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**THE CAT IS ALREADY OUT OF THE BAG: RESOLVING
THE CIRCUIT SPLIT OVER THE DANGEROUS PATIENT
EXCEPTION TO THE PSYCHOTHERAPIST–PATIENT
PRIVILEGE**

Blake R. Hills*

I. INTRODUCTION

Consider a scenario in which a psychotherapist¹ is treating a patient who has a criminal history that includes multiple convictions for violent offenses.² During a therapy session, the patient tells their psychotherapist that the federal judge from their last case is “gonna pay for what he did to me.” The psychotherapist warns the authorities, and everything is fine for a while, but the judge is subsequently found beaten to death. There is enough circumstantial evidence to charge the patient with the murder of the judge, but the case is not especially strong. In order to shore up its case, the prosecution seeks to have the psychotherapist testify at trial about the threat. Is there a privilege that prevents psychotherapists from testifying against their clients in a criminal trial?³ If there is a general privilege, is there an exception for dangerous patients?⁴

The Supreme Court declared that there is a psychotherapist–patient privilege in *Jaffee v. Redmond*.⁵ Unfortunately, the Court did not address whether there is a dangerous patient exception to the privilege.⁶ This has led to a split between the circuits with varying answers about the existence of an exception.⁷ The resulting system of rules that depends on location is a significant problem that should

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1. See *What Is a Psychotherapist? Types of Psychotherapy*, HEALTH COMMUNITY (Jan. 21, 2002), <http://www.healthcommunities.com/mental-health-care/what-is-psychotherapist-psychotherapy.shtml> [<https://perma.cc/CT4R-95VV>].

2. See *infra* notes 168–76 and accompanying text.

3. See *infra* Part IV.

4. See *infra* notes 71–82 and accompanying text.

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

6. See *infra* notes 75–77 and accompanying text.

7. See *infra* notes 76–82 and accompanying text.

be fixed by the Supreme Court.⁸ The fact that “more than half of all prison and jail inmates ha[ve] a mental health problem” demonstrates that this is a problem that will persist until it is addressed by the Court.⁹

This Article proceeds in several parts. Part II discusses the general principles regarding privileges.¹⁰ Part III details a history of the rules surrounding psychotherapist–patient communications.¹¹ Part IV examines the *Jaffee* decision and discusses what the Supreme Court did and did not say about the psychotherapist–patient privilege and a possible dangerous patient exception.¹² Part V surveys the split of authority amongst the federal circuit courts.¹³ Part VI suggests that the Court should be guided by policy to hold that there is a dangerous patient exception to the psychotherapist–patient privilege.¹⁴ Finally, Part VII proposes a procedure for courts to use when determining whether the dangerous patient exception is applicable in a particular case.¹⁵

II. PRIVILEGES IN GENERAL

For at least the last three hundred years, it has been “a fundamental maxim that the public . . . has a right to every man’s evidence.”¹⁶ Because testimonial exclusionary privileges contravene that fundamental principle, “they must be strictly construed and accepted ‘only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.’”¹⁷ Indeed, privileges “are not lightly created nor

8. See *infra* notes 194–97 and accompanying text.

9. U.S. DEP’T OF JUSTICE, NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), <http://www.bjs.gov/content/pub/pdf/mhppji.pdf> [<https://perma.cc/7JCV-Z8M9>]. The Bureau of Justice Statistics reported that during one sample year, “more than half of all prison and jail inmates had a mental health problem, including 705,600 inmates in State prisons, 78,800 in Federal prisons, and 479,900 in local jails.” *Id.*

10. See *infra* Part II.

11. See *infra* Part III.

12. See *infra* Part IV.

13. See *infra* Part V.

14. See *infra* Part VI.

15. See *infra* Part VII.

16. *United States v. Bryan*, 339 U.S. 323, 331 (1950) (citing WIGMORE, EVIDENCE § 2192 (3d ed. 1940)).

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

expansively construed, for they are in derogation of the search for truth.”¹⁸

“Privileges are justified by the need to protect the privacy of certain relationships and the need to encourage open communications within these relationships.”¹⁹ Essentially, privileges are justified when “the social cost of protecting these relationships far outweighs the testimonial benefits.”²⁰ There are four conditions that must be met to satisfy this standard:

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.²¹

The earliest recognized privilege was the attorney–client privilege under Roman law.²² This was also the first privilege to be recognized under the common law of England during the reign of Elizabeth I.²³ However, in 1776, the House of Lords rejected the idea that there was a physician–patient privilege under the common law in the *Duchess of Kingston’s Case*.²⁴ In the United States, the physician–patient privilege was first recognized by statute in New York in 1828.²⁵

18. United States v. Nixon, 418 U.S. 683, 710 (1974).

19. Deborah Paruch, *From Trusted Confidant to Witness for the Prosecution: The Case Against the Recognition of a Dangerous-Patient Exception to the Psychotherapist-Patient Privilege*, 9 U.N.H. L. REV. 327, 331 (2011).

20. Deborah C. Edwards, Note, *Duty-to-Warn Even if It May Be Hearsay? The Implications of a Psychotherapist’s Duty-to-Warn a Third Person When Information Is Obtained from Someone Other than His Patient*, 3 IND. HEALTH L. REV. 171, 173 (2006).

21. 8 WIGMORE, EVIDENCE § 2285 (J. McNaughton rev. 1961).

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

23. *Id.* at 669–70.

24. *Id.* at 671; see also Rex. v. Duchess of Kingston, 20 How. St. Tr. 355, 572–73 (1776).

25. *Id.* at 676; see also N.Y. REV. STAT. pt. 3, ch. 7, tit. 3, § 73 (1829).

III. HISTORY OF THE PSYCHOTHERAPIST–PATIENT PRIVILEGE

There was no psychotherapist–patient privilege under the common law.²⁶ This is not surprising, as psychiatry was not fully developed until well into the twentieth century.²⁷ The first case on record to recognize the privilege was the Illinois Circuit Court case of *Binder v. Ruvell* in 1952.²⁸ In that civil case, a psychiatrist and a hospital were both summoned to produce the medical records of a recent patient.²⁹ The court ruled that the information provided by a patient to a psychiatrist during psychotherapy sessions was protected from disclosure even though Illinois did not recognize a physician–patient privilege at that time.³⁰ In determining that Illinois law should recognize this privilege, the court concluded that the protection of the confidences that arise in the psychotherapist–patient relationship outweighed the “correct disposal of a particular case.”³¹

Once other states began to recognize the privilege, it gained widespread acceptance fairly quickly.³² For instance, forty-five states recognized some form of the privilege by 1985.³³ By 1996, the District of Columbia and all fifty states enacted some form of the privilege.³⁴

Federal courts were not as quick to give the psychotherapist–patient privilege widespread acceptance.³⁵ In 1972, the Supreme Court submitted proposed rules of evidence to Congress that would have recognized nine federal privileges, including a psychotherapist–patient privilege.³⁶ Proposed Rule 504 provided in part:

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26. Molly E. Slaughter, Note, *Misuse of the Psychotherapist-Patient Privilege in Weisbeck v. Hess: A Step Backward in the Prohibition of Sexual Exploitation of a Patient by a Psychotherapist*, 41 S.D. L. REV. 574, 588 (1996).
 27. Major Dru Brenner-Beck, “Shrinking” the Right to Everyman’s Evidence: *Jaffee in the Military*, 45 A.F. L. REV. 201, 208 (1998).
 28. See Edwards, *supra* note 20, at 176.
 29. *Binder v. Ruvell*, No. 52C2535 (Ill. Cir. Ct. June 24, 1952), reported in 150 JAMA 1165, 1241 (1952).
 30. See *id.*
 31. *Id.* at 1242.
 32. See *Developments in the Law—Privileged Communications: Medical and Counseling Privileges*, 98 HARV. L. REV. 1530, 1539 (1985).
 33. *Id.*
 34. See *Jaffee v. Redmond*, 518 U.S. 1, 12 (1996).
 35. See *infra* notes 36–51 and accompanying text.
 36. See Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 231, 240–42 (1972).

