

January 1985

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Recommended Citation

Leslie B. Small, *Psychotherapists' Duty to Warn: Ten Years After Tarasoff*, 15 Golden Gate U. L. Rev. (1985).
<http://digitalcommons.law.ggu.edu/ggulrev/vol15/iss2/1>

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COMMENTS

PSYCHOTHERAPISTS' DUTY TO WARN: TEN YEARS AFTER *TARASOFF*

I. INTRODUCTION

A decade has passed since the landmark case of *Tarasoff v. Regents of the University of California*.¹ In *Tarasoff*, the California Supreme Court ruled that if psychotherapists determine or should have determined that their patient presents a serious danger of violence to another, they incur a duty to use reasonable care to warn the intended victim of such danger.² Reaction to the decision, especially by psychiatrists, was immediate and generally negative.³ Apparently in response to the magnitude and source of criticism, the supreme court granted a rehearing,⁴ at which time it formulated the duty of therapists more

1. 529 P.2d 553, 118 Cal. Rptr. 129 (1974), *vacated*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

2. 529 P.2d at 555, 118 Cal. Rptr. at 131.

3. For a discussion of the first *Tarasoff* opinion (including reaction to the decision), see, e.g., Note, *Tarasoff v. Regents of the University of California: Psychotherapists, Policemen and the Duty to Warn—An Unreasonable Extension of the Common Law?*, 6 GOLDEN GATE U.L. REV. 229 (1975-1976); Note, *Duty Imposed on Psychotherapists to Exercise Reasonable Care to Warn Potential Victims of Foreseeable Imminent Dangers Posed by Mentally Ill Patients*, 6 SETON HALL L. REV. 536 (1975); Note, *Tarasoff v. Regents of University of California: The Psychotherapists' Peril*, 37 U. PITT. L. REV. 155 (1975-1976); Comment, *Tarasoff v. Regents of University of California—Risk Allocation in Mental Health Care: Whether to Treat the Victim or His Patient*, 1975 UTAH L. REV. 553 (1975).

4. See, e.g., Quinn, *The Impact of Tarasoff on Clinical Practice*, 2 BEH. SCIENCES AND THE LAW 319, 322 (1984). "Both the imposition of a mandated positive duty on clinicians and the specificity of that duty . . . caused an uproar in the professional community." *Id.* When the first *Tarasoff* decision was published, the Northern California Psychiatric Society [hereinafter cited as the Society], headed a successful attempt to persuade the court to rehear its ruling. See Givelber, Bowers and Blich, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443, 449 (1984) [hereinafter cited as Givelber]. The Society, the American Psychiatric Association, and state and local organizations of psychologists and social workers, joined together as *amici curiae*. *Id.* at 449.

broadly.⁵

The broader *Tarasoff* duty to protect third parties continues to generate concern among psychotherapists.⁶ Opponents argue that disclosure of patients' confidential communications to third parties may disrupt the therapist-patient relationship, thereby compromising effective treatment.⁷ Furthermore, psychotherapists object to the imposition of liability premised upon the prediction of patient dangerousness.⁸ They contend that there is no consistent professional standard for predicting violence, and that such predictions are unreliable and inaccurate.⁹ Additionally, psychotherapists are disturbed by recent cases that extend the duty to protect.¹⁰

In response to the courts' ongoing presumption that psychotherapists can accurately predict patient dangerousness, as well as the courts' recent expansion of the duty to protect,¹¹ the Cali-

5. 17 Cal. 3d at 450, 551 P.2d at 353, 131 Cal. Rptr. at 33. For a comparison of both *Tarasoff* opinions, see Note, *Untangling Tarasoff: Tarasoff v. Regents of the University of California*, 29 HASTINGS L.J. 179 (1977-1978).

6. See *infra* notes 7-10 and accompanying text.

7. See Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976-1977); Special Project, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165 (1978); see also Beigler, *Tarasoff vs. Confidentiality*, 2 BEH. SCIENCES AND THE LAW 273 (1984); Gurevitz, *Tarasoff: Protective Privilege Versus Public Peril*, 134 AM. J. PSYCHIATRY 289 (1977); Roth and Meisel, *Dangerousness, Confidentiality, and the Duty to Warn*, 134 AM. J. PSYCHIATRY 508 (1977). But see Beck, *When the Patient Threatens Violence: An Empirical Study of Clinical Practice After Tarasoff*, 10 BULL. AM. ACAD. PSYCHIATRY AND LAW 189 (1982); Slovenko, *Psychotherapy and Confidentiality*, 24 CLEV. ST. L. REV. 375 (1975).

8. See Coccozza and Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1975-1976); see also Birns and Levien, *Dangerousness: Legal Determinations and Clinical and Legal Considerations in the Therapy of Violence-Prone Patients*, 18 CURRENT PSYCHIATRY THERAPIES 55 (1978); Schwartz, *Some Problems in Predicting Dangerousness*, 52 PSYCHIATRIC QUARTERLY 84 (1980); Steadman, *The Right Not to be a False Positive: Problems in the Application of the Dangerousness Standard*, 52 PSYCHIATRIC QUARTERLY 84 (1980). For a review of research studying the prediction of patient dangerousness, see Wettstein, *The Prediction of Violent Behavior and the Duty to Protect Third Parties*, 2 BEH. SCIENCES AND THE LAW 291 (1984).

9. See, e.g., Steadman, *supra* note 8. "Nowhere in the research literature is there any documentation that clinicians can predict dangerous behavior beyond the level of chance." *Id.* at 96.

10. See Mills, *The So-Called Duty to Warn: The Psychotherapeutic Duty to Protect Third Parties*, 2 BEH. SCIENCES AND THE LAW 237, 239 (1984). For a discussion of the cases expanding the duty to protect, see *infra* notes 88-153 and accompanying text.

