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CONTOURS AND CHAOS: A PROPOSAL FOR COURTS TO APPLY THE "DANGEROUS PATIENT" EXCEPTION TO THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

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INTRODUCTION

In *Jaffee v. Redmond*,[1] the Supreme Court of the United States held that Federal Rule of Evidence 501[2] protects communications between a psychotherapist and his patient. The *Jaffee* decision prevents adverse parties from compelling disclosure or testimony of communications between a psychotherapist and his patient in any legal proceeding.[3] The Supreme Court, however, sidestepped the question of when exceptions to the psychotherapist-patient privilege might arise.[4] Instead, the *Jaffee* Court tacitly condoned an exception when disclosing psychotherapist-patient communications could protect against a threat of serious harm to the patient or others.[5] Courts and commentators refer to this theoretical exception as the "dangerous patient" exception to the psychotherapist-patient privilege.[6] Thus far, three federal circuits have addressed whether this exception applies to criminal cases.[7] Not surprisingly, each circuit has defined the circumstances under which the "dangerous patient" exception applies in dramatically different ways.[8] As it stands, no uniform test exists to determine when, if ever, a "dangerous patient" exception to the psychotherapist-patient privilege applies in criminal cases.

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1. 518 U.S. 1, 15 (1996).

2. Federal Rule of Evidence 501 states,

> 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 the 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, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

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

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

5. *See id.*

6. *See, e.g.*, United States v. Chase, 301 F.3d 1019, 1024 (9th Cir. 2002) (per curiam) (cert. denied, 72 U.S.L.W. 3507 (U.S. Mar. 1, 2004) (No. 03-1118)) [hereinafter *Chase I*]; George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The* Tarasoff *Duty and the* Jaffee *Footnote*, 74 WASH. L. REV. 33 (1999); Melissa L. Nelken, *The Limits of Privilege: The Developing Scope of Federal Psychotherapist-Patient Privilege Law*, 20 REV. LITIG. 1, 33 (2000); 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 (1997).

7. *See* United States v. Chase, 340 F.3d 978 (9th Cir. 2003) (en banc) [hereinafter *Chase II*]; *Chase I*, 301 F.3d 1019; United States v. Hayes, 227 F.3d 578 (6th Cir. 2000); United States v. Glass, 133 F.3d 1356 (10th Cir. 1998).

8. *See Chase II*, 340 F.3d at 989 n.5, 991–92; *Chase I*, 301 F.3d at 1025; *Hayes*, 227 F.3d at 586; *Glass*, 133 F.3d at 1360.

The difficulty courts have faced in formulating such a test arises from the tension between two equally important, but often competing, interests: (1) a patient's interest in obtaining unfettered mental health treatment and (2) society's interest in protecting intended victims from known risks. A solution that remains faithful to the Court's holding in *Jaffee* must find a way to resolve this tension by carving out an exception that properly balances these two competing interests. This article seeks to fill that need by providing a workable and uniform framework under which courts may apply the "dangerous patient" exception in criminal cases.

The article comprises four sections. Section I reviews the *Jaffee* decision and the resulting psychotherapist-patient privilege. Section II discusses recent federal case law addressing whether a "dangerous patient" exception to the privilege exists in criminal cases. Section II summarizes the different tests governing the "dangerous patient" exception that have emerged among the circuits. Section III urges courts to apply a "dangerous patient" exception in criminal cases to protect third parties from known threats of harm. Finally, section IV proposes a model for courts to uniformly apply a "dangerous patient" exception in criminal cases.

I. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

States have long recognized some form of physician-patient privilege.[9] By 1943, the vast majority of states protected communications between patients and physicians.[10] And by 1996, all fifty states and the District of Columbia had enacted some form of psychotherapist-patient privilege.[11] On the federal level, however, a split over the existence of a psychotherapist-patient privilege had developed among the circuits.[12] By 1995, two circuits had recognized the privilege, while four had rejected its existence.[13]

Against this backdrop came the Seventh Circuit's decision in *Jaffee v. Redmond*.[14] In *Jaffee*, the Seventh Circuit recognized a psychotherapist-patient privilege that

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9. See, for example, an 1829 New York statute stating,

> No person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon.

N.Y. REV. STATS. § 73 (1829).

10. *See* 1 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 98 (5th ed. 1999) (noting that only seventeen states had no psychotherapist-patient privilege by 1943).

11. *See Jaffee*, 518 U.S. at 12 n.11 (listing state statutes that recognize psychotherapist privilege).

12. *See id.* at 7 (noting split among circuits).

13. *See id.*; *see also* Nelken, *supra* note 6, at 4 n.9 ("The Second and Sixth Circuits had recognized the privilege...but the Fifth, Ninth, Tenth, and Eleventh Circuits had declined to do so.").

14. 51 F.3d 1346 (7th Cir. 1995). In *Jaffee*, an on-duty police officer, Mary Lu Redmond, shot a man named Ricky Allen. *Id.* at 1348–49. The administrator of Allen's estate brought a wrongful death suit against Redmond and her employer. *Id.* at 1348. During pre-trial discovery, Allen's estate discovered that, after the shooting, Redmond had attended approximately fifty counseling sessions with a clinical social worker. *See id.* at 1350. Allen's estate sought access to all notes from those meetings. *Id.* Both Redmond and her social worker refused to produce the notes, arguing that a psychotherapist-patient privilege protected the information contained in those notes. *Id.* The district court disagreed and ordered Redmond and her social worker to produce the notes and answer questions at a deposition. *Id.* at 1350–51. When they refused, the district court instructed the jury that it could draw a negative inference against Redmond. *Id.* at 1351. Eventually, the jury returned a verdict in favor of Allen's estate. *Id.* at 1352. On appeal to the Seventh Circuit, Redmond successfully urged the Seventh Circuit to recognize a psychotherapist-patient privilege. *Id.* at 1355–58. Thereafter, Allen's estate filed a petition for certiorari with the U.S. Supreme Court. *See Jaffee*, 518 U.S. at 7–8.

protected psychotherapist-patient communications only in limited circumstances.[15] Specifically, the privilege protected such communications only where the patient's privacy concerns outweighed the need for disclosure of the contents of the patient's counseling sessions.[16]

On appeal from the Seventh Circuit, the U.S. Supreme Court, in an eight-to-one decision, affirmed the Seventh Circuit's decision.[17] The Supreme Court found that "reason and experience" dictate that a psychotherapist-patient privilege "'promotes sufficiently important interests to outweigh the need for probative evidence.'"[18] The Court identified two sets of interests that the privilege would promote.[19] First, the privilege would serve the private interest of the patient.[20] The Court stated that effective therapy depends on an "atmosphere of confidence and trust," an atmosphere where a patient can freely disclose to the psychotherapist his most intimate thoughts.[21] Once the psychotherapist and the patient develop that atmosphere, the patient might disclose embarrassing or disgraceful thoughts.[22] Consequently, the Court reasoned, "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."[23]

Second, the Court reasoned that the privilege offers a commensurate benefit to the public at large.[24] Specifically, the Court stated that the privilege "facilitat[es] the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem."[25] The Court then declared that the citizenry's mental health constitutes a "public good of transcendent importance."[26]

Next, the Court compared the benefits of serving these public and private interests to the benefits of allowing psychotherapists to testify against their patients.[27] The

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15. *Jaffee*, 51 F.3d at 1355–58.

16. *See id.* at 1357.

> However, we also note that the privilege we recognize in a case of this nature requires an assessment of whether, in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests.... Accordingly, we will determine the appropriate scope of the privilege "by balancing the interests protected by shielding the evidence sought with those advanced by disclosure."

Id. (quoting *In Re* Zuniga, 714 F.2d 632, 640 (6th Cir. 1983)).

17. *Jaffee*, 518 U.S. at 3, 18. Justice Scalia wrote the only dissenting opinion. *Id.* at 18–36. Justice Rehnquist joined the last part of Scalia's dissent. *Id.* at 18. In that part, Scalia rejected the majority's holding that the psychotherapist-patient privilege should extend to social workers. *Id.* at 27–36.

18. *Id.* at 9–10 (citations omitted).

19. *Id.* at 10–11.

20. *Id.* at 10.

21. *Id.* at 10–11; *see also* Sam A. Mackie, *Proof of Unauthorized Disclosure of Confidential Patient Information by a Psychotherapist*, 24 AM. JUR. 3D *Proof of Facts* 123 (1994).

> Some of psychotherapy's aims are to change maladaptive behavior patterns, improve interpersonal relationships, resolve inner conflicts that cause personal distress, modify inaccurate assumptions about a person's self and environment, and foster a more definite sense of self-identity, which itself promotes individual growth and leads to a more meaningful and fulfilling existence.

Id. at 129.

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

23. *Id.*

24. *Id.* at 11.

25. *Id.*

26. *Id.*

27. *Id.* at 11–12.

Court concluded that the former outweighed the latter.[28] In fact, the Court predicted that, without the privilege, patients would be less likely to disclose statements against their own interest.[29] As such, allowing psychotherapists to testify against their patients would yield no cognizable benefit.[30]

The Court then attempted to define the contours of the new privilege.[31] The Court began by explicitly rejecting the Seventh Circuit's balancing of interests approach.[32] According to the Court, the Seventh Circuit's balancing approach would create uncertainty for patients.[33] In each instance, a judge would have to determine whether the patient's privacy interests outweighed the evidentiary need for disclosure.[34] Such a case-by-case approach, the Court stated, would provide no effective way for the patient to know whether his confidential statements would remain confidential.[35] Consequently, the Court concluded that, under these circumstances, the psychotherapist-patient privilege would amount to no privilege at all.[36]

The Court, therefore, adopted a rule that would allow patients to predict with certainty whether the privilege would protect their statements from discovery.[37] Under that rule, a patient is entitled to invoke the psychotherapist-patient privilege if he proves three things: (1) the statements were confidential when made; (2) he made the statements to a licensed psychiatrist, psychologist, or clinical social worker; and (3) he made the statements in the course of diagnosis or treatment.[38] Despite establishing a seemingly bright-line rule, the Court indicated that it did not intend to announce an absolute privilege for courts to rigidly apply in all future cases. Indeed, the Court expressly declined to "delineate [the] full contours [of the privilege] in a way that would 'govern all conceivable future questions in this area.'"[39] Rather, the Court left the details of the privilege to be decided on a case-by-case basis.[40] Most notably, in an ambiguous footnote,[41] the Court hinted that the protection of the patient or of a third party might outweigh the privilege in certain circumstances:

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28. *Id.* at 11.
29. *Id.* at 12.
30. *Id.*
31. *See id.* at 15–18. The Court also ruled that the privilege applied with equal force to licensed psychiatrists, psychologists, and clinical social workers. *Id.* at 15–17.
32. *Id.* at 17.
33. *Id.*
34. *Id.*
35. *Id.* at 18.
36. *Id.* (quoting Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)) ("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.").
37. *See id.* at 18.
38. *See id.* at 15.
39. *Id.* at 18 (quoting *Upjohn*, 449 U.S. at 393).
40. *Id.*
41. *See, e.g.*, Stacy Aronowitz, *Following the Psychotherapist-Patient Privilege Down the Bumpy Road Paved by* Jaffee v. Redmond, 1998 ANN. SURV. AM. L. 307, 319 ("In *Jaffee*, the Supreme Court determined that those communications between licensed psychotherapists and their patients made in the course of diagnosis or treatment are privileged. In so doing, the Supreme Court created a vague and ill-defined privilege bound for inconsistent interpretations among the lower federal courts.").

> Although it would be premature to speculate about most future developments in 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.[42]

This footnote, often referred to as the "*Jaffee* footnote," has created a split among the circuits over its meaning.[43] The remainder of this article discusses the nature of this split and offers a workable approach for courts to apply the "dangerous patient" exception in criminal cases.

II. RECENT CASE LAW INVOLVING THE *JAFFEE* FOOTNOTE

Since the Supreme Court decided *Jaffee*, three circuits have addressed whether a "dangerous patient" exception to the psychotherapist-patient privilege exists in criminal cases.[44] From these circuits have emerged starkly divergent views on whether and when such an exception exists.[45] In *Glass*, for example, the Tenth Circuit advocated a strict two-part test to determine whether a physician may testify to statements that he learned in treating the accused.[46] By contrast, the Sixth Circuit in *United States v. Hayes* refused to recognize a "dangerous patient" exception in any criminal case.[47] Subsequently, the Ninth Circuit in *Chase I* created a relatively undefined and broad exception to the privilege allowing psychotherapists to testify against their patients.[48] In *Chase II*, however, the Ninth Circuit adopted the Sixth Circuit's reasoning and, for the most part, rejected a dangerous patient exception in criminal cases.[49] Below, each case and the resulting "dangerous patient" exception are discussed.

1. United States v. Glass

The Tenth Circuit decided the first post-*Jaffee* case to address the "dangerous patient" exception.[50] In *Glass*, the Tenth Circuit held that *Jaffee* allowed an exception to the psychotherapist-patient privilege where disclosure was the only way to prevent a threat of serious injury to third parties.[51] The patient in *Glass*, Archie Monroe Glass, voluntarily admitted himself to a "mental health unit for treatment

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

43. *See supra* note 8.

44. *See Chase II*, 340 F.3d 978 (en banc); *Chase I*, 301 F.3d 1019 (per curiam); United States v. Hayes, 227 F.3d 578 (6th Cir. 2000); United States v. Glass, 133 F.3d 1356 (10th Cir. 1998).

45. *See supra* note 8.

46. *See Glass*, 133 F.3d at 1360. Other commentators disagree that the Tenth Circuit created a strict test in *Glass*. For example, Professor Nelken believes the Tenth Circuit created an "overly broad" exception to the general psychotherapist privilege. Nelken, *supra* note 6, at 33–34 ("The lack of any clear reference or context for the [Supreme] Court's footnote in the *Jaffee* opinion has led the Tenth Circuit to create an overly broad exception to the privilege in one of the few post-*Jaffee* appellate opinions to date."). Professor Nelken, however, expressed this view before the Ninth Circuit decided *Chase I*. As discussed in this section, the Ninth Circuit's approach in *Chase I* created a much broader exception to the psychotherapist privilege than did the Tenth Circuit's in *Glass*.

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

48. *See Chase I*, 301 F.3d at 1024.

49. *See Chase II*, 340 F.3d at 992.

50. *See Glass*, 133 F.3d 1356.

51. *See id.*

of his 'ongoing mental illness.'"[52] A psychotherapist, Dr. Shantharam Darbe, examined Glass on several occasions.[53]

During one examination, Glass told Dr. Darbe that "'he wanted to get in the history books like Hinkley [sic] and wanted to shoot Bill Clinton and Hilary [sic].'"[54] Dr. Darbe took no action in response to Glass's statement.[55] Instead, he released Glass a few days later, and Glass agreed to participate in an outpatient mental health treatment, but he soon disappeared after being released.[56] Secret Service agents were notified of Glass's disappearance, and they eventually contacted Dr. Darbe.[57] Dr. Darbe told the agents about Glass's desire to kill the president and first lady.[58] Glass was later "[i]ndicted for knowingly and willfully threatening to kill the President of the United States."[59]

Before trial, Glass moved to exclude the statements he had made to Dr. Darbe, arguing that the psychotherapist-patient privilege protected those statements from disclosure.[60] In response, the government claimed that Dr. Darbe had determined that Glass presented a danger to President Clinton.[61] Once Dr. Darbe had reached that determination, he incurred a duty to protect the president.[62] The district court agreed and declared the psychotherapist-patient privilege inapplicable where a person with an established history of mental illness, such as Glass, threatens a third party.[63]

On appeal, the Tenth Circuit held that a psychotherapist could testify about a patient's threatening statements if (1) the threat "was serious *when it was uttered*" and (2) disclosing the threat "was the *only means* of averting harm to the [victim] when the disclosure was made."[64] Unable to determine whether Glass's statements satisfied this test, the Tenth Circuit remanded the case to the district court for further proceedings.[65]

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52. *Id.* at 1357.

