Editor:

I read with interest Dr. Weiner's article[1] describing two prosecutions of patients because of the actions of their psychiatrists under compulsion of California's *Tarasoff* statute[2]—namely, reporting a criminal threat[3] (or "terrorist threat," as it is styled in some jurisdictions).

In one of Dr. Weiner's cases, Ms. B. began experiencing homicidal thoughts, without a realistic plan, toward a judge presiding over a minor infraction case against her. "[C]oncerned about the violent thoughts,. . .she took a bus to a local hospital and asked to be seen in psychiatric emergency services" (Ref. 1, p 240). Instead of extending care—for example, admitting her and observing for the presence of persisting violent ideas 72 hours later—the staff inoculated itself against a lawsuit, at her expense: "[I]n accordance with *Tarasoff*, [they] notified the police and warned the judge. Later that night she was arrested and transferred to the county jail, charged with making criminal threats" (Ref. 1, p 240), subsequently "serving several months in jail."

Ms. B. was a patient who reached out for help, and her psychiatrist instead gave her handcuffs. This is what is wrong with *Tarasoff*.

In the other case, Mr. A., with a blood alcohol level of more than .32, made suicidal comments and also expressed homicidal thoughts about his ex-girlfriend. Evidently, so unnerved by potential duty-to-warn liability, "[a] psychiatric nurse. . .notified the police" without waiting to see how the patient might feel after his near-lethal intoxication level resolved a bit. Mr. A. was arrested (again, "later that night"), was found guilty of making a criminal threat, and was "sentenced to several years in state prison" (Ref. 1, p 240). Significantly, the trial judge found that Mr. A. had intended his homicidal ideation to be divulged to his ex-girlfriend by the psychiatrist.

Mr. A. is thus an individual adjudicated to have purposely exploited psychiatric emergency personnel to carry out his criminal harassment of a third party. This is what is wrong with Dr. Weiner's "possible remedy[:]. . .to amend the criminal threats statute. . .[to] exclude threats expressed in the context of a mental health evaluation. . ." (Ref. 1, pp 240–1).

The necessary, albeit somewhat artificial, premise of all law is that the public knows of it, else how could it have any effect, good or, as in *Tarasoff*, bad: "inhibit[ing] [patients] from making revelations necessary to effective treatment" (Ref. 1, p. 240, quoting Justice Clark, dissenting in *Tarasoff*). As such, the proposed statutory exemption would invite every antisocial grudge-holder to launder his threats through a psychiatrist and thereby to harass his victim with impunity.

The duty to warn makes mental health professionals instruments of the police, with no demonstrated benefit to individual patients or to society. For me, this makes it plainly an untenable law.

Further complicating (and shoring up) the duty to warn, by resculpting an unrelated criminal statute, is in theory objectionable as a peripheral compromise that implies acceptance of the illegitimate core. Worse, practically, it would make mental health professionals, additionally, instruments of criminal harassers.

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2. Cal. Civ. Code § 43.92 (West 2002)
3. Cal. Penal Code § 422 (West 2002)

Editor:

We would like to comment on Dr. Weiner's concerns that *Tarasoff* warnings result in criminal charges and subsequent diversion of psychiatric patients into the criminal justice system.[1]

In Canada, we have had the luxury of observing U.S. developments before approaching the problem.[2] Eventually the Supreme Court ruled on a case involving not only doctor/patient confidentiality but also solicitor/client privilege. The court addressed the duty to warn but not explicitly the duty to protect.[3] The court noted that it was inappropriate for them to consider the exact steps that an expert might take to prevent harm to the public[4] making it clear that a sensible, proportioned approach was acceptable.

The Canadian Psychiatric Association has, therefore, published a position paper[5] based on these developments that provides some discretion to the phy-

sician and explicitly leaves open the possibility of civil mental health commitment as a course of action that protects the public and safeguards the well-being of the patient. We believe that this flexibility serves all parties well.

We would be interested in the comments of your readers regarding this typically Canadian solution.

