenry.³ However, in dicta set out in a footnote near the conclusion of the opinion (footnote 19 of the opinion), the Court suggested that the privilege might not be absolute, that it might need to “give way [in situations where] . . . a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.”⁴

In the years since this decision, the lower federal courts have wrestled with how to determine the contours of the psychotherapist-patient privilege, particularly in light of the Supreme Court’s comments contained within footnote 19. Currently, the federal circuit courts are split over whether the Court intended to establish a dangerous-patient exception to the psychotherapist-patient privilege and the situations in which this exception would be appropriate. A year

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

2. *Id.* at 9–10.

3. *Id.* at 10–11.

4. *Id.* at 18 n.19.

and a half after *Jaffee* was decided, the Tenth Circuit, in *United States v. Glass*,⁵ crafted a dangerous-patient exception to the privilege, which was fashioned after the criteria set forth by the *Jaffee* Court in footnote 19.⁶ However, the Sixth and Ninth Circuits have refused to recognize the exception on the grounds that the footnote is dicta and that a dangerous-patient exception contravenes the rationale and the holding of the *Jaffee* opinion.⁷

This article addresses the dangerous-patient exception to the psychotherapist-patient privilege and argues against the recognition of this exception. Parts I and II of this article present a discussion of the history of privileges and the development of the psychotherapist-patient privilege, culminating with an in-depth discussion of the Supreme Court's opinion in *Jaffee*. This section also includes a brief discussion of the two distinct rationales supporting privileges: the deontological rationale and the utilitarian rationale espoused by Dean John Henry Wigmore and adopted by the U.S. Supreme Court.

Part III of this article presents the opinions of the federal circuit courts that have grappled with the question of whether to recognize the dangerous-patient exception to the psychotherapist-patient privilege.

In Part IV, this article sets forth reasons why the *Glass* court and the other courts that have adopted the *Glass* test are wrong. It explains that the comments set forth in the *Jaffee* footnote are mere obiter dicta and, thus, have negligible value. It also demonstrates that interpreting this footnote as authorizing a dangerous-patient exception is wholly inconsistent with the *Jaffee* opinion and the Supreme Court's sanctioning of the legislative history of Federal Rule of Evidence 501, particularly the proposed but rejected rules related to privileges. Part IV also argues that the *Glass* court erred in crafting the test by failing to conduct the proper legal analysis in light of the privileges that the Supreme Court set forth in *Jaffee* and, two years later, in *Swidler & Berlin v. United States*.⁸

5. 133 F.3d 1356 (10th Cir. 1998).

6. *Id.* at 1359.

7. See *United States v. Chase*, 340 F.3d 978, 991–92 (9th Cir. 2003); *United States v. Hayes*, 227 F.3d 578, 584–85 (6th Cir. 2000).

8. 524 U.S. 399 (1998).

Part IV also addresses the “reason and experience” requirement of Federal Rule of Evidence 501, which provides that privileges are to be governed by the principles of the common law “as they may be interpreted by the [federal] courts . . . in light of reason and experience.”⁹ This section presents the reasons why “reason and experience” do not support the recognition of the dangerous-patient exception to the privilege. It shows not only that there is no clear consensus among the states with respect to a therapist’s duty to protect third parties, but also that there is much confusion among the laws of the states with respect to the dangerous-patient exception. Finally, this section examines the “reason and experience” requirement of Rule 501 in light of the commonly recognized exceptions to the other federal communication privileges. It concludes that because neither the attorney-client privilege, the spousal privilege, nor the clergy-penitent privilege are subject to a “dangerous-person” exception, “reason and experience” do not support the recognition of this type of exception to the psychotherapist-patient privilege.

Part V of this article discusses the limited situations in which a therapist might be compelled to testify about a patient’s confidential communications. This article concludes with a discussion of, and recommendation for, procedures that courts should follow when presented with challenges to the psychotherapist-patient privilege. It recommends that courts conduct *in camera* review of the evidence proffered in support of exceptions to the privilege and require that the proponent of the exception prove the necessary elements by a preponderance of the evidence. These procedures will provide protection against the needless public disclosure of confidential patient information and serve to protect the confidentiality of the therapist-patient relationship, which the *Jaffee* Court recognized is a “*sine qua non* for successful psychiatric treatment.”¹⁰

9. FED. R. EVID. 501.

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

II. INTRODUCTION TO THE LAW OF PRIVILEGES¹¹

Privileges are a unique aspect of the law of evidence; unlike other rules of evidence designed to improve the reliability of the fact-finding process, the rules governing the scope and effect of privileges operate to “impede the search for truth by excluding evidence that may be highly probative.”¹² Privileges are justified by the need to protect the privacy of certain relationships and the need to encourage open communications within these relationships.¹³ The most common privileges include an individual’s right to be free from compelled self-incrimination and the privileges that protect confidential communications between spouses, attorneys and their clients, and physicians and their patients.¹⁴ The law of privileges has developed from several sources. Some privileges are provided for in the Constitution, such as the privilege against self-incrimination.¹⁵ In the states, privileges are generally statutory, whereas the federal law of privileges originates from the common law.¹⁶ One of the earliest privileges to be recognized was the Roman law that refused to compel an attorney to testify against his client during the pendency of a case.¹⁷ Additional privileges came into existence during the early Middle Ages, beginning with recognition of the priest-penitent privilege.¹⁸ This privilege, which had its origin in the seal of confession

11. Certain sections within Parts II and III of this article are taken from a previous article written by the author. See Deborah Paruch, *The Psychotherapist-Patient Privilege in the Family Court: An Exemplar of Disharmony Between Social Policy Goals, Professional Ethics, and the Current State of the Law*, 29 N. ILL. U. L. REV. 499, 501–521 (2009).

12. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 5.1, at 329 (3d ed. 2003).

13. *Id.*

14. KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 72, at 114 (John W. Strong ed., 5th ed. 2006).

15. U.S. CONST. amend. V.

16. PAUL C. GIANELLI, UNDERSTANDING EVIDENCE, § 37.04, at 566 (2d ed. 2006).

17. Daniel W. Shuman, *The Origins of the Physician-Patient Privilege and Professional Secret*, 39 SW. L.J. 661, 667 (1985).

18. *Id.* at 668–69.

and canon law, prohibited priests from revealing confessional confidences.¹⁹

The first privilege recognized under the common law of England was the attorney-client privilege, which was initially recognized during the reign of Elizabeth I²⁰ and “[b]y the time of the American Revolution . . . was firmly entrenched in the [American] common law.”²¹ The rationale for this privilege was that it was a “point of honor” for gentlemen to not reveal confidences entrusted to them.²² These early privileges are grounded in deontology,²³ the school of ethics that focuses on the inherent rightness or wrongness of actions themselves, as opposed to the correctness or incorrectness of the consequences of the actions.²⁴ The deontological approach to privi-

19. *Id.* at 668. Some contemporary scholars believe that that common law of England did not recognize the priest-penitent privilege. *See id.* at 670 n.40 (citing Edward A. Hogan, Jr., *A Modern Problem on the Privilege of the Confessional*, 6 LOY. L. REV. 1, 2, 13 (1951)).

20. *Id.* at 669–70. Recognition of the attorney-client privilege followed the passage of the Statute of Elizabeth in 1562–1563 that provided penalties for a witness’s refusal to testify following service of process and offer of payment of expenses. *Id.* (citing 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542–43 (John T. McNaughton ed., rev. ed. 1961)). Historically, the attorney-client privilege belonged to the attorney “as a gentleman” with courts honoring a gentleman’s pledge of secrecy. Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1228 (1962) [hereinafter *Functional Overlap*]. This right was originally held by all gentlemen, “but during the 17th and 18th centuries it was gradually repudiated.” *Id.* Lawyers were able to retain the privilege by maintaining that the privilege, in fact, belonged to the client based on two different theories: “(1) that the privilege was necessary to assure complete disclosure by the client and a competent defense by the lawyer; and (2) that the lawyer was no better than a servant.” *Id.* (citations omitted). This latter theory is traced to an ancient rule that prohibited a slave from testifying against a master. Shuman, *supra* note 17, at 667.

21. *Functional Overlap*, *supra* note 20, at 1229.

22. Shuman, *supra* note 17, at 671.

23. *See* Paul S. Appelbaum, *Privacy in Psychiatric Treatment: Threats and Responses*, 159 AM. J. PSYCHIATRY 1809, 1810–11 (2002) (discussing the school of deontological thought in relation to the psychotherapist-patient privilege problem).

24. ENCYCLOPEDIA OF ETHICS 63–64 (Susan Neiburg Terkel & R. Shannon Duvall eds., 1999). There are two distinct categories of contemporary ethical theories: deontological and teleological:

leges focuses on the importance of the societal values encompassed in the privilege and recognizes that disclosure of certain confidences is in and of itself wrong.²⁵

The deontological school of thought views privacy as “an essential ingredient of a democratic society.”²⁶ According to Professor David Louisell, privileges are “[p]rimarily . . . a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state’s coercive or supervisory powers and from the nuisance of its eavesdropping.”²⁷ Professor Louisell has also remarked that the fact that the existence of these guarantees sometimes results in the exclusion of probative evidence at a trial is merely a secondary and incidental feature of the privileges’ vitality and “not too great a price to pay for secrecy in certain communicative relations—husband-wife, client-attorney and penitent-clergyman.”²⁸

Teleological, which encompasses utilitarianism, is the ‘ethics of ends and consequences.’ 1 JOHN K. ROTH, *ETHICS* 367 (John K. Roth ed., 2005). Teleological theories prioritize the good over the right. *See id.* The good is defined as ‘the end or purpose of human actions; for example, ‘the greatest happiness for the greatest number.’ These theories evaluate moral actions in terms of whether they contribute to the good.’ *Id.* Thus, according to teleological theories, consequences or results will determine the rightness or wrongness of moral actions. *Id.* This is contrasted with deontological theories, which argue for the ‘independence of the right from the good.’

Id. at 364; Paruch, *supra* note 11, at 503 n.13.

25. Shuman, *supra* note 17, at 664 (quoting David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 *TULSA L. REV.* 101, 101 (1956)).

26. *Id.* at 666 (citing ALAN F. WESTIN, *PRIVACY AND FREEDOM* 32 (1967)). This concept of privacy was incorporated into the Fourth Amendment to the U.S. Constitution. Justice Brandeis recognized this in his dissent in *Olmstead v. United States*, where he stated:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

27. Louisell, *supra* note 25, at 110–11.

28. *Id.* at 109–10.

Some two hundred years after the attorney-client privilege was first recognized in English common law, the English courts were called upon to address the physician-patient privilege. This occurred in the 1776 bigamy trial of Elizabeth, the Duchess of Kingston.²⁹ This decision is viewed as a critical turning point in the law of privileges because it was then that courts began to apply a utilitarian test to privileges, where the importance of the evidence replaced ethics as the standard for recognition of privileges.³⁰ In the utilitarian approach, also referred to as the instrumental rationale, privileges are viewed as obstructions to the truth-finding process and as fostering a disregard for the fundamental principle that “the public . . . has a right to every man’s evidence.”³¹

The utilitarian approach was adopted by two of the giants in Anglo-American evidence law, Jeremy Bentham and John Henry Wigmore.³² Utilitarianism is the ethical principle maintaining that an action is right if it tends to maximize the happiness of everyone affected by the action.³³ Thus, the utilitarian focus is on the consequences of an act rather than on the act’s intrinsic nature or the motives of the actor.³⁴ Dean Wigmore was an empiricist who challenged the soundness of the deontological approach.³⁵ He urged the courts to strictly construe existing privileges and identified four conditions, which he believed were necessary, for the recognition of a privilege:

29. *Rex v. Duchess of Kingston*, 20 How. St. Tr. 355, 572–73 (H.L.) (Eng.).

30. *Id.*; WIGMORE, *supra* note 20, § 2286, at 531.

31. *See* WIGMORE, *supra* note 20, § 2285, at 527; *see also* *United States v. Bryan*, 339 U.S. 323, 331 (1950).

32. *See* EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 2.5, 141–46 (2d ed. 2009) (discussing Bentham’s role in the transition to the modern privilege doctrine).

33. *Utilitarianism*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/620682/utilitarianism> (last visited Apr. 27, 2011).

34. *Id.* Utilitarianism is a tradition originating from the eighteenth-and-nineteenth-century English philosophers and economists Jeremy Bentham and John Stuart Mill and holds that “an action is right if it tends to promote happiness and wrong if it tends to produce the reverse of happiness” for everyone affected by the action. *Id.*; *see also* JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J. Burns & H.L.A. Hart eds., 1970) (1789); JOHN STUART MILL, *UTILITARIANISM* (George Sher ed., 1979) (4th ed. 1871).

35. WIGMORE, *supra* note 20, § 2285, at 527.

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.³⁶

The U.S. Supreme Court has adopted Wigmore's test for the recognition of privileges, stating that privileges should be utilized "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."³⁷ The Court utilized this approach in recognizing the importance of the attorney-client privilege in *Swidler & Berlin*, finding that "[t]he attorney-client privilege is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice,'"³⁸ and the psychotherapist-patient privilege in *Jaffee*.³⁹

However, the utilitarian approach is not without its critics. Authors have challenged the behavioral assumptions underlying the

36. WIGMORE, *supra* note 20, § 2285, at 527 (emphases omitted). This oft-quoted passage in Wigmore's treatise has been viewed as the most important section in his volume dedicated to privileges. IMWINKELRIED, *supra* note 32, §3.2.3, at 159.

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

38. *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

39. *See Jaffee v. Redmond*, 518 U.S. 1, 9–10 (1996) (finding that the psychotherapist-patient privilege was justified because the protection of confidential communications between a patient and her therapist advances considerably important interests that outweigh the need for relevant evidence).

instrumental rationale, disputing the contention that people would refrain from consulting with attorneys or confiding in therapists without the promise of confidentiality.⁴⁰ As such, legal scholars have questioned the soundness of employing the instrumental rationale to uphold a variety of communication privileges, including the attorney-client privilege,⁴¹ the clergy-penitent privilege,⁴² the psychotherapist-patient privilege,⁴³ and the spousal-communications privilege.⁴⁴ Additionally, exclusive reliance on the utilitarian model for the recognition of privileges has been criticized on the grounds that it is “too narrow and legalistic a basis on which to erect privilege doctrine.”⁴⁵

More recently, the focus of some legal scholars has been on the broader concept of human autonomy, the freedom to control one’s own life and destiny, which has been defined as an ultimate moral good in society.⁴⁶ Similarly, other commentators have suggested that the best arguments for the preservation of privileges are those based on the instrumental rationales as well as rationales evolving

40. See, e.g., Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. PITT. L. REV. 145 (2004).

41. IMWINKELRIED, *supra* note 32, § 5.2.1, at 300 (citing RICHARD O. LEMPET & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 614 (1977)).

42. CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5612, at 87–88 (1992) (noting that the instrumental case for the clergy-penitent privilege is weak).

43. See IMWINKELRIED, *supra* note 32, § 5.2.2, at 313–35 (giving a detailed presentation of the empirical studies dealing with the psychotherapist-patient privilege).

44. WIGMORE, *supra* note 20, § 2332, at 643–44. Wigmore believed that there was no convincing data that the spousal-communication privilege was necessary to aid communication between spouses. *Id.*

45. IMWINKELRIED, *supra* note 32, § 5.2.3, at 335. Professor Edward Imwinkelried has developed and proposed a humanistic rationale for the recognition of privileges derived from the constitutional right to autonomy. See *id.* § 5.2.3, at 335–38. Under his proposal, the positive theory of freedom is a normative proposition as contrasted with an empirical hypothesis, and his theory or rationale for the recognition of privileges is tested by examining the theory’s consistency with liberal democratic theory as opposed to subjecting it to experimentation and scientific examination. See *id.* § 5.2.3, at 338.

46. Richard C. Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 KY. L.J. 1165, 1174–75 (1999).

from considerations of privacy, loyalty, and human dignity.⁴⁷ For instance, in the attorney-client context, it is argued that communications ought to be protected from disclosure not only because the free flow of information may be improved because of the privilege but also because individuals should be entitled to have attorneys advise them on legal matters without the fear that the information communicated can be revealed by means of a subpoena.⁴⁸ Likewise, even though communications between a therapist and her patient may be enhanced by the existence of a privilege, the protection of these confidences should be justified on the basis that public disclosure of these types of communications, even though needed to resolve a legal dispute, “would be repugnant to most of society.”⁴⁹

III. THE DEVELOPMENT OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

The historical foundation of psychotherapeutic confidentiality is thought to be the Hippocratic Oath, which is not surprising given psychiatry’s origin within the medical profession.⁵⁰ The Hippocratic Oath states in part: “Whatsoever I see or hear in the course of my profession as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets.”⁵¹ The right of individuals to control the disclosure of personal medical information is also closely tied to the notion of personal privacy that was first acknowledged as a legal concept in the United States at the end of the nineteenth century.⁵²

47. Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 796 (2002).

48. *Id.*

49. *Id.* For an in-depth discussion of the constitutional right of privacy as a rationale for the psychotherapist-patient privilege, see Steven R. Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1 (1980).

50. Howard B. Roback & Mary Shelton, *Effects of Confidentiality Limitations on the Psychotherapeutic Process*, 4 J. PSYCHOTHERAPY PRAC. & RES. 185, 185 (1995).

51. *Id.*

52. RALPH REISNER ET AL., *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 43, 297 (4th ed. 2004). As initially conceived by Justice

A. *Early Recognition of the Privilege*

In 1952, the Illinois Cook County Circuit Court became what some believe to be the first U.S. court to recognize a psychotherapist-patient privilege.⁵³ In *Binder v. Ruvell*,⁵⁴ a prominent psychiatrist and a hospital were summoned to produce the medical records of Mrs. Binder, who was a recent patient at the hospital.⁵⁵ The court ruled that the information provided by a patient to a psychiatrist during psychotherapy sessions was protected from disclosure, even though the State of Illinois, at the time, did not recognize a physician-patient privilege.⁵⁶ In determining whether Illinois law should recognize this new privilege, the court adopted the utilitarian approach and analyzed the psychotherapist-patient privilege in terms of the elements expounded by Dean Wigmore.⁵⁷ It concluded that the protection of the confidences that arise in the psychotherapist-patient relationship far outweighed the “correct disposal of a particular case.”⁵⁸

During the mid-to-late-1950s, the idea that therapy patients might need unique legal protections took hold, and the concept of the

Brandeis, the right of privacy is “[t]he right to be left alone.” Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890). While some have argued that the psychotherapist-patient privilege is protected by the constitutional right to privacy, a liberty interest contained in the Fifth and Fourteenth Amendments to the U.S. Constitution, these arguments have largely been unsuccessful. Compare Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249, 251–52 (1996) (indicating the constitutional aspects of privilege as it relates to privacy), with Smith, *supra* note 49, at 4. Additionally, Smith also argues that the First Amendment protects therapeutic communications since “autonomous control over the development and expression of one’s intellect, interests, tastes, and personality” are rights protected by the First Amendment. Smith, *supra* note 49, at 20 n.141 (quoting *Doe v. Bolton*, 410 U.S. 179, 211 (1973) (Douglas, J., concurring)) (emphasis omitted).

