

THE PSYCHOTHERAPIST-PATIENT PRIVILEGE AS AN “OCCASIONAL INSTRUMENT OF INJUSTICE”: AN ARGUMENT FOR A CRIMINAL THREAT EXCEPTION

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I. INTRODUCTION

The Supreme Court, in *Jaffee v. Redmond*,¹ announced a federal testimonial privilege protecting communications between a psychotherapist and his patient from disclosure in federal court.² However, in footnote 19 of the opinion, the Court noted that there may be times where the privilege “must give way,” such as when disclosure of statements made in therapy is necessary to protect a victim the patient has threatened to harm.³ Nonetheless, commentators have argued against an exception to the privilege when the statements made to the therapist indicate that a target is in danger,⁴ and some federal circuit courts have rejected such a “dangerous patient exception” to the psychotherapist-patient privilege.⁵ This Article takes an opposing view and argues for an exception that is narrower than the dangerous patient exception—a “criminal threat exception.” No court or commentator has argued for a similar exception.

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1. 518 U.S. 1 (1996).
2. *Id.* at 15 (“[c]onfidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence”).
3. *Id.* at 18 n.19. (“[w]e 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”).
4. *E.g.*, 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 (2011); Anthony Parsio, Note, *The Psychotherapist-Patient Privilege: The Perils of Recognizing a “Dangerous Patient” Exception in Criminal Trials*, 41 NEW ENG. L. REV. 623 (2007).
5. *See* *United States v. Chase*, 340 F.3d 978, 992 (9th Cir. 2003); *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000).

This Article will demonstrate that, without an exception to the psychotherapist-patient privilege where the patient's threatening statement is itself a crime, the federal courts are rendered "occasional instruments of injustice," as Justice Scalia warned in his dissent in *Jaffee*.⁶ Moreover, the rationale behind *Jaffee*'s creation of the psychotherapist-patient privilege—that society's interest in the mental health of the citizenry outweighs society's interest in the search for the truth in court—does not hold true where the patient's statement to his therapist is itself a crime, specifically a threat against a federal official that Congress has criminalized in the interest of ensuring the free and fair functioning of the federal government. Therefore, a narrow exception should be recognized under those circumstances. This Article will refer to this narrow exception as the "criminal threat exception."⁷

Section II will illustrate the problem by examining Jared Loughner's shooting of Congresswoman Gabrielle Giffords, a federal judge, and many others in January 2011, as well as the possible outcomes if Loughner had expressed his desire to harm the Congresswoman to a therapist before the incident. Section III provides background information on the legal issue, including the Supreme Court's creation of the psychotherapist-patient privilege in *Jaffee v. Redmond*,⁸ the footnote in *Jaffee* that invites exceptions to the privilege, and the circuit split on the issue of whether courts should recognize a dangerous patient exception.

Section IV will demonstrate how the psychotherapist-patient privilege serves as an instrument of injustice when it protects a statement made to the therapist that is itself a crime. Application of the privilege renders the patient essentially immune from prosecution after stating a criminal threat to his therapist; in contrast, the same patient could be prosecuted for stating the same criminal threat to his mother. Thus, the privilege operates as an unjust, court-created exception to Congress's statute criminalizing the threat.

As a prelude to Section VII, Section V examines the rationale for criminalizing threats, particularly against federal officials. Threats against public officials are crimes for several important reasons: not only to protect the target from the threat being carried out, but also to protect the official from the fear of the violence and to protect them from the disruption that that fear engenders. Also, as a prelude to Section VII, Section VI explains that, in determining whether to recognize an exception to a privilege, courts

6. *Jaffee*, 518 U.S. at 22 (Scalia, J., dissenting).

7. This Article does not contend that all threatening statements that are criminalized fit within the rationale for an exception offered in Section VII, although they do fit within the rationale for an exception offered in Section IV.

8. 518 U.S. at 16.

should weigh the costs of the exception against the benefits of an exception, just as they do in determining whether to create a privilege. In deciding to create a psychotherapist-patient privilege, the Supreme Court in *Jaffee* weighed the costs of the privilege against its benefits and determined that the benefits outweighed the costs. The balance shifts, however, when a patient makes a statement to his therapist that is a criminal threat against a federal official.

The need for a criminal threat exception to the psychotherapist-patient privilege, considering the rationale for criminalizing threats against public officials discussed in Section V, exceeds the costs. Thus, Section VII will demonstrate that a criminal threat exception to the psychotherapist-patient privilege should be recognized in limited circumstances. In the case of a threat against a public official, the public's need for the evidence is elevated. At the same time, any impact on the therapeutic relationship is minimal and does not justify rejecting the criminal threat exception. In addition, one of the concerns for rejecting the dangerous patient exception—that it will result in inconsistent application of the Federal Rules of Evidence—is not a legitimate reason for rejecting a limited criminal threat exception.

This Article will conclude by providing, in Section VIII, some guidance as to the procedure for determining whether the criminal threat exception, which is modeled after the procedure for presenting the crime-fraud exception to the attorney-client privilege, should apply.

II. ILLUSTRATION

On January 8, 2011, citizens in a Tucson, Arizona, community gathered to hear an address by Congresswoman Gabrielle Giffords. Only minutes after the Congresswoman began her address, Jared Loughner opened fire on the crowd, killing six and injuring thirteen.⁹

In the months leading up to the attack, Loughner had exhibited warning signs of mental disturbance. He rambled on the internet with radical postings about mind control and violence.¹⁰ He was suspended from his community college due to several instances of classroom disruptions requiring police involvement.¹¹ Although given the opportunity to return to

9. Shailagh Murray & Sari Horwitz, *Rep. Gabrielle Giffords Shot in Tucson Rampage; Federal Judge Killed*, WASH. POST (Jan. 9, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/08/AR2011010802422.html>.

10. Eve Conant, *Gabrielle Giffords' Gunman: Jared Lee Loughner*, DAILY BEAST (Jan 8, 2011 5:09 PM EST), <http://www.thedailybeast.com/articles/2011/01/08/gabrielle-giffords-gunman-myspace-page-youtube-and-more.html>.

11. Robert Anglen, *Jared Lee Loughner, Suspect in Gabrielle Giffords Shooting, Had College Run-ins*, [ARIZ. REPUBLIC](http://www.azcentral.com/news/articles/2011/01/) (Jan. 9, 2011), <http://www.azcentral.com/news/articles/2011/01/>

school pending clearance from a mental health professional, Loughner never sought treatment, and instead withdrew his enrollment.¹² Since being detained, Loughner has been found incompetent, diagnosed with schizophrenia, and a court has determined that he may be involuntarily medicated.¹³

If Loughner had sought treatment, could the Tucson tragedy have been prevented? Suppose Loughner had interacted with a psychotherapist prior to the shooting and expressed a desire to shoot Congresswoman Giffords. In communicating those desires, Loughner would likely have committed a crime in violation of 18 U.S.C. § 115(a)(2), which criminalizes threats against members of Congress. However, many variables would have still existed in determining whether the actual crime could have been prevented. For example, would the hypothetical therapist have warned authorities of Loughner's potentially deadly behavior despite the therapist's ethical duty of confidentiality? Assuming that the therapist could and would have communicated Loughner's hypothetical threat to law enforcement, what steps could police have taken to protect the Congresswoman and keep a watchful eye on Loughner? Could one of those steps have been indicting Loughner in federal court for his violation of the federal criminal statute? If so, could the therapist have testified in federal court about the threat?

Under Arizona law, as in many states,¹⁴ when a therapist hears a credible threat, he is to communicate the threat to identifiable victims, if possible, and notify law enforcement.¹⁵ However, if Loughner were indicted in federal court for violating the federal criminal statute, then the Federal Rules of Evidence would apply to determine whether the therapist could testify in court. The federal psychotherapist-patient privilege, without an exception, would preclude the therapist from testifying to the statements that Loughner made in the therapist's office,¹⁶ thus making prosecution of Loughner for that particular crime impracticable. Loughner would have

09/20110109jared-lee-loughner-gabrielle-giffords-arizona-shooting.html; John Cloud, *The Troubled Life of Jared Loughner*, TIME (Jan. 15, 2011), <http://www.time.com/time/magazine/article/0,9171,2042358-2,00.html>.

12. See *supra* note 3.

13. United States v. Loughner, Nos. 11-10339, 11-10504, 11-10432, 2012 WL 688805 (9th Cir. Mar. 5, 2012).

14. Most states impose on psychotherapists a duty to warn potential targets or authorities when a patient makes a threat in therapy. United States v. Hayes, 227 F.3d 578, 583 (6th Cir. 2000). This duty to warn is often referred to as a state's "*Tarasoff* law" or the psychotherapist's "*Tarasoff* duty" because the idea of this state law "duty to warn" began in California with *Tarasoff v. Regents of the University of California*, 551 P.2d 334, 345 (Cal. 1976).