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5. Chaimowitz G, Glancy G: Duty to protect. CPA Position Paper. Can J Psychiatry 47:1–4, 2002

Editor:

We developed the Slater Method in part because of the challenges of deinstitutionalization and criminalization of persons with mental retardation (MR) who are incompetent to stand trial, and the result has been an ability to commit many incompetent-to-stand-trial defendants with MR to the community while demonstrating to the courts that we are making an effort at competency restoration. Dr. Ronald Schouten, in his commentary on the Slater Method,[1] suggests that our training program results in incompetent individuals' merely appearing competent, and examiners unwittingly, or perhaps even deliberately, "endorsing" incompetent defendants as competent. His ensuing real-world scenario is that indifferent defense counsel, unreasonable prosecutors, and unenlightened judges—none of whom is willing to provide accommodations for defendants with disabilities—send passive defendants with MR who are mislabeled as competent to a terrible fate. We want to address several of Dr. Schouten's points:

1. Completing the Slater Method program equals competence.

Dr. Schouten comments that "individuals who go through" the Slater Method could be "endorsed as CST [competent to stand trial] by forensic mental health professionals." However, completing the training and education process, which includes rote learning, is not synonymous with achieving competence. Competency can only be determined subsequent to the Method's training program by a separate, independent assessment by a forensic examiner. This assessment is the same competency evaluation that persons with normal intelligence receive. While the Slater Method is a vehicle to help restore persons with MR to competency, it is not always successful in achieving that aim. Our results so far indicate that we still recommend most of these defendants with MR to the court as incompetent, even after repeated attempts at restoration. Dr. Schouten's dramatic concerns notwithstanding, our experience shows defendants are not "launched" into court mislabeled as competent. In addition, for those who are restored to competency, any remaining trial-related impairments are communicated candidly to the court.

2. Persons with MR can memorize significant amounts of information without developing understanding.

Dr. Schouten comments that "[m]eaningful defense of oneself against criminal charges requires more than memorization of concepts and behavior through repetition, memory aids, and organizational strategies" (Ref. 1, p 204). He implies that persons with MR go through the Slater Method memorizing significant amounts of information without developing understanding, which in turn, makes them only appear competent. Level of processing is important in storing new memories, and the population with MR is not as homogeneous in this regard as Dr. Schouten assumes. Superficial processing (or "rote memorization," the act of simply repeating information over and over without thinking about it) makes it more difficult to store and retrieve newly presented information. Thinking about information in ways that allows one to form associations or relate the material to one's own experiences constitutes a deeper level of processing, which makes it easier to remember the material later.[2,3] Persons with MR demonstrate decreased capacity and efficiency in learning new material. Thus, for persons with MR to learn enough information to demonstrate competency on independent examination, it is unlikely that rote memory alone is at work. Some deeper level of understanding must be present to learn the significant amount of material that would be necessary to establish competency.

3. Moving through the Slater Method program makes it easier to be found competent under Dusky.

Dr. Schouten implies that moving through the Slater Method program makes it easier to be found competent under *Dusky*, since defendants with "minimal understanding [enter] a criminal justice system where their fates will be decided without any meaningful participation by them" (Ref. 1, p 203). There is nothing about the Slater Method that either reduces the *Dusky* standard of competency or makes it easier to "pass" as competent. While Dr. Schouten appears to take issue with the competency criteria established in *Dusky*, and while it is the case that many minor charges are adjudicated without a trial, it does not follow that this program is designed to weaken the *Dusky* standard or to plead out cases by allowing incompetent persons to participate in court.

4. There should be a more rigorous standard than Dusky *for the population with MR.*

Dr. Schouten states that the restoration of defendants with MR "may lead to apparent attainment of the technical standard for competency to stand trial without developing the level of understanding necessary to be an informed participant in the trial process" (Ref. 1, p 202). We agree that the *Dusky* standard is far from perfect. But *Dusky* is the standard, and clients with MR are held to that standard—no less, and no more. The fact that we suggest to the courts ways to enhance these defendants' participation, to optimize performance, does not mean that we are rewriting the standard. Assessing an individual's mental capacity to stand trial is separate from the willingness of a particular court to provide accommodations for anyone with MR or otherwise who appears before it. In our experience, judges and defense attorneys are concerned about defendants with MR, and they follow these cases with particular attention and care. We have noticed that attorneys are often frustrated at having to take additional time with such clients. We merely offer these suggestions in the hope they will be helpful to the judicial process.

Guaranteeing that every incompetent defendant with MR will be declared competent is not the driving aim of the Slater Method. The goal is to provide consistent education toward competency restoration, no matter where defendants are located in our care system; to communicate that effort to the courts; and to continue to make accurate competency assessments. The forensic commitment of incompetent defendants with MR, the rising arrest and incarceration rate, and the trend in mental health services to community-based treatment present major opportunities to state mental health agencies. A way of providing services for the population with MR has to be built on realistic assessments about the competency paradigm, about learning, and about the judicial system.

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