NEGLIGENCE—PHYSICIANS AND SURGEONS—DUTY IMPOSED ON PSYCHOTHERAPISTS TO EXERCISE REASONABLE CARE TO WARN POTENTIAL VICTIMS OF FORESEEABLY IMMINENT DANGERS POSED BY MENTALLY ILL PATIENTS—*Tarasoff v. Regents of University of California,* 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974).

On October 27, 1969, Tatiana Tarasoff was fatally stabbed by Prosenjit Poddar, an Indian-born graduate student attending the University of California at Berkeley.[1] Two months prior to the murder, Poddar, during a psychotherapy session conducted at the campus hospital, allegedly confided his intention to kill Miss Tarasoff to his therapist, Dr. Moore.[2] Immediately thereafter, Dr. Moore, with the concurrence of two of the hospital's psychiatrists, determined that Poddar was dangerous and enlisted the aid of the campus police to escort him to a mental hospital for observation.[3] Poddar was then taken into custody by the campus police and detained for a brief period, but was released when they were satisfied that he was rational.[4] Upon learning of the Poddar incident, Dr. Harvey Powelson, the director of the campus hospital's psychiatric department, ordered that no further action be taken to secure Poddar's commitment.[5] Poddar subsequently terminated the psychiatric treatment,[6] but none of the therapists or policemen involved took any steps to warn either Tatiana or her parents of the potential danger posed by Poddar.[7]

Following the murder, Miss Tarasoff's parents instituted a wrongful death action against the therapists and policemen,[8] as well as their employer, the Regents of the University of California, predicating liability upon two bases. First, the plaintiffs asserted that the defendants failed to exercise reasonable care to have

[1] People v. Poddar, 10 Cal. 3d 750, 753-54, 518 P.2d 342, 344-45, 111 Cal. Rptr. 910, 912-13 (1974).

[2] Tarasoff v. Regents of Univ. of Cal., 108 Cal. Rptr. 878, 880 (Dist. Ct. App. 1973), *rev'd,* 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974). Prior to publication in 33 Cal. App., a hearing was granted by the California supreme court. For this reason, the opinion was not reported in 33 Cal. App.

[3] Tarasoff v. Regents of Univ. of Cal., 108 Cal. Rptr. at 880.

[4] *Id.*

[5] *Id.*

[6] Tarasoff v. Regents of Univ. of Cal., 13 Cal. 3d 177, ——, 529 P.2d 553, 559, 118 Cal. Rptr. 129, 135 (1974).

[7] *Id.* at ——, 529 P.2d at 555, 118 Cal. Rptr. at 131.

[8] Named as defendants in this action were: Dr. Moore, Poddar's therapist; Drs. Gold and Yandell, the psychiatrists who concurred with Moore; Dr. Powelson, the head of the hospital's department of psychiatry; the chief of the campus police; and four campus police officers. *Id.* at —— n.2, 529 P.2d at 555, 118 Cal. Rptr. at 131.

Poddar committed for psychiatric evaluation.[9] Second, the plaintiffs alleged the existence of a duty on the part of the defendants to warn them of their daughter's peril, the breach of which proximately resulted in Tatiana's death.[10]

The trial court, concluding that the plaintiffs' complaint failed to state a cause of action, sustained the defendants' demurrer.[11] The court of appeals affirmed, holding that the defendants were under neither a duty to commit Poddar for evaluation nor a duty to warn the plaintiffs of the danger he posed.[12] In *Tarasoff v. Regents of University of California,*[13] the Califoria supreme court reversed, holding that a viable cause of action against the therapists and their employer could be predicated upon their negligent failure to warn the intended victim of her peril.[14] The court also held that the defendant police officers were subject to liability for failure to warn on the ground that their actions with respect to Poddar "increased the risk of violence."[15]

---

[9] *Id.* at ——, 529 P.2d at 555, 118 Cal. Rptr. at 131.

[10] *Id.*

[11] Tarasoff v. Regents of Univ. of Cal., 108 Cal. Rptr. 878, 880 (Dist. Ct. App. 1973).

[12] *Id.* at 883, 885-87.

[13] 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974).

[14] *Id.* at ——, 529 P.2d at 555, 118 Cal. Rptr. at 131.

The court found that the defendant therapists were not immune from liability for their failure to warn. In arriving at this conclusion, the court focused its attention on CAL. GOV'T CODE § 820.2 (West 1966), which insulates public employees from liability if their " 'act or omission' " causing injury " 'was the result of the exercise of the discretion vested in' " them. 13 Cal. 3d at ——, 529 P.2d at 561-62, 118 Cal. Rptr. at 137-38 (quoting from CAL. GOV'T CODE § 820.2 (West 1966)).

Recognizing that discretion plays a part in nearly every act of a public official, the court relied on Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968), in which section 820.2 was construed as bestowing immunity only for fundamental " 'policy decisions.' " 13 Cal. 3d at ——, 529 P.2d at 562, 118 Cal. Rptr. at 138 (quoting from Johnson v. State, 69 Cal. 2d 782, 793, 447 P.2d 352, 360, 73 Cal. Rptr. 240, 248 (1968)).