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of his mental or emotional condition, including drug addiction, among himself, his psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.³⁷

The proposed rule contained exceptions to the privilege for (1) communications made pursuant to proceedings to hospitalize a patient, (2) communications made in connection with court-ordered examinations, or (3) communications relevant to an issue of the mental or emotional condition when the condition is relied upon as an element of the claim or defense.³⁸

The timing of this proposed rule was unfortunate; it was submitted while the Watergate scandal was unfolding.³⁹ The battle between Congress and the President over executive privilege contributed towards “an enormous outcry” against the privilege provisions of the proposed rules.⁴⁰ As a result of the controversy, Congress chose to jettison all of the proposed privileges and enacted Rule 501 as the single rule of privilege.⁴¹ Rule 501 simply provides that “[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege” in the absence of a provision in the Constitution, statutes, or rules.⁴² In rejecting specific privilege rules and only adopting a general rule, the Senate Judiciary Committee stated that it was not against the recognition of specific privileges such as:

Psychiatrist-patient, or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a

37. *Id.* at 241.

38. *Id.*

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

40. *Id.* at 513.

41. See *id.* at 514.

42. FED. R. EVID. 501.

confidential relationship and other privileges should be determined on a case-by-case basis.⁴³

Unsurprisingly, the contentious background and vague language of Rule 501 led to confusion about whether there was a psychotherapist–patient privilege in federal court proceedings.⁴⁴ The Second,⁴⁵ Sixth,⁴⁶ and Seventh⁴⁷ Circuits recognized the privilege. However, the Fifth,⁴⁸ Ninth,⁴⁹ Tenth,⁵⁰ and Eleventh⁵¹ Circuits declined to do so.

IV. JAFFEE V. REDMOND

The Supreme Court finally addressed the existence of the psychotherapist–patient privilege in the federal courts in *Jaffee v. Redmond*.⁵² That case began when Officer Mary Lu Redmond responded to a call regarding a fight in progress at an apartment complex.⁵³ Although there were differing accounts of what happened at the scene, it was undisputed that Redmond shot and killed Ricky Allen shortly after she arrived.⁵⁴ Jaffee, the administrator of Allen’s estate, subsequently filed suit in federal court, alleging that Redmond violated Allen’s constitutional rights by using excessive force.⁵⁵

During pretrial discovery, Jaffee learned that Redmond participated in approximately fifty counseling sessions with a licensed clinical social worker.⁵⁶ Jaffee sought access to the social worker’s notes about Redmond’s counseling sessions, but this attempt was “vigorously resisted” with an assertion that the notes were protected by the psychotherapist privilege.⁵⁷ The district court rejected this

43. Edwards, *supra* note 20, at 175–76.

44. See *infra* notes 45–51 and accompanying text.

45. *In re Doe*, 964 F.2d 1325, 1328 (2d Cir. 1992).

46. *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983).

47. *Jaffee v. Redmond*, 51 F.3d 1346, 1355 (7th Cir. 1995), *aff’d*, 518 U.S. 1 (1996).

48. *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir. 1976).

49. *In re Grand Jury Proceedings*, 867 F.2d 562, 565 (9th Cir. 1989).

50. *United States v. Burtrum*, 17 F.3d 1299, 1302 (10th Cir. 1994).

51. *United States v. Corona*, 849 F.2d 562, 567 (11th Cir. 1988).

52. *Jaffee*, 518 U.S. 1.

53. *Id.* at 4.

54. *Id.* at 4–5. Redmond testified that she shot Allen when it appeared that he was about to stab another man with a butcher knife, while members of Allen’s family who were at the scene testified that Allen was unarmed. *Id.*

55. *Id.* at 5.

56. *Id.*

57. *Id.*

argument, but Redmond and the social worker both refused to disclose the contents of the notes and refused to answer questions about their conversations during depositions.⁵⁸ At the end of trial, the judge instructed the jury that there was no legal justification for the refusal to turn over the notes and permitted the jury to presume that the contents would have been unfavorable to Redmond.⁵⁹ The jury awarded Allen's estate \$500,000 on the state claim and \$45,000 on the federal claim.⁶⁰

The Seventh Circuit reversed and remanded for a new trial.⁶¹ The court concluded that the "reason and experience" factors of Rule 501 required the recognition of the psychotherapist–patient privilege.⁶² The court explained that "[r]eason tells us that psychotherapists and patients share a unique relationship, in which the ability to communicate freely without the fear of public disclosure is the key to successful treatment," and "[a]s to experience, . . . all 50 States have adopted some form of the psychotherapist–patient privilege."⁶³ However, the court stated that the privilege "would not apply if, '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.'"⁶⁴

The Supreme Court began its analysis by stating that although the general rule does not favor testimonial privileges, exceptions may be justified when a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."⁶⁵ The Court then found that "reason and experience" dictate that a psychotherapist–patient privilege "promotes sufficiently important interests to outweigh the need for probative evidence."⁶⁶ The privilege would promote the private interest of the patient by facilitating an "atmosphere of confidence and trust."⁶⁷ Thus, the privilege is necessary because "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."⁶⁸ However, it is not enough that a

58. *Id.*

59. *Id.* at 5–6.

60. *Id.* at 6.

61. *Id.*

62. *Id.* (quoting *Jaffee v. Redmond*, 51 F.3d 1346, 1355 (7th Cir. 1995)).

63. *Id.* (quoting *Jaffee*, 51 F.3d at 1355–56).

64. *Id.* at 7 (quoting *Jaffee*, 51 F.3d at 1357).

65. *Id.* at 9 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

66. *Id.* at 9–10 (quoting *Trammel*, 445 U.S. at 51).

67. *Id.* at 10.

68. *Id.*

privilege serves a private interest; “an asserted privilege must also ‘serv[e] public ends.’”⁶⁹ The Court stated that the privilege would benefit the public at large “by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem.”⁷⁰

After holding that Rule 501 did provide for a psychotherapist–patient privilege, the Court was faced with defining the contours of the privilege.⁷¹ The Court expressly rejected the Seventh Circuit’s balancing test because “[m]aking 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.”⁷² Instead, the Court held that “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure.”⁷³ The Court then explained that the privilege applies equally to licensed psychologists, psychiatrists, and clinical social workers.⁷⁴

Although this appeared to be a bright-line rule, the Court expressly declined to “delineate its full contours in a way that would ‘govern all conceivable future questions in this area.’”⁷⁵ Instead, the Court stated that the details of the privilege should be determined on a case-by-case basis.⁷⁶ Most importantly, the Court stated in a footnote that:

Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.⁷⁷

69. *Id.* at 11 (alteration in original) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

70. *Id.*

71. *Id.* at 15.

72. *Id.* at 17.

73. *Id.* at 15.

74. *Id.* at 15–17.

75. *Id.* at 18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981)).

76. *Id.*

77. *Id.* at 18 n.19.

This footnote created a split among the circuits about whether there is a dangerous patient exception to the psychotherapist–patient privilege.

