The Duty to Warn: A Reconsideration and Critique

Paul B. Herbert, JD, MD

J Am Acad Psychiatry Law 30:417–24, 2002

A previous article in this Journal[1] surveyed a psychotherapist's legal duty to warn third parties of violent threats made by a patient. Twenty-seven states impose an actual duty to warn (as did the seminal case of *Tarasoff v. The Regents of the University of California*[2] itself): Arizona, California, Colorado, Delaware, Idaho, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin. Nine others, plus the District of Columbia, depart from *Tarasoff* and purport only to grant permission to warn: Alaska, Connecticut, Florida, Illinois, New York, Oregon, Rhode Island, Texas, and West Virginia. However, no two states approach the issue exactly the same way, and the legal schemes of many impose a substantial burden of guesswork on clinicians (not least because several of the "permission" states appear likely to be "duty" states in disguise). One state, Virginia, rejects *Tarasoff*. The remaining 13 states have no definitive *Tarasoff* law (although several appear to be strongly leaning toward some form of duty): Alabama, Arkansas, Georgia, Hawaii, Iowa, Kansas, Maine, Nevada, New Mexico, North Carolina, North Dakota, South Dakota, and Wyoming.

In view of this impressive degree of disorganization a quarter of a century after the genesis of the duty-to-warn doctrine, this article offers a critical reexamination of *Tarasoff* and the duty to warn.

Paul Herbert is a psychiatrist in Ventura, CA (and was a law clerk at the California Supreme Court at the time *Tarasoff* was argued and decided). Address correspondence to: Paul Herbert, MD, 1172B Pittsfield Lane, Ventura, CA 93001. E-mail: paul@mfire.com

Tarasoff v. The Regents of the University of California

The concept of a "*Tarasoff* duty" is familiar to mental health professionals and continues to be recapitulated.[3,4] However, it is not widely known what actually happened in the *Tarasoff* case itself—the facts and the court's precise holding.[5]

The Facts

Prosenjit Poddar, raised in rural India, arrived in Berkeley, California, in September 1967 to study graduate electronics and naval architecture.[6] Beginning in the fall of 1968, Poddar began romantically pursuing Tatiana Tarasoff, a community-college student who lived with her parents nearby. Tarasoff was never really interested, but cultural differences produced much misunderstanding. In March 1969, Poddar blurted out a marriage proposal, which was promptly rejected. Angry and humiliated, he returned home and voiced to his roommate thoughts of killing Tarasoff. Over the next few months, Poddar's behavior was plainly paranoid: taping telephone conversations with Tarasoff, then staying in his room for days on end listening to them, and telling coworkers that he would like to blow up Tarasoff's house.

Finally, in June 1969, Poddar's roommate persuaded him to see a university health service psychiatrist. At the initial interview, Poddar told the psychiatrist of his thoughts of killing an unnamed young woman with whom he was obsessed. Antipsychotic and sleep medication were prescribed and weekly therapy appointments with a psychologist were scheduled. Poddar kept these appointments for eight weeks, repeatedly confessing his homicidal ideas toward the unidentified woman. In August 1969, the therapist told Poddar that he would take steps to

restrain him if he continued such talk. Poddar immediately stopped coming to therapy. The therapist conferred with the treating psychiatrist (and with another university psychiatrist) and then wrote a letter to university police stating that Poddar

> . . .has been threatening to kill an unnamed girl. . . . He has told [his roommate] that he intends to. . .buy a gun and that he plans to kill the girl. He has been somewhat more cryptic with me, but has alluded strongly to the compulsion to "get even with," and "hurt" the girl. . . . [W]e concur in the opinion that Mr. Poddar should be committed for observation in a mental hospital. I request the assistance of your department in this matter [Ref. 6, p 63].

The campus police tracked Poddar down at his new apartment (very near Tarasoff's house) and interviewed him in front of his new roommate, Tarasoff's brother, about the death threats. Poddar acknowledged a troubled relationship with an unidentified young woman but denied any death threats (Ref. 6, p 63). The brother knew that the alleged threats were against his sister but did not take them seriously (Ref. 6, p 63). The officers, "satisfied that Poddar was rational, released him on his promise to stay away from Tatiana" (Ref. 2, p 341).

