Commentary: No Place to Hide

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J Am Acad Psychiatry Law 32:96–8, 2004

> Seek not to be made a Judge unless thou have the strength to take away iniquities.—Ecclesiasticus VII, 6 [Vulgate] [text upon which English common law judges were sworn]

Law schools usually teach that the standards and burden of proof for civil and criminal cases are different because civil cases are about mere money and criminal cases are about liberty. Mental health law, however, rather unhappily, sits in the middle—it is quasi-criminal. I could not think of a worse position to be in than that of a mental heath detainee when civil standards (and due process protection) are applied for a criminal (liberty compromising) disposition. But if you think that is bad, think of the rather unique extension of civil principles to a criminal process exemplified by what has been called the "criminalization of *Tarasoff*."[1] After 25 years, the *Tarasoff*[2] debate rages on in the pages of this journal and elsewhere, while yet another circuit court unsatisfactorily attempts to reach a middle ground.

Legislation and case law has fairly well established by now that there is a duty to warn, however broadly one interprets that duty. To warn is a breach of confidentiality, nevertheless, quite distinct from breaching privilege, which is where the recent case of *Chase*[3] is grounded. Because *Chase* was decided in a federal court, inevitably the caveat of public protection—being a possible future exception to privilege inserted as a footnote ("the privilege must give way," also known as the *Jaffe* footnote)[4]—raised its unattractive head. In the end, it is still not clear where psychiatrists stand in terms of disclosure, legally and ethically.

This discourse is replete with interesting poles: privilege versus confidentiality, legality versus ethics, and more recently, as the Ninth Circuit (*en banc*) tried to distinguish, wrong versus harm. I find it interesting that this mirrors the circuit split that has become wider since the Supreme Court was invited to resolve this issue in *Jaffe*. Since psychiatrists by a rather unclear mandate have been enlisted to prevent harm, it is surprising that a more robust elaboration of the various harms were not to be found in the decision by the Ninth Circuit.

In balancing benefit against harm, courts traditionally care more about the consequences of their decisions, such as the potential for harm, than upholding overriding principles, such as the sanctity of patient confidentiality. The thinking by courts seems to be that principles are good as long as they do not come in conflict with public safety (a different kind of harm) or public policy. The dangerous patient exception to normal therapist-patient testimonial privilege is one such example. If the rationale of warning (and by extension protecting) the potential victim is to prevent future acts of violence, it can be argued that some good is achieved (for the patient) by ensuring that the patient does not pay for his crimes and that he has adequate treatment. Why else would a patient reveal violent fantasies if not to seek help and ask the therapist to stop him from acting on those fantasies? Doesn't he know that a secret out for one purpose is a secret out for all purposes? But does a patient really know? A similar argument about what patients really know or understand at an emotional level, even after they have been explicitly (in the form of limits to confidentiality warning) told about the different nature of the forensic evaluation, has not yet been satisfactorily resolved.[5,6] Are doctors (healers) ever anything else, even if they say they are? It is thus entirely possible that the good side of the patient is asking the therapist[7] to take all necessary steps to stop him from acting in a violent way. Quite understandably, outside of psychoanalytic circles this argument has not found much favor. Mostly, we are allowed to make bad decisions, even dangerous ones, if we are

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deemed competent and autonomous to make those decisions.

Yet patients are different in many ways. They often have compromised autonomy and often require benign, paternalistic protection. The justice system is designed in a rather curious way ostensibly to protect the patient's interest, often at the expense of due process. In no other branch of law does one find hearsay evidence having so much impact on the outcome of a case. In commitment hearings, evidence ordinarily inadmissible is allowed, once again, ostensibly to help the patient. Chase argued with little success that the evidence of acts other than those charged (threats made against individuals other than the federal agents) were inadmissible under federal rules of evidence[8] (that other crimes and wrongdoings may not be used to show propensity), as the court found that this "other act" was inextricably intertwined.[9] Once that court allowed the therapist's testimony on offenses (once a threat is uttered, it becomes an offense) already committed, there was no other way to hold. The cat was already out of the bag.

The case Weiner[10] described is not much different in substance from the *Chase* case. One can argue that the patient in Weiner's case, like Chase, sought help in her distress, but the existing law mandated that this distress be disclosed. One then has to go back to the *Jaffee* majority to see why this should not be, because disclosure will deter future patients from seeking help (Ref. 4, p 11). It has not been proven conclusively that the *Jaffee* protection has fostered psychotherapy any more than the *Tarasoff* ruling has prevented access to it. Justice Scalia said (Ref. 4, p 22, dissenting opinion) that mental health suffers more if people are prevented from seeking advice from their mothers than if they are prevented from talking to a psychotherapist, yet there is no mother-child privilege. The question becomes therefore: do people have an inherent claim to a private space? If that is an accepted proposition, then that should be absolute. What can be gained by a limited adherence to principles if expediencies (or public policies) are going to erode it from time to time?

