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The Scope of a Psychiatrist's Duty to Third Persons:
The Protective Privilege Ends Where the Public Peril Begins

Recently, in *Brady v. Hopper*, a United States District Court dismissed a $14 million lawsuit filed against John Hinckley Jr.'s psychiatrist, Dr. John Hopper, by White House Press Secretary James Brady and two other men injured in Hinckley's assassination attempt on President Reagan.1 The gravamen of the complaint was that if Dr. Hopper had properly performed his professional duties he would have controlled Hinckley's behavior, thus thwarting the presidential assassination attempt. Additionally, the complaint alleged that Dr. Hopper should have warned Hinckley's parents and law enforcement officials of Hinckley's condition and potential for political assassination.2 Judge Moore, writing for the district court, found that Dr. Hopper could not have predicted that Hinckley would attempt to assassinate President Reagan; Hinckley had no history of violent behavior and had made no specific threat against any specific victim.3

This note discusses the nature of a psychiatrist's duty to third persons.4

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1 570 F. Supp. 1333 (D. Colo. 1983). The lawsuit was filed in federal district court in Denver, Colorado by James S. Brady, the President's press secretary, Timothy J. McCarthy, a Secret Service agent, and Thomas Delahanty, a police officer in Washington, D.C., where the shooting took place on March 30, 1981. Mr. Brady, who suffered brain damage, sued for $8 million. Mr. McCarthy, who suffered lung and liver damage, sued for $2 million. Officer Delahanty, who was wounded in the neck, sued for $4 million. *Id.*

2 570 F. Supp. at 1335.


4 In 1980, John Hinckley's parents had arranged for their son to obtain psychiatric counseling from Dr. Hopper of the Evergreen Consultants in Denver, Colorado. Allegedly, Hopper's professional evaluation of Hinckley "did not alert anyone to the seriousness of his condition." *New York Times*, Apr. 5, 1981, at 30, col. 2. Prior to his attack on President Reagan, Hinckley had developed a romantic fantasy about actress Jodie Foster after seeing "Taxi Driver," a movie where Miss Foster portrayed a teenage prostitute. Although Hinckley had never met Foster, he wrote to her: "If you don't love me, I'm going to kill the President." *New York Times*, Apr. 1, 1981, at 1, col. 2. In "Taxi Driver," Robert DeNiro portrays a cab driver who stalks a United States senator after his romantic advances toward one of the senator's aides are rejected, and then murders several characters. Federal investigators believed that Hinckley was living out the role of the taxi driver. *Id.*

4 In this note, the terms "psychiatrist," "therapist," "psychotherapist," and "mental health professional" are used interchangeably. Additionally, for the sake of convenience, the masculine pronoun "his" is used instead of "her" when an anonymous psychiatrist is referred to.
parties. Part I examines the theory motivating the landmark case of *Tarasoff v. Regents of the University of California*,\(^5\) where the California Supreme Court imposed tort liability upon a psychotherapist for failing to warn a potential victim of the dangerous propensities of his patient. Part II outlines the present scope of a psychiatrist’s responsibility, both in terms of a duty to predict dangerousness in patients, and of a duty to take appropriate measures to protect third persons, including the duty to warn. The subsequent development of California case law further delineating and limiting the scope of a psychiatrist’s liability is also considered. Part III presents the policy considerations surrounding both the nature of therapy and a psychiatrist’s duty to safeguard the public. Part IV summarizes the basis and scope of a psychiatrist’s duty to third parties and offers some brief suggestions to psychiatrists for avoiding legal liability and malpractice suits.

**I. Tarasoff v. Regents of the University of California**

The landmark case commonly cited as authority for imposing liability on psychiatrists for their patients’ behavior is *Tarasoff v. Regents of the University of California*, a 1976 California Supreme Court decision. The *Tarasoff* court held the treating psychotherapist liable in damages to the parents of a young woman murdered by his patient.\(^6\) On October 27, 1968, Prosenjit Poddar, an Indian student attending the University of California, Berkeley, shot and killed Tatiana Tarasoff, a woman with whom he was enamored but who had rejected him. Tatiana’s parents sued Poddar’s psychologists, the Regents of the University of California, and the campus police.\(^7\)

\(^6\) The court explained that the therapist could not escape liability merely because the third party victim was not a patient of his. *Id.* at 432, 551 P.2d at 340. The court further explained that,

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\text{[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. . . . Thus [the discharge of this duty] may call for [the therapist] to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or take whatever other steps are reasonably necessary under the circumstances.}^{10}
\]

*Id.*

\(^7\) *Id.* at 433-34, 551 P.2d at 341. Plaintiffs asserted four causes of action: 1) failure to detain a dangerous patient; 2) failure to warn of a dangerous patient; 3) abandonment of a dangerous patient; and 4) breach of a primary duty to patient and the public. *Id.* The first and fourth complaints were barred by governmental immunity. *Id.* The source of immunity is § 5154 of the California Welfare and Institutions Code, which states that “[t]he professional
Poddar had been undergoing psychotherapy from the University of California health services and had apparently confided to his psychotherapist, Dr. Lawrence Moore, that he intended to kill Tatiana because she had rejected his affection. Dr. Moore subsequently warned the campus police of Poddar's violent tendencies, and the police did briefly detain Poddar for observation. The police released Poddar shortly thereafter, however, because they claimed he appeared rational. Although Dr. Moore did warn the campus police, he did not warn either Tatiana or her parents of Poddar's intent to kill Tatiana.

The Tarasoff court referred to a situation similar to Brady. The reference is interesting in that it came seven years before the Hinckley assassination attempt on President Reagan. The Tarasoff court felt that where a therapist is aware that his patient expects to attempt to kill the President of the United States, the court would hesitate to hold that the therapist would not be obligated to warn authorities.

II. Scope of a Therapist's Duty

A. Basis of Liability: Special Relationship Theory

In general, a person has no duty to control the conduct of another nor to warn of his dangerous tendencies, unless a "special" relationship exists between the two persons. A "special" relationship is

person in charge of the facility providing 72-hour treatment and evaluation, his designee, and the peace officer responsible for the detainment of the person shall not be held civilly or criminally liable for any action by a person released at or before the end of 72 hours.

