2002

Dangerous Patients: An Exception to the Federal Psychotherapist-Patient Privilege

Huston Combs

University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Evidence Commons, and the Law and Psychology Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol91/iss2/7

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
Dangerous Patients:
An Exception to the Federal Psychotherapist-Patient Privilege

BY HUSTON COMBS*

INTRODUCTION

In 2000, the Sixth Circuit in United States v. Hayes1 declined to establish a dangerous patient exception to the federal psychotherapist-patient privilege in criminal prosecutions. Coupled with the psychotherapist’s duty to warn, as first recognized in Tarasoff v. Regents of the University of California2 and now adopted in a majority of states,3 this holding leads to the seemingly paradoxical result of requiring a psychotherapist to warn third parties of potential violence while excluding from evidence in criminal proceedings all psychotherapist-patient privileged communications.

As in Hayes, privileged communications may be the only evidence of a criminal offense.4 Suppressing the confidential communications may therefore effectively guarantee summary judgment for the defendant during prosecution for unrealized threats. Likewise, if a patient asserts the psychotherapist-patient privilege during prosecution for a committed act of violence, suppression of privileged patient communication greatly thwarts

* J.D. expected 2003, University of Kentucky.

1 United States v. Hayes, 227 F.3d 578 (6th Cir. 2000) (holding that there is no dangerous patient exception to the psychotherapist-patient privilege under FED. R. EVID. 501).

2 Tarasoff v. Regents of the Univ. of Cal., 529 P.2d 553 (Cal. 1974) (holding that a psychotherapist has the duty to use reasonable care to give threatened persons such warnings as are essential to avert foreseeable danger arising from his patient’s condition or treatment).


4 The grand jury indictment in Hayes was based on three counts of statements by Hayes to psychotherapists threatening the life of a federal official. Hayes, 227 F.3d at 581.
prosecution. Despite recognizing these possibilities, the *Hayes* holding⁵ and the psychotherapist-patient privilege itself are premised on the overriding value that certain confidentiality plays in successful psychotherapy.⁶ The psychotherapist-patient privilege is based on the underlying idea that the societal benefit of a mentally healthy populace outweighs the occasional loss of evidence in federal proceedings.⁷ The holding in *Hayes* implies that, in weighing competing interests, a dangerous patient exception does not tip the balance in favor of an evidentiary exception.

The most common situation justifying a dangerous patient exception to the privilege occurs when the admissibility of privileged communications in criminal proceedings is necessary to avert harm to a third party. The Tenth Circuit, one of three circuits of the United States Courts of Appeals to consider the dangerous patient exception, developed the “necessary to avert harm” exception in *United States v. Glass*.⁸ The Ninth Circuit recently adopted this exception and its underlying rationale as well.⁹ Although other possible circumstances arguably justify exception, such as when the psychotherapist informs his or her patient in advance that communications will not be confidential,¹⁰ the Tenth Circuit held that the “necessary to avert harm” exception is the only instance where the testimony offered outweighs the benefit of the exception in the balancing framework that first established the privilege.¹¹ Despite this distinction, the Sixth Circuit denied a

---

⁵ The majority in *Hayes* notes that “recognition of a ‘dangerous patient’ exception surely would have a deleterious effect on the ‘atmosphere of confidence and trust’ in the psychotherapist/patient relationship.” *Id.* at 584.

⁶ *E.g.*, Jaffee v. Redmond, 518 U.S. 1, 10 (1996) (“Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is ‘rooted in the imperative need for confidence and trust.’” (quoting Trammel v. United States, 445 U.S. 40, 51 (1980))).

⁷ *See id.* at 11-12.

⁸ *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998) (holding that the psychotherapist-patient privilege should be broken if necessary to avert a serious threat of harm to a third party).

⁹ *United States v. Chase*, 301 F.3d 1019 (9th Cir. 2002) (holding that a dangerous patient exception to the psychotherapist-patient privilege applies when a threat of harm is serious and imminent and when the harm can be averted only by means of disclosure by the therapist).

¹⁰ *See Hayes*, 227 F.3d at 587 (Boggs, J., dissenting) (“[W]hen the social worker has specifically informed the patient that the social worker will not keep the communications confidential, there is no barrier to that person testifying . . ..”).

¹¹ *See Glass*, 133 F.3d at 1356. *See also Jaffee*, 518 U.S. at 9-10 (“[T]he question we address today is whether a privilege protecting confidential communications between a psychotherapist and [his or ] her patient ‘promotes sufficiently
petition for a rehearing en banc, and the opinion split between the federal courts remains.

This Note contends that the strict law announced by the Sixth Circuit in United States v. Hayes fails to accommodate certain circumstances justifying a dangerous patient exception to the psychotherapist-patient privilege. Part I of this Note explores the history of the psychotherapist-patient privilege by outlining its development and by examining its formal recognition by the United States Supreme Court in Jaffee v. Redmond. In addition, Part I examines the exceptions to the privilege that federal courts have adopted since the Jaffee decision. Part II outlines the rationale behind the Tarasoff decision and examines state decisions reconciling the duty to protect with the evidentiary psychotherapist-patient privilege. Part III explores the facts and the judicial reasoning in both the Hayes and Glass cases and illustrates the differences between their holdings. Finally, the Note concludes that the Hayes holding fails to accommodate the possibilities to which the Jaffee court refers.

I. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

A. History

In 1972 the United States Supreme Court, acting on the recommendation of the Judicial Conference Advisory Committee on the Rules of Evidence, submitted to Congress nine proposed testimonial privileges. These proposed privileges were included in nine separate rules, including the psychotherapist-patient privilege in Proposed Rule 504. Historically, the Supreme Court has recognized a testimonial privilege only where such privilege facilitates a private good based on the inherent need for confidence. The privilege must also promote a public good that transcends the important interests to outweigh the need for probative evidence. (quoting Trammel, 445 U.S. at 51).

13 See infra notes 18-49 and accompanying text.
14 See infra notes 50-76 and accompanying text.
15 See infra notes 77-92 and accompanying text.
16 See infra notes 93-128 and accompanying text.
18 Jaffee v. Redmond, 518 U.S. 1, 9 n.7 (1996).
19 See id. at 10.
predominant principle of utilizing all rational means for ascertaining the truth. Thus, inherent in a Supreme Court recommendation of the psychotherapist-patient privilege is the Court’s belief that confidentiality in psychotherapy would benefit both the patient and the public despite the evidentiary loss to society.

Congress ultimately rejected the nine specific privileges in favor of a single, open rule that left the development of the privileges to the federal courts. This rule, Federal Rule of Evidence 501, states that, absent acts of Congress or rules of the Supreme Court, privileges are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The Senate Judiciary Committee stated, however, that "in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient ... privilege."

Despite widespread agreement that confidentiality is requisite for successful psychiatric treatment, the psychotherapist-patient privilege described in Proposed Rule 504 contained three specific exceptions: communications relevant to proceedings for hospitalization of patient, statements made during an examination by judicial order, and communications relevant to the condition of the patient when that condition is an element of the claim or defense. The drafters created these exceptions after determining that in each circumstance the public need for evidence outweighs the need for confidentiality in successful psychotherapy. Missing from these exceptions is one regarding dangerous patients; however, the drafters intentionally excluded such an exception.

The Advisory Committee believed that patients who willingly expressed to psychotherapists their intention to commit crime were unlikely to commit the crime and were instead making a plea for help. If the pleas were subject to disclosure, the patient would fear the consequences of disclosure and would therefore deprive the psychotherapist of the

20 See id. at 9.
21 See FED. R. EVID. 501.
22 Id.
25 See id. at 243-44 (citing Abraham S. Goldstein & Jay Katz, Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute, 36 CONN. B.J. 175 (1962)).
26 See Goldstein & Katz, supra note 25, at 188.
27 See id.
opportunity to offer help to the patient. Ultimately, the drafters believed that more crime would be prevented if patients could disclose their criminal intentions than if communications were used against the patient in a criminal proceeding. By intentionally excluding an exception for dangerous patients, the Advisory Committee showed great deference to the principle that the success of a psychotherapist depends upon his or her ability to communicate freely with a patient in a confidential setting.

By leaving the development of the psychotherapist-patient privilege to the lower federal courts, Congress left room for disparate treatment of the privilege. In fact, some Appellate Courts did not initially recognize the privilege; this disparity was not resolved until the Supreme Court formally recognized the privilege in 1996. Even in jurisdictions that recognized the privilege, differences arose as to its scope, leaving without answers questions such as under what circumstances is the privilege justified, and what are the boundaries of the term "psychotherapist?"

B. Jaffee v. Redmond

In 1996, the United States Supreme Court squarely faced the question of whether the advantages of protecting confidential communications between a psychotherapist and his or her patient outweigh the need for evidence. Given that Rule 501 recognizes privileges "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," the Supreme Court in Jaffee was greatly influenced by the fact that all fifty states adopted some form of the psychotherapist-patient privilege. In addition, the Court reasoned that "any State's promise of confidentiality would have little value" if federal courts could ignore that promise. Ultimately, the

---

28 Id.
29 See Harris, supra note 3, at 62 ("[T]he drafters of Proposed Rule 504 assumed 'that less harm will ensue if patients feel free to ventilate their intentions.'").
30 E.g., United States v. Corona, 849 F.2d 562, 567 (11th Cir. 1988) (holding that no psychotherapist-patient privilege exists in federal criminal trials); United States v. Meagher, 531 F.2d 752, 753 (5th Cir. 1976) (failing to recognize a psychotherapist-patient privilege because such privilege did not exist at common law).
32 See id. at 9-10.
33 FED. R. EVID. 501.
34 See Jaffee, 518 U.S. at 14.
35 Id. at 13.
decision to recognize the psychotherapist-patient privilege relied upon the same conclusion reached by the states: "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete discourse of facts, emotions, memories, and fears."36 The privilege was limited to "confidential communications between a licensed psychotherapist and [his or] her patients [made] in the course of diagnosis or treatment."37