15. ARIZ. REV. STAT. ANN. § 36-517.02 (2012).

16. See United States v. Chase, 340 F.3d 978, 992 (2003) (holding that there is no dangerous-patient exception to the psychotherapist-patient privilege for evidentiary purposes).

been a free man, ready and able to put his threat into action. Presumably, federal prosecutors would have had to wait for him to act on his threat and prosecute him for the actions he took, admitting evidence of the violent crime, rather than the earlier crime of threatening the Congresswoman.

If Jared Loughner had sought treatment and made a credible threat against Congresswoman Giffords in therapy, an exception to the psychotherapist-patient privilege would be warranted in order to admit that statement and prosecute Loughner for his crime—the threatening statement—before he could carry out the threat. Thus, this Article argues for a narrow “criminal threat exception” to the psychotherapist-patient privilege.

III. BACKGROUND

The public “has a right to every man's evidence.”¹⁷ Testimonial exclusionary rules and privileges contravene that fundamental rule.¹⁸ Therefore, they are not favored and must be strictly construed.¹⁹ They are 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.”²⁰ Testimonial privileges, which are “exceptions to the demand for every man's evidence,” are “not lightly created nor expansively construed, for they are in derogation of the search for truth.”²¹

Nevertheless, certain circumstances or relationships justify excluding evidence. The United States Constitution provides for the exclusion of certain types of evidence.²² In addition, through common law, courts have carved out other exceptions to the general rule favoring admissibility.²³ Congress at one time endeavored to specifically set out the types of testimony or evidence to be excluded, but ultimately left the courts to

17. *United States v. Bryan*, 339 U.S. 323, 331 (1950).

18. *Id.* (“When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.”).

19. *Trammel v. United States*, 445 U.S. 40, 50 (1980).

20. *Id.* (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

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

22. *See, e.g.*, U.S. CONST. amend. V (declaring that no person “shall be compelled in any criminal case to be a witness against himself”).

23. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (attorney-client privilege); *Trammel*, 445 U.S. at 51 (priest-penitent privilege); *Trammel*, 445 U.S. at 53 (spousal privilege).

decide based on reason and experience.²⁴ Hence, Federal Rule of Evidence 501, which provides:

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court.²⁵

In 1996, resolving a split among the circuits,²⁶ the Supreme Court in *Jaffee v. Redmond* announced, under authority provided to it by Rule 501, a federal testimonial privilege protecting communications between a psychotherapist and his patient.²⁷ An exception to the general principle disfavoring testimonial privileges is justified when the proposed privilege “promotes sufficiently important interests to outweigh the need for probative evidence.”²⁸ The Court determined that a psychotherapist-patient privilege did outweigh the need for probative evidence. The Court was convinced that the nation’s need for effective mental health treatment was a “public good of transcendent importance”²⁹ and that effective psychotherapy hinged upon the ability of the patient to communicate with his psychotherapist openly and without fear of potential repercussions.³⁰ The Court also determined that the need for potential evidence would be modest.³¹ Therefore, the Court concluded that the psychotherapist privilege promoted sufficiently important interests to outweigh the need for evidence.³²

Regarding the scope of the privilege, the Court declined to “delineate its full contours in a way that would ‘govern all conceivable future questions.’”³³ However, in footnote 19 of the opinion, the Court noted that there may be times where the privilege must “give way”³⁴—times when the

24. See *Trammel*, 445 U.S. at 47 (explaining that, in rejecting rules proposed by the Judicial Conference Advisory Committee on Rules of Evidence and enacting Rule 501, Congress “manifested an affirmative intention not to freeze the law of privilege” but to “provide the courts with the flexibility to develop rules of privilege on a case-by-case basis” and to “leave the door open to change”) (citing 120 Cong. Rec. 40891 (1974) (statement of Rep. Hungate)).

25. FED. R. EVID. 501.

26. See *Jaffee v. Redmond*, 518 U.S. 1, 7-8 (1996) (“Because of the conflict among the Courts of Appeals and the importance of the question, we granted certiorari.”).

27. *Id.* at 9-10 (“[T]he question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient ‘promotes sufficiently important interests to outweigh the need for probative evidence’ . . . Both ‘reason and experience’ persuade us that it does.”) (internal citations omitted).

28. *Id.* (quoting *Trammel*, 445 U.S. at 51).

29. *Id.* at 11.

30. *Id.* at 10.

31. *Id.* at 11.

32. *Id.* at 9-10.

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

34. *Id.* at 18 n.19.

testimony *should* be admitted despite the Court's rationale for excluding it.³⁵ The Court hypothesized that the privilege might not apply when disclosure of the statements made in therapy is necessary to protect an intended victim of the patient.³⁶ This footnote provides a hint to a possible exception to the psychotherapist-patient privilege:

[A]lthough 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 serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.³⁷

Footnote 19 of *Jaffee* has given rise to what many have labeled a circuit split regarding whether there is a "dangerous patient exception" to the psychotherapist-patient privilege that will allow the psychotherapist to testify when a patient makes a statement in therapy that threatens the safety of a third party.³⁸ Four circuit courts of appeals have addressed the question of whether those circuits should recognize a "dangerous patient exception" when a patient makes a threat in the office of his therapist.³⁹ A more narrow issue was actually present—although perhaps not presented—in three of those cases.⁴⁰ In three cases, the defendants were indicted for making threatening statements that were in and of themselves

35. As for the argument that footnote 19 does not invite an exception to the privilege but, instead, was intended to assure a therapist's compliance with the state duty to protect third persons from harm and to recognize the need for therapists to testify in involuntary commitment proceedings, see Judge Kleinfeld's dissent in *Chase*, 340 F.3d at 995. Judge Kleinfeld explains that the United States Supreme Court means what it says:

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.

Chase, 340 F.3d 978, 995 (9th Cir. 2003) (Kleinfeld, J., concurring in the result).

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

37. *Id.*

38. See, e.g., Phillip A. Sellers II, *United States v. Landor: The Federal Circuit Split Over the Dangerous Patient Exception to the Psychotherapist-Patient Privilege*, 34 AM. J. TRIAL ADVOC. 417 (2010); 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 (2009); Daniel Buroker, *The Psychotherapist-Patient Privilege and Post-Jaffee Confusion*, 89 IOWA L. REV. 1373 (April 2004).

39. *United States v. Auster*, 517 F.3d 312 (5th Cir. 2008); *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003); *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000); *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998).

40. *Chase*, 340 F.3d 978; *Hayes*, 227 F.3d 578; *Glass*, 133 F.3d 1356.

crimes.⁴¹ Had those three courts considered the more narrow issue of whether an exception should be created where the patient's threatening statement was in itself a crime, such as a threat to harm the President of the United States—rather than the broader issue of whether the court should create a “dangerous patient exception”—their decisions may have been consistent with one another.

The courts properly examined the issues presented to them as did the Court in *Jaffee*—weighing the benefits and burdens to society of excluding the evidence against the benefits and burdens to society of excluding the evidence.⁴² Even more specifically, given footnote 19, which was clearly concerned with the safety of the individual who is the target of the threat,⁴³ the courts brought personal safety of the target into the equation.⁴⁴ However, what the courts did not address is the fact that the threats made in those cases were different from the threats contemplated in *Jaffee* footnote 19 because the threats made in those cases were in and of themselves crimes. A relevant question to consider is *why* those threatening statements are criminalized. If the reason for criminalizing those statements is weighed *along with* the concern for the safety of the individual threatened, then the balancing *does* weigh in favor of admitting the testimony in the prosecution of the threat. Thus, this Article argues for a limited “criminal threats exception” to the psychotherapist patient privilege when the threatening statement uttered to the psychotherapist is in itself a crime, specifically, a threat that is criminalized because it is against a federal official whose safety is important to the free and fair functioning of our government.

41. *Chase*, 340 F.3d at 979 (defendant indicted for making a threat against agents of the Federal Bureau of Investigation in violation of 18 U.S.C. § 115); *Hayes*, 227 F.3d at 578 (defendant indicted for making a threat to murder his supervisor at the United States Postal Service in violation of 18 U.S.C. § 115); *Glass*, 133 F.3d at 1357 (defendant indicted for making a threat to kill the President of the United States in violation of 18 U.S.C. § 871).

42. See *Jaffee*, 518 U.S. at 11 (“In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest.”).

43. *Id.* at 18 n.19 (“there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or others can be averted only by means of a disclosure by the therapist”).

44. *Chase*, 340 F.3d at 990 (stating that “[t]he potential victim's well-being is as important as that of the patient”); *Hayes*, 227 F.3d at 584-85 (discussing the connection between a psychotherapist's warning a third party for his safety and permitting the therapist to testify in a later prosecution); *Glass*, 133 F.3d at 1360 (remanding the case for a determination as to whether disclosure of the threat was the only means of averting harm to the President).