53. See *Binder v. Ruvell*, No. 52C2535 (Ill. Cir. Ct. June 24, 1952), available at <http://jaffee-redmond.org/cases/binder.htm>.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

psychiatrist-patient privilege was actively debated.⁵⁹ In 1960, the Group for the Advancement of Psychiatry (“GAP”) issued a report entitled *Confidentiality and Privileged Communication in the Practice of Psychiatry*, which included this frequently quoted passage that articulated the need for the privilege:

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. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication There is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients’ conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient’s awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.⁶⁰

The State of Connecticut was the first state to enact a psychotherapist-patient privilege statute.⁶¹ The privilege applied in civil and criminal cases and covered communications between patients and psychotherapists.⁶² This Connecticut law ultimately formed the basis for the U.S. Supreme Court’s subsequent proposal for a psychotherapist-patient privilege in the Federal Rules of Evidence.⁶³

59. Paul W. Mosher, *Psychotherapist-Patient Privilege: The History and Significance of the U.S. Supreme Court’s Decision in the Case of Jaffee v. Redmond* (1999) (unpublished manuscript), available at <http://jaffee-redmond.org/articles/mosher.htm>.

60. *Id.* (quoting GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, CONFIDENTIALITY AND PRIVILEGED COMMUNICATION IN THE PRACTICE OF PSYCHIATRY 92 (1960) [hereinafter GAP REPORT]) (emphases omitted).

61. *Id.* (citing Abraham S. Goldstein & Jay Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 118 AM. J. PSYCHIATRY 733, 733 (1962)).

62. *Id.*

63. *Id.*

B. The Proposed Federal Rule of Evidence 504

The proposed Federal Rules of Evidence submitted to Congress in 1969 by the Supreme Court initially included provisions for the recognition of nine federal privileges, including a psychotherapist-patient privilege, which was set forth in proposed Federal Rule of Evidence 504.⁶⁴ The proposed rule protected confidential communi-

64. See Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 240–41 (1972). Proposed Federal Rule of Evidence 504 reads:

Psychotherapist-Patient Privilege [Not enacted.]

(a) Definitions.

(1) A 'patient' is a person who consults or is examined or interviewed by a psychotherapist.

(2) A 'psychotherapist' is (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.

(3) A communication is 'confidential' if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Who may claim the privilege. 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. His authority so to do is presumed in the absence of evidence to the contrary.

(d) Exceptions.

(1) Proceedings for hospitalization. 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.

cations between patients and physicians or psychologists made for the purpose of diagnosis or treatment of mental or emotional conditions.⁶⁵ The rule contained three specific exceptions: There was no privilege for communications made pursuant to proceedings to hospitalize a patient, for communications made in connection with court-ordered psychiatric examinations, or for communications made in connection with civil proceedings in which a patient introduced his mental condition into the case.⁶⁶ The committee did not include an exception for dangerous patients.⁶⁷ The omission was a delibe-

(2) Examination by order of judge. If the judge orders an examination of the mental or emotional condition of the patient, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(3) Condition an element of claim or defense. There is no privilege under this rule as to communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

Id.

65. *Id.*

66. *Id.* at 241.

67. *Id.* at 241-42. The Advisory Committee Report provides:

The case for the privilege is convincingly stated in Report No. 45, Group for the Advancement of Psychiatry 92 (1960):

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. This makes it difficult if not impossible for him to function without being able to assure his 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. The relationship may well be likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment.

Id. (quoting GAP REPORT, *supra* note 60, at 92) (internal quotation marks omitted).

Later, the Advisory Committee Report goes on to say: "While many of the statutes simply place the communications on the same basis as those between at-

rate decision. The committee that drafted the Connecticut statute believed that patients willing to express to their therapists their intentions to commit crimes were not likely to carry out their intentions; rather, they were making pleas for help.⁶⁸

torney and client, basic differences between the two relationships forbid resorting to attorney-client save as a helpful point of departure.” *Id.* at 243 (citing Goldstein & Katz, *supra* note 61, at 736; WIGMORE, *supra* note 20, § 2286 n.23, at 534–35) (internal citation omitted).

The Advisory Committee also wrote:

Subdivision (d). The exceptions differ substantially from those of the attorney-client privilege, as a result of the basic differences in the relationships. 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.

(1) The interests of both patient and public call for a departure from confidentiality in commitment proceedings. Since disclosure is authorized only when the psychotherapist determines that hospitalization is needed, control over disclosure is placed largely in the hands of a person in whom the patient has already manifested confidence. Hence damage to the relationship is unlikely.

(2) In a court ordered examination, the relationship is likely to be an arm’s length one, though not necessarily so. In any event, an exception is necessary for the effective utilization of this important and growing procedure. The exception, it will be observed, deals with a court ordered examination rather than with a court appointed psychotherapist. Also, the exception is effective only with respect to the particular purpose for which the examination is ordered. The rule thus conforms with the provisions of 18 U.S.C. § 4244 that no statement made by the accused in the course of an examination into competency to stand trial is admissible on the issue of guilt and of 42 U.S.C. § 3420 that a physician conducting an examination in a drug addiction commitment proceeding is a competent and compellable witness.

(3) By injecting his condition into litigation, the patient must be said to waive the privilege, in fairness and to avoid abuses. Similar considerations prevail after the patient’s death.

Id. at 243–44 (internal citations omitted).

68. *See id.* at 233–34 (not listing a future-crime exception). The Proposed Rules cited an article by the authors of the Connecticut statute:

It should be noted that our committee deliberately chose not to write a ‘future crime’ exception into the bill. Its members were persuaded that,

In 1973, the proposed rules were submitted to Congress for approval.⁶⁹ However, the proposed rules, particularly Article V, which dealt with privileges, got caught up in the political crossfire arising out of the Watergate scandal.⁷⁰ Strong criticism was aimed at the “broad scope of the proposed privileges for secrets of state and official information.”⁷¹ The fact that the proposed rules excluded spousal communications from the marital privileges and called for the elimination of the physician-patient privilege was also the subject of frequent attacks.⁷² Unable to resolve the controversies surrounding these proposed rules, Congress ultimately decided to eliminate all of the proposed privileges and to enact a single rule, Rule 501.⁷³ Federal Rule of Evidence 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, govern-

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 such 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.

Goldstein & Katz, *supra* note 61, at 738–39.

69. Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511, 512 (1994).

70. *Id.* at 512–14.

71. Broun, *supra* note 47, at 777.

72. *Id.* at 776.

73. Imwinkelried, *supra* note 69, at 514.

ment, State, or political subdivision thereof shall be determined in accordance with State law.⁷⁴

Following Congress's decision to enact Rule 501 in lieu of recognizing the specific privileges recommended by the Advisory Committee, the federal courts reached differing opinions in deciding whether to recognize the psychotherapist-patient privilege.⁷⁵ However, the states did not share in this disagreement; by the time the U.S. Supreme Court addressed the issue in *Jaffee*, statutes in each of the fifty states and the District of Columbia had already recognized the psychotherapist-patient privilege.⁷⁶

C. *A Therapist's Ethical Duty of Confidentiality and the California Supreme Court's Decision in Tarasoff v. Regents of the University of California*

In keeping with the long-held belief that confidentiality is essential to the therapeutic relationship,⁷⁷ the various mental health professions employ a code of ethics that imposes on its members a duty

74. FED. R. EVID. 501.

75. See *Jaffee v. Redmond*, 518 U.S. 1, 7–8 (1996).

76. *Id.* at 12 & n.11.

77. Brief for the Am. Psychoanalytic Ass'n et al. as Amici Curiae Supporting Respondents at 5, *Jaffee v. Redmond*, 518 U.S. 1 (1996) (No. 95-266), 1996 WL 2017 [hereinafter Brief for the Am. Psychoanalytic Ass'n] (citing 2 HAROLD KAPLAN & BENJAMIN SADOCK, *COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1775–77* (6th ed. 1995)). The American Psychoanalytic Association has stated that analysis cannot proceed without the formation of a rational, trusting therapeutic alliance. *Id.* The threat that a therapist might reveal a patient's most revealing secrets in a court of law would “stand as a permanent obstacle to development of the necessary degree of patient trust” and “would pose a significant, and for many patients an insurmountable, barrier to effective treatment.” *Id.* (citing ROBERT LANGS, *THE TECHNIQUE OF PSYCHOANALYTIC PSYCHOTHERAPY* 193 (1973)). Similarly, the American Psychological Association has noted that the establishment of trust between the therapist and the patient “has been deemed so essential by some that it has been argued that psychotherapy is rendered worthless in its absence.” Brief for the Am. Psychol. Ass'n as Amici Curiae Supporting Respondents at 12, *Jaffee*, 518 U.S. 1 (No. 95-266) (quoting Mark B. DeKraai & Bruce D. Sales, *Privileged Communications of Psychologists*, 13 PROF. PSYCHOL. 372, 372 (1982)).

to protect patients' confidences.⁷⁸ Even though the mental health profession consistently and zealously advocated for confidentiality as the cornerstone of successful treatment, courts and legislators began to craft exceptions to this ethical duty of confidentiality, which required the disclosure of a patient's confidential communications in certain select situations. In 1976, in the landmark case *Tarasoff v. Regents of the University of California*,⁷⁹ the California Supreme Court first articulated what has come to be known as the "*Tarasoff*

78. See, e.g., AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, Standard 4: Privacy and Confidentiality (2002), available at <http://www.apa.org/ethics/code/index.aspx>. Some relevant subsections of the American Psychological Association's Code of Conduct are:

4.01 Maintaining Confidentiality

Psychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship.

4.02 Discussing the Limits of Confidentiality

(a) Psychologists discuss with persons (including, to the extent feasible, persons who are legally incapable of giving informed consent and their legal representatives) and organizations with whom they establish a scientific or professional relationship (1) the relevant limits of confidentiality and (2) the foreseeable uses of the information generated through their psychological activities.

(b) Unless it is not feasible or is contraindicated, the discussion of confidentiality occurs at the outset of the relationship and thereafter as new circumstances may warrant.

....

4.05 Disclosures

(a) Psychologists may disclose confidential information with the appropriate consent of the organizational client, the individual client/patient, or another legally authorized person on behalf of the client/patient unless prohibited by law.

(b) Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose such as to (1) provide needed professional services; (2) obtain appropriate professional consultations; (3) protect the client/patient, psychologist, or others from harm; or (4) obtain payment for services from a client/patient, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose.

Id. (internal citations omitted).

79. 551 P.2d 334 (Cal. 1976).

duty,” which imposes a duty on therapists to protect third parties from harm caused by their patients.⁸⁰ In *Tarasoff*, Prosenjit Poddar, a patient of Dr. Lawrence Moore, a psychologist employed by the University of California at Berkley, killed Tatiana Tarasoff on October 27, 1969.⁸¹ Two months prior to the murder, Poddar had confided to Moore his intention to kill Tarasoff.⁸² Dr. Moore immediately contacted the campus police, who briefly detained Poddar but subsequently released him.⁸³ Neither the campus police nor Dr. Moore took further action.⁸⁴

The California Supreme Court held, “[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.”⁸⁵ The court stated that this duty could be accomplished in a variety of ways, including: warning the “intended victim or others likely to apprise the victim of the danger,” notifying the police, or taking “whatever other steps are reasonably necessary under the circumstances.”⁸⁶ Regarding Poddar and his therapist, the court found that a “special relationship” existed between them, which gave rise to a duty on the part of the therapist to use reasonable care to protect a threatened individual from danger emanating from a patient’s mental illness.⁸⁷ Concerns were raised in amicus briefs filed by the American Psychiatric Association and other mental health societies that this duty would be unworkable because therapists cannot accurately predict when, or if, a patient will

80. *Id.* at 343–47.

81. *Id.* at 339. The facts stated are as alleged by Tarasoff’s parents. *Id.*

82. *Id.*

83. *Id.* at 339–40.

84. *Id.* at 340.

85. *Tarasoff*, 551 P.2d at 340.

86. *Id.*

87. *Id.* at 344. The court likened the therapist-patient relationship and the interconnected duty to third persons to situations in which a doctor was found to have a duty to warn family members of a patient’s contagious disease and other cases where courts have found physicians liable to third parties for the doctor’s negligent failure to diagnose a contagious disease. *Id.*

become violent.⁸⁸ Although the court acknowledged the difficulty a therapist would have in correctly forecasting a patient's behavior, it responded that a therapist "need only exercise 'that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of (that professional specialty) under similar circumstances.'"⁸⁹

The *Tarasoff* decision prompted a swell of similar judicial decisions and statutory enactments throughout the states, such that, by the time that *Jaffee* reached the U.S. Supreme Court, a majority of states had followed *Tarasoff* in one form or another.⁹⁰ It is with this backdrop that the Supreme Court granted the petition for certiorari in *Jaffee*.

D. *The U.S. Supreme Court's Recognition of the Psychotherapist-Patient Privilege: Jaffee v. Redmond*

In *Jaffee*, seven members of the Supreme Court found that the communications between a patient and her therapist were protected from disclosure by a psychotherapist-patient privilege.⁹¹ The case involved Mary Lu Redmond, a police officer for the Village of Hoffman Estates, Illinois, who shot and killed a young man while on patrol duty.⁹² Following this incident, she received extensive therapy from a licensed clinical social worker.⁹³ Carrie Jaffee, the administrator of the decedent's estate, filed a civil rights action in federal court against Redmond and the Village of Hoffman Estates, alleging that the respondents had violated the decedent's constitutional rights by the use of excessive force.⁹⁴

88. See Brief for the Am. Psychiatric Ass'n as Amici Curiae, *Tarasoff*, 551 P.2d 334 (S.F. No. 23042).

89. *Tarasoff*, 551 P.2d at 345 (quoting *Bardessono v. Michels*, 478 P.2d 480, 484 (Cal. 1970) and *Quintal v. Laurel Grove Hosp.*, 397 P.2d 161, 172 (Cal. 1965)).

90. George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The "Tarasoff Duty" and the Jaffee Footnote*, 74 WASH. L. REV. 33, 47 (1999).

91. *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996).

92. *Id.* at 4.

93. *Id.* at 3-5.

94. *Id.* at 5.

During the pretrial discovery phase of the litigation, the petitioners sought access to the social worker's notes of her sessions with Redmond.⁹⁵ The respondents objected to the request on the ground that the information was protected by the psychotherapist-patient privilege.⁹⁶ Although the district court rejected that argument, neither Redmond nor her therapist complied with the order to disclose the contents of the notes.⁹⁷ At the close of the trial, the judge instructed the jury that the refusal to turn over the notes had no "legal justification" and, therefore, the jury could presume that the contents would have been detrimental to the defendants.⁹⁸ The jury awarded the petitioners \$545,000 in damages.⁹⁹ The Seventh Circuit, recognizing the existence of the psychotherapist-patient privilege, reversed and remanded the case.¹⁰⁰ The Supreme Court granted certiorari to decide whether "it is appropriate for federal courts to recognize a 'psychotherapist privilege' under Rule 501 of the Federal Rules of Evidence."¹⁰¹

The opinion, authored by Justice Stevens, begins by noting that Rule 501 allows federal courts to recognize new privileges by interpreting "common law principles . . . in the light of reason and experience," and that it directs the federal courts to "continue the evolutionary development of testimonial privileges."¹⁰² However, the Court recognized the general principle limiting the recognition of privileges, stating:

For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are

95. *Id.*

96. *Id.*

97. *Jaffee*, 518 U.S. at 5.

98. *Id.* at 5–6.

99. *Id.* at 6.

100. *Jaffee v. Redmond*, 51 F.3d 1346, 1358 (7th Cir. 1995), *aff'd*, 518 U.S. 1 (1996).

101. *Jaffee*, 518 U.S. at 4.

102. *Id.* at 2.

distinctly exceptional, being so many derogations from a positive general rule.¹⁰³

The Court explained that exceptions from the general rule disfavoring testimonial privileges may be justified by a public good.¹⁰⁴ Applying the utilitarian approach, the Court noted that deciding whether the psychotherapist-patient privilege was justified required that it determine whether the protection of confidential communications between a patient and her therapist advances considerably important interests, which outweigh the need for relevant evidence.¹⁰⁵

The Court found that the psychotherapist-patient privilege does advance important private and public interests.¹⁰⁶ It also found that private interests are served when the communications between a patient and her therapist are protected from involuntary disclosure because effective psychotherapy demands “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.”¹⁰⁷ As the Court explained, the “mere possibility” of disclosure of confidential communications could obstruct the development of the confidential relationship required for treatment to be successful.¹⁰⁸ Thus, the Court concluded that “[w]here there may be exceptions to this general rule . . . , there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment.”¹⁰⁹ The Court also found that the protection of confidential communications between patients and therapists serves important public interests because it facilitates the provision of mental health services.¹¹⁰ It remarked: “The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.”¹¹¹

103. *Id.* at 9 (alteration in original) (internal quotation marks omitted) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

104. *Id.*

105. *Id.* at 9–10.

106. *Id.* at 10.

107. *Jaffee*, 518 U.S. at 10.

108. *Id.*

109. *Id.* at 10 (citing Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 242 (1972) (Advisory Committee’s Notes)) (internal quotation marks omitted).

110. *Id.* at 11.

111. *Id.*

Continuing its analysis, the Court weighed the public and private interests served by the privilege against the value of the evidence expected to be produced in the absence of a privilege.¹¹² The Court suggested that little valuable evidence would be produced in the absence of a privilege because patients would be hesitant to disclose confidential information.¹¹³ It noted:

If 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. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being. This unspoken ‘evidence’ will therefore serve no greater truth-seeking function than if it had been spoken and privileged.¹¹⁴

In interpreting the “reason and experience” language of Rule 501, the Court explained that recognition of the privilege by all of the states indicated that “reason and experience” support recognition of the privilege in the federal courts.¹¹⁵ In reaching this conclusion, the Court also relied on the fact that the psychotherapist-patient privilege was included among the nine privileges recommended in the Advisory Committee’s proposed rules.¹¹⁶

The Court rejected the balancing test adopted by the Seventh Circuit in which the court balanced the evidentiary need for the information against the privacy interests at stake.¹¹⁷ The Court noted:

Making the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interests in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege An uncertain privilege, or one which purports to be

112. *Id.* at 11–12.