In the decision on appeal in Jaffee, the Seventh Circuit had adopted a fact-specific balancing test to determine whether the psychotherapist-patient privilege applied to a given situation.38 Under the Seventh Circuit's analysis, the privacy interests of the individual were measured against the evidentiary need for the disclosure.39 The Supreme Court categorically denied the balancing test in favor of a firm psychotherapist-patient privilege. The Court believed that a case-by-case analysis would effectively thwart the public and private interests served by the privilege.40 The Court compared the psychotherapist-patient privilege to the spousal and attorney-client privileges by noting that all are "'rooted in the imperative need for confidence and trust.'"41

The Court reasoned that protecting psychotherapist-patient communications engenders productive confidence between the psychotherapist and patient and that this confidence in turn facilitates effective psychotherapy.42 Increasing the mental health of the individual through effective psychotherapy in turn benefits the "mental health of our citizenry."43 This public value of a citizenry of sound mental health was critical in the Court's analysis. Finally, the Court noted that the "mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."44 Thus, the public and private benefits of psychotherapy depend on confidentiality between the therapist and his or her patient.

36 Id. at 10, 13.
37 Id. at 15.
39 See id. at 1357 ("[W]e will determine the appropriate scope of the privilege 'by balancing the interests protected by shielding the evidence sought with those advanced by disclosure.'") (quoting In re Zuniga, 714 F.2d 632, 640 (1983)).
40 See Jaffee, 518 U.S. at 17.
41 Id. at 10 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).
42 Id. at 11 ("The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem.").
43 Id.
44 Id. at 10.
Despite rejecting a balancing test in favor of a general privilege, the Supreme Court did not fully define its scope. The Court found it "neither necessary nor feasible to delineate [the] full contours [of the psychotherapist-patient privilege] in a way that would 'govern all conceivable future questions in this area.'"\(^4\) Importantly, the Court, in dicta ("the Jaffee Footnote"), recognized that there were situations in which the privilege would yield to the interests of justice:

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.\(^6\)

Should the privilege apply in all circumstances? The Court essentially left this development to the lower courts but noted that an "'uncertain privilege . . . is little better than no privilege at all.'"\(^7\)

Although the Jaffee Court did not define the scope of situational applicability, the Court narrowed the scope of the privilege in other ways. Importantly, social workers were included in the psychotherapist definition along with psychiatrists and psychologists.\(^8\) In addition, the privilege only applies when made "in the course of diagnosis or treatment" by a licensed psychotherapist.\(^9\) Thus, with certain limits prescribed by the Supreme Court, the Jaffee decision left the lower federal courts with the ability to set the ultimate parameters on the application of the privilege. This discretion was guided by the overriding principle of the public and private benefits that result from confidential psychotherapy.

C. Federally Recognized Exceptions to the Psychotherapist-Patient Privilege

1. Patient-Litigant Exception

It is clear that the Advisory Committee that drafted Proposed Rule 504, with its three exceptions, contemplated the psychotherapist-patient

\(^{45}\) Id. at 18 (quoting Upjohn Co. v. United States, 449 U.S. 383, 386 n.19 (1981)).

\(^{46}\) Id. at 18 n.19.

\(^{47}\) Id. at 18 (quoting Upjohn, 449 U.S. at 393).

\(^{48}\) Id. at 15.

\(^{49}\) Id.
privilege giving way to evidentiary needs. Language in Jaffe also illustrates this expectation. By stating in dicta that the psychotherapist-patient privilege undoubtedly gives way in particular circumstances, the Supreme Court in Jaffe essentially reestablished a certain balancing element into the privilege. Balancing should enable courts to make exceptions to the general rule and should be used to acknowledge recurrent situations that demand special treatment; however, there are myriad situations in which this need might occur.

The first common exception to the psychotherapist-patient privilege is the “patient-litigant” exception, under which the patient cannot claim the privilege if the defense or claim is based on his or her “mental or emotional condition.” The patient-litigant exception is in fact more of a waiver than an exception. Many courts have held that solely by placing one’s mental or emotional state at issue, a patient waives the privilege. Under this interpretation, the waiver occurs regardless of whether the parties intend to introduce evidence of mental state.

Other jurisdictions have taken a narrower approach, holding that the privilege is only waived if the patient “does not call as a witness a person who has provided [him or] her with psychotherapy, and does not introduce into evidence the substance of any communication with such a person.” Jurisdictions adopting this test have analogized the psychotherapist-patient privilege to the attorney-client privilege. As a result, logic demands that the patient-litigant exception should occur in parallel situations where the attorney-client privilege is waived, namely when the attorney’s advice is at issue. The Jaffe Court equated the fundamental purposes of the psychotherapist-patient privilege with the attorney-client privilege. This approach taken by the lower courts seems more in line with the Supreme Court’s reasoning. The solid, established privilege is necessary for the individual and the public to benefit from psychotherapy; however, in

50 See Jaffe, 518 U.S. at 18 n.19.
51 See id.
54 See Nelken, supra note 52, at 21.
56 Id. at 229-30.
57 See Jaffe v. Redmond, 518 U.S. 1, 10 (1996).
predictable, recurrent situations, the privilege should yield, much as the attorney-client privilege yields, in parallel situations.