Lanterman-Petris-Short Act, CAL. WELF. & INST. CODE § 5154 (West 1972 & Supp. 1976); 17 Cal. 3d at 450, 551 P.2d at 353. Plaintiffs' third cause of action seeking $10,000 punitive damages against Dr. Powelson, Dr. Moore's superior, was barred by previous California statutes and decisions. Id. at 450, 551 P.2d at 353. The opinion focuses on plaintiffs' second cause of action—failure to warn of a dangerous patient. Id. at 434, 551 P.2d at 342.

8 17 Cal. 3d at 434, 551 P.2d at 342.
9 Id. Dr. Moore contended that he owed no duty to Tatiana or her parents in these circumstances. Id. The court rebutted Dr. Moore's contention that he owed no duty of care to Tatiana by citing the special relationship between psychotherapist and patient which creates such a duty. Id. at 436, 551 P.2d at 343. Dr. Moore then contended that such a duty is "unworkable because therapists cannot accurately predict whether or not a patient will resort to violence." Id. at 438, 551 P.2d at 344.
10 Id. at 441, 551 P.2d at 346.
11 Id. The therapist's inability to predict with accuracy that his patient will commit the crime is not reason to relieve the therapist of liability. Id.

12 RESTATEMENT (SECOND) OF TORTS § 315 (1965) [hereinafter cited as RESTATEMENT] reads:

General Principle
one where an individual seeks the professional advice of another whom he considers more knowledgeable, and in so doing, puts himself in a position of being controlled, or at least swayed, by the professional's opinions or conduct. The professional, by reason of the relationship, then has a duty to exercise reasonable care in his course of dealing with the one seeking advice. Examples of such special relationships include the attorney-client, priest-penitent, physician-patient, and psychiatrist-patient relationship.

The Tarasoff court found that because of Poddar and Dr. Moore's relationship as patient-psychiatrist, a special relationship existed between them. The Tarasoff court then discussed the duty of reasonable care required by that relationship.

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) 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, or
(b) a special relation exists between the actor and the other which gives to the other a right of protection.

Id. The Tarasoff court does not imply that there was a special relation between Tatiana and Dr. Moore. 17 Cal. 3d at 436-37, 551 P.2d at 343. The duty of reasonable care springs from the special relation between Dr. Moore and Poddar, as psychotherapist and patient. Id.

13 RESTATEMENT, supra note 12, § 315. See note 12 supra.

14 See also RESTATEMENT, supra note 12, § 314 A and B, which give examples of other special relationships and the consequent duty which arises to protect members of the public.

§ 314 A. Special Relations Giving Rise to Duty to Aid or Protect
(1) A common carrier is under a duty to its passengers to take reasonable action
(a) to protect them against unreasonable risk of physical harm, and
(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
(2) An innkeeper is under a duty to his guests.
(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

§ 314 B. Duty to Protect Endangered or Hurt Employee
(1) If a servant, while acting within the scope of his employment, comes into a position of imminent danger of serious harm and this is known to the master or to a person who has duties of management, the master is subject to liability for failure by himself or by such person to exercise reasonable care to avert the threatened harm.
(2) If a servant is hurt and thereby becomes helpless when acting within the scope of his employment and this is known to the master or to the person having duties of management, the master is subject to liability for his negligent failure or that of such person to give first aid to the servant and to care for him until he can be cared for by others.

15 17 Cal. 3d at 432, 551 P.2d at 340.
16 Id. at 432, 551 P.2d at 340. See also note 6 supra. The court noted that the difficulty in predicting dangerousness was no excuse for psychiatrists not warning potential victims of their patients' dangerous tendencies. Id. at 440, 551 P.2d at 346.
noted:

The role of the psychiatrist, who is indeed a practitioner of medicine, and that of the psychologist who performs an allied function, are like that of the physician who must conform to the standards of the profession and who must often make diagnoses and predictions based upon such evaluations. Thus the judgment of the therapist in diagnosing emotional disorders and in predicting whether a patient presents a serious danger of violence is comparable to the judgment which doctors and professionals must regularly render under accepted rules of responsibility.17

The Tarasoff court analogized the psychiatrist-patient "special" relationship to the physician-patient "special" relationship. Physicians must warn their patients of the possible side effects of prescribed medication if the effects may be dangerous to their health or to others.18 Physicians must also warn the families of patients with infectious diseases of the possibility of the disease spreading.19 Accordingly, since a special relationship existed between Dr. Moore and Poddar, Dr. Moore had a duty to either control the conduct of Poddar to prevent him from causing foreseeable harm to others, or to warn others of Poddar's dangerous propensities.20 Thus, the court

17 Id. at 439, 551 P.2d at 345. See also notes 6, 9, and 16 supra.
19 17 Cal. 3d at 437, 551 P.2d at 343-44. The court also notes that "a hospital must exercise reasonable care to control the behavior of a patient which may endanger other persons." Id. This reasoning comes from the Restatement (Second) of Torts §§ 319-320. Restatement § 319 reads:
Duty of Those in Charge of Person Having Dangerous Propensities
One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.
Restatement § 320 reads:
Duty of Person Having Custody of Another to Control Conduct of Third Persons
One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor
(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and
(b) knows or should know of the necessity and opportunity for exercising such control.
20 17 Cal. 3d at 437, 551 P.2d at 343. The court balanced the alleged harm done to patients from the warnings about them against the peril to the victim's life, and concluded
found that by alerting the university police, Dr. Moore had not fully discharged his duty to exercise reasonable care. Dr. Moore also had a duty to warn either Tatiana or her parents of the danger posed by Poddar.\footnote{Id. at 432, 551 P.2d at 340. See also notes 6, 9, and 16 supra.}

Psychiatrists may be held liable for failure to warn, or alternatively for negligent treatment of a patient or misdiagnosis. The special relationship between patient and psychiatrist gives rise to all of these causes of action against a psychiatrist.