V. CIRCUIT SPLIT

It is not surprising that, left on their own, the circuit courts have taken varying positions on whether there is a dangerous patient exception.⁷⁸ Currently, one circuit recognizes the dangerous patient exception,⁷⁹ three do not,⁸⁰ and one relies on the doctrine of waiver.⁸¹ In the circuits that have not yet picked a side, the district courts have recognized the exception.⁸²

A. Tenth Circuit

The Tenth Circuit became the first circuit to address the dangerous patient exception in *United States v. Glass*.⁸³ That case began when the defendant was voluntarily admitted to the mental health unit of a hospital for treatment of his “ongoing mental illness.”⁸⁴ While he was in the hospital, the defendant told his psychotherapist that he wanted to “get in the history books” like the man who shot Ronald Reagan and that he wanted to shoot President Clinton and Mrs. Clinton.⁸⁵ The defendant was subsequently released from the hospital after he agreed to participate in outpatient therapy and live with his father.⁸⁶ Shortly thereafter, a nurse notified law enforcement after discovering that the defendant had left his father’s home.⁸⁷ As a consequence, the Secret Service contacted the psychotherapist and learned about the defendant’s statements.⁸⁸

The defendant was subsequently charged with knowingly and willingly threatening to kill the President of the United States.⁸⁹ The defendant moved to exclude the statements he made to his psychotherapist on the ground that these were confidential

78. See *infra* Sections V.A–E.

79. See *infra* Section V.A.

80. See *infra* Sections V.B–D.

81. See *infra* Section V.E.

82. See *infra* Section V.F.

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

84. *Id.* at 1357.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* (citing 18 U.S.C. § 871(a) (1994)).

communications protected by the psychotherapist–patient privilege.⁹⁰ In response, the prosecution argued that the statements were admissible because they fell within the exception of footnote 19 of *Jaffee*.⁹¹ The district court agreed with the prosecution and determined that when there is “an express threat to kill a third party by a person with an established history of mental disorder” the psychotherapist–patient privilege is inapplicable.⁹²

The Tenth Circuit held that even though *Jaffee* was a civil case, the psychotherapist–patient privilege also applied in criminal cases.⁹³ Although the court did not expressly use the words “dangerous patient exception,” the court found that footnote 19 did allow for such an exception.⁹⁴ Specifically, the court held that an exception to the privilege exists when “the threat was serious when it was uttered and . . . its disclosure was the only means of averting harm to the [victim] when the disclosure was made.”⁹⁵ However, the court was unable to determine whether these two requirements were met based on the record before it, so it remanded the case for additional factual findings.⁹⁶

B. Sixth Circuit

The Sixth Circuit addressed the potential of a dangerous patient exception in *United States v. Hayes*.⁹⁷ In that case, the defendant was an employee of the Postal Service who had behaved erratically at work.⁹⁸ After having several of these erratic episodes, the defendant sought treatment at a Veterans Administration hospital.⁹⁹ During treatment, the defendant told his psychotherapist that he wanted to kill his supervisor and that he was only able to resist this desire because he recognized that doing so would jeopardize his continued employment.¹⁰⁰ The defendant was released from the hospital but readmitted himself a few days later.¹⁰¹ The defendant repeated his

90. *Id.*

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

92. *Id.*

93. *See id.* at 1359–60.

94. *Id.*

95. *Id.* at 1360.

96. *Id.*

97. *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000).

98. *Id.* at 580.

99. *Id.*

100. *Id.*

101. *Id.*

homicidal desires, but the doctors concluded that he could control himself and released him from the hospital with a prescription for psychotropic medication.¹⁰² A few weeks later, the defendant met with a social worker and detailed his plan to kill his supervisor.¹⁰³ After the defendant gave even more details about his plan in a subsequent meeting with the social worker, the social worker warned the supervisor.¹⁰⁴

After the plan was reported, the Postal Inspector obtained the defendant's medical records, and the defendant was charged with threatening to kill a federal official.¹⁰⁵ The defendant moved to dismiss the indictment and to suppress his medical records, including any testimony from his psychotherapists based on the psychotherapist–patient privilege.¹⁰⁶ The district court ruled that the records and testimony were privileged and granted the motion to suppress.¹⁰⁷

The Sixth Circuit began its analysis by acknowledging that psychotherapists have a duty under state law to warn a foreseeable victim if a patient poses a serious danger of violence.¹⁰⁸ However, the court saw no connection between a therapist's duty to notify a third person of a patient's threat and the psychotherapist–patient privilege.¹⁰⁹ The court then identified three reasons for rejecting a dangerous patient exception to the privilege.¹¹⁰ First, the exception “would have a deleterious effect on the ‘atmosphere of confidence and trust’ in the psychotherapist/patient relationship.”¹¹¹ Second, even though allowing a psychotherapist to testify “serv[es] [a] public end,” the benefits are outweighed by the need to improve the mental health of the general public.¹¹² Third, the fact that the majority of states had not adopted a dangerous patient exception indicated that the exception should not be part of the federal common law.¹¹³

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 580–81.

106. *Id.* at 581.

107. *Id.*

108. *Id.* at 583.

109. *Id.* at 583–84.

110. *Id.* at 584–86.

111. *Id.* at 584.

112. *Id.* at 585 (alterations in original).

113. *Id.* at 585–86.

Therefore, the court declined to recognize a dangerous patient exception.¹¹⁴

C. *Eighth Circuit*

The Eighth Circuit addressed the possible existence of a dangerous patient exception in *United States v. Ghane*.¹¹⁵ The case began when the defendant, who had a documented history of mental illness, called a suicide hotline and reported that he was suicidal.¹¹⁶ The defendant was then transported to the hospital, where he reported that if he were to commit suicide, he would use the cyanide that he had at his apartment.¹¹⁷ After receiving consent from the defendant to search his apartment, the police found and seized the cyanide.¹¹⁸

The defendant was admitted to the psychiatric ward where he was treated by a clinical psychiatrist.¹¹⁹ During an examination, the defendant told the psychiatrist that he was suicidal, that he had thoughts of harming other people who were associated with the Corps of Engineers, and that he had access to chemicals.¹²⁰ After obtaining the defendant's consent, the psychiatrist reported the threats to law enforcement.¹²¹ The defendant was subsequently charged with stockpiling, retaining, and possessing a chemical weapon.¹²² The psychiatrist was allowed to testify at trial after the district court ruled that such testimony was admissible under a dangerous patient exception to the psychotherapist–patient privilege.¹²³

The Eighth Circuit held that footnote 19 of *Jaffee* did not establish a dangerous patient exception to the psychotherapist–patient privilege.¹²⁴ In so holding, the court adopted the reasoning of *Hayes*.¹²⁵ First, the court found no connection between the duty to report threats under state law and the application of the privilege in

114. *Id.* at 586. The court stated that a psychotherapist could testify against a patient in a hearing related to the involuntary hospitalization of the patient. *Id.*

115. *United States v. Ghane*, 673 F.3d 771, 779–86 (8th Cir. 2012).

116. *Id.* at 775.

117. *Id.*

118. *Id.* at 775–76.

119. *Id.* at 776.

120. *Id.*

121. *Id.*

122. *Id.* at 775.

123. *Id.* at 784.

124. *Id.* at 784–85.

