

Utilizing Therapists to Obtain Death Penalty Verdicts

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As a result of recent decisions by the United States and California Supreme Courts, therapists now have been placed in a position in which they can be forced to testify in death penalty cases for the only purposes of achieving a conviction and a death penalty verdict. Zeal for the death penalty seems to have overcome any concern for the ethics of psychiatrists or even for the welfare of society. In California, therapists can now be forced to testify against their own patients in capital cases even if the patient does not tender his mental state as an issue, despite the presence of a psychotherapist-patient privilege in the state for criminal matters. In California, the only option for therapists who wish to treat potentially dangerous patients may be to conduct the therapy under the umbrella of attorney-client privilege. Otherwise they may not be able to avoid serious ethical problems and personal danger if the patient actually does kill someone during or after therapy. They may be unable honestly and ethically to treat such patients without obtaining truly informed consent to therapy under these potentially "undercover policeman" circumstances. Hopefully, professional organizations will take a more activist position, and courts will appreciate the folly of these decisions and reverse them. Otherwise, they may spread to other states, for which California frequently sets precedents.

Recent judicial decisions now are placing treating psychiatrists in a position whereby they can be forced to testify in criminal cases about information divulged during therapy sessions, even if the death penalty is the sole purpose for obtaining their testimony. Any jurisdiction without a psychotherapist-patient privilege already has this potential, but the law generally has recognized the need to balance the welfare of individ-

uals against the welfare of society. However, the new decisions have created a situation whereby confidentiality and privilege are sacrificed for the sole purpose of obtaining a death penalty verdict, even after all danger to others may have dissipated.

In California, a statute intended to permit testimony at civil commitment hearings¹ gradually has been distorted by the California Supreme Court until it now has been changed beyond any recognition to permit testimony in criminal cases. This interpretation was made despite the presence in California of a psychotherapist-patient privilege for criminal matters. Considering that most states have a statute permitting testimony by

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therapists at civil commitment hearings, the precedent set in California could be followed by many other states if similar "reasoning" is employed. The development is not necessarily relevant solely to California.

The *Tarasoff*² and *Lifschutz*³ rulings were California Supreme Court decisions having applicability only to California, but they soon impacted other areas of the country. The patient litigant exception to privilege articulated in *Lifschutz* has been accepted in most other jurisdictions; but, at least in these decisions, the patient usually retains control over waiving the privilege. The patient can decide whether to raise a psychiatric issue or defense. However, states have taken differing approaches to the "*Tarasoff*" duty to potential victims. Not all jurisdictions have found such a duty to protect. Nevertheless, concern about a potential duty to victims has spread throughout the country. Such worries sometimes lead to counterproductive measures that can prove harmful to many, including potential victims. The seeming acceptance in recent years by patients and the psychiatric profession of the above decisions and their consequences and the lack of much relevant research data unfortunately may give the courts the impression that violations of therapist-patient confidentiality are not a serious problem, and that concerns previously expressed by professional organizations were unwarranted.

Although controversy exists about the proper role of forensic psychiatry in death penalty cases,⁴ forensic practitioners who believe either from personal or

professional perspectives that participation is unethical usually have control over whether and how they wish to become involved in these cases. However, it has been generally indisputable that the role of a treating therapist is to help patients and not to kill them. Moreover, the recent decisions potentially turn the therapist into an "undercover policeman," who obtains damaging information without the legal need even for a Miranda-type warning. This information often is obtained by engendering a false sense of trust that now can be used against a patient, even to obtain a death penalty verdict.

Recent Judicial Decisions

An example of the new judicial decisions that can force therapists to testify in a manner to produce a death penalty regardless of their personal ethics occurred on a national level recently in the United States Supreme Court holding in *Payne v. Tennessee*.⁵ In this decision, the Court reversed positions taken by it only two years earlier. The Court decided that victim impact statements could now be used to prove aggravating circumstances to obtain a death penalty. A battle of the experts about the presence of posttraumatic stress disorder in a victim may become a new issue.⁶ A therapist may now be called to testify about the impact of a capital crime on his patient. Although such testimony may be therapeutic for the patient who may wish the therapist to testify, such participation may violate the therapist's own sense of ethics in that it would be offered for the sole purpose of obtaining

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a death penalty for the offender. Unlike the forensic psychiatrist, the treating therapist is unlikely to know he is becoming involved in a death penalty case until it is too late. Moreover, since the privilege is the patient's, the therapist in such a dilemma may have no legal choice other than to risk contempt or to persuade the patient not to permit the therapist to testify by utilizing privilege.