The university health service's chief of psychiatry, astonishingly, "then asked the police to return [the psychotherapist's] letter, directed that all copies of the letter and notes that [he] had taken as therapist be destroyed, and 'ordered no action to place. . .Poddar in [a] 72-hour treatment and evaluation facility' " (Ref. 2, p 341).

Poddar purchased a gun and began to stalk Tarasoff. One evening just before Halloween 1969, he found her at home alone and killed her, called the police, and waited to be arrested.[7]

Tarasoff's parents sued the university health service's chief of psychiatry; the psychiatrist who initially interviewed Poddar; the psychologist who saw him for the eight sessions, along with one other campus psychiatrist who had the misfortune to have taken part in one discussion about what to do at the time Poddar broke off treatment; and the campus police. Their complaint alleged that "defendant therapists did in fact predict that Poddar would kill and were negligent in failing to warn" (Ref. 2, p 345).

The Decision

The trial court dismissed the suit because no law had ever obligated a psychotherapist to warn a third party of a danger that the therapist should have divined from a patient's confidential therapeutic communications. Tatiana Tarasoff's parents appealed, and the case ultimately reached the California Supreme Court.

Commentators frequently refer to *Tarasoff I* and *Tarasoff II*. In fact, there is only one *Tarasoff* (the one called *Tarasoff II*). On December 23, 1974, the California Supreme Court upheld the parents' pleadings, reversing the dismissal and remanding the case for trial against the police and the psychotherapists.[8] The Court's basic justification was the "Good Samaritan" principle—doing an act one is not obligated to do, in this case seeking to commit Poddar, gives rise to liability if the act is done (or abandoned) negligently (*viz.* Poddar may have been made angry, and therefore more dangerous, by the attempt to commit him for the protection of Tatiana Tarasoff). The duty the Court decided to create was solely a duty to warn. An uproar ensued, particularly from the law enforcement and mental health communities. The Court took the unusual step of vacating its decision and calendaring the case for reconsideration. This time, multiple *amici* joined, including the American Psychiatric Association, the San Francisco Psychoanalytic Institute, and the National Association of Social Workers (Ref. 7, p 294 n.70).

Eighteen months later, on July 1, 1976, the Court tried again.[2] The decision issued on that date is, legally, the only *Tarasoff* decision. The opinion gives no hint that the Court ever heard the case before, and the 1976 decision extinguishes the 1974 decision just as fully as it does the intermediate appellate court's decision.[9]

On the essential question, whether a psychotherapist must, on pain of a civil suit for damages, recognize that a patient poses a risk of serious harm or death to an identified third party and then must warn or otherwise protect that third party, the Court divided four to three.

Much has been made of the change from "duty to warn" in the first opinion to "duty to warn or otherwise protect" in the second. This is a distinction with little practical difference. Clearly, aside from a warning, only hospitalization could reasonably suffice to protect a putative murder victim. Anything less surely would not wash with a jury in the aftermath of a tragedy. (If the *Tarasoff* Court had other ideas, it kept them to itself: ". . .this duty may require the therapist to. . .warn the intended victim. . . , to no-

tify the police or to take whatever other steps are reasonably necessary under the circumstances" (Ref. 2, p 340). But civil liability would attach under ordinary principles of negligence and proximate cause where a psychotherapist fails to initiate justified civil commitment proceedings (available in every jurisdiction) and an identifiable victim is harmed as a result, with or without *Tarasoff*.[10] Further, the therapists in *Tarasoff* did attempt to commit Poddar (i.e., "protect"), but the police independently chose not to hold him. What the therapists did not do was "warn." Thus, the holding is confined to the legal consequences of the failure to "warn"; all else is *dictum*. Other states generally couch the core duty as warning; some offer protecting by hospitalization but by no lesser means as an alternative (Ref. 1, p 275).

Justice Matthew Tobriner wrote the opinion for the four-judge majority in *Tarasoff* . The reasoning is convoluted and somewhat opaque but boils down to two fundamentals: (1) public policy and (2) the purported "special relationship" of a psychotherapist and patient. In the opinion's most frequently quoted passage, Tobriner stated what he perceived as the pivotal policy consideration:

> Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from concealed knowledge of the therapist that his patient was lethal. . . [Ref. 2, pp 347–8].