Employing the scope of immunity delineated in *Johnson,* the *Tarasoff* court indicated that it should only be as broad as absolutely essential to permit "legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions." 13 Cal. 3d at ——, 529 P.2d at 562, 118 Cal. Rptr. at 138. Following the guidelines established in *Johnson,* the court in *Tarasoff* determined that the failure to issue a warning to Miss Tarasoff was not of such a nature as to warrant the protection of section 820.2. *Id.* at ——, 529 P.2d at 562-63, 118 Cal. Rptr. at 138-39.

The court did conclude, however, that CAL. GOV'T CODE § 856 (West 1966), immunized the therapists from liability for their failure to secure Poddar's confinement. Section 856 confers total immunity upon public officials for injuries caused by a "determin[ation] . . . [w]hether to confine a person for mental illness." *Id.* Both Dr. Powelson's order that no further action be taken against Poddar and Dr. Moore's acquiescence in that order were perceived by the court as falling within the ambit of section 856 and, thus, protected from liability. 13 Cal. 3d at ——, 529 P.2d at 564. 118 Cal. Rptr. at 140.

[15] 13 Cal. 3d at ——, 529 P.2d at 561, 118 Cal. Rptr. at 137. The court found that CAL. WELF. & INST'NS CODE § 5154 (West 1972) shielded the police officers from liability for

Although the court failed to explain its rationale for holding the police officers liable,[16] it found two bases on which to predicate the liability of the therapists. Of primary importance was the existence of a psychotherapist-patient relationship which, the court concluded, gave rise to a duty on the part of the therapists to warn those foreseeably endangered by their patient.[17] Additionally, the court premised the therapists' duty to warn on the fact that their conduct leading to the termination of Poddar's treatment contributed to the danger of the decedent.[18] Thus, the effect of *Tarasoff* is to extend to the psychotherapist the seldom-imposed duty to take affirmative action for the protection of others.

At common law, there was no general duty to protect or aid another human being who was in peril.[19] The basis of this rule was the distinction which has been drawn between misfeasance and nonfeasance—"active misconduct" and "passive inaction"[20]—and a judicial unwillingness to subject the nonfeasor to liability. Underlying this distinction was a reluctance on the part of early courts to become vehicles for the enforcement of moral duties.[21] In addition, the courts were too preoccupied with more glaring types of

---

discharging Poddar after having him in their custody. 13 Cal. 3d at ——, 529 P.2d at 564-65, 118 Cal. Rptr. at 140-41. Section 5154 immunizes a "peace officer" charged with detaining an individual at a facility offering "72-hour treatment and evaluation" from liability for the acts of "a person released at or before the end of 72 hours." CAL. WELF. & INST'NS CODE § 5154 (West 1972).

The court determined that since plaintiffs' complaint attributed to the campus police the capability of performing "peace officer" functions, they should be deemed to occupy that status within the meaning of section 5154 and thus fall within its protection. 13 Cal. 3d at ——, 529 P.2d at 565, 118 Cal. Rptr. at 141.

[16] Justice Clark, in his dissenting opinion, criticized the majority for failing to articulate the precise basis on which it predicated the police officers' liability. After characterizing the discussion of the police defendants as "lost" in the majority's opinion, Justice Clark expressed fears that the expansiveness of the holding may be interpreted to mean that a duty to warn ensued merely from Poddar's release. 13 Cal. 3d at ——, 529 P.2d at 569, 118 Cal. Rptr. at 145. Furthermore, Justice Clark asserted that one might extrapolate from the opinion that a corresponding duty to warn of potential danger is imposed on prison officials "whenever a prisoner is released," thus placing an insuperable burden upon peace officers. *Id.*

[17] *Id.* at ——, 529 P.2d at 555, 118 Cal. Rptr. at 131.

[18] *Id.*

[19] *See* W. PROSSER, THE LAW OF TORTS § 56, at 340 (4th ed. 1971) [hereinafter cited as PROSSER]; RESTATEMENT (SECOND) OF TORTS § 314 (1965) [hereinafter cited as RESTATEMENT].

[20] Dean Prosser has described the distinction as one "between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm." PROSSER, *supra* note 19, § 56, at 338-39 (footnote omitted). *See also* Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability* (pt. 1), 56 U. PA. L. REV. 217, 219 (1908).

[21] PROSSER, *supra* note 19, § 56, at 339.

misconduct to give serious consideration to acts of omission, even where serious harm resulted.[22]

As a result, liability for failing to act for the protection of others evolved very slowly, with courts carving out exceptions to the general rule.[23] One such exception in which courts have held that a duty of care exists is in circumstances

> in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct . . . .[24]

Once a special relationship giving rise to a duty of care is established,[25] affirmative duties, including a duty to warn, may be imposed to prevent injury to third parties.

Illustrative of this principle, which has been applied in a myriad of circumstances,[26] is *Ellis v. D'Angelo.*[27] In *Ellis,* a babysitter instituted an action against the parents of a four-year-old child who had caused the sitter serious injury. The court upheld the cause of action against the parents on the ground that they had negligently

---

[22] RESTATEMENT, *supra* note 19, § 314, comment *c* at 116.

[23] PROSSER, *supra* note 19, § 56, at 339.

[24] Tarasoff v. Regents of Univ. of Cal., 13 Cal. 3d 177, ——, 529 P.2d 553, 557, 118 Cal. Rptr. 129, 133 (1974) (citing RESTATEMENT (SECOND) OF TORTS §§ 315-20 (1965)).