53. *Id.*

54. *Id.*

55. *See id.*

56. *Id.* Glass also promised to stay at his father's residence while participating in the outpatient treatment. *Id.* Shortly thereafter, an outpatient nurse discovered that Glass had vacated his father's residence. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (citing 18 U.S.C. § 871(a) (2000)).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* Citing the *Jaffee* footnote and a psychotherapist's duty to protect his patient's victims, the district court found the psychotherapist-patient privilege inapplicable when a patient makes a credible threat to kill another. *See id.* The Tenth Circuit later reversed the district court's conclusion as lacking any objective factual support indicating that the patient actually presented a serious threat to the president. *See id.* ("This conclusion was made without presentation of evidence and, from our review of the record, appears to be supported factually only by argument contained in the government's trial court brief").

64. *Id.* at 1360 (emphasis added).

65. *See id.* at 1359–60. On remand, the district court found that Glass's statements satisfied the two-part test and admitted Dr. Darbe's testimony. *See* Nelken, *supra* note 6, at 35 (citing *Order*, Apr. 9, 1998, Case No. CR-96-94-T, U.S. District Court, Western District of Oklahoma (Thompson, J.) at 2, 5, 8).

2. United States v. Hayes

Nearly three years after *Glass*, the Sixth Circuit decided *United States v. Hayes*.[66] In *Hayes*, the district court initially, and the Sixth Circuit later, excluded repeated and detailed threats made by Roy Lee Hayes, a U.S. Postal Worker, to various psychotherapists.[67] In February 1998, Hayes sought treatment at the Veterans Administration Mountain Home Hospital (MHH) for severe depression and fits of "irregular behavior."[68] During treatment,[69] Hayes told a psychotherapist, Dr. Hansen, that he wanted to kill his supervisor but that fear of losing his job prevented him from doing so.[70] Shortly after being released, Hayes readmitted himself to MHH.[71] He again stated that he wished to kill his supervisor, but the MHH treating physicians concluded that he could control this desire and that he understood the consequences of his actions.[72] Dr. Radford, another psychotherapist at MHH, warned that he would not keep Hayes' threats confidential.[73] But no one on the MHH staff ever disclosed Hayes' threats to the intended victim or to law enforcement officials.[74]

A few weeks after being released from MHH,[75] Hayes consulted a social worker named James Edward Van Dyke at a local Veterans' center.[76] Van Dyke initially warned Hayes that if he determined that Hayes posed a risk of serious harm to a third party, Van Dyke would warn the third party of that risk.[77] Undeterred, Hayes declared that he wished to kill his supervisor and even detailed how he would murder her.[78] During a subsequent visit with Van Dyke, Hayes reiterated his desire to kill his supervisor[79] and described "in great detail" how he would do so.[80] Van Dyke warned again that he would not keep confidential any serious threats that Hayes made.[81] The next day, Van Dyke informed Hayes' supervisor about the threats[82] and Hayes was later charged with threatening to murder a federal official.[83] Van Dyke also warned Hayes' intended victim about Hayes' threats.[84]

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66. 227 F.3d 578 (6th Cir. 2000).
67. *See id.* at 587.
68. *Id.* at 580.
69. *See id.* The MHH staff initially diagnosed Hayes with "major depression, accompanied by severe psychotic features," and began treating him.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 588.
74. *See id.* at 580.
75. *See id.* The MHH staff released Hayes on February 26, 1998, "with a prescription for various psychotropic drugs."
76. *See id.*
77. *See id.*
78. *See id.* Despite Hayes' threats, Van Dyke concluded that Hayes posed no serious threat and allowed Hayes to leave.
79. *Id.*
80. *Id.* In particular, Hayes indicated that he knew details about the supervisor's home and schedule. *Id.*
81. *See id.*
82. *Id.*
83. *Id.* at 581.
84. *See id.*

Before trial, Hayes moved to suppress all statements that he had made to his various psychotherapists.[85] The magistrate judge deciding the motion ruled inadmissible all such statements, except those that Van Dyke had revealed to Hayes' intended victim.[86] The magistrate reasoned that Hayes' statements to Van Dyke were not privileged because disclosing Hayes' threats was the only way to avert harm to Hayes' intended victim.[87] The district court, citing the Tenth Circuit's decision in *Glass*, went further, ordering suppression of Hayes' statements to Van Dyke in addition to Hayes' statements to the other MHH psychotherapists.[88] Specifically, the district court relied on Van Dyke's admission that he had considered no other option to disclosing Hayes' statements to the intended victim.[89] The district court also found significant that Van Dyke disclosed Hayes' statements in response to an order from Van Dyke's supervisor.[90] The district court, therefore, granted Hayes' motion and, subsequently, dismissed the case.[91]

On appeal, the Sixth Circuit rejected the Tenth Circuit's decision in *Glass*, holding instead that no "dangerous patient" exception to the psychotherapist-patient privilege exists in criminal cases.[92] The Sixth Circuit distinguished between a physician's duty to protect potential victims and the subsequent act of testifying about his patient's statements.[93] The therapist's duty to protect, the court declared, preserved and protected the "health and safety of innocent third parties."[94] These benefits outweighed the benefit derived from maintaining the confidentiality of a patient's "life-threatening communications."[95] A therapist's subsequent testimony against his patient, on the other hand, yielded no commensurate benefit.[96] On the contrary, the court stated that a dangerous patient was unlikely to follow through with his threat once court proceedings had begun.[97]

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85. *See id.*
86. *Id.*
87. *See id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *See id.* at 586.
93. *See id.* at 583–84.

> Before turning to the question whether it is advisable to graft a "dangerous patient" exception for criminal proceedings onto the federal psychotherapist/patient privilege, we will first clarify a misperception held by Hayes, the government, and, to some extent, the Tenth Circuit that the standard of care exercised by a treating psychotherapist prior to complying with (or, for that matter, failing to comply with) a state's "duty to protect" requirement is somehow pertinent to the applicability of the psychotherapist/patient privilege in criminal proceedings. We think there is little correlation between those two inquiries.

Id. at 583.

94. *Id.*
95. *Id.*
96. *See id.* at 584–85.
97. *Id.* at 584.

> We see only a marginal connection, if any at all, between a psychotherapist's action in notifying a third party (for his own safety) of a patient's threat to kill or injure him and a court's refusal to permit the therapist to testify about such threat (in the interest of protecting the psychotherapist/patient relationship) in a later prosecution of the patient for making it. State law requirements that psychotherapists take action to prevent serious and credible threats from being carried out serve a far more immediate function than the proposed "dangerous patient"

Moreover, the Sixth Circuit predicted that, even if it recognized a "dangerous patient" exception, courts could not consistently apply it in criminal cases.[98] For example, the court noted the danger of "conditioning the applicability of the proposed 'dangerous patient' exception on the standard of care exercised by a treating psychotherapist."[99] Under such a standard, the court cautioned, future cases would "devolve into a battle of experts" over whether the psychotherapist reasonably disclosed the patient's threat.[100] And the ensuing battles would likely yield erratic results.[101] Furthermore, the court declared that a federal testimonial privilege should not depend on how each state defines a psychotherapist's "'reasonable' professional conduct."[102]

Next, the court outlined three reasons weighing against recognizing a "dangerous patient" exception in criminal cases.[103] First, the exception would have a "deleterious effect on the 'atmosphere of confidence and trust' in the psychotherapist/patient relationship."[104] Second, improving the citizenry's mental health outweighed any benefit resulting from a psychotherapist's testimony about his patient's confidential communications.[105] Third, the court emphasized that the evidence jurisprudence of the majority of states recognized no analogous "dangerous patient" exception in criminal cases.[106]

The court, however, condoned a "dangerous patient" exception in involuntary hospitalization proceedings.[107] In fact, it argued that the Supreme Court intended to carve out just such an exception in the *Jaffee* footnote. "We think the *Jaffee* footnote was referring to the fact that psychotherapists will sometimes need to testify in court proceedings, such as those for the involuntary commitment of a patient...."[108] In such circumstances, the psychotherapist's testimony may "ultimately improve [the

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exception. Unlike the situation presented in *Tarasoff*, the threat articulated by a defendant such as Hayes is rather unlikely to be carried out once court proceedings have begun against him.

Id. at 583–84.

98. *See id.* at 584.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See id.* at 584–86.

104. *Id.* at 584 (citations omitted).

105. *See id.* at 585. The court conceded that allowing a psychotherapist to testify against his patient could advance a public end. The court, however, did not identify the precise public end that such testimony could serve. But the court concluded that the end would not justify the means:

> We think that allowing a psychotherapist to testify against his or her patient in a criminal prosecution about statements made to the therapist by the patient for the purposes of treatment arguably "serv[es] [a] public end," but it is an end that does not justify the means. The *Jaffee* footnote recognizes that in cases such as this, there are at least two interests at stake: the improvement of our citizens' mental health achieved, in part, by open dialogue in psychotherapy, on the one hand, and the protection of innocent third parties, on the other. Both are "public ends" which the federal common law should foster. We believe, therefore, that the *Jaffee* footnote is no more than an aside by Justice Stevens to the effect that the federal psychotherapist/patient privilege will not operate to impede a psychotherapist's compliance with the professional duty to protect identifiable third parties from serious threats of harm.

Id.

106. *Id.* (noting that only California had enacted a "dangerous patient" exception applicable to criminal cases as part of its evidence code).

107. *See id.*

108. *Id.*

patient's] mental state."[109] Using that same testimony in criminal proceedings, however, would yield no equivalent good to either the patient or the public.[110]

Finally, the court rejected the argument that Hayes had waived the psychotherapist-patient privilege by continuing to make threats despite Van Dyke's repeated disclosure warnings.[111] The court reasoned that no psychotherapist had ever told Hayes that they could later testify against him in a criminal proceeding.[112] The court concluded that, absent this warning, Hayes could not have waived his right to protect his confidential statements from disclosure.[113]

In dissent, Judge Boggs attacked the majority's analysis in rejecting a "constructive waiver" theory.[114] Judge Boggs argued that Hayes relinquished all expectations of confidentiality once he received explicit warnings that Van Dyke and Dr. Radford would not keep Hayes' threatening statements confidential.[115] Absent that expectation of confidentiality, nothing prevented Van Dyke from testifying about Hayes' statements.[116]

3. Chase I

Subsequently, the Ninth Circuit in *United States v. Chase (Chase I)* affirmed a district court's ruling allowing a psychotherapist to testify about her patient's threats toward agents of the Federal Bureau of Investigation (FBI).[117] The patient, Steven Gene Chase, received treatment from Dr. Kay Dieter beginning in 1997 for irritability, anger, and depression.[118] In August 1999, Chase showed Dr. Dieter an appointment book containing the names, addresses, and social security numbers of

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109. *Id.*

110. *Id.*

> Once in prison, even partly as a consequence of the testimony of a therapist to whom the patient came for help, the probability of the patient's mental health improving diminishes significantly and a stigma certainly attaches after the patient's sentence is served. While, as with involuntary hospitalization, incarceration would serve the "public end" of neutralizing the threat posed by a patient, the price paid in achieving that neutralization may often be that many patients will not seek the professional help they need to regain their mental and emotional health.

Id.

111. *See id.* at 586. Van Dyke had repeatedly and explicitly warned Hayes that he would disclose any serious threat made towards a third party. *Id.* at 580. Dr. Radford at MHH had similarly warned Hayes previously. Despite this, Hayes continued to threaten his supervisor.

112. *Id.* at 586.

113. *Id.*

114. *Id.* at 587–89.

115. *See id.* at 587–88.

116. *See id.* Judge Boggs found two factors significant to his waiver analysis. First, Hayes had received three separate warnings that his threats would not be kept confidential. *See id.* Second, despite the warnings, Hayes continued to make escalating violent threats towards his supervisor. *See id.* Under such circumstances, Judge Boggs concluded that Hayes had expressly waived any privilege he may have had in the threatening statements. *Id.* at 588–89. The United States does not argue that Hayes *constructively* waived his privilege, which would occur had he repeated the threats to a third party. Rather it argues, correctly in my view, that Hayes waived any privilege purely and simply, by continuing to threaten after he had been given notice that his threats would not be held in confidence.

117. *See Chase I*, 301 F.3d at 1019–31.

118. *Id.* at 1021. Dr. Dieter diagnosed Chase with "bipolar type II disorder with episodes of intense anger and obsessive rumination against certain individuals." *Id.* From the beginning, Chase displayed anger toward, and made threats against, a number of people. *Id.*

people whom Chase planned to kill.[119] The list consisted of people that Chase had encountered in business and legal dealings.[120] Additionally, the list contained the names of "two FBI agents who had been assigned to investigate complaints" that Chase had previously lodged.[121] Chase described his homicidal thoughts toward all of these people to Dr. Dieter and recalled threatening several of the individuals in the past.[122] In response, Dr. Dieter warned Chase that, if she believed that he planned to murder someone, she would reveal his plans to the intended victim.[123]

Two months later, on October 18, 1999, Chase phoned Dr. Dieter and told her that he had fought with his wife and felt "extremely upset."[124] He then ominously stated that he had life insurance if anything should happen to him.[125] These statements alarmed Dr. Dieter, and she sought advice from her supervisor and the clinic's legal counsel.[126] They instructed Dr. Dieter to report Chase's statements to local police, which she did the next day.[127] About six days later, FBI agents contacted Dr. Dieter.[128] She then relayed Chase's statements to the FBI agents and complied with their request to secretly obtain further details from Chase during his next session.[129]

At that session, Chase again made threatening statements.[130] Dr. Dieter reminded Chase of her duty to warn those individuals of the danger that Chase posed to them.[131] Chase reiterated that he did not intend to act on his impulses.[132] Shortly thereafter, FBI agents informed Dr. Dieter that they used the information she had provided them to obtain a search warrant for Chase's home.[133] Chase was subsequently charged with two counts involving threatening to kill FBI agents and one firearm count.[134]

Before trial, Chase moved to exclude the threats that he had made during his counseling sessions.[135] The district court denied Chase's motion, finding the psychotherapist-patient privilege inapplicable to Chase's threats.[136] In so concluding, the