Even more chilling though is a recent series of decisions by the California Supreme Court that have encouraged the use of therapists essentially as "undercover policemen." Therapists can now be utilized not only for prevention of future dangerous acts but also for prosecution for past offenses, without the need for any evidence of ongoing danger or even the legal requirement of a Miranda-type warning. Even police detectives legally cannot obtain such information with no warning.

The California Supreme Court in 1983 ruled in *People v. Stritzinger*⁷ in child abuse cases that there is no privilege for the information leading to a child abuse report and the statutorily required data the therapist knows, but the privilege is otherwise retained. Although Judge Mosk, writing for the majority, appreciated the need for confidentiality after the child abuse report to enable therapy to occur, he did not seem to anticipate the feeling of betrayal and resultant damage done by permitting the therapist to testify against the patient in a later criminal trial. The information could be used to prosecute the offender, despite the presence in California of a statutory psychotherapist-patient privi-

lege for criminal cases, and a constitutional right to privacy for therapy, found by the court in the *Lifschutz* case.³ The basis for the decision in the *Stritzinger* case⁷ was the California Child Abuse Reporting Act⁸ that does, in fact, clearly state that there is no privilege in these cases. This ruling, in effect, extended the clear overriding and indisputable rationale that the value of protecting children is more important than the value of confidentiality. It is much more questionable to violate confidentiality if the sole purpose is prosecuting the offender, regardless of the best interests of the child. It apparently is assumed in *Stritzinger* that prosecution of the offender is necessarily in the child's interest. The decision does not clarify whether privilege is obviated only when prosecution is necessary to protect a child. The decision also does not limit the prosecution from calling the therapist to testify if the testimony is relevant even if the information could be obtained by other means that would better protect a patient's privacy. The advantages of this option are not mentioned in the statute or considered in the decision.

Several recent California Supreme Court decisions expand on *Stritzinger*⁷ and some appellate decisions, to apply to death penalty situations, in which no statute clearly obviates privilege. The holdings that will be discussed permit the use of a treating psychiatrist's testimony for the sole purpose of obtaining a death penalty verdict. These decisions have been derived from strange novel "reasoning." Hopefully, the folly of these current decisions will be recognized as

dangerous both for therapists and for society. Perhaps the court could reconsider as it did with its first *Tarasoff* ruling, or professional organizations will take a stronger position and not dismiss these developments as having relevance only for California. Legislative action might be necessary. The Court's reasoning is complex and logic questionable and, consequently, is difficult to follow. The decisions represent misguided social policy and priorities. They are likely to prevent many patients from obtaining treatment to help control violent acts.

The rulings do not represent unusual California statutes. Instead they represent unusual convoluted court interpretations of innocuous or irrelevant statutes by a court apparently determined to undermine therapist confidentiality whenever testimony is relevant—disregarding any sense of balance. Literal interpretations of the statute are taken out of context. Although the court made some limited effort to protect confidentiality, they seem unaware of their negative impact on honest effective treatment of potentially violent patients.

An apparent pro-prosecution bias combined with little respect for therapist-patient confidentiality could provide a precedent for other courts that are similarly inclined. These maneuvers are especially striking since the same California Supreme Court has rejected provisions that would enable attorneys to issue *Tarasoff* type warnings that could stop future crimes even on a permissive basis.⁹ Attorneys in California are forbidden to do so even if they desire to do otherwise.

The current California Supreme Court rulings go back to the 1991 *Wharton* decision¹⁰ that sustained a death penalty verdict, obtained primarily as a result of the testimony of two therapists who, for some reason, offered to testify for the prosecution. They did so despite their patient's objection and despite the patient not wishing to raise his mental state as an issue. The patient had sought mental health counseling from a postdoctoral intern and from a psychiatrist to help him control himself. He stated he stayed away from guns and knives because he was afraid he might use them on himself or others. He told the intern therapist he was afraid he could lose control and hurt the potential victim when he had a headache or was drinking alcohol. Because of a history of violence, alcohol, and drug use, the postdoctoral intern decided to warn the potential victim who said she already knew but was unable to leave the defendant because she was lonely. When the potential victim called the psychiatrist to complain about medication, he recommended that she see a former therapist to help her leave. There is no mention of any warning to the police. The defendant later killed her and confessed to the police that he had been drunk when he committed the crime.