\section*{B. Therapists' Duty to Predict Dangerousness}

Widespread disagreement exists among courts and psychiatrists concerning the prediction of dangerousness\footnote{See note 33 infra and accompanying text. But see notes 28 and 32 infra (cases supporting the notion of a broader duty on the part of therapist to warn potential victims).} and the duty to warn potential victims of the danger posed by patients.\footnote{See, e.g., Semler v. Psychiatric Institute of Washington, D.C., 538 F.2d 121 (4th Cir. 1976). In Semler the Court of Appeals for the Fourth Circuit held a psychiatric hospital liable that “professional inaccuracy in predicting violence cannot negate the therapist's duty to protect the threatened victim.” Id. at 440, 551 P.2d at 346. The court further noted that “[t]he risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved.” Id. at 440-41, 551 P.2d at 346. The court does not imply that there was a special relation between Tatiana and Dr. Moore. Id. at 436-37, 551 P.2d at 343. The duty of reasonable care springs from the general relation between Dr. Moore and Poddar, as psychotherapist and patient. Id.\footnote{See note 33 infra (cases supporting the notion of a broader duty on the part of therapist to warn potential victims).} supplying proper information regarding a pa-

In predicting dangerousness, one might argue that there should be more potential liability on psychiatrists releasing mental patients than on psychiatrists simply treating out-patients. In mental hospitals, more control is exercised over the patient, and with a greater opportunity to observe patients, psychiatrists can make a more accurate prediction of the patient’s dangerousness. Although there may be some logic to this argument, the locale of the patient appears irrelevant to the psychiatrist's primary duty to diagnose, since both private psychiatrists and those who work in mental hospitals are licensed and hold themselves out as psychiatrists competent to diagnose mental disorders. See J. Fleming and B. Maximov, The Patient or His Victim: The Therapist's Dilemma, 62 CALIF. L. REV. 1025, 1029 (1974). The authors argue that the amount of control that can be exercised, for example, with in-patients as contrasted to out-patients, is irrelevant to the creation or negation of a duty to warn. Id. The duty to warn is present regardless of the amount of control that a psychiatrist exercises over his patient. Id. As previously mentioned, the duty is “inextricably woven” into the duty to diagnose or predict dangerousness; see notes 45 and 51 infra. Hence, since all psychiatrists are licensed to diagnose, they are under a duty to predict dangerousness, regardless of the amount of control exercised over the patient.\footnote{See note 33 infra (cases supporting the notion of a broader duty on the part of therapist to warn potential victims). But see note 66 infra (cases supporting the specific threats to specific victims rule).}
tient's mental condition at release hearings, and complying with police orders to notify officials upon a patient's release. In other words, where the psychiatrist promised a policeman or judge that he would notify authorities upon a patient's release, he is then legally bound by his promise to do so.

Dr. Moore, the defendant psychotherapist in Tarasoff, argued unsuccessfully that therapists cannot accurately predict the dangerousness of their patients. The American Psychiatric Association, in an amicus brief in Tarasoff, indicated that "therapists, in the present state of the art, are unable reliably to predict violent acts." Although the American Psychiatric Association has argued that psychiatrists cannot accurately predict dangerousness, many courts

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25 See, e.g., Hicks v. United States, 357 F. Supp. 434 (D.D.C. 1973). In Hicks the District Court for the District of Columbia held a mental hospital negligent for failing to transmit adequate information to the trial court concerning its patient's mental condition, resulting in the patient's premature release. The patient murdered his wife shortly after he was released. Id. at 434.

26 See, e.g., Williams v. United States, 450 F. Supp. 1040 (D.S.D. 1978). In Williams, Judge Bogne of the District Court of South Dakota held a hospital liable for its failure to notify county authorities, as it had been ordered to do by police and agreed to do itself, of the discharge and release of its patient, a man with a known propensity for violence. Id. at 1040. The hospital violated its agreement to notify the police upon the patient's release. Id. at 1046.

27 17 Cal. 3d at 438, 551 P.2d at 344. The court ruled that the therapist's duty includes not only diagnosing the danger posed, but also warning foreseeable victims of such danger. 17 Cal. 3d at 438, 551 P.2d at 344. The court further held that predictions about dangerousness of a patient must be made under accepted rules of professional responsibility. 17 Cal. 3d at 438, 551 P.2d at 344. Standards are determined by what similar professionals in the community would do. Since the therapist is licensed to diagnose emotional disorders, and in fact holds himself out as capable of doing so, he should be capable of predicting danger posed by their patients.

28 Id. at 438, 551 P.2d at 344. It is ironic that therapists hold themselves out as being capable professionals, but when threatened by a lawsuit they suddenly become inept. It seems that by the very act of becoming licensed, a therapist should have to accept some responsibility for understanding and predicting the dangers posed by his patients.


have rejected this premise.\textsuperscript{30} The opinion of these courts regarding the difficulty of predicting dangerousness is aptly summarized in Lipari v. Sears, Roebuck & Co.,\textsuperscript{31} where the court stated that

it may be difficult for medical professionals to predict whether a particular mental patient may pose a danger to himself or others. This factor alone, however, does not justify banning recovery in all situations. The standard of care for health professionals adequately takes into account the difficult nature of the problems facing psychotherapists. . . . Under this standard, a therapist who uses the proper psychiatric procedures is not negligent even if his diagnosis may have been incorrect. Given this protection, the Court is of the opinion that the difficulty in predicting dangerousness does not justify denying recovery in all cases.\textsuperscript{32}
Psychiatrists are not required to be omniscient when diagnosing dangerousness. They must simply "take those steps, and initiate those measures and procedures customarily taken or initiated for the care and treatment of mentally ill and dangerous persons by mental health professionals practicing in the community." When a psychiatrist 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 those who foreseeably might be endangered by his patient's conduct.

Liability is limited to foreseeable potential victims, but the therapist need not know the exact identity of the potential victim, only that his patient foreseeably could have posed an unreasonable risk of harm to the potential victim or to a class of persons of which the victim was a member. If the therapist could not have reasonably foreseen a threat of danger by his patient and his patient performs an unforeseen and unforeseeable act of violence upon a victim, the therapist will normally not be held liable in hindsight.

in the community would do. See note 30 supra. For example, in Bradley Center v. Wessner, 296 S.E.2d 693 (Ga. 1982), the Supreme Court of Georgia held that a duty fell upon a private mental hospital to exercise due care in the control of its patients. The hospital was found negligent in issuing an unrestricted weekend pass to a patient who had been predetermined to be a known threat to his wife. Id. at 694. The court found that the exercise of due care in these circumstances was determined by reference to the standards of the psychiatric profession: what a competent psychiatrist in similar circumstances would do. Id. at 696.

The Peterson court followed Lipari in concluding that the psychiatrist had a duty to take reasonable precautions to protect anyone foreseeably endangered by the patient's mental problems. Id. at 237. The psychiatrist testified at trial that his patient was potentially dangerous and his behavior unpredictable, especially if he used the drug "angel dust," which the psychiatrist predicted would be quite likely. Id. at 235. Nevertheless, the psychiatrist failed to petition the court for a 90-day commitment possible under the state statute, or take any other precautions for the protection of those persons foreseeably endangered by the patient's drug-related mental problems. Id. But see note 36 infra and accompanying text.