A duty of care has been imposed on parties standing in particular relationships to a source of peril. *See, e.g.,* Fletcher v. Baltimore & P.R.R., 168 U.S. 135, 138 (1897) (master to servant); Bieker v. Owens, 234 Ark. 97, 99, 350 S.W.2d 522, 524 (1961) (parent to child); Beaudoin v. W.F. Mahaney, Inc., 131 Me. 118, 122, 159 A. 567, 569 (1932) (owner of an automobile to one driving it in his presence); Connolly v. Nicollet Hotel, 254 Minn. 373, 382, 95 N.W.2d 657, 664 (1959) (operator of business establishment to those persons upon premises); Missouri, K. & T. Ry. v. Wood, 95 Tex. 223, 233-34, 66 S.W. 449, 451 (1902) (custodian to dangerous ward).

In other instances, relationships to foreseeable victims have given rise to a duty of care. *See, e.g.,* McPherson v. Tamiami Trail Tours, Inc., 383 F.2d 527, 533 (5th Cir. 1967) (carriers to passengers); Winn v. Holmes, 143 Cal. App. 2d 501, 505, 299 P.2d 994, 996 (1956) (owners of premises to business invitees); King v. Dade County Bd. of Pub. Instruction, 286 So. 2d 256, 258 (Fla. Dist. Ct. App. 1973), *cert. denied,* 294 So. 2d 89 (1974) (school to pupil); Fortney v. Hotel Rancroft, Inc., 5 Ill. App. 2d 327, 331, 125 N.E.2d 544, 546 (1955) (innkeepers to guests); Sylvester v. Northwestern Hosp., 236 Minn. 384, 386-90, 53 N.W.2d 17, 19-21 (1952) (hospital to patients); Taylor v. Slaughter, 171 Okla. 152, 154, 42 P.2d 235, 237 (1935) (custodian to prisoners).

[25] The determination as to which special relationships warrant the imposition of a duty of care basically represents a judicial conclusion as to what "sound social policy requires." Harper & Kime, *The Duty to Control the Conduct of Another,* 43 YALE L.J. 886, 886 (1934). *See also* PROSSER, *supra* note 19, § 56, at 339. However, the criteria applied to arrive at this determination have been bemoaned as being "so incredibly complicated as almost to defy analysis." Harper & Kime, *supra* at 904.

[26] *See, e.g.,* Freese v. Lemmon, 210 N.W.2d 576, 579-80 (Iowa 1973) (physician under a duty to warn a motorist who had suffered a seizure of the dangers in driving a car).

[27] 116 Cal. App. 2d 310, 253 P.2d 675 (Dist. Ct. App. 1953).

failed to warn the babysitter of their child's propensity for furiously attacking people.[28] The court emphasized that a parent who is cognizant of the potential danger posed by his child must use reasonable care to control the child, thereby minimizing the harm he may cause.[29] Clearly, the duty to warn forseeable victims of the child's dangerous proclivities emanated from the parents' duty to control their child.

A second area in which courts have departed from the common law principle that no one is under a duty to protect another has been found in situations in which the defendant has acted either to control a person's conduct or to protect the intended victim.[30] The underlying basis for subjecting one who acts affirmatively to liability is that once a person undertakes "to render service, he must employ reasonable care," which may include warning potential victims.[31] Thus, in *Morgan v. County of Yuba,*[32] the court held that a sheriff who had elicited the reliance of a woman by promising to warn her of the release of an individual who had threatened to kill her, owed a duty to give that warning, the violation of which was a basis for liability.[33] Similarly, in *Johnson v. State,*[34] the defendant's affirmative conduct in placing a foster child in the plaintiff's home gave rise to a duty to warn the plaintiff of the young man's dangerous qualities.[35]

The California supreme court concluded that both of these exceptions were applicable to the facts in *Tarasoff.*[36] In first determining that the special relationship between the psychotherapists and their patient, Poddar, was sufficient to establish a duty on the part of the therapists to warn those foreseeably endangered by Poddar, the court relied on a number of cases in which it had been recognized that a doctor-patient relationship may give rise to affirmative duties.[37] For example, in *Wojcik v. Aluminum Co. of America,*[38] the court held that a tubercular employee, as well as his wife, could maintain a cause of action against the husband's

[28] *Id.* at 317, 253 P.2d at 679.

[29] *Id.* at 317-20, 253 P.2d at 679-80.

[30] *See* RESTATEMENT, *supra* note 19, §§ 321-24A. *See also* PROSSER, *supra* note 19, § 56, at 343-44.

[31] 13 Cal. 3d at ——, 529 P.2d at 559, 118 Cal. Rptr. at 135.

[32] 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (Dist. Ct. App. 1964).

[33] *Id.* at 941, 944-46, 41 Cal. Rptr. at 510, 512-13.

[34] 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

[35] *Id.* at 785-86, 447 P.2d at 355, 73 Cal. Rptr. at 243.

[36] 13 Cal. 3d at ——, 529 P.2d at 557, 118 Cal. Rptr. at 133.

[37] *Id.* at ——, 529 P.2d at 558-59, 118 Cal. Rptr. at 134-35.