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119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* Chase also confided to Dr. Dieter that he had begun drinking. *Id.*
123. *See id.* Chase assured Dr. Dieter that he did not intend to take any immediate action. *Id.* Thereafter, Dr. Dieter told her supervisor about Chase's statements and asked whether those statements obligated her to warn the identified individuals. *Id.* Dr. Dieter's supervisor advised her to obtain more information from Chase before disclosing his statements. *Id.*
124. *Id.*
125. *See id.*
126. *Id.*
127. *Id.*
128. *See id.*
129. *Id.* at 1021–22.
130. *See id.* at 1022. First, he declared that, if an existing lien on his home were not lifted, "he would get his guns, get in his vehicle and have himself some justice." *Id.* Second, he declared that he had located all but four people on the list that he had previously shown to Dr. Dieter. *See id.* at 1021–22. He also claimed that he was targeting their children. *Id.* at 1022.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *See id.* Chase also sought to exclude evidence of threats he had made to others against individuals who were not FBI agents. These threats, however, were not subject to the "dangerous patient" exception, as Chase had not uttered them to psychotherapists. *See id.* at 1022–23.
136. *Id.* at 1022.

district court relied on three factors: "(1) that Chase's threats were serious when uttered, (2) that harm was imminent, and (3) that disclosure to authorities was the only means of averting the threatened harm."[137]

Citing the psychotherapist's duty to protect,[138] a three-judge panel of the Ninth Circuit held the psychotherapist-patient privilege does not protect a patient's threats of imminent and unavoidable harm:

> Just as the ethics of the profession recognize a "dangerous patient" exception to the psychotherapist's obligation of confidentiality that permits disclosure of otherwise-confidential information when (1) a threat of harm is serious and imminent and (2) the harm can be averted only by means of disclosure by the therapist, we hold that the same exception extends to the psychotherapist's permitted testimony under the same circumstances. This holding is faithful both to the *Jaffee* footnote and to the obvious policy considerations that underlie it.[139]

The three-judge panel found the facts surrounding Chase's threats justified admitting Dr. Dieter's testimony against Chase for two reasons.[140] First, the panel noted that objective evidence supported Dr. Dieter's belief that Chase posed an imminent threat.[141] Specifically, the panel relied on the following evidence: (1) Chase had compiled a list of names in his appointment book of persons he desired to kill; (2) he had taken steps to track down his victims; (3) he "had mentioned his life insurance policy"; and (4) he "had described other stresses in his life," such as consuming alcohol and arguing with his wife.[142] The panel, however, declined to state whether a psychotherapist's mere subjective belief of imminent harm could trigger the "dangerous patient" exception.[143]

Second, the panel found that Dr. Dieter "reasonably considered disclosure to law enforcement authorities to be the only effective means of averting harm."[144] The panel noted that Dr. Dieter "considered initiating civil commitment procedures but concluded that it was unlikely that Chase would be held for longer than seventy-two hours due to his lack of a committable mental illness."[145] Moreover, Dr. Dieter believed that Chase could possibly harm himself if committed against his will.[146]

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137. *Id.* A jury ultimately convicted Chase of threatening to murder federal law enforcement officers and Chase appealed. *See id.* at 1020, 1023. Chase was also charged with two additional counts: (1) threatening to murder the FBI agents who in his view had failed properly to investigate his complaints and (2) possession of firearms by a person adjudicated by the Social Security Administration as a mental defective. The district court, however, subsequently dismissed the last count. *Id.* at 1022. The jury acquitted Chase on the second count. *Id.* at 1023.

138. *Id.* at 1024. The three-judge panel refused to apply a crime/fraud exception to Chase's statements. According to the panel, Chase made his threats in the course of treatment; he did not make the threats to promote a particular crime or fraud. *Id.* at 1025 n.3.

139. *Id.* at 1024.

140. *See id.* at 1025.

141. *See id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

4. Chase II

Shortly after the three-judge panel's decision in *Chase I*, the Ninth Circuit vacated the panel's decision and ordered that the case be reheard en banc.[147] Borrowing largely from the Sixth Circuit's decision in *Hayes*, the Ninth Circuit abandoned the reasoning of *Chase I* and found the "dangerous patient" exception inapplicable to criminal cases.[148]

In so holding, the Ninth Circuit first distinguished between a physician's duty to protect third parties and the subsequent act of testifying about the patient's statements in court.[149] The court concluded that, in Chase's case, sufficient objective evidence existed to support the physician's decision to disclose Chase's threats to law enforcement officials.[150] But the court refused to equate a proper breach of a patient's confidentiality with a license to testify about the patient's statements in a criminal proceeding.[151]

The court then cited four reasons for declining to recognize a "dangerous patient" exception in criminal cases.[152] First, the court found that the states' nearly uniform refusal to recognize a "dangerous patient" exception counseled against creating such an exception to the federal psychotherapist-patient privilege.[153]

Second, the court cited the different purposes behind the proposed "dangerous patient" exception and the physician-patient confidentiality laws among the various states.[154] In particular, the court observed that the laws governing a physician's duty to breach a patient's confidentiality existed only to protect third parties.[155] In contrast, a physician's subsequent testimony at a criminal proceeding achieved no parallel goal, other than proving a completed crime.[156]

Third, the court looked to the recommendations by the Judicial Conference Advisory Committee on the Rules of Evidence.[157] In 1972, the Advisory Committee had recommended proposed Rule 504 establishing a psychotherapist-patient testimonial privilege.[158] The court found it significant that proposed Rule 504 identified three exceptions to the privilege; however, Rule 504 did not provide for a "danger-

147. United States v. Chase, 314 F.3d 1031 (9th Cir. 2002).

148. *Chase II*, 340 F.3d at 991–92 (en banc).

149. *See id.* at 984–85.

150. *See id.* at 985.

151. *See id.* at 987–89.

152. *See id.* at 985–92.

153. *See id.* at 985–86. Like the Sixth Circuit in *Hayes*, the Ninth Circuit, *en banc*, observed that California stood alone among the states in providing for an evidentiary "dangerous patient" exception. Unlike California, most states declined to equate a physician's duty to protect third parties with a waiver of the testimonial privilege. *See id.* at 986. Consequently, the court reasoned that recognizing a "dangerous patient" exception on the federal level would undermine state confidentiality laws.

154. *Id.* at 986–89.

155. *Id.* at 987.

156. *Id.* Relatedly, the court noted the differing standards among the state laws governing when a physician must breach a patient's confidentiality. *Id.* at 987–88. These varying standards, according to the court, exemplified why courts should not equate a physician's state-imposed duty to breach confidentiality with a waiver of the patient's testimonial privilege. Moreover, the court opined that most patients would be unaware of the law governing a physician's duty to disclose in the state in which the patients reside, and, even if the patients know of a given state's disclosure law, they would not expect that the physician would be able to testify in a criminal proceeding, because most states prohibited such testimony. *Id.* at 988–89.

157. *Id.* at 989–90.

158. *Id.* at 989 (citing Proposed Federal Rules of Evidence, 56 F.R.D. 183, 240–41 (1972)).

ous patient" or future crime exception.[159] The Ninth Circuit acknowledged that the Supreme Court of the United States ultimately rejected Rule 504 and, instead, recognized the privilege under the "more open-ended Rule 501."[160] Nevertheless, the court believed that the Supreme Court's favorable citation to Rule 504 warranted the court's reliance on Rule 504 in resolving unclear questions about exception to the privilege.[161]

Fourth, the Ninth Circuit cited public policy reasons against recognizing a "dangerous patient" exception.[162] In particular, the court observed that the exception would negatively impact the physician-patient relationship.[163] In contrast, recognizing the exception would provide no commensurate benefit to society.[164] For example, the court noted that, in the usual case, the physician's testimony would be only cumulative of other evidence offered to prove the victim's guilt.[165] Moreover, the court stated that effective therapeutic treatment was likely to provide a more long-lasting solution than would temporary incarceration.[166] Thus, after balancing the interests, the court concluded that protecting the physician-patient relationship outweighed "the marginal" benefits derived from recognizing the exception.[167]

The Ninth Circuit, however, stated its conclusion would not prevent a psychotherapist from testifying about her patient's statements in state court proceedings, such as civil commitment hearings.[168] Indeed, the court noted that most states allowed psychotherapists to testify in civil commitment proceedings.[169]

Moreover, in a cryptic footnote, the Ninth Circuit suggested that its opinion would not preclude a psychotherapist's testimony at a criminal proceeding in every instance.[170] Specifically, the court envisioned a different result if the psychotherapist had explicitly informed the patient of his obligation to testify about the patient's threatening statements in a subsequent criminal proceeding:

> In [Chase's] case, Dr. Dieter did not inform Defendant that she might testify against him in court, although she did warn him that she would disclose his threats for the purpose of protecting intended victims. We need not decide whether the result would be different if a psychotherapist informed a patient ahead of time that she would testify in court; arguably, the patient in that

159. *Id.*
160. *Id.* at 990.
161. *Id.*
162. *Id.* at 990–92.
163. *Id.* at 990.
164. *Id.* at 991.
165. *See id.* at 991.
166. *Id.*
167. *Id.* at 991–92. The Ninth Circuit likewise rejected the notion that the *Jaffee* Court's dictum, contained in footnote nineteen of that decision, condoned a "dangerous patient" exception in criminal cases. *See id.* at 984. The Ninth Circuit acknowledged that the *Jaffee* Court's footnote "presaged the issues" presented before the Ninth Circuit. But the Ninth Circuit declined to find that the *Jaffee* Court meant to establish an actual exception to the physician-patient relationship. Rather, the Ninth Circuit interpreted the *Jaffee* Court's language about "the privilege giv[ing] way" to prevent "a serious threat of harm" as only "elliptically" endorsing a physician's recognized duty to disclose a patient's threats of harm to intended victims. The Ninth Circuit, therefore, found no support for recognizing a "dangerous patient" exception in the *Jaffee* decision.
168. *Id.* at 991.
169. *Id.*
170. *Id.* at 988 n.5.

> circumstance would be agreeing that the subsequent communication was not confidential.[171]

Concurring in the majority's result, Judge Kleinfeld, joined by Judges Nelson and Clifton, attacked the majority's interpretation of the *Jaffee* footnote.[172] Judge Kleinfeld believed that the *Jaffee* Court's footnote spoke "expressly to the issue in this case," even though it spoke to the issue only in dicta.[173] Nevertheless, noting the due deference courts apply to Supreme Court dicta, Judge Kleinfeld concluded the Supreme Court's dictum, in this case, carried even more persuasive value than in ordinary circumstances.[174] Judge Kleinfeld ridiculed the majority's view that the Supreme Court's dictum referred only to the psychotherapist's duty to warn.[175] Judge Kleinfeld suggested that the majority had merely subverted the Supreme Court's plain language to fit its own ends:

> The majority reads the words "the privilege must give way" to mean that *the privilege* does *not* give way....But that is not what the Court said. And it makes no sense to say, as the majority apparently does, that the Court was speaking to the issue of whether a psychotherapist may disclose a serious threat to the prospective victim, rather than whether the psychotherapist may testify in court about it....There is just no getting around 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.[176]

Judge Kleinfeld then explained why "reason and experience" supported the "dangerous patient" exception in Chase's case.[177] First, Judge Kleinfeld found that Chase had waived the psychotherapist privilege.[178] In particular, Judge Kleinfeld observed Chase's psychotherapist had explicitly warned Chase that she would not keep his threats confidential; yet, he continued making such threats.[179]

Second, Judge Kleinfeld challenged the majority's conclusion about the impact of the "dangerous patient" exception on the physician-patient relationship.[180] Judge Kleinfeld argued that a physician's act of discharging her duty to warn would irreversibly destroy the patient's confidence in the secrecy of the physician-patient relationship.[181] Refusing to recognize a "dangerous patient" exception, according to Judge Kleinfeld, would not revive the lost confidence between the two.[182] Consequently, he concluded that no logical reason existed to believe that refusing

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171. *Id.* Ultimately, the court concluded that the district court erred in allowing the psychotherapist to testify about the threatening statements that Chase had made during therapy. *Id.* at 992. Nevertheless, the court affirmed Chase's conviction because the error was harmless in light of the other evidence showing Chase's guilt. *Id.* at 992–93.

172. *See id.* at 995–96.

173. *Id.* at 995.

174. *See id.*

175. *See id.* at 995–96.

176. *Id.* at 996.

177. *Id.* at 996–98.

178. *Id.* at 996.

179. *Id.*

180. *Id.* at 996–97.

181. *Id.*

182. *Id.*

to recognize the dangerous patient exception would somehow preserve the physician-patient relationship.[183]

Third, Judge Kleinfeld determined society would pay too great a cost if courts refused to recognize a "dangerous patient" exception.[184] He acknowledged the detrimental effects of a "dangerous patient" exception on the therapeutic relationship between a patient and his physician.[185] But society's interests in protecting the lives of the patients' victims outweighed concerns about the adverse effects on the therapeutic relationship.[186] Moreover, Judge Kleinfeld stated that refusing to recognize the exception would force victims to incur huge costs to protect themselves, including the legal costs of initiating civil commitment proceedings.[187]

Although ultimately rejected by the Ninth Circuit en banc, the considerations Judge Kleinfeld and others have identified dictate that courts should recognize a "dangerous patient" exception. In the following section, these considerations and the arguments in favor and against the exception are further examined.

III. SHOULD COURTS RECOGNIZE A "DANGEROUS PATIENT" EXCEPTION?

Amid the varying views of if and when a "dangerous patient" exception should apply lies the fundamental question that must be answered: should courts ever recognize a "dangerous patient" exception in criminal cases? The Supreme Court of the United States has seemingly answered this question in the affirmative.[188] Indeed, the Court had no doubt that situations would arise where "the privilege must give way."[189] The Court specifically cited averting threats of harm to patients or others as precisely such situations.[190] The remainder of this section demonstrates that existing precedent and society's interest in protecting intended victims both support a "dangerous patient" exception in criminal cases.

Precedent from Other Exceptions Supports Recognizing a "Dangerous Patient" Exception

Courts have already carved out exceptions to the psychotherapist-patient privilege to protect children or, more generally, to prevent crime and fraud. For example, in *United States v. Burtrum*,[191] the Tenth Circuit refused to recognize a

183. *Id.*
184. *Id.* at 997.
185. *Id.*
186. *Id.*
187. *Id.* Finally, Judge Kleinfeld cited the ultimate goal of "truth vindication" as a reason to recognize the "dangerous patient" exception. *Id.* at 997–98. Judge Kleinfeld observed that Chase's physician had properly determined that Chase posed an imminent threat to his intended victims. *See id.* at 998. As such, Judge Kleinfeld concluded that the truth-seeking process outweighed any benefit from preserving the "remaining shreds of the confidential therapeutic relationship." *Id.* at 998.
188. *See Jaffee*, 518 U.S. at 18 n.19.
189. *Id.*
190. *Id.*
191. 17 F.3d 1299 (10th Cir. 1994). The Tenth Circuit decided *Burtrum* before the Supreme Court handed down its decision in *Jaffee*. Nothing, however, suggests that *Burtrum* does not remain good law. To the contrary, in *Glass*, the Tenth Circuit cited *Burtrum* but declined to extend its analysis to cases involving "dangerous patients." *Glass*, 133 F.3d at 1359.

psychotherapist-patient privilege in criminal cases involving child sexual abuse.[192] At least twenty-five states have likewise refused to apply the psychotherapist-patient privilege in cases relating to child abuse.[193] An exception to the psychotherapist-patient privilege to protect children from abuse shares a common foundation with the "dangerous patient" exception. Both represent society's interest in protecting innocent victims from grave or serious harm.[194] Both consider disclosure the only way to avert the harm.[195] Thus, the rationale supporting an exception to protect children likewise supports an exception to protect against dangerous patients.