The "special relationship" rationale was based on the Restatement (2d) of Torts:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless. . .a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct. . . .[11]

Three justices strongly disagreed. Justice Stanley Mosk concurred with the remand solely because the plaintiffs had alleged that the psychiatrists had made an actual prediction that Poddar would kill Tarasoff. He fully accepted *amicus* The American Psychiatric Association's thoroughly documented argument that predictions of "dangerousness," even in the context of explicit threats, are woefully unreliable. As such, Justice Mosk forcefully objected to the majority's casual consignment of the issue of "negligence" in this context to juries:

> I cannot concur. . .in the majority's rule that a therapist may be held liable for failing to predict his patient's tendency to violence if other practitioners, pursuant to the "standards of the profession," would have done so. The question is, what standards. . . ? The majority's. . .rule will take us from the world of reality into the wonderland of clairvoyance [Ref. 2, p 354, concurring and dissenting opinion].

Justice William Clark, joined by Justice Marshall McComb, fortified Justice Mosk's exegesis on psychiatric forecasts of dangerousness, with references to study after study. He then thoughtfully addressed an issue substantially ignored by the majority, the cost of diminished confidentiality between patient (or prospective patient) and psychotherapist, concluding that "by imposing a duty to warn, the majority contributes to the danger to society of violence by the mentally ill" (Ref. 2, p 359, dissenting opinion) because some will be discouraged from engaging in treatment and those who do engage may not do so as effectively.

Many commentators have elaborated on the misgivings of the dissenting justices and have highlighted other weaknesses in the majority's position. Among these are the unexplained ironies of (1) declaring a professional relationship special expressly to undermine precisely that which makes it special, trust and confidentiality, and (2) finding that an outpatient psychotherapist is in a position to control a putatively dangerous person but that police officers who have detained the person for questioning are not.[12]

Tarasoff thus was a remarkable act of legal genesis in its day, even for the famously activist California Supreme Court of the 1970s. A psychotherapist would now be civilly liable in damages if a patient seriously harmed or killed a third party after giving the psychotherapist a basis on which he or she "determined that [the patient] presented a serious danger of violence to [the specific victim], or pursuant to the standards of the profession should have so determined, but nevertheless failed to exercise reasonable care to protect [the victim] from that danger" (Ref. 2, p 353).

The new rule was highly debatable on the merits, as the four-to-three split and the vigorous dissents attest. The legal reasoning was a stretch, entailing unconvincing distinctions of recent California cases and the essentially unexplained abandonment of settled California law requiring a special relationship with the victim,[11] clearly not present in *Tarasoff*. The Court went beyond the facts of the case itself (an allegation of a flat prediction of violence) to fashion

new law (liability predicated on reasonably foreseeable harm). Most fundamentally, however, *Tarasoff* was quintessential judicial legislation—law-making, grounded explicitly on policy-weighing. Such law-making is the exclusive province of elected legislatures, who can find facts and examine problems systematically and not the proper role of unelected judges, who neither possess nor can conscript the pertinent expertise.[13]

The Outcome for the Parties

The ultimate outcome of more than seven years of litigation in multiple courts for the principals themselves in *Tarasoff* was rather peculiar: no one was held responsible for the killing by any court. On remand, the civil suit was settled without trial. "It is rumored that the money involved was minimal" (Ref. 6, p 69).

As to criminal charges, Poddar was back home in India, unconvicted, long before the civil suit was finally resolved by settlement on July 1, 1977, the first anniversary of the famous decision (Ref. 7, p 294). He had been tried for first-degree murder, was convicted of second-degree (unpremeditated) murder, and had served just over five years in Vacaville prison. A new lawyer was then appointed and successfully appealed. The California Supreme Court in 1974 vacated the conviction, ruling that the trial judge should have given a diminished-capacity (manslaughter) instruction.[14]

The prosecutor elected not to retry Poddar, instead reaching an agreement that Poddar would fly home immediately to India and never return to the United States. Although perhaps debatable philosophically, this was an eminently practical disposition. Poddar could not have been convicted of first-degree murder, under double jeopardy. A reconviction of second-degree murder would probably have yielded no further incarceration, because Poddar had already served more than five years (as a model prisoner), about the average term in California at that time; and, under the new required instructions, the conviction might well have been for only voluntary manslaughter. Thus, a retrial, visiting new trauma on the victim's family and significant cost to the taxpayers, would have resulted in Poddar's remaining free and in California. Under the agreement, although not convicted, at least he would be thousands of miles away from the jurisdiction for which the district attorney was responsible.