125. *Id.* at 785.

criminal proceedings.¹²⁶ Second, the court indicated that a dangerous patient exception would have a “deleterious effect on the ‘confidence and trust’ the Supreme Court held is implicit in the confidential relationship between the therapist and a patient.”¹²⁷ Thus, the court did not adopt the dangerous patient exception in the Eighth Circuit.¹²⁸

D. Ninth Circuit

The Ninth Circuit addressed the potential of a dangerous patient exception in *United States v. Chase*.¹²⁹ That case involved a defendant who received treatment from a psychiatrist and a psychologist for irritability, depression, and anger.¹³⁰ During a series of counseling sessions and a phone call, the defendant told his psychiatrist that he was planning to kill FBI agents.¹³¹ The defendant stated during one counseling session that if a lien against his house was not dropped “he would get his guns, get in his vehicle and have himself some justice,” and “he had gathered more information on the people he intended to kill and that he had located all but four of those on his list.”¹³² The psychiatrist reported the threats.¹³³ After the FBI made plans to interview the defendant and search his home, the defendant called the psychiatrist’s clinic and spoke with telephone operators, whom he told that “there are FBI Marshals that are on their way out to get me and if that happens, people are going to die.”¹³⁴

The defendant was arrested and charged with threatening to murder FBI and other law enforcement officials.¹³⁵ The defendant claimed that his psychiatrist could not testify about his statements, but the district court held that the testimony was admissible.¹³⁶ The district court found that the psychotherapist–patient privilege did not apply because the psychiatrist had properly determined that the threats were serious when uttered, that harm was imminent, and that disclosure was the only way to prevent the harm.¹³⁷ A three-judge panel of the

126. *Id.* (quoting *United States v. Hayes*, 227 F.3d 578, 583–84 (6th Cir. 2000)).

127. *Id.* (quoting *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996)).

128. *Id.* at 786. The court did state that a psychotherapist could testify against a patient in a hearing related to the involuntary hospitalization of the patient. *Id.* at 785–86.

129. *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003).

130. *Id.* at 979.

131. *Id.* at 979–80.

132. *Id.* at 980.

133. *Id.*

134. *Id.*

135. *Id.* at 981.

136. *Id.*

137. *Id.*

Ninth Circuit affirmed the district court's decision, but the full court decided to rehear the case en banc.¹³⁸

The full Ninth Circuit began its analysis by distinguishing between the duty to disclose the threats under state law and the testimonial privilege.¹³⁹ The court interpreted footnote 19 of *Jaffee* to endorse the duty to disclose threats to the intended victim.¹⁴⁰ However, the court found that there were several reasons for not recognizing a dangerous patient exception.¹⁴¹

First, the court found that a federal exception to the privilege "would weaken state confidentiality laws" because all but one of the states in the circuit had laws with a distinction between the duty to disclose and the testimonial privilege.¹⁴² Next, the court stated that while the duty to disclose threats to the victim had obvious benefits that outweighed the cost of the effect on the psychotherapist-patient relationship, subsequent testimony at a trial did not if the patient was no longer dangerous at the time of trial.¹⁴³ In addition, the court found that because Proposed Rule 504 did not contain a dangerous patient exception, that fact weighed against recognizing such an exception.¹⁴⁴ Finally, the court concluded that the benefits derived from refusing to recognize the exception far outweighed any evidentiary gain resulting from the compelled testimony because of the "deleterious effect" that abrogation of the privilege would have on the therapeutic relationship.¹⁴⁵

E. Fifth Circuit

The Fifth Circuit had the opportunity to address a dangerous patient exception in *United States v. Auster* but ultimately resolved the issues in the case on waiver grounds.¹⁴⁶ In that case, the defendant was a retired police officer who received workers' compensation benefits for close to two decades.¹⁴⁷ The defendant was also treated for paranoia, anger, and depression for a number of

138. *Id.*

139. *Id.* at 985.

140. *Id.* at 984 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996)).

141. *See id.* at 985-92.

142. *Id.* at 985-86.

143. *Id.* at 987.

144. *See id.* at 990.

145. *Id.* at 990-91 (quoting *United States v. Hayes*, 227 F.3d 578, 584 (6th Cir. 2000)).

146. *See United States v. Auster*, 517 F.3d 312, 320-21 (5th Cir. 2008).

147. *Id.* at 313.

years.¹⁴⁸ During his therapy sessions, the defendant made numerous threats of violence directed towards the managers of his workers' compensation claim.¹⁴⁹ His therapists reported the threats.¹⁵⁰ When the company managing the defendant's claim subsequently told him that it would stop paying a portion of his claim, the defendant made specific threats during therapy directed towards the company's personnel, city authorities, and police officials.¹⁵¹ The defendant stated that he had "stockpiles of weapons and supplies to provide the basis for his actions."¹⁵²

After these specific threats, the therapist warned the benefits company, and one of the employees contacted the police.¹⁵³ The defendant was arrested and was subsequently charged with extortion.¹⁵⁴ The defendant moved to suppress the communications between himself and his therapist based on the psychotherapist–patient privilege.¹⁵⁵ The district court granted the motion and the government appealed.¹⁵⁶

The Fifth Circuit began its analysis by noting that under *Jaffee*, the psychotherapist–patient privilege only applies to confidential communications.¹⁵⁷ The court noted that the fundamental rule of privilege is that "[t]he communications must originate in a confidence that they will not be disclosed."¹⁵⁸ "[W]ithout such a reasonable expectation [of confidentiality,] there is no privilege."¹⁵⁹ The court explained that the operative test is "whether there was a 'reasonable expectation of confidentiality' when the statement was made."¹⁶⁰ The court also noted that the requirement of confidentiality is clear from *Jaffee's* express statement that "[l]ike other testimonial privileges, the patient may of course waive the protection."¹⁶¹ With this context in mind, the court held that because

148. *Id.*

149. *See id.* at 313–14.

150. *See id.* at 313 & n.2, 314.

151. *Id.* at 314.

152. *Id.*

153. *See id.*

154. *See id.*

155. *See id.*

156. *See id.* at 313–14.

157. *See id.* at 315 (quoting *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996)).

158. *Id.* at 315 n.6 (alteration in original) (quoting 1 CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 72 (6th ed. 2006)).

159. *Id.* at 316.

160. *Id.* at 317.

161. *Id.* at 318 n.17 (quoting *Jaffee*, 518 U.S. at 15 n.14).

the defendant knew when he made the threat that it would be reported to the benefits company, the psychotherapist–patient privilege did not apply as a matter of law “because he had no reasonable basis to conclude that the statement was confidential.”¹⁶²

Because the psychotherapist–patient privilege did not apply to the defendant’s non-confidential statement, the court stated that it was unnecessary to determine whether there is a dangerous patient exception.¹⁶³ However, the court stated that footnote 19 of *Jaffee* demonstrates that the Supreme Court views the psychotherapist–patient privilege to be limited in scope.¹⁶⁴ “Moreover, because the Court contemplated that the privilege must give way in some instances involving dangerous patients, even where there is confidentiality, it follows *a fortiori* that the privilege is inapplicable in similar situations involving dangerous patients where there is no confidentiality.”¹⁶⁵

F. District Courts

There are some circuits that have not addressed the existence of a dangerous patient exception to the psychotherapist–patient privilege.¹⁶⁶ However, some district courts in those circuits have addressed the issue.¹⁶⁷

The United States District Court for the District of Maine addressed this issue in *United States v. Hardy*.¹⁶⁸ In that case, the defendant had a history of mental illness and a criminal history that included convictions for violent offenses.¹⁶⁹ In May of 2008, the defendant went to the emergency room of a hospital “complaining of either high blood pressure or a blood sugar issue.”¹⁷⁰ During his initial assessment, the defendant threatened to kill the President by cutting his head off and shooting him.¹⁷¹ This threat was reported to the Secret Service, and the defendant was transferred to another hospital for psychiatric evaluation.¹⁷² While at the second hospital,

162. *Id.* at 315.