IV. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE AS AN INSTRUMENT OF INJUSTICE

Without an exception to the psychotherapist-patient privilege for threatening statements that are crimes, the same man will be effectively absolved of a crime he indisputably committed simply because he made the criminal statement to the right person—his therapist. In contrast, the same man could have been imprisoned⁴⁵ for the exact same statement if he had stated it to someone else, such as his mother. An exception should be acknowledged to reconcile this injustice.

As hypothesized above,⁴⁶ had Jared Loughner interacted with a psychotherapist prior to the shooting and expressed his desire to assassinate Congresswoman Giffords, he could well have committed a crime in violation of 18 U.S.C. § 115(a)(2), which criminalizes threats against members of Congress. Under an Arizona statute, when a therapist hears a credible threat, he is to communicate the threat to identifiable victims, if possible, and notify law enforcement.⁴⁷ However, if Loughner were indicted in federal court for violating 18 U.S.C. § 115, the federal psychotherapist-patient privilege created in *Jaffee* would preclude the therapist from testifying to the statements that Loughner made in the therapist's office.⁴⁸ Thus, prosecution of Loughner for threatening Congressman Giffords would be difficult, at least.⁴⁹ Loughner would remain a free man, ready and able to put his threat into action.

45. Conviction for a threat against the President carries a maximum prison sentence of five years and a fine. 18 U.S.C. § 871 (2006). Threatening a judge, senator, or congressman may be punished by imprisonment of up to ten years. 18 U.S.C. § 115 (2006).

46. *See supra* Section II.

47. ARIZ. REV. STAT. ANN. § 36-517.02 (2012).

48. The Ninth Circuit has refused to recognize a dangerous patient exception. *See Chase*, 340 F.3d at 992 (holding that there is no dangerous-patient exception to the psychotherapist-patient privilege).

49. It has been argued that, where a patient makes a threatening statement in therapy, he has probably made such threatening statements elsewhere, too, so that there is other evidence to admit at the patient's criminal trial. *See, e.g., Chase*, 340 F.3d at 991. However, the criminal trial to be had in that event is most likely the criminal trial of the crime the patient threatened to commit and then actually did commit, not at the trial of the crime of the threatening statements themselves. Perhaps if there had been a trial on the threatening statement itself, a trial of the violent crime would not be necessary, and the target of the threat would not have become a victim of the crime of physical violence.

In addition, it is worth noting that the authorities are more likely to be informed of a threatening statement that is made to a therapist than a threat that is made to someone else because a therapist may have a duty to warn the target or authorities, whereas others do not. Authorities may, of course, discover threatening statements that the patient made to others *after* the threatened crime is actually carried out and an investigation ensues.

Suppose, on the other hand, that Loughner had told his mother⁵⁰ of his desire⁵¹ to harm the Congresswoman. There, generally, is no federal parent-child privilege.⁵² Thus, *if* the authorities were ever to discover that Loughner made such statements and indicted him, his mother could be compelled to testify to the statements that he had made to her, increasing the likelihood of a successful prosecution of Loughner for the threatening statements—ensuring the safety of the Congresswoman and fulfilling the purpose of the 18 U.S.C. § 115.

Paradoxically, Loughner's mother would be under no legal duty, as is the therapist, to inform the Congresswoman or the authorities about the threat. Thus, if Loughner were to make the threatening statement to his therapist, the statement is criminal, *reported, yet inadmissible*. In contrast, if Loughner were to make the same statement to this mother, the statement is criminal and *admissible, yet unreported*. Why should he be essentially immune from prosecution for the statement simply because of his audience? Although it is a crime to threaten the President or a congresswoman or a federal judge, *if* that statement is made in a therapist's office, the perpetrator is essentially immune from prosecution. Thus, in these situations, the psychotherapist-patient privilege serves as an instrument of injustice. A "criminal threat" exception should be recognized to rectify the injustice. In addition, as fully explained below, the reasons for the privilege itself do justify the privilege in such a situation.

V. RATIONALE FOR CRIMINALIZING THREATS

Congress has seen fit to criminalize various types of threatening statements.⁵³ There are three primary reasons why true threats are punishable: (1) to protect individuals from the fear of violence; (2) to protect individuals from the disruption that fear engenders; and (3) to

50. Justice Scalia posited in *Jaffee* that the ability to confide in one's mother was more important than the ability to confide in his therapist. *Jaffee v. Redmond*, 518 U.S. 1, 22 (2000) (Scalia, J., dissenting) ("Would your mental health be more significantly impaired by preventing you from seeing a psychotherapist, or by preventing you from getting advice from your mom? I have little doubt what the answer would be. Yet there is no mother-child privilege.").

51. This analysis assumes that his statement was a true threat and would meet the elements of the crime set out in 18 U.S.C. § 115 (Supp. 2011).

52. See, e.g., *In re Matthews*, 714 F.2d 223, 224 (2d Cir. 1983) (stating that there is no privilege not to testify against family members); *In re Grand Jury Proceedings*, 647 F.2d 511, 512-13 (5th Cir. 1981) (finding no judicial support for "parent-child" privilege and declining to create one); *United States v. Ismail*, 756 F.2d 1253, 1257-59 (6th Cir. 1985) (rejecting claim of family privilege); *United States v. Penn*, 647 F.2d 876, 884-85 (9th Cir. 1980) (stating that there exists no general "family privilege" under Fed. R. Evid. 501); *In re Grand Jury Subpoena of Santarelli*, 740 F.2d 816, 817 (11th Cir. 1984) (upholding order requiring witness to testify in grand jury proceeding investigating his father, as against claim of "parent-child" privilege).

53. See *infra* note 56.

protect individuals from the possibility that the threatened violence will occur.⁵⁴ In addition to, or as part of, these reasons, there is the need to prevent people from being coerced into acting against their will.⁵⁵

Some statutes that criminalize threats are specific as to the target of the threat.⁵⁶ Some people, or targets, need to be protected from fear of violence for the good of society; it is to the benefit of the citizenry as a whole that those people are not disrupted in their activities or coerced into taking certain action against their will. And it may be particularly important to society that threats against those people not be carried out because of the disruption to society that would result.

For example, it is a crime to threaten the President of the United States because “the Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence.”⁵⁷ A serious threat on the President's life is “enormously disruptive” and involves “substantial costs to the Government.”⁵⁸ Even a threat made with no intention of carrying it out requires reaction from those charged with protecting the President and may still restrict the President's movements.⁵⁹ A threat to the President is a crime against the general

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54. Alec Walen, *Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should Be used Instead of Long-Term Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 803 (2011) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).
55. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 367 (2001) (listing four reasons: (1) the need to protect people from the fear of violence; (2) the need to prevent the disruption that that fear engenders; (3) the need to incarcerate people who have identified themselves as likely to carry out a threatened crime before they have the opportunity to perpetrate the crime; and (4) the need to prevent people from being coerced into acting against their will).
56. 18 U.S.C. § 112(b) (2006) (making it unlawful to threaten a foreign official in the performance of his duties); 18 U.S.C. § 115 (Supp. 2011) (criminalizing threats to United States judges or other federal officers in the performance of their official duties); 18 U.S.C. § 871 (2006) (rendering it illegal to make threats of violence against the President or Vice President). Other statutes criminalize threats that are not based upon the status of the individual threatened. *See, e.g.*, 18 U.S.C. § 241 (2006) (providing criminal penalties for conspiracies to threaten persons for enjoying rights and privileges of United States laws); 18 U.S.C. § 245 (2006) (outlawing threats against persons engaging in certain federally protected activities); 18 U.S.C. § 372 (2006) (making it unlawful to conspire to prevent by threat a person from accepting or holding any office).
57. *Watts v. United States*, 394 U.S. 705, 707 (1969) (citing H. R. Rep. No. 652, 64th Cong., 1st Sess. (1916)).
58. *Rogers v. United States*, 422 U.S. 35, 46-67 (1975) (Marshall, J., concurring).
59. *Id.*; *see also United States v. Kosma*, 951 F.2d 549, 556-57 (3d Cir. 1991) (“Not only is [the federal statute criminalizing threats against the President] meant to protect the President's life, but it is also meant to prevent the disruptions and inconveniences which result from the threat itself, regardless of whether there is any intention to execute the threat” because the “risks to the country's national security are obvious.”).

citizenry—“an affront to the peace of mind and tranquility of the people.”⁶⁰ Thus, criminalizing threats against the President preserves an “orderly and peaceful society.”⁶¹ A President's death in office has “worldwide repercussions and affects the security and future of the entire nation.”⁶²

In addition to the leader of our country, other public officials are positioned such that citizens also have an interest in assuring that the officials can carry out their duties without fear of intimidation and without coercion.⁶³ “It is the first and highest duty of a Government to protect its governmental agencies, in the performance of their public services, from threats of violence which would tend to coerce them or restrain them in the performance of their duties.”⁶⁴ Thus, Congress has criminalized threats against public officials other than the President himself. For example, it is a crime to threaten a federal judge, a senator, or a congressman with intent to interfere with their official duties or to retaliate against them for performance of their official duties.⁶⁵

Because of the need to protect people from the fear of violence, the need to prevent the disruption that that fear engenders, and the need to prevent people from being coerced into acting against their will, true threats are not protected by the First Amendment.⁶⁶ If these concerns are sufficient to hold that a threatening statement is not protected by the First Amendment, then they are worthy of considering in the calculus when determining whether a threat should be admitted in court or excluded under the psychotherapist-patient privilege. Judge Kleinfeld explained well what is at stake in his concurring opinion in *United States v. Chase*:

Protecting federal officials from assassination is only part of the purpose of the law. The statute criminalizing threats against federal officials is not merely prophylactic, to prevent the harms threatened. It prohibits the threats themselves. Federal officials, high and low, are supposed to be able to do their jobs, not only without being killed, but also without facing death threats. The threats themselves inhibit the efficient functioning of government.⁶⁷

60. See Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 556 (2004).

61. *Id.*

62. *Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969).

