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Stanley Mosk

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Stanley Mosk*

California statutory law provides a psychotherapist-patient privilege, under which communications between a patient and his psychotherapist are protected from disclosure.[1] There is an exception to this privilege when the patient is dangerous to himself or others.[2] Both the privilege and the exception are clear. In two recent decisions, however, a bare majority of the California Supreme Court misconstrued the pertinent statutory provisions with mischievous effect.[3] In a more recent decision, a unanimous court commenced the labor of correcting its own errors.[4] Whether the court will complete the task remains to be seen.

I. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE AND THE "DANGEROUS PATIENT" EXCEPTION

* Justice of the California Supreme Court. I am indebted to Dennis Peter Maio, J.D., Yale Law School, 1981, for his work on this Article.

1. CAL. EVID. CODE § 1014 (West Supp. 1993). *See infra* text accompanying note 6 for relevant portion of section 1014. All further references to "the Code" are to the California Evidence Code.

2. CAL. EVID. CODE § 1024 (West 1966). *See infra* text accompanying notes 8-9 for relevant portions of section 1024.

3. People v. Wharton, 809 P.2d 290 (Cal. 1991), *cert. denied*, 112 S. Ct. 887 (1992); People v. Clark, 789 P.2d 127 (Cal.), *cert. denied*, 111 S. Ct. 442 (1990).

In *Wharton*, Chief Justice Lucas' majority opinion commanded only four votes. *Wharton*, 809 P.2d at 299-342. Justice Mosk dissented. *Id.* at 342-45 (Mosk, J., dissenting). Justice Broussard filed a separate dissent, in which Justice Kennard concurred. *Id.* at 345-51 (Broussard, J., dissenting).

Likewise, in *Clark*, the majority comprised only four justices. *Clark*, 789 P.2d at 134-64. Justices Mosk, Broussard, and Kaufman each filed concurring and dissenting opinions. *Id.* at 164-66 (Mosk, J., concurring and dissenting); *id.* at 166-68 (Broussard, J., concurring and dissenting); *id.* at 168-77 (Kaufman, J., concurring and dissenting).

4. Menendez v. Superior Court, 834 P.2d 786 (Cal. 1992).

In 1965, the California Legislature enacted the California Evidence Code.[5] Section 1014 codifies the psychotherapist-patient privilege, which provides, in relevant part, that "the patient . . . has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist."[6] Section 1012 defines "confidential communication between patient and psychotherapist" as

> information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship.[7]

Section 1024 sets forth the so-called "dangerous patient" exception.[8] Pursuant to this exception, there is no privilege as to an otherwise protected communication "if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger."[9]

II. GROUND LOST: *PEOPLE V. CLARK* AND *PEOPLE V. WHARTON*

A. People v. Clark

In *People v. Clark*,[10] a deeply divided California Supreme Court affirmed a judgment of death.[11] The court produced four opinions: a ma-

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5. Cobey-Song Evidence Act, ch. 299, § 2. 1965 Cal. Stat. 1297, 1297-1356 (codified as CAL. EVID. CODE).

6. CAL. EVID. CODE § 1014 (West Supp. 1993). *See generally* CHARLES T. MCCORMICK ET AL., MCCORMICK ON EVIDENCE §§ 101-05 (3d ed. 1984); 2 B. WITKIN, CALIFORNIA EVIDENCE, *Witnesses* §§ 1201-1204 (3d ed. 1986 & Supp. 1992).

7. CAL. EVID. CODE § 1012 (West Supp. 1993).

8. CAL. EVID. CODE § 1024 (West 1966).

9. *Id.* Additionally, upon making the determination that the patient is "dangerous," the psychotherapist has an affirmative duty to warn all potential victims of the perceived danger. Tarasoff v. Regents of the Univ., 551 P.2d 334, 343 (Cal. 1976). *See generally* Violet Lee, Comment, *The Dangerous Patient Exception and the Duty to Warn: Creation of a Dangerous Precedent?*, 9 U.C. DAVIS L. REV. 549 (1976).