2. **Crime-Fraud Exception**

The First Circuit has also examined whether there should be a crime-fraud exception to the psychotherapist-patient privilege similar to that recognized under the attorney-client privilege. Such an exception was recognized by the First Circuit in *In re Grand Jury Proceedings (Gregory P. Violette)*, where the court ruled to enforce grand jury subpoenas for psychiatrists whose testimony was sought in an investigation for fraudulent disability claims by the defendant. The proceedings were based on the government’s belief that Gregory Violette made false statements concerning his psychiatric condition to financial institutions in exchange for loans and disability insurance. Violette intervened to assert a crime-fraud exception to the federal psychotherapist-patient privilege, a question of first impression among the federal courts.

In holding that a crime-fraud exception applies to the psychotherapist-patient privilege, the First Circuit analogized the crime-fraud exception to the attorney-client privilege. For the crime-fraud exception to the attorney-client privilege, the First Circuit noted that the “balance shifts . . . when a client communicates for the purpose of advancing a criminal or fraudulent enterprise.” This holding does not imply that protecting criminal and fraudulent communication has no potential value because attorneys are in a position to discourage unlawful activity. The crime-fraud exception, however, rests on the principle that preventing crime and fraud can better be served through admitting evidence into the judicial system than through the attorney’s counseling.

After reviewing Jaffee’s reliance on the attorney-client privilege to create the psychotherapist-patient privilege, the First Circuit logically

---

58 See *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71 (1st Cir. 1999).
59 Id.
60 Id. at 72.
61 Id.
62 Id. at 74 (noting that no court since Jaffee has determined whether the privilege is subject to a crime-fraud exception).
63 Id. at 75-77.
64 Id. at 76.
65 Id.
66 Id.
carried the crime-fraud exception to the psychotherapist setting. The court reasoned that the “mental health benefits, if any, of protecting such communications pale in comparison to ‘the normally predominant principle of utilizing all rational means of ascertaining truth.’” 66 In fact, the First Circuit determined that there were few situations in which legitimate mental health communications and communications regarding crime or fraud could simultaneously exist.67 Situations where potential harm arises from protecting the information, however, are quite possible, as the case at bar illustrates.68

The rationale for the exception rested on the idea that communications in the furtherance of fraud lack the therapeutic nature that the privilege seeks to protect. The court, however, did limit the exception to cases where the “patient’s purpose is to promote a particular crime or fraud.” As a result, a criminal’s confession of a past robbery would not justify use of the exception.69 Thus, the justifications, exceptions, and even the applicability of psychotherapist-patient privilege parallel the attorney-client privilege.

3. Other Potential Exceptions

One potential exception to the psychotherapist-patient privilege that has been rejected by the federal courts rests on a defendant’s right to compulsory process.70 In United States v. Doyle,71 the defendant subpoenaed the records of the psychotherapist who treated the victim of the crime. The victim suffered extreme psychological harm and the government sought an augmented sentence based on the federal sentencing guidelines.72 The court drew analogies to the spousal and attorney-client privileges in rejecting such an exception to the psychotherapist-patient privilege.73 Although the communications might help the defendant’s cause under the facts, revealing the communications would involve a fact-specific balancing test, which is exactly what the Jaffee Court disliked.74 In ruling that Sixth Amendment

---

67 Id. at 77.
68 Id. at 71.
69 See id. at 71.
70 Id. at 77.
71 See Nelken, supra note 52, at 39.
73 Id. at 1189.
74 Id. at 1189-90.
75 See Jaffee v. Redmond, 518 U.S. 1, 17 (1996) (“We reject the balancing component of the privilege implemented by [the Court of Appeals] and a small number of States.”).
DANGEROUS PATIENTS

The defendant's rights do not overcome the psychotherapist-patient privilege, the court adhered to the importance of a firm privilege as espoused in Jaffee.76

II. THE TARASOFF DUTY TO WARN

The now widely recognized duty of a psychotherapist to protect third parties from potential threats was first recognized by the Supreme Court of California in Tarasoff v. Regents of the University of California.77 The underlying facts involved a psychotherapist who became convinced that his patient, Prosenjit Poddar, posed a violent threat to a third party, Tatiana Tarasoff. Subsequently, Poddar killed Tarasoff.78 The survivors of Tarasoff then brought a negligence claim based on the psychotherapist's failure to warn Tarasoff or her parents of the danger Poddar posed.79

The original 1974 Tarasoff decision concerned a duty to warn but was replaced with the broader duty to protect in the 1976 Tarasoff II.80 Both Tarasoff cases based the duty owed to third parties on the special relationship that exists between the psychotherapist and the patient.81 The underlying policy is that protecting third parties from foreseeable violence justifies breaking the confidentiality between the therapist and the patient. Although the psychotherapist is in a unique position to help the patient and confidentiality is critical to successful therapy, protecting a third party from serious harm is imperative. On a simple balancing test, the outcome seems clearly logical; however, the affirmative duty to warn, created by the Tarasoff decision, is novel and debatable.