[38] 18 Misc. 2d 740, 183 N.Y.S.2d 351 (Sup. Ct. 1959).

employer for failing to warn of the contagious disease, after it had been diagnosed by physicians serving as agents of the defendant.[39] Similarly, in *Kaiser v. Suburban Transportation System,*[40] the court sustained a cause of action instituted by an injured bus passenger against a doctor who allegedly had failed to warn his patient, the bus driver, of the possible side effects of a prescribed drug.[41] Together, these cases serve to illustrate that a doctor may be liable not only for a failure to warn his patient of the particular dangers resulting from an illness, but also for the failure to alert third parties foreseeably endangered by the patient.

The *Tarasoff* court could find no logical reason for restricting the imposition of a duty to warn to a doctor treating physical ailments, and

> conclude[d] that a doctor or a psychotherapist treating a mentally ill patient . . . bears a duty to use reasonable care to give threatened persons such warnings as are essential to avert foreseeable danger arising from his patient's condition or treatment.[42]

In determining that the second exception—that an affirmative act of a defendant may give rise to a duty to warn—was applicable, the court focused on the relationship between the defendants' conduct in treating Poddar and his subsequent discontinuance of psychotherapy.[43] The court perceived a correlation between the "defendants' bungled attempt" at having Poddar committed for evaluation and Poddar's termination of treatment, which, if continued, may have dissuaded him from killing Miss Tarasoff.[44] Thus, the court found that the defendants, having aggravated the victim's position of danger, were under a duty to issue a warning.[45]

The defendant therapists advanced two policy considerations to support the view that the duty to warn endangered third parties should not be imposed upon a psychotherapist.[46] First, they asserted that patients undergoing therapy are encouraged to express all hostile and violent thoughts, and that very few patients carry

---

[39] *Id.* at 743-47, 183 N.Y.S.2d at 355-59. *See also* Hofmann v. Blackmon, 241 So. 2d 752, 753 (Fla. Dist. Ct. App. 1970) (physician's negligent failure to diagnose contagious disease of father deemed to have violated a duty to warn child who later contracted the disease).

[40] 65 Wash. 2d 461, 398 P.2d 14, *modified,* 401 P.2d 350 (1965).

[41] 65 Wash. 2d at 464, 398 P.2d at 16.

[42] 13 Cal. 3d at ——, 529 P.2d at 559, 118 Cal. Rptr. at 135.

[43] *Id.*

[44] *Id.* at ——, 529 P.2d at 555, 118 Cal. Rptr. at 131.

[45] *Id.* at ——, 529 P.2d at 559, 118 Cal. Rptr. at 135.

[46] *Id.* at ——, 529 P.2d at 559-60, 118 Cal. Rptr. at 135-36.

their threats to fruition.[47] Additionally, the defendants argued that since the harm to the patient resulting from disclosure could be quite acute, the psychotherapist is put in the difficult position of having to determine which patients are apt to carry out their expressed aggressions, and then weigh this against the detrimental effects which a warning would likely precipitate.[48] Since this is an extremely delicate decision, requiring a high degree of professional skill and judgment, the defendants maintained that it should not provide the basis for any future liability.[49] Second, the therapists contended that the imposition of a duty to warn would be incompatible with effective treatment, inasmuch as psychotherapy requires full and complete disclosure on the part of the patient, which will only be forthcoming if the confidentiality of communications is maintained.[50]

In addressing the first of these arguments, the court indicated that the determination required of the therapist was no more demanding than that which other professionals are called upon to make.[51] Furthermore, the standard of conduct to which the therapist would be held—that degree of skill ordinarily exercised by therapists under like circumstances—takes account of judgmental differences.[52] Consequently, the court concluded that neither the therapists' difficulties in making professional judgments nor the court's difficulties in assessing such determinations warranted exempting the therapists from liability.[53]

---

[47] *Id.* at ——, 529 P.2d at 560, 118 Cal. Rptr. at 136.

[48] *Id.*

[49] *Id.* Psychiatrists are already faced with potential liability arising out of errors in judgment. For example, a faulty determination that a minor is either in need of emergency psychiatric treatment or sufficiently emancipated to be capable of consenting to treatment could give rise to legal liability. Rosenberg, *The Right to a Sound Mind,* 10 TRIAL 36, 40 (May/June 1974).

[50] 13 Cal. 3d at ——, 529 P.2d at 560, 118 Cal. Rptr. at 136.

[51] *Id.* A physician is under both an ethical and a legal duty not to divulge the confidences of his patient. *See* Slovenko, *Psychiatry and a Second Look at the Medical Privilege,* 6 WAYNE L. REV. 175, 175 (1960); Note, *Confidential Communications—A Physician Is Under a General Duty Not To Disclose Information Obtained in the Course of a Doctor-Patient Relationship,* 26 ALA. L. REV. 485, 487 (1974). Yet, in many circumstances society imposes upon him the obligation of determining when this duty to his patient is overridden by greater societal interests. For example, some states require a physician to report instances of apparent child abuse. *See, e.g.,* CAL. PENAL CODE § 11161.5 (West Supp. 1975); MICH. COMP. LAWS ANN. § 772, 571 (1968). *See also* N.J. STAT. ANN. § 9:6-8.10 (Supp. 1975-76) (applicable to any person). Many jurisdictions also require a doctor to report all injuries which appear to be the result of specified unlawful conduct. *See, e.g.,* CAL. PENAL CODE § 11161 (West 1970); DEL. CODE ANN. tit. 24, § 1762 (Supp. 1971-72).

[52] 13 Cal. 3d at ——, 529 P.2d at 560, 118 Cal. Rptr. at 136.