10. 789 P.2d 127 (Cal.), *cert. denied*, 111 S. Ct. 442 (1990).

11. *Id.* at 164. Clark was convicted by jury of rape, arson, first degree murder, and two counts of attempted second degree murder. *Id.* at 134-35. After the superior court imposed the death penalty, the California Supreme Court reviewed the case on

jority opinion commanding a bare four votes[12] and three separate concurring and dissenting opinions.[13]

The *Clark* majority considered the defendant's claim that the superior court's admission into evidence of certain threatening communications assertedly protected by the psychotherapist-patient privilege amounted to prejudicial error.[14] They rejected the point, holding that "even if erroneously admitted, the evidence was not prejudicial."[15]

The *Clark* majority further held that the threatening communications were not protected by the psychotherapist-patient privilege because they were properly revealed to the potential victim prior to trial, and thus were no longer confidential.[16] Contrary to its own language, the *Clark* majority effectively narrowed the psychotherapist-patient privilege by erroneously fabricating a novel "requirement" that in order to be protected, a communication must be *and remain* "confidential."[17] The court noted that "[a] psychotherapist has a professional duty to maintain the confidential character of communications made to him by his patient during the course of the relationship, but when it is necessary to disclose confidential information to avert danger to others the therapist must do so."[18]

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automatic appeal. *Id.* at 134. On review, Clark argued that he did not possess the requisite intent to kill. *Id.*

12. *Id.* at 134-64. Justice Eagleson authored the majority opinion, in which Chief Justice Lucas and Justices Panelli and Kennard concurred. *Id.*

13. *Id.* at 164-66 (Mosk, J., concurring and dissenting); *id.* at 166-68 (Broussard, J., concurring and dissenting; Mosk, J., concurring therein); *id.* at 168-77 (Kaufman, J., concurring and dissenting).

14. *Id.* at 150-54. During an interview with Dr. Weinberger, a court appointed psychologist, the defendant expressed his desire to kill his ex-therapist's brother. *Id.* at 149. Weinberger was subsequently allowed to testify as to these threats. *Id.* at 151. The defendant contended that his statements to Weinberger were confidential, and thus protected by the psychotherapist-patient privilege. *Id.*

15. *Id.* at 153. The court reasoned that the defendant's statements to Weinberger were such a "minor aspect of the overwhelming evidence of aggravating factors reflected in the circumstances of the crime itself" that a jury could not have reasonably reached a different verdict even if the evidence had been excluded. *Id.* at 153-54.

16. *Id.* at 151.

17. *See id.* at 150-54 (emphasis added).

18. *Id.* at 151 (citing Tarasoff v. Regents of the Univ., 551 P.2d 334, 347 (Cal. 1976)). In *Tarasoff*, the California Supreme Court dealt generally with the psychotherapist's duty under the common law "to use reasonable care to protect the intended victim" of a patient who "presents a serious danger of violence." *Tarasoff*, 551 P.2d at 340.

The *Tarasoff* court held that

According to the *Clark* majority, the purpose underlying Evidence Code section 1014 "is not to prevent the use of a defendant's statements against him in legal proceedings. It exists to prevent the unnecessary disclosure of statements made in confidence in the course of a privileged communication with a therapist and thereby to facilitate treatment."[19] However, the court also noted that if the statements have been revealed to third persons in a communication that is not itself privileged, then they are no longer confidential.[20]

The *Clark* majority continued:

> The question is not whether the psychotherapist-patient privilege has been waived or the exception that would permit compelled disclosure in a legal proceeding applies, but whether the privilege may be claimed at all once the communication is no longer confidential . . . . [O]nce the communication has lost its confidential status, [it becomes irrelevant] whether the psychotherapist 'reasonably believes' that revelation of the communication is necessary.[21]

The court concluded that "[t]he reason for the privilege—protecting the patient's right to privacy and promoting the therapeutic relationship—and thus the privilege itself, disappear once the communication is

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> [w]hen a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

Tarasoff, 551 P.2d at 340.

The *Tarasoff* court further held that

> the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger.