63. See Elrod, *supra* note 60 (explaining that cases interpreting threats against the President serve as a foundation or a guideline for the interpretation of other federal statutes outlawing threats).

64. H. R. Rep. No. 652, 64th Cong., 1st Sess. (1916) (accompanying bill criminalizing threat against President).

65. 18 U.S.C. § 115 (2006).

66. See Walen, *supra* note 54; Rothman, *supra* note 55; *Watts v. United States*, 394 U.S. 705 (1969).

67. *United States v. Chase*, 340 F.3d 978, 991 (9th Cir. 2003) (Kleinfeld, J., concurring in the result).

Not surprisingly, the people who often make threats against government officials are mentally ill.⁶⁸ Although, as the Court determined in *Jaffee*, society does have an interest in the mental health of those individuals, society also has a particular interest in the safety of certain officials—not only for the personal safety of that individual official but for the free and fair functioning of our government itself.

VI. WEIGHING NEED FOR THE EVIDENCE AGAINST POLICY BEHIND THE PRIVILEGE

While the Court in *Jaffee* did say that the psychotherapist-patient privilege is not subject to a balancing test,⁶⁹ the Court did not mean that the privilege is absolute or unqualified.⁷⁰ As stated by Justice Cardozo:

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68. See, e.g., *United States v. Humphreys*, 352 F.3d 1175, 1177 (8th Cir. 2003) (the defendant, who told others that either he or one of his followers would douse President Bush with a flammable material and throw a match on him, suffered from a bipolar disorder and had had several periods of hospitalization because of his delusions); *United States v. Barbour*, 70 F.3d 580, 583 (11th Cir. 1995) (the defendant, who was severely depressed, drove from Florida toward West Virginia, where he intended to commit suicide; but, after missing his highway exit, he decided instead to drive to Washington, D.C., to assassinate President Clinton); *United States v. Johnson*, 14 F.3d 766, 767 (2d Cir. 1994) (the defendant was in a psychiatric center claiming to be depressed, suicidal, and hearing voices when he said he intended to kill President Bush for his role in the Gulf War); *United States v. Poff*, 926 F.2d 588, 589-90 (7th Cir. 1991) (the defendant believed she was threatening public officials at the behest of her dead father).
69. *Jaffee v. Redmond*, 518 U.S. 1, 17-18 (2006). The Court in *Jaffee* rejected a balancing test by applying the reasoning of the Court in *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). In *Upjohn*, the Court stated, in regards to the attorney-client privilege, that 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.” 449 U.S. at 393. However, exceptions to the attorney-client privilege have been recognized, despite the concerns of uncertainty. See *United States v. Zolin*, 491 U.S. 554 (1989) (recognizing a crime-fraud exception to the attorney-client privilege because the central purpose of the privilege, to encourage full and frank communication between attorneys and their clients and therefore promote broader public interests in the observance of law and administration of justice, is not served when the client reveals future wrongdoing).
70. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 5:43 (3d ed., updated June 2011) (“the Court in *Jaffee* clearly did not mean to suggest that the privilege is absolute or unqualified”); see also *In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 74 (1st Cir. 1999) (“The *Jaffee* Court did not envision the psychotherapist-patient privilege as absolute or immutable. Rather the Court suggested the possibility of exceptions to the operation of the privilege and prophesied that the details would emerge on a case-by-case basis.”) (citing *Jaffee*, 518 U.S. at 18 n.10); *United States v. Auster*, 517 F.3d 312, 315 (5th Cir. 2008) (“the Court viewed the privilege as limited in scope”); *United States v. Chase*, 340 F.3d 978, 984 (9th Cir. 2003) (“the Court in *Jaffee* declined to delineate the ‘full contours’ of the psychotherapist privilege”); *United States v. Glass*, 133 F.3d 1356, 1359 (10th Cir. 1998) (stating that *Jaffee* “indicated the contours of the privilege would be fleshed out on a case-by-case basis”).

[T]he recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process.⁷¹

Indeed, the overriding principle is that courts evaluate privileges in light of “reason and experience.”⁷² Thus, when determining the scope of a privilege—whether an exception to the privilege should be recognized—courts should consider, using reason and experience, the societal benefits and costs of the exception.⁷³ The rationale for an exception to a privilege must be that the “systemic benefits” of protecting the particular category of communications are outweighed by the costs of foregoing probative evidence.⁷⁴

The downside of recognizing a privilege is always the exclusion of relevant evidence—a negative impact on the truth-seeking function of the court and, thus, the administration of justice.⁷⁵ However, if the societal good of the privilege is greater than the negative impact on the administration of justice, then recognizing a privilege is warranted.⁷⁶ However, in some circumstances, the balance of the scales might shift and

71. *Clark v. United States*, 289 U.S. 1, 13 (1933).

72. FED. R. EVID. 501 (“The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege. . . .”); *see also Jaffee*, 518 U.S. at 9 (noting that the authors of Rule 501 borrowed the phrase “reason and experience” from the Court’s opinion in *Wolfe v. United States*, 291 U.S. 7, 12 (1934), where the Court stated: “[T]he rules governing the competence of witnesses in criminal trials in the federal courts . . . are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience.”).

73. *United States v. Zolin*, 491 U.S. 554, 562 (1989) (acknowledging a crime-fraud exception to the attorney-client privilege because the reason for the privilege “ceas[es] to operate at a certain point” (quoting 8 J. WIGMORE, EVIDENCE § 2298 (McNaughton rev. 1961)); *Violette*, 183 F.3d at 75 (expressing that the same balancing that a court does in determining whether to create a previously-unrecognized privilege should likewise be done in determining the scope of that privilege, i.e., whether there are exceptions to it); *see also Auster*, 517 F.3d at 615 (addressing “weighing the pros and cons of extending the psychotherapist-patient privilege”); *Chase*, 340 F.3d at 984 (weighing “the gain from refusing to recognize a dangerous patient exception to the psychotherapist-patient privilege” against “the gain from recognizing the exception”).

74. *Violette*, 183 F.3d at 75. As to the statement by the Court in *Jaffee* that an uncertain privilege has little more value than no privilege at all, *see supra* note 69.

75. *Jaffee*, 518 U.S. at 9.

76. *Id.*; *see also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (stating that the purpose of the attorney-client privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice”).

the privilege may not be warranted.⁷⁷ In such instances, perhaps, an exception to the privilege should be recognized. In determining whether to recognize an exception to a privilege, a court must consider the following: what is the negative impact that the exception would have on the societal good that was sought to be promoted by the privilege itself?⁷⁸ If that negative impact is small in comparison to the benefit to be gained by admitting the evidence—a benefit to the administration of justice—then perhaps an exception to the privilege should be recognized.⁷⁹

For example, consider the costs and benefits of the attorney-client privilege. The cost of the attorney-client privilege is, of course, the exclusion of probative evidence and thus a negative impact on the administration of justice.⁸⁰ However, the attorney-client privilege provides a benefit to the justice system; “[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”⁸¹ In some circumstances, however, the benefit of the privilege does not outweigh its costs. For example, where a client has consulted his attorney for the purpose of furthering a crime or fraud, courts recognize a crime-fraud exception.⁸² Excluding evidence in such a situation turns the rationale for the privilege on its head: it cannot be argued that there is some benefit to the justice system by allowing a client to perpetrate a crime with the assistance of his attorney with full confidence that his communications are protected by a privilege whose goal is to promote the administration of justice.⁸³ A crime-fraud exception to the attorney-client privilege is justified because the statements that the client made “in furtherance of a crime or fraud have relatively little (if any) positive impact on the goal of promoting the administration of justice benefit to the system,” and thus “the rationale that underpins the privilege vanishes (or, at least, diminishes markedly in force).”⁸⁴

77. *Zolin*, 491 U.S. 562 (considering crime-fraud exception to attorney-client privilege); *Violette*, 183 F.3d at 75 (considering crime-fraud exception to psychotherapist-patient privilege); *Auster*, 517 F.3d at 615 (considering dangerous-patient exception to psychotherapist-patient privilege); *Chase*, 340 F.3d at 984.