163. *See id.* at 321.

164. *Id.* at 315 n.5 (citing *Jaffee*, 518 U.S. at 18 n.19).

165. *Id.*

166. *See supra* notes 45–51 and accompanying text.

167. *See infra* notes 168–93 and accompanying text.

168. *United States v. Hardy*, 640 F. Supp. 2d 75, 79–80 (D. Me. 2009).

169. *See id.* at 77.

170. *Id.*

171. *See id.*

172. *See id.*

the defendant told his treating psychiatrist that he was going to kill the President, a former president, and a senator.¹⁷³ These threats were also reported to the Secret Service.¹⁷⁴

The defendant was subsequently charged with making a threat against the President of the United States.¹⁷⁵ The defendant contended that the statements he made in the hospitals were protected by the psychotherapist–patient privilege.¹⁷⁶

The court began its analysis by noting that the statements fell under the psychotherapist–patient privilege, but under footnote 19 of *Jaffee*, there are times when the privilege must give way.¹⁷⁷ The court then briefly recited the holdings of *Glass* and *Hayes* and stated that it found the rationale of *Glass* to be more persuasive in light of footnote 19’s suggestion “that the privilege must give way to a serious threat of harm.”¹⁷⁸ Thus, the court found that the statements were admissible under the dangerous patient exception to the privilege.¹⁷⁹

The United States District Court for the Southern District of Florida addressed this issue in *United States v. Highsmith*.¹⁸⁰ In that case, the defendant voluntarily admitted himself into a Veteran’s Administration hospital because of homicidal and suicidal thoughts.¹⁸¹ Two days later, the defendant told a staff psychiatrist that he had a gun at home which he intended to use to kill an administrative law judge and then kill himself.¹⁸² The defendant repeated these threats over the next two days, and the psychiatrist notified law enforcement about the threats.¹⁸³

The defendant was subsequently charged with threatening to kill an administrative law judge.¹⁸⁴ The defendant filed a motion to suppress the statements he made to his psychiatrist based on the psychotherapist–patient privilege.¹⁸⁵ The prosecution recognized the

173. *See id.* at 78.

174. *See id.*

175. *See id.* at 76. This statute prohibits “knowingly and willfully” making a threat against the President, Vice-President, and other elected officials. 18 U.S.C. § 871(a) (2012).

176. *See Hardy*, 640 F. Supp. 2d at 76.

177. *See id.* at 78–79 (citing *Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996)).

178. *Id.* at 80.

179. *See id.*

180. *See United States v. Highsmith*, No. 07-80093-CR, 2007 WL 2406990 (S.D. Fla. Aug. 20, 2007).

181. *See id.* at *1.

182. *See id.*

183. *See id.*

184. *Id.*

185. *See id.* at *1, *2.

privilege but argued that the statements fell within the dangerous patient exception.¹⁸⁶ The defendant argued that there was no such exception in federal court.¹⁸⁷

The court began its analysis by quoting the language of footnote 19 of *Jaffee*.¹⁸⁸ The court acknowledged that there was a split among the circuits on the meaning of footnote 19 and then concluded “that footnote 19 in *Jaffee* was an acknowledgment of the existence of a narrow exception to the psychotherapist–patient privilege.”¹⁸⁹ Further, the court concluded that the footnote “cannot be read as merely recognizing the duty of a psychotherapist to warn third parties of potential danger or to testify in civil commitment proceedings.”¹⁹⁰ In addition, the court stated that the Supreme Court’s “use of the word *privilege* in a testimonial context cannot be construed to refer to either a *duty* which state law might impose on a therapist, or an *authorization* which state law might bestow on a therapist, to warn of potential harm to the patient or third parties.”¹⁹¹ Thus, the court held that there is a dangerous patient exception that allows a psychotherapist to “testify about confidential communications received from a patient ‘if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.’”¹⁹² However, the court concluded that the defendant’s statements did not fall under the dangerous patient exception because the exception requires a showing “that a serious threat of harm can be averted only by means of disclosure” and because the defendant was in a locked psychiatric unit, disclosure was not the only way to prevent harm to the judge.¹⁹³

VI. THE SUPREME COURT SHOULD EXPRESSLY RECOGNIZE THE DANGEROUS PATIENT EXCEPTION TO THE PSYCHOTHERAPIST–PATIENT PRIVILEGE

The failure of the Supreme Court in *Jaffee* to specifically address the existence of a dangerous patient exception to the psychotherapist–patient privilege has led to a confused mixture of

186. *See id.* at *2.

187. *See id.*

188. *See id.* (quoting *Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996)).

189. *Id.*

190. *Id.* (citing *United States v. Chase*, 340 F.3d 978, 995–96 (9th Cir. 2003) (Kleinfeld, J., concurring)).

191. *Id.*

192. *Id.*

193. *See id.* at *3.

rules that depend on where a trial occurs.¹⁹⁴ Different outcomes for identical facts based merely on the location of the court is very unfair.¹⁹⁵ This situation is untenable in a modern age when crimes frequently cross jurisdictional boundaries.¹⁹⁶ The time has come for the Supreme Court to expressly recognize that there is a dangerous patient exception to the psychotherapist–patient privilege in federal court proceedings.¹⁹⁷

A. *The Tarasoff Duty to Report*

Any discussion of the dangerous patient exception must begin with a recognition that psychotherapists already have a statutory duty under state law to report serious threats of harm made by patients under their care.¹⁹⁸ This duty is generally referred to as the *Tarasoff* duty, which had its origin in *Tarasoff v. Regents of the University of California*.¹⁹⁹

194. See *supra* Part V.

195. See *Unfairness*, CAMBRIDGE U. PRESS, <https://dictionary.cambridge.org/us/dictionary/english/unfairness> [<https://perma.cc/T4KB-VJWS>] (last visited Dec. 26, 2019) (“[T]he quality or fact of not treating people in an equal way, or of being morally wrong.”).

196. See Cynthia Burke, *Cross-Jurisdictional Task Forces on the Border: Targeting Drugs and Violence in San Diego County*, SANDAG 3 (Feb. 2014), sandag.org/uploads/publicationid/publicationid_1823_17169.pdf [<https://perma.cc/VV5G-AFBY>] (“Criminal activity . . . often crosses jurisdictional boundaries”); see Brian A. Jackson et al., *Knowing More, but Accomplishing What? Developing Approaches to Measure the Effects of Information-Sharing on Criminal Justice Outcomes*, SEMANTIC SCHOLAR 13, pdfs.semanticscholar.org/4da0/a16bd9e8ce8325489f88722a4cf6883009cb.pdf [<https://perma.cc/LM5Z-2Z6W>] (last visited Dec. 26, 2019) (explaining that “criminal activity can cross jurisdictional boundaries”).

197. See *infra* notes 198–214 and accompanying text.

198. See *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 193 (D. Neb. 1980) (imposing a duty to control anyone foreseeably endangered by a patient); see *Hamman v. County of Maricopa*, 775 P.2d 1122, 1128 (Ariz. 1989) (explaining that a foreseeable victim is anyone “within the zone of danger, that is, subject to probable risk of the patient’s violent conduct”); see *Naidu v. Laird*, 539 A.2d 1064, 1072–73 (Del. 1988) (holding that a psychiatrist has a duty to warn the general public, which could have been injured as a result of an automobile accident with the psychotic patient); see *Bardoni v. Kim*, 390 N.W.2d 218, 223 (Mich. Ct. App. 1986) (finding a duty to warn an identifiable victim).