113. *Jaffee*, 518 U.S. at 11–12.

114. *Id.*

115. *Id.* at 12–13.

116. *Id.* at 14.

117. *Id.* at 17.

certain but results in widely varying applications by the courts, is little better than no privilege at all.¹¹⁸

Finally, although the Court refused to identify exceptions to the privilege, as that issue was not implicated by the case, Justice Stevens hinted that the privilege might not apply in certain situations.¹¹⁹ He stated in footnote 19:

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.¹²⁰

Less than two years after this decision, the Tenth Circuit was called upon to delineate the contours of this privilege and to interpret the import of this particular footnote.¹²¹

118. *Id.* at 17–18 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

119. *Jaffee*, 518 U.S. at 18.

120. *Id.* at 18 n.19. Justice Scalia dissented and was joined in part by Chief Justice Rehnquist. *See id.* at 18–36 (Scalia, J., dissenting). He criticized the majority for ignoring the “traditional judicial preference for the truth” and for “creating a privilege that is new, vast, and ill defined.” *Id.* at 19–20 (Scalia, J., dissenting). He questioned whether the privilege truly serves personal interests and whether there is a public benefit resulting from the privilege. *Id.* at 22 (Scalia, J., dissenting). He asked:

When is it, one must wonder, that the *psychotherapist* came to play such an indispensable role in the maintenance of the citizenry’s mental health? For most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends and bartenders—none of whom was awarded a privilege against testifying in court. Ask the average citizen: Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege.

Id. at 22 (Scalia, J., dissenting) (emphasis in original).

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

IV. THE DANGEROUS-PATIENT EXCEPTION TO THE
PSYCHOTHERAPIST-PATIENT PRIVILEGE: THE FEDERAL CIRCUIT
COURT DECISIONS

A. *The Tenth Circuit: United States v. Glass*

With *United States v. Glass*, the Tenth Circuit became the first federal circuit court after *Jaffee* to examine whether federal courts should recognize a dangerous-patient exception to the psychotherapist-patient privilege.¹²² *Glass* involved a defendant, Archie Monroe Glass, who was voluntarily admitted to the mental health unit at Hillcrest Hospital in February 1996.¹²³ During his stay, he told his psychotherapist, Dr. Shantharam Darbe, that he “wanted to get in the history books like Hinkley [sic] and wanted to shoot Bill Clinton and Hilary [sic].”¹²⁴ He was subsequently released from the hospital after agreeing to participate in outpatient therapy and reside with his father.¹²⁵ However, ten days after his release, a nurse discovered that he had left his father’s home.¹²⁶ She contacted local law enforcement, which, in turn, contacted Secret Service agents.¹²⁷ These agents interviewed Dr. Darbe, who reported Glass’s statements.¹²⁸ Glass was charged with knowingly and willfully threatening to kill the President in violation of 18 U.S.C. § 871(a).¹²⁹

Glass moved to exclude Dr. Darbe’s statement on the ground that it was protected from disclosure by the psychotherapist-patient pri-

122. *Id.*

123. *Id.* at 1357.

124. *Id.*

125. *Id.*

126. *Id.*

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

128. *Id.* at 1357.

129. *Id.* 18 U.S.C. § 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) (2006).

vilege as set forth in *Jaffee*.¹³⁰ The government argued that the statement was not protected by the privilege because it fell within the exception Justice Stevens set forth in footnote 19 of the *Jaffee* opinion—where “a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.”¹³¹

The court of appeals agreed with this argument by the government. It found that footnote 19 did, in fact, suggest a dangerous-patient exception and identified the necessary criteria.¹³² However, the court found that, based on the sparse record in the court below, the evidence failed to demonstrate that the required criteria were established.¹³³ It remanded the case to the district court for factual findings and a determination of whether Glass’s 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.”¹³⁴

B. *The Sixth Circuit: United States v. Hayes*

In 2000, the Sixth Circuit was confronted with the same issue as the *Glass* court in *United States v. Hayes*.¹³⁵ In *Hayes*, the defendant, Roy Lee Hayes, an employee of the U.S. Postal Service, was charged with threatening to murder a federal official in violation of 18 U.S.C. §115,¹³⁶ as a result of disclosures he made during a therapy session.¹³⁷ On February 9, 1998, Hayes sought treatment at the Veterans Administration Mountain Home Hospital in Johnson City,

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

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

132. *Id.* at 1359–60.

133. *Id.* at 1359.

134. *Id.* at 1360. There is no published record of the proceedings of the district court on remand.

135. 227 F.3d 578 (6th Cir. 2000).

136. 18 U.S.C. § 115(a)(1) provides in part:

Whoever . . . threatens to assault, kidnap, or murder, a United States official . . . with intent to impede, intimidate, or interfere with such official . . . while engaged in the performance of official duties, or with intent to retaliate against such official . . . on account of the performance of official duties, shall be punished.

18 U.S.C. § 115(a)(1) (2006).

137. *Hayes*, 227 F.3d at 579–80.

Tennessee.¹³⁸ At his first therapy session with Dr. Dianne Hansen, he expressed his desire to kill his supervisor, Veda Odle.¹³⁹ He was released from the hospital several days later but was hospitalized again in late February, during which time he repeated his desire to kill Odle.¹⁴⁰

On March 10, 1998, Hayes went to the Veterans Center in Johnson City, where he met with James Edward Van Dyke, a social worker at the center.¹⁴¹ During this session, Hayes again revealed his desire to kill Odle.¹⁴² Van Dyke claimed that he advised Hayes that he had a duty to warn Odle if he believed that Hayes posed a serious threat to her.¹⁴³ Van Dyke allowed Hayes to leave on the condition that he return for a therapy session on March 31.¹⁴⁴ During his follow-up session on March 31, Hayes “outlined in great detail” his plan to murder Odle.¹⁴⁵ Although Van Dyke once again allowed Hayes to leave, he reported these threats to Odle.¹⁴⁶ When Odle learned of Hayes’s threats, she immediately contacted the Postal Inspector, who filed a criminal complaint against Hayes.¹⁴⁷

After a grand jury issued an indictment against him, Hayes moved to dismiss the indictment and suppress the production of his therapist’s records and to exclude Van Dyke from testifying on the ground that the evidence was privileged.¹⁴⁸ The district court ordered the suppression of Van Dyke’s testimony and Hayes’s medical records and, soon thereafter, dismissed the case against him.¹⁴⁹ The Sixth Circuit affirmed.¹⁵⁰

The Sixth Circuit began its discussion by distinguishing the state law *Tarasoff* duty-to-warn requirement from the psychotherapist-

138. *Id.* at 580.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Hayes*, 227 F.3d at 580.

144. *Id.*

145. *Id.* at 580.

146. *Id.*

147. *Id.* at 580–81.

148. *Id.* at 581.

149. *Hayes*, 277 F.3d at 581.

150. *Id.* at 587.

patient privilege.¹⁵¹ It noted the lack of connection between a therapist's duty to notify a third person of a patient's threat to harm him and the psychotherapist-patient privilege, which serves to prohibit a therapist from testifying about the threat in a subsequent prosecution of the patient.¹⁵² The court explained that the "*Tarasoff* duty" serves a more immediate function than the dangerous-patient exception and further explained that the likelihood of the threat being carried out greatly diminishes once court proceedings have begun.¹⁵³ The court commented on the paradox involved in cases like *Hayes*'s: Although *Hayes* should be applauded for seeking therapy for his psychotic delusions, he, instead, would become subject to criminal prosecution when his therapists are required to testify against him.¹⁵⁴

The court went on to examine the effect that a dangerous-patient exception would have on the therapeutic relationship.¹⁵⁵ It noted that although warning a patient about a therapist's duty to protect an intended victim could have a "marginal effect" on a patient's openness in therapy, warning a patient that his statements could be used against him in criminal proceedings would "certainly chill and very likely terminate open dialogue."¹⁵⁶ The court also opined that a therapist's testimony in a criminal proceeding, which is used to convict and incarcerate a patient, fails to serve the public's interest in protecting third parties from threats posed by patients because incarceration diminishes the likelihood that a patient's mental health will improve.¹⁵⁷

In addressing the questions raised by footnote 19 of the *Jaffee* opinion, the Sixth Circuit found that Justice Stevens meant to assure that the privilege would not operate to impede a therapist's compliance with the duty to protect third persons from harm.¹⁵⁸ The court also found that Justice Stevens intended to recognize the need

151. *Id.* at 583.

152. *Id.* at 583–84.

153. *Id.* at 584.

154. *Id.*

155. *Hayes*, 227 F.3d at 584–85.

156. *Id.* at 585 (citing Gregory B. Leong et al., *The Psychotherapist as Witness for the Prosecution: The Criminalization of Tarasoff*, 8 AM. J. PSYCHIATRY 1011, 1014 (1992)).

157. *Id.*

158. *Id.*

for therapists to testify in certain court proceedings, such as those for involuntary commitment of a patient, as part of their duty to protect the patient or identifiable third persons.¹⁵⁹

Finally, the court noted that the majority of states did not have a dangerous-patient exception as part of their evidence jurisprudence and that only California had a dangerous-patient exception contained within its evidence code.¹⁶⁰ The court also relied on the fact that the proposed Federal Rules of Evidence did not provide for a dangerous-patient exception to the psychotherapist-patient privilege in reaching its conclusion that “reason and experience” demonstrated that the exception should not be part of the federal common law.¹⁶¹ It stated:

We hold, therefore, that the federal psychotherapist/patient privilege does not impede a psychotherapist’s compliance with his professional and ethical duty to protect innocent third parties, a duty which may require, among other things, disclosure to third parties or testimony at an involuntary hospitalization proceeding. Conversely, compliance with the professional duty to protect does not imply a duty to testify against a patient in criminal proceedings or in civil proceedings other than directly related to the patient’s involuntary hospitalization, and such testimony is privileged and inadmissible [sic] if a patient properly asserts the psychotherapist/patient privilege.¹⁶²

159. *Id.*

160. *Id.* at 585–86.

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

162. *Id.* In addition to arguing for a dangerous-patient exception, the government made an alternative argument that Hayes’s continued threats, which were made after Van Dyke informed him that he would need to disclose the threats to law enforcement, constituted a waiver of the testimonial privilege. *Id.* The majority, however, was unconvinced. *Id.* It noted: “It is one thing to inform a patient of the ‘duty to protect’; it is quite another to advise a patient that his ‘trusted’ confidant may one day assist in procuring his conviction and incarceration.” *Id.* The court found that since none of Hayes’s therapists had advised him that they might testify against him, he could not have made a knowing and voluntary waiver of the privilege. *Id.* The court explained that for a valid waiver to occur, “a psychotherapist must provide that patient with an explanation of the consequences of that waiver suited to the unique needs of that patient.” *Id.* at 587.

C. *The Ninth Circuit: United States v. Chase*

The Ninth Circuit was the third circuit court to address the dangerous-patient-exception issue. In *United States v. Chase*,¹⁶³ defendant Steven Chase was charged with two counts of threatening federal law enforcement officers in violation of 18 U.S.C. § 115(a)(1)(B).¹⁶⁴ These threats were communicated to Dr. Kay Dieter on several occasions despite the fact that Dieter repeatedly warned Chase that she had a duty to warn the intended victims of these threats.¹⁶⁵ Chase repeated these threats to two telephone operators at Dieter's clinic.¹⁶⁶ Dr. Dieter testified at trial, recounting the therapy sessions in which Chase had threatened the federal agents.¹⁶⁷ The district court held that the testimony was admissible.¹⁶⁸ It applied the test set forth in *Glass* and found that the psychotherapist-patient privilege did not apply.¹⁶⁹ On appeal, the Ninth

In his dissenting opinion, Judge Boggs argued that any barriers to testifying against a patient are eliminated once a therapist informs a patient that their conversations will not be kept confidential. *Id.* at 588 (Boggs, J., dissenting). Boggs also found that Hayes had waived any privilege when he continued to threaten Odle after he had been informed that his threats would be reported, stating: "I object to creating a barrier that prevents competent testimony as to the commission of a crime by a fully warned patient from coming into court." *Id.* at 589 (Boggs, J., dissenting).

163. 340 F.3d 978 (9th Cir. 2003).

164. *Id.* at 979.

165. *Id.*

166. *Id.* at 980.

167. *Id.* at 981.

168. *Id.*

169. *Chase*, 340 F.3d at 981; see *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998). The district court held that the dangerous-patient exception applied because "Dr. Dieter had determined that Defendant's threats were serious when uttered, that harm was imminent, and that the disclosure to authorities was the only means of averting the threatened harm." *Chase*, 340 F.3d at 981. The jury convicted Chase of the charges in connection with the threats made to the telephone operators, but it acquitted him of the charges relating to the threats he made during his therapy sessions. *Id.* The Ninth Circuit upheld the trial court's decision because it found that the admission of Dieter's testimony was harmless error since the jury had acquitted Chase of the charges associated with those particular threats. *Id.* at 993.

Circuit found that the district court erred in recognizing the dangerous-patient exception and in admitting Dieter's testimony.¹⁷⁰

The Ninth Circuit engaged in a lengthy analysis of the psychotherapist-patient privilege and the dangerous-patient exception to it.¹⁷¹ The court first found that even though Chase's threats themselves constituted a crime, the statements remained confidential under Oregon law.¹⁷² It noted: "Once Defendant finished uttering the threats, the charged crime was completed, and the psychiatrist was in the same position she would have occupied had her patient described a bank robbery in which he had participated a week earlier."¹⁷³

Next, the court discussed the *Jaffee* and *Hayes* decisions in depth.¹⁷⁴ Like the *Hayes* court, the Ninth Circuit drew a clear distinction between a therapist's ethical duty of confidentiality and the testimonial privilege.¹⁷⁵ It noted: "[A] state-law breach of psychotherapist-patient *confidentiality* would not necessarily lead to an abrogation of the federal *testimonial privilege*."¹⁷⁶ In a similar vein, the court interpreted *Jaffee*'s footnote 19 to be the Supreme Court's indirect endorsement of a therapist's duty to disclose threats to intended victims and the authorities.¹⁷⁷

The court provided four reasons in support of its refusal to recognize a dangerous-patient exception.¹⁷⁸ First, it found that crafting a federal exception to the psychotherapist-patient privilege would undermine the confidentiality laws of the states located in the Ninth Circuit because California was the only one of them to have recognized an evidentiary dangerous-patient exception.¹⁷⁹

Second, the Court found little connection between a therapist's "*Tarasoff* duty" to report serious threats and the testimonial privilege, noting: "There is not necessarily a connection between the

170. *Chase*, 340 F.3d at 992–93.

171. *Id.* at 982–92.

172. *Id.* at 982.

173. *Id.*

174. *Id.* at 983–85.

175. *Id.* at 984–85.

176. *Chase*, 340 F.3d at 985 (emphases in original).

177. *Id.* at 984.

178. *Id.* at 985–92.

179. *Id.* at 985–86.

goals of protection and proof.”¹⁸⁰ Furthermore, the Court counseled against conditioning a federal testimonial privilege on any state reporting laws because doing so would result in similarly situated patients facing different rules of evidence in the federal courts because of the variations among the state reporting laws.¹⁸¹

Third, the court cited the fact that Proposed Rule of Evidence 504 did not include a dangerous-patient exception.¹⁸² The court noted that because the Supreme Court recognized the privilege and favorably cited to Proposed Rule 504, “the contents of the [Proposed Rule] have considerable force and should be consulted when the psychotherapist-patient privilege is invoked.”¹⁸³

Finally, the Court addressed the public policy reasons supporting the privilege and those in support of the exception.¹⁸⁴ It concluded that the benefits derived from refusing to recognize the exception far outweighed any evidentiary gain resulting from the compelled testimony.¹⁸⁵ It noted the “deleterious effect” that abrogation of the privilege would have on the therapeutic relationship and, in doing so, quoted the *Hayes* court: “[I]f our Nation’s mental health is indeed as valuable as the Supreme Court has indicated, and we think it is, the chilling effect that would result from the recognition of a ‘dangerous patient’ exception and its logical consequences is the first reason to reject it.”¹⁸⁶

180. *Id.* at 987.

181. *Id.* at 987–88.

182. *Chase*, 340 F.3d at 989.

183. *Id.* at 990 (quoting 3 WEINSTEIN’S FEDERAL EVIDENCE § 504.02, at 504–07 1997) (footnote omitted).

184. *Id.* at 990–92.

185. *Id.* at 990.

186. *Id.* at 990–91 (quoting *United States v. Hayes*, 227 F.3d 578, 584–85) (2000)). In a concurring opinion, Judge Kleinfeld expressed that this case was precisely the type of case described in footnote 19 of the *Jaffee* opinion, and therefore, the psychotherapist-patient privilege should not apply. *Id.* at 995 (Kleinfeld, J., concurring). He reminded the majority that *Jaffee* involved only testimonial privileges, not a therapist’s duty of confidentiality and further explained that because the issue of the “*Tarasoff* duty” to warn is a question of state tort law, it is beyond the scope of *Jaffee*. *Id.* at 996 (Kleinfeld, J., concurring). Judge Kleinfeld also reminded the majority of the plain language of footnote 19, which states, “the privilege must give way.” *Id.* at 995 (Kleinfeld, J., concurring) (citing *Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996)). He stated: “There is just no getting around

D. *The Fifth Circuit: United States v. Auster*

The Fifth Circuit was confronted with the question of whether the dangerous-patient exception to the psychotherapist-patient privilege should be adopted in *United States v. Auster*.¹⁸⁷ However, the court did not decide the issue, but, rather, found that the privilege itself did not exist because the defendant had no reasonable expectation of confidentiality.¹⁸⁸

In *Auster*, defendant John Auster had, over the course of several years, made numerous threats against certain individuals during therapy sessions.¹⁸⁹ His therapists had repeatedly informed him that his threats would be reported.¹⁹⁰ More importantly, his therapists routinely reported these threats to his potential victims, and Auster was aware that his potential victims were warned of his threats.¹⁹¹ The court found that Auster did not have a reasonable expectation of confidentiality with respect to these threats and, on that basis, concluded that the threats were not privileged communications.¹⁹² Thus,

the proposition that *Jaffee* said, and meant, that the psychotherapist-patient 'privilege must give way,' referring to the privilege under Rule 501 to refuse to testify." *Id.* at 996 (Kleinfeld, J., concurring) (quoting *Jaffee*, 518 U.S. 1 at 18 n.19).