For example, in McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (1979), the New Jersey Superior Court held that a psychiatrist or therapist may have a duty to take whatever steps are reasonably necessary to protect an intended or potential victim of his patient when he determines, or should determine, in the appropriate factual setting and in accordance with the standards of his profession established at trial, that the patient is or may present a probability of danger to that person. Id. at 488-91, 403 A.2d at 511-12.

In Thompson, the court limited potential victims to only those "readily identifiable." See notes 42-44 infra and accompanying text.

See, e.g., Case v. United States, 523 F. Supp. 317 (S.D. Ohio 1981); Ellis v. United
C. Therapist's Duty to Warn Third Parties of the Danger Posed by a Patient

Tarasoff imposed upon psychiatrists a general duty to warn, regardless of whether potential victims could be specifically identified. The duty could include: 1) warning potential, foreseeable


In Case v. United States, 523 F. Supp. 317 (S.D. Ohio 1981), the District Court for the Southern District of Ohio held psychiatrists free of liability for their patient's murder of a victim because they had complied with the professional standards in their determination that the patient was not dangerous and could be discharged. Similarly, in Ellis v. United States, 484 F. Supp. 4 (D.S.C. 1978), the District Court of South Carolina held that the United States was not liable for medical malpractice in granting a custody pass which complied with generally accepted medical and psychiatric standards, even though during the absence, the patient hurled his daughter from a second story porch to her death. Moreover, in Cameron v. State, 37 A.D.2d 46, 322 N.Y.S.2d 562 (1971), the New York appellate court held a hospital not liable for the decision to release a mental patient, even though the decision proved to be erroneous by hindsight. The decision to release the patient complied with accepted psychiatric standards regarding the determination of dangerousness of mental patients.

In Ross v. Central Louisiana State Hospital, 392 So. 2d 698 (La. Ct. App. 1980), a Louisiana appellate court held a state hospital not liable for the release of a mental patient who shot and killed her children after she failed to take her medication, because given the facts and circumstances at the time of the patient's release, the hospital could not have foreseen her actions. The patient had no tendency to violence, and the medication she was taking was not for the purpose of preventing violence. Id. at 699. Since by accepted medical and psychiatric standards the hospital could not have foreseen the patient's reaction to not taking her medicine, the hospital was under no duty to warn the patient or her family of potential danger. Id. See also Leverett v. State, 399 N.E.2d 106 (Ohio Ct. App. 1978), where the court found that a hospital may be held liable for the negligent release of a mental patient only when the hospital, in exercising its medical judgement, knew or should have known that the patient, upon his release, would be very likely to cause harm to himself or others. Such likelihood must be more than a mere possibility and not based on hindsight. Id. at 110. The duty to predict dangerousness on the part of the psychiatrist and the duty to initiate procedures customarily initiated for mentally ill persons is dictated by what mental health professionals practicing in the community would do. See note 33 supra and accompanying text. Therefore, if the psychiatrist took the proper psychiatric procedures in a given situation, he will be protected from liability if something unforeseen does happen. Id.

37 17 Cal. 3d 425, 551 P.2d 334 (1976). A well-known case following the Tarasoff court's finding that a psychiatrist owes a duty to the general public for his patient's behavior is McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (1979). The superior court of New Jersey held Dr. Milano, a psychiatrist who had been treating Lee Morgenstein, a 15 year old boy, liable for Morgenstein's killing Miss McIntosh, a girl with whom Morgenstein was infatuated. Morgenstein had feelings of violence toward McIntosh and had confided to Dr. Milano his jealousy of McIntosh's boyfriends. The New Jersey court relied heavily on Tarasoff and the special relationship between a psychiatrist and his patient creating a duty to warn third parties of his patient's potential danger. 168 N.J. Super. at 489, 403 A.2d at 512. Alternatively, the court relied on a physician's duty to the general public to protect society from danger, analogous to contagious disease cases. 168 N.J. Super. at 489, 403 A.2d at 512. Defendant Milano argued that his patient had shown no signs of violence toward McIntosh; thus, he could not have predicted that he would kill her. The court remained firm, however,
victims; 2) warning other persons who could warn the victims of the danger; 3) warning the police; or 4) taking whatever other steps seem reasonably necessary under the circumstances. If the patient is an out-patient, one step might include having the patient committed under applicable state statutes for a short period of observation. Since Tarasoff, some courts have narrowly construed the duty to warn by limiting potential victims to "readily identifiable" persons or those identifiable after a "moment's reflection." Both constructions considerably limit a psychiatrist's potential liability.

In Thompson v. County of Alameda, the California Supreme Court limited foreseeable victims to those readily identifiable. In Thompson, the county released from custody a juvenile delinquent, known by the treating psychiatrist to have dangerous and violent tendencies toward other children. The county did not warn the local police, the delinquent's parents, or the parents of neighborhood children. A short time later, the plaintiff's five year old son was sexually assaulted and murdered. The court refused to hold the county liable for any failure to warn. The court did recognize that the neighborhood children were foreseeable potential victims; however, it found no duty on the part of the county to warn the children or their parents, simply because there were too many possible victims to warn. Moreover, the court disregarded as a basis of liability the duty imposed by Tarasoff to take whatever steps are "reasonably necessary in

holding that Milano should have known that his patient was a threat, and that his failure to warn was the proximate cause of McIntosh's death. 168 N.J. Super. at 482, 403 A.2d at 508.

38 17 Cal. 3d at 432, 551 P.2d at 340. One or all of these steps may be required to fulfill the duty to exercise reasonable care to avoid foreseeable harm, depending on the circumstances of the case.

39 See Thompson v. County of Alameda, 27 Cal. 3d 741, 614 P.2d 728 (1980); notes 44-49 infra and accompanying text. For other non-California courts which have applied a similar definition to potential victims, see note 33 supra.

40 See Mavroudis v. Superior Court, 102 Cal. App. 3d 594, 162 Cal. Rptr. 724 (1981); notes 52-57 infra and accompanying text.

41 See notes 42-57 infra and accompanying text.

42 27 Cal. 3d 741, 614 P.2d 728 (1980).