Courts have also recognized a crime/fraud exception to the psychotherapist-patient privilege.[196] In *In re Violette*, the First Circuit ruled that the psychotherapist-patient privilege does not apply when a patient's "communications are intended directly to advance a particular criminal or fraudulent endeavor...."[197] The *Violette*

> Hence, *Burtrum* is distinguishable. First, it was decided before *Jaffee* and acknowledged the split in the circuits over recognition of a psychotherapist/client privilege. Second, *Burtrum* addressed only the narrow issue whether to recognize the privilege in a criminal child sexual abuse context. To resolve that question within those contours, we held under a balancing of the need to protect this vulnerable segment of society, minor victims often intimidated by the legal system and fearful of testifying, against the quest for relevant evidence in the prosecution of child abuse cases, "that significant evidentiary need compels the admission of this type of relevant evidence in child sexual abuse prosecutions...." That is, a subset of the public good, the welfare of children, presented the sort of situation *Jaffee* anticipated. However, *Burtrum's* analysis cannot be extended here.

Id. (citations omitted).

192. *Burtrum*, 17 F.3d at 1302. Later, in *Glass*, the Tenth Circuit reaffirmed this rule. *Glass*, 133 F.3d at 1360.

193. ARIZ. REV. STAT. ANN. § 32-3283 (West 1992); ARK. CODE ANN. § 17-46-107(3) (1995); CAL. EVID. CODE § 1027 (West 1992); COLO. REV. STAT. § 19-3-304 (Supp. 1995); DEL. R. EVID. 503(d)(4) (Michie 1997); GA. CODE ANN. § 19-7-5(c)(G) (1991); IDAHO CODE § 54-3213(3) (1994); LA. CODE EVID. ANN. art. 510(b)(2)(k) (West 1995); MD. CODE ANN., CTS. & JUD. PROC. § 9-121(e)(4) (1995); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1994); MICH. COMP. LAWS ANN. § 722.623 (West 1992); MINN. STAT. ANN. § 595.02.2(a) (WEST 1988); MISS. CODE ANN. § 73-53-29(e) (1995); MONT. CODE ANN. § 37-22-401(3) (1995); NEB. REV. STAT. § 28-711 (1995); NMSA 1978, § 61-31-24(C) (1995); N.Y.C.P.L.R. § 4508(a)(3) (McKinney 1993); OHIO REV. CODE ANN. § 2317.02(G)(1)(a) (Anderson 1995); OR. REV. STAT. § 40.250(4) (1991); R.I. GEN. LAWS § 5-37.3-4(b)(4) (1995); S.D. CODIFIED LAWS § 36-26-30(3) (MICHIE 1994); TENN. CODE ANN. § 63-23-107(b) (1990); VT. R. EVID. § 503(d)(5) (1994); W. VA. CODE § 30-30-12(a)(4) (1993); WYO. STAT. ANN. § 14-3-205 (Michie 1994).

194. *Compare Burtrum*, 17 F.3d at 1302 (exception to psychotherapist-patient privilege in criminal child sexual abuse cases protects "vulnerable segment of society" often "intimidated by legal system"), *with Jaffee*, 518 U.S. at 18 n.19 (stating that situations may arise where privilege must give way "if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist").

195. *See Glass*, 133 F.3d at 1360 (stating that "dangerous patient" exception applies only where "disclosure [is] the only means of averting harm to [the victim] when the disclosure was made"); *Chase I*, 301 F.3d 1019 (en banc) (indicating that "dangerous patient" exception applies only where psychotherapist "reasonably considered disclosure to law enforcement authorities to be the only means of averting harm"). *Cf.*

> Criminal child sexual abuse cases illustrate well the policy reasons behind the presumption against testimonial privileges in criminal cases. These crimes occur in a clandestine manner and victimize a vulnerable segment of society. Moreover, minor victims often are intimidated by the legal system and may have difficulty testifying. Thus, these crimes may be difficult to detect and prosecute. We conclude that significant evidentiary need compels the admission of this type of relevant evidence in child sexual abuse prosecutions. We decline to recognize a psychotherapist/client privilege in a criminal child sexual abuse case.

Burtrum, 17 F.3d at 1302 (citations omitted).

196. *In re* Violette, 183 F.3d 71 (1st Cir. 1999).

197. *Id.* at 77. The First Circuit, however, excluded from this exception confessions of past crimes, because such confessions assist in the patient's therapy. The court acknowledged that allowing a career criminal to confess his past crimes in therapy may also have the undesired consequence of increasing the patient's criminal enterprise. *Id.*

court then applied this crime/fraud exception to the statements of the patient, Gregory P. Violette.[198] Violette had made false statements to two psychotherapists to defraud disability insurers and moneylenders.[199] The First Circuit held that the crime/fraud exception applied to these statements and ordered the psychotherapists to reveal Violette's false statements.[200] Although implicating distinct policy rationales, the *Violette* court's recognition of a crime/fraud exception evidences a willingness to carve out sound exceptions to the psychotherapist-patient privilege.

Finally, courts recognize an exception to the psychotherapist-patient privilege where the patient places her mental health at issue in a lawsuit. For example, in *Sarko v. Penn-Del Directory Co.*,[201] a civil plaintiff, K. Sarko, sued her employer for violating the Americans with Disabilities Act.[202] Sarko claimed that she suffered from clinical depression.[203] She told her employer of her condition and asked her employer to make "reasonable accommodation" for this condition.[204] Sarko's employer, however, refused to do so and later discharged her.[205]

In the resulting lawsuit, the employer sought access to Sarko's medical records from, among other sources, her primary treating psychiatrist.[206] When Sarko refused, the district court ordered her to produce the records.[207] According to the district court, Sarko had waived her psychotherapist-patient privilege by placing her mental condition directly at issue in the lawsuit.[208]

These three examples demonstrate that recognizing a "dangerous patient" exception to prevent harm or injury to third parties does not represent a major departure from existing precedent. As discussed below, the arguments against recognizing a "dangerous patient" exception fail to withstand scrutiny.

The Arguments against Recognizing a "Dangerous Patient" Exception Lack Merit and Fail to Adequately Consider Society's Interest in Protecting Intended Victims

Recognizing a "dangerous patient" exception in criminal cases promotes public safety by protecting intended victims from grave and imminent harm.[209] Indeed, the Tenth Circuit, and the Ninth Circuit in *Chase I,* condoned applying the exception in criminal cases only to prevent imminent harm or injury to third parties.[210] However, opponents of a "dangerous patient" exception in criminal cases dispute whether the

198. *Id.* at 78.
199. *Id.*
200. *Id.*
201. 170 F.R.D. 127 (E.D. Pa. 1997).
202. *Id.* at 129.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 130–31.
208. *Id.* at 130.
209. *See* Wadsworth, *supra* note 6, at 875 (arguing that courts should recognize dangerous patient exception to avert serious harm to patient or others).
210. *See Glass*, 133 F.3d at 1360 (admitting psychotherapist's testimony about patient's threat where disclosing threat "was the only means of averting harm"); *see also Chase I*, 301 F.3d at 1022 (affirming district court's finding that patient posed "imminent danger" and that disclosing patient's statements made in therapy "was the only means of averting" danger).

exception is necessary to protect against imminent threats of harm.[211] Instead, they generally cite three reasons why courts should reject a "dangerous patient" exception in criminal cases. First, they contend that a psychotherapist's existing duty to protect potential victims sufficiently neutralizes the threat that the patient poses to those victims.[212] Second, they claim that recognizing the exception would destroy the "atmosphere of confidence and trust" that exists between a psychotherapist and his patient.[213] Third, opponents argue that the majority of jurisdictions do not provide for a "dangerous patient" exception in their evidentiary jurisprudence.[214] As discussed below, each of these arguments fails to withstand scrutiny.

1. Duty to Protect versus Evidentiary Privilege

Opponents to a "dangerous patient" exception in criminal cases assert that the exception fails to achieve its primary goal: protection of intended victims.[215] According to opponents, the "dangerous patient" exception comes into play only after one of two events: (1) a patient has attempted to carry out a previously communicated threat or (2) the psychotherapist has discharged his duty to protect the intended victim.[216] By that time, however, any imminent danger has subsided.[217] Consequently, allowing a psychotherapist's testimony in a subsequent criminal trial serves no purpose other than easing the prosecutor's burden to prove a completed crime.[218] By contrast, a psychotherapist's existing "duty to protect" intended victims from a dangerous patient accomplishes the legitimate goal of protecting the potential victim.[219]

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211. *See, e.g.*, Harris, *supra* note 6, at 52.

> The *Tarasoff* rationale breaks down...to justify compelling the therapist to testify to confidential communications in criminal proceedings against a patient who has carried out or attempted to carry out a threat. Such after-the-fact testimony is not necessary to protect the victim or potential victim, and the primary purpose of the proceeding is punishment of the patient rather than protection of others.

Id. (citations omitted); Nelken, *supra* note 6, at 38 (noting "important distinction...between situations where it is still possible to avert harm by breaching confidentiality and situations where the psychotherapist testimony can serve only to further prosecution of the patient").

212. *See, e.g., Hayes*, 227 F.3d at 584 (psychotherapists' duty under state law to prevent patients from executing serious and credible threats serves "far more immediate function" than proposed "dangerous patient" exception).

213. *Id.* ("[R]ecognition of a 'dangerous patient' exception surely would have a deleterious effect on the 'atmosphere of confidence and trust' in the psychotherapist/patient relationship.").

214. *See, e.g., id.* at 585 ("The majority of states have no such exception as part of their evidence jurisprudence; California, alone, has enacted a 'dangerous patient' exception as part of its evidence code which would arguably apply in a criminal case."); *Chase II*, 340 F.3d at 985–86 (noting that California is the only state in the Ninth Circuit to recognize evidentiary "dangerous patient" exception and stating, "almost all the states, then, recognize the distinction between confidentiality (which is affected by the *Tarasoff* duty) and testimonial privilege (which is not)").

215. *See, e.g.*, Harris, *supra* note 6, at 52 ("Such after-the-fact testimony is not necessary to protect the victim or potential victim....The social utility of the therapist's testimony in a criminal proceeding against the patient simply does not compare to the social utility of a *Tarasoff* warning.") (citations omitted).

216. *Id.*

217. *Id.; see also Chase II*, 340 F.3d at 987 ("If a patient was dangerous at the time of the *Tarasoff* disclosure, but by the time of trial the patient is stable and harmless, the protection rationale that animates the exception to the states' confidentiality laws no longer applies.").

218. *See, e.g.*, Harris, *supra* note 6, at 52.

219. *See Hayes*, 227 F.3d at 584 ("State law requirements that psychotherapists take action to prevent serious and credible threats from being carried out serve a far more immediate function than the proposed 'dangerous patient' exception."); *see also Chase II*, 340 F.3d at 987.

The psychotherapist's "duty to protect" traces back to the California Supreme Court's landmark decision in *Tarasoff v. Regents of the University of California*.[220] There, the California Supreme Court held a psychotherapist must protect third parties from threats of serious danger that a patient under the psychotherapist's care poses.[221] In *Tarasoff*, Porsenjit Poddar, a student at the University of California at Berkeley, shot and stabbed to death Tatiana Tarasoff.[222] About two months before the murder, Poddar had received therapy on an outpatient basis from Dr. Lawrence Moore, a psychologist for the Cowell Memorial Hospital at the University of California at Berkeley.[223] During a session with Dr. Moore, Poddar announced that he planned to kill Tarasoff when she returned from vacation.[224] After consulting with two colleagues, Dr. Moore decided to commit Poddar for observation and called Berkeley campus police to assist him in confining Poddar.[225] Shortly thereafter, campus police took Poddar into custody and questioned him about Tarasoff.[226] Poddar convinced campus police that he posed no threat and promised to stay away from Tarasoff.[227] Based on this assurance, campus police released Poddar.[228] Neither Dr. Moore nor campus police relayed Poddar's threats to Tarasoff or any of her relatives.[229] Less than two months later, Poddar brutally murdered Tarasoff.[230]

In a subsequent lawsuit, the California Supreme Court found the "special relationship" between a psychotherapist and his patient placed certain obligations on the psychotherapist.[231] Specifically, the relationship obliged the psychotherapist to anticipate the patient's potential for violence and to protect the intended victim:

> When 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.[232]

> The *Tarasoff* duty is justified on the ground of protection; the societal benefit from disclosing the existence of a dangerous patient out-weighs the private and public cost of the deleterious effect on the psychotherapist-patient relationship. By contrast, ordinarily testimony at a later criminal trial focuses on establishing a past act. There is not necessarily a connection between the goals of protection and proof.

Id.

220. 551 P.2d 334 (Cal. 1976). The California Supreme Court initially held that psychotherapists owe a duty to warn third parties of potential threats from patients under their care. *Tarasoff v. Regents of the University of California*, 529 P.2d 553 (Cal. 1974). Subsequently, the California Supreme Court vacated that decision and reheard the case. In the resulting opinion, the court enunciated a duty to protect. *Tarasoff*, 551 P.2d at 345.

221. *Tarasoff*, 551 P.2d at 345.

222. *See also* People v. Poddar, 518 P.2d 342, 344 (Cal. 1974) (reversing Poddar's original conviction for second degree murder for failure to give adequate instructions concerning a defense of diminished capacity) (superceded by statute as stated in People v. Bobo, 518 P.2d 342 (Cal. App. 3 Dist. 1990)).

223. *Tarasoff*, 551 P.2d at 339.

224. *Id.* at 341. Poddar did not mention Tarasoff's name, but it appears that Dr. Moore readily identified the victim as Tarasoff.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 433.

230. *Id.*

231. *Id.* at 443.

232. *Id.* at 431.

Opponents to a "dangerous patient" exception in criminal cases criticize courts for equating the *Tarasoff* duty to protect with the "dangerous patient" exception.[233] Indeed, the Sixth Circuit, and the Ninth Circuit in *Chase II*, asserted that little or no connection exists between the two.[234] The Sixth Circuit assumed that, once the psychotherapist discharges his *Tarasoff* duty, the patient will be less likely to carry out his threat.[235] Admitting the psychotherapist's testimony at a subsequent criminal proceeding would, therefore, serve no protective function.[236]

Similarly, Professor George C. Harris posits that courts should recognize a "dangerous patient" exception only to prevent future harm to victims.[237] Professor Harris would apply the exception solely in civil commitment and restraining order proceedings.[238] Like the Sixth Circuit, Professor Harris necessarily assumes that the psychotherapist can eliminate the threat by initiating civil commitment proceedings against the patient.[239] Alternatively, the victim can eliminate the threat by obtaining a restraining order against the patient.[240] In any event, advocates of these views believe that criminal proceedings are unnecessary to protect intended victims from the danger posed by a dangerous patient.

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233. *See* Nelken, *supra* note 6, at 35–37; *see also* Harris, *supra* note 6, at 49–57.

234. *See Hayes*, 227 F.3d at 583–84.

> We see only a marginal connection, if any at all, between a psychotherapist's action in notifying a third party (for his own safety) of a patient's threat to kill or injure him and a court's refusal to permit the therapist to testify about such threat (in the interest of protecting the psychotherapist/patient relationship) in a later prosecution of the patient for making it.