Id. at 347. *See generally* 2 B. WITKIN, CALIFORNIA EVIDENCE, *Witnesses* § 1212 (3d ed. 1986 & Supp. 1992) (discussing *Tarasoff*); 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 860-61 (3d ed 1986 & Supp. 1992).

19. *Clark*, 789 P.2d at 151 (citing *Tarasoff*, 551 P.2d at 346-47).

20. *Id. But cf.* Roberts v. Superior Court 508 P.2d 309, 316 (Cal. 1973) (finding that privilege had not been waived by disclosure when a psychotherapist exchanged patient's records with other physicians after patient had actively asserted privilege). *See generally* Jonathan Baumoel, Comment, *The Beginning of the End for the Psychotherapist-Patient Privilege*, 60 U. CIN. L. REV. 797, 798 (1992) (arguing that "exception to the psychotherapist-patient privilege when a patient's confidential communications are revealed to a third party is justified only when a significant government interest outweighs the patient's privacy interest").

21. *Clark*, 789 P.2d at 151 (citing CAL. EVID. CODE § 1024 (West 1966)).

no longer confidential."[22]

B. People v. Wharton

One year later, in *People v. Wharton*,[23] a deeply divided California Supreme Court once again affirmed a judgment of death.[24] In *Wharton*, the court produced three opinions: a majority opinion commanding a bare four votes[25] and two separate dissenting opinions.[26]

The *Wharton* majority considered the defendant's claim that the superior court's admission into evidence of certain communications assertedly protected by the psychotherapist- patient privilege amounted to prejudicial error.[27] While the majority rejected the point,[28] the other three Justices found the claim to be meritorious.[29] In the course of its discussion, the *Wharton* majority effectively broadened the "dangerous patient" exception beyond its terms,[30] even though it expressly recognized its "obligation" to construe the exception "narrowly."[31]

As noted, a communication otherwise protected by the psychotherapist-patient privilege comes within the "dangerous patient" exception if, at the time the privilege is claimed, there is reasonable cause for the psychotherapist to believe that the patient is dangerous and that

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22. *Id.*

23. 809 P.2d 290 (Cal. 1991), *cert. denied*, 112 S. Ct. 887 (1992).

24. *Id.* at 342.

25. *Id.* at 299-342. Chief Justice Lucas wrote the majority opinion, in which Justices Panelli, Arabian, and Baxter concurred. *Id.*

26. *Id.* at 342-45 (Mosk, J., dissenting); *id.* at 345-51 (Broussard, J., dissenting; Kennard, J., concurring therein).

27. *Id.* at 304-14. Prior to committing the murder, the defendant had told both of his therapists that he planned to injure the victim. *Id.* at 304-06. Both therapists warned the eventual victim, and subsequently testified at trial as to the defendant's threatening statements. *Id.* The defendant's primary argument on review was that the dangerous patient exception should not apply to allow the therapists to testify regarding the warnings given to the victim. *Id.* at 307-08. The defendant reasoned that the purpose of the dangerous patient exception is to avert danger to would-be victims and, thus, would not be relevant once the harm to the victim has occurred. *Id.* at 308.

28. *Id.* at 314.

29. *Id.* at 344-45 (Mosk, J., dissenting); *id.* at 345-51 (Broussard, J., dissenting; Kennard, J., concurring therein).

30. In addition, the *Wharton* majority followed *Clark* with its narrowing of the psychotherapist-patient privilege. *Id.* at 312-13 (citing People v. Clark, 789 P.2d 127, 151-54 (Cal.), *cert. denied*, 111 S. Ct. 442 (1990).

31. *Id.* at 308, 313.

disclosure of the communication is necessary to prevent the threatened harm.[32]

First, the *Wharton* majority erroneously construed the "dangerous patient" exception so as to effectively abolish the crucial requirement that *disclosure of the communication is necessary to prevent threatened harm.*[33] This requirement is plain in both the statutory language[34] and the legislative history,[35] and compels the conclusion that the exception does not apply when disclosure is not *needed* to forestall *future* injury, as when some means other than disclosure is available, or when the injury has already been inflicted.[36]

Second, the *Wharton* majority erroneously held that the "dangerous patient" exception extends to any and all communications that "trigger" the requisite "reasonable cause."[37] This holding turns the exception on its head. Contrary to the statutory language and the legislative history,[38]

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32. *See* Tarasoff v. Regents of the Univ., 551 P.2d 334, 347 (Cal. 1976); *see also supra* note 18 and accompanying text.