199. *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976); see also *United States v. Chase*, 340 F.3d 978, 984 (9th Cir. 2003) (“Some of these exceptions allow, and some require, a psychotherapist to disclose threats made by a patient during therapeutic sessions if the psychotherapist determines that the patient poses a risk of serious harm to self or others. This exception is often referred to as the *Tarasoff* duty”); see also *Romar v. Fresno Cmty. Hosp. & Med. Ctr.*, 583 F.

In 1969, Prosenjit Poddar killed Tatiana Tarasoff two months after he “confided his intention to kill Tatiana” to his psychologist at the Cowell Memorial Hospital at the University of California at Berkeley.²⁰⁰ Specifically, Poddar told his psychologist during outpatient treatment that “he was going to kill an unnamed girl, readily identifiable as Tatiana, when she returned home from spending the summer in Brazil.”²⁰¹ The psychologist decided that Poddar should be committed for observation so he asked campus police for assistance in confining Poddar.²⁰² The police took Poddar into custody but released him after he promised to stay away from Tatiana.²⁰³ Neither the psychologist nor the police warned Tatiana or her family that she was in any danger, and she was murdered by Poddar two months later.²⁰⁴ Tatiana’s parents subsequently filed suit, asserting various claims based on the failure to warn and protect Tatiana.²⁰⁵

The California Supreme Court began its analysis by noting that there is a special relationship between a psychotherapist and a patient.²⁰⁶ Because of this special relationship, the court held that, “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.”²⁰⁷ Depending on the nature of the case, this duty may require the psychotherapist to “warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.”²⁰⁸ The court concluded that:

[T]he public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert

Supp. 2d 1179, 1188 (E.D. Cal. 2008) (“The duty of a psychotherapist to warn a third party victim was created by the California Supreme Court in *Tarasoff*. . .”).

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

201. *Id.* at 341.

202. *See id.*

203. *Id.*

204. *See id.* at 339, 341.

205. *See id.* at 340–41.

206. *See id.* at 343.

207. *Id.* at 340.

208. *Id.*

danger to others. The protective privilege ends where the public peril begins.

. . . In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal. If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment.²⁰⁹

Because *Tarasoff* ignited a trend of legislation, the majority of states imposed a *Tarasoff* duty on psychotherapists by the time *Jaffee* reached the Supreme Court.²¹⁰ Before the Court decided *Jaffee*, the *Tarasoff* duty existed for as long as twenty years in some states.²¹¹ The fact that the Court did not mention *Tarasoff* in footnote 19 of *Jaffee* indicates that the Court was referring to an exception to the privilege that was not the same as the existing *Tarasoff* duty to make out-of-court disclosures.²¹² The Court certainly knew how to state that the *Tarasoff* duty and the dangerous patient exception were the same.²¹³ The Court's use of the phrase "the privilege must give way," instead of "the right to out-of-court confidentiality must give way" indicates that the Court was referring to an exception that would allow in-court testimony.²¹⁴

B. Waiver

In regard to the psychotherapist–patient privilege, the Supreme Court stated in *Jaffee* that "[l]ike other testimonial privileges, the

209. *Id.* at 347.

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

211. See *Jaffee v. Redmond*, 518 U.S. 1 (1996); see *Tarasoff*, 551 P.2d at 334.

212. See *Jaffee*, 518 U.S. at 15 n.19.

213. See *infra* note 214 and accompanying text.

214. *Jaffee*, 518 U.S. at 15 n.19; see *United States v. Chase*, 340 F.3d 978, 995 (9th Cir. 2003) (Kleinfeld, J. concurring) ("The words 'the privilege must give way' do not mean that 'the right to out-of-court confidentiality must give way,' or that 'the right to confidentiality is superseded by the duty of out-of-court disclosure to the prospective victim.' They mean what they say, that what must 'give way' is the 'privilege.' The 'privilege' is the privilege not to testify in federal court.").

patient may of course waive the protection.”²¹⁵ This principle fully supports recognition of the dangerous patient exception.²¹⁶

Because of the *Tarasoff* duty to warn, many professional associations such as the American Counseling Association, the American Psychiatric Association, the American Psychological Association, and the National Association of Social Workers have advised their members to inform patients about the limits of confidentiality.²¹⁷ Thus, studies have shown that many psychotherapists advise their patients about the *Tarasoff* duty to report and that in cases where psychotherapists warned third parties, almost all previously discussed the duty to report with their patients.²¹⁸ This is advisable because:

Despite the premium placed on confidentiality within the psychotherapist-patient relationship, it appears that “[t]rust—not confidentiality—is the cornerstone of psychotherapy,” because “[d]isclosing information about a patient without knowledge or consent would be a breach of trust.” Indeed, if a psychotherapist discusses his *Tarasoff* duty with a patient, it could strengthen the therapeutic relationship.²¹⁹

Any patient who makes threats after being warned by his psychotherapist that threats will be reported has waived any claim that the threats are privileged.²²⁰ As Wigmore clearly stated, the central rule for any privilege is that “communications must originate in a confidence that they will not be disclosed.”²²¹ For example, this is the case with the much older attorney–client privilege, for which “[i]t is vital to a claim of privilege that the communication have been

215. *Jaffee*, 518 U.S. at 15 n.14.

216. *See Avoiding Liability Blog: Confidentiality and the Dangerous Patient*, CPH & ASSOCIATES (June 2007), <https://www.cphins.com/confidentiality-and-the-dangerous-patient/> [<https://perma.cc/YQM6-UUUX>].

217. *See* Elisia Klinka, *It's Been a Privilege: Advising Patients of the Tarasoff Duty and Its Legal Consequences for the Federal Psychotherapist-Patient Privilege*, 78 *FORDHAM L. REV.* 863, 890 (2009).

218. *See id.* at 890–91.

219. *Id.* at 889 (alteration in original) (quoting RALPH SLOVENKO, *PSYCHOTHERAPY AND CONFIDENTIALITY TESTIMONIAL PRIVILEGED COMMUNICATION, BREACH OF CONFIDENTIALITY, AND REPORTING DUTIES* 292 (1998)).

220. *See infra* note 225 and accompanying text.

221. WIGMORE, *supra* note 21, § 2285.

made and maintained in confidence.”²²² “It is not enough for the meeting to be between a lawyer and would-be client, or that the meeting take place away from public view.”²²³

Indeed, the Supreme Court expressly stated in *Jaffee* that the psychotherapist–patient “privilege covers *confidential* communications made to licensed psychiatrists and psychologists [, and] *confidential* communications made to licensed social workers in the course of psychotherapy.”²²⁴ This “explicit confidentiality requirement is fatal to [any] claim of privilege” when the patient makes a threat after being warned that it would be disclosed because the patient has “no reasonable basis to conclude that the statement was confidential.”²²⁵

C. Policy

In *Jaffee*, the Supreme Court recognized that all evidentiary privileges “must also serv[e] public ends.”²²⁶ This policy applies to the spousal privilege, the psychotherapist–patient privilege, and the attorney–client privilege.²²⁷ Because this policy applies to all privileges, it is helpful to examine what the Supreme Court has said about the crime–fraud exception to the attorney–client privilege in order to understand what the Court meant in footnote 19 of *Jaffee* when it said, “[W]e do not doubt that there are situations in which the privilege must give way.”²²⁸

When it comes to the attorney–client privilege, the Supreme Court stated in *Upjohn Co. v. United States* that the purpose of the privilege “is to encourage full and frank communication between attorneys and

222. *United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 1997) (quoting *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976)).