Judge Kleinfeld also expressed that a patient clearly waives the privilege when he continues to communicate threats after being warned by the therapist that his threats will be disclosed. *Id.* at 996 (Kleinfeld, J., concurring). He also disagreed with the majority's evaluation of the harm to the therapeutic relationship as the result of a therapist's disclosure. *Id.* at 997 (Kleinfeld, J., concurring). Rather, he found that the real damage to the relationship occurs at the point where the therapist initially betrays the patient's confidences. *Id.* (Kleinfeld, J., concurring). Furthermore, in cases where disclosure of a patient's threats is necessary, he expressed that:

[T]he social interest in assuring that the judge and jury know the whole truth greatly exceeds the value of preserving any remaining shreds of the confidential therapeutic relationship. The jury ought, in such circumstances, to know the truth about what Chase said. The cat being already out of the bag, trial is no occasion for stuffing it back in.

Id. at 998 (Kleinfeld, J., concurring).

187. 517 F.3d 312 (5th Cir. 2008).

188. *Id.* at 315.

189. *Id.* at 313.

190. *Id.*

191. *Id.*

192. *Id.* at 315–16.

the court was able to resolve this case on these grounds and avoid reaching a decision as to whether or not a dangerous-patient exception should be recognized.¹⁹³

193. *Auster*, 517 F.3d at 321. Auster was a retired New Orleans police officer who was receiving workers' compensation benefits. *Id.* at 313. Drs. Fred Davis and Harold Ginzburg were treating him for paranoia, anger, and depression. *Id.* He was in treatment for several years and threatened numerous people during his therapy sessions. *Id.*

The Fifth Circuit held that Auster's communications to his therapists were not privileged because Auster had no reasonable expectation of confidentiality, as his therapists had repeatedly informed him that his threats would be communicated to his targeted victims, and he was aware of numerous instances where these threats were in fact reported to the potential victims. *Id.* at 315. The Fifth Circuit was correct to reach this decision given the unusual facts of this case.

However, the Fifth Circuit did not stop there. It went on to perform a balancing test, finding that the "cost-benefit scales favor disclosure" in situations where a patient has no reasonable expectation of confidentiality. *Id.* at 319. It also concluded that the benefit to therapy from protecting these communications from disclosure at trial, while allowing the therapist to warn the threatened individuals, is *de minimus* because the "atmosphere of confidence and trust" is severely undermined once the disclosure is made. *Id.* at 318. Conversely, the court found that the increase in the admissibility of this type of probative evidence at trial serves the public interest because of the important interests in the proper administration of criminal trials. *Id.* at 318–19.

Although the court was correct to conclude that a confidential communication is one that is not intended for disclosure to third persons, disclosure of confidential communications does not, in and of itself, waive the privilege. MUELLER & KIRKPATRICK, *supra* note 12, §5.6, at 352–54 (3d ed. 2003). The Advisory Committee Notes to Proposed Rule of Evidence 512 suggest that a waiver of a privilege does not occur where a disclosure is made before the holder has a chance to claim the privilege. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 242 (1972). Additionally, many courts have found that if disclosure results from a breach of an ethical duty of confidentiality, the holder of the privilege can nonetheless prevent the subsequent use in legal proceedings. *See, e.g., United States v. Sindona*, 636 F.2d 792, 804–05 (2d Cir. 1980) (allowing the assertion of a privilege where evidence was improperly divulged by an attorney); *In re Dayco Corp. Derivative Sec. Litig.*, 102 F.R.D. 468, 470 (S.D. Ohio 1984) (upholding a privilege even though the privileged information had been published in a newspaper); *Bryson v. Tillinghast*, 749 P.2d 110, 112 (Okla. 1988) (privilege can be asserted to block the testimony of a doctor at trial even though the information was disclosed by the doctor to the police and used as the basis for an arrest).

V. THE *CHASE* AND *HAYES* CASES WERE CORRECTLY DECIDEDA. *Footnote 19 and the Legislative History of Proposed Rule 504*1. *Jaffee's Footnote 19*

The much-discussed footnote 19 in the U.S. Supreme Court's decision in *Jaffee* provides:

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 others can be averted only by means of a disclosure by the therapist.¹⁹⁴

The courts that have dealt with this footnote have not only disagreed over its meaning¹⁹⁵ but have also disagreed as to the persuasive value that should be afforded to this dicta.¹⁹⁶

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

195. In *Auster*, the Fifth Circuit noted that *Jaffee's* footnote 19 "demonstrates that the Court viewed the privilege as limited in scope." *Auster*, 517 F.3d at 315 n.5. Conversely, Judge Boggs, in his dissenting opinion in *Hayes*, stated: "[F]ootnote 19 in *Jaffee* at least indicated that the Supreme Court did not mean that the rule it had laid down was absolute, with no opening for further consideration in light of other circumstances." *United States v. Hayes*, 227 F.3d 578, 588 (6th Cir. 2000) (Boggs, J., dissenting).

196. Dictum has been defined as a "court's stating of a legal principle more broadly than is necessary to decide the case" or a "court's discussion of points or questions not raised by the record or its suggestion of rules not applicable in the case at bar." Lisa M. Durham Taylor, *Parsing Supreme Court Dicta to Adjudicate Non-Workplace Harms*, 57 DRAKE L. REV. 75, 90 (2008) (quoting BLACK'S LAW DICTIONARY 485 (8th ed. 2004)). Obiter dictum, translated as a remark by the way, has been defined as a "judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential." *Id.* at 90–91 (quoting BLACK'S LAW DICTIONARY 1102 (8th ed. 2004)). Footnote 19 is clearly dictum: It suggests a rule that was not necessary to the decision and, furthermore, identifies a situation (when a patient's threats present a serious threat of harm to others) that was not present in the case before the Court. *Jaffee* was a § 1983 action in which the petitioners sought damages for wrongful death resulting from a shooting incident involving Officer Redmond, and the petitioners sought to compel the production of Redmond's therapist's notes

The legal community has struggled to formulate a workable definition of dicta and to fashion a consistent approach to determining the appropriate level of authority it should be afforded.¹⁹⁷ Legal theorists have long engaged in the dictum-holding debate.¹⁹⁸ Early commentators such as Karl Llewellyn advocated for a formalistic approach to differentiating dicta from case holdings.¹⁹⁹ Professor Llewellyn proposed four rules that he believed form the foundation of American case law procedure:

1. The court must decide the legal dispute that is before it.
2. The court can decide nothing but the legal dispute before it.
3. All cases must be decided based on a rule of law of general applicability (in the relevant state).
4. Everything, but everything, said in an opinion is to be read and understood only in relation to the actual case before the court.²⁰⁰

Accordingly, Professor Llewellyn believed that the holding of a case must be a narrow proposition and anything that is not part of the holding is dicta.²⁰¹

from their therapy sessions following the incident. *See supra* notes 91–94 and accompanying text.

197. *See generally* Taylor, *supra* note 196, at 77.

198. *See id.* at 97–100.

199. *Id.* at 97 (citing KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 14–15 (Paul Gewirtz ed., Michael Ansaldi trans., 1989)).

200. *Id.* (quoting LLEWELLYN, *supra* note 199, at 14–15).

201. LLEWELLYN, *supra* note 199, at 14. If dicta has no precedential value, then why do judges include it in opinions? Some theorize that statements a judge makes while fully aware that they have no precedential value are made with some hope that they will be persuasive. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2027 n.109 (1994) (“A lower court is . . . always free to treat a higher court’s dicta as persuasive authority.”). These types of statements have been said to be the classic forms of dicta. *Id.* at 2000. For an example of this type of dicta, see Justice Scalia’s remarks in *California v. Hodari D.*, 499 U.S. 621, 622–48 (1991). Others have speculated as to why the Supreme Court would include dicta in its opinions. One commentator has suggested that the Court might want to indicate how it would likely resolve a particular question in the future and,

Contemporary dicta doctrine is unsettled and far from clear. Courts have not settled on a cohesive means of determining the persuasive value of dicta;²⁰² judicial opinions vary widely with some courts going so far as to treat some dicta as binding authority.²⁰³ However, the value that courts have assigned to dicta does appear to be directly related to the depth of discussion and analysis the dicta initially received.²⁰⁴ Professor Lisa Durham Taylor has described the various gradations of dicta as a spectrum “with the left end comprised of the court’s offhand remarks and side comments, referred to by some as obiter dicta, and the right end occupied by the court’s reasoned conclusions about the law, often labeled judicial dicta or considered dicta.”²⁰⁵ The First Circuit has noted: “[I]n evaluating dicta, [m]uch depends on the character of the dictum. Mere obiter may be entitled to little weight, while a carefully considered statement . . . , though technically dictum, must carry great weight, and may even . . . be regarded as conclusive.”²⁰⁶ The Supreme Court appears to agree. It has noted that considered dicta, contrasted with obiter dicta, has “capacity, though it be less than a decision, to tilt the balanced mind toward submission and agreement.”²⁰⁷ Additionally, it has been said that obiter dicta or “passing statements unsupported by any authority or even extended discussion are entitled to

since the Court is only able to decide a small fraction of the cases brought before it, providing the lower courts with this information can guide them in reaching the decision that the Court itself might reach. Bradley Scott Shannon, *Overruled by Implication*, 33 SEATTLE U. L. REV 151, 173–74 (2009).

202. See Taylor, *supra* note 196, at 106–07.

203. See *id.* at 107.

204. See *id.* at 106–07.

205. *Id.* at 93–94 (footnotes omitted).

206. *Id.* at 93 n.79 (citing *McCoy v. Mass. Inst. of Tech.*, 950 F.3d 13, 19 (1st Cir. 1991) (quoting CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* § 58 (4th ed. 1983)).

207. *Hawks v. Hamill*, 288 U.S. 52, 59 (1933). Justice Souter has commented: “Sound judicial decisionmaking requires ‘both a vigorous prosecution and a vigorous defense’ of the issues in dispute, and a . . . rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572 (1993) (Souter, J., concurring in part and concurring in the judgment) (internal citation omitted).

nothing but disregard.”²⁰⁸ One scholar has gone so far as to suggest that these types of deliberate asides may violate the case or controversy requirement of Article III of the U.S. Constitution, which prohibits federal courts from issuing advisory opinions.²⁰⁹

This confusion surrounding the proper treatment of dicta is illustrated in the federal courts’ opinions that have addressed footnote 19 of the *Jaffee* opinion. The Tenth Circuit, in *Glass*, treated this dicta as decisive when it crafted a dangerous-patient exception to the psychotherapist-patient privilege based solely upon the language contained within the footnote, without ever addressing the question of dicta.²¹⁰ Judge Kleinfeld, concurring in *Chase*, opined that the Supreme Court spoke to the issue of the dangerous-patient exception in footnote 19 and, based on this interpretation, concluded that the dangerous-patient exception was applicable.²¹¹ In doing so, he noted:

We ordinarily treat Supreme Court dicta with ‘due deference’ even though they are not binding. Because we are to interpret those decisions ‘in the light of reason and experience,’ the Supreme Court’s dictum should speak even more persuasively than usual, since, dictum or not, what the Court says reflects its ‘reason and experience.’²¹²

208. Shannon, *supra* note 201, at 174.

209. Dorf, *supra* note 201, at 2006, 2009.

210. *United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998). The Tenth Circuit held that the psychotherapist-patient privilege would not apply to threats that are “serious when . . . uttered and . . . disclosure [is] the only means of averting harm.” *Id.* at 1360.

211. *United States v. Chase*, 340 F.3d 978, 995 (9th Cir. 2003) (Kleinfeld, J., concurring).

212. *Id.* at 995 (Kleinfeld, J., concurring) (quoting *United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996)). Referencing footnote 19, Judge Kleinfeld concluded that the “privilege of a psychotherapist to refuse to testify in federal court, or her patient’s privilege to bar her testimony, does not exist ‘if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.’ That is, when the serious threat occurred that could be averted only by disclosure, the privilege died.” *Id.* at 995 (Kleinfeld, J., concurring) (quoting *Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996)). However, it is interesting that in another part of the opinion he remarks that the footnote “has the look of a footnote

More recently, the District of Maine, in adopting the *Glass* test, concluded that the Tenth Circuit's rationale was "persuasive . . . particularly given the Supreme Court's footnote in *Jaffee* suggesting that the privilege must give way to a serious threat of harm."²¹³

It is clear that the courts that have relied upon this footnote in reaching their decisions, particularly the Tenth Circuit, which crafted a dangerous-patient exception based entirely on this footnote, have erred. They have assigned a significant level of persuasive value to this footnote, which is nothing more than an offhand remark or side comment. This footnote is wholly unsupported by any authority and void of any reasoned analysis or conclusions about the law.²¹⁴ As such, it is the classic form of obiter dicta, and courts interpreting the *Jaffee* opinion should give it little weight or, better still, simply disregard these comments.

2. *The Legislative History of Proposed Federal Rule of Evidence 504*

In addition to the disagreement surrounding the persuasive value of footnote 19, the federal circuit courts have also disagreed as to the meaning of the footnote. The Tenth Circuit, in *Glass*, along with the dissenting judges in *Hayes* and Judge Kleinfeld, concurring in *Chase*, believed that the Supreme Court suggested it would be appropriate to recognize a dangerous-patient exception to the psychotherapist-patient privilege in situations where a serious threat of harm can only be prevented by a therapist's disclosure.²¹⁵ Conversely, the *Hayes* majority understood the footnote to recognize the need for therapists to testify in certain court proceedings, such as those for involuntary commitment proceedings, and found that Justice Stevens meant to assure that the privilege would not impede upon a therapist's compliance with the "*Tarasoff* duty."²¹⁶ Likewise, the *Chase*

added to avert a risk that someone in the majority perceived were the opinion published without it." *Id.* at 996 (Kleinfeld, J., concurring).

213. *United States v. Hardy*, 640 F. Supp. 2d 75, 80 (D. Me. 2009).

214. This issue was neither addressed in the parties' briefs nor was raised during oral argument.

215. *Chase*, 340 F.3d at 996 (Kleinfeld, J., concurring); *United States v. Hayes*, 227 F.3d 578, 588 (6th Cir. 2000) (Boggs, J., dissenting); *Glass*, 133 F.3d at 1360.

216. *Hayes*, 227 F.3d at 585–86.

majority interpreted *Jaffee*'s footnote 19 to be the Supreme Court's indirect endorsement of a therapist's duty to disclose threats to intended victims and found that the Court intended to extend the state "*Tarasoff* duty" to psychotherapist-patient relationships to which federal law would apply, such as psychological treatment by federally employed therapists at overseas government hospitals.²¹⁷

In a strong concurring opinion in *Chase*, Judge Kleinfeld criticized the majority for its position.²¹⁸ He chastised the majority for ignoring the Court's use of the word privilege, stating:

The words 'the privilege must give way' [within the footnote] do not mean that the right to out-of-court confidentiality must give way There is only one way to read the plain English of the *Jaffee* footnote, and that is that the privilege of a psychotherapist to refuse to testify in federal court, or her patient's privilege to bar her testimony, does not exist 'if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.'²¹⁹

However, Judge Kleinfeld's conclusion is flawed. The footnote is not unambiguous, as he suggests, because there is inconsistency within the language of the footnote itself. Although the Court used the word "privilege" ("we do not doubt that there are situations in which the *privilege* must give way"), it also chose the word "disclosure," rather than "testimony," in the latter part of its sentence ("if a serious threat of harm to the patient or others can be averted only by means of a *disclosure* by the therapist").²²⁰

To "disclose" means "[t]o bring into view by uncovering; to expose; to make known; . . . to free from secrecy."²²¹ "Testimony," on the other hand, is defined as "[e]vidence given by a competent witness under oath or affirmation; . . . [a] particular kind of evidence

217. *Chase*, 340 F.3d at 984 & 984 n.2.

218. *Id.* at 993–98 (Kleinfeld, J., concurring).

219. *Id.* at 995 (Kleinfeld, J., concurring). Furthermore, Judge Kleinfeld reminded the majority that *Jaffee* dealt only with the testimonial privilege, not with the question of the therapist's authority to disclose threats to potential victims, which is a matter of state law and, therefore, outside the scope of the *Jaffee* opinion. *Id.* at 996 (Kleinfeld, J., concurring).

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

221. BLACK'S LAW DICTIONARY 417 (5th ed. 1979).

that comes to tribunal through live witnesses speaking under oath or affirmation in presence of tribunal, judicial, or quasi-judicial.”²²² If the Court intended to refer only to the testimonial privilege, as suggested by Judge Kleinfeld, then it should have used the word “testimony” rather than “disclosure,” and the footnote would have read: “[W]e do not doubt that there are situations in which the *privilege* must give way . . . if a serious threat of harm to the patient or others can be averted only by means of the *testimony* . . . by the therapist.” On the other hand, it is possible, as the *Chase* majority noted, that the Court intended to endorse a therapist’s duty to divulge threats to intended victims.²²³ Hence, the Court’s use of the word “disclosure” in the latter part of the sentence should be interpreted to mean that, in attempting to protect innocent victims and comply with the “*Tarasoff* duty,” a therapist would, in fact, reveal or “disclose” a patient’s threat to the authorities or the potential victim.

In addition to the fact that footnote 19 is ambiguous, interpreting it as endorsing the use of the dangerous-patient exception in a wide variety of situations is wrong because this interpretation renders the footnote inconsistent with the rest of the *Jaffee* opinion. One commentator has argued that “it is nonsensical to interpret a footnote in dictum to stand for the proposition that a ‘dangerous patient exception’ should be recognized when it goes against the very core rationale for the privilege.”²²⁴ Additionally, it would be irrational for the *Jaffee* Court to have endorsed a dangerous-patient exception given the fact that it specifically noted its agreement with the Judicial Conference Advisory Committee’s Proposed Rule 504²²⁵ that purposefully rejected the exception.²²⁶

222. *Id.* at 1324.

223. *Chase*, 340 F.3d at 984.

224. Paul S. Appelbaum, *Privilege in the Federal Courts: Should There Be a “Dangerous Patient Exception”?*, 59 L. & PSYCHIATRY 714, 715 (2008) (quoting Anthony Parsio, Note, *The Psychotherapist-Patient Privilege: The Perils of Recognizing a “Dangerous-Patient Exception” in Criminal Trials*, 41 NEW ENG. L. REV. 623, 651 (2007)).

225. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 241 (1972).

226. *Jaffee v. Redmond*, 518 U.S. 1, 14–15 (1996). In fact, the Court has treated the Proposed Rules as instructive in other cases. See, e.g., *United States v. Gillock*, 445 U.S. 360, 367–68 (1980).