Id.; *see also Chase II*, 340 F.3d at 987 ("[A]nalytically there is little connection between a psychotherapist's state-imposed obligation to report a dangerous patient at the time the patient makes a threat, on the one hand, and the later operation of the federal testimonial privilege, on the other."); Harris, *supra* note 6, at 52 ("The social utility of the therapist's testimony in a criminal proceeding against the patient simply does not compare to the social utility of a *Tarasoff* warning.").

235. *See Hayes*, 227 F.3d at 584 ("Unlike the situation presented in *Tarasoff*, the threat articulated by a defendant such as Hayes is rather unlikely to be carried out once court proceedings have begun against him.").

236. *See id.*

237. Harris, *supra* note 6, at 33 ("Whether or not a *Tarasoff* duty to protect existed at an earlier time, exception to the evidentiary privilege should be made only where psychotherapists' testimony is necessary to prevent future harm to patients or identified potential victims.").

238. *Id.* at 67.

239. *Id.*

> Exception to the evidentiary privilege is justified for testimony in a restraining order proceeding or in a proceeding to hospitalize the patient, the purposes of which are to protect the potential victims, the patient, or the public. No similar justification exists, however, for compelling a therapist to testify against her patient in a criminal proceeding after the threat of harm has been carried out or is no longer viable.

Id.

240. *Id.* at 33.

> [E]xception to the evidentiary privilege should be made only where psychotherapists' testimony is necessary to prevent future harm to patients or identified potential victims. Applying this standard, the dangerous patient exception generally would not apply in criminal actions against patients, but would apply only in proceedings for the purpose of protecting patients or third parties, such as restraining order hearings or proceedings to hospitalize patients.

Id.; *Hayes*, 227 F.3d at 585 ("We think the *Jaffee* footnote was referring to the fact that psychotherapists will sometimes need to testify in court proceedings, such as those for the involuntary commitment of a patient, to comply with their 'duty to protect' the patient or identifiable third parties."); Nelken, *supra* note 6, at 36–37 ("The dangerous-patient evidentiary exception should be limited...to situations in which disclosure is necessary to prevent harm to others, such as hospitalization proceedings or proceedings to obtain a restraining order.").

These assumptions, however, fail for two reasons. First, civil commitments and restraining orders, by their nature, are temporary.[241] Thus, to ensure her safety, the intended victim would have to seek continuing assistance from the courts and legal system, thereby incurring commensurate legal costs.[242] Moreover, the intended victim would be required to continually prove that the patient poses an imminent threat of harm.[243] That task will prove difficult once the psychotherapist breaks confidence and fulfills his *Tarasoff* duty. Thereafter, the patient will no longer feel he can freely disclose incriminating information to his psychotherapist.[244] Absent the psychotherapist's testimony, a court will be less inclined to find an imminent threat of harm. Consequently, the victim will have little or no recourse in the face of danger.

Second, these assumptions ignore the on-going risk of harm that disturbed individuals pose to their intended victims. For example, assume that a psychotherapist concludes that his patient poses a significant risk of harm to an intended victim. He then discharges his *Tarasoff* duty and informs the victim of the threat. In response, the victim applies for a temporary restraining order against the patient, believing it will remove the threat that the patient poses to her. But initiating legal proceedings only strengthens the patient's resolve to carry out his threats. Indeed, recent data indicates that restraining orders may actually incite violence against the victim.[245] Thus, instead of protecting the victim, instituting civil proceedings

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241. A civil commitment proceeding is an action to involuntarily commit or detain in a suitable facility, such as a mental health hospital, an individual considered to be mentally ill and dangerous. *See* 53 AM. JUR. 2D *Mentally Impaired Persons* §§ 7, 14 (2003). Typically, the committed individual remains in custody until such time as the individual's release would not create a substantial risk of bodily injury to another person or serious danger to the property of another. *Id.* § 7. Persons subject to involuntary civil commitment are entitled to periodic review of their commitments. *Id. § 26.* A temporary restraining order is "an extraordinary remedy" that may be granted to restrain specified conduct and that requires imminent and irreparable injury. *See* 13 JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE, §§ 65.31, 65.32, 65–80; 65.60[3] (3d ed. 2003). Temporary restraining orders typically may not exceed ten days in duration. *Id.* § 65.38. ("[Even i]f the order does not contain an expiration date, it automatically expires 10 days after it has been entered by the court."); *see also* 42 AM. JUR. 2D *Injunctions* § 293 (2003) (under state statutes similar or identical to federal rule, temporary restraining order is invalid if expiration date exceeds 10 days after issuance).

242. *See, e.g., Chase II*, 340 F.3d at 997 (Kleinfeld, J., concurring) (arguing that refusing to recognize "dangerous patient" exception results in unreasonable costs to threatened individual and stating, "How shall the threatened individual assemble the money for lawyers and experts and persuade the involved bureaucracies and individuals to act fast enough to prevent realization of the threat?").

243. Issuance of a temporary restraining order or other injunctive relief requires showing of "imminent" and "irreparable" harm. *See* 13 MOORE ET AL., *supra* note 241, §§ 65.31, 65.32, 65.60[3].

244. *See* L.R.Wulsin et al., *Unexpected Clinical Features of the* Tarasoff *Decision: The Therapeutic Alliance and the "Duty to Warn,"* 1983 AM. J. PSYCHIATRY 140, 602 ("Given that trust is the sine qua non of the therapist-patient relationship and that confidentiality is the mechanism for protecting that trust, only rarely can the therapist breach the patient's confidence without losing the patient's trust.").

245. *See* STALKING CRIMES AND VICTIM PROTECTION, PREVENTION, INTERVENTION, THREAT ASSESSMENT, AND CASE MANAGEMENT 364, 512 (Joseph A. Davis ed., 2001) ("The TRO may escalate the situation and may trigger a violent response by the stalker. It is recognized that restraining orders may not be effective in actually protecting a victim and may instead 'provoke' the stalker."); *see also* Gerald McOscar, *Restraining Orders May Incite Domestic Violence, available at* http://fatherless.net/fv/nl980103.htm (last visited Mar. 1, 2004) ("[M]any women are unwittingly discovering that taking out a protection order against their husbands and lovers may actually incite violence—sometimes with tragic consequences."); Callie Anderson Marks, *The Kansas Stalking Law: A "Credible Threat" to Victims. A Critique of the Proposed Kansas Stalking Law and Proposed Legislation*, 36 WASHBURN L.J. 468 (1997) (stating that obtaining restraining order may provoke violence) (citing KAREN PARRISH ET AL., STALKED!: BREAKING THE SILENCE ON THE CRIME EPIDEMIC OF THE NINETIES 9 (1995)); EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 200–03 (2d ed. 1996) (discussing

against a dangerous patient may actually place the intended victim in greater danger.

Moreover, even if the intended victim obtains a valid restraining order, as Professor Harris suggests,[246] the patient can simply disregard the order. Research shows that restraining orders do not prevent subsequent violations of the initial order.[247] In fact, the restrained party violates the restraining order through some form of contact with the victim in about fifty percent of all cases.[248] Even worse, the patient may have already attempted to carry out his threat against the intended victim by the time she applies for the restraining order. Either way, a patient who repeatedly threatens another's life exhibits a disregard for both the law and the consequences attendant to criminal action. Yet, commentators necessarily assume that commencing civil proceedings will adequately protect intended victims from such dangerous individuals.[249] Common sense and experience dictate otherwise.[250]

The facts of *Tarasoff* illustrate this point. In *Tarasoff*, a physician recognized that his patient, Poddar, presented a serious risk of injury to a third party and told law enforcement officers of this threat.[251] Moreover, police officers confronted Poddar with the information that they had learned from his psychologist and demanded that he stay away from his intended victim.[252] Indeed, they even took him into custody and released him only after he promised the officers that he would, in fact, leave Tarasoff alone.[253] Nevertheless, Poddar methodically planned for two months to get close to Tarasoff and eventually killed her.[254]

Although Tarasoff never obtained a restraining order, or a warning for that matter, the facts suggest that a restraining order would have made little, if any, difference. A restraining order is effective only when the restrained party agrees to abide by its terms. As discussed above, a party subject to a restraining order is likely to disregard the order in one way or another. Presumably, Poddar would have done

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general ineffectiveness of protection orders to prevent future harm to victims).

246. *See* Harris, *supra* note 6, at 63.

247. *See* STALKING CRIMES AND VICTIM PROTECTION, PREVENTION, INTERVENTION, THREAT ASSESSMENT, AND CASE MANAGEMENT, *supra* note 245 ("The research to date has generally shown that restraining orders in general do not prevent subsequent violation of the order.").

248. *See id.* ("[I]n about half or more of cases in which a restraining order is in effect, the order is subsequently violated through some form of contact by the restrained party."); *see also* Betsy Thai, *The Trend Toward Specialization Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1292 (2000) (stating that studies show that "almost 50% of court-issued protection orders were violated within two years") (citing DO ARRESTS AND RESTRAINING ORDERS WORK? 10 (Eve S. Buzawa & Carl G. Buzawa eds., 1996)).

249. *See, e.g.*, Harris, *supra* note 6, at 67.

250. *See* STALKING CRIMES AND VICTIM PROTECTION, PREVENTION, INTERVENTION, THREAT ASSESSMENT, AND CASE MANAGEMENT, *supra* note 245, at 512 ("The TRO may escalate the situation and may trigger a violent response by the stalker....It is recognized that restraining orders may not be effective in actually protecting a victim and may instead 'provoke' the stalker."); *see also* McOscar *supra* note 245 ("[M]any women are unwittingly discovering that taking out a protection order against their husbands and lovers may actually incite violence—sometimes with tragic consequences.").

251. *Tarasoff*, 551 P.2d at 341.

252. *Id.*

253. *Id.*

254. Alan A. Stone, *The* Tarasoff *Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 258, 360 (1976) ("While Tatiana Tarasoff was out of the country during the summer, Poddar broke his promise to the police and established a relationship with her brother, who, not having been warned, was unaware of the danger Poddar posed.").

so if Tarasoff had successfully obtained a restraining order against him. Indeed, police had already detained Poddar, and he had already promised to stay away from Tarasoff.[255] Since this failed to deter Poddar, there is no reason to believe that a restraining order, the strength of which depended on Poddar's willingness to abide by it, would have actually restrained him.

To be sure, the facts of *Tarasoff* demonstrate that the intended victim's safety requires the psychotherapist's testimony in a criminal proceeding. Absent that testimony, the prosecution will not be able to prove that the patient made terrorist threats against the intended victim.[256] Consequently, the victim, even if made aware of the risk posed by a dangerous patient, will never feel secure. Opponents, anticipating this argument, maintain that obtaining convictions can never justify a "dangerous patient" exception.[257] But this misses the point. As the tragic circumstances of *Tarasoff* demonstrate, protecting the intended victim from ongoing threats of harm—not obtaining convictions—necessitates the exception.

2. *Effect on the Atmosphere of Confidence and Trust*

In *Jaffee*, the Supreme Court of the United States declared that "effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make frank and complete disclosure of facts, emotions, memories, and fears."[258] Likewise, commentators note that psychotherapists have a unique need to ensure confidentiality:

> 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,

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255. *Tarasoff*, 551 P.2d. at 341.

256. As discussed in section III, the proposed framework for allowing psychotherapist-testimony requires that the psychotherapist explicitly warn the patient that he will not keep confidential, in any manner, threats that the patient makes towards others. In *Chase II*, the Ninth Circuit stated that, in the ordinary case, other evidence besides a physician's testimony usually will exist to show the patient's guilt. 340 F.3d 978. Notably, the Ninth Circuit cited no authority for this proposition. Moreover, the facts of both *Hayes* and *Glass* suggest that the opposite is true.

257. For example, Professor Harris argues that criminal proceedings, as opposed to civil proceedings, have no relationship to protecting victims and potential victims. Thus, he sees no reason to extend the rationale behind *Tarasoff* to allow a psychotherapist to testify against his or her client in a criminal proceeding. Harris, *supra* note 6, at 52–53.

> The *Tarasoff* rationale breaks down, however, when it is used, as in *Menendez* and *Wharton* and as apparently contemplated by *Jaffee*, to justify compelling the therapist to testify to confidential communications in criminal proceedings against a patient who has carried out or attempted to carry out a threat. Such after-the-fact testimony is not necessary to protect the victim or potential victim, and the primary purpose of the proceeding is punishment of the patient rather than protection of others. The social utility of the therapist's testimony in a criminal proceeding against the patient simply does not compare to the social utility of a *Tarasoff* warning....Any argument based on the importance of obtaining convictions in cases involving violent crimes is not, in any event, based on the protective rationale of the *Tarasoff* duty unless the proceeding is one that will result in affirmative steps to protect an identifiable potential victim.

Id. (citations omitted); Nelken, *supra* note 6, at 35–36.

258. *Jaffee*, 518 U.S. at 10–11.

> indeed, privileged communication. A threat to secrecy blocks successful treatment.[259]

Opponents to the "dangerous patient" exception claim that the exception creates just such a threat to secrecy.[260] In *Hayes*, for instance, the Sixth Circuit cited the effect upon the "atmosphere of confidence and trust" as the primary reason to reject a criminal "dangerous patient" exception.[261] The Sixth Circuit acknowledged that the psychotherapist's existing duty to protect negatively impacts the psychotherapist-patient relationship.[262] But a warning that the psychotherapist may later reveal the patient's statements in a criminal proceeding would irreparably harm the fragile relationship:

> While early advice to the patient that, in the event of the disclosure of a serious threat of harm to an identifiable victim, the therapist will have a duty to protect the intended victim, may have a marginal effect on a patient's candor in therapy sessions, an additional warning that the patient's statements may be used against him in a subsequent criminal prosecution would certainly chill and very likely terminate open dialogue.[263]

Professor Harris predicts similar consequences to the psychotherapist-patient relationship if courts require psychotherapists to warn their patients that they may later divulge their patient's statements in criminal proceedings.[264] Nevertheless, both the Sixth Circuit and Professor Harris would allow a psychotherapist to testify against his patient in involuntary hospitalization or restraining order proceedings.[265] Likewise, in *Chase II* the Ninth Circuit stated that it would allow a psychotherapist to testify about his patient's statements in civil commitment proceedings.[266] These

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259. 1 MCCORMICK, *supra* note 10, § 98.

260. *See, e.g.*, Harris, *supra* note 6, at 57; *Hayes*, 227 F.3d at 584–85.

261. *See Hayes*, 227 F.3d at 584–85; *see also Chase II*, 340 F.3d at 991 ("A criminal conviction with the help of a psychotherapist's testimony is almost sure to spell the end of any patient's willingness to undergo further treatment for mental health problems.").

262. *See Hayes*, 227 F.3d at 584–85.

263. *Id.*

264. *See* Harris, *supra* note 6, at 56.