33. *See Tarasoff*, 551 P.2d at 308-09.

34. *See* CAL. EVID. CODE §§ 1012, 1014, 1024 (West 1966 & Supp. 1993). For the relevant portions of these statutory sections, see *supra* notes 6-9 and accompanying text.

35. *See generally Wharton*, 809 P.2d at 344-45 (Mosk, J., dissenting).

36. *See id.* (Mosk, J., dissenting). At one point in its opinion, the *Wharton* majority stated that if the "dangerous patient" exception is read to require that disclosure of the communication is necessary to prevent threatened harm, "a dangerous patient could regain the protection of the privilege by simply killing his victim, certainly an absurd result." *Id.* at 308 (citing People v. Morris, 756 P.2d 843, 851 (Cal. 1988)). At another point, the majority stated, in similar fashion, that such a reading

> would inevitably lead to absurd results. For example, under [this] interpretation, a therapist could never testify that his or her patient was *presently* dangerous to another person in the following circumstances: (1) where the patient was in custody at the time of trial, (2) where the potential victim had moved and the patient did not know where the victim currently lived, (3) where the potential victim lived in another state or country, or (4) . . . where the victim had been killed by the time of trial.

Id. at 309 n.5.

The "absurdity" perceived by the justices of the *Wharton* majority merely reflects their own view that the scheme enacted by the California Legislature is unwise. But, of course, it matters not that they are apparently displeased with the psychotherapist-patient privilege as codified in California Evidence Code section 1014, which authorizes the patient to exclude even the most highly relevant communication from any and all legal proceedings. *See* CAL. EVID. CODE § 1014 (West Supp. 1993). Nor does it matter that they are apparently displeased with the "dangerous patient" exception as codified in California Evidence Code section 1024, which is applicable only when disclosure of the communication is *needed* to forestall *future* injury. *See* CAL. EVID. CODE § 1024 (West 1966). It may be noted in passing that, contrary to the *Wharton* majority's misunderstanding, although a psychotherapist cannot always disclose protected communications, he can always testify that his patient is dangerous.

37. *Wharton*, 809 P.2d at 313, 314. *See id.* at 308.

38. *See generally id.* at 344-45 (Mosk, J., dissenting) (discussing legislative history

disclosure is potentially allowed for each and every communication, as opposed to only the specific communication which is needed to forestall future injury.[39]

III. GROUND REGAINED: *MENENDEZ V. SUPERIOR COURT*

In *Menendez v. Superior Court*[40]—a notorious case charging two brothers in a wealthy and prominent Beverly Hills family with the capital murder of their parents—the California Supreme Court again considered an argument for the exclusion of evidence pursuant to the psychotherapist-patient privilege.[41] The superior court ruled against the point in its entirety[42] and, on petition for writ of mandate and/or prohibition, the court of appeal sustained the ruling.[43] On petition for review, however, the supreme court disagreed, determining that the ruling was partly unsound.[44] In *Menendez*, as will appear, a unanimous supreme court almost totally succeeded in reestablishing, within its proper scope, both the psychotherapist-patient privilege and the "dangerous patient" exception.[45]

Although generally adhering to *Wharton* (unsurprisingly, in view of *stare decisis* and the fact that no party called for reconsideration) the court in *Menendez* effectively corrected one of the *Wharton* majority's errors. It expressly held that "an otherwise protected communication" comes within the "dangerous patient" exception if "there is reasonable cause for the psychotherapist to believe that (1) the patient is dangerous *and* (2) disclosure of the communication is necessary to prevent any harm."[46] The court thereby made it clear that the exception does *not* extend to any and all communications that may be deemed to "trigger"

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and the purpose of California's psychotherapist-patient privilege).