The duty does not arise until the therapist "determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another."82 In order to adhere to the duty of

76 Doyle, 1 F. Supp. 2d at 1190. The Oregon district court quoted from a portion of Jaffee that extolled the virtues of a predictable privilege. Id.
77 Tarasoff v. Regents of the Univ. of Cal., 529 P.2d 553 (Cal. 1974).
78 Id. at 554-56.
79 Id. at 556. Plaintiffs originally brought four claims: (1) "'Failure to Detain a Dangerous Patient;'" (2) "'Failure to Warn on a Dangerous Patient;'" (3) "'Abandonment on a Dangerous Patient;'" and (4) "'Breach of Primary Duty to Patient and the Public.'" The court allowed only the second claim. Id. at 556-65.
80 Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976) [hereinafter Tarasoff II].
82 Tarasoff II, 551 P.2d at 340.
care owed to the third party, the therapist must "notify the police, or [] take whatever other steps are reasonably necessary under the circumstances." In notifying another party of the potential threat of violence, therapists obviously break the seal of confidentiality between themselves and their patients. Subsequent decisions in other jurisdictions have predominately focused on two factors: whether the violence was foreseeable and whether the psychotherapist had sufficient control over the patient. In dealing with these factors, California and most other states recognizing the psychotherapist's duty to warn have limited its application to cases where the patient has made "a serious threat of violence against a reasonably identifiable victim."

The psychotherapist's duty to protect has not been the subject of many cases, and only a handful have involved identifiable third parties. As a result, the judiciary has not spoken to many of the possibilities that might arise with respect to the Tarasoff II duty and has not clearly reconciled the decision with psychotherapist-patient privilege. The Supreme Court of California, in California v. Wharton, held that there is no evidentiary privilege when the criteria for disclosure exist. The California statute states that "[t]here is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." The Tarasoff II decision in fact relied upon this exception to create the duty to protect; the exception to the privilege was "a declaration of public policy that [psycho]therapist-patient confidentiality must yield in the face of danger to third parties."

Another state to examine the psychotherapist-patient relationship with respect to the Tarasoff II duty is Oregon. The Supreme Court of Oregon took an alternate approach by holding that the dangerous patient exception arises when harm can be averted only by means of disclosure at the time of

83 Id.
84 See Beck, supra note 81, at 141.
85 Harris, supra note 3, at 48.
86 See Beck, supra note 81, at 142 ("There are only six cases that, like Tarasoff, involve outpatients, and only one of these six involved an explicit threat to a named victim.").
89 Harris, supra note 3, at 50.
90 See State v. Miller, 709 P.2d 225 (Or. 1985).
the proceedings that raise the evidentiary issue.\textsuperscript{91} In distinguishing the duty to protect from the evidentiary exception, the court noted:

\begin{quote}
The public interest to be served by notifying the police, in most cases, could be achieved by divulging only that information needed to show why a clear and immediate danger is believed to exist. It would rarely justify the full disclosure of the patient's confidences to the police, and never justify a full disclosure in open court, long after any possible danger has passed.\textsuperscript{92}
\end{quote}

The differences are essentially in timing: under the California decision, the duty to protect exception arises whenever the \textit{Tarasoff II} duty arises, while the Oregon decision makes clear that the exception should be analyzed at the time of criminal proceedings and only rarely applies. Under the Oregon decision, if the threat has passed by the time of the evidentiary proceeding, then the duty to protect exception does not apply. Under the California rule, however, the exception would apply. These two distinct approaches to reconciliation of the psychotherapist-patient privilege and the \textit{Tarasoff II} duty to protect illustrate two ways in which the \textit{Jaffee} dicta might be interpreted.

\section*{III. FACTUAL BACKGROUND}

Among the federal appellate courts, only the Sixth, Ninth, and Tenth Circuits have examined whether a dangerous patient exception to the federal psychotherapist-patient privilege exists in criminal proceedings. The Tenth Circuit,\textsuperscript{93} whose holding was followed by the Ninth Circuit,\textsuperscript{94} relied upon the \textit{Jaffee} footnote\textsuperscript{95} and concluded that such an exception existed if the otherwise privileged communication would be needed for the protection of a third party.\textsuperscript{96} The Sixth Circuit, in \textit{United States v. Hayes}, rejected this rule in favor of a privilege immune from a dangerous patient exception for criminal proceedings.\textsuperscript{97}