> On the one hand there would be what has presumably become a commonplace of ethical disclosure, a *Tarasoff* warning that, while the patient's communications will be generally kept in strictest confidence, there could be circumstances under which the therapist would have a duty to reveal those confidences to the extent necessary to protect the patient or another person. On the other hand, if exception to the evidentiary privilege is coupled with the *Tarasoff* duty, one can imagine a quite different and more chilling warning: "while our conversations will generally be kept in confidence, you should know that, if you reveal to me an intention to harm another person, I may have a duty to take steps to protect that person and might also be forced to testify in later court proceedings to what you said." Commentators from the psychotherapeutic community, not surprisingly, find a substantial difference in those two scenarios.

Id.; Nelken, *supra* note 6, at 34-36 (concurring with the Sixth Circuit's assumption that recognizing "dangerous patient" exception would have a "deleterious effect" on the psychotherapist-patient relationship). *Cf. Chase II*, 340 F.3d at 988 n.5 (suggesting that a court would properly apply "dangerous patient" exception where physician actually informs patient that physician could testify in subsequent criminal proceeding).

265. *See Hayes*, 227 F.3d at 585 (permitting psychotherapist to testify to his patient's confidential statements in involuntary commitment of patient proceedings); *see also* Harris, *supra* note 6, at 63 (advocating that courts permit psychologists to testify about their patients' confidential statements only at restraining order proceedings and involuntary hospitalization of patient proceedings).

266. *See Chase II*, 340 F.3d at 988.

proceedings, according to the Sixth Circuit and Professor Harris, will likely improve the patient's health while preserving the physician-patient relationship:

> 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 hospitalization. While that patient, by definition, will initially reject the prospect of hospitalization, it may ultimately improve his mental state and should not leave a stigma after the stay concludes.[267]

In contrast, the delicate psychotherapist-patient relationship cannot, according to the Sixth Circuit and Professor Harris, withstand the same testimony at a criminal proceeding.[268]

However, this underestimates the effects of allowing a psychotherapist to testify against his patient at a civil proceeding. No reason exists to believe that a psychotherapist's testimony at a civil hearing will have a less damaging effect on the therapeutic process than the same testimony at a criminal hearing. On the contrary, both carry the same potential to destroy the atmosphere of confidence and trust underlying the psychotherapist-patient privilege.[269] Consider the following hypothetical example. During several therapy sessions with his psychotherapist, a patient makes repeated and credible threats against a specific individual. He also takes other steps that objectively indicate that he is likely to carry out his threats. In response, the psychotherapist reminds the patient that he has a duty to disclose the patient's threats to the intended victim and law enforcement. The psychotherapist then informs the intended victim and law enforcement officers of the danger that the patient poses. Next, either the psychotherapist moves to civilly commit the patient or the intended victim applies for a restraining order.

At the subsequent hearing in this hypothetical situation, the psychotherapist testifies about the threatening statements that the patient made during the therapy sessions. He also testifies that he believes the patient poses a substantial risk of imminent harm to the intended victim. All the while, the patient sits in court watching his psychotherapist reveal the patient's confidential statements. Depending on the nature of that hearing, the patient is either involuntarily hospitalized or restrained from his intended victim. Either way, the psychotherapist will have breached the patient's confidence and engendered a sense of betrayal in the patient. The patient's resulting anger and alienation would surely destroy any trust or confidence that he once had in his psychotherapist.[270]

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267. *Hayes*, 227 F.3d at 585.

268. *See id.*

269. *See* Wulsin et al., *supra* note 244, at 602 ("Given that trust is the sine qua non of the therapist-patient relationship and that confidentiality is the mechanism for protecting that trust, only rarely can the therapist breach the patient's confidence without losing the patient's trust.").

270. In *Chase II*, Judge Kleinfeld predicted that the patient would experience the same anger and alienation when his psychotherapist discharged her duty to warn the patient's intended victims. *Chase II*, 340 F.3d at 997 (Kleinfeld, J., concurring).

> Once the person the deranged individual hates so much that he plans to kill him knows his secrets, and the deranged individual knows that his psychotherapist refuses to keep his secrets from that person, there is not much therapeutic value in refusing later to tell this already-disclosed information to the judge and jury. After all, the deranged person does not hate them

The psychotherapist, of course, could have preserved the "atmosphere of confidence and trust" by refusing to testify at the civil commitment or restraining order hearing. But without his testimony, the intended victim would remain at risk. Even if a restraining order were issued, there is no guarantee that it will ensure the victim's safety—a questionable assumption at best. Thus, the objective observer must decide whose interest society should protect: the patient's interest in becoming a functioning member of society or the intended victim's interest in protecting her life. Clearly, the latter outweighs the former.

Even commentators opposed to recognizing a "dangerous patient" exception in criminal cases condone the exception in civil commitment or restraining order proceedings.[271] But as shown above, the psychotherapist's testimony in civil proceedings is just as likely to destroy the "atmosphere of confidence and trust" between the psychotherapist and the patient. Thus, a model allowing a "dangerous patient" exception in civil proceedings, but prohibiting it in criminal proceedings, defies common sense. Realistically, a psychotherapist's testimony against his patient in either setting will negatively impact the "atmosphere of confidence and trust." Only an outright ban on psychotherapist testimony will preserve the "atmosphere of confidence and trust" underlying the psychotherapist-patient relationship. An outright ban, however, would sacrifice the safety of the intended victim for the health of the patient in every instance. Presumably, the Supreme Court of the United States recognized the need for a "dangerous patient" exception to avoid such a result.[272]

Anticipating this argument, opponents blur the issue by comparing the "dangerous patient" exception to the psychotherapist's duty to protect. For example, Professor Harris concedes that a psychotherapist's ethical obligation to inform the patient of the psychotherapist's duty to protect has adverse effects on the psychotherapist-patient relationship.[273] He argues that warning the patient that the psychotherapist may have to testify about the patient's statements in criminal proceedings would likely cause irreparable damage to the relationship.[274] To support this claim, Professor Harris cites two studies[275] suggesting that physicians believe

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> and his confidentiality is long gone. The majority is evidently concerned about deranged murderous individuals stopping valuable therapy because the psychotherapist reveals their confidences. But where that will occur, it will doubtless already have occurred where the psychotherapist betrayed their confidences to their worst enemies.

Id.

271. *See Hayes*, 227 F.3d at 585 (permitting psychotherapist to testify to his patient's confidential statements in involuntary commitment of patient proceedings); Harris, *supra* note 6, at 63 (advocating that courts permit psychologists to testify about their patient's confidential statements only at restraining order proceedings and involuntary hospitalization of patient proceedings).

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

273. Harris, *supra* note 6, at 55–56 (noting that ethical duty to inform patient of *Tarasoff* duty has chilling effect on psychotherapist-patient relationship).

274. *Id.* at 56–57.

275. Readers should note that, when the California Supreme Court decided *Tarasoff*, commentators forecasted similar dire consequences to those predicted in the studies that Harris cites. *Cf.* Catherine Thompson Dobrowitsky, *In Light of Reason and Experience: Against a Crime Fraud Exception to the Psychotherapist-Patient Privilege*, 35 U. MICH. J.L. REFORM 621, 631 n.67 (citing Toni Pryor Wise, Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of* Tarasoff, 31 STAN. L. REV. 165, 177 (1978) (stating that, after the second *Tarasoff* ruling, one-fourth of 1272 psychotherapists "reported observing in their patients some reluctance to discuss their violent tendencies when the patients learned that the therapist might in some circumstances breach confidentiality")); Stone, *supra* note 254, at 369 n.52 ("violent thoughts and ideas are not uncommon among

a psychotherapist's testimony in a criminal proceeding would destroy the therapeutic process.[276] Of these two studies, only one addresses the "dangerous patient" exception.[277]

Professor Harris's reliance on this study is misplaced for three reasons. First, the study upon which Professor Harris relies only addresses situations where the "danger has dissipated."[278] But, as discussed above, danger has not truly dissipated until the intended victim is removed from harm's way.[279] Oftentimes this requires more than the commencement of civil proceedings.[280] Second, Professor Harris ignores the effect of a psychotherapist's testimony at a civil proceeding. Indeed, the study that Professor Harris cites does not distinguish between civil and criminal proceedings.[281] Moreover, as demonstrated above, testimony at a civil proceeding is just as likely to damage the psychotherapist-patient relationship as the same testimony at a criminal proceeding. Third, even under Professor Harris's model, psychotherapists would have to disclose the possibility they might have to testify against their patients at civil commitment and restraining order hearings. Thus, even under Professor Harris's model, psychotherapists would have to provide the precise warning that Professor Harris disapproves:

> while our conversations will generally be kept in confidence, you should know that, if you reveal to me an intention to harm another person, I may have to take steps to protect that person and might also be forced to testify in later court proceedings to what you said.[282]

The difference between this warning and a warning that specifically identifies criminal proceedings is negligible at best.[283] Protecting intended victims undoubtedly justifies such a difference, assuming any exists at all.

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patients coming to psychotherapy; such a *Miranda*-type warning would chill all such dialogue"); *Tarasoff*, 551 P.2d at 346 n.12 ("Counsel for defendants Regents and amicus American Psychiatric predict that a decision of this court holding that a therapist may bear a duty to protect a potential victim will deter violence-prone persons from seeking therapy, and hamper the treatment of other patients."). Not surprisingly, these speculative arguments failed to persuade the California Supreme Court. *See id.* Subsequent studies suggest that the *Tarasoff* duty positively affected the therapeutic process. *See* Wulsin et al., *supra* note 244, at 601–03 (arguing that therapist's duty to victim and therapeutic duty to patient produce synergistic effect of enhancing patient's capacity to make choices); *see also* David B. Wexler, *Patients, Therapists, and Third Parties: The Victimological Virtues of* Tarasoff, 2 INT. J.L. & PSYCHIATRY 1 (1979) ("A *Tarasoff*-type obligation [may prompt] a paradigmatic (or at least pragmatic) shift in the treatment of interpersonal violence....In terms of its overall impact, then, *Tarasoff* may help rather than hinder therapy."); M.J. Mills et al., *Protecting Third Parties: A Decade after* Tarasoff, 144 AM. J. PSYCHIATRY 68, 72 (1987) ("One cannot assume...that warning a third party is inevitably counterproductive. Sometimes the duty to warn can be viewed as another available therapeutic option apart from its being a legal requirement.").

276. *See* Harris, *supra* note 6, at 55–56 n.104.

277. *See* Gregory B. Leong et al., *The Psychotherapist as a Witness for the Prosecution: The Criminalization of* Tarasoff, 149 AM. J. PSYCHIATRY 1101 (1992).

278. Harris, *supra* note 6, at 56 n.104.

279. *See supra* pp. 118–20.

280. *See supra* pp. 119–20.

281. *See* Leong et al., *supra* note 277, at 1101.

282. Harris, *supra* note 6, at 56.

283. The Ninth Circuit's decision in *Chase II* seemingly breaks rank with Professor Harris on this point. In *Chase II*, the Ninth Circuit suggested that the "dangerous patient" exception would apply where the physician warns the patient that the physician might testify about the patient's threatening statements in a criminal proceeding. 340 F.3d at 988 n.5.

3. The Majority of Jurisdictions Do Not Provide for a "Dangerous Patient" Exception

Courts that refuse to apply the "dangerous patient" exception in criminal cases consistently note that most states do not provide for an analogous exception. For example, the Sixth Circuit observed that only California explicitly recognizes such an exception.[284] In contrast, the vast majority of states have "no such exception as part of their evidence jurisprudence."[285] The Ninth Circuit, in *Chase II*, also found this fact significant in analyzing the states' experience with the psychotherapist-patient privilege.[286]

This simplistic argument, however, applies nearly every time a court decides a novel issue of law. Indeed, opponents to the *Tarasoff* duty made an identical argument when the California Supreme Court considered whether a psychotherapist owes a duty to protect.[287] At that time, California stood alone in recognizing such a duty.[288] Today, the vast majority of states require psychotherapists to protect victims against dangerous patients under the psychotherapist's care.[289] Moreover, commentators have suggested that at least twenty-nine states implicitly support a "dangerous patient" exception to prevent serious threats of harm.[290]

In sum, no logical reason exists to prohibit a "dangerous patient" exception in criminal cases but allow it in civil proceedings. As such, the exception should apply in both settings. The remainder of this article proposes a four-part test for courts to follow in determining when the exception should apply in criminal cases.

IV. A WORKABLE FRAMEWORK TO APPLY THE DANGEROUS PATIENT EXCEPTION IN CRIMINAL CASES

The protection of intended victims compels a "dangerous patient" exception to the psychotherapist-patient privilege in criminal cases.[291] The question remains, however, under what circumstances should courts allow psychotherapists to testify about their patients' confidential statements? Thus far, two circuits have attempted to answer this question.[292] Neither has provided a satisfactory framework for courts to follow in future cases. For example, neither circuit has defined the limits to which a psychotherapist can testify concerning his patient's statements.[293] Likewise, neither circuit has definitively settled whether a psychotherapist's subjective belief that his patient poses a threat of imminent harm alone triggers the exception.[294] This section,

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284. *See Hayes*, 227 F.3d at 585.

285. *Id.*

286. *Chase II*, 340 F.3d at 985.

287. *See, e.g.*, Wadsworth, *supra* note 6, at 877.

288. *See Hayes*, 227 F.3d at 583 (stating that imposition of psychotherapist's duty to protect began with California Supreme Court's decision in *Tarasoff*).

289. *See* Harris, *supra* note 6, at 47.

290. *See* Wadsworth, *supra* note 6, at 887.

291. *See supra* Part II.

292. *Glass*, 133 F.3d at 1360; *Chase I*, 301 F.3d at 1024.

293. *See Glass*, 133 F.3d at 1360; *Chase I*, 301 F.3d at 1024 (failing to define limits of proposed testimony).

294. *Glass*, 133 F.3d at 1360 (failing to discuss whether psychotherapist's belief that patient poses threat of imminent harm must be objective or subjective); *Chase I*, 301 F.3d at 1025 (stating that psychotherapist's subjective belief of imminent harm "may" be sufficient to trigger "dangerous patient" exception).

therefore, proposes a workable framework under which courts may apply a "dangerous patient" exception in criminal cases.

As explained below, courts should allow psychotherapists to testify about their patients' otherwise confidential statements when the following four elements are met: (1) the patient threatens a specific individual or individuals or the psychotherapist can readily identify the individual or individuals threatened, (2) the psychotherapist objectively believes that the patient poses an imminent threat of injury to such individual or individuals, (3) the psychotherapist explicitly warns the patient that he will not keep confidential any threatening statements the patient makes against a particular individual or individuals for any purpose, and (4) the psychotherapist possesses no reasonable way to prevent harm or injury to the threatened individual or individuals. Even if these elements are met, courts should strictly limit the statements to which the psychotherapist may testify.

As shown below, this framework strikes the appropriate balance between two often competing interests: the patient's interest in obtaining unfettered mental health treatment and society's interest in protecting intended victims. Critics may argue that the *Jaffee* Court explicitly rejected balancing of interests in annunciating the psychotherapist-patient privilege and, thus, *Jaffee* prohibits any balancing to determine whether a patient's statements are privileged.[295] However, *Jaffee* prohibited only balancing the probative value of the evidence against the patient's privacy interests in his statements.[296] At no point did the *Jaffee* Court reject all balancing.[297] On the contrary, in footnote nineteen, the Court endorsed balancing competing interests to determine whether *an exception* to the privilege should exist.[298] Specifically, the Court stated society's interests in protecting its citizenry could outweigh a patient's privacy interests in shielding his confidential statements from disclosure.[299] Moreover, subsequent courts addressing the "dangerous patient" exception have explicitly balanced society's interest in protecting third parties with the patient's interest in preserving a therapeutic relationship with his physician.[300] Courts, therefore, should consider these competing interests and apply the following test to strike the appropriate balance between them.