39. This is because each and every communication bears in some way on the dangerousness of the patient. *See id.* at 313-14.

40. 834 P.2d 786 (Cal. 1992) (Mosk, J., authoring the opinion of the court).

41. *Id.* at 788-89. During an investigation, the police seized three audiotapes containing information relating to the killings from the office of the defendants' psychotherapist. *Id.* at 788. The defendants argued that the tapes were inadmissable pursuant to the psychotherapist-patient privilege. *Id.* at 789.

42. *Id.* at 790.

43. *Id.* at 792.

44. *Id.* at 793.

45. *See id.* at 793-99.

46. *Id.* at 794 (citing People v. Wharton, 809 P.2d 290, 306-14 (Cal. 1991), *cert. denied*, 112 S. Ct. 887 (1992).

the requisite "reasonable cause," but only to the specific communication that must be disclosed by the psychotherapist in fulfillment of his duty to warn.[47]

By contrast, the court in *Menendez* all but totally disapproved of *Clark*.[48] Its criticism, to be sure, was aimed against the superior court's "reading" of *Clark*, which was altogether faithful to the opinion of the *Clark* majority, rather than against *Clark* itself.[49] Nevertheless, the criticism hit its mark.

At the outset, the court declared that, as to the proposition that the psychotherapist-patient "privilege requires the communication to be and remain 'confidential[,]' [t]he law is otherwise."[50] The court observed that "[t]he privilege can cover a communication that was never, in fact, 'confidential'—so long as it was made in confidence."[51] The court noted that "[s]imilarly, the privilege can cover a communication that has lost its 'confidential' status."[52] The court rejected any implication that

> the privilege is not intended to enable the patient to prevent disclosure in legal proceedings. To be sure, the purpose is not to grant him power to bar evidence *for its own sake*. But the purpose is indeed to grant him power to bar evidence—in order to protect his right to privacy and promote the psychotherapeutic relationship.[53]

The court also rejected any suggestion that

> the patient's privacy is breached and the psychotherapeutic relationship destroyed as soon as any communication loses its 'confidential' status in any degree. Such a proposition is unsupported. For example, if the communication is insignificant in content or the disclosure is narrow in scope, the patient's privacy may be implicated only slightly. Also, and perhaps more important, the psychotherapeutic relationship may survive even the broadest disclosure of the most substantial communication—much as other relationships do. That seems especially true when, as here, the patient whose communication is disclosed is unaware of the fact.[54]

Finally, the court made clear that *Clark* was internally inconsistent:

> In *Roberts v. Superior Court*, . . . we held that only the patient has the power to

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47. *Id.* at 796. "'[T]he public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others.'" *Id.* (quoting Tarasoff v. Regents of the Univ., 551 P.2d 334, 347 (Cal. 1976)).

48. *Id.* at 793-99.

49. *See id.* at 793.

50. *Id.*

51. *Id.* "The communication need only comprise 'information . . . transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, *so far as the patient is aware*, discloses the information' to no 'outside' third person." *Id.* (quoting CAL. EVID. CODE § 1012 (West Supp. 1966)).

52. *Id.*

53. *Id.* at 794.

54. *Id.*

> waive the privilege in any part. A fortiori, only the patient has the power to cause the privilege to go out of existence in its entirety. By its citation to *Roberts*, *Clark* impliedly accepts the patient's control of waiver of the privilege. But inexplicably, . . . *Clark* . . . all but expressly reject[s] the patient's control of the privilege's very existence.[55]

In a word, after *Menendez*, practically nothing remains of *Clark* beyond a memory of the shadow it had cast on the psychotherapist-patient privilege.[56]

IV. CONCLUSION

The analysis set out in the preceding section shows that the California Supreme Court has corrected its own errors so far as *Clark* is concerned. In *Menendez*, the court squarely repudiated the *Clark* majority's erroneous "requirement" that a communication must be and remain "confidential" in order to come within the psychotherapist-patient privilege.[57]