Home in India, Poddar married a lawyer (Ref. 7, p 290).

A Critique of the Duty to Warn

One authority on the duty to warn has cogently observed:

> There is no dispute as to the controversy or confusion spawned by the *Tarasoff* decision and its progeny. Its very existence has reshaped the configurations of mental health practice. The extent to which it is both known and materially misunderstood assures maintenance and continuation of its symbolic, shaman-like status. The fact that clinicians self-report changes in their therapeutic approach (because of fear, real or imagined, of *Tarasoff*-inspired legal liability) attests to the dominance of its image [Ref. 15, p 21].

Considerations of Policy and Principle

Things have changed a great deal in society, and in psychiatry, since 1976. Involuntary hospitalization now is much more punctiliously regulated, hospital stays now are a rushed few days instead of months or years, and psychiatrists now freely divulge confidential information over the phone to employees of third-party payors (unthinkable just a few years ago but now *sine qua non* for most inpatient and much outpatient practice). It is therefore perhaps no longer easy in one's imagination to see and to feel, with balance and nuance, the clinical and ethical terrain before *Tarasoff*.

Surely, however, it is remarkable that one adult might be held accountable for another adult's deliberate criminal conduct, based on a statement made perhaps many months before. This seems an awkward fit with the basic premise of Anglo-American justice, both criminal and civil: individual responsibility. If such responsibility-by-proxy is acceptable in principle, or thought to be justified on policy grounds, one might further wonder, "Why psychotherapists, of all people?"

People may divulge violent thoughts to friends, coworkers, strangers, family. These casual confidantes may all preserve such confidence with impunity if they choose. Even a psychotherapist presumably has no duty to warn anyone of statements made by a friend or relative or by a stranger seated beside him or her on an airplane. It is only, ironically, when there is a relationship of trust and confidentiality, a physician-patient or clinician-client relationship, that the *Tarasoff* rule mandates or permits breach of the trust: "[H]ad Poddar confided his homicidal intention to a neighbor or the local barkeep, that indi-

vidual would bear no responsibility for failing to disclose the danger or prevent the tragedy, despite the absence of any ethical or legal obligation to preserve confidentiality" (Ref. 7, p 291).

It is plainly society's position, borne witness by its laws (including psychotherapist-patient privilege), regulations (e.g., professional licensure requirements) and allocation of resources, that psychotherapy is a net good—that it works or helps in some way.[16] Most would agree that confidentiality is instrumental to psychotherapy[16]; hence, the ubiquitous laws and ethics strictures sanctioning against its breach. Clearly, then, any incursion into the trust and confidentiality undergirding psychotherapy is a harm to society and, as such, is a definite loss.

On the other side of the equation, whether society gains from diluting confidentiality, the picture is blurred at best. First, despite advances in risk assessment, the newer approaches have generally not penetrated beyond forensic specialists and fall substantially short of exact science:

> Advances in understanding or predictive accuracy are more likely to come from efforts to assess the interactions among substantial numbers of variables associated with violence. . . . Prediction is similarly fraught. It is no longer reasonable to expect clinicians unaided to be able to identify the variables that may be influential for a particular person, integrate that information, and arrive at a valid estimate of the person's risk for violence. . . . [C]linicians [may] need to have computer support available. At best, predictions will involve approximations of the degree of risk presented by a person, presented as a range rather than a single number, with the recognition that not every person thus classified, even one accurately determined to be in a high risk group, will commit a violent act.[17]

More important, there is simply no way to know how and how much *Tarasoff* curtails effective psychotherapy. How many patients are not as fully forthcoming and therefore are denied the cathartic, exploratory, and supportive ministrations by which psychotherapy might temper violent urges? How many potential patients simply do not engage in, or drift away from, treatment because they cannot feel fully free to disclose what troubles them most—and therefore wander the streets without even needed antipsychotic medication to tamp their violent demons? How much and in what ways does *Tarasoff*, subtly but perhaps profoundly, alter how psychotherapists see themselves and their patients—who are, after all, walking lawsuits under *Tarasoff*—and commensurately diminish psychotherapy and weaken its impact against violence?[18] One experienced observer has commented: "Warning the putative victim of one's patient was a highly unprecedented, non-clinical idea. . . . In the author's consultative experience, this novel breach in the age-old mandate to maintain confidentiality appears to have shaken clinicians' conviction of the 'rightness' of confidentiality itself" (Ref. 19, p 346).