78. *See supra* note 73.

79. *See supra* note 73.

80. *See, e.g., Zolin*, 491 U.S. at 562.

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

82. *See, e.g., Zolin*, 491 U.S. at 562-63.

83. *Id.*

84. *In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 76 (1st Cir. 1999) (discussing crime fraud exception to attorney-client privilege).

As with all privileges,⁸⁵ the cost of the psychotherapist-patient privilege is the exclusion of probative evidence and thus a negative impact on the administration of justice.⁸⁶ However, the Supreme Court has determined that the benefit of the psychotherapist-patient privilege, the improved mental health of individuals and thus society, outweighs the costs.⁸⁷ In some circumstances, however, the benefit of the privilege to the mental health of society may not outweigh its costs to the administration of justice. Where the benefit of the privilege to the mental health of society does not outweigh its costs to the administration of justice, an exception is warranted.⁸⁸ Where a patient consults with his therapist for purpose of furthering a crime or fraud, does the mental health benefit presumed by the privilege remain unchanged? Does the cost to society of excluding the evidence remain unchanged? Or is the cost of excluding the evidence now higher than the mental health benefit?

As a result of weighing the costs and benefits of excluding evidence under the psychotherapist-patient privilege against the costs and benefits of admitting it, the First Circuit recognized a crime-fraud exception to the psychotherapist-patient privilege.⁸⁹ In *In re Grand Jury Proceedings (Violette)*, the defendant purportedly made statements to his therapists regarding bank fraud and other related crimes.⁹⁰ The defendant asserted the psychotherapist-patient privilege in an effort to quash subpoenas compelling his therapists to testify against him.⁹¹ The First Circuit recognized a crime-fraud exception to the psychotherapist-patient privilege because the benefits of the psychotherapist-patient privilege did not outweigh the costs of the privilege in that situation.⁹²

The court recognized the benefit of enforcing the psychotherapist-patient privilege and excluding the evidence—the need for confidence and

85. See *United States v. Nixon*, 418 U.S. 683, 710 (1974) (stating that “exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth”); *Jaffee v. Redmond*, 518 U.S. 1, 9 (2000).

86. *Jaffee*, 518 U.S. at 16.

87. *Id.* (stating that a psychotherapist-patient privilege serves a “public good transcending the normally predominate principle of utilizing all rational means for ascertaining the truth” (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980))).

88. *Violette*, 183 F.3d at 75 (stating that the task of articulating the scope of an existing privilege calls for the same type of analysis as that used in considering whether a previously unrecognized privilege should be created); see also *United States v. Auster*, 517 F.3d 312, 315 (5th Cir. 2008); *United States v. Chase*, 340 F.3d 978, 984 (9th Cir. 2003).

89. See *Violette*, 183 F.3d at 74 (“We hold that the crime-fraud exception applies to the psychotherapist-patient privilege.”).

90. *Id.* at 72.

91. *Id.* at 73.

92. *Id.* at 75-76 (“the rationale for the exception must be that the systemic benefits of protecting this category of communications are outweighed by the costs of foregoing probative evidence of criminal activity”).

trust in a therapist-patient relationship in order to facilitate the mental health of citizens.⁹³ The court also recognized that, generally speaking, weighed against the costs of recognizing the privilege and excluding the evidence—the detriment to truth-seeking and thus the administration of justice—the privilege is justified, pursuant to the Court in *Jaffee*.⁹⁴ However, when the communications are in furtherance of a crime or fraud, the mental health benefits of protecting the communications, “if any,” “pale in comparison to” the “normally predominant principle of utilizing all rationale means for ascertaining the truth.”⁹⁵ When the balance shifts to the need for probative evidence, the rationale that underpins the privilege vanishes because the communications do not create a net benefit to the system.⁹⁶ Thus, the court recognized the crime-fraud exception to the privilege, at least in that situation.⁹⁷ The exception was warranted because the “systemic benefits of protecting” such communications are “outweighed by the costs of foregoing probative evidence” of that particular criminal activity.⁹⁸

Likewise, there should be an exception to the psychotherapist-patient privilege when a patient makes a threat that is a crime *if* the costs are greater than any mental health benefits of such communications. “[I]t is incumbent upon courts to hold the often delicate balance between competing interests steady and true.”⁹⁹ Where the statement that a patient makes to his therapist is in itself a crime against an individual whom society has an interest in protecting for the free and fair functioning of our government, then the mental health benefit does not outweigh the need for the evidence of that threatening statement in a prosecution for the threat itself. The “systemic benefits of protecting” such communications are

93. *Id.* (citing *Jaffee v. Redmond*, 518 U.S. 1, 10-11 (2000)).

94. *Id.* (citing *Jaffee*, 518 U.S. at 10-11).

95. *Id.* at 77 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting in turn *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

96. *Id.* at 76.

97. *Id.* at 77 (“the slit we cut today in the shroud of psychotherapist-patient secrecy will be slight and will not chill much, if any, clinically relevant speech”) (citing *In re Grand Jury Subpoena* (Psychological Treatment Records), 710 F. Supp. 999, 1014 (D.N.J. 1989) (hypothesizing, pre-*Jaffee*, that “[t]he absence of the privilege when the psychotherapeutic relationship may be criminal will have . . . no adverse effect on society’s interest in fostering psychotherapeutic treatment”), *aff’d*, 879 F.2d 861 (3d Cir. 1989) (table)).

98. See *In re Grand Jury Proceedings* (Violette), 183 F.3d 71, 75 (1st Cir. 1999) (stating, in determining whether to recognize a crime-fraud exception to the psychotherapist-patient privilege, that “the rationale for [an] exception must be that the systemic benefits of protecting this category of communications are outweighed by the costs of foregoing probative evidence of criminal activity”).

99. *Id.* at 74 (citing *Clark*, 289 U.S. at 13).

“outweighed by the costs of foregoing probative evidence” of that particular criminal activity.¹⁰⁰ Thus, a “criminal threat exception” is warranted.

VII. THE COST OF EXCLUDING A PSYCHOTHERAPIST’S TESTIMONY REGARDING A DEFENDANT’S THREAT AGAINST A FEDERAL OFFICIAL IS GREATER THAN THE MENTAL HEALTH BENEFITS TO BE GAINED FROM EXCLUDING THE TESTIMONY.

When a patient makes a threatening statement to his psychotherapist against a federal official and Congress has criminalized such a threat, the costs to the justice system of excluding that statement in a prosecution for the crime are greater than the mental health benefits. Thus, a “threat to federal official” exception should be recognized.

The *Jaffee* Court created the psychotherapist-patient privilege because it reasoned that society’s interest in the mental health of the citizenry outweighs society’s interest in the search for the truth in court.¹⁰¹ For the same reason, the Sixth and Ninth Circuits have refused to create or recognize a dangerous patient exception to the psychotherapist-patient privilege.¹⁰²

When the Sixth and Ninth Circuits decided whether to create an exception, there were other factors to consider beyond those that were addressed as part of the holding in *Jaffee*, although that factor was arguably raised in footnote 19 of *Jaffee*.

In *Jaffee*, a civil suit had been brought against a police officer, who had shot and killed a suspect.¹⁰³ The deceased’s family sought to introduce evidence of statements that the police officer had made in therapy for purposes of establishing her culpability.¹⁰⁴ In addition to the therapist’s proposed testimony, there was testimony of eyewitnesses to the shooting who could testify regarding the officer’s culpability.¹⁰⁵ In other words, the

100. *See id.* at 75.

101. *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996) (“The question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient ‘promotes sufficiently important interests to outweigh the need for probative evidence’” (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980))).

102. *United States v. Hayes*, 227 F.3d 578, 585 (6th Cir. 2000) (concluding that “the proposed ‘dangerous patient’ exception is unnecessary to allow a psychotherapist to comply with his or her professional responsibilities and would seriously disserve the ‘public end’ of improving the mental health of our Nation’s citizens”); *United States v. Chase*, 340 F.3d 978, 991-92 (9th Cir. 2003) (concluding that “the gain from refusing to recognize a dangerous-patient exception to the psychotherapist-patient testimonial privilege in federal criminal trials outweighs the gain from recognizing the exception”).

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

104. *Id.* at 5.

105. *Id.* at 5-6.

physical harm about which the testimony would be admitted had already occurred. The testimony, if admitted, would have established liability for harm that had already occurred; it would not, in any way, prevent any future harm.