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55. *Id.* (citing People v. Clark, 789 P.2d 127, 151 (Cal.), *cert. denied*, 111 S. Ct. 442 (1990); Roberts v. Superior Ct., 508 P.2d 309, 316 (Cal. 1973)). In passing, the following point bears emphasis. Contrary to the *Clark* majority's apparent understanding, the "dangerous patient" exception and the rule of *Tarasoff* do not operate in the same sphere. Quite the opposite. As noted, *Tarasoff* defines the psychotherapist's duty under the common law "to use reasonable care" in the world at large "to protect the intended victim" of a patient who "presents a serious danger of violence." Tarasoff v. Regents of the Univ., 551 P.2d 334, 340 (Cal. 1976). By contrast, the exception removes the patient's authorization under the California Evidence Code to exclude an otherwise protected communication from a legal proceeding if there is reasonable cause for the psychotherapist to believe that the patient is dangerous and that disclosure of the communication is necessary to prevent threatened harm. *See* CAL. EVID. CODE § 1024 (West 1992).

56. Of course, the fact that the *Wharton* majority followed *Clark*, see *supra* note 30, means nothing now that *Clark* itself is no longer vital.

57. *See supra* notes 50-56 and accompanying text. All that survives of *Clark* is what *Menendez* labeled its "holding": "[W]hen a psychotherapist discloses a patient's threat to the patient's intended victim in a so-called '*Tarasoff* warning,' the disclosed threat is not covered by the privilege." *Menendez*, 834 P.2d at 793 (citations omitted). Plainly, the *Clark* "holding" is in actuality obiter dictum. It is unnecessary to the conclusion that "even if erroneously admitted, the evidence [of the disclosed threat] was not prejudicial." *Clark*, 789 P.2d at 153. *Menendez*'s contrary labeling is itself no more than dictum. *See Menendez*, 834 P.2d at 793.

Just as plainly, the *Clark* "holding" is unsound and hence falls of its own weight. First, it is simply an instance of the erroneous "confidentiality requirement" rejected in *Menendez*. *See supra* notes 50-56 and accompanying text. Certainly, the *Clark* "holding" cannot be treated as a mere restatement of the "dangerous patient" exception, seeing that it purportedly renders the exception "irrelevant." *See Clark*, 789 P.2d at 151. Second, the *Clark* "holding" would undermine *Tarasoff*. As noted, in

Furthermore, the preceding analysis makes a similar showing that the California Supreme Court has corrected its own errors so far as *Wharton* is concerned. In *Menendez*, the court departed from the *Wharton* majority's erroneous holding that the "dangerous patient" exception extends to any and all otherwise protected communications that may be deemed to "trigger" reasonable cause for psychotherapist's belief in the dangerousness of the patient and the necessity of disclosure to prevent threatened harm.[58]

It remains to be seen whether the court will reject the *Wharton* majority's erroneous construction of the "dangerous patient" exception, which effectively abolished the crucial requirement that disclosure is necessary to prevent harm.[59] *Menendez* inspires hope in this regard. But if the court fails to act, the California Legislature may be expected to intervene. The legislature has manifested its intent to be the only source of law relating to privilege.[60] Surely, it will eventually remove the taint that the *Wharton* majority has injected.

Tarasoff, the court held that "the therapist's obligations to his patient require that he" make any disclosures of a communication "necessary to avert danger to others . . . discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger." *Tarasoff*, 551 P.2d at 347 (citation omitted). Under the *Clark* "holding," the therapist could not fulfill his obligations. Any disclosure of a communication—no matter how "discreet" and "private"—would allow disclosure to all the world on the ground that "the communication has lost its confidential status." *Clark*, 789 P.2d at 151.

58. *Compare Menendez*, 834 P.2d at 794 *with* People v. Wharton, 809 P.2d 313, 314 (Cal. 1991), *cert. denied*, 112 S. Ct. 887 (1992).

59. *See Wharton*, 809 P.2d at 306-14.

60. *See* CAL. EVID. CODE § 911 (West 1966) (setting forth general rule regarding privileges); *Wharton*, 809 P.2d at 345 n.2 (Mosk, J., dissenting).