Thus, has *Tarasoff* diminished or increased net violence? No one knows, whereas indisputably it has diminished psychotherapy—the only question being how and how much. A shaky foundation, it would seem, for so widespread a doctrine, which has now aged into relatively casual respectability.

Some commentators perceive a judicial retreat from *Tarasoff* since about 1990.[3,15] However, most *Tarasoff* laws now are statutory, and the cases routinely cited for the decline of *Tarasoff* are mostly mere applications of particular statutory language to specific facts. No jurisdiction, in fact, has had a *Tarasoff* law on its books and later eliminated it. It is true that the expansion of *Tarasoff* stalled around 1990. On the other hand, only 13 states lack *Tarasoff*-like provisions, and several of these have case law containing pro-*Tarasoff dicta*.

Practical Considerations

Psychotherapists vary widely in their approach to *Tarasoff*. This variation is a function of many things, including practice setting, professional discipline, patient demographics, and the level of knowledge and legal sophistication of the individual practitioner. Often most telling, however, is an individual clinician's philosophical slant, or "comfort level."

A rigid legal duty that thus operates under the subtle shadings of an individual clinician's self-placement along a spectrum of community practice inevitably sets up collisions between a patient's expectations and a clinician's felt imperatives. Many therapists, after all, do not mention *Tarasoff* to their patients in the abstract, reserving explication of it to the rare cases, in most practices, when it "comes up" (Ref. 18, Note, p 184). This is not necessarily an unreasonable position, because a *Tarasoff* exegesis at the initial therapy session might well chill a patient's eagerness to discuss violent material that needs to be discussed for the therapy to work and that ordinarily would not justify a *Tarasoff* warning. However, one may sympathize with a patient who views a *Tarasoff* advisement, given only on an as-needed basis, as coming a little late, tantamount to an ambush, like

being "Mirandized" after the confession. One may wonder also whether such a patient's future therapy, with other clinicians, will be colored disadvantageously by such a surprise.

Tarasoff, in other words, does real harm and guarantees that there will occur instances of outrage and aggrievement within the delicate framework of psychotherapy, apart from whatever potential good it may do.

A jury saw it this way recently in suburban Atlanta, awarding former police officer Jack Garner $280,000 in a malpractice suit against psychologist Anthony Stone, after Dr. Stone gave a *Tarasoff* warning.[20] Garner went to Dr. Stone because of job stress, anger, and depression. At the first session, Garner disclosed that the previous evening he had imagined walking into his supervisor's office and "taking his service revolver and hitting him in the chest area and his fat gut." Dr. Stone elicited another fantasy, of a suicide in which Garner took "8 to 10 of them with me," going on to explain that "them" referred to superiors in the police department (Ref. 20, pp 95–96). Garner viewed the discussion as healthy venting, not violent intentions. It was an entirely different matter for Dr. Stone. "The *Tarasoff* warning was already on his mind as he and Garner shook hands" (Ref. 20, p 96). Dr. Stone confided his concerns to a colleague.

For the next few days, Dr. Stone conferred repeatedly with his colleague about *Tarasoff*. Meanwhile, Garner suspected that they were in touch with his superiors. Nonetheless, "[H]e wasn't done with therapy. He just no longer trusted [Dr. Stone]. Within days, Garner met with. . .a psychiatrist for a fresh evaluation." The psychiatrist found no basis for a *Tarasoff* warning (Ref. 20, pp 96–98).

Alas, Dr. Stone had already "put in a. . .call to a lawyer affiliated with the Georgia Psychological Association, who told Stone he had a 'clear duty to warn' the officials threatened" (Ref. 20, p 96), which Dr. Stone promptly did. Given that Georgia is among the states with no definitive *Tarasoff* law, this was pretty bold legal advice—and pretty bad, as it turned out.