43 Id. at 741, 614 P.2d at 728. The county knew that the juvenile had "latent, extremely dangerous and violent propensities regarding young children, and that sexual assaults upon young children and violence connected therewith were a likely result of releasing him into the community." Id. at 747, 614 P.2d at 730.

44 Id. at 747, 614 P.2d at 730. The court found the class of people to whom a warning would have to be given to be too broad to be effective. Where there were no specific individuals nor any specific threats, the court declined to impose a general duty to warn. Id. at 759, 614 P.2d at 738.

45 Id. at 757, 614 P.2d at 736. "[T]he warning sought by plaintiffs would of necessity have to be made to a broad segment of the population and would be only general in nature." Id. at 757, 614 P.2d at 736.
the circumstances" in order to avoid foreseeable harm.\textsuperscript{46}

The *Thompson* majority considered and rejected both a general warning to the community and a specific warning to the delinquent’s mother. Warning the delinquent’s mother of her child’s dangerous tendencies would appear to have been reasonably and minimally necessary, since she could have exerted some control over the youth, possibly preventing her son’s attack on the neighborhood child.\textsuperscript{47} And, considering the *Thompson* court’s concern with the burden of warning the large number of potential victims, warning the delinquent’s mother seems amazingly simple, yet effective.

Judge Tobriner, who wrote the majority opinion in *Tarasoff*, vigorously dissented in *Thompson*, arguing that the special relationship between psychiatrist and patient created a broad duty to warn.\textsuperscript{48} He maintained that even if a general duty to warn was not appropriate, at least a duty on the part of the county to warn the juvenile’s mother of her son’s violent tendencies was required.\textsuperscript{49} Nevertheless, the *Thompson* court limited the duty imposed by *Tarasoff* to warning “readily identifiable” victims,\textsuperscript{50} stating that where an individual poses a potential risk of harm to a significant portion of the community, no duty arises on the part of the psychiatrist to warn anyone.\textsuperscript{51}

In *Mavroudis v. Superior Court*,\textsuperscript{52} a California appellate court further defined “potential victims.” The *Mavroudis* court held that a psychiatrist has a duty to warn any victim whose identity could be revealed after a “moment’s reflection.”\textsuperscript{53} The court noted that the therapist’s duty arises when the therapist determines or should determine that his patient presents a serious threat to a third person. The court further observed that the victims need not be specifically named by the patient, only that a potential victim be identified after

\begin{itemize}
  \item \textsuperscript{46} Id. at 757, 614 P.2d at 736. The court found that a general warning would be ineffective and an unnecessary expenditure of limited police resources. \textit{Id.} at 757, 614 P.2d at 736.
  \item \textsuperscript{47} See text accompanying notes 48 and 49.
  \item \textsuperscript{48} 27 Cal. 3d at 760, 614 P.2d at 738. Judge Tobriner’s argument seems plausible, because if the hospital had warned the mother, she might have exercised greater control over her son.
  \item \textsuperscript{49} \textit{Id.} at 760, 614 P.2d at 738. Judge Tobriner’s dissent echoes the *Tarasoff* majority opinion. His concern is the death of innocent persons which could have been prevented by the psychiatrist warning the victims’ parents.
  \item \textsuperscript{50} \textit{Id.} at 753-54, 614 P.2d at 734. Readily identifiable victims seem to include only those toward whom the patient has made specific threats.
  \item \textsuperscript{51} \textit{Id.} at 760, 614 P.2d at 738. The court held that where the victim was a member of a “large amorphous public group,” the county had no duty to warn. \textit{Id.} at 760, 614 P.2d at 738.
  \item \textsuperscript{52} 102 Cal. App. 3d 594, 162 Cal. Rptr. 724 (1981).
  \item \textsuperscript{53} \textit{Id.} at 601, 162 Cal. Rptr. at 729.
\end{itemize}
a "moment's reflection" by the therapist.\textsuperscript{54}

Factually, \textit{Mavroudis} limited the class of victims required to be warned to the parents of a young man who had been receiving psychiatric treatment. The parents were attacked and injured by their son, whom the psychiatrist knew to be dangerous.\textsuperscript{55} The court did not find that the psychiatrist's duty extended to warning the community in which the parents lived, although under a \textit{Tarasoff} analysis the entire community could have been identified as a potential victim.\textsuperscript{56} The court held that the psychiatrist could have identified the parents as potential victims after a "moment's reflection," and that if he felt their son posed a danger, the doctor should have warned them.\textsuperscript{57}

Third parties may have a cause of action against the therapist for failure to warn when they are identifiable potential victims of the therapist's patient,\textsuperscript{58} even when the patient made no specific threat against them.\textsuperscript{59} The therapist is bound by this duty because he holds himself out and is licensed as one who diagnoses psychological problems and emotional and mental disorders.\textsuperscript{60} In diagnosing dangerousness, the therapist must exercise the "reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the profession."\textsuperscript{61}

A psychiatrist's duty to warn third parties of the danger posed by his patient springs from the primary duty of a psychiatrist to diag-

\textsuperscript{54} \textit{Id.} at 601, 162 Cal. Rptr. at 729. The court noted that the therapist need not be perfect in his forecast of dangerousness, but merely exercise the standard of care ordinarily exercised by members of his profession. \textit{Id.} at 601, 162 Cal. Rptr. at 729-30.

\textsuperscript{55} \textit{Id.} at 600, 162 Cal. Rptr. at 728. The court stated that it would be unreasonable for the psychiatrist to interrogate his patient to determine potential victims. \textit{Id.} at 601, 162 Cal. Rptr. at 729.

\textsuperscript{56} \textit{Id.} at 601, 162 Cal. Rptr. at 729. See notes 6-16 \textit{supra} and accompanying text.

\textsuperscript{57} 102 Cal. App. 3d at 608, 162 Cal. Rptr. at 734. This analysis is similar to the approach suggested by Judge Tobriner in his dissent in \textit{Thompson}, where he argued that at least the mother of a juvenile known to be a child sexual offender should be warned. See notes 45-46 \textit{supra}. But see Leedy v. Hartnett, 510 F. Supp. 1125 (M.D. Pa. 1981), where, under Pennsylvania law, a VA hospital was held not liable for the release of its patient and the subsequent beating of plaintiffs with whom the patient was planning to stay, even though hospital personnel knew the patient had a tendency towards violence when drinking. \textit{Id.} The Leedy court refused to extend the \textit{Tarasoff} warning to one not a readily identifiable, precise victim specifically threatened. The court did not apply the \textit{Mavroudis} "moment's reflection" standard in judging victims, because it considered the plaintiffs with whom the patient was staying to be in a class of persons too broad to impose a general warning. \textit{Id.} at 1131.