It is reasonable to believe, given the Court's favorable recognition of Proposed Rule 504, that the Court intended to endorse one of the exceptions that was specifically contained in Proposed Rule 504, specifically the exception for involuntary hospitalization proceedings.²²⁷ This interpretation is further supported by the fact that the "serious threat of harm to the patient or others" language used by Justice Stevens in footnote 19 is comparable to the "[d]angerousness to self or others" language that is incorporated in various forms into the involuntary commitment statutes of nearly all jurisdictions and is the most commonly used statutory element for involuntary inpatient commitment.²²⁸

Those that disagree with this conclusion have suggested that the Court could not have intended to limit the dangerous-patient exception to involuntary commitment proceedings since mental health commitment proceedings are governed by state law and are held only in state courts.²²⁹ However, this position fails to consider the fact that involuntary mental health commitment proceedings involving Native American Indians are frequently conducted in tribal courts,²³⁰ many of which have adopted the federal rules of evidence.²³¹ Fur-

227. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 241 (1972). The exception 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." *Id.*

228. JOHN PARRY & ERIC Y. DROGIN, CIVIL LAW HANDBOOK ON PSYCHIATRIC AND PSYCHOLOGICAL EVIDENCE AND TESTIMONY 145 (2001).

229. See Appelbaum, *supra* note 224, at 715 (arguing that because state law regulates commitment hearings, the Supreme Court could not have meant to regulate them).

230. See Jay H. Shore et al., *Telepsychiatry with Rural American Indians: Issues in Civil Commitments*, 26 BEHAV. SCI. & L. 287, 294–95 (2009). Public Law No. 83-280 transferred "limited federal jurisdiction over Indian reservations to the states of Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin." *Id.* at 293. Other states, including Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah and Washington, subsequently passed legislation asserting jurisdiction in accordance with Public Law No. 280. *Id.* In these states, civil commitment proceedings may be brought in either state court or tribal court. *Id.* at 293–94. In those states without jurisdiction under Public Law No. 280, proceedings must be brought in tribal court. *Id.*

231. See, e.g., *In re* Amendment and Adoption of Supreme Court Rules and Procedures, Supreme Court of the Cherokee Nation, Appendix, Rule 103, at 21 (pro-

ther, since many states have fashioned their rules of evidence based on the federal rules, the decisions of federal courts that have interpreted these rules carry significant persuasive value in those states. Therefore, in those tribal courts that have adopted the federal rules and in the states that have adopted a privilege rule of evidence fashioned after Federal Rule 501, federal court decisions interpreting this rule, particularly the decisions of the U.S. Supreme Court, are highly persuasive authority.²³²

B. *The Sixth and Ninth Circuits Employed the Correct Legal Analysis*

Two years after the Supreme Court handed down its decision in *Jaffee*, it granted certiorari in *Swidler & Berlin v. United States*.²³³ In this case, the Court was asked to delineate the contours of the attorney-client privilege; specifically, it was asked to determine whether the attorney-client privilege survived after the death of a client.²³⁴ In deciding this issue, the Court employed the utilitarian approach, as it had recently done in *Jaffee*.²³⁵ It weighed the interests served by the privilege against the public's interest in the proper administration of the judicial process and held that the privilege survived the death of the client.²³⁶

In this case, the decedent, Vincent Foster, was the Deputy White House Counsel under President Bill Clinton.²³⁷ He met with James Hamilton, a partner at the firm of Swidler & Berlin, on a Sunday morning in the summer of 1993.²³⁸ Foster met with Hamilton in or-

viding that “[a]ll proceedings hereunder shall, so far as practicable, be conducted in accordance with the Federal Rules of Evidence and Civil Procedure unless preempted within these rules”).

232. *See, e.g.*, *People v. Paasche*, 525 N.W.2d 914, 917 (Mich. Ct. App. 1994) (noting agreement with the Supreme Court's reasoning in *United States v. Zolin*, 491 U.S. 554 (1989), a case involving the crime-fraud exception to the attorney-client privilege).

233. 524 U.S. 399, 403 (1998).

234. *Id.* at 402–03.

235. *Id.* at 409.

236. *Id.* at 410–11.

237. *Id.* at 401.

238. *Id.* at 401–02.

der to obtain legal representation for matters involving congressional and other investigations into the firings of employees from the White House Travel Office.²³⁹ Hamilton took three pages of handwritten notes during this meeting; nine days later, Foster committed suicide.²⁴⁰ In 1995, special prosecutor Kenneth Starr began an investigation into whether certain people had lied or obstructed justice in the earlier investigations.²⁴¹ In December 1995, at Starr's request, a federal grand jury issued subpoenas to Hamilton and Swidler & Berlin for Hamilton's handwritten notes of his earlier meeting with Foster.²⁴² The petitioners objected on the grounds of attorney-client privilege and the work-product doctrine.²⁴³

In determining the scope of the attorney-client privilege, the Supreme Court compared the injury to the attorney-client relationship caused by the disclosure of client communications to the benefit to be gained from the correct disposal of litigation.²⁴⁴ Justice Rehnquist, writing for the majority, noted that the attorney-client privilege is intended to "encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'"²⁴⁵ Next, the Court cited *Jaffee* for the proposition that the loss of evidence resulting from the privilege would be minimal since, without the privilege, it was unlikely that the patient would have made the

239. *Swidler & Berlin*, 524 U.S. at 401–02.

240. *Id.*

241. Fred C. Zacharias, *The Fallacy That Attorney-Client Privilege Has Been Eroded: Ramifications and Lessons for the Bar*, 1999 PROF. LAW. 39, 47 (1999).

242. *Swidler & Berlin*, 524 U.S. at 402.

243. *Id.* Because the Court found that the attorney-client privilege survived the death of the client, it did not decide the work-product issue. *Id.* at 403 n.1. The D.C. Circuit had ruled that the privilege was not absolute. *In re Sealed Case*, 124 F.3d 230, 234 (D.C. Cir. 1997). It applied a balancing test and opined that the risk of posthumous disclosure, limited to the criminal context, would have a minimal chilling effect on client communications, whereas the cost of protecting these communications after death was significant. *Id.* at 233. The court also found that the uncertainty introduced by the balancing test was minor, given the fact that several other exceptions to the attorney-client privilege exist. *Id.* at 234. It held that there is a posthumous exception to the privilege for communications that are of substantial importance in a criminal case. *Id.*

244. *Swidler & Berlin*, 524 U.S. at 403–10.

245. *Id.* at 403 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

communication.²⁴⁶ The Court found this reasoning to apply with equal force to the attorney-client relationship and concluded that, absent the privilege's posthumous application, it was unlikely that the client would have made the disclosures to his attorney.²⁴⁷

Prosecutor Starr argued that an exception to the privilege should be allowed in criminal cases.²⁴⁸ He suggested that this exception would have minimal impact on the privilege if the disclosure of confidential attorney-client communications were restricted to information that would be of "substantial importance to a particular criminal case."²⁴⁹ The Court rejected this argument, noting that there was no case authority for the proposition that a privilege should apply differently in civil and criminal cases.²⁵⁰ And, just as it had in *Jaffee*, the Court rejected the use of a case-by-case balancing test, commenting: "Balancing *ex post* the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege."²⁵¹

246. *Id.* at 408 (citing *Jaffee v. Redmond*, 518 U.S. 1, 12 (1996)).

247. *Id.*

248. *Id.* at 408–10.

249. *Id.* at 408.

250. *Swidler & Berlin*, 524 U.S. at 408–09.

251. *Id.* at 409. Finally, even though Justice Rehnquist expressed some concern over the lack of empirical evidence to support the contention that a client will be less likely to share confidences with his attorney if he knows that the information will not remain privileged after his death, the Court nonetheless held that the attorney-client privilege survived the death of a client. *Id.* at 407. The Court stated:

[W]e think there are weighty reasons that counsel in favor of posthumous application. Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communication may be as feared as disclosure during the client's lifetime.

Id.

In deciding whether to recognize a dangerous-patient exception to the psychotherapist-patient privilege, both the Sixth and Ninth Circuits followed the utilitarian approach that the Court employed in *Jaffee* and *Swidler & Berlin*.²⁵² As the Supreme Court did in *Swidler & Berlin*, the Sixth and Ninth Circuits examined the public and private interests at stake in protecting a patient's confidential communications and compared these interests to the benefits to be gained from the correct disposal of litigation.²⁵³ The Sixth Circuit noted that informing a patient that his statements could be used against him in criminal proceedings would "certainly chill and very likely terminate open dialogue."²⁵⁴ Likewise, the Ninth Circuit concluded that the benefits accruing from protecting the privilege far outweigh any evidentiary gain resulting from the compelled testimony.²⁵⁵ Quoting the Sixth Circuit, it stated: "[I]f our Nation's mental health is indeed as valuable as the Supreme Court has indicated, and we think it is, the chilling effect that would result from the recognition of a 'dangerous patient' exception and its logical consequences is the first reason to reject it."²⁵⁶

In contrast, the test adopted by the Tenth Circuit in *Glass* was a case-by-case balancing test—the approach that was specifically rejected by the Supreme Court in both *Jaffee* and *Swidler & Berlin*.²⁵⁷ The *Glass* test allows the admission of confidential patient communications at trial if the court determines that both the threat was serious when made and that harm can only be averted by disclosure.²⁵⁸ The second prong of this test requires the court to evaluate and weigh the evidence on a case-by-case basis and also requires that the court find that the therapist's testimony to be of considerable importance to the case.²⁵⁹ This is the identical method proposed by Prose-

252. See *United States v. Chase*, 340 F.3d 978, 992–93 (9th Cir. 2003); *United States v. Hayes*, 227 F.3d 578, 585–86 (6th Cir. 2000).

253. See *Chase*, 340 F.3d at 990–91; *Hayes*, 227 F.3d at 584–85.

254. *Hayes*, 227 F.3d at 584–85.

255. *Chase*, 340 F.3d at 990.

256. *Id.* at 990–91 (quoting *Hayes*, 227 F.3d at 584–85).

257. *United States v. Glass*, 133 F.3d 1356, 1359 (10th Cir. 1998); see *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998) (rejecting a balancing test); *Jaffee v. Redmond*, 518 U.S. 1, 17–18 (1996) (rejecting a balancing test).

258. *Glass*, 133 F.3d at 1359–60.

259. *Id.*

ctor Starr in *Swidler & Berlin*, which was rejected by the Supreme Court on the ground that balancing “the importance of the information [in a particular case] against client interests . . . introduces substantial uncertainty into the privilege’s application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege.”²⁶⁰

Furthermore, the Sixth and Ninth Circuits were correct in refusing to draw a distinction between criminal and civil cases.²⁶¹ The Supreme Court made it clear in *Swidler & Berlin* that there was no authority for treating privileges one way in criminal cases and another way in civil cases.²⁶² Although *Swidler & Berlin* involved the attorney-client privilege, whereas the dangerous-patient exception implicates the psychotherapist-patient privilege, this is a distinction without a difference. These privileges should be afforded the same treatment because similar policy reasons justify them. Confidentiality is necessary in both of these relationships to encourage full and frank communication between attorneys and clients as well as between therapists and their patients in order to promote broader public interests in the administration of justice and the mental health of this country’s citizenry.

C. *Federal Rule of Evidence 501: The Reason and Experience Requirement*

1. *The States’ Experience*

Federal Rule of Evidence 501 provides in relevant part:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules pre-

260. *Swidler & Berlin*, 524 U.S. at 409.

261. Concurring in *Chase*, Judge Kleinfeld would have required the therapist to testify to threats made by the patient, stating: “As a percipient witness to a felony, she ought to be required to testify to what she perceived.” *Chase*, 340 F.3d at 994. Likewise, the dissent in *Hayes* seemed to find the fact that the case was a criminal prosecution to be significant, noting: “[I]t is important to recognize that, if the proffered evidence is believed, what occurred here was a crime.” *Hayes*, 227 F.3d at 588. This distinction is also implicit in *Glass*, which was a criminal case. See *Glass*, 133 F.3d at 1356.

262. *Swidler & Berlin*, 524 U.S. at 408–09.

scribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States *in the light of reason and experience*.²⁶³

In determining that “reason and experience”²⁶⁴ supported the recognition of the psychotherapist-patient privilege, the *Jaffee* Court took note of the fact that the privilege was recognized in each of the fifty states and the District of Columbia.²⁶⁵ However, because there is considerable discrepancy among the states with respect to a therapist’s duty to third parties and little agreement regarding the dangerous-patient exception to the testimonial privilege, the experience of the states does not provide a basis for recognizing a dangerous-patient exception to the psychotherapist-patient privilege.

It is important at this point to note the distinction between the “*Tarasoff* duty” to protect and the dangerous-patient exception to the psychotherapist-patient privilege. A therapist’s “*Tarasoff* duty” to warn, or otherwise protect third parties from potential harm, is an exception to a therapist’s ethical duty of confidentiality and is enforced independently of the evidentiary rules of privilege.²⁶⁶ Privileges, on the other hand, protect only against compelled testimony in legal proceedings.²⁶⁷ In some ways, ethical rules may provide more protection than legal privileges because the duty of confidentiality is not limited to judicial settings and applies to matters not covered by privileges, such as non-confidential communications and secrets that are not communications. Many mental health professionals believe that absolute confidentiality can only be assured if an evidentiary privilege applies alongside a professional duty of confidentiality, because the fact that there is a professional ethical requirement of confidentiality does not mean that an evidentiary privilege exists and *visa versa*.²⁶⁸

263. FED. R. EVID. 501 (emphasis added).

264. *Id.*

265. *Jaffee v. Redmond*, 518 U.S. 1, 6 (1996).

266. MUELLER & KIRKPATRICK, *supra* note 12, § 5.2.

267. *Id.*

268. In a jurisdiction that does not recognize a privilege, a person called as a witness can be compelled to disclose confidential information. In fact, most ethical

Most states recognize an exception to the ethical duty of confidentiality in one form or another.²⁶⁹ There are, however, considerable variations among the states. The majority of states limit a therapist's duty to protect potential victims to situations where the patient has made a serious threat to an identifiable individual.²⁷⁰ In approximately half of the states, a therapist's duty to warn of potential danger is mandatory; in others this duty is merely permissive.²⁷¹ A few states impose no such duty at all.²⁷²

There is also disagreement among the states regarding the specific types of protective measures that a therapist is required to take. The disarray among the states with respect to a therapist's duty to protect potential victims has been described as "virtually unprecedented for any widespread legal doctrine."²⁷³ Some states impose on a therapist only a duty to warn, whereas others require a therapist to warn and take additional steps to protect the potential victim.²⁷⁴ For example, a Colorado statute provides:

When there is a duty to warn and protect under the circumstances specified above, the duty shall be discharged by the mental health care provider making reasonable and timely efforts to notify any person or persons specifically threatened, as well as notifying an appropriate law enforcement agency or by taking other appropriate action including, but not limited to, hospitalizing the patient.²⁷⁵

standards provide an exception to the confidentiality requirement when the disclosure is required by law. See AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, Standard 4: Privacy and Confidentiality (2002), available at <http://www.apa.org/ethics/code/index.aspx>.

269. See Elisia Klinka, Note, *It's Been a Privilege: Advising Patients of the Tarasoff Duty and Its Legal Consequences for the Federal Psychotherapist-Patient Privilege*, 78 FORDHAM L. REV. 863, 885 (2009).

270. *Id.*

271. *Id.* at 885–86.

272. *Id.* at 886; see, e.g., *Thapar v. Zezulka*, 994 S.W.2d 635, 639 (Tex. 1999).

273. Klinka, *supra* note 269, at 886 (quoting Paul B. Herbert & Kathryn A. Young, *Tarasoff at Twenty-Five*, 30 J. AM. ACAD. PSYCHIATRY L. 275, 280 (2002)).

274. PARRY & DROGIN, *supra* note 228, at 160.

275. COLO. REV. STAT. ANN. § 13-21-117 (West 2005 & Supp. 2010).

The duty to protect is the majority rule, whereas the duty to warn is the minority rule.²⁷⁶ Additionally, a few states, like California, have created safe harbors for therapists whose patients have threatened others during therapy sessions.²⁷⁷ In California, a therapist's statutory duty is fulfilled when the psychotherapist "mak[es] reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency."²⁷⁸

There is similar disarray among the states with respect to the recognition of the dangerous-patient exception to the testimonial privilege.²⁷⁹ Much of this confusion stems from the legislatures' and the courts' tendency to conflate the ethical duty of confidentiality with the testimonial privilege. This confusion is also the result of ambiguous statutes, which fail to make this distinction clear. Although California is the only state that includes a dangerous-patient exception to the psychotherapist-patient privilege as part of its evidence code,²⁸⁰ a few other jurisdictions have statutes that clearly appear to create an exception to the testimonial privilege.²⁸¹ For example, a Wyoming statute entitled "Privileged communication" begins with the language "[i]n judicial proceedings" and prohibits a therapist from disclosing confidential information except in a series

276. PARRY & DROGIN, *supra* note 228, at 160.

277. CAL. CIV. CODE § 43.92(b) (West 2007).

278. *Id.*

279. Some states apply a balancing test in determining whether to recognize the privilege and allow disclosure of confidential communications if the information is "sufficiently relevant to the proceeding . . . to outweigh the importance of maintaining confidentiality . . ." Harris, *supra* note 90, at 41-42 & 42 n.45 (quoting W. VA. CODE ANN. § 27-3-1(b)(3) (LexisNexis 2008)).

280. *Id.* at 43. The statute 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.

CAL. EVID. CODE § 1024 (West 2009).

281. Harris, *supra* note 90, at 42. Florida also appears to recognize this exception. See *Guerrier v. Florida*, 811 So. 2d 852, 856 (Fla. Dist. Ct. App. 2002) ("[T]he Legislature intended to allow admission of the psychiatrist's testimony in a subsequent prosecution of the dangerous patient for offenses committed against the victim.").

of enumerated situations, including situations where “an immediate threat of physical violence against a readily identifiable victim is disclosed to the psychologist.”²⁸² Likewise, Illinois provides for the abrogation of the psychotherapist-patient privilege “in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide,” mental competency proceedings, malpractice actions, and cases involving the validity of a will.²⁸³ Ohio allows “testimony” when a patient’s communications to his therapist indicate a “clear and present danger to the client or other persons.”²⁸⁴

282. WYO. STAT. ANN. § 33-27-123 (2009).

283. 225 ILL. COMP. STAT. ANN. 15/5 (West 2007).

284. Ohio’s statute specifically references testimony and states: “The following persons shall not testify in certain respects . . . unless . . . the communication . . . indicates clear and present danger to the client or other persons.” OHIO REV. CODE ANN. § 2317.02(G)(1) (LexisNexis 2010 & Supp. 2011). Other states appear to draw the distinction between the disclosure of confidential communications and testimony. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 233, § 20B (West 2000 & Supp. 2011). The Massachusetts statute provides:

[I]n any court proceeding . . . a patient shall have the privilege of refusing to disclose, and of preventing a witness from disclosing, any communication, wherever made, between said patient and a psychotherapist . . . [except] [i]f a psychotherapist, in the course of his diagnosis or treatment of the patient, determines that the patient is in need to treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the patient against himself or another person and on the basis of such determination discloses such communication either for the purpose of placing or retaining the patient in such hospital . . . or placing the patient under arrest or under the supervision of law enforcement authorities.