Garner's "life changed irrevocably." His badge, uniform and gun were confiscated. He was placed on administrative leave, investigated by Internal Affairs and then reassigned to the pound, to euthanatize dogs and cats. An animal lover, Garner was sure "it was purposely done to work on me psychologically. . . . I had to clean the incinerator of the bones and the debris" (Ref. 20, pp 96–98). His requests for transfer were rebuffed, and soon he was fired for insubordination.

Garner lost his house, suffered marital difficulties, was ostracized by former friends, and ended up driving a van on the night shift for $9 an hour. Asked whether he would reveal his feelings in therapy again, he said: "It's like you go on a plane, and it says 'If you open this door, you'll be sucked out.' Are you going to open the door?" (Ref. 20, p 98)

A Suggested Approach

Tarasoff laws seem animated by the comforting notion on the part of nonpsychotherapist lawmakers that threats of violence are rare and dramatic events in the course of psychotherapy. Of course, the exact opposite is true: mental health workers must grapple with threats of suicide or of violence against others regularly as an integral part of their work. For those who work with seriously troubled patients, such statements are daily grist.

Psychotherapy is exploratory and creative, an exercise in discovery and catharsis. Much of what is most powerful and essential in it is spontaneous and dynamic, not methodical—provisional and metaphorical, not literal. What to make of the flow and currents and eddies of words and ideas—how to channel or exploit them fruitfully and when, instead, to be alarmed—amid the myriad flecks and shadows and facets that make each psychotherapeutic relationship unique involves the most sensitive deployment of skill, experience, judgment, intuition, care, and sometimes boldness. Whether a patient really means particular words as a threat—that is, the probability, in a particular, unique case, that words will become violence, when, in most cases, they do not—simply cannot be assayed or quantified, cannot be compared, one situation with another. As long as psychotherapy is personal and not just mechanical, as long as it is art as well as science (as is all clinical medicine), there must be a vital residuum of irreducible uncertainty.

It is this precise uncertainty, at the core of psychotherapy, that rebukes the implicit assumption undergirding *Tarasoff*. Concluding, without data, that a warning—even in a particular case, let alone in the abstract—will do more good than harm is as devoid of coherence as asking (and purporting to answer) "How long is a piece of string?" As such, it would

seem wiser and more practical to replace the standard *Tarasoff* regime of legal opaqueness premised on false psychiatric certainty with its opposite—legal clarity that incorporates the lack of certainty that inevitably suffuses mental health practice:

> A psychotherapist may warn a third party threatened explicitly or implicitly with physical harm by a patient, directly and/or by notifying the police, but need not, and is immune from civil liability under either election.

Such a rule would not block warnings. Anyone, psychotherapists not excepted, will take a life possibly at risk very seriously, and many will err on the safe side, especially if given explicit statutory sanction to do so. The focus more appropriately would be to do what is clinically and morally sound, not what is legally prudent—to err on the safe side in the interest of others' life and limb, not in the protection of one's own wallet and license. "The U.K. has nothing corresponding to the *Tarasoff* decision and so questions of confidentiality are discussed in clinical and ethical rather than legal terms."[21]

Texas is the only jurisdiction that currently comes close to this approach: statutory clarity combined with reposing the grave decision to breach confidentiality and warn solely in the discretion of the therapist—although it sports the unnecessarily risky quirk of allowing notice only to the police, prohibiting a direct warning to the victim.[22] (Three other states also have statutes purporting to confer such discretion on psychotherapists. However, it is not clear that the Oregon law covers all psychotherapists,[23] and the Illinois[24] and New York[25] statutes have yet to be judicially embraced.)

Absent sound law, mental health patients and their clinicians are at least entitled to clear law on so important an issue. At present, one knows what to do in only half of the jurisdictions in the United States—those that impose a duty to warn. Any "permission" jurisdiction could, without warning, turn out to be a "duty" jurisdiction, and in the one-quarter of the states that maintain a legal vacuum on the issue, one can only guess what to do.

Better still, of course, would be sound law. Wedging psychiatric clinicians into a procrustean and legalistic paradigm that runs jarringly counter to their training and professional culture, surely distorts and diminishes psychotherapy, and harms individuals, in return for unproven and, many believe, dubious benefit to "society."