223. *Id.* (citing *United States v. Melvin*, 650 F.2d 641, 646–47 (5th Cir. 1981)).

224. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (emphasis added).

225. *United States v. Auster*, 517 F.3d 312, 315 (5th Cir. 2008); *see also* *United States v. Chase*, 340 F.3d 978, 996 (5th Cir. 2003) (Kleinfeld, J., concurring) (stating that “this case could be simply and properly resolved on the ground that by communicating after the psychotherapist had told him she would not keep the communications secret, appellant waived the privilege”); *see also* *United States v. Hayes*, 227 F.3d 578, 589 (5th Cir. 2000) (Boggs, J., dissenting) (stating that the defendant/patient “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”).

226. *Jaffee*, 518 U.S. at 11 (alteration in original) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

227. *See id.* (first citing *Upjohn*, 449 U.S. at 389; then citing *Trammel v. United States*, 445 U.S. 40, 53 (1980)).

228. *Id.* at 18 n.19.

their clients and thereby promote broader public interests in the observance of law and administration of justice.”²²⁹ The central policy behind the privilege is that “sound legal advice or advocacy serves public ends.”²³⁰ With this in mind, the Supreme Court stated in *United States v. Zolin* that an unfettered attorney–client privilege does not serve public ends.²³¹ Specifically, the Court stated:

The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—“ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*.” It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the “seal of secrecy” between lawyer and client does not extend to communications “made for the purpose of getting advice for the commission of a fraud” or crime.²³²

This reason for the crime–fraud exception to the attorney–client privilege is analogous to the reason for the dangerous patient exception to the psychotherapist–patient privilege.²³³

To be sure, “[t]he mental health of [our] citizenry, no less than its physical health, is a public good of transcendent importance.”²³⁴ However, just like the attorney–client privilege, there should also be an exception to the psychotherapist–patient privilege when a patient makes serious threats to perpetrate future violent wrongdoing on specific individuals, especially when those threats are carried out.²³⁵ Protecting the life of a third party outweighs the mental health benefit to a patient, and this includes the need for testimony in criminal prosecutions.²³⁶ As the First Circuit stated when it recognized a crime–fraud exception to the psychotherapist–patient privilege, “we likewise should exclude from the privilege communications made in furtherance of crime or fraud because the mental health benefits, if

229. *Upjohn*, 449 U.S. at 389.

230. *Id.*

231. *United States v. Zolin*, 491 U.S. 554, 562 (1989).

232. *Id.* at 562–63 (citations omitted).

233. *See infra* text accompanying notes 234–41.

234. *Jaffee v. Redmond*, 518 U.S. 1, 2 (1996).

235. *See* MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(1) (AM. BAR ASS’N 2019).

236. *See infra* text accompanying note 237.

any, of protecting such communications pale in comparison to the ‘normally predominant principle of utilizing all rational means for ascertaining truth.’”²³⁷

There is an additional policy consideration.²³⁸ Just as an attorney who witnessed their client commit a crime could not claim that they were exempt from testifying about it under the attorney-client privilege,²³⁹ a psychotherapist should likewise not be exempt from testifying under the psychotherapist–patient privilege when they are a witness to a patient making threats that constitutes a crime.²⁴⁰ For instance, because:

[A] true threat to kill FBI agents made to a third party constitutes [a] crime, it follows that the psychotherapist observed the patient committing a crime in her office, just as she would have if she had seen the patient steal her receptionist’s purse on the way out. As a percipient witness to a felony, she ought to be required to testify to what she perceived.²⁴¹

D. Is There an Additional Cost to the Dangerous Patient Exception?

The Supreme Court stated in *Jaffee* that the psychotherapist–patient privilege was needed because “disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace” and “the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.”²⁴² It seems to be intuitively true that most people would not want embarrassing conversations to be made public as a general principle, but is the specific possibility of disclosure of threats to third parties really a deterrent to open communication?²⁴³

When it comes to psychotherapists advising patients about their *Tarasoff* duty to report threats, “[t]here has not been extensive

237. *In re Grand Jury Proceedings* (Gregory P. Violette), 183 F.3d 71, 77 (1st Cir. 1999) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

238. See *infra* text accompanying notes 239–41.

239. See *United States v. Chase*, 340 F.3d 978, 994 (9th Cir. 2003) (Kleinfeld, J., concurring).

240. See *Klinka*, *supra* note 217, at 917–18.

241. *Chase*, 340 F.3d at 994.

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

243. See *infra* notes 244–51 and accompanying text.

empirical support to give credence to the deterrence hypothesis.”²⁴⁴ “The empirical data that does exist suggests that only ‘a small minority of clients and patients would be altogether deterred from consulting and that perhaps a significant minority would be dissuaded from being completely candid during the consultation.’”²⁴⁵ In fact, “studies ‘suggest that therapy is not hindered’ when confidentiality is breached due to a *Tarasoff*-required warning, ‘so long as a patient is involved in the decision and/or appropriately informed.’”²⁴⁶ The defendants in *Hayes*,²⁴⁷ *Chase*,²⁴⁸ and *Auster*²⁴⁹ were all advised by their psychotherapists that threats would be reported, but they continued to make threats even after receiving this notice.²⁵⁰ Obviously, they were not dissuaded by the express lack of confidentiality.²⁵¹

But the real question is whether a dangerous patient exception would cause any impediment to the “confidential relationship necessary for successful treatment” beyond what already exists.²⁵² Whatever damage occurs to the psychotherapist–patient relationship has already occurred at the point the patient knows that threats will be reported to the target or the police, and has certainly occurred once the threats actually are reported.²⁵³ Indeed, “[i]f the possibility that the therapist will reveal secrets to authorities or intended victims has not already chilled communication between the patient and psychotherapist, it is not likely that the additional possibility of the therapist testifying in federal court would have that effect.”²⁵⁴

244. Klinka, *supra* note 217, at 894–95 (citing EDWARD J. IMWINKELRIED, *THE NEW WIGMORE A TREATISE ON EVIDENCE* § 5.2.2 (Richard D. Friedman ed., 2002)).

245. *Id.* (quoting IMWINKELRIED, *supra* note 244, § 5.2.2).

246. *Id.* at 895 (quoting Fillmore Buckner & Marvin Firestone, “Where the Public Peril Begins” 25 Years After *Tarasoff*, 21 J. LEGAL MED. 187, 220 (2000)); see also Joi T. Montiel, *The Psychotherapist-Patient Privilege as an “Occasional Instrument of Injustice”: An Argument for a Criminal Threat Exception*, 36 S. ILL. U. L. J. 445, 469 (2012) (“There is psychological literature to suggest that most patients will continue with therapy even after being informed that their admissions of violent impulses to their psychotherapist might be disclosed by their therapists to third parties.”).

247. *United States v. Hayes*, 227 F.3d 578, 580 (6th Cir. 2000).

248. *United States v. Chase*, 340 F.3d 978, 979–80 (9th Cir. 2003).

249. *United States v. Auster*, 517 F.3d 312, 313 (5th Cir. 2008).