In contrast, it must be admitted that the need for the search for the truth in court is higher to some degree in a footnote 19 situation—when someone’s safety is in danger—than it is in the *Jaffee* situation—when the evidence is needed simply to establish liability in a civil case. Nonetheless, in considering whether to adopt a dangerous patient exception, the Sixth and Ninth Circuits did not see that the elevated concern when someone’s safety is in danger was elevated *sufficiently* to overcome the interest in the mental health of the defendant and the citizenry generally.¹⁰⁶

However, in a situation such as that presented to the Sixth Circuit in *Hayes* and the Ninth Circuit in *Chase*—when viewed as more than just a situation where “Joe Citizen” is a target of the threat, but more specifically as a situation where the entire country has an interest in the safety of the target—an additional factor weighs on the side of the scale in favor of admitting the evidence by recognizing an exception to the psychotherapist-patient privilege. That additional factor is the concern—recognized by Congress in criminalizing threats against these specific targets—for the safety of particular targets that are integral to the functioning of the federal government.¹⁰⁷ The rationale for criminalizing those types of threats should be considered—not only the interest in protecting the targets from the threatened violence itself, but also to protect the targets against the fear of the threatened violence and from the disruption that the fear of the threatened violence engenders.¹⁰⁸ Moreover, each of these concerns impacts not only the individual threatened, but also the nation as a whole when the targeted individual is a judge or congressman, for example. The rationale behind *Jaffee*’s creation of the psychotherapist-patient privilege and the rationale for rejecting the dangerous patient exception in *Hayes* and *Chase*—that society’s interest in the mental health of the citizenry outweighs society’s interest in the search for the truth in court—does not hold true in this unique situation, where the target of the threat is protected by Congress’s legislation criminalizing threats against him because of the public’s interest in his performance of his job.

106. See, e.g., *Chase*, 340 F.3d at 992 (holding that there is no dangerous-patient exception because recognizing the exception would “significantly injure the interests justifying the existence of the privilege”); *Hayes*, 227 F.3d at 585-86 (holding that there is no dangerous patient exception because the exception would disserve the public policy of improving the mental health of citizens).

107. See *supra* Section V.

108. See Walen, *supra* note 54.

It is important to remember that the privilege itself is an exception to a general rule that relevant evidence should be admitted and should not be hidden from the finder of fact.¹⁰⁹ Privileges are to be interpreted narrowly; recognizing an exception is consistent with the long-standing general principle of the need for every man's evidence.¹¹⁰ An exception in this situation is merely a return to the general rule of admitting relevant evidence and to the fundamental maxim that "[t]he public . . . has a right to every man's evidence."¹¹¹ The limited exception offered in this Article facilitates the fact-finding process and safeguards the integrity of the judicial process. In contrast, applying the psychotherapist privilege in this situation makes the federal courts "occasional instruments of injustice," as Justice Scalia warned in his dissent in *Jaffee*.¹¹² As discussed in Section I above, enforcing the privilege in this situation results in immunity from prosecution, even where the crime is without question, simply because of the perpetrator's audience.¹¹³

A. In the Case of a Threat to a Federal Official, the Public's Need for the Evidence is Sufficiently Elevated to Outweigh the Public's Interest in Mental Health

Where the target of the threat is a federal official whom the public has an interest in protecting, the need for the psychotherapist's testimony regarding the threat is sufficiently elevated to overcome the public's interest in the mental health of society. First, there is no other evidence of the crime. Second, more than just the personal safety of the individual threatened is at stake; also at stake is the public's interest in the personal

109. *United States v. Bryan*, 339 U.S. 323, 331 (1950) ("When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.").

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

111. *Bryan*, 339 U.S. at 331.

112. *Jaffee v. Redmond*, 518 U.S. 1, 22 (2000) (Scalia, J., dissenting). Justice Scalia wrote:
Effective psychotherapy undoubtedly is beneficial to individuals with mental problems, and surely serves some larger social interest in maintaining a mentally stable society. But merely mentioning these values does not answer the critical question: Are they of such importance, and is the contribution of psychotherapy to them so distinctive, and is the application of normal evidentiary rules so destructive to psychotherapy, as to justify making our federal courts *occasional instruments of injustice?*
Id. (emphasis added).

113. *See United States v. Hayes*, 227 F.3d 578, 589 (6th Cir. 2000) (Boggs, J., dissenting) ("We have the odd spectacle that a criminal can perpetrate his crimes (the threats) simply by either purchasing, or being provided at public expense, a particular type of listener, with no opportunity for the listener to avoid facilitating the crime.").

safety of that target so that he may conduct his work free of fear and intimidation for the fair functioning of our government.

In *Jaffee*, the plaintiffs in a civil action sought to introduce evidence of statements that a police officer had made in therapy for purposes of establishing the police officer's culpability in the shooting of a suspect.¹¹⁴ The Court noted the prosecution's "need" for the evidence was not so great because there was other evidence on the same issue.¹¹⁵ There were, for example, eyewitnesses to the incident.¹¹⁶ In contrast, in situations like in *Chase* and *Hayes*, and in the hypothetical prosecution of Jared Loughner for threatening Congresswoman Gabrielle Giffords in his hypothetical visit with his therapist, where the charged crime *is* the statement made in the psychotherapist's office, the only people who can attest to the crime are the defendant himself and his therapist. There is no other evidence of that particular crime.¹¹⁷ The crime was completed within the confines of the therapist's office.¹¹⁸ Thus, the "need" for the evidence is higher than it was in *Jaffee*. *Jaffee* did not contemplate a situation wherein the statement to the therapist is the *only* evidence of the charged crime.¹¹⁹

Second, the need for the truth is elevated. More is at stake than establishing civil liability; more is at stake than punishing a defendant for his crime;¹²⁰ more is at stake than protecting the personal safety of the

114. *Jaffee v. Redmond*, 518 U.S. 1, 5 (2000).

115. *Id.* at 7.

116. *Id.* at 5 (witnesses testified that the officer "drew her gun before exiting her squad car" and that the victim "was unarmed when he emerged from the apartment building").

117. The Ninth Circuit, in *United States v. Chase*, rejected the dangerous patient exception assuming that "it will usually be the case that there is other evidence of the crimes in question." 340 F.3d 978, 991 (9th Cir. 2003). The assumption is inaccurate when the crime charged is the threatening statement made to the therapist in the course of therapy. See *infra* note 118.

118. *Chase*, 340 F.3d at 983 ("Once Defendant finished uttering the threats, the charged crime was completed."). Judge Kleinfeld explained in his concurring opinion in *Chase* that, once it is assumed that the threatening statement was a true threat and therefore 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." *Id.* at 994 (Kleinfeld, J., concurring in the result).

Of course, if others are present and thus might be able to testify to the criminal statement made in the therapist's office, the communication would not have been confidential and the privilege would not apply due to lack of confidentiality. *United States v. Auster*, 517 F.3d 312, 315 (5th Cir. 2008) ("The [*Jaffee*] Court, however, mindful of the burden imposed on the judiciary's truth-seeking function, unambiguously limited the psychotherapist-patient privilege's applicability to those instances in which the patient's statement was made in confidence, holding that the 'privilege covers confidential communications made to licensed psychiatrists and psychologists[, and] confidential communications made to licensed social workers in the course of psychotherapy.'" (quoting *Jaffee*, 518 U.S. at 15).

119. *Jaffee*, 518 U.S. at 5, 7.

120. The Fifth Circuit, in *Auster*, noted that the public has more of an interest in a criminal case than in a civil case like *Jaffee*. 517 F.3d at 319.

target of the threat.¹²¹ In addition to all of those concerns, the public's interest in the target's ability to conduct his work free of fear and intimidation for the fair functioning of our government is also at stake.

As discussed in Section V above, some people, or targets, need to be protected from fear of violence for the good of society; for example, it is a crime to threaten a federal judge, a senator, or a congressman with intent to interfere with their official duties or to retaliate against them for performance of their official duties.¹²² It is to the benefit of the nation as a whole that those people are not disrupted in their activities or coerced into taking certain action against their will. It is particularly important to society

121. It has been argued that a state's *Tarasoff* warning sufficiently protects the target of the threat. *See, e.g., United States v. Hayes*, 227 F.3d 578, 584 (6th Cir. 2000) (“[s]tate law requirements that psychotherapist take action to prevent serious and credible threats from being carried out serve a far more immediate function than the proposed ‘dangerous patient’ exception”). But, as Judge Kleinfeld asked, “What, exactly, is one to do if a psychotherapist calls up and says ‘I have a deranged patient who plans to kill you, and he’s serious?’ Call the police? They do not provide bodyguard services. Seek state civil commitment proceedings, as the majority opinion suggests? 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?” *Chase*, 340 F.3d at 983 (Kleinfeld, J., concurring). Instead, as Judge Kleinfeld answers, “[t]he fastest way to get someone locked up who threatens to kill a federal official in violation of the statute of conviction may well be a federal criminal proceeding in which the psychotherapist testifies about what the patient says.” *Id.*

It has also been argued that involuntary commitment will adequately protect the victim. *See, e.g., Chase*, 340 F.3d at 991 (noting that the federal testimonial privilege does not apply in commitment proceedings and that states generally allow therapist to testify there). It is interesting to note that, although Arizona makes it easier than any other state to commit a mentally ill person, Jared Loughner likely would not have qualified. Sharon Begley, *Could Loughner Have Been Committed?*, DAILY BEAST (Jan. 12, 2011, 6:30 AM), <http://www.thedailybeast.com/newsweek/2011/01/12/could-jared-loughner-have-been-committed.html>. Even if he had been committed, it is unlikely he would have stayed behind locked doors for long. *Id.* One expert said that, given that Loughner “was functional enough a few months [prior to the shooting] to fill out court papers expunging an old arrest record and to buy a Glock[, he] would likely have been out in no more than two days.” *Id.*

In addition, it has been argued that the likelihood of a threat being carried out is reduced by the time the evidence might be admitted in a criminal trial. *Chase*, 340 F.3d at 991 (stating that the threat is “rather unlikely to be carried out once court proceedings have begun”). This is yet again another assumption.