In this case, there is no evidence of any continuing ongoing danger since the defendant was incarcerated and his confession to the murder itself would have ensured a lengthy prison term. The therapists, represented by county counsel, unexplainedly joined the people's motion to testify about information that

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the defendant alleged to be privileged. As stated by Judge Mosk in his dissent, the only arguable basis at all for speculation as to premeditation and deliberation necessary for first degree murder and the death penalty in this case was laid by the therapists' testimony. Even that evidence was very weak since the defendant had come for help to control himself; however, the California Supreme Court did not consider its role to review the evidence.

In admitting the therapists' testimony, the California Supreme Court relied on a statutory exception to the psychotherapist-patient privilege¹¹ section 1024, enacted in 1965, about a decade before *Tarasoff*. This section states, "there is no privilege under this article 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." The court clarified it was not a matter of waiver of privilege, but under the statute there is no privilege if the predicated conditions apply.

The court ignored the fact that this is a privilege section that refers to the need to disclose the information in a judicial or other legal type proceeding whose limits and parameters are controlled by the courts and legislature and not an issue of confidentiality, referring to psychiatric ethical requirements whose limits and parameters are determined by the medical and psychiatric professions. Confidentiality and not privilege is rel-

evant to the need for disclosure elsewhere, such as to the victim. The court itself in its second *Tarasoff* decision² referred to a duty to protect and not to warn. Warning even before *Tarasoff* was an ethical option. The *Tarasoff* decision merely created potential liability for not taking reasonable steps to protect a victim. Recently, the court in the *Menendez* decision¹² accepted that if a psychotherapist-patient privilege exists, it is the patient's, and not the therapist's privilege to breach. Revelations by a therapist to a potential victim do not violate privilege. Since there was no judicial proceeding at the time of the threat, the only possible relevant need for disclosure other than to the victim might be that the information should be disclosed to the police. Such disclosures might be considered equivalent to court testimony. However, not only is there no evidence that any police notification was made or necessary in the *Wharton* case, but police notification rarely meets the statutory requirement of being "necessary to prevent the threatened danger," or even of being helpful. Recent legislation encouraging police notification and warning of potential victims was intended to limit soaring *Tarasoff* liability.¹³⁻¹⁵ Despite notification of police as an option to discharge potential liability, the police are limited in what they can do to control possible dangerous acts in these situations. Notifying police is also mentioned in the *Tarasoff* case itself² as one option to discharge the duty to protect.

A possible relevant interpretation would be that the need to notify some-

one despite the absence of a relevant legal proceeding would obviate privilege. Such an interpretation though seems unusually convoluted. An absence of privilege in the nonexistent legal proceeding or need to violate confidentiality outside a legal proceeding waives privilege for an actual later legal proceeding when the danger no longer exists. Alternatively, an evidence code section admittedly intended to permit testimony for civil commitment cases to prevent future dangerousness has been distorted to obviate privilege in a later criminal case when danger may no longer exist it was present at an earlier time, and the patient also had the poor judgement to seek out and trust a therapist. Another problem that generally had been ignored but eventually provided a basis for the *Wharton* decision¹⁰ is the apparent confusion in the California Appellate Courts between confidentiality (an ethical issue) and privilege (a legal right).¹⁶ This confusion dates back to the *Tarasoff*² case itself, in which it was asserted in a footnote that the absence of privilege in a nonexistent legal proceeding provided a necessary justification for violating confidentiality in a nonjudicial proceeding, such as to a potential victim. Previously, this confusion was likely of little import since in recent years even before *Tarasoff*, it had been professionally and ethically permissible to violate confidentiality, if necessary to prevent a future dangerous action. However, in the *Mavroudis* case¹ in 1980, the California Appellate Court in a *Tarasoff* type civil suit against the therapist, gave parents a right to obtain records of their son's treatment

after the son attacked his parents with a hammer. The appellate court ruled that the trial court should have reviewed the records in camera to see whether a privilege exception existed, by looking for evidence for the dangerous patient exception to privilege at the time of treatment. This decision at the appellate level apparently also confused the possible need to notify the parents and violate confidentiality, with a lack of privilege in a nonexistent legal proceeding. It overcame privilege at a later time when only therapist liability and not future danger was the issue. The interpretation facilitated suing therapists by allowing victims to obtain otherwise privileged information without the patient's permission. The court seemed to consider therapist liability as more important than patient confidentiality or privilege, but confused privilege with confidentiality.