[53] *Id.*

The court treated the second policy consideration rather summarily. While recognizing the important stake which society has in effectively treating the mentally ill and the role that confidentiality plays in effective therapy, the court pointed out that these considerations must be balanced against the interest of public safety.[54] However, having identified the competing concerns, the court eschewed any detailed analysis of their respective merits. Rather, the court looked to the state's evidence code to ascertain how the competing interests should be balanced. It first noted that a state statute established a broad psychotherapist-patient testimonial privilege,[55] but that an exception to this privilege was created for those instances where the mental patient is determined by the therapist to be dangerous.[56] The *Tarasoff* court gleaned from these statutes a legislative determination that society's interest in the safety of potential victims outweighs the patient's interest in confidentiality, thereby justifying the imposition of a duty to warn.[57]

In refuting the defendants' assertions, the court not only gave cursory treatment to the arguments advanced, but also failed to undertake any in-depth analysis of other policy considerations relevant to the issue. More specifically, the court neglected to examine the peculiar needs of the psychotherapist-patient relationship and the wide-reaching effects which the imposition of a duty to warn would likely generate. Since the imposition of a duty in tort law represents a conclusion as to what sound social policy requires,[58] the wisdom of the court's determination can only be

[54] *Id.* at ——, 529 P.2d at 560-61, 118 Cal. Rptr. at 136-37.

[55] *Id.* at ——, 529 P.2d at 560, 118 Cal. Rptr. at 136. *See* CAL. EVID. CODE § 1014 (West 1966). A testimonial privilege is an exception to the general duty to divulge what one knows. 8 J. WIGMORE, EVIDENCE § 2192, at 70 (McNaughton rev. ed. 1961). It grants a legal right to withhold communications while on the witness stand. Goldstein & Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute,* 36 CONN. B.J. 175, 176 (1962); Slovenko, *supra* note 51, at 176. In a majority of states, the communications between a psychotherapist and his patient fall within the scope of the physician-patient testimonial privilege. Goldstein & Katz, *supra* at 179-80. However, a number of states have enacted privilege statutes expressly covering the psychotherapist-patient relationship. *See, e.g.,* CONN. GEN. STAT. ANN. § 52-146c, d (Supp. 1975); ILL. ANN. STAT. ch. 51, § 5.2 (Smith-Hurd Supp. 1974).

[56] 13 Cal. 3d at ——, 529 P.2d at 560-61, 118 Cal. Rptr. at 136-37. CAL. EVID. CODE § 1024 (West 1966) provides that the psychotherapist-patient privilege is abrogated

> if the psychotherapist has reasonable cause to believe that the patient is . . . dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.

[57] 13 Cal. 3d at ——, 529 P.2d at 560-61, 118 Cal. Rptr. at 136-37.

[58] In the words of Dean Prosser,

> "duty" is . . . an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.

PROSSER, *supra* note 19, § 53, at 325-26.

evaluated by weighing the competing interests involved and looking at the probable consequences which will result.

The starting point in such an evaluation must focus on the role which confidentiality plays in effective treatment. It has been widely asserted and accepted that complete patient disclosure is the sine qua non of psychotherapy,[59] and that such disclosure will not be forthcoming unless the patient is assured of confidentiality.[60] This inordinate need for confidentiality has not gone without judicial recognition. In *Taylor v. United States,*[61] the United States Court of Appeals for the District of Columbia, in disallowing the testimony of a psychiatrist who had treated the criminal defendant, stated that

> [m]any physical ailments might be treated with some degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him.[62]

The California supreme court embraced this view in the much publicized case of *In re Lifschutz,*[63] where it acknowledged in dictum

[59] Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications,* 10 WAYNE L. REV. 609, 619 (1964). *See also* Slovenko, *supra* note 51, at 184-85.

[60] *See* Louisell, *The Psychologist in Today's Legal World: Part II,* 41 MINN. L. REV. 731, 744-45 (1957). *Cf.* Slawson, *Patient-Litigant Exception: A Hazard to Psychotherapy,* 21 ARCHIVES GEN. PSYCHIATRY 347, 347-51 (1969).

Emotionally maladjusted persons often come to the therapist replete with suspicion, insecurity, and fears of betrayal. Cross, *Privileged Communications Between Participants in Group Psychotherapy,* 1970 LAW & SOC. ORDER 191, 198. *See also* Heller, *Some Comments to the Lawyer on the Practice of Psychiatry,* 30 TEMPLE L.Q. 401, 401 (1957). A relationship of trust must therefore be established between the therapist and patient or the latter may, consciously or unconsciously, refrain from telling all. *See* Guttmacher & Weihofen, *Privileged Communications between Psychiatrist and Patient,* 28 IND. L.J. 32, 44 (1952); Heller, *supra* at 405. *See also* Note, *Psychiatrist-Patient Privilege—A Need for the Retention of the Future Crime Exception,* 52 IOWA L. REV. 1170, 1178 (1967).

[61] 222 F.2d 398 (D.C. Cir. 1955).

[62] *Id.* at 401-02. *See also* Browne v. Brooke, 236 F.2d 686, 688-89 (D.C. Cir. 1956) (Bazelon, J., dissenting); State v. Sullivan, 60 Wash. 2d 214, 225-26, 373 P.2d 474, 480 (1962).