250. See *supra* notes 247–49 and accompanying text.

251. See *Auster*, 517 F.3d at 313–14; see *Chase*, 340 F.3d at 979–81; see *Hayes*, 227 F.3d at 580–81.

252. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996); see also *infra* notes 253–64 and accompanying text.

253. See Montiel, *supra* note 246, at 468–69.

254. *Id.* at 469.

In addition, there is always the potential that a psychotherapist will testify against a patient for involuntary commitment purposes, as recognized by *Chase*,²⁵⁵ *Ghane*,²⁵⁶ and *Hayes*.²⁵⁷ The assumption is that the psychotherapist–patient relationship will “continue during the patient’s hospitalization” and, while the patient “will initially reject the prospect of hospitalization, it may ultimately improve his mental state and should not leave a stigma after the stay concludes.”²⁵⁸ However, there is no good reason to believe that the psychotherapist–patient relationship is too fragile to withstand testimony at a criminal trial but is strong enough to withstand testimony in a civil commitment proceeding.²⁵⁹ Although “there is a legal distinction between criminal incarceration and involuntary civil commitment, the nuance—in terms of trust and confidence—likely does not matter much to the fellow committed.”²⁶⁰

In short, whatever harm disclosure causes to the psychotherapist–patient relationship occurs long before testimony at trial.²⁶¹ Any additional harm that may result from testimony is clearly outweighed by the need to protect the lives of third parties.²⁶² Where a third party has actually been harmed or killed, the need for justice overwhelmingly outweighs any benefit of continuing therapy that failed to prevent the perpetration of violence.²⁶³ Thus, the Court should recognize the existence of the dangerous patient exception.²⁶⁴

VII. PROCEDURE

In order to determine whether the dangerous patient exception applies, a trial court should follow an organized procedure.²⁶⁵ Relevant literature and caselaw provide little guidance about this procedure.²⁶⁶ The procedure that is used to determine the applicability of the crime–fraud exception to the attorney–client

255. See *Chase*, 340 F.3d at 991.

256. See *United States v. Ghane*, 673 F.3d 771, 786 (8th Cir. 2012).

257. See *United States v. Hayes*, 227 F.3d 578, 585–86 (6th Cir. 2000).

258. *Id.* at 585.

259. See *United States v. Auster*, 517 F.3d 312, 319 (5th Cir. 2008).

260. *Id.*

261. See *supra* notes 252–60 and accompanying text.

262. See *supra* notes 236–37 and accompanying text.

263. See *supra* notes 236–37 and accompanying text.

264. See *supra* notes 194–263 and accompanying text.

265. See *infra* notes 266–78 and accompanying text.

266. See *supra* Part V.

privilege should also be used to determine whether the dangerous patient exception applies.²⁶⁷

In *United States v. Zolin*, the Supreme Court held that it is appropriate for a court to conduct an *in camera* review of communications in order to determine whether they are privileged.²⁶⁸ However, the Court held that an *in camera* review is not automatic and adopted a standard that,

Before engaging in *in camera* review to determine the applicability of the [exception to the privilege], “the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person,” that *in camera* review of the materials may reveal evidence to establish the claim that the [exception to the privilege] applies.²⁶⁹

Similarly, a party asserting that the dangerous patient exception applies should be required to make this same kind of *prima facie* showing that the patient made a threat to her psychotherapist, “the threat was serious when it was uttered[,] and . . . its disclosure was the only means of averting harm to the [third party] when the disclosure was made.”²⁷⁰ What matters is not whether the harm could be averted at the time of the testimony, but whether the harm could be averted only by disclosure at the time of the disclosure.²⁷¹ This is because “when the serious threat occurred that could be averted only by disclosure, the privilege died.”²⁷²

In order to achieve fair results, courts should employ a procedure in which a *prima facie* showing triggers an *in camera* review, but does not end the inquiry.²⁷³ If the party invoking the dangerous patient exception makes the *prima facie* showing and the court reviews the psychotherapist’s testimony or records *in camera*, the party claiming the protection of the psychotherapist–patient privilege should have an opportunity to argue against application of the exception.²⁷⁴ Fairness

267. See *infra* notes 268–72 and accompanying text.

268. See *United States v. Zolin*, 491 U.S. 554, 557, 569 (1989).

269. *Id.* at 572 (citation omitted).

270. *United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998).

271. See *id.* at 1360.

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

273. See *United States v. Trenk*, 385 F. App’x 254, 257 (3d Cir. 2010).

274. See generally *id.* at 258 (“Although the practice of making documents available for *in camera* inspection is ‘well established’ . . . it does not deprive the party invoking the

requires that both sides have an opportunity to argue their positions.²⁷⁵

Another way to promote fairness is to have a different judge than the one presiding over the case conduct the *in camera* review of the contested testimony and materials to rule on the applicability of the dangerous patient exception.²⁷⁶ Indeed, some state and federal courts have encouraged *in camera* review by a separate judge to determine the applicability of the crime–fraud exception to the attorney–client privilege.²⁷⁷ This practice promotes fairness by avoiding possible prejudice that may result when a judge who reviews material and determines that it is privileged, later rules on an issue that information from the *in camera* review may affect.²⁷⁸

VIII. CONCLUSION

Jaffee was decided over two decades ago, and it has been a source of confusion and inconsistency ever since.²⁷⁹ The Supreme Court should resolve the split among the circuits by relying on the policy that the psychotherapist–patient privilege must only be used in a way that serves public ends.²⁸⁰ Doing so requires the recognition of the dangerous patient exception.²⁸¹

By the time a case gets to court and the testimony of a psychotherapist becomes an issue, there has, generally, already been a disclosure of the threats made by a dangerous patient.²⁸² When threats are made after the patient was warned that any threats would be disclosed, any claim to privilege has been waived by the patient.²⁸³ Even where there has not been a waiver, any damage to

privilege of the opportunity to contest the application of the crime–fraud exception.” (citations omitted).

275. See *id.* at 259 (remanding case in order to offer party an opportunity to present arguments against the application of the crime–fraud exception).

276. See Douglas R. Richmond, *Understanding the Crime-Fraud Exception to the Attorney-Client Privilege and Work Product Immunity*, 70 S.C. L. REV. 1, 30 (2018) (“Ideally, any *in camera* review should be conducted by a judge other than the one presiding over the case involving the communications.”); see also *People v. Radojic*, 998 N.E.2d 1212, 1223 (Ill. 2013).

277. See *People v. Radojic*, 998 N.E.2d 1212, 1223 (Ill. 2013); see *In re St. Johnsbury Trucking Co.*, 184 B.R. 446, 455 n.17 (Bankr. D. Vt. 1995).

278. See *In re Marriage of Decker*, 606 N.E.2d 1094, 1107 (Ill. 1992).

279. See *supra* Parts IV–V.

280. See *supra* Parts V–VI.

281. See *supra* notes 194–97 and accompanying text.

282. See *supra* notes 252–54 and accompanying text.

283. See *supra* note 220 and accompanying text.

the psychotherapist–patient relationship has already occurred by the initial disclosure to a third party and any damage from in-court testimony is likely to be minimal.²⁸⁴ Thus, any remaining benefit to the relationship by preventing in-court testimony is greatly outweighed by the public’s interest in having the jury decide the case based on all of the evidence.²⁸⁵ “The cat being already out of the bag, trial is no occasion for stuffing it back in.”²⁸⁶

284. *See supra* notes 253–54 and accompanying text.

285. *See supra* notes 262–63 and accompanying text.

286. *United States v. Chase*, 340 F.3d 978, 998 (9th Cir. 2003) (Kleinfeld, J., concurring).