In the *Wharton* case,¹⁰ the California Supreme Court has extended the confusion in a much more serious way. The court held that the therapist's need to violate confidentiality in a nonjudicial setting somehow met the predicate of the dangerous patient privilege exception, despite the section's reference to privilege and therefore to a legal proceeding, even though no legal proceeding actually existed at the time disclosure was made. The court apparently has interpreted the section 1024 exception to apply to a later disclosure in a judicial setting if at any prior time a therapist considered or should have considered a patient dangerous and that disclosure of the communication to anyone in any

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setting at any prior time was necessary to stop the danger. There was no need to communicate the information at the trial in the *Wharton* case to prevent danger since the defendant had confessed to the murder and no present or future danger was in question. Moreover, the *Mavroudis* court¹ acknowledged that the actual purpose of the section 1024 exception was to allow testimony at civil commitment hearings. Most, if not all other states permit such testimony, sometimes by a statute.

The California Supreme Court majority decided in the *Wharton* case that the information and conversations that triggered the *Tarasoff* warning were discoverable as were the professional opinions and diagnoses. Excluded were any statements in therapy that did not trigger the warning. Two dissenting judges opined that a communication should remain privileged unless it was necessary to prevent a threatened danger. Since in this case the victim already knew about the danger, privilege should have applied. In another dissent, Judge Mosk stated the majority had ignored the clear meaning that the section 1024 exception refers to future harm. Since the threat of harm had ceased to exist, the reason for the exception evaporated. Confidentiality therefore should be paramount. By a strange twist of reasoning, unlikely to be used by even a semirational defendant, the majority, in contrast, stated that were they to adopt this interpretation of the statute, "a dangerous patient could regain the protection of the privilege by simply killing his victim." The court thereby claimed that such an "absurd"

result could not be a correct interpretation. However, it is difficult to understand why any defendant who merely threatened a potential victim and therefore had no privilege but also needed no privilege since no crime had been perpetrated, would kill a victim merely to regain a privilege he did not need.

In the very recent *Menendez* decision,¹² Judge Mosk accepted the *Wharton* ruling, in which he had dissented, and wrote the opinion for a unanimous decision. In this case, the *Menendez* brothers murdered their parents. Two months after the murders, the younger brother made an urgent appointment with the therapist. Sensing a possible confession and information that could leave him vulnerable to personal danger, the therapist allegedly arranged for his business associate and lover to pose as a patient in the waiting room. The defendant, however, confessed during a walk with the therapist in a nearby park that he and his brother had murdered their parents. Since he planned to tell his older brother about his confession, the therapist wanted to observe the older brother, whom he said he considered far more dangerous than the younger one. Therefore, he arranged for the older brother to come in. When the older brother allegedly declared they now had to kill the therapist, the latter claimed he disclosed his fears for the safety of his loved ones to a woman who claimed to be his business associate, paramour, and former patient.

The therapist explained he made audiotapes of one session and of the notes from the other sessions to secure his own

safety. He told the brothers that the sessions were confidential but would not be so if the defendants threatened him or anyone else. Further, he told the brothers that if anything happened to him or anyone in his family, the tapes had been duplicated and placed in three different locations and would be given to the police.