The \textit{Hayes} decision concerned Roy Lee Hayes, who worked as a union steward for the United States Post Office in Marion, Virginia. In 1997, he

\begin{itemize}
\item \textsuperscript{91} \textit{Id.} at 236-37.
\item \textsuperscript{92} \textit{Id.} at 236.
\item \textsuperscript{93} \textit{See} \textit{United States v. Glass}, 133 F.3d 1356 (10th Cir. 1998).
\item \textsuperscript{94} \textit{United States v. Chase}, 301 F.3d 1019 (9th Cir. 2002).
\item \textsuperscript{95} \textit{Jaffee v. Redmond}, 518 U.S. 1, 18 n.19 (1996).
\item \textsuperscript{96} \textit{Glass}, 133 F.3d at 1360.
\item \textsuperscript{97} \textit{United States v. Hayes}, 227 F.3d 578 (6th Cir. 2000).
\end{itemize}
began to behave unpredictably, and often became depressed to the point of not performing his employment duties. In discussions with psychotherapists, Hayes indicated on two different occasions that he wanted to kill Vera Odle, his supervisor at the post office. Despite Hayes’s violent desires, the psychotherapists at MHH never warned Odle, and Hayes was released with only a prescription for his condition.

As his condition failed to improve, in early 1988, Hayes sought the help of James Van Dyke, a social worker in the Veterans Center in Johnson City. Hayes gave Van Dyke detailed descriptions of his plan to kill Odle. Subsequently, Hayes left the Veterans Center after Van Dyke similarly concluded that Hayes was not dangerous. After experiencing a period of anxiety and lack of self restraint in late March, Hayes again met with Van Dyke, making more specific and ominous threats against Odle. After this session, Van Dyke became wary of possible harm to Odle and of his potential responsibility for failing to warn Odle. As a result, Van Dyke informed Odle of Hayes’ threats.

Odle’s supervisor, Postal Inspector Terrence Vlug, demanded the records Van Dyke made of his meetings with Hayes. Vlug then filed a criminal complaint under 18 U.S.C. § 115(a)(1), charging Hayes with threatening to murder a federal officer. The district court applied the standard announced in United States v. Glass, finding that Hayes’ statements to doctors at MHH and to Van Dyke were privileged. The court held that the psychotherapist-patient privilege applied to both sets of statements because revealing Hayes’ threats was not “the only means of averting harm” to Odle when Hayes made the threats.

---

98 Id. at 580.
99 Id.
100 Id.
101 Id.
102 18 U.S.C. § 115(a)(1) provides: “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. . . .”
103 United States v. Glass, 133 F.3d 1356 (10th Cir. 1998) (holding that the psychotherapist-patient privilege should be abandoned if necessary to avert a serious threat of harm to a third party).
104 Hayes, 227 F.3d at 581 (quoting Glass, 133 F.3d at 1360).
Judge Ryan, for a three-judge panel of the Sixth Circuit, affirmed the district court’s dismissal, although on grounds distinct from the district court. First, in noting that the psychotherapist-patient privilege does not interfere with a professional duty to protect third parties, the Court properly acknowledged the distinctions between the dangerous patient exception and the Tarasoff duty to protect. The court found the two concepts to be distinct and chronologically different because the psychotherapist’s duty to protect arises during the course of psychotherapy, whereas the dangerous patient exception arises at prosecution. Thus, allowing psychotherapist testimony generally serves only an evidentiary purpose, whereas the duty to protect serves the public function of protecting the health of third parties. The psychotherapist’s duty to protect requires taking all reasonable steps to avert harm to third parties, which may or may not include warning a third party. As the Sixth Circuit noted, if a dangerous patient exception were triggered upon a psychotherapist’s warning to a third party, the testimonial privilege would depend upon whether a psychotherapist acted reasonably, which would greatly impede the criminal rights of the defendant. More importantly, by the time of trial, the privilege is often broken solely for the sake of prosecution because the benefit of protecting a third party has generally vanished. However, this generalization ignores cases where breaking the privilege for evidentiary purposes is necessary for the protection of a third party.

There clearly is no compelling reason to break the psychotherapist-patient privilege for evidentiary reasons related to a past threat that is no longer material or for evidentiary reasons related to the prosecution of an executed threat, but situations can arise where “an unrealized threat” can only be avoided by criminal prosecution. As the Sixth Circuit stated:

[C]ompliance 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 if a patient properly asserts the psychotherapist/patient privilege.

Ultimately, the Sixth Circuit properly recognized that the duty to warn and the psychotherapist-patient privilege can co-exist, but the holding ignores

---

105 See id. at 583-84.
106 See id.
107 Id. at 584.
108 Id. at 586.
certain situations in which a psychotherapist’s warning to a third party is inadequate for the third party’s protection.