\textsuperscript{58} See note 37 \textit{supra}.

\textsuperscript{59} See also notes 5-21 \textit{supra} and accompanying text (\textit{Tarasoff}), notes 52-57 \textit{supra} and accompanying text (\textit{Mavroudis}). But see notes 42-49 \textit{supra} and accompanying text (\textit{Thompson}).

\textsuperscript{60} See notes 5-21 \textit{supra} and accompanying text (\textit{Tarasoff}), and note 58 \textit{supra}.

\textsuperscript{61} Hedlund v. Superior Court of Orange County, 34 Cal. 5d 695, 669 P.2d 41 (1983).
nose and treat his patients; the two are inseparable. The psychiatrist is obligated by the psychiatrist-patient relationship to use reasonable care and take the steps necessary for the protection of both his patient and those foreseeably endangered by the patient’s conduct.

The courts disagree as to whom the psychiatrist must warn. Some courts hold that the psychiatrist has a duty to warn any foreseeable victim regardless of whether the patient has made specific threats against him. Other courts hold that a psychiatrist only has a duty to warn those persons against whom the patient has made specific threats.

62 The warning aspect of the duty imposed on the therapist to diagnose dangerousness posed by his patient is “inextricably interwoven with the diagnostic function.” Id. at 704, 669 P.2d at 809.

63 See notes 34 and 35 supra and accompanying text. In Homere v. State, 48 A.D.2d 422, 370 N.Y.S.2d 246 (1975), the Supreme Court of New York, Appellate Division, held the state liable “not for an erroneous medical judgment, but rather for its failure to make anything other than a purely administrative decision to release” the patient. Id. at 424, 370 N.Y.S.2d at 249. Hospital authorities had failed to make any further evaluation of their decision to discharge the patient after he had engaged in behavior necessitating a straight jacket. The state’s psychiatrist failed to take those steps necessary to protect the potential victims of his patient. Here, the steps necessary would simply have been not releasing the patient and making further observation of him.

A typical decision where the psychiatrist failed to take the necessary steps to protect the potential victims of his patient is Merchants National Bank & Trust Co. v. United States, 272 F. Supp. 409 (D.N.D. 1967). The court held that the government agents who were employees at a government mental hospital exercised no care at all in placing a certain patient on leave of absence at a ranch. The patient was seriously mentally ill, but the hospital warned the ranch owner that the patient merely suffered a nervous breakdown. Dr. Russell O. Saxvik, an expert in the psychiatric field, testified that the ranch owner should have been given specific instructions with regard to the patient. Id. at 414. Dr. Saxvik stated that under accepted psychiatric practices, the mental hospital should have known the whereabouts of its patient on leave, and the hospital should have in turn notified the committing health board. Id. The government’s agents were negligent in both substandard professional conduct and careless custodial care of the patient. Id. at 418. The court held that considering the circumstances under which the patient had been placed on leave of absence, where the patient had repeatedly threatened to kill his wife if given the opportunity, the government’s agents exercised no care at all. Id. at 417.

64 See note 30 supra. But see notes 42-49 supra (Thompson) and notes 66-70 infra (Brady v. Hopper).

65 See Brady v. Hopper, 570 F. Supp. 1333 (D. Colo. 1983); Leedy v. Hartnett, 510 F. Supp. 1125 (M.D. Pa. 1981); Thompson v. County of Alameda, 27 Cal. 3d 741, 614 P.2d 728 (1980); Bellah v. Greenson, 73 Cal. App. 3d 911, 141 Cal. Rptr. 92 (1977); Cairl v. State, 323 N.W.2d 20 (Minn. 1982). In Bellah v. Greenson, the court held that there was no duty on the part of the therapist to warn the parents of their daughter’s suicidal tendencies. 73 Cal. App. 3d 911, 141 Cal. Rptr. 92 (1977). The court limited the warning required by Tarasoff to potential danger directed at others, not self-directed, thus the therapist had no duty to warn anyone of his patient’s suicidal tendencies. Id. at 916, 141 Cal. Rptr. at 95.

In Leedy, Judge Muir of the Middle District of Pennsylvania held that the psychiatrist
For example, Judge Moore's dismissal of Brady's, McCarthy's, and Delahanty's suit against Dr. Hopper, Hinckley's psychiatrist, indicates that he has followed in the footsteps of the Thompson court in adopting the "specific threats to specific victims" rule. Judge Moore found that regardless of whether Hopper conformed to the standard of care required by the psychiatric profession in his treatment of Hinckley, he had no duty to control Hinckley or to warn anyone of Hinckley's danger. This was so since Hinckley made no specific threats to any specific victims. Judge Moore also noted the lack of any relation between Dr. Hopper and the plaintiffs. Citing to Palsgraf v. Long Island R.R., he analogized the attenuated relation and duty between Dr. Hopper and the patients to that of Mrs. had no duty to warn the people with whom a potentially dangerous patient went to visit. The patient, who had a known tendency to violence when drinking, attacked and battered the people with whom he stayed after his discharge from the hospital. 510 F. Supp. 1125 (M.D. Pa. 1981). The psychiatrist knew who the patient intended to visit, but the court reasoned that the potential victims were not a group of readily identifiable persons, because the patient posed no danger to them any different from the danger he posed to anyone with whom he might be in contact when he became violent. Id. at 1131. Dr. Hostetter, a board certified psychiatrist and expert witness at the trial, testified that, in his opinion, a hospital following proper psychiatric procedures should have been aware of the patient's potential for violence and danger, and should have warned any person with whom the medical staff reasonably knew or should have known the patient would have frequent social contact. Id. at 1130. In spite of Dr. Hostetter's expert testimony, the court held that the hospital had no duty to warn. Id.

Similarly, in Cairl, the Minnesota Supreme Court held that a state hospital did not have a duty to warn parents of their son's pyromaniacal tendencies. The son subsequently started a fire at home which killed his younger sister and caused significant property damage. 323 N.W.2d 20, 22 (Minn. 1982). The court reasoned that "the duty to warn is not owed to statistically probable victims, but rather to specifically targeted victims." Id. at 26. The court further stated that the pyromaniacal child posed no danger to his parents any different from the danger he posed to any member of the public with whom he might be in contact when seized with the urge to start a fire. Id.