A month later, the defendants consulted an attorney and gave the therapist permission to talk with him. The therapist considered the current danger to have dissipated. However, three months later the therapist broke up with his lover and she reported everything to the Beverly Hills police. They obtained a search warrant, confiscated the tapes, and used the information therein to arrest the brothers. The state wished to use the tapes at the trial. The California Supreme Court clarified its position as consistent with *Wharton*¹⁰ and accepted part but not all of the appellate court ruling in the *Menendez* case.¹² They clarified that a *Tarasoff* warning meets the criteria for section 1024 privilege exception if there is a reasonable cause for the psychotherapist to believe that (a) the patient is dangerous and (b) disclosure of the communication is necessary to prevent any harm. It is not necessary that the patient be dangerous to someone other than the therapist nor does it demand that the therapist actually make a disclosure. The exception is keyed solely to existence of the specified factual predicate, namely, reasonable cause for the belief for the dangerousness of the patient and the necessity of disclosure. Some tapes therefore were ruled to be

privileged and others were not. The court again clarified that it was not a question of a waiver of privilege but whether privilege existed at all. The court extended its precedent in *Stritzinger*⁷ for child abuse reports and *Wharton*¹⁰ for relevant preceding data, finding that privilege was nonexistent for the entire session that required a communication, and not merely for the warning itself, thereby making the therapist a potential important prosecution witness. Despite retaining privilege for the other sessions, the Court does not seem to have appreciated that it has precluded any possible honest therapy with potentially violent patients or any meaningful continued therapy or trust by a patient toward a therapist who is used to testify against him at a criminal trial. The Court seems to have confused the undisputed priority to prevent future danger with the much more questionable wish to punish an offender for a past crime.

In the *Menendez*¹¹ ruling the court reversed its previous position in the 1990 *Clark* case¹⁷ in which it had ruled that revelation of information to a potential victim by a psychologist waived the privilege by making the information no longer confidential. The unanimous court in *Menendez* agreed with Judge Mosk's dissenting view in *Clark*, to the effect that the old eavesdropper rule had been repudiated. Now privilege was clarified as including a communication that never, in fact, remained confidential, but nevertheless was made in confidence, with the patient's belief that the information's transmission disclosed the

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information to no outside third person. Privilege does not require the communication to be and remain confidential.

The court disagreed with the appellate court¹⁸ that the motives for treatment were relevant. The decision held that motive is largely if not totally immaterial. The court stated psychotherapists sometimes are motivated by self-interest to earn a living, and patients are motivated by self-preservation as when struggling to resist suicidal or antisocial conduct. The dispositive fact, according to the decision, is what the participants do and not why.

What Can Be Done Now?

What can therapists do now to (a) maintain the privilege for their patients in a possible future criminal proceeding, and (b) not be forced legally to testify against their patients? Unfortunately, the problem may be a lost cause in states or jurisdictions with no psychotherapist- or physician-patient privilege for criminal matters. In California, it is possible that if the patient himself contacted the potential victim and thereby diffused the danger it would not meet the *Wharton* dangerous patient exception to privilege. The court, in its decisions, has limited the application of section 1024 privilege exception to those *confidential* communications that triggered or should have triggered a warning. No disclosure of *confidential* information would occur if the patient already had communicated the information himself to the intended victim. If the therapist has good reason to believe the patient is no longer dangerous, there would be no need for the

therapist to make a disclosure. It also might be more therapeutic to have the patient himself tell the victim. However, in its current zeal to undermine the privilege, it is possible that courts might decide that the exception was already triggered during the few minutes until the patient notified the intended victim, or the court may decide that privilege was somehow waived by the patient's informing the intended victim of his feelings, though the information he told the therapist was considered confidential by the patient.

Therefore, it would be more certain that privilege in a possible future trial could be maintained, if therapists suggested to potentially dangerous patients that they contact an attorney to protect their rights against self-incrimination before working therapeutically on the problem of possible future dangerous behavior. The therapist could conduct the therapy under the protection of attorney-client privilege. The attorney could request the therapy and perhaps periodic reports. The therapist would need to take care not to give the patient the impression that violent behavior was expected, but only that the therapist was taking what might become a routine measure to ensure privilege and absence of self-incrimination under these circumstances. The California Supreme Court in the *Clark* case¹⁷ clarified that the attorney-client privilege is almost absolute and survives a *Tarasoff* warning made by a psychologist who had been hired under it. The attorney-client privilege has an exception only for advice to enable commission of crime or fraud.

The therapy, therefore, should be privileged if it could be conducted under the protection of that umbrella. However, it is unclear that the court will allow a patient's rights to be protected in this manner.