[63] 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970). In *Lifschutz,* a psychiatrist, who had been held in contempt of court for refusing to divulge information pertaining to his treatment of a patient, applied for a writ of habeas corpus to obtain his release. *Id.* at 420, 467 P.2d at 559, 85 Cal. Rptr. at 831. His patient had brought a suit for assault in which he alleged emotional and mental injury. The defendant subsequently sought to discover information concerning Dr. Lifschutz's prior treatment of the plaintiff. The trial court, determining that the psychotherapist-patient statutory privilege did not apply because the patient himself had put the question of his emotional condition in issue, ordered the doctor to cooperate. When Dr. Lifschutz refused to comply, the court held him in contempt. *Id.* at 420-21, 467 P.2d at 559-60, 85 Cal. Rptr. at 831-32.

For a discussion of the publicity generated by this case see Slovenko, *Psychotherapist-Patient Testimonial Privilege: A Picture of Misguided Hope,* 23 CATH. U.L. REV. 649, 656-57 (1974).

"that an environment of confidentiality of treatment is vitally important to the successful operation of psychotherapy."[64] In addition, legislative recognition of the essential need for confidentiality in psychotherapy is evidenced by the number of special psychotherapist-patient privilege statutes that have been enacted.[65] In particular, the California legislature, in creating a psychotherapist-patient testimonial privilege much broader than that covering the physician-patient relationship,[66] made it quite clear that the desire to maintain confidentiality was its prime consideration:

> Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Research on mental or emotional problems requires similar disclosure. Unless a patient or research subject is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment or complete and accurate research depends.[67]

Given, then, this central role which confidentiality plays within psychotherapy, what are the likely effects of the imposition of a duty to warn?

In his dissent in *Tarasoff,* Justice Clark predicted that the majority's decision "will cripple the use and effectiveness of psychiatry."[68] With this opinion, the overwhelming number of psychotherapists would be in complete accord.[69] They view the inability to assure patients of complete confidentiality as likely to both deter mentally ill persons from seeking treatment and inhibit those already in therapy from making the complete disclosure necessary for effective treatment.[70] One basis for this view is that a

---

[64] 2 Cal. 3d at 422, 467 P.2d at 560-61, 85 Cal. Rptr. at 832-33.

[65] *See, e.g.,* CAL. EVID. CODE § 1014 (West 1966); CONN. GEN. STAT. ANN. § 52-146c, d (Supp. 1975); FLA. STAT. ANN. § 90.242 (Supp. 1974-75); GA. CODE ANN. § 38-418 (1974); ILL. ANN. STAT. ch. 51, § 5.2 (Smith-Hurd Supp. 1974); KY. REV. STAT. ANN. § 421.215 (1972); MD. ANN. CODE art. 35, § 13A (1971).

[66] *Compare* CAL. EVID. CODE § 1010 *et seq.* (West 1966) *with id.* § 990 *et seq. See also* Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma,* 62 CALIF. L. REV. 1025, 1032 (1974).

[67] CAL. EVID. CODE § 1014, Comment (West 1966).

[68] 13 Cal. 3d at ——, 529 P.2d at 567, 118 Cal. Rptr. at 143.

[69] Goldstein & Katz, *supra* note 55, at 178. *See, e.g.,* Love & Yanity, *Psychotherapy and the Law,* 20 MED. TRIAL TECHNIQUE Q. 405, 425 (1974).

[70] *See* Goldstein & Katz, *supra* note 55, at 179; Slawson, *supra* note 60, at 351; Slovenko, *supra* note 51, at 187-88. *See also* Cross, *supra* note 60, at 201; Heller, *supra* note 60, at 406.

A survey conducted by the *Yale Law Journal,* indicating that laymen would likely be deterred from making full disclosure to therapists if confidentiality could not be guaranteed, attests to the inhibiting effects that may follow. Comment, *Functional Overlap Between the*

patient would fear that divulgence either of the fact that he is undergoing therapy or of the communications made therein could have disastrous repercussions upon his reputation and status.[71]

There is, however, a paucity of evidence indicating that these adverse consequences would, in fact, occur. Treatment by psychiatrists and psychologists does not appear to have been hindered in those states where a psychotherapist-patient testimonial privilege has not been recognized.[72] Quite the contrary, as the court pointed out in *Lifschutz,* "the practice of psychotherapy has grown, indeed flourished, in an environment of a non-absolute privilege."[73]

Recent trends in therapy would also appear to undermine the psychotherapists' argument. Those asserting the essentiality of complete confidentiality generally presuppose a "dyadic relationship," with the patient and therapist, meeting over a period of time, forming a relationship of trust.[74] Today, however, with treatment frequently being conducted at clinics and local centers, it is not unusual for the patient to encounter a number of therapists during the course of his treatment.[75] Moreover, group therapy, a mode of treatment conducted within an atmosphere of lesser confidentiality,[76] is becoming increasingly widespread.[77] The com-

---

Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 YALE L.J. 1226, 1255 (1962).

[71] Slovenko, *supra* note 63, at 654; Slovenko, *supra* note 51, at 185. *See also* Note, *supra* note 60, at 1179.

[72] Fleming & Maximov, *supra* note 66, at 1060; Comment, *supra* note 70, at 1255.