66 Brady, 570 F. Supp. at 1339. See note 65 supra. See also notes 1-3 supra and accompanying text. The courts in Leedy and Cairl followed a similar approach. See note 65 supra.

67 Brady, 570 F. Supp. at 1339. Judge Moore questioned whether there was a foreseeable risk that Hinckley would inflict the harm that he did, and decided there was not. Id. The basis of liability in the Hinckley case, were it decided for Brady, et al., would not be that Hopper had failed to warn Brady as an individual, but rather that he failed to take those steps necessary to protect the foreseeable victims of Hinckley. Arguably, anyone who was normally near the President would be a potential victim since Hinckley had made threats and general intimations about presidential assassinations.

68 248 N.Y. 339, 341, 162 N.E. 99, 101 (Ct. App. 1928). Chief Justice Cardozo held the Long Island Railroad not liable for its servant's dropping an unknown package of explosives on the tracks, causing an explosion which dropped a scale on the plaintiff, injuring her. Id. at 341, 162 N.E. at 101. The plaintiff was too far removed from the servant's action to recover on a negligence theory. Id. at 341, 162 N.E. at 101.

However, third party's do not always need to show the relation between themselves and the psychiatrist. See cases cited in note 30 supra.
Palsgraf and the guard at the railroad station. Thus, even if Dr. Hopper had a duty to warn President Reagan and failed to do so, there remained no duty to the plaintiffs and hence, no liability. Judge Moore rejected the plaintiffs' argument which relied primarily on Lipari's reasoning. Lipari reasoned that the therapist need not know the identity of the injured party, but only that the injured party was a member of a class of persons who were exposed to an unreasonable risk of harm by the patient. Judge Moore rejected the reasoning of Lipari because it created a duty on the part of the therapist to the public at large.

III. Policy Considerations

Several policy issues must be considered in analyzing professional liability. These issues include the role of a psychiatrist, patient confidentiality, the goal of therapy, the issue of deterrence if a patient's confidences are disclosed, and the difficulty in predicting dangerousness. Ultimately, however, these policy issues are outweighed by society's interests. Society must be protected from unreasonable, avoidable dangers.

A. The Proper Role of a Psychiatrist—Counselor or Judge?

By the very nature of psychotherapy, the patient is encouraged to freely vocalize his fantasies, repressed feelings, and desires. Requiring psychiatrists to warn potential victims every time a patient expresses feelings of anger toward someone would seriously interfere with the treatment, both because of the breach in confidentiality and the practical problem of determining whether a patient really

69 Brady, 570 F. Supp. at 1339.
70 Id. See note 67 supra. Judge Moore overlooked Dr. Hopper's alleged negligent treatment of Hinckley in reaching his decision, since he could have found Hopper liable on a theory of negligence or malpractice for failing to use due care in treating his patient. The negligence would then be the proximate cause of Brady's injury. See also notes 31-33 supra and accompanying text.
71 See notes 75, 77, and 79 supra.
72 See Fleming and Maximov, note 22 supra.
Confidentiality of communication is only one prerequisite to treatment. It sets the stage for an exchange of thought, word and action at the emotional level. Without trust, there can be no proper transference. In fact, the essence of much psychotherapy is the learning of trust in the external world by the formation of a trusting relationship with the therapist. This becomes the model for trust in the external world and ultimately in the self.

Id. at 1041, n.68 (quoting D. Dawidoff, THE MALPRACTICE OF PSYCHIATRISTS 44 (1973)).
73 See notes 77, 79, and 80 infra and accompanying text.
intended to carry out his violent feelings.\textsuperscript{74}

If psychiatrists are required to sit as judges in the patient-psychiatrist relationship, patients may consequently have reservations about expressing their feelings. Thus, an important goal of psychotherapy, helping patients express their repressed feelings, will be unattained.\textsuperscript{75} Not only may patients be frustrated in achieving mental health, but psychiatrists may be overly concerned with protecting themselves from potential liability and warn all possible victims at the slightest hint of danger.\textsuperscript{76}

The psychiatrist's role should not be that of a judge, but one of counselor, helping the patient accept himself and work through his problems with the knowledge that his trust is well-placed.\textsuperscript{77} The scope of the Tarasoff decision requiring psychiatrists to warn potential victims threatens the maintenance of confidentiality between psychiatrist and patient.\textsuperscript{78} If a patient cannot trust his psychiatrist to keep confidential sensitive information, he will be deterred from seeking and continuing treatment,\textsuperscript{79} just as Poddar discontinued his therapy after he was detained by the campus police.\textsuperscript{80}

The process of voicing repressed anger in therapy would seem to

\textsuperscript{74} See Tarasoff, 17 Cal. 3d at 438, 551 P.2d at 344.

\textsuperscript{75} See Fleming and Maximov, note 22 \textit{supra}, at 1034. A frequent goal of treatment is to encourage the patient to discharge suppressed feelings, including aggression and even anger. \textit{Id.}

\textsuperscript{76} See Tarasoff, 17 Cal. 3d 425, 438, 551 P.2d 334, 344. The American Psychiatric Association cited numerous articles indicating that psychiatrists tend to consistently overpredict violence, and are more often incorrect than correct. \textit{Id.} at 438, 551 P.2d at 344; see also note 28 \textit{supra}.

\textsuperscript{77} See CAL. EVID. CODE § 1014, (West 1966) which states:

[P]sychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. . . [And although] the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected.

\textsuperscript{78} See Tarasoff, 17 Cal. 3d 425, 551 P.2d 334; see also notes 75-77 \textit{supra}. The Tarasoff decision requires the therapist to sit as judge of his patient, rather than as counselor.

\textsuperscript{79} See Taylor v. United States, 222 F.2d 398 (D.C. Cir. 1955). The opinion reads in pertinent part:

The psychiatric patient confides more utterly than anyone else in the world.

He exposes to the therapist not only what his words express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say — and all that the psychiatrist learns from what they say — may be revealed to the whole world from a witness stand.

\textit{Id.} at 401 (quoting from M. Guttmacher & H. Weihofen, \textsc{Psychiatry and the Law} 272 (1952)).