These questionable assumptions led the Sixth and Ninth Circuits to the conclusion that concern for the victim's safety is not higher than the public's interest in mental health. Allowing assumptions into the calculus is at least debatable. That is even more questionable when the risk to the safety of the target is also a risk to the proper functioning of the federal government. Those assumptions do not justify a departure from the general rule that relevant evidence should be admitted, particularly given the impact of excluding evidence in the situation addressed in this Article.

122. *See, e.g., 18 U.S.C. § 112(b)* (2006) (making it unlawful to threaten a foreign official in the performance of his duties); *18 U.S.C. § 115* (2006) (criminalizing threats to United States judges or other federal officers in the performance of their official duties); *18 U.S.C. § 871* (2006) (rendering it illegal to make threats of violence against the President or Vice President).

that threats against those people not be carried out because of the disruption to government that would result.

That concern is worthy of considering in the calculus when determining whether a threat should be admitted in court or excluded under the psychotherapist-patient privilege. Although, as the Court determined in *Jaffee*, society does have an interest in mental health, society also has a particular interest in the safety of certain officials—not only for the personal safety of that individual official but for the free and fair functioning of our government itself. The benefit to be gained by the admission of highly probative evidence is elevated where the crime is a threat against one of these protected individuals. It is sufficiently elevated that it outweighs the injury to the psychotherapist-patient relationship caused by the disclosure of a patient's confidential communications at trial.

B. Any Impact on the Therapeutic Relationship of this Limited Exception is Minimal and Does Not Justify Rejecting the Exception

Although allowing a limited exception to the psychotherapist-patient relationship may have some impact on some patient's willingness to receive and be open in therapy, any potential impact is minimal. Moreover, the possibility of that minimal impact does not justify rejecting the exception that is needed to pursue truth in a prosecution for a threat crime committed against a federal official.

Most states impose on psychotherapists a duty to warn potential targets or authorities when a patient makes a threat in therapy.¹²³ Thus, with or without an exception to the federal psychotherapist-patient privilege that would allow the therapist to testify in federal court, when a patient makes a credible threat against a specific victim, the therapist must reveal the threat.¹²⁴ The fact that the therapist will reveal the patient's statements

123. *United States v. Hayes*, 227 F.3d 578, 583 (6th Cir. 2000); Klinka, *supra* note 38 (citing Paul B. Herbert & Kathryn A. Young, *Tarasoff at Twenty-Five*, 30 J. AM. ACAD. PSYCHIATRY L. 275, 277 (2002)). This duty to warn is often referred to as a state's "*Tarasoff* law" or the psychotherapist's "*Tarasoff* duty." The idea of this state law "duty to warn" began in California with *Tarasoff v. Regents of the University of California*, 551 P.2d 334, 345 (Calif. 1976). In *Tarasoff*, the California Supreme Court established the psychotherapist's responsibility to protect a potential victim through the "duty to warn." *Id.* The court held that, when a therapist determines that his patient is dangerous, the therapist incurs a duty to use reasonable care to protect the victim against the potential harm. *Id.* By informing the victim or proper law enforcement agency of the patient's communicated threat, the psychotherapist takes an affirmative step to fulfill this duty. *Id.*

124. In some states, the therapist must actually tell the patient at that time of his duty to warn when the patient makes the threat. *See, e.g.*, *United States v. Auster*, 517 F.3d 312 (5th Cir. 2008). In that scenario, the Fifth Circuit held in *Auster*, the patient no longer has any reason to expect confidentiality and, thus, the psychotherapist-patient privilege, which is dependent upon confidentiality, does not apply. *Id.* at 315. *But see Hayes*, 227 F.3d at 584; *United States v.*

does some damage to the psychotherapist-patient relationship.¹²⁵ In considering whether to allow an exception to the psychotherapist-patient privilege that would allow a therapist to also testify in federal court, the pertinent question is: What is the *additional* damage to the psychotherapist-patient relationship that would result if, in addition to warning the victim or authorities, the therapist could also testify in a criminal prosecution.¹²⁶

For the Sixth and Ninth Circuits, this additional damage is too much to tolerate and, thus, those courts reject the exception.¹²⁷ They conclude that warning a patient that his statements could be used against him in a criminal proceeding would “certainly chill and very likely terminate open dialogue.”¹²⁸

An alternative viewpoint, however, is that allowing an exception does not significantly injure the therapist-patient relationship. The damage to

Chase, 340 F.3d 978, 990 (9th Cir. 2003) (both proceeding to determine whether to recognize a dangerous patient exception despite an arguable lack of confidentiality and thus inapplicability of the privilege). The Fifth Circuit’s approach in *Auster* is a sound approach that would relieve a court from having to decide whether to adopt or create an exception to the psychotherapist-patient privilege. See *Auster*, 517 F.3d at 321. The exception offered by this Article might be offered to a court as an alternative to the argument that there was no confidentiality upon warning the patient of the *Tarasoff* duty. In addition, as explained in Section VII.C. below, one benefit of the exception offered here is that it is not dependent on a warning to the patient about the state law duty to warn, as is the *Auster* approach.

125. See, e.g., *Chase*, 340 F.3d at 990 (“We know that the initial disclosure to the target or to the authorities can be damaging to the psychotherapist-patient relationship.”); *Auster*, 517 F.3d at 213 (stating that, once the patient has been warned that the therapist might disclose to third parties the “‘atmosphere of confidence and trust’ has already been severely undermined”). The Fifth Circuit in *Auster* went on to point out that the damaging effect of a *Tarasoff* warning is further reinforced because, once the therapist informs the target or authorities, there is no reason for them to keep the threat a secret. *Auster*, 517 F.3d at 318 (“There is, after all, no obligation that the target keep the *Tarasoff* warning confidential, and it is unrealistic to believe that he will do so; there are likely mutual acquaintances between the target and the patient—e.g., friends, co-workers, family—and the target will almost certainly tell them, if for no other reason than to let them know that there is a potentially serious problem with the patient and that everyone ought to be on the lookout for trouble.”). “[O]nce information is released, both client and psychologist lose control over redisclosure.” Mary Alice Fisher, *Protecting Confidentiality Rights: the Need for an Ethical Model*, AM. PSYCHOLOGIST, Jan. 2008 at 10 (cited in *Auster*, 517 F.3d at 318 n.21).
126. *Auster*, 517 F.3d at 318 (“Consider the marginal impact on effective therapy of allowing a statement into evidence that the patient knew would be communicated to third parties when he uttered it.”).
127. *Chase*, 340 F.3d at 991 (“we conclude that the gain from refusing to recognize a dangerous-patient exception to the psychotherapist-patient testimonial privilege in federal criminal trials outweighs the gain from recognizing the exception”); *Hayes*, 227 F.3d at 584-85.
128. *Hayes*, 227 F.3d at 585 (citing Gregory B. Leong et al., *The Psychotherapist as Witness for the Prosecution: The Criminalization of Tarasoff*, AM. J. PSYCHIATRY 149:8, at 1011, 1014 (Aug. 1992)). The Sixth Circuit in *Hayes* also speculated that the probability of mental health improving in prison is diminished. *Hayes*, 227 F.3d at 585; see also *Chase*, 340 F.3d at 991.

that relationship occurs at the point¹²⁹ when the patient knows that therapist will report threats to police or target.¹³⁰ As such, there is little to be gained from protecting these communications from disclosure at trial. If not at the point that the patient knows the psychotherapist may reveal his secrets to his “worst enemy,”¹³¹ then at least at the point that the psychotherapist does communicate patient threats to a third party, the damage to the psychotherapist-patient relationship has been realized.¹³² Further communication by the psychotherapist in a criminal proceeding does not significantly increase damage to the relationship.¹³³ In other words, “the cat already being out of the bag, trial is no occasion for stuffing it back in.”¹³⁴ If 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.¹³⁵

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.¹³⁶ Furthermore, there is always the possibility that a therapist may testify against the patient for purposes of having him hospitalized against his will.¹³⁷ If the assumption is that the threat of hospitalization is not enough to deter a patient from speaking with his therapist, then it is reasonable to also assume that the threat that a therapist may testify against him is also not enough to deter a patient from speaking to his therapist. Although there is a legal distinction between criminal incarceration and civil commitment, that “nuance—in terms of trust and confidence—likely does not matter much to the fellow committed.”¹³⁸

129. This may be the point at which the patient is imputed with knowledge that the therapist has a duty or at the point at which the patient has actual knowledge because the therapist has told him, as is required in some states.