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295. *See* Harris, *supra* note 6, at 56 (concluding that arguments supporting dangerous patient exception that turn on "fact specific, case-by-case balancing of the value of therapeutic confidence against evidentiary truth-finding" contradict *Jaffee*'s rejection of balancing approach); *see also Jaffee*, 518 U.S. at 17.

> We reject the balancing component of the privilege implemented by [the Seventh Circuit Court of Appeals] and a small number of states. Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.

Id.

296. *Jaffe*, 518 U.S. at 17–18.

297. *Id.* at 18 n.19 (endorsing balancing to determine whether exception to privilege should exist).

298. *See* Alexandra P. West, *Implying Plaintiff's Waivers of the Psychotherapist-Patient Privilege after* Jaffee v. Redmond, 59 U. PITT. L. REV. 901, 904–05 (1998) ("It is true that the question of whether a privilege has been waived is a separate inquiry from the initial question of whether the communication was privileged. The Court's no-balancing prohibition applies only to the determination of whether a particular communication is privileged.").

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

300. *See, e.g., Hayes*, 227 F.3d at 585; *see also Chase II*, 340 F.3d at 990–92.

1. Specific Victim or Victims

Protecting potential victims provides the strongest reason to recognize a "dangerous patient" exception in criminal cases.[301] Consequently, logic dictates that courts should apply the exception only where the patient has targeted a specific individual or individuals. Of course, a patient's failure to specifically name a particular individual should not automatically preclude courts from applying the exception. Rather, courts should apply the exception if the psychotherapist can readily identify the individual or individuals threatened.[302] Unless it is known who is at risk, it is unlikely that a psychotherapist's testimony will serve the fundamental purpose of the "dangerous patient" exception: namely, to protect third parties from imminent and on-going harm or injury. Not surprisingly, a parallel limitation on the psychotherapist's duty to protect exists in most states that have adopted California's *Tarasoff* duty.[303]

2. Threat of Imminent Harm or Injury

In order to prevent the exception from swallowing the rule, any workable test must require an objective threat of imminent harm to a third party. Indeed, both courts that have applied the exception to date have stressed the imminent risk of harm the patient must pose to his intended victim. For example, the Tenth Circuit would apply the "dangerous patient" exception only when the psychotherapist believes that the patient poses a risk of imminent harm.[304] Likewise, in *Chase I*, the Ninth Circuit announced the same general rule.[305] To be sure, the importance of recognizing an exception to an evidentiary privilege necessitates such a require-

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301. *See* Harris, *supra* note 6, at 53–54.

> Any argument [in favor of a "dangerous patient" exception in criminal cases] based on the importance of obtaining convictions in cases involving crimes is not, in any event, based on the protective rationale of the *Tarasoff* duty unless the proceeding is one that will result in affirmative steps to protect an identifiable victim.

Id. (citations omitted); *see also* Lynda Womack Kennedy, *Role of* Jaffee v. Redmond*'s "Course of Diagnosis or Treatment" Condition in Preventing Abuse of the Psychotherapist-Patient Privilege*, 35 GA. L. REV. 345, 368 (2000) ("The adoption of a dangerous-patient exception would indicate...that society and the courts place the dangerous-patient rationale—'the public interest in safety from violent assault'—above the psychotherapy rationale.") (citations omitted).

302. *See Tarasoff*, 551 P.2d at 431 (noting that Poddar did not specifically identify Tarasoff as the victim, but Poddar provided enough details for psychotherapist to identify her as the victim).

303. *See* Vikram S. Mangalmurti, *Psychotherapist's Fear of* Tarasoff*: All in the Mind?*, 22 J. PSYCHIATRY & L. 379, 384 (1994); *see also, e.g.*, ARIZ. REV. STAT. ANN. § 36-517.02 (West 1997) (threats of immediate serious harm or death to clearly identified or identifiable victim); UTAH CODE ANN. § 78-14a-102 (1996) (threat of violence against readily identifiable victim); Paul S. Appelbaum et al., *Statutory Approaches to Limiting Psychiatrist's Liability for Their Patient's Violent Acts*, 146 AM. J. PSYCHIATRY 821, 824 (1989) (noting that jurisdictions that have adopted the *Tarasoff* duty to protect "are nearly unanimous in requiring that victims be identifiable").

304. *See Glass*, 133 F.3d at 1360 (stating that "dangerous patient" exception applies where disclosure of patient's communications is only means to avert threat of serious harm).

305. *Chase I*, 301 F.3d at 1024 (stating that "dangerous patient" exception applies where "a threat of harm is serious and imminent").

ment,[306] but both circuits faltered in attempting to define the contours of a psychotherapist's belief that imminent harm exists.

The Tenth Circuit, for example, permits the psychotherapist to determine whether imminent harm exists only when the patient first utters a threatening statement.[307] Under this rule, a psychotherapist must ignore developments that occur after the patient makes the initial statement; however, a patient may later reveal related information that increases the imminence or seriousness of his initial threat. In *Hayes*, for instance, the patient, Roy Lee Hayes, told a social worker that he wanted to kill his supervisor.[308] The social worker, however, concluded that Hayes posed no risk of imminent harm to his supervisor.[309] Later, however, the social worker became alarmed when Hayes stated he had studied his supervisor's daily habits, knew where she lived, and provided details about how he would kill her.[310]

Undoubtedly, this subsequent information increased the seriousness of Hayes' initial statements. Yet, the Tenth Circuit's decision in *Glass* arguably prohibits courts from considering subsequently-revealed information in deciding whether to apply the "dangerous patient" exception.[311] Such a rule defies common sense and should not be followed. Instead, courts should consider the following two factors in deciding whether the patient poses an imminent risk of harm: (1) whether the psychotherapist believed the threat was serious when uttered or (2) whether the psychotherapist learned subsequent information that increased the seriousness of the initial threat.

In contrast to the Tenth Circuit's overly restrictive approach, the Ninth Circuit's decision in *Chase I* failed to articulate any definable standard for future courts to assess a psychotherapist's belief that his patient poses a risk of imminent harm.[312] For example, the *Chase I* court suggested a psychotherapist's mere subjective belief that imminent harm exists could trigger the "dangerous patient" exception, but the court expressly declined to establish any bright-line rule for future cases.[313] As such,

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306. Harris, *supra* note 6, at 51.

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

Id.

307. *See Glass*, 133 F.3d at 1359–60 (applying "dangerous patient" exception only where threat "was serious when it was uttered" and noting that, "when the statement was made, the treating psychiatrist did not contact authorities").

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

309. *Id.*

310. *Id.*

311. *See Glass*, 133 F.3d at 1360 (stating "dangerous patient" exception applies if "threat was serious when it was uttered").

312. *Chase I*, 301 F.3d at 1025.

313. *Id.*

> We need not decide here what will suffice to lower the bar for admissibility of a psychotherapist's testimony as to otherwise privileged communications—for example, whether the psychotherapist's subjectively perceived prospects of imminent harm could be adequate, or whether instead such perception must be objectively reasonable. Those boundaries for operation of the *Jaffee* footnote are better left for future case development. For the present it is enough to say that Dr. Dieter's view of the situation can fairly be considered to have been reasonable in itself.

Id.

the Ninth Circuit's opinion in *Chase I* left open the crucial question of whether the "dangerous patient" exception requires a psychotherapist to objectively or subjectively believe that his patient poses an imminent threat of harm.[314]

The following two reasons illustrate why courts should require the psychotherapist to objectively believe that his patient poses a risk of imminent harm. First, an objective approach ensures the judge, not the psychotherapist, makes the ultimate evidentiary ruling. The Sixth Circuit in *Hayes* touched on this issue.[315] While ultimately rejecting the "dangerous patient" exception in criminal cases, the Sixth Circuit cautioned against relying on a psychotherapist's individual assessment of whether the exception should apply.[316] Indeed, if courts adopt a subjective model, a psychotherapist's otherwise unreasonable belief of imminent harm could trigger the "dangerous patient" exception. But this would place evidentiary decisions in the hands of those lacking legal training or experience.[317] An objective model, by contrast, allows a judge to decide whether the psychotherapist reasonably believed that imminent danger existed. Evidentiary decisions belong to those with legal training. Simultaneously, an objective approach would alleviate the Ninth Circuit's concerns in *Chase II* about the varying state disclosure laws affecting federal evidentiary decisions.[318] Under an objective model, all decisions relating to the "dangerous patient" exception would be decided under the same criteria, regardless of the state's law.

Second, requiring an objective model ensures that courts will not confuse a psychotherapist's fear of personal liability with the psychotherapist's actual belief that the patient poses a risk of imminent harm. Under *Tarasoff*, psychotherapists have a legal duty to protect potential victims.[319] If a psychotherapist fails to discharge that duty, victims can recover significant monetary damages from the psychotherapist.[320] Commentators from the psychotherapeutic community recognize the anxiety this possibility engenders in psychotherapists.[321] Indeed, the fear of personal liability encourages psychotherapists to discharge their duty to protect as soon as possible.[322] An anxious psychotherapist would likely err in favor of

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314. *Id.*

315. *Hayes*, 227 F.3d at 584.

316. *Id.* ("More fundamentally, we think it would be rather perverse and unjust to condition the freedom of individuals on the competency of a treating psychotherapist.").

317. Presumably, the Sixth Circuit would still reject this test, because the standards that constitute an "objective belief of imminent harm" would differ among the states. *Hayes*, 227 F.3d at 584 ("Moreover, it cannot be the case that the scope of a federal testimonial privilege should vary depending upon state determinations of what constitutes 'reasonable' professional conduct."). But no reason exists to believe that courts could not consistently determine whether or not a psychotherapist objectively believed his patient posed a threat of imminent harm.

318. *Chase II*, 340 F.3d at 988 ("The Federal Rules of Evidence should apply uniformly and not vary depending on the state in which the defendant resides.").

319. *Tarasoff*, 551 P.2d at 342–43.

320. *See* Leong et al., *supra* note 277, at 149 ("Failure to discharge [the duty to protect] properly, coupled with a subsequent injury to the threatened person, exposes the therapist to civil damages for malpractice.").

321. *Id.* ("Since violence perpetrated by patients is not always preventable. The existence of a duty to protect serves as a continuing source of anxiety for the malpractice-conscious psychotherapist.").

322. Paul S. Appelbaum, *The New Preventive Detention: Psychiatry's Problematic Responsibility for the Control of Violence*, 145 AM. J. PSYCHIATRY 779, 779–81 (1988) (noting that fear of potential liability provides "powerful incentives" for psychotherapists to discharge duty to protect against patients that may not constitute an actual threat).

discharging his duty to protect in close cases.[323] But a psychotherapist's concern about personal liability should bear no relevance to whether the "dangerous patient" exception should apply in a given case. Instead, the exception should apply solely to protect innocent victims.

Under a subjective approach, however, courts may equate a psychotherapist's duty to protect with the psychotherapist's belief that his patient poses a risk of imminent harm. Prosecutors could argue that, when a psychotherapist discharges his *Tarasoff* duty, the psychotherapist subjectively believes imminent harm exists. The psychotherapist's fear of legal exposure, however, may have caused him to prematurely discharge his duty to protect.[324] Courts, therefore, should not rely on the psychotherapist's exercise of this duty as evidence that the psychotherapist actually believes his patient poses a risk of imminent harm. Instead, courts should apply the "dangerous patient" exception only where a court determines that the psychotherapist's belief of imminent harm was reasonable.

It would, of course, be impossible to precisely define what constitutes an "objectively reasonable belief that imminent harm exists" for every case. But at a minimum, an objectively reasonable belief of imminent harm exists where the patient discloses sufficient details about both his intended victim and his accompanying plan to commit a violent crime against that victim.

The facts of *Chase* exemplify this point. In *Chase*, three factors justified the psychotherapist's belief that Chase posed an imminent threat of harm. First, Chase kept a list of the names, addresses, and social security numbers of his intended victims in his appointment book.[325] Second, he described the steps he had taken to track down his victims.[326] Third, he stated that he had located all but four of his victims and began targeting their children as well.[327] These facts,[328] taken together and coupled with Chase's initial homicidal threats, provided objective evidence that Chase posed an imminent threat of harm to his intended victims.[329]

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323. *See id.* at 779–82 ("Fear of liability has led some psychiatrists to hospitalize, solely for the purpose of preventing violence, patients who do not otherwise require inpatient care....Psychiatrists are responding rationally by seeking to minimize liability, albeit at the cost of compromising their notions of what constitutes appropriate psychiatric care....").

324. Ginger Mayor McClarren, *The Psychiatric Duty to Warn: Walking a Tightrope of Uncertainty*, 56 U. CIN. L. REV. 269, 280 (1987) (noting that a "therapist who chooses not to warn may be liable to the victim of a patient's intentional or negligent acts").

325. *Chase I*, 301 F.3d at 1021.

326. *Id.* at 1025.

327. *Id.* at 1022.

328. The Ninth Circuit cited two other instances showing that Chase posed an imminent threat of harm to his victim: (1) Chase had mentioned his life insurance policy to Dr. Dieter and (2) Chase "had described other stresses in his life, including alcohol consumption and arguments with his wife." *Id.* at 1025. Reasonable minds may disagree whether either of these examples objectively indicates a reasonable belief that imminent harm exists. The first—mentioning his life insurance policy—seemingly indicates that the patient planned to kill himself. Moreover, he mentioned this in a completely different context from his initial threats. *Id.* at 1021. The second—consuming alcohol and arguing with his spouse—seems too ephemeral to indicate an actual threat of harm. Indeed, one would imagine that significant portions of the nation's population both consume alcohol and despair over arguments with their spouses.

329. In *Chase II*, the Ninth Circuit, while ultimately rejecting a "dangerous patient" exception in criminal cases, found that the facts surrounding Chase's threats justified the physician's decision to disclose Chase's threatening statements. 340 F.3d at 985 ("In the circumstances of this case, we have no doubt that Dr. Dieter properly disclosed the threats that Defendant had related regarding several specific individuals.").

The facts of *Hayes* are also instructive. On two occasions, Hayes described the manner in which he planned to kill his intended victim.[330] He also stated he knew details about his intended victim's home and schedule, including when she would be home alone.[331] Moreover, Hayes expressed an escalating desire to murder his intended victim each time that he spoke with the social worker.[332] These facts show the social worker objectively believed that Hayes posed a risk of imminent harm to the intended victim.

The patients in both *Hayes* and *Chase* exhibited the desire, the means, and the opportunity to injure their respective victims. In the future, courts addressing similar circumstances should find that a psychotherapist acts reasonably in believing that his patient poses an imminent threat of harm.

3. Explicit Warning

In order to preserve the atmosphere of confidence and trust between a psychotherapist and his patient, courts should not allow psychotherapists to testify unless they have first given their patients an explicit warning that their statements may not be kept confidential. As explained below, requiring explicit warnings ensures patients' confidences are not revealed solely on the basis of preliminary and routine warnings given at the outset of any therapy.