Id.; *see also* TENN. CODE ANN. § 24-1-207(a) (2000) (“Neither the psychiatrist nor any member of the staff may *testify* or be compelled to *testify* as to such [confidential] communications or otherwise reveal them in such proceedings without consent of the patient . . .”) (emphasis added). The Tennessee statute allows for three exceptions. *Id.* These exceptions are mental health proceedings, court ordered examinations, and where the patient has placed his emotional condition at issue in a case. *See id.* § 24-1-207(a)(1)–(3). However, the statute also provides that “[p]rivileged communications . . . may be *disclosed* without consent if . . . [a] patient has made an actual threat to physically harm an identifiable victim or victims . . .” *Id.* § 24-1-207(c)(1)(A). It also provides immunity for mental health professions in certain circumstances: “No civil or criminal action shall be instituted, nor shall liability be imposed due to the disclosure of otherwise confidential

Other states have statutes that address situations involving dangerous patients; however, it is not clear whether the required disclosure is intended to be an exception to the therapist's ethical duty of confidentiality or an exception to the testimonial privilege. For example, a West Virginia statute provides: "Confidential information shall not be disclosed, except . . . [t]o protect against a clear and substantial danger of imminent injury by a patient . . . to himself or others."²⁸⁵ A South Carolina statute entitled "Confidences of patients of mental illness or emotional conditions" allows a therapist to "reveal . . . the intention of the patient to commit a crime or harm himself and the information necessary to prevent the crime or harm."²⁸⁶

Connecticut's statutory scheme exemplifies the confusion surrounding the distinction between a therapist's ethical duty of confidentiality and the testimonial privilege. One Connecticut statute is entitled "Disclosure of privileged communications between marital and family therapist and person consulting such therapist prohibited. Exceptions."²⁸⁷ It allows disclosure of "communications . . . [w]here a marital and family therapist believes in good faith that the failure to disclose such communications presents a clear and present danger to the health or safety of any individual."²⁸⁸ Even though the title of the statute contains the word "privilege," which would lead some to conclude that the therapist could be compelled to testify against a patient, the Supreme Court of Connecticut recently held just the op-

communications . . . pursuant to this section." *Id.* § 24-1-207(c)(2). This statute, therefore, appears to allow a therapist to reveal a patient's threats to the authorities and potential victims and to provide immunity from liability as a result of the disclosure, while it also appears to prohibit a therapist from testifying about these threats in criminal proceedings.

285. W. VA. CODE ANN. § 27-3-1(b)(5) (LexisNexis 2008); *see also* MICH. COMP. LAWS SERV. § 333.18237 (LexisNexis 2008).

286. S.C. CODE ANN. § 19-11-95(C)(3) (Supp. 2010). This statute is included under Title 19 of the South Carolina statutes that is entitled "Evidence." *Id.* However, there is no mention of judicial proceedings or testimony in the section whose title is "Confidences of patients of mental illness or emotional conditions." *Id.*

287. CONN. GEN. STAT. ANN. § 52-146q (West 2005).

288. *Id.* § 52-146q(c)(2).

posite.²⁸⁹ In 2009, the court interpreted a related statute to prohibit in-court testimony by a social worker.²⁹⁰

In summary, it is clear that there is no consensus among the states with respect to a therapist's duty to protect potential victims, and much confusion exists in the law regarding exceptions to a therapist's duty of confidentiality and the dangerous-patient exception to the testimonial privilege. Hence, the "reason and experience" of the states operate against the recognition of this exception.

It has been suggested that because several exceptions to the psychotherapist-patient privilege already exist, "reason and experience" favor the recognition of the dangerous-patient exception to this privilege.²⁹¹ It has also been argued that when other exceptions to a privilege exist, the impact of an additional exception is marginal.²⁹² It does appear that the trend amongst the states is to extend the psychotherapist-patient privilege to a wide variety of mental health professionals, while limiting its use through the creation of numerous exceptions.²⁹³ Currently, some twenty jurisdictions recognize the three exceptions to the psychotherapist-patient privilege contained in Proposed Rule 504 of the Federal Rules of Evidence,²⁹⁴ and virtually all states recognize exceptions to the psychotherapist-patient privilege in cases involving child abuse and neglect.²⁹⁵ That being said, the fact that the state law of privilege is riddled with exceptions and has been described as a "crazy quilt pattern of legislation across the

289. *See* State v. Orr, 969 A.2d 750, 756 (Conn. 2009).

290. *Id.*

291. *See, e.g.*, B. Joseph Wadsworth, *Evidence—Recognition of a Federal Psychotherapist-Patient Privilege*. Jaffee v. Redmond, 116 S.Ct. 1923 (1996), 32 LAND & WATER L. REV. 873, 880–81 (1997).

292. This was Kenneth Starr's argument in *Swidler & Berlin*. *See* Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998).

293. Harriet L. Glossoff et al., *Privileged Communication in the Counselor-Client Relationship*, 78 J. OF COUNSELING & DEV. 454, 455 (2000).

294. Karen L. Ross, *Revealing Confidential Secrets: Will It Save Our Children?*, 28 SETON HALL L. REV. 963, 971 (1998). In these states, communications between therapists and patients are not privileged if for court proceedings requiring hospitalization, communications during a court-ordered examination of the mental or emotional condition of the patient, or communications when the mental or emotional condition of the patient is an element of a claim or defense. *See* Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 240–41 (1972).

295. Glossoff et al., *supra* note 293, at 456; *see also* Paruch, *supra* note 11, at 537.

country” is no justification for recognizing additional ones.²⁹⁶ In fact, just the opposite is true. This was acknowledged by the Supreme Court in *Swidler & Berlin*, where the Court stated: “A ‘no harm in one more exception’ rationale could contribute to the general erosion of the privilege, without reference to common-law principles or ‘reason and experience.’”²⁹⁷ Indeed, two years earlier in *Jaffee* the Court stated: “An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”²⁹⁸

2. “Reason and Experience” – The Other Communication Privileges

Determining whether the “reason and experience” requirement of Rule 501 justifies the recognition of the dangerous-patient exception to the psychotherapist-patient privilege should also require an examination and comparison of the other federal communication privileges, the rationale justifying these privileges, and the commonly recognized exceptions to these privileges. The “reason and experience” requirement of Rule 501 should command consistent treatment of those privileges that are based on common rationales and are

296. Glossoff et al., *supra* note 293, at 455; *see id.* at 455–58 (providing a table illustrating the exceptions to the privilege by state and the District of Columbia). Many federal courts have recognized a patient-litigant exception to the psychotherapist-patient privilege, which was provided for in the rejected Federal Rule of Evidence 504(d)(3). Melissa L. Nelken, *The Limits of Privilege: The Developing Scope of Federal Psychotherapists-Patient Privilege Law*, 20 REV. LITIG. 1, 19 (2000). The proposed rule crafted an exception for “communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense.” Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 241 (1972). The majority of federal cases interpreting *Jaffee* have involved this exception, which arises most frequently in claims in civil cases for emotional distress, purportedly the result of the defendant’s conduct. Nelken, *supra* note 296, at 20–21; *see also* Deirdre M. Smith, *An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in the Federal Courts*, 58 DEPAUL L. REV 79, 80 (2008). Professor Smith describes the psychotherapist-patient privilege as a “body of law in disarray” with inconsistent methods of enforcement, sometimes within the same district. *Id.*

297. *Swidler & Berlin*, 524 U.S. at 410.

298. *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996).

supported by comparable public policies, unless a compelling reason exists to justify different treatment. Ensuring consistent treatment of privileges provides certainty to the law of privileges and further serves to promote the policies upon which they were created.

The following section presents a discussion of the commonly recognized communication privileges, the underlying rationale supporting those privileges, and the generally recognized exceptions to each of them. It demonstrates that although the attorney-client, spousal-communication, clergy-penitent, and psychotherapist-patient privileges all share a similar purpose—to prevent intrusion into certain select relationships and protect communications between the parties in these relationships—neither the common law nor statutory law has carved out an analogous exception to the dangerous-patient exception for the attorney-client, spousal-communication, or clergy-penitent privileges.

a. *The Attorney-Client Privilege*

The attorney-client privilege is the oldest of the confidential communication privileges known to the common law.²⁹⁹ It was initially rooted in the notion of loyalty, based on a code of honor holding that to require a person to divulge a secret is itself a breach of a moral duty and, thus, is wrong.³⁰⁰ McCormick has described the rationale for the contemporary attorney-client privilege as resting on three propositions.³⁰¹ First, the complexity of modern day law requires that people have the assistance of attorneys in order to settle their disputes and manage their affairs.³⁰² The second proposition is that attorneys will be unable to properly assist their clients unless they are fully informed of the facts of the client's situation.³⁰³ Third, clients cannot be expected to provide their attorneys with all of the facts without the assurance that the attorney cannot be compelled to reveal these confidences in court.³⁰⁴ The U.S. Supreme Court has

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

300. Shuman, *supra* note 17, at 667.

301. BROUN ET AL., *supra* note 14, § 87, at 150–51.

302. *Id.*

303. *Id.*

304. *Id.*

described the rationale supporting the attorney-client privilege as: “The privilege is intended to encourage ‘full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.’”³⁰⁵

In addition to the privilege, attorney ethical rules also protect communications between attorneys and clients, similar to the ethical rules that protect communications between mental health professionals and their patients.³⁰⁶ Model Rule of Professional Conduct 1.6 requires an attorney to protect “information relating to the representation of a client” unless the client consents to the disclosure.³⁰⁷ It also allows disclosure in select circumstances, including the prevention of injury to the financial or property interests of others and controversies between an attorney and client.³⁰⁸ The Rule also contains a dangerous-client exception, providing that: “A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm.”³⁰⁹ This rule is permissive: It gives the attorney discretion to determine whether to disclose the information.³¹⁰ The comments to Rule 1.6 of the Michigan Rules of Professional Conduct provide insight into the decision in favor of a permissive, as opposed to a compulsory, disclosure rule:

[I]t is very difficult for a lawyer to ‘know’ when such a heinous purpose will actually be carried out, for the client may have a change of mind. To require disclosure when the client intends such an act, at the risk of professional discipline if the assessment of the client’s purpose turns out to be wrong, would be to impose a penal risk that might interfere with the

305. *Swidler & Berlin v. United States*, 524 U.S. 399, 404 (1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

306. See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2009).

307. *Id.* at R. 1.6(a).

308. *Id.* at R. 1.6(b).

309. *Id.* at R. 1.6(b)(1).

310. An earlier version of the 1983 Model Rules would have made this disclosure mandatory, however, it was changed after strong opposition was voiced to the mandatory disclosure requirement. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE* 281 (2009).

lawyer's resolution of an inherently difficult moral dilemma.³¹¹

Presently, every jurisdiction's ethical rules contain a dangerous-client exception; some states allow an attorney to disclose client confidences while other states require disclosure by the attorney when the attorney believes a client is likely to commit an act expected to result in serious injury or death.³¹² At present, eleven states mandate that an attorney reveal confidential information in order to prevent the client from killing or inflicting serious bodily harm on a third party.³¹³ However, even with these mandatory reporting requirements, there is little empirical evidence demonstrating that attorneys actually warn third parties of threats made by their clients.³¹⁴ Moreover, there is no evidence that lawyers are actually disciplined for failing to give such warnings; there are no reported disciplinary cases against attorneys for failing to warn under these circumstances.³¹⁵

Furthermore, unlike the disclosure rules applicable to mental health professionals, attorneys are not held liable in tort for injuries to third parties caused by their clients because the common law of tort has not extended the "*Tarasoff* duty" to attorneys.³¹⁶ There are no reported cases in which courts have held attorneys civilly liable for the failure to warn third parties about a client's dangerous intentions, and the few courts that have addressed this issue have held to the contrary.³¹⁷ It has been argued that no special relationship exists

311. MICH. RULES OF PROF'L CONDUCT R. 1.6 cmt. (2010). Although the Model Rules limit the disclosure to situations involving death or serious bodily injury, other states allow attorneys to disclose client information under more expansive criteria. For example, the Michigan Rules of Professional Conduct allow an attorney to reveal "the intention of a client to commit a crime and the information necessary to prevent the crime." *Id.* at R. 1.6(c)(4).

312. See R. Michael Cassidy, *Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1679-80 (2003).

313. Davalene Cooper, *The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client's Threat to Cause Serious Physical Harm or Death*, 36 IDAHO L. REV. 479, 481 n.4 (2000).

314. *Id.* at 482.

315. *Id.* at 481.

316. *Id.* at 480.

317. Cassidy, *supra* note 312, at 1683.

between an attorney and a client, unlike that found to exist between a patient and a therapist, principally because of the difficulty of determining the appropriate standard of care.³¹⁸ Those advocating for this position draw a distinction between therapists and attorneys on the grounds that attorneys do not receive any special training in evaluating the seriousness and legitimacy of a client's threats.³¹⁹

However, this position assumes that mental health professionals possess the skills that allow them to accurately predict behavior. Yet, studies have shown the opposite to be true. It is suggested that "[a]t best it would seem that clinicians can predict violent behavior with an accuracy rate that is slightly better than chance."³²⁰ After an in-depth study of the empirical data in this area, one researcher has concluded: "I do not believe that either the researcher or legal scholar has delivered very much that is really useful to frontline clinicians making violence risk assessments in the wide variety of settings in which these assessments are required."³²¹

Further, therapists often have difficulty determining if the dangerousness threshold is met and, therefore, if the "Tarasoff duty" is invoked.³²² But because of the law's current emphasis on the duty to

318. See Cooper, *supra* note 313, at 503–04. Some authors have suggested that the lack of training in predicting human behavior or evaluating the mental health of a client is all the more reason for requiring mandatory reporting by attorneys of threats made by their clients. See Deborah Abramovsky, *A Case for Increased Disclosure*, 13 FORDHAM URB. L.J. 43, 51 (1985). However, one empirical study suggested that lawyers do not have difficulty evaluating the seriousness of threats by a client to kill or seriously harm another person. See Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 114–17 (1994).

319. Cooper, *supra* note 313, at 503–04.

320. PARRY & DROGIN, *supra* note 228, at 176. This is a serious issue that deserves meaningful discussion; however an in-depth analysis of this topic is beyond the scope of this article. For a more complete discussion, see Christopher Slobogin, *Involuntary Community Treatment of People Who Are Violent and Mentally Ill: A Legal Analysis*, 45 HOSP. & COMMUNITY PSYCHIATRY 685 (1994).

321. PARRY & DROGIN, *supra* note 228, at 178 (citing Henry J. Steadman, *From Dangerousness to Risk Assessment of Community Violence: Taking Stock at the Turn of the Century*, 28 J. AM. ACAD. PSYCHIATRY & L. 265, 269 (2000)).

322. This argument was made by the American Psychiatric Association in *Tarasoff* but was rejected without discussion by the California Supreme Court. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 344 (Cal. 1976). One commentator has noted: "The courts have had little difficulty in imposing liability through

warn, therapists are more apt to err on the side of warning and will often ignore other more effective clinical interventions.³²³

The other key argument that is advanced in support of not extending the “*Tarasoff* duty” to attorneys is that attorneys have a “unique role” as advocates for their clients and that imposing duties on attorneys to protect third parties would be “contrary to the client-centered model of our adversarial system.”³²⁴ In fact, this argument applies with equal force to mental health professionals who also have a “unique role” as advocates for their patients.³²⁵ It is also contended that because attorneys have an ongoing role to play within the legal system with respect to a client, “forced disclosure might drive a wedge between the attorney and any client whom he continues to represent.”³²⁶ Yet, this was the *Jaffee* Court’s precise justification for the psychotherapist-patient privilege—the need to protect the trust and confidentiality of the psychotherapist-patient relationship which it found to be a “*sine qua non* for successful psychiatric treatment.”³²⁷

Finally, although the rules of professional responsibility provide for a dangerous-patient exception to the ethical duty of confidentiality, there is no recognized dangerous-person exception to the attorney-client testimonial privilege. The crime-fraud exception to the attorney-client privilege is a close counterpart; however, there is a significant distinction between these two exceptions. In order for the crime-fraud exception to abrogate the attorney-client testimonial privilege, it must be shown that the communications between the attorney and the client were made in the furtherance of a crime or

hindsight analysis.” PARRY & DROGIN, *supra* note 228, at 184 (quoting ROBERT I. SIMON, CLINICAL PSYCHIATRY AND THE LAW 314 (2d ed. 1992)). It is also clear that mental health professionals are uncomfortable dealing with the legal concept of dangerousness, which is distinguishable from violence. *Id.* While dangerousness is a “legal status,” which varies from jurisdiction to jurisdiction and judge to judge, violence is a “social science concept and the primary subject when clinical assessments are being made about dangerousness to others.” *Id.* at 175.

323. PARRY & DROGIN, *supra* note 228, at 184.

324. Cassidy, *supra* note 312, at 1683.

325. This is a key reason why mental health professionals have long advocated for the right to protect the confidential communications of their patients. *See id.*

326. *Id.* at 1683 n.283.

327. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996).

fraud and that the client sought the advice of the attorney to assist in carrying out the crime or fraud.³²⁸ The Supreme Court has explained that the purpose of the exception is to assure that the “seal of secrecy” between attorney and client does not protect communications “made for the purpose of getting advice for the commission of a fraud or crime.”³²⁹ Therefore, although an attorney may disclose (or, in some states, must disclose) information about a dangerous client, the attorney can be compelled to testify only if the client actually sought the attorney’s assistance or advice in furtherance of the dangerous activity. This, of course, stands in stark contrast to the dangerous-patient exception to the psychotherapist-patient privilege, where not only can therapists be compelled to testify about clients’ threats, but, in many instances, this testimony actually has been the only evidence used to criminally convict a patient.³³⁰

b. *The Marital Privileges*

There are two generally recognized marital privileges: the spousal-testimonial privilege and the marital-communications privilege. The testimonial privilege allows a witness to refuse to testify against a spouse in a criminal proceeding and, in some jurisdictions, gives a criminal defendant the right to prohibit a spouse from testifying against him.³³¹ The marital-communications privilege, which is rec-

328. BROUNET AL., *supra* note 14, § 95, at 164–65.

329. *United States v. Zolin*, 491 U.S. 554, 563 (1989) (quoting *O’Rourke v. Darbishire*, [1920] A.C. 581, 604 (P.C.)).

330. *See, e.g., United States v. Hardy*, 640 F. Supp. 2d 75 (D. Me. 2009) (using a therapist’s testimony to convict a defendant for threatening the President of the United States).