Patients in California or in any other state that might adopt the California court's strange reasoning probably also should be advised not to request a writ of habeas corpus for release from an involuntary mental health hold nor request a civil commitment hearing. Instead, they should attempt to be voluntary patients, since the dangerous patient exception *was* intended for civil commitment hearings, and testimony in a civil commitment hearing would appear even more clearly and legitimately to meet the dangerous patient exception as articulated by the court in *Wharton*.¹⁰ If the patient later committed a crime related to the reason he had been involuntarily hospitalized, the privilege would seem to have become nonexistent for all future judicial proceedings, consistent with the *Wharton* reasoning, since communication in court was necessary to "prevent the threatened danger." At the present time, I am not yet aware of any such case, but the logic seems inescapable. Perhaps, even testimony at California's more informal probable cause hearings, required for all involuntarily hospitalized patients, might obviate the privilege if the patient were hospitalized as a danger to others. Therapists who testify in these situations also seem at risk for being forced to testify against their patients should a later criminal act occur.

Summary

The California Supreme Court has taken a major and chilling step toward turning therapists into "undercover detectives" who are in a unique position of being able to extract damaging and even life-threatening confessions and statements from their patients who trust them. Both therapists and patients may be unaware of this possibility. There is not even the legal requirement expected of police officers to give a *Miranda* warning, or of psychiatrists in forensic death penalty examinations to explain the nature and purpose of the evaluation,¹⁸ articulated by the United States Supreme Court. The California decision utilizing reasoning approaching sophistry has gone contrary to the clear legislative intent of the psychotherapist-patient privilege for criminal proceedings and has continued to read more and more into an innocuous statute. Hopefully, other states will not follow this dangerous precedent that undermines previous legislation with confused concepts and reasoning. It is urgent that therapists and their organizations make every effort to persuade the courts or legislature to recognize the error and folly of the recent rulings. The complexity of the so-called reasoning in these decisions, for some readers may lead to difficulty in understanding the lack of expected logic. It would be too easy to blame the decisions on the specific California statutes that in no way resemble what the court has read into them. Such judiciary-created distortions of law could occur in any state since most have similar statutes for civil commitment.

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Although according to the APA it is ethically permissible to follow the law,²⁰ some therapists may now consider their only truly ethical alternative to be contempt of court and a possible jail term if they are forced to testify against their patients. In some cases, lack of relevance of the testimony could be argued. Although many were concerned and wrote about the dangers of *Tarasoff*,²¹⁻²⁵ there is a relative dearth of reaction to the new decisions despite their strong potential for danger to therapists, patients, the public, and the profession.

Undertaking treatment of dangerous patients in California now has become personally as well as ethically much more dangerous for therapists. Patients who have committed a possible death penalty offense may soon learn that as a result of the *Wharton* decision it is to their legal advantage to murder their former therapist who may be the only one who can provide the evidence needed to obtain a death penalty verdict against them. Lest this be thought unlikely, in the California *Clark*¹⁷ case, the defendant was described as planning to find a prisoner near discharge who would kill the former therapist's brother as retaliation. Thus, even an incarcerated defendant with financial or criminal connections may be able to arrange for the therapist's murder. Unlike a forensic psychiatrist, the therapist in such cases may be in a unique position to provide damaging testimony. Once therapists, with or without forensic experience, become aware of the potential ethical and physical dangers confronting them if they treat a potentially danger-

ous patient, it is likely to become much more difficult for such patients to obtain treatment, with resultant increased danger to society. Therapists are especially likely to avoid such treatment after a therapist is killed or held in contempt of court.

The apparent zeal for punishment and the death penalty shown by the California Supreme Court seems to have overcome any true concern for the welfare of individuals, the protection of society, or any respect for legislative intent. What possible meaningful remnants can remain of psychotherapist-patient privilege in criminal and especially in death penalty cases if the therapist can be forced to violate the patient's trust and testify against the patient's welfare and wishes even in regard to life itself? This trend is more remarkable since the same court recently has forbidden attorneys to violate confidentiality to prevent future harm, even a murder,⁹ even if the attorney wishes to do so. "*Tarasoff*" warnings by attorneys in California are not even permissible since the court recently, without explanation, rejected a proposed change in the State Bar Rules of Professional Conduct that would have permitted them on a permissive basis. Legally, the California Supreme Court was required to sign off on the new rule changes that had been developed after three years of work. Unlike its revolutionary decisions clearly violating legislative intent, and almost destroying a psychotherapist-patient privilege for criminal matters, the court apparently left even a minor permissive change for attorneys to the legislature. Since the

court could have ruled otherwise, both for therapists and attorneys, historical tradition cannot provide the primary explanation.