As the preceding quotation indicates, the Sixth Circuit interpreted the Jaffee footnote to apply to cases where the protection of the third party involves a psychotherapist testifying for the involuntary commitment of a patient.109 Hospitalization would eliminate the serious threat of harm, so this scenario preserves the benefit of psychiatric care while also protecting a third party. Allowing psychiatric testimony at a criminal proceeding, however, would not have the same effect of fostering mental health because such care is typically not available to one who is incarcerated. The court reasons that adoption of a federal common law exception would be unwise because the majority of states recognize no such exception.110

In dissent, Judge Boggs argued that the psychotherapist-patient privilege should not “creat[e] a barrier that prevents competent testimony as to the commission of a crime by a fully warned patient. . . .” The dissent’s disagreement with the holding is based on the undisputed fact that Hayes was repeatedly warned during the course of his psychotherapy that his threats could not be kept confidential.112 Under this reasoning, by continuing with his statements, Hayes impliedly waived his privilege. Unlike the waiver to the psychotherapist-patient privilege that may occur when a person claims mental or emotional damages, this supposed waiver occurs in the course of treatment. Since confidentiality is necessary for effective treatment, the “waiver” should only be used in situations where averting third party harm is necessary. This Tarasoff duty to warn is probably what Hayes’ psychotherapists considered when informing him that threatening statements could not be kept confidential. Using the statements at criminal proceedings would only be logical when also necessary to avert harm. Otherwise, the confidentiality upon which psychotherapy depends would be undermined. In other words, if only a pure evidentiary reason were used for breaking the privilege, the costs would outweigh the benefits under a Jaffee balancing test.

Determining what the Supreme Court contemplated in footnote nineteen of Jaffee is difficult. Consistent with the Sixth Circuit’s interpretation, the footnote can be read narrowly in scope, covering only situations

109 Id. at 585.
110 Id. at 585-86.
111 Id. at 589.
112 Id. at 588 ("Dr. Radford told Hayes in February, as Hayes himself testified, that his threats to kill Odle would have to be reported. Van Dyke warned Hayes twice that his threats would not and could not be kept in confidence.").
for hospitalization proceedings. Yet, by stating that an exception to the privilege would be justified if necessary to avert harm, the Supreme Court seems to have contemplated more. For instance, in a hearing for a restraining order, one party might request to have a psychotherapist testify. A reasonable person might view the restraining order as necessary for averting harm to a third party in the same way that a criminal prosecution is necessary to avert harm to a third party. Unlike a hospitalization proceeding, neither a restraining order nor a criminal conviction would entail psychotherapy for the defendant; thus, allowing the psychotherapist to testify would be an exception to the privilege where the underlying purpose (i.e., the mental health of the citizenry) is completely defeated. However, using a balancing test, the imminent safety of a third party would surely outweigh the corresponding break in the psychotherapist-patient privilege.

In analyzing whether the dicta in Jaffee created a dangerous patient exception to the psychotherapist-patient privilege, the Hayes court applies the proper analysis in light of the Jaffee decision: a balancing test of the private and public benefits of psychotherapy with the public need for evidence. When stating that the privilege serves a greater public good, the Supreme Court in Jaffee implicitly stated that the public’s need for evidence would have to justify an exception to the privilege. In most criminal proceedings, an exception to the privilege would serve only an evidentiary function. What the Sixth Circuit failed to acknowledge is that a criminal proceeding may be the only way to protect the interests of a third party. Because a break in the psychotherapist-patient privilege must be “necessary to avert harm,” all other possible alternatives for avoiding the harm would have to be exhausted. As the Sixth Circuit notes, involuntary hospitalization might often provide a solution. Yet, in rare instances, a

113 Id. at 586.
115 See Hayes, 227 F.3d at 584.
116 See Jaffee, 518 U.S. at 15 (“Because we agree with the judgment of the state legislatures and the Advisory Committee that a psychotherapist-patient privilege will serve a ‘public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth,’ we hold that confidential communications between a licensed psychotherapist and [his or] her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.”) (citation omitted).
117 See Hayes, 227 F.3d at 585 (“After involuntary hospitalization, for example, the patient would no longer pose a ‘serious threat of harm’ to anyone and, hopefully, the psychotherapist/patient relationship can continue during the patient’s
criminal proceeding might be the only way to avert harm, and this rare circumstance would be fact-specific. The rule of law pronounced by the Sixth Circuit, however, fails to accommodate this possibility by stressing the societal benefits of confidentiality over potentially imminent harm to an innocent individual.\footnote{118 See id. at 584-85 ("Passing for the moment the question whether the Supreme Court adopted a 'dangerous patient' exception to the psychotherapist/patient privilege in a footnote, we begin by examining the effect such an exception would have on the 'confidence and trust' that is implicit in the confidential relationship between therapist and patient.").}

The Tenth and Ninth Circuits however, adopted a more liberal reading and application of the \textit{Jaffee} footnote. The Tenth Circuit, in \textit{United States v. Glass}, considered a situation where the patient threatened to kill the President and the psychotherapist became concerned when the patient could not be located for several days.\footnote{119 United States v. Glass, 133 F.3d 1356, 1357 (10th Cir. 1998).} The court remanded the case and instructed the district court to make a determination concerning whether the threat was serious when uttered and whether a disclosure was "the only means to avert harm."\footnote{120 \textit{Id.} at 1360.} On remand, the lower court determined that a dangerous patient exception was necessary to avert harm. A secret service agent testified that he considered the threat serious because Glass had previously made such threats and because he had the resources to execute his plan.\footnote{121 \textit{Id.} at 1360.}