The *Chase* court said that admission of Dr. Doe's testimony was wrong but did no harm (Ref. 3, p 993). The point is not whether she herself did any harm, although one can see why that would be important from a tort point of view. Dr. Doe did no (legal) wrong in warning the victims; what she perhaps did wrong was to testify later. She would not have even done wrong if the courts carved out the dangerous patient exception, which they expressly refused to do (Ref. 3, p 985). There is therefore, in the court's mind, a point when duty to warn has been fulfilled and no more is required. The court of course does not take into consideration the further transgressions, like waiting for Chase to tell her more about his plan and telling Chase about potential disclosure only once initially and then refusing to take his calls. One can argue that obtaining further information to weigh the credibility of the threats is a legitimate therapeutic concern, and this argument holds water until the point when Dr. Doe abandons him. The initial threat was made on August 18, 1999, and, explicit as it was, Chase also disclosed that he had made similar threats several times in the past five years. A warning about the limits to confidentiality was given at this point and repeated on another occasion. It is not suggested that such warning has to be administered on every occasion, but it begs the question of whether the patient really understands that a disclosure (by the therapist of such threats) for one purpose (preventive) is a disclosure for all other purposes, including punitive. Given that two months passed before the threats were repeated and the FBI took five days to contact Dr. Doe to learn more about the threats, one would be forgiven for questioning the immediacy of the danger, which must be one of the main determinants in invoking *Tarasoff*.

As a legal matter, this is all harmless, for the conviction would have been secured on testimony of others. On a legal point, there may be a requirement for Dr. Doe to testify as a percipient witness to a felony (Ref. 3, p 994, concurring opinion). The three concurring judges (in the *en banc* decision) correctly pointed out that federal evidentiary rules are not the same as the therapist's ethical obligation or indeed tort duties to potential victims. The three judges say that the privilege is already dead, courtesy of the caveat of permissible disclosure to avert serious harm (*Jaffe* footnote) (Ref. 4, p 18, n 19) and this indeed seems to be the case. It also appears on the surface that once a limit to confidentiality warning is given (and understood) any such privilege is waived. Indeed, if the threat was expressed under explicit warning that it will be disclosed, the threat becomes unprivileged communication (Ref. 3, p 996). Given that at that time, in Oregon state court Chase would have full testimonial privilege,[11] did the Ninth Cir-

cuit intend to reinforce the circuit split that has beclouded the issue of psychotherapist-patient privilege since *Jaffe*? It is true that federal rules of evidence must apply uniformly and not be dependent on the vagaries of state law. The Ninth Circuit went some way to put the vexing matter of the dangerous patient exception[12] to rest, but the fact remains that the *Chase* judgment did nothing to stop the trend of legalized state intrusion into one's most private space.

The legal argument aside, there remains the ethics argument of harm and wrong. Can there be wrong without harm? The legal answer is a resounding yes and indeed this is the view the court took. The courts dismissed Dr. Doe's testimony on the grounds that there is no dangerous patient exception. The court does not so much as comment on the other improprieties noted by Dr. Herbert in his article.[13] They did not have to, for the court's duty is to uphold the law in its various interpretations, in the light of reason and experience. But does the fact that no additional harm was done (and the privilege violation is not a constitutional error) make it any less wrong? Should right and wrong be decided by harm analysis alone and with no regard for what is just? It is true perhaps that the erroneous admission of Dr. Doe's testimony did not prejudice the defendant. The real harm was done to the psychotherapist-patient relationship and perhaps to the "mental health of our citizenry" which was deemed to be "no less important than its physical health" (Ref. 4, p 11). The Supreme Court in *Jaffe* strove hard to carve out a privilege that was almost not there, just to protect this concept of public (health) good. The bland assertion that no harm was done without so much as a passing comment on the fact that the therapist waited (and even strove) to obtain more self-incriminating evidence from the patient while hiding behind the *Tarasoff* protection was the real harm in this case. The harm was done to the credibility of the profession, to the sanctity of the private space one calls psychotherapy, and by extension, to the mental health of our citizenry. This, added to the considerable wrongs, makes this an insignificant victory for the privacy lobby.

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