Professional ethics in psychiatry recognizes that each moment in its full context is unique and dynamic, demanding flexibility and not rigidity with respect to confidentiality: "Psychiatrists at times may find it necessary, to protect the patient or the community from imminent danger, to reveal confidential information disclosed by the patient."[26]

So too the law would be wiser were it humbler on this issue.

References

1. Herbert PB, Young KA: *Tarasoff* at twenty-five. J Am Acad Psychiatry Law 30:275–81, 2002
2. Tarasoff v. The Regents of the University of California, 551 P.2d 334 (Cal. 1976)
3. Walcott DM, Cerundolo P, Beck JC: Current analysis of the *Tarasoff* duty: an evolution towards the limitation of the duty to protect. Behav Sci Law 19:325–43, 2001
4. McNiel DE, Binder RL, Fulton FM: Management of threats of violence under California's duty-to-protect statute. Am J Psychiatry 155:1097–1101, 1998
5. Lake PF: Revisiting *Tarasoff*. Albany Law Rev 58:97–173, 1994
6. Winslade WJ, Ross JW: The Insanity Plea. New York: Charles Scribner & Sons, 1983, p 53
7. Merton V: Confidentiality and the "dangerous" patient: implications of *Tarasoff* for psychiatrists and lawyers. Emory Law J 31: 263–342, 1982
8. Tarasoff v. The Regents of the University of California, 529 P.2d 553 (Cal. 1974), vacated by 551 P.2d 334 (Cal. 1976)
9. Tarasoff v. The Regents of the University of California, 108 Cal. Rptr. 878 (Cal. Ct. App. 1973) (reversed)
10. Hicks v. U.S., 511 F.2d 407 (D.C. Cir. 1975), and Homere v. State, 361 N.Y.S.2d 820 (N.Y. App. Div. 1974), aff'd, 370 N.Y.S.2d 246 (1975) (both predating *Tarasoff*)
11. Restatement (Second) of Torts, §§ 314, 315(a) (1965)
12. Stone AA: The *Tarasoff* decisions: suing psychotherapists to safeguard society. Harv Law Rev 90:358–78, 1976
13. Note, Professional obligation and the duty to rescue: when must a psychiatrist protect his patient's intended victim? Yale Law J 91: 1430–45, 1982, p 1432 (see Flanders v. Cooper, 706 A.2d 589, 592 (Me. 1998), distinguishing *Tarasoff*)
14. People v. Poddar, 518 P.2d 342 (Cal. 1974)
15. Perlin ML: *Tarasoff* at the millennium: new directions, new defendants, new dangers, new dilemmas. Psychiatr Times 16:20–21, 1999
16. Harris GC: The dangerous patient exception to the psychotherapist-patient privilege: the *Tarasoff* duty and the *Jaffee* footnote. Wash Law Rev 74:33–68, 1999
17. Monahan J, Steadman HJ, Silver E, *et al*: Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence. New York, NY: Oxford University Press, 2001, pp 142–3
18. Note, Where the public peril begins: a survey of psychotherapists to determine the effects of Tarasoff. Stanford Law Rev 31:165–90, 1978; contrast Gilvelber DJ, Bowers WJ, Blitch CL: *Tarasoff*,

myth and reality: an empirical study of private law in action. Wisconsin Law Rev 1984:443–97, 1984
19. Gutheil TG: Moral justification for Tarasoff-type warnings and breach of confidentiality: a clinician's perspective. Behav Sci Law 19:345–53, 2001
20. Max DT: The cop and the therapist. The New York Times Magazine. December 3, 2000, pp 94–9
21. Beck JC: Dangerous severe personality disorder law and other developments. AAPL Newsletter. April 2001, p 12
22. Tex. Health & Safety Code § 611.004(a)(2), applied in Thapar v. Zezulka, 994 S.W.2d 635 (Tex. 1999)
23. Or. Rev. Stat. § 179.505, applied in State v. Miller, 709 P.2d 225 (Or. 1985)
24. Ill. Comp. Stat. Ann. ch. 740, § 110/11 (viii)
25. N. Y. Mental Hygiene Law § 33.13.6
26. The Principles of Medical Ethics, With Annotations Especially Applicable to Psychiatry. Washington, DC: American Psychiatric Association, 2001, § 4(8), p 8