331. MUELLER & KIRKPATRICK, *supra* note 12, § 5.31. This privilege evolved from the common law doctrine that rendered a spouse incompetent to testify for or against the other spouse. *Id.* This spousal disqualification originated from two canons of medieval jurisprudence: the rule that a party is ineligible to testify on his own behalf because of his interest in the proceedings and the legal fiction that a wife and her husband are the same person. *Trammel v. United States*, 445 U.S. 40, 44 (1980). The rationale for the testimonial privilege is to preserve the harmony and sanctity of the marriage relationship. *Id.* at 52. Up until the Supreme Court’s 1980 decision in *Trammel*, both spouses held the testimonial privilege in federal courts. *Id.* at 53. In *Trammel*, the Court altered this long standing rule, holding that the testimonial privilege vests solely in the testifying spouse. *Id.* In

ognized in federal courts and in nearly all of the states,³³² prevents the compelled disclosure of “information privately disclosed between husband and wife in the confidence of the marital relationship.”³³³ The rationale for this privilege is the desire to protect the trust and privacy of the spousal relationship and allow spouses to communicate freely and in confidence with each other.³³⁴

There are only a few well-recognized exceptions to the marital privileges. The first commonly recognized exception to these privileges arises in proceedings where one spouse is charged with a tort or crime against the other spouse or a child of either, or against the property of the other spouse.³³⁵ Another frequently recognized exception arises in actions by one spouse against the other,³³⁶ which occurs most frequently in divorce proceedings.³³⁷ Finally, the joint-participant exception, recognized by virtually all of the federal circuit courts but not all of the states, is an exception to the marital-communications privilege for ongoing or future crimes.³³⁸ However, in order for this exception to abrogate the marital-communications privilege, it must be demonstrated that both spouses were participants in a crime, or actively involved in planning a crime, at the time of the communication.³³⁹ The common law “*Tarasoff* duty” to warn or protect third parties from potential harm by a spouse does not ap-

so holding, it noted “[t]he ancient foundations for so sweeping a privilege have long since disappeared” and the contemporary justifications (preserving marital harmony) are “unpersuasive” when the witness is willing to testify against the spouse. *Id.* at 52.

332. MUELLER & KIRKPATRICK, *supra* note 12, § 5.32.

333. *Id.*

334. *Id.*

335. *Id.*; *see, e.g.*, MICH. COMP. LAWS SERV. § 600.2162(3)(d) (LexisNexis 2008). The Michigan statute states:

The spousal privileges . . . and the confidential communications privilege . . . do not apply in any of the following: . . . (d) In a cause of action that grows out of a personal wrong or injury done by one to the other or that grows out of the refusal or neglect to furnish the spouse or children with suitable support.

Id.

336. BROUN ET AL., *supra* note 14, § 84, at 146–47.

337. *Id.*

338. *See id.*

339. *See id.*

ply and there is no equivalent dangerous-person exception to this privilege.

c. The Clergy-Penitent Privilege

The clergy-penitent privilege is more closely aligned to the psychotherapist-patient privilege than the other two communication privileges addressed above because it protects disclosures made in connection with professional, spiritual, and personal counseling that frequently involves deeply personal and intensely emotional matters.

The clergy-penitent privilege is recognized in every state by statute and at common law in federal court.³⁴⁰ The statutory form of the privilege varies widely among the states but generally serves to protect communications made in confidence to a clergyman in his or her professional or spiritual capacity.³⁴¹ Although the states are split as to who holds the privilege, the majority of states assign the privilege to the parishioner.³⁴²

This privilege is the least defensible under the utilitarian approach.³⁴³ If the penitent believes strongly in the need to confess, the utilitarian case for this privilege becomes critically weak, since the communications between the clergyman and the penitent are likely to be made irrespective of the presence of the privilege.³⁴⁴ Therefore, the rationale for this privilege appears to be grounded in privacy concerns rather than the utilitarian principles that seem to provide the foundation for the other communication privileges. This privilege is “based in part upon the idea that the human being does sometimes have need of a place of penitence and confession and spiritual discipline. When any person enters that secret chamber, this closes the door upon him, and civil authority turns away its ear.”³⁴⁵

This privilege is also unique in that it has been defined broadly by legislatures and interpreted broadly by courts, some suggest, out

340. IMWINKELRIED, *supra* note 32, § 6.2.3, at 525. The U.S. Supreme Court acknowledges this privilege. See *Trammel v. United States*, 445 U.S. 40, 51 (1980).

341. See *Cassidy*, *supra* note 312, at 1630.

342. *Id.* at 1650.

343. IMWINKELRIED, *supra* note 32, § 6.2.3, at 529.

344. *Id.*

345. *Reutkemeier v. Nolte*, 161 N.W. 290, 294 (Iowa 1917).

of fear that a narrow interpretation might interfere with religious freedom.³⁴⁶ There are virtually no exceptions to the privilege. Moreover, courts have consistently refused to impose tort liability on members of the clergy as a result of their failure to warn third parties of a parishioner's dangerous plans.³⁴⁷

Even in the area of mandated reporting of child abuse and neglect,³⁴⁸ only thirty-two states include clergy in their list of mandated reporters.³⁴⁹ And in fifteen of these states, the privilege survives the duty to report.³⁵⁰ In other words, the duty to report does not apply to information obtained in the confidential religious counseling setting.³⁵¹ Furthermore, although ten states have mandatory reporting statutes that indicate that the clergy-penitent privilege is "abrogated" in cases of child abuse and neglect, it remains unclear whether the duty to report would also require the clergy member to testify in subsequent legal proceedings.³⁵² In Wyoming, for example, clergy are required to report suspected cases of child abuse irrespective of the source of the information; however, they are not required to testify in later proceedings.³⁵³

The objective of the law with respect to the communication privileges is the protection of confidential communications within selected relationships in order to advance important social policy goals. In the attorney-client relationship, confidentiality serves to promote "the observance of the law and the administration of jus-

346. Cassidy, *supra* note 312, at 1673.

347. *Id.* at 1685.

348. Mandated reporting statutes generally require that professionals with frequent contact with children to report suspected cases of abuse or neglect to the state Department of Social Services. *Id.* at 1667. These statutes also provide the reporter with immunity from civil liability for reporting suspected cases and carry misdemeanor criminal penalties for failure to report when required to do so. *Id.*

349. *Id.* at 1668.

350. *Id.* at 1669.

351. *Id.*

352. Cassidy, *supra* note 312, at 1670.

353. WYO. STAT. ANN. § 14-3-210 (2009). In nine other states, clergy have a duty to report irrespective of the source of the information and can be compelled to testify in subsequent proceedings. See Cassidy, *supra* note 312, at 1670-71 & n.226. The author notes that, notwithstanding the wording of these statutes, whether a court would deny an assertion of the clergy-penitent privilege in a judicial proceeding is open to debate. *Id.* at 1670.

tice.”³⁵⁴ The marital-communications privilege serves to “foster marital relationships by encouraging communications.”³⁵⁵ And while the clergy-penitent privilege may serve to protect free exercise of religion, it principally serves to protect an individual’s right to privacy.³⁵⁶

The social policy goal served by the psychotherapist-patient privilege—improving the mental health of the citizenry—is equally as important as the policies served by the other privileges addressed above. Moreover, protecting the confidential relationship between a therapist and patient is the cornerstone to achieving this goal. All of the major psychotherapeutic theories indicate that successful therapy outcomes are dependent upon the relationship between the therapist and the patient.³⁵⁷ The American Psychoanalytic Association believes that analysis cannot proceed without the formation of a trusting therapeutic alliance.³⁵⁸ The threat that a therapist might reveal a patient’s most revealing secrets in a court of law would “stand as a permanent obstacle to development of the necessary degree of pa-

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

355. IMWINKELRIED, *supra* note 32, § 6.2.1, at 507.

356. *Id.* § 6.2.3(b), at 529–530.

357. See Patricia Honea-Boles & Jean E. Griffin, *The Court Mandated Client: Does Limiting Confidentiality Preclude a Therapeutic Encounter?*, 29 TEX. COUNSELING ASS’N J. 149, 150 (2001) (citing Charles J. Gelso & Jean A. Carter, *Components of the Psychotherapy Relationship: Their Interaction and Unfolding During Treatment*, 41 J. COUNSELING PSYCHOL. 296 (1994)). The therapists’ warmth or acceptance and empathic resonance are positively correlated with therapeutic outcome. *Id.* (citing D.E. Orlinsky & K.I. Howard, *Process and Outcome in Psychotherapy*, in MICHAEL J. LAMBERT, HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE 311–81 (S.L. Garfield & A.E. Bergin eds., 5th ed. 2004)). A therapist’s unconditional regard for the patient allows for therapeutic change. *Id.* (citing Carl R. Rogers, *The Necessary and Sufficient Conditions of Therapeutic Personality Change*, 21 J. CONSULTING PSYCH. 95 (1957)). A strong working alliance has been demonstrated to result in positive outcomes and is viewed as the most fundamental factor of the therapeutic relationship. Alliance is viewed as consisting of three components: an agreement on the goals of the relationship, an agreement on the tasks, and the development of an intimate bond between the parties with trust at the center. *Id.* at 151 (citing Edward S. Bordin, *The Generalizability of the Psychoanalytic Concept of the Working Alliance*, 16 PSYCHOTHERAPY: THEORY, RES. & PRAC. 252, 252–59 (1979)).

358. Brief for the Am. Psychoanalytic Ass’n, *supra* note 77, at 5.

tient trust,” which would pose “an insurmountable[] barrier to effective treatment.”³⁵⁹

Moreover, like the clergy-penitent privilege, protecting the confidentiality of the therapist-patient relationship is justified on humanistic grounds, originating from an individual’s right to privacy. This right to privacy plays a central role in the therapeutic environment because full disclosure is an essential component of psychoanalytic therapy, which assumes that conscious thoughts and feelings are caused by unconscious factors.³⁶⁰ Anna Freud has noted: “Confidentiality of the material . . . is a prerequisite for free association. No [patient] succeeds in divesting himself of all defenses or controls unless he can be certain that the derivatives of his id will not become known beyond the confines of the analytic situation.”³⁶¹ The disclosure of this private personality, although necessary for successful treatment, could be “devastating if revealed to ordinary scrutiny.”³⁶² Finally, given the social stigma that remains attached to psychotherapy, the mere disclosure that an individual is in therapy could be detrimental.³⁶³

Thus, there are ample reasons that justify protection of confidential therapist-patient communications, just as there are with the other communication privileges. However, only this privilege is subject to abrogation by a dangerous-patient/person exception, requiring a once-trusted confidant to testify in criminal proceedings against a

359. *Id.* Countless others have expressed the need for trust and openness in the therapeutic relationship for which confidentiality is the cornerstone. See Honea-Boles & Griffin, *supra* note 357, at 150. Honea-Boles and Griffin present numerous other works and studies which support the proposition that the stronger the therapeutic relationship, the more beneficial the therapy to the patient. See *id.*

360. Brief for the Am. Psychoanalytic Ass’n, *supra* note 77, at 7–8. It is through full disclosure and the process known as “free association” that the therapist and patient can successfully bring unconscious material “into the light of consciousness.” *Id.* at 9.

361. *Id.* at 11 (quoting ANNA FREUD, *THE WRITINGS OF ANNA FREUD* 417 (1968)).

362. Ralph Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 194 (1960). The establishment of a psychotherapist-patient privilege is necessary because, in a psychotherapeutic situation, treatment is directed towards feelings and attitudes that are unacceptable to the patient and to society. *Id.* at 194–95.

363. Brief for the Am. Psychoanalytic Ass’n, *supra* note 77, at 4.

patient and allowing statements made within the confines of this confidential relationship to provide all the evidence that may be needed by the prosecution for a criminal conviction. Thus, “reason and experience,” determined by comparison to these other communication privileges, do not support the recognition of a federal dangerous-patient exception to the psychotherapist-patient privilege.

VI. CIRCUMSTANCES WARRANTING ABROGATION OF THE PRIVILEGE

A. *The Psychotherapist-Patient Privilege Should Be Abrogated Only In Certain Narrowly Prescribed Circumstances*

Many judges and legal scholars have taken the position that the dangerous-patient exception, as set forth by the *Glass* court, should not apply in criminal trials.³⁶⁴ They believe that testimony by a therapist in a criminal trial, as to threats made by a patient in therapy, does not fulfill the criteria set forth in the *Jaffee* footnote.³⁶⁵ They argue that this type of evidence cannot serve to avert harm because the criminal proceedings take place long after the threats were made and because the sole purpose of any criminal proceeding is to punish the defendant for his prior acts.³⁶⁶ Nonetheless, many patients have been charged with crimes based solely on threats they made during therapy sessions.³⁶⁷ Indeed, all of the federal circuit court cases that have addressed the dangerous-patient exception were criminal cases where the proceedings originated from a therapist’s report.³⁶⁸ In these cases, the defendants were charged with violations of federal statutes that criminalize threats against federal officials or employees, and, in these cases, the therapist was the key witness, and sometimes the only witness, for the prosecution.

Another concern that arises from using the *Glass* test as the criteria for defining the dangerous-patient exception is the level of intrusion into the therapist-patient relationship and the amount of disclo-

364. See, e.g., *United States v. Hayes*, 227 F.3d 578, 586 (6th Cir. 2000).

365. See *id.*

366. See *id.*

367. Appelbaum, *supra* note 224, at 716.

368. *United States v. Chase*, 340 F.3d 978, 991–92 (9th Cir. 2003); *Hayes*, 227 F.3d at 586; *United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998).

sure of patient confidences that occurs as a result. This particular concern was initially addressed by the California Supreme Court in *Tarasoff*.³⁶⁹ In this case, the court recognized the importance of limiting the amount of disclosure of patients' confidences, stating: "[T]he therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger."³⁷⁰

However, when a therapist is compelled to testify against a patient in an adversarial proceeding, such as a criminal trial, preserving the privacy of the patient is impossible. Envision a situation where a patient threatens an identifiable third person during a therapy session. Assume that the therapist believes his patient poses a serious threat of harm and, in accordance with the "*Tarasoff* duty," reports these threats to the authorities. If the patient is subsequently charged with a crime, the therapist will most likely be called to testify at the criminal trial. If the therapist testifies that he believed his patient's threats were serious, the first prong of the *Glass* test, which requires a finding that the threat was "serious when it was uttered," is met.³⁷¹ However, any challenge to the therapist's testimony would necessitate defense counsel's inquiry into the reasons supporting the therapist's belief that the threats were serious. In doing so, defense counsel opens the door to the disclosure of vast amounts of potentially highly prejudicial information, which otherwise would have remained privileged.

Because of the significant problems that arise when a therapist is compelled to testify against a patient, this testimony should only be required in certain, select situations. One author has suggested that the privilege should only be abrogated if the patient presents a serious threat of harm to himself or others and the disclosure by the psychotherapist will substantially advance the mental health interests

369. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 347 (Cal. 1976).

370. *Id.*

371. *Glass*, 133 F.3d at 1360. Under the objective test, a threat is considered serious when the threat "can reasonably be interpreted as a serious expression of intent to harm or assault the target." *United States v. Stewart*, 420 F.3d 1007, 1018 (9th Cir. 2005).

of the patient.³⁷² This approach would eliminate the second prong of the *Glass* test—the criterion that harm can be averted only by means of disclosure—and the confusion that arises when courts conflate the testimonial privilege with the “*Tarasoff* duty” to warn. Limiting a therapist’s testimony to situations where the patient’s mental health would be served would appear to restrict this testimony to mental health commitment proceedings and, therefore, would not place a therapist in the compromising position of being a prosecutorial witness.

It may be argued that even in this type of situation the therapist-patient relationship will suffer because the patient will perceive the therapist’s testimony as being against his interests. However, in commitment proceedings, a therapist retains the role as the patient’s advocate and is there to recommend a course of action that will serve the patient’s best interests. Furthermore, although involuntary commitment does involve a loss of freedom, there is a significant difference between punishment in the form of a prison sentence and the loss of freedom that results from involuntary hospitalization.

Other scholars have identified additional circumstances in which this type of testimony might be appropriate. Professor George Harris, who has advocated for the compelled testimony of therapists at civil commitment proceedings, has also suggested that a therapist’s testimony might be appropriate in proceedings to secure restraining orders.³⁷³ He sees this type of proceeding as a necessary outgrowth of a therapist’s “*Tarasoff* duty” to protect potential victims from harm.³⁷⁴

Dr. Paul Appelbaum has suggested that, in spite of the harm resulting from the compelled testimony of therapists at a patient’s criminal trial, there may be occasions when this testimony may actually be the only means of averting harm.³⁷⁵ Sometimes commitment proceedings or restraining orders are not enough to protect potential victims. Appelbaum believes this can occur when patients who pose long-term threats to other persons do not qualify for acute

372. Daniel M. Buroker, Note, *The Psychotherapist-Patient Privilege and Post-Jaffee Confusion*, 89 IOWA L. REV. 1373, 1388 (2004).

373. Harris, *supra* note 90, at 33.

374. *Id.* at 63.

375. Appelbaum, *supra* note 224, at 714–16.

hospitalization, or because involuntarily committed patients may be released much sooner than they would be if they were imprisoned.³⁷⁶ He argues that in these types of situations, incarceration may be the only means of protecting a potential victim and the testimony of a therapist could be essential to achieving this end.³⁷⁷ However, Appelbaum cautions that unless the line can be held, it would be preferable not to abrogate the privilege with respect to dangerous patients “lest the exception overwhelm the general rule that patients’ communications in therapy are deserving of protection.”³⁷⁸

However, even in the type of situation Appelbaum describes, a therapist’s testimony may not be the only means of averting harm because, oftentimes, evidence of a patient’s threats is available from other, non-privileged sources. In fact, a troubling aspect of the cases in which patients are prosecuted for threats made during therapy is that the government appears all too quick to subpoena the therapist and base its case principally on this testimonial evidence, while other means of proving a defendant’s threats may be readily available. It is unlikely that an individual threatening the life of another person would only make these types of threatening statements during therapy. It is far more likely that this person has communicated his threats to other individuals who can be produced to testify at trial.

Even though Dr. Appelbaum has identified the circumstances under which he would allow the testimony of therapists at criminal trials, he has expressed concern that the most troubling aspect of the dangerous-patient exception is its “vulnerability to being used expansively for purposes beyond those originally envisioned.”³⁷⁹ Indeed, one needs look no further than California for evidence of a court’s inability to hold this line.³⁸⁰ California, which has enacted a dangerous-patient exception into its evidence code, is a prime example of how this exception has swallowed the privilege.

California Evidence Code §1024 provides:

376. *Id.*

377. *Id.*

378. *Id.* at 716.

379. *Id.*

380. *See, e.g.,* *People v. Wharton*, 809 P.2d 290 (Cal. 1991).