In \textit{United States v. Chase}, the Ninth Circuit considered a case in which a patient stated that he would kill federal officers if they searched his home.\footnote{122 United States v. Chase, 301 F.3d 1019, 1022 (9th Cir. 2002).} Chase was receiving treatment for "irritability, anger symptoms, and depression," and during his therapy sessions he often displayed great volatility toward former business associates.\footnote{123 \textit{Id.} at 1022.} The death threats on which prosecution was based occurred during a telephone exchange between Chase and his therapist when Chase was locked in his home and anticipating the execution of a search warrant.\footnote{124 \textit{Id.} at 1024.} The Ninth Circuit reasoned that a dangerous patient exception is "faithful both to the \textit{Jaffee} footnote and to the obvious policy considerations that underlie it."\footnote{125 \textit{Id.} at 1024.} Since the trial court found that Chase presented imminent danger of causing serious harm to hospitalization.").

\textit{id.} at 584-85 ("Passing for the moment the question whether the Supreme Court adopted a 'dangerous patient' exception to the psychotherapist/patient privilege in a footnote, we begin by examining the effect such an exception would have on the 'confidence and trust' that is implicit in the confidential relationship between therapist and patient.").

\textit{Id.} at 1360.

\textit{Id.} at 1022.

\textit{Id.} at 1024.
others and that his therapist’s disclosure to authorities was the only means of averting that harm, the testimony regarding the threats was properly admitted by the trial court.\textsuperscript{126}

Both \textit{Glass} and \textit{Chase} illustrate that in some instances imminent harm may only be avoided by prosecution—warnings and involuntary commitment may not suffice. As common sense dictates, threats are unlikely to materialize once a criminal proceeding for the threats has begun. The fact that threats are unlikely to occur after criminal proceedings begin, however, does not eliminate the possibility. Although the circumstances might be rare, what the \textit{Hayes} court ignores is that psychotherapist testimony at a criminal proceeding might be the only way that harm can be avoided. In the same light, a magistrate might view a restraining order as the only means of protecting a third party. Both scenarios would benefit from the logical application of the dangerous patient exception to the psychotherapist-patient privilege.

Ultimately, the \textit{Hayes} Court saw little connection between a psychotherapist’s warning to a third party and lifting the psychotherapist-patient privilege to allow testimony recounting the threats.\textsuperscript{127} The court reasoned that the duty to warn serves a more immediate goal than a dangerous patient exception because threats are unlikely to be carried out once criminal proceedings have begun. But it is still possible to execute threats even after criminal proceedings have begun, especially when a judgment for the prosecution is impossible without the necessary evidence.

At the outset, the \textit{Hayes} court was correct in differentiating the \textit{Tarasoff} duty to warn from the dangerous patient exception.\textsuperscript{128} Yet, the \textit{Hayes} decision ignores a possibility that might arise: a scenario in which testimony is the only means of averting harm. Although the drafters of Proposed Rule 504 likewise excluded a dangerous patient exception, Congress ultimately rejected the rules in favor of a common law approach. Thus, in light of “experience and reason,” there are circumstances where the protection of a third party depends upon the admissibility of confidential communications in a criminal proceeding. This is exactly what the district courts determined in \textit{Glass} and \textit{Chase}, the only two federal opinions exploring the scenario. The “necessary to avert harm” standard announced in \textit{Glass} is high and will not often be met. Yet, with a sweeping rule as was pronounced in \textit{Hayes}, the benefits of confidential psychother-

\textsuperscript{126} \textit{Id.} “[I]t was unlikely that Chase would be held for longer than 72 hours due to his lack of a committable mental illness.” \textit{Id.} at 1025.

\textsuperscript{127} \textit{See} United States v. Hayes, 227 F.3d 578, 583-84 (6th Cir. 2000).

\textsuperscript{128} \textit{See id.}
apy will occasionally come at the price of grave harm, or even death, to innocent third parties.

IV. CONCLUSION

The Supreme Court's footnote in *Jaffee*, although subject to multiple interpretations, supports the dangerous patient exception to the psychotherapist-patient privilege in criminal proceedings, but only when absolutely necessary to prevent harm. In such situations the breaking of the privilege goes beyond serving a simple evidentiary need because society is served with an immediate benefit: the protection of innocent citizens. Due to the existence of both societal and evidentiary benefits, the Supreme Court, if reviewing the issue on certiorari, would likely recognize an exception to the psychotherapist-patient privilege in criminal proceedings where necessary to avert harm to third parties. This exception will arise in only a few instances, and by infrequently invoking it, the damage done to the privilege and to efficacious psychotherapy is minimized. By recognizing the rare but recurrent situation demanding this dangerous patient exception to the psychotherapist-privilege, the Supreme Court would be adhering to its reasoning and balancing approach, similarly used to grant exceptions to other privileges, but the creation of the exception would not be so broad as to consume the benefits of the psychotherapist-patient privilege.