The American Psychological Association's ethical rules require a psychotherapist to disclose "the relevant limitations on confidentiality" at the outset of the psychotherapist-patient privilege.[333] Courts deciding whether to apply a "dangerous patient" exception in criminal cases disagree over the significance of this disclosure. The Sixth Circuit, on the one hand, finds such initial disclosures inapposite to whether the "dangerous patient" exception should apply in criminal cases.[334] Instead, the Sixth Circuit believes only specific and individually tailored warnings about a psychotherapist's testimony can justify a "dangerous patient" exception:

> 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.... What cannot be forgotten, in cases of this sort, is that patients such as Hayes often suffer from serious mental and/or emotional disorders. Consequently, it must be the law that, in order to secure a valid waiver of the protections of the psychotherapist/patient privilege from a patient, a psychotherapist must provide that patient with an explanation of the consequences of that waiver suited to the unique needs of that patient.[335]

By contrast, the Ninth Circuit in *Chase I* did not discuss the effect of a physician's initial or subsequent confidentiality warnings.[336] Rather, the *Chase I* court

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

331. *Id.*

332. *Id.*

333. *Hayes*, 227 F.3d at 586 (citing AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, Standard 5.01 (Dec. 1992)).

334. *Id.*

335. *Id.* at 586–87.

336. *Chase I*, 301 F.3d at 1024–25 (failing to discuss relevance of initial or subsequent confidentiality warnings).

apparently assumed patients automatically waive all rights to confidentiality by simply making threats of imminent harm.[337] Subsequently, in *Chase II*, the Ninth Circuit indicated that a "dangerous patient" exception would apply if the patient received a routine warning that the physician might testify about any threatening statements the patient might make in the course of therapy.[338]

None of these approaches, however, balances society's interest in protecting victims with the patient's interest in becoming a functioning member of society. Courts should consider these competing interests in weighing the effects of a psychotherapist's warnings concerning the limits of confidentiality. For example, a rule that patients automatically waive the psychotherapist-patient privilege by accepting a psychotherapist's initial confidentiality disclosure effectively means patients will forfeit their privilege anytime they seek therapy. This, in turn, frustrates the public's interest in "facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem."[339] At the opposite extreme, a rule that preserves the privilege, even where a patient has received a clear warning not to expect confidentiality, elevates the patient's individual interests over society's interests in protecting intended victims. Indeed, courts requiring psychotherapists to utter "magic words"[340] that precisely delineate how and when the psychotherapist may disclose a patient's threatening remarks place form above matter. Moreover, these courts place an unrealistic burden on psychotherapists.

Instead, courts can strike the proper balance between the public and the patient's interests by asking the following question: did the patient receive an "explicit warning" informing him that he had no expectation of confidentiality? A patient receives an "explicit warning" when, in the course of treatment or diagnosis, a patient makes a threatening statement to a psychotherapist and the psychotherapist informs the patient that the psychotherapist will not keep any subsequent threat confidential for any purpose. Courts should implement this "explicit warning" model to determine if the "dangerous patient" exception applies in a given criminal case. Assuming the exception applies, a psychotherapist can testify about threatening statements that the patient makes after receiving an "explicit warning."[341] This approach resolves the inequitable consequences arising from either the Ninth Circuit or the Sixth Circuit's model.[342] It prohibits courts from equating a psychotherapist's routine confidential-

337. In *Chase I*, the Ninth Circuit stated that it found persuasive the dissenting opinion in *Hayes*. *Id.* In his dissent in *Hayes*, Judge Boggs argued that patients aware of the limits in confidentiality waive the psychotherapist-patient privilege by making threats. 227 F.3d at 588 (Boggs, J., dissenting).

338. *Chase II*, 340 F.3d at 988 n.5. ("We need not decide whether the result would be different if a psychotherapist informed a patient ahead of time that she would testify in court; arguably, the patient in that circumstance would be agreeing that the subsequent communication was not confidential.").

339. *Jaffee*, 518 U.S. at 11.

340. *Hayes*, 227 F.3d at 588 (Boggs, J., dissenting) ("The fact that Radford and Van Dyke did not use magic words like 'I can testify against you in court about what you tell me' as opposed to simply implying 'I can tell the police about what you tell me' should not be decisive.").

341. *Id.* at 589 (Boggs, J., dissenting) (suggesting that psychotherapist "could not testify about anything said up to the point at which notice is given that the actual or threatened criminal conduct being discussed is no longer covered by confidentiality").

342. *See id.* at 586 (refusing to apply "dangerous patient" exception even though patient received numerous warnings that threatening statements toward his supervisor would not be kept confidential); *see also Chase I*, 301

ity disclosure with a patient's knowing waiver of the psychotherapist-patient privilege. Moreover, the "explicit warning" model prohibits courts from ignoring the patient's knowledge that he has no right to expect continued confidentiality in particular statements.

To illustrate, the "explicit warning" model would allow a psychotherapist's testimony about the threatening statements in *Hayes*. As detailed above, Hayes sought treatment from two sources, a psychotherapist and a social worker.[343] He told them both that he wanted to kill his supervisor.[344] Both treating sources warned Hayes that they would not keep his threats confidential.[345] Moreover, both treating sources told Hayes they would report his threats to the police.[346] After Hayes received the first such warning, he knew he had no right to confidentiality in any subsequent threats that he might make. Nevertheless, he continued to make escalating threats of serious harm.[347] Courts should apply the "dangerous patient" exception under similar circumstances, assuming the remaining elements of the proposed test are met.

Critics may argue that, under the "explicit warning" model, the patient gets one free bite at the apple. In other words, the patient must threaten a third party before the psychotherapist can give the patient an explicit confidentiality warning. The psychotherapist cannot testify about the initial threat.

This criticism, however, ignores the policy justifying the "dangerous patient" exception. The exception is not designed to punish patients that threaten harm to a third party.[348] Rather, the exception should exist only to prevent the patient from harming third parties.[349] Thus, whether the patient is allowed to utter one threat without consequences is immaterial. In any event, it is unlikely that a person truly posing an imminent threat of harm will actually stop making threatening statements after receiving an "explicit warning." Indeed, the facts of *Chase* and *Hayes* show that explicit warnings do not deter disturbed individuals from making threats.[350]

4. No Other Reasonable Way to Avert Harm

Finally, in order to prevent a patient's confidences from being needlessly revealed, courts should prohibit a psychotherapist's testimony unless there is no other reasonable way to avert the harm. This hurdle, however, should not be placed so high as to require no other means possible, regardless of how unreasonable, to avert the harm.

Both the Sixth Circuit in *Hayes* and the Ninth Circuit in *Chase I* recognized a "dangerous patient" exception in criminal cases only where disclosing the patient's

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F.3d at 1024 (seemingly equating routine confidentiality warning with waiver of all subsequent threatening statements).

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

344. *Id.*

345. *Id.* at 588. The record does not indicate if either of Hayes' psychotherapists provided Hayes with an initial disclosure about a psychotherapist's limits on keeping threats confidential. But the record affirmatively shows that Hayes received three separate disclosure warnings after threatening his supervisor's life.

346. *Id.* at 580.

347. *Id.*

348. *See Jaffee*, 518 U.S. at 18 n.19 (stating that exception may exist to avert harm to third parties).

349. *See id.*

350. *Chase I*, 301 F.3d at 1021–22; *see also Hayes*, 227 F.3d at 580.

statements constituted "the only means of averting harm" to the intended victim.[351] Neither circuit defined the circumstances under which future courts may find disclosure of a patient's threatening remarks constitutes "the only means of averting harm." Conceivably, under this standard, even unreasonable alternatives to disclosure could defeat applicability of the "dangerous patient" exception. This result, however, would render recognition of the "dangerous patient" exception a moot point.

Not surprisingly, courts determining whether to apply the "dangerous patient" exception have not strictly adhered to the stated rule.[352] Instead, courts apply the exception where the psychotherapist possesses no "reasonable alternative" to disclosing the patient's statements. In *Chase I*, for example, the psychotherapist reasonably believed she could not prevent harm without disclosing her patient's statements.[353] Accordingly, the *Chase I* court condoned applying the "dangerous patient" exception and allowed the psychotherapist to testify about those statements.[354]

Courts deciding whether or not to apply the "dangerous patient" exception should embrace this approach. It promotes fairness to patients while relieving prosecutors from the unduly onerous burden of proving that no conceivable alteratives to disclosure exist.

5. Limiting the Psychotherapist's Testimony

Assuming the facts of a given case satisfy the four elements above, courts should allow psychotherapists to testify about their patients' statements. This, however, raises yet another question: what limits should courts place on the psychotherapist's testimony? Thus far, no court has answered this question. Certainly patients and prosecutors have differing ideas on just how courts should do so. Patients, of course, would most likely seek to limit the psychotherapist's testimony as much as possible. Indeed, a patient would prefer that courts prevent his psychotherapist from revealing any of the patient's statements. Prosecutors, by contrast, would urge courts to allow psychotherapists to testify about any relevant statements the patient made. A rule adopting this approach would, for example, permit prosecutors to inquire about the causes of a patient's hostility toward a particular victim. Such inquiries would likely reveal the patient's most private and embarrassing thoughts and beliefs. Indeed, some commentators have cited the patient's right to privacy as an argument against

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351. *Glass*, 133 F.3d at 1360; *Chase I*, 301 F.3d at 1024 (holding that "dangerous patient" exception applies when "the harm can be averted only by means of disclosure by the therapist").

352. *See, e.g., infra* notes 353–354 and accompanying text.

353. *Chase I*, 301 F.3d at 1025.

354. *See id.*

> Dr. Dieter testified that she considered initiating civil commitment procedures but concluded that it was unlikely that Chase would be held for longer than 72 hours due to his lack of a committable mental illness. Dr. Dieter was also concerned about a prior threat Chase had made to harm himself or clinic staff if any attempt were made to hospitalize him against his will. Thus, we find that Dr. Dieter reasonably considered disclosure to law enforcement authorities to be the only effective means of averting harm.

Id.

applying the "dangerous patient" exception in criminal cases.[355] Likewise, the Supreme Court of the United States noted that effective therapy often requires patients to disclose to their psychotherapist embarrassing and disgraceful communications.[356]

These considerations should compel courts to strictly limit the statements to which a psychotherapist can testify. Specifically, courts should permit psychotherapists to testify only to the following: (1) statements that the patient made after the psychotherapist gave the patient an "explicit warning"[357] and (2) statements showing that the patient poses or posed an imminent threat of harm to the specific victim. This model permits a prosecutor to elicit information necessary to prove his case and, thereby, protect the intended victim. Meanwhile, this model prohibits prosecutors from eliciting psychotherapist testimony that is not directly related to the charged offense. Thus, this model does not discourage patients from confiding in their psychotherapists.[358]

To date, however, courts have not yet placed these necessary limitations on psychotherapist testimony. For example, in *Chase I*, the patient was charged with threatening to kill FBI agents.[359] The district court allowed Chase's psychotherapist to testify about the threatening statements Chase made against FBI agents.[360] But

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355. *See Harris*, *supra* note 6, at 55–56.

> Exception to the evidentiary privilege would exact a much greater burden on that privacy interest than does the therapists *Tarasoff* duty to breach confidentiality. A therapist's *Tarasoff* warning typically entails notification only to law enforcement authorities and/or the potential victim that the patient poses a danger. It does not typically require a repetition of the patient's confidential statements to the therapist, but merely private notice that the patient may be a threat to the potential victim's safety. Exception to the evidentiary privilege, on the other hand, would entail the therapist's public testimony to the most intimate details of the patient's dangerous thoughts that have been shared with the therapist. Sharing of such thoughts is, of course, encouraged by the therapeutic process in an atmosphere of utmost confidence and safety for the very purpose of allowing the therapist to intervene and help the patient successfully manage those thoughts. Hearing those thoughts played back in a public courtroom and used to create a criminal case against the patient would be a drastic infringement on the patient's legitimate expectation of privacy.

Id.

356. *See Jaffee*, 518 U.S. at 10.

357. *See supra* pp. 143–145.

358. *See, e.g.*, *Hayes*, 227 F.3d at 588 (Boggs, J., dissenting).

> All of the court's concerns in support of encouraging persons to confide in mental health professionals would be satisfied by a more limited rule that such recipients of information could not testify about anything said up to the point at which notice is given that the actual or threatened criminal conduct being discussed is no longer covered by confidentiality.

Id.; *see also* West, *supra* note 298, at 905 (noting that patient's decision to bring lawsuit where mental state is at issue should not amount to complete waiver of psychotherapist-patient privilege:

> A plaintiff's choice to bring a lawsuit, possibly requiring that some personal information be revealed, does not reduce his or her privacy interest in other personal information. In court, plaintiffs need not disclose personal information not relevant to the case. In therapy, however, issues are not compartmentalized; rather, they are explored within the context of the patient's life. For example, in treating a patient who is having difficulties coping with discrimination in the workplace, it would be helpful for a therapist to know that the patient has a history of childhood sexual abuse. The patient's lawsuit in no way reduces his or her interest in keeping the childhood victimization private.)

359. *Chase I*, 301 F.3d at 1022. Chase was also charged with one count involving possession of a firearm.

Id.

360. *Id.* at 1024 n.2.

inexplicably, neither the district court nor the three-judge panel of the Ninth Circuit limited the psychotherapist's testimony to statements that were related to the charged offense.[361] For instance, Chase's psychotherapist testified about threats Chase made to a "number of people associated with his former business and legal proceedings."[362] Chase, however, was not charged with threatening any of these people.[363] As such, the court should have prohibited this testimony.

Likewise, future courts should limit the extent to which a psychotherapist may reveal his patient's confidential statements. Specifically, courts should permit psychotherapists to testify about only those statements that are directly relevant to the charged offense. If courts question the relevancy of a given statement, they should err in favor of protecting the patient's privacy interests. This strict rule allows the prosecutor to elicit only truly relevant information while protecting the patient's right to privacy.

V. CONCLUSION

The U.S. Supreme Court's decision in *Jaffee v. Redmond* established a federal psychotherapist-patient privilege. Courts now must decide if and when exceptions to that privilege exist. Protecting potential victims from the risk of harm posed by dangerous patients justifies a "dangerous patient" exception in criminal cases. But, as discussed above, protecting potential victims oftentimes clashes with society's interest in facilitating mental health treatment for disturbed individuals.[364] Courts, therefore, must find a way to resolve this tension by carving out an exception that properly balances these two competing interests. Thus far, no court has achieved this feat.[365]

The proposed framework in this article strives to provide courts with a mechanism to strike the proper balance. On the one hand, the framework allows prosecutors to elicit a patient's statements through psychotherapist testimony when the patient poses an imminent threat of harm to a specific individual. This serves society's interest in protecting potential victims. On the other hand, the framework imposes strict limits both on when the exception applies and the extent to which the psychotherapist can reveal the patient's confidential statements. Thus, by applying this proposed framework, courts can simultaneously protect the patient's right to privacy while providing the patient clear notice of when that right ends.

361. *Id.* at 1021–22 (summarizing threats that Chase made to business and legal associates and their children).
362. *Id.* at 1021.
363. *Id.* at 1022.
364. *See supra* Part II.
365. *See supra* Part III.