\textsuperscript{80} Tarasoff, 17 Cal. 3d 425, 434, 551 P.2d 334, 342. One can hardly blame a patient for
actually deter, not promote, violence. Patients can vent the negative feelings in the psychiatrist's office instead of repressing them and later venting them upon a victim. If psychiatrists must warn potential victims to avoid professional liability, their patients will lose the opportunity to work through repressed feelings and the opportunity for growth and change. Perhaps the real victim in requiring psychiatrists to warn potential victims is the patient himself.

B. Therapist's Ephemeral Duty to Safeguard the Public

Although policy considerations for protecting the psychiatrist-patient relationship are important, these policies are outweighed by society's interest. Society must be protected from the unreasonable risk posed by a dangerous patient. Such a risk is avoidable with little effort on the part of the psychiatrist. A psychiatrist's role is not one-dimensional, nor should it be. Therapists must not only be sympathetic to their patients, but must also consider the broader implications of their actions. Therapists must realize that their overall objective is to serve the patient and society. After all, patients see therapists to help themselves adjust in society.

While it is impossible to foresee all the possible and varied interactions between a patient and other members of the public, it is feasible to foresee that an individual with latent propensities for violence, either toward particular individuals or in general, will harm someone if certain precautions are not taken. While some may not agree that therapists have a duty to safeguard the public, some do recognize a moral obligation of the therapist in this regard, at least insofar as the therapists is able to avoid foreseeable risk.


82 See note 81 supra.

83 See notes 84-89 infra and accompanying text.

84 See note 65 supra and accompanying text.

85 See cases cited in note 30 supra and accompanying text.

Our Anglo-Saxon system of law often does not incorporate moral obligations into its legal system. An individual has no duty to rescue a person in grave danger, for example, during a mugging or rape, and incurs no liability for failing to intervene or otherwise act. RESTATEMENT, supra note 12, § 315. Similarly, the individual has no duty to prevent a stranger from committing suicide. Id. Ironically, although our system does not impose a duty upon a citizen to help another, if help is given, the rescuer can be held liable for unintentional harm inflicted on the rescued person. RESTATEMENT, supra note 12, §§ 319-320. See Clayton v. New Dreamland Roller Skating Rink, 14 N.J. Super. 390, 82 A.2d 458 (1951), where a good samaritan was held liable for battery when he incorrectly set plaintiff's broken arm
Especially where a special relationship exists between two persons, or where one party has control over another, the professional or "controller" must use reasonable care to avoid an unreasonable risk of harm to others. Under such a duty, a therapist's role cannot simply be to diagnose his patients. He must take all those steps necessary to avoid foreseeable harm from the patient upon others. This duty may include violating the confidentiality of the psychiatrist-patient relationship, but confidentiality often yields to a higher interest. For example, attorneys are required under the Code of Professional Responsibility to reveal the confidences of their client when the client intends to commit a future crime. The attorney must also disclose the information necessary to prevent a crime. The attorney's duty is analogous to the therapist where the therapist can foresee that his patient will commit a future crime upon either a specific victim or upon the public. Where the interest of society is so strong, i.e., preventing a severe injury or death, confidentiality must yield.

If confidences are broken, it is not a foregone conclusion that all is lost in the psychiatrist-patient relationship. No empirical proof exists to demonstrate that the goal of therapy will not be attained, or that patients will be deterred from seeking therapy. In fact, some studies indicate results to the contrary, reasoning that patients go to therapists as a cry for help and want the therapist to disclose their hidden problems so that they can be helped. As a professional, a therapist could discreetly warn the authorities or potential victims.

Footnotes:

86 Restatement, supra note 12, §§ 315, 319.
87 Model Code of Professional Responsibility DR 4-101(c)(3) (1980).
88 Model Code of Professional Responsibility DR 4-101(c)(3) (1980). ABA Opinion 314 (1965) provides that an attorney must disclose the confidences of his client if he knows beyond a reasonable doubt that a crime will be committed.
89 Fleming and Maximov, supra note 22, at 1039 n.63. The authors note that the very atmosphere which deters some patients will attract others. Studies have shown that some patients disclose in the hopes that such disclosures will make the psychiatrist take control over them. Id. at 1039. Thus, the deterrence factor may be counterbalanced by the attraction of other patients. Id. at 1040.
He could disclose or warn in a fashion that would preserve the privacy of the patient as fully as possible and still be compatible with the prevention of the threatened danger.\textsuperscript{91}

IV. Conclusion

Who must decide if, when, and under what conditions a patient is ready to be released—the courts or the psychiatrists? Of course, the psychiatrist, as a professional, must make the initial determination. Should the courts be able to override the psychiatrist's decision?

A balance, of course, must be reached. A court is forced to weigh the interests of a particular therapy patient with the interests of society. The \textit{Tarasoff} court clearly felt that the interests of society far outweigh the interests of a patient.\textsuperscript{92} The court noted that, "[i]n this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal."\textsuperscript{93} The court further noted that, "[t]he protective privilege ends where the public peril begins."\textsuperscript{94}

Clearly, a balance may be reached. Society benefits from a discreet and directed warning in that a death or injury is prevented. The patient benefits in two ways: first, the patient is prevented from committing some violent act for which he would have to suffer the consequences later; second, the patient continues in therapy since the confidences are preserved to the greatest possible extent by a discreet and directed warning. Of course, how the psychiatrist "warns" determines the success for both the patient and society. If the psychiatric profession has not discussed the issue and promulgated procedures for such warnings, now is surely the time.

Until some consensus is reached, psychiatrists should take three steps to protect themselves from liability, and society from any possible harm. First, practicing therapists and mental health care facilities should carefully check state law to determine the scope of their duty, both to their patients and to the public, since courts are holding them accountable for diagnosing dangerousness. Second, psychiatrists should follow the procedures commonly practiced in their community by mental health professionals to protect third parties who might foreseeably be endangered by a patient's conduct. Such

\textsuperscript{91} \textit{See} 17 Cal. 3d 426, 442, 551 P.2d 334, 347.
\textsuperscript{92} \textit{Id.} at 443, 551 P.2d at 347.
\textsuperscript{93} \textit{Id.} \textit{See also} note 87 supra.
\textsuperscript{94} \textit{Id.}
steps might include notifying a potential victim, calling the police, or instituting commitment proceedings to ensure that the patient does not harm third parties. And finally, like any other professional, the psychiatrist should invest and maintain a healthy malpractice insurance policy. Hopefully, following the first two steps will preclude reliance on the third.

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