If the *Tarasoff*² or *Lifschutz*³ cases are any indication, California court decisions frequently spread to other jurisdictions, so there is a realistic danger that the *Wharton* and *Menendez* decisions will spread. Psychiatrists in other states with a psychotherapist-patient privilege for criminal matters should be concerned. Most papers published to date^{26, 27, 30, 31} have focused primarily on the aspects of these cases related to *Tarasoff* warnings. The psychiatric profession has had little reaction to the current legal threats, perhaps because *Tarasoff* has proven to be less of a problem than originally feared. However, *Tarasoff* most likely did not have a great impact on therapeutic treatment; because even prior to it, responsible therapists always had attempted to protect their patients from the serious consequences of dangerous actions.²⁸ Ethically, even the 1957 AMA principles permitted confidentiality violations "to protect the welfare of the individual or of the community."²⁹ The section 1024 privilege statute was irrelevant to warning outside a legal proceeding since psychiatric ethics already permitted such warnings on a discretionary basis.

The California Supreme Court seems to have become so accustomed to regulating psychiatric practice that it has forgotten that most aspects of psychiatric practice and ethics are determined by the psychiatric profession itself. The *Tarasoff* case itself merely created poten-

tial liability for failing to take measures to protect a victim. Such actions including violations of confidentiality already were ethically permissible and not prohibited by law for outpatients. The *Tarasoff* decision did not create serious problems because the "duty to protect" permitted measures therapeutic to a patient in order to protect a potential victim. Therapists benefitted their own patients as well as the intended victim by employing means such as hospitalization to preclude the necessity for a *Tarasoff* warning in most instances. However, some frightened therapists who resort too frequently to counterproductive useless warnings may have driven patients away from therapy and much needed help. We have no data to answer these questions, and it is folly merely to assume this problem never occurs since clinical experience would suggest otherwise.

Any competent potentially dangerous and appropriately informed patient now should refuse, at least in California, to give his therapist any potentially incriminating evidence. If he does give such evidence to his therapist, serious questions should be raised about his competence to enter therapy or whether he has been adequately informed. Therapists should not forget their ethical duties to protect their patients and should not become "undercover detectives" who lure patients into trusting them and revealing things that can be used to prosecute and even execute them. These very serious attacks upon therapist credibility with patients and distortion of the helping role of therapists must be countered

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to allow potentially dangerous patients to be treated with integrity, safety, and honesty. Unlike previous decisions eroding psychotherapist-patient privilege, the current decisions preclude good honest treatment of these patients. As they become more aware of the problems, the ability to treat such patients is likely to diminish with resultant increased danger to society. Because these decisions permit testimony against a patient at the death penalty phase even if no "Miranda" warning was given, they may run counter to the United States Supreme Court decision in *Estelle v. Smith* (19).

Unless these decisions are reversed, it may become ethically, even if not legally necessary, for California therapists to warn patients entering therapy that confidentiality and privilege cannot be assured if a situation arises that may reasonably cause a therapist to think a patient is dangerous (whether or not the therapist actually considers the patient to be dangerous), and if disclosure to anyone was later considered to have been necessary to prevent the danger (whether or not the therapist actually makes such a disclosure). If circumstances such as these seem even to present a possibility of becoming a future issue, the competence of patients to consent to psychotherapy should be evaluated with an attempt made to assess whether a patient fully appreciates the risks to him of having no privilege for discussions with the therapist should he be reasonably perceived as dangerous. This lack of privilege would become significant, if he ever later acted dangerously. Competence may need reevalu-

ation when the patient has come to trust the therapist, to determine if slippage of the original warning has occurred. Since danger is so difficult to predict, perhaps every patient would need a warning with the consequence of seriously impeding therapy. Patients wishing help now should be informed of this important risk. To ensure truly informed consent, patients, especially if they may meet the privilege exception described above, at least in California, now at least ethically need to be warned, chilling as the effect on therapy would be. The warning to patients should include information that anything they tell their therapist could be used in *any* future legal proceeding to convict or conceivably even to execute them.

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