[73] 2 Cal. 3d at 426, 467 P.2d at 564, 85 Cal. Rptr. at 836. It must be remembered that psychotherapists, even absent a duty to warn, cannot guarantee confidentiality. For example, some states recognize no testimonial privilege covering the communications between psychotherapist and patient. Slawson, *supra* note 60, at 348-49. Even those states which do have statutes covering this relationship do not provide an absolute protection. *See, e.g.,* CAL. EVID. CODE §§ 1016, 1024 (West 1966).

Traditionally "the public, legislatures, and courts have acted in reliance upon statements of therapists which indicate that treatment can in fact change behavior." Schwitzgebel, *The Right to Effective Mental Treatment,* 62 CALIF. L. REV. 936, 948 (1974). However, there is a disturbing quantum of evidence suggesting that, at least as traditionally practiced, it is ineffective in improving patient behavior. *See* Eysenck, *The Effects of Psychotherapy,* 1 INT'L J. PSYCHIATRY 97, 135-36 (1965); Schwitzgebel, *supra* at 941-48. What success is achieved seems to be more the result of a chance affinity between patient and therapist rather than any particular mode of treatment. Slovenko, *supra* note 63, at 665. Thus, therapeutic effectiveness, questionable at best, should not be substantially diminished by the requirement of disclosure.

[74] Slovenko, *supra* note 63, at 663.

[75] *Id.* Furthermore, it is not unusual for therapists to enter into pre-treatment agreements with their patients, limiting the degree of confidentiality within which treatment will take place. Fleming & Maximov, *supra* note 66, at 1041.

[76] Fleming & Maximov, *supra* note 66, at 1042. Group therapy entails "simultaneous treatment for a number of patients" in which the "interactions between patient and therapist or among the patients themselves [are used] for exposing and solving problems confronting

bined significance of these factors is to diminish the persuasiveness of the view that a patient's self-disclosure and thus effective treatment will be inhibited by the inability to assure total confidentiality.

There is, however, a more fundamental interest which may militate against the imposition of a duty toward third parties, and that is the right to privacy of the individual patient.[78] A party enters therapy with an expectation that confidentiality will be maintained.[79] Precisely because disclosure, even of the fact that one is undergoing mental treatment, could do irreparable damage, the patient's interest in privacy is substantial and deserving of protection.[80] Moreover, this right to privacy has been recognized as having "constitutional underpinnings."[81] The United States Sureme Court, in *Griswold v. Connecticut,*[82] recognized the fundamental nature of the right of privacy within the context of the marital relationship.[83] In *In re Lifschutz,* the California supreme court, by way of dicta, indicated that the psychotherapist-patient relationship fell within *Griswold's* broad principles and that the patient's privacy interest "draws sustenance from our constitutional heritage."[84]

Recognition that a right has constitutional dimensions does not, however, preclude all state interference, but rather delimits such interference to those areas in which the state's interest is compelling.[85] Noting this, the *Lifschutz* court held that the state's interest in arriving at the truth in legal proceedings was sufficiently substantial to justify some intrusion upon the patient's right to privacy.[86] Clearly the state's interest in the safety of its citizens is as

members of the group." *Id.* at 1041-42 (footnote omitted). For a general discussion of this mode of treatment see Cross, *supra* note 60.

[77] Slovenko, *supra* note 63, at 663.

[78] The important stake which the patient undergoing therapy has in the maintenance of privacy can be gleaned from a recognition of the nature of the information disclosed:

> [T]here is hardly any situation in the gamut of human relations where one human being is so much subject to the scrutiny and mercy of another human being as in the psychodiagnostic and psychotherapeutic relationships. Implicit in the nature and processes of psychodiagnosis and psychotherapy is a profound prying into the most hidden aspects of personality and character, a prying often productive of disclosure of secrets theretofore unknown even to the conscious mind of the patient himself.

Louisell, *supra* note 60, at 745 (footnote omitted).

[79] *See* M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 271 (1952); Fox, *Professional Confidences and the Psychologist,* 3 TASMANIA U.L. REV. 12, 13 (1968).

[80] *See* Fleming & Maximov, *supra* note 66, at 1050-51.

[81] *In re* Lifschutz, 2 Cal. 3d 415, 432, 467 P.2d 557, 568, 85 Cal. Rptr. 829, 840 (1970).

[82] 381 U.S. 479 (1965).

[83] *Id.* at 485-86.

[84] 2 Cal. 3d at 431, 467 P.2d at 567, 85 Cal. Rptr. at 839. For an extended discussion of Lifschutz see Note, *Psychotherapy and the Law,* 3 CONN. L. REV. 599 (1971).

[85] Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[86] 2 Cal. 3d at 432-33, 467 P.2d at 568, 85 Cal. Rptr. at 840.

compelling as that of obtaining facts during litigation. Support for this view can be derived from the operation of emergency commitment statutes, extant in virtually every state, which provide for the detention of persons deemed dangerous to others.[87] If a state's interest in protecting its citizens is sufficient to overcome a patient's right to liberty upon a determination that he is dangerous, certainly a patient's right to privacy should likewise yield once a similar determination is made.