130. *Auster*, 517 F.3d at 318.

131. *Id.*; *Chase*, 340 F.3d at 997-98 (Kleinfeld, J., concurring in the result).

132. *Auster*, 517 F.3d at 318; *Chase*, 340 F.3d at 997-98 (Kleinfeld, J., concurring in the result).

133. *Auster*, 517 F.3d at 318.

134. *Chase*, 340 F.3d at 998 (Kleinfeld, J., concurring in the result).

135. *Id.*; *Cf. Sixth Circuit Holds That Tarasoff Disclosures Do Not Vitiating Psychotherapist-Patient Privilege*, 114 HARV. L. REV. 2194, 2199-200 (2001) (noting that psychological literature indicates few patients would not “disclose their violent impulses to their psychotherapists” if they knew their psychotherapists may be compelled to testify if the patient acted on those impulses); M. Brian P. McKeever, *Contours and Chaos: A Proposal for Courts to Apply the “Dangerous Patient” Exception to the Psychotherapist-Patient Privilege*, 34 N.M. L. REV. 109, 134 (2004).

136. Robert D. Miller et al., *Miranda Comes to the Hospital: The Right to Remain Silent in Civil Commitment*, 142 AM. J. PSYCHIATRY 1074, 1076 (1985) (cited in *Auster*, 517 F.3d at 318 n.18).

137. *Chase*, 340 F.3d at 986 n.3. (“Many states carve out separate testimonial exceptions, which permit psychotherapists to testify at commitment hearings and other identified proceedings.”).

138. *Auster*, 517 F.3d at 319.

Thus, reason and experience dictate that the concern for a detrimental impact on therapy need not be given too much weight.

Even if there is minimal harm to the psychotherapist-patient relationship by allowing the testimony in a criminal proceeding, this harm is not always the most important consideration. In any event, any minimal additional harm to the psychotherapist-patient relationship does not outweigh the benefit to be gained by admitting highly probative evidence of a threat against a government official whose safety is important to the functioning of the federal government.

C. The Proposed “Threat to Federal Official” Exception Will Not Result in Inconsistent Application of Federal Evidence Rules Across the States

Many of the objections that the Sixth and Ninth Circuit have for rejecting the “dangerous patient exception” are related to the state law duty of a psychotherapist to warn potential targets or authorities when a patient makes a threatening statement in therapy. However, the narrow exception advocated in this Article does not depend on the duty to warn being triggered. Thus, many of the points that the Sixth and Ninth Circuits made against the exception are not legitimate objections to recognizing the limited exception proposed here and admitting the testimony of a psychotherapist when his patient has spoken a threat against a federal official.

All states have some law that addresses whether and in what situation a therapist may or must advise law enforcement authorities when a patient, in therapy, communicates some kind of threat.¹³⁹ Not surprisingly, the “duty to warn” laws vary from state to state.¹⁴⁰ Thus, if a dangerous patient exception were “triggered” only when the particular state’s duty to warn were “triggered,” then, indeed, the Federal Rules of Evidence would be applied differently from state to state.¹⁴¹ For example, in Washington, a patient’s statement might trigger a therapist’s duty to warn under Washington law, but that same statement, uttered in California, might not trigger a therapist’s duty to warn under California’s statute.¹⁴² Thus, in a federal prosecution for a threatening statement, if the exception depended on whether the duty to warn were triggered, in a federal prosecution in Washington, the evidence would be admissible and in California it would

139. *See supra* note 123.

140. *Chase*, 340 F.3d at 987 (“different states have different standards regarding when a psychotherapist must (or may) breach confidentiality by disclosing a patient’s threats”).

141. *Id.*

142. *Id.* at 987-88.

not.¹⁴³ This is not, of course, a desirable result.¹⁴⁴ For this reason, among others discussed elsewhere in this Article, the Sixth and Ninth Circuits rejected the dangerous patient exception.¹⁴⁵

However, the premise is flawed. The dangerous patient exception need not be—and should not be—dependent on or “triggered by” any state’s duty to warn statute. The Fifth Circuit in *Auster* recognized as much and explained that, when the therapist informs the patient of his duty to warn the target or the authorities of the patient’s statement, the patient no longer has any reason to expect confidentiality and, thus, the psychotherapist-patient privilege, which is dependent upon confidentiality, does not apply.¹⁴⁶

In order for the exception urged here to apply, there is no need for a state warning to the patient to be made. The exception suggested in this Article would not be “triggered” by the state law duty to warn coming into play. Instead, the exception should apply when the statement itself is a crime, more specifically, a criminal threat against a federal official. Whether the statement may or may not *also* trigger a state law duty to warn is a separate inquiry and is not relevant to whether the statement is admissible in a federal prosecution.¹⁴⁷

VIII. PROCEDURE

To determine whether the exception advocated here applies, a trial court should review the allegedly privileged communication with the psychotherapist *in camera*.¹⁴⁸ Before the *in camera* review, the trial court should determine that there is a factual basis to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish that the exception applies.¹⁴⁹

If the *in camera* review leads to the conclusion that the psychotherapist’s testimony could lead a reasonable juror to determine that the statements made to the therapist constitute a true threat against a federal official, then the exception should apply and the therapist should testify. As

143. *Id.*

144. The Federal Rules of Evidence are to apply uniformly and not vary depending on the state in which the defendant resides. *See, e.g.,* Lippay v. Christos, 996 F.3d 1490, 1497 (3d Cir. 1993).

145. *Chase*, 340 F.2d at 987-88.; *Hayes*, 227 F.3d at 584.

146. *Auster*, 517 F.3d at 315.

147. *See id.* at 317 (“Though, in certain instances, state law may play a role in negating confidentiality (just as other factors can nullify it, e.g., the presence of third parties), the operative test is a federal one”) (footnote omitted).

148. *See United States v. Zolin*, 491 U.S. 554 (1989) (explaining procedure for *in camera* review to determine applicability of crime-fraud exception to attorney-client privilege).

149. *See id.* at 572.

the prosecution proceeds, the defendant can, of course, offer an insanity defense or argue that the statement that he made was not a true threat.¹⁵⁰

Whether a defendant should be excused for the criminal statements he made in the course of therapy should be a question for a jury to decide, not a question for a judge to decide based on admissibility of the evidence.¹⁵¹ Without an exception in this circumstance, the judge in essence decides that the defendant may be absolved of his crime simply because the patient made the threat in the presence of the “right person.”¹⁵² This renders the court, through the psychotherapist patient privilege, an “instrument of injustice.”¹⁵³

IX. CONCLUSION

The Supreme Court in *Jaffee v. Redmond* announced a federal testimonial privilege protecting communications between a psychotherapist and his patient in federal court. However, in footnote 19 of the opinion, the Court noted that there may be times where the privilege must “give way,” such as when “disclosure” of the statements made in therapy is necessary to protect an intended victim of the patient. While commentators have argued against an exception to the privilege when the statements made to the therapist indicate that a target is in danger and some courts have rejected such a “dangerous patient exception” to the psychotherapist-patient privilege, this Article takes an opposing view. This Article argues for an exception that is more narrow than the dangerous patient exception—a “criminal threat exception.”

Where courts refuse to acknowledge an exception to the psychotherapist-patient privilege where the patient’s threatening statement is in itself a crime, the federal courts are rendered “occasional instruments of injustice.” Moreover, the rationale behind *Jaffe*’s creation of the psychotherapist-patient privilege—that society’s interest in the mental health of the citizenry outweighs society’s interest in the search for the truth in court—does not hold true where the statement that a patient makes to his therapist is in itself a crime, specifically a threat against a federal official that has been criminalized by Congress in the interest of ensuring the free and fair functioning of our government. Therefore, a narrow exception—a

150. See *Chase*, 340 F.3d at 993 (Kleinfeld, J., concurring in the result) (“No doubt many patients’ disclosures to psychotherapist would sound alarming were they repeated in court, and yet would not be ‘true threats.’”).

151. *Id.* at 998 (“[T]he social interest in assuring that the judge and jury know the whole truth greatly exceeds the value of preserving any remaining shreds of the confidential relationship. The jury ought . . . to know the truth about what the [defendant] said.”).

152. See *supra* section IV.

153. *Jaffee*, 518 U.S. at 22 (Scalia, J., dissenting).

“criminal threat exception” should be acknowledged under those circumstances.