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.³⁸¹

The California Supreme Court interpreted this statute in *People v. Wharton* and held that the privilege itself never comes into existence if the statutory conditions are met.³⁸² It noted: “[I]f a certain factual predicate exists (i.e., if the therapist believes the patient is a danger to another and disclosure is necessary to prevent the danger), the statute does not provide that the privilege is ‘waived’; it merely provides that ‘[t]here is no privilege.’”³⁸³ As a result of this interpretation, therapists in California have been compelled to testify in a wide variety of circumstances, well beyond situations where disclosure is “necessary to prevent the threatened danger.”³⁸⁴ Therapists are routinely required to testify in criminal proceedings and at death penalty hearings about threats made by their patients as proof of premeditation. Still other situations have been reported where entire therapy sessions have been stripped of their confidentiality once a threat was made.³⁸⁵

A recent district court decision from the District of Maine, *United States v. Hardy*,³⁸⁶ further illustrates how easily these confidential communications can be stripped of their privileged status.³⁸⁷ In *Hardy*, the defendant entered an emergency room of a medical center in May 2008.³⁸⁸ In the process of admission, he threatened to kill President Bush.³⁸⁹ He was transferred to another hospital for a psy-

381. CAL. EVID. CODE § 1024 (West 2009).

382. *Wharton*, 809 P.2d at 347. The holding was reaffirmed a year later. See *Menendez v. Superior Court*, 834 P.2d 786 (Cal. 1992).

383. *Wharton*, 809 P.2d at 312. The court also held that confidential communications lose their privileged status once they have been disclosed to third parties. *Id.* at 348.

384. § 1024.

385. Appelbaum, *supra* note 224, at 716.

386. 640 F. Supp. 2d 75 (D. Me. 2009).

387. *Id.* at 77–78.

388. *Id.* at 77.

389. *Id.*

chiatric evaluation, where he continued to threaten the president.³⁹⁰ The defendant was involuntarily committed, and his threats were immediately reported to law enforcement authorities.³⁹¹ He remained hospitalized in several different facilities for seven months.³⁹² He was released in January 2009 and arrested five months later.³⁹³

At trial, the government sought to compel the testimony of the defendant's therapists as to the threats he made in May 2008.³⁹⁴ The court adopted the *Glass* test and found that the dangerous-patient exception permitted the therapists' testimony.³⁹⁵ The court recognized that the defendant was not arrested until five months after his release from the hospital and a year after he made the threats.³⁹⁶ Nonetheless, it found that the dangerous-patient exception applied and required the therapists' testimony at the criminal trial even though it never addressed the second prong of the *Glass* test—whether the testimony was the only means of averting harm to the president.³⁹⁷

The California experience and the *Hardy* case illustrate the psychotherapist-patient privilege's vulnerability and the slippery slope towards its demise that is created once courts recognize the dangerous-patient exception to this privilege. Experience to date seems to demonstrate that courts that have recognized this exception are unable to contain and limit its use to the rare situations in which it might be justified. Therefore, as Appelbaum has suggested, this exception should not be recognized, and courts, instead, should adhere to the rule that patients' communications during therapy are deserving of protection.³⁹⁸

390. *Id.* at 78.

391. *Id.*

392. *Hardy*, 640 F. Supp. 2d at 78.

393. *Id.*

394. *Id.* at 79.

395. *Id.* at 79–80.

396. *Id.* at 80.

397. *Id.* at 80–81.

398. Appelbaum, *supra* note 224, at 714–16.

B. *The Appropriate Procedures and Burden of Proof*

If one is to accept that there are some situations where a therapist's testimony in a criminal trial is the only means of averting harm to third persons, courts should employ procedures designed to minimize the public exposure of patient confidential information when making this determination and in the other select situations which may call for a therapist's testimony. Consistent with Federal Rule of Evidence 104(a) and the Supreme Court decision *United States v. Zolin*,³⁹⁹ courts should utilize *in camera* inspection of the proffered evidence and require that any exception to the psychotherapist-patient privilege be supported by a sufficient amount of proof.

The existence and the scope of a privilege are questions to be determined by the court pursuant to Federal Rule of Evidence 104(a).⁴⁰⁰ The Rule also provides that in making this determination, a court is not bound by the rules of evidence, except the rules pertaining to privileges.⁴⁰¹ One interpretation of this rule would require that courts, in determining the existence or contour of a privilege, consider only non-privileged evidence. However, the Supreme Court rejected this argument in *Zolin*.⁴⁰² In *Zolin*, the Court held that the crime-fraud exception to the attorney-client privilege need not be established by independent evidence.⁴⁰³ The Court refused to adopt an interpretation of Rule 104(a) that would treat the challenged communications as privileged for all intents and purposes.⁴⁰⁴ It found that the cost of imposing an absolute prohibition on the use of this evidence for the purpose of establishing the exception was "into-

399. 491 U.S. 554 (1989).

400. FED. R. EVID. 104(a). Rule 104(a) provides:

Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Id.

401. *Id.*

402. *Zolin*, 491 U.S. at 566.

403. *Id.* at 568.

404. *Id.* at 566–68.

lerably high.”⁴⁰⁵ It stated: “A *per se* rule that the communications in question may never be considered creates, we feel, too great an impediment to the proper functioning of the adversary process.”⁴⁰⁶

The Court also held that, at the request of the party opposing the privilege, an *in camera* review may be used to ascertain whether purportedly privileged attorney-client communications would fall within the crime-fraud exception.⁴⁰⁷ The Court seemed cognizant of the practice in which federal prosecutors and civil litigants frequently invoked this exception in their attempts to defeat objections to discovery.⁴⁰⁸ With this in mind, and while also recognizing the need to protect “open and legitimate disclosure” between attorneys and clients, the Court held that before conducting an *in camera* review, the trial court should require a showing of a “factual basis adequate to support a good faith belief by a reasonable person . . . that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.”⁴⁰⁹ The Court also held that this threshold requirement may be satisfied by means of any lawfully obtained evidence that has not been determined to be privileged.⁴¹⁰ Finally, the Court reiterated its previous rulings that the disclosure of allegedly privileged materials *in camera* does not operate to waive or terminate the privilege.⁴¹¹

The Illinois Supreme Court has adopted the approach espoused in *Zolin* and, in doing so, issued additional cautionary instructions to its lower courts, adding additional protection to the privilege.⁴¹² It considered the problems inherent in having judges view information that may be privileged when they are subsequently required to rule

405. *Id.* at 569.

406. *Id.*

407. The Court noted that the judge has discretion as to whether to conduct an *in camera* review. *Id.* at 572. In making its decision, the Court instructed the judge to consider the importance of the alleged privileged material to the case and the likelihood that the evidence produced through the *in camera* review will fall within the crime-fraud exception. *Id.*

408. IMWINKELRIED, *supra* note 32, § 6.13.2, at 1185–86.

409. *Zolin*, 491 U.S. at 571–72.

410. *Id.* at 575.

411. *Id.* at 574–75.

412. *In re Marriage of Decker*, 606 N.E. 2d 1094, 1107–08 (Ill. 1992).

on an issue that may be affected by the privileged information.⁴¹³ The court suggested that once the threshold test for *in camera* review is established, a different judge should conduct the *in camera* inspection.⁴¹⁴ The court also suggested that the *in camera* questioning be as narrow as possible to preserve the confidentiality of the information.⁴¹⁵

The Eighth Circuit has also addressed this question and recommended procedures that a trial court should follow when determining if the crime-fraud exception should apply.⁴¹⁶ First, it noted that a district court does not need to conduct a formal hearing or accept additional evidence and argument once it determines that the exception does not apply.⁴¹⁷ It also explained that, in the case of *in camera* review, the party to the privilege has the absolute right to be heard by evidence and argument; the opposing party, however, shall not be privy to the confidential materials unless it has been established that the crime-fraud exception applies.⁴¹⁸ The court also explained that if the trial court finds that the exception applies, it should keep the privileged communications under seal to prevent any further disclosure until after all the appeals have been completed.⁴¹⁹

Of special concern is the level of proof under Rule 104(a) that is needed to establish an exception to a privilege. In *Clark v. United States*,⁴²⁰ the Supreme Court indicated that a party opposing a privilege must make a showing of a “prima facie case”⁴²¹ to the court that

413. *See id.*

414. *Id.* at 1107.

415. *Id.*

416. *See In re General Motors Corp.*, 153 F.3d 714 (8th Cir. 1998).

417. *Id.* at 716.

418. *Id.* at 717.

419. *Id.*

420. 289 U.S. 1 (1933).

421. *Id.* at 14. “Prima facie” has been described as the “most rubbery” of legal phrases. *In re Grand Jury Proceedings*, 417 F.3d 18, 22 (1st Cir. 2005). Prima facie evidence is defined as “evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the case which it supports, but which may be contradicted by other evidence. BLACK’S LAW DICTIONARY 1071 (9th ed. 2009).

a privilege should be abrogated.⁴²² Years later, in *Bourjaily v. United States*,⁴²³ a criminal case involving the co-conspirator exception to the hearsay rule, the Court held that preliminary questions of fact under Rule 104(a) must be established by a preponderance of the evidence.⁴²⁴ It stated: “The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration.”⁴²⁵ Unfortunately, the *Zolin* Court refused to address this question with respect to the crime-fraud exception, although it did indicate that a higher standard of proof is required for public disclosure of allegedly privileged information than for *in camera* review.⁴²⁶

As the result of the *Zolin* Court’s refusal to address this question, the lower federal courts have continued to struggle with the question of the appropriate level of proof necessary to establish the crime-fraud exception. The standard of proof in cases in which the issue involved disclosure of confidential attorney-client communications to a grand jury has been defined in a variety of ways, including “some foundation in fact,” “reasonable basis,” and “reasonable cause to believe.”⁴²⁷ Other courts have described this burden as the equivalent of a “prima facie” case,⁴²⁸ a finding of “probable cause,”⁴²⁹ or “more than suspicion but less than a preponderance of evidence.”⁴³⁰

The Ninth Circuit recently held in *In re Napster Inc. Copyright Litigation* that a party asserting the crime-fraud exception to the attorney-client privilege in a civil case must prove by a preponderance of the evidence that the exception applies.⁴³¹ The Ninth Circuit found that requiring the existence of the crime-fraud exception to be

422. *Clark*, 289 U.S. at 14.

423. 483 U.S. 171 (1987).

424. *Id.* at 176.

425. *Id.* at 175.

426. *United States v. Zolin*, 491 U.S. 554, 570–72 (1989).

427. *In re Napster Inc. Copyright Litigation*, 479 F.3d 1078, 1093–94 (9th Cir. 2007), *abrogated by* *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599 (2009).

428. *See, e.g., In re Sealed Case*, 107 F.3d 46, 49–50 (D.C. Cir. 1997).

429. *In re John Doe, Inc.*, 13 F.3d 633, 637 (2d Cir. 1994).

430. *United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996).

431. 479 F.3d at 1095.

proven by a preponderance of the evidence standard is “consonant with the importance of the attorney-client privilege.”⁴³² The court also commented: “It would be very odd if . . . a court could find such an important privilege vitiated where an exception to the privilege has not been established by a preponderance of the evidence.”⁴³³ The court further supported its decision by noting the holding in *Bourjaily* that Rule 104 requires that preliminary questions of fact are to be determined by a preponderance of the evidence standard.⁴³⁴ Finally, although the court acknowledged that the Supreme Court refused to address this specific question in *Zolin*, it indicated that it believed *Zolin* signaled that preliminary questions regarding privileges should be established under Rule 104(a).⁴³⁵ In conclusion, the Ninth Circuit noted that judicious use of *in camera* review, combined with a preponderance burden, strikes an appropriate balance between recognizing “the importance of the attorney-client privilege and deterrence of its abuse than a low threshold for outright disclosure.”⁴³⁶

Although the *Napster* court was careful to limit its holding to civil cases, the reasoning it provided to support its decision can be applied with equal force to criminal cases.⁴³⁷ Furthermore, this application in criminal cases is particularly appropriate in light of the Supreme Court’s comment in *Swidler & Berlin* that “there is no case authority for the proposition that the [attorney-client] privilege applies differently in criminal and civil cases.”⁴³⁸

Although these cases all involved the crime-fraud exception to the attorney-client privilege, there is no reason that these procedures should be restricted to cases involving the attorney-client privilege. The psychotherapist-patient privilege should stand on equal footing with the attorney-client privilege, and, as such, courts should not vitiate this important privilege absent a finding by a preponderance of the evidence that an exception applies. Nevertheless, it does not

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.* at 1096.

436. *Id.*

437. *See In re Napster*, 479 F.3d at 1096.

438. *Swidler & Berlin v. United States*, 524 U.S. 399, 408–09 (1998).

appear that any of the federal courts that addressed the dangerous-patient exception to the psychotherapist-patient privilege employed *in camera* procedures, nor is it apparent what standard of proof the courts applied.

An unreported decision from the Southern District of Florida, *United States v. Highsmith*,⁴³⁹ illustrates a situation where these procedures should have been applied in order to preserve the confidentiality of the therapist-patient communications. In *Highsmith*, the court held that the dangerous-patient exception did not apply because it was not shown that the therapist's testimony was the only means of averting harm.⁴⁴⁰ However, because the court did not engage in *in camera* review of the evidence proffered by the government to support its claim that the exception should apply, the confidentiality of the patient's disclosures was unnecessarily destroyed and the therapist-patient relationship was damaged as the result of the public exposure of privileged information.⁴⁴¹

The procedures recommended by the *Zolin* Court, and further developed by the Eighth and Ninth Circuits, could be employed by

439. No. 07-80093-CR, 2007 WL 2406990 (S.D. Fla. Aug. 20, 2007).

440. Defendant Harry Nathaniel Highsmith was charged with threatening to kill an Administrative Law Judge employed by the Social Security Administration's office of Hearings and Appeals. *Id.* at *1. In January 2007, the defendant voluntarily admitted himself into the Veteran's Administration hospital in West Palm Beach, Florida, suffering from homicidal and suicidal ideations. *Id.* He was placed in a locked psychiatric unit. *Id.* During the first few days of his hospitalization, he repeatedly expressed to his treating psychiatrist a plan to shoot the judge who had ruled against him in a Social Security proceeding. *Id.* He also indicated that he had a gun, which he planned to use to carry out his plan. *Id.* The psychiatrist judged the threat to be credible and notified the judge and law enforcement officials of the threat. *Highsmith*, 2007 WL 2406990, at *1. A few days later, the defendant's suicidal and homicidal thoughts were resolved, and he was discharged from the hospital. *Id.* He was arrested immediately following his discharge. *Id.* at *2. At trial, the prosecution sought to compel the testimony of his therapist. *Id.* The court adopted the *Glass* test but ruled that the criteria were not met. *Id.* at *3-4. It found that because the therapist had determined that the defendant was no longer a threat at the time of his release, it would be inconsistent to conclude that this testimony would be the only means of averting the harm. *Id.* Much of this information, which was freely disclosed and became part of the written opinion in the case, could have been protected through the use of *in camera* procedures.

441. *See id.* at *3-4.

all courts called upon to determine if any exceptions to the psychotherapist-patient privilege apply. These procedures are particularly important in jurisdictions that have recognized the dangerous-patient exception because they guard against the needless public disclosure of confidential patient information and protect the confidentiality of the therapist-patient relationship, which the *Jaffee* Court recognized is a “*sine qua non* for successful psychiatric treatment.”⁴⁴²

Therefore, in cases where a party seeks to compel a therapist to testify as to communications made by a patient during therapy, a court should follow the *Zolin* procedure and require a threshold showing of a factual basis sufficient to support a good faith belief that *in camera* review of the information will reveal evidence to establish an exception to the privilege. The court may then conduct an *in camera* inspection of the privileged information only if it determines that this initial burden has been met. Moreover, the proponent of the exception should have the burden of proving the dangerous-patient exception by a preponderance of the evidence. In jurisdictions that have recognized the dangerous-patient exception, the burden should be squarely on the government to prove by a preponderance of the evidence that the patient’s threats were serious when made and that the testimony of the therapist at the criminal trial is the only means of averting harm. Furthermore, in demonstrating that the therapist’s testimony is the “only” means of averting the harm, the government should be required to show that it put forth reasonable efforts to locate other forms of proof and that the evidence needed to establish this criterion is not available through any other means.

VII. CONCLUSION

“An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”⁴⁴³

In *Jaffee*, the Supreme Court, operating under the authority granted to it by Federal Rule of Evidence 501, which allows federal

442. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (internal quotation marks omitted).

443. *Id.* at 18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

courts to recognize new privileges by interpreting “common law principles . . . in the light of reason and experience,”⁴⁴⁴ held that a psychotherapist-patient privilege should be recognized in the federal courts.⁴⁴⁵ The Court found that important public and private interests are served by protecting the confidences of patients in therapy because effective psychotherapy demands “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.”⁴⁴⁶ It also recognized that: “The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.”⁴⁴⁷

However, much confusion has arisen as the result of the Court’s offhand remarks in footnote 19 of the opinion, and this confusion threatens the continued viability of the privilege.⁴⁴⁸ In situations where a patient has made threatening statements against federal officials or federal employees during therapy, and where the therapist reported such threats to law enforcement authorities pursuant to state law, these patients have found themselves charged with violations of federal criminal laws. Federal prosecutors, seizing upon these reports as a convenient means of obtaining evidence, seek to have courts compel the testimony of these therapists at the patient’s criminal trial. This testimony is often the only evidence the prosecution needs to secure a conviction.

This article has argued against the recognition of the dangerous-patient exception to the psychotherapist-patient privilege. Simply put, there is little legal support or justification for the exception other than the *Jaffee* Court’s casual dicta. This exception is not justified by “reason and experience.” There is no support in the legislative history of Rule 501. Indeed, the contrary is true. Neither the experience of the states, nor the developed body of federal common law with respect to the other communication privileges, provides justification for the exception. Moreover, this exception requires courts to engage in a case-by-case balancing test—a procedure that was spe-

444. *Id.* at 8 (quoting FED. R. EVID. 501).

445. *Id.* at 9–10.

446. *Id.* at 10.

447. *Id.* at 11.

448. *See Jaffee*, 518 U.S. at 18 n.19.

cifically rejected by the *Jaffee* Court because “[m]aking the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interests in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.”⁴⁴⁹

The guiding principle behind the *Jaffee* Court’s decision to recognize the psychotherapist-patient privilege was to protect the confidentiality of patient disclosures in therapy with the goal of improving the nation’s mental health. The important policies served by this privilege are threatened by the dangerous-patient exception, which has the demonstrated potential for significant abuse if not curtailed and could lead to a general erosion of the privilege. Instead, courts should adopt the approach that preserves and protects this vital privilege and the special relationships to which it is attached.

449. *Id.* at 17.