In contradistinction to the rights of the patient are those of the potential victim, who has an important interest in remaining free from physical harm.[88] This interest is gaining increasing recognition as the level of violence within our society continues to soar.[89] Even many of those who most vehemently support the enactment of strong psychotherapist-patient privilege statutes recognize that where there is danger of harm to innocent third parties the need for strict confidentiality is outweighed.[90]

Recent legislative trends buttress the view that the rights of innocent victims should be a paramount consideration. For example, the Uniform Rules of Evidence except from testimonial privilege communications made to a physician where the service was sought "to enable or aid [the patient] to commit or to plan to commit a crime or a tort."[91] Additionally, a number of states are establishing programs to compensate victims of violent crime.[92]

---

[87] Fleming & Maximov, *supra* note 66, at 1052; Note, *supra* note 60, at 1184. For example, the California emergency commitment statute provides for a 72-hour confinement for evaluation and treatment of persons considered dangerous either to themselves or to others. CAL. WELF. & INST'NS CODE § 5150 (West Supp. 1975).

[88] One commentator has recently observed:

> As a citizen, most of the rights guaranteed me under the Bill of Rights become nugatory if I am hopelessly crippled by violence, and all of them become extinguished if I am killed.

Hook, *The Emerging Rights of the Victims of Crime,* 46 FLA. B.J. 192, 193 (1972). He therefore suggested that a greater emphasis should be placed upon the attainment of societal security even if the cost is a certain degree of curtailment of the rights of individuals. *Id.* at 194.

[89] Between 1960 and 1970, violent crime, which is "limited to murder, forcible rape, robbery and aggravated assault," rose by 156 percent in the United States. 1970 FBI UNIFORM CRIME REP. 3.

[90] *See, e.g.,* Fisher, *supra* note 59, at 633; Slovenko, *supra* note 51, at 197-98; Note, *supra* note 60, at 1182.

[91] UNIFORM R. EVID. 27(6).

[92] California established a program to compensate victims of violent crime in 1965. Act of July 16, 1965, ch. 1549, [1965] Cal. Stat. 3641 (repealed 1967). The program in its present form was enacted in 1967. Act of August 30, 1967, ch. 1546, [1967] Cal. Stat. 3707 (codified at CAL. GOV'T CODE § 13959 *et seq.* (West Supp. 1975)). It has since been criticized as being "ineffective and unresponsive." Younger, *Commendable Words: A Critical Evaluation of California's Victim Compensation Law,* 7 J. BEVERLY HILLS B. ASS'N 12, 16 (March-April 1973).

Furthermore, emergency commitment statutes, expressly designed to prevent harm to potential victims,[93] demonstrate a subordination of the patient's interests to those of society. And, as the majority in *Tarasoff* correctly pointed out, California's " 'dangerous patient' exception" to the psychotherapist-patient testimonial privilege can be viewed as evidencing a legislative determination that, as between the potential victim and the patient, the interests of the former should take precedence.[94]

Society has a genuine interest in promoting effective therapy,[95] and confidentiality may play a key role in the achievement of this objective. However, the imposition of a duty to warn in instances where danger to innocent third parties is imminent is not likely to undermine this goal.[96] Of more alarming consequence is the fact that fundamental rights of the patients undergoing therapy may be abridged. Yet, where fundamental interests of disparate groups are not coterminous, this result is inevitable, and the correctness of the balance struck must be viewed in terms of its consequences for society as a whole.[97]

The evaluation of the social importance of one policy as opposed to another is, ultimately, a value judgment, the sagacity of which can only be determined with the passage of time. However, given our present level of violence, the decision to impose a duty to warn where there exists foreseeable danger to innocent parties appears to be a correct one. As the *Tarasoff* majority emphasized, "we

---

Following California's initiative, a number of states have established programs which provide financial aid, in varying degrees, to victims of crime. *See, e.g.,* HAWAII REV. STAT. § 351-1 *et seq.* (1968), *as amended,* (Supp. 1973); MD. ANN. CODE art. 26A, § 1 *et seq.* (1974), *as amended,* (Supp. 1974); N.J. STAT. ANN. § 52:4B-1 *et seq.* (Supp. 1975-76); N.Y. EXEC. LAW § 620 *et seq.*, at 529 (McKinney 1972), *as amended,* (McKinney Supp. 1974-75). For a general discussion of the social consequences of victim compensation see Mueller, *Compensation for Victims of Crime: Thought Before Action,* 50 MINN. L. REV. 213 (1965).

[93] Fleming & Maximov, *supra* note 66, at 1052. For a discussion of the probable effects that the imposition upon a psychiatrist of the duty to warn will have on emergency commitments see Note, *supra* note 60, at 1185.

[94] 13 Cal. 3d at —— n.11, 529 P.2d at 561, 118 Cal. Rptr. at 137 (quoting from Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma,* 62 CALIF. L. REV. 1025, 1063 (1974)).

[95] Love & Yanity, *supra* note 69, at 424. The societal importance of effective treatment of the mentally ill was underscored in Binder v. Ruvell, No. 52C2535 (Ill. Cir. Ct., June 24, 1952), reprinted in 150 J.A.M.A. 1241 (1952), in which the court characterized psychiatry as "a healing process affecting thousands and perhaps millions of our inhabitants." *Id.* at 1242. *See also* 2 Cal. 3d at 421-22, 467 P.2d at 560, 85 Cal. Rptr. at 832.

[96] *See* notes 72-77 *supra* and accompanying text.

[97] As articulated by Justice Cardozo, "[t]he final cause of law is the welfare of society." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 66 (1921).

can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal."[98]

Joseph J. Malcolm

[98] —— Cal. 3d at ——, 529 P.2d at 561, 118 Cal. Rptr. at 137.