11. See *infra* note 158.

ifornia legislature introduced Assembly Bill 2900.¹² Governor Deukmejian vetoed A.B. 2900 two months after its approval by the legislature.¹³

This Comment discusses the *Tarasoff* decisions and subsequent cases defining the scope of the psychotherapists' duty to protect persons other than their patients. It examines the rationale behind A.B. 2900, and assesses the bill's effect upon the *Tarasoff*-related objections it addresses. In spite of the Governor's veto of A.B. 2900, there is a need for statutory guidelines to clearly and equitably define the scope of the psychotherapists' duty to protect. This Comment proposes a model statute that attempts to strike a favorable balance among the complex, overlapping interests of psychotherapists, patients, and the public.

II. THE TARASOFF DECISION AND ITS LEGACY

In 1969, Prosenjit Poddar received outpatient psychotherapy at Cowell Memorial Hospital at the University of California, Berkeley.¹⁴ During therapy he confided to a psychologist his intention to kill Tatiana Tarasoff, an unnamed but readily identifiable young woman with whom he had become obsessed.¹⁵ Concerned about his patient's behavior, the psychologist orally notified campus police that he would request Poddar's commitment for psychiatric evaluation.¹⁶ After the campus police took Poddar into custody and questioned him, they were satisfied he was rational and released him with a warning to stay away from Tatiana.¹⁷ The psychiatrist in charge of the clinic then directed no further action be taken to detain Poddar, and ordered all documentation of the case destroyed.¹⁸ Two months after confid-

12. A.B. 2900, Cal. Leg. Reg. Sess. (1983-1984) (introduced Feb. 13, 1984) [hereinafter cited as A.B. 2900].

13. A.B. 2900 was vetoed by the Governor on Sept. 28, 1984. See memo from Governor Deukmejian (Sept. 28, 1984) (copy on file at Golden Gate University Law Review Office) [hereinafter cited as Governor's Memo].

14. 529 P.2d at 556, 118 Cal. Rptr. at 132.

15. *Id.* Tatiana was spending the summer in South America at the time Poddar disclosed his intention to kill a young woman when she returned from Brazil. *Id.*

16. *Id.* The psychologist also sent a letter to the Berkeley Police Chief which requested the assistance of the police department in securing Poddar's confinement. *Id.*

17. *Id.*

18. *Id.*

ing in his psychologist, Poddar stabbed Tatiana to death.¹⁹

The victim's parents sued the therapist and policemen involved, alleging they had negligently failed to confine Poddar and to warn them of threats directed at their daughter.²⁰ The superior court concluded that there was no cause of action because there was no psychotherapists' duty to warn or protect third parties.²¹ On appeal, the California Supreme Court reversed and held that a cause of action for negligent failure to warn could be stated against the therapists.²² According to the court, the special relationship between psychotherapist and patient could sustain a duty to warn an intended victim.²³ The court ruled that the duty to warn was triggered once psychotherapists determined or, pursuant to professional standards, should have determined that a patient presented a serious threat of danger.²⁴

On rehearing, the court refashioned its decision in several significant ways.²⁵ First, the majority broadened the psychotherapists' duty from the duty to warn to the duty to protect,²⁶ holding that once psychotherapists determine, or should have determined, that a patient poses a serious threat of violence to others, they should exercise reasonable care to protect the threatened victim.²⁷ Second, the court asserted that the manner in which

19. *Id.* For a more detailed summary of the facts see Stone, *supra* note 7, at 358-61. The criminal case is reported in *People v. Poddar*, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. 910 (1974).

20. 529 P.2d at 555, 118 Cal. Rptr. at 131.

21. *Id.* The issue on appeal to the California Supreme Court was whether or not a duty existed. See Mills, *supra* note 10, at 240.

22. 529 P.2d at 561, 118 Cal. Rptr. at 137.

23. *Id.* at 557-59, 118 Cal. Rptr. at 133-35. The majority recognized that, as a general rule, courts are reluctant to impose an affirmative duty, for the benefit of third persons, in cases of nonfeasance as opposed to misfeasance. *Id.* at 557 & n.5, 118 Cal. Rptr. at 133 & n.5. However, the courts have recognized an exception to this common law rule if "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." *Id.* at 557, 118 Cal. Rptr. at 133. See RESTATEMENT (SECOND) OF TORTS § 315 (1965). Additionally, the court concluded that the plaintiffs could assert a cause of action against the police defendants for failure to warn because the officers' conduct increased the risk of violence to Tatiana. 529 P.2d at 561, 118 Cal. Rptr. at 137.

24. 529 P.2d at 555, 118 Cal. Rptr. at 131.

25. See Stone, *supra* note 7, at 361; Mills, *supra* note 10, at 238. See also *infra* notes 26-30 and accompanying text.

26. 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

27. *Id.* at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25. Significantly, the court decided

the duty could be discharged would vary with the facts of each case.²⁸ Warning the potential victim was again cited as an example of exercising reasonable care.²⁹ However, the court did not consider such a warning the only means by which psychotherapists could satisfy their legal obligation.³⁰ The court left psychotherapists with only vague guidelines to look to in determining the nature of their duty toward third parties, and how they might fulfill that duty.

In formulating its decision, the *Tarasoff* majority rejected the defendant therapists' contention that imposition of a duty to protect third parties was unworkable because therapists could not accurately predict patient dangerousness.³¹ The court acknowledged that therapists encounter difficulties when attempting to forecast situations of violence, but asserted that therapists need not render a perfect performance.³² Finding psychiatry and psychology analagous to other fields of medicine, the majority asserted that therapists need only conform to accepted standards of their profession.³³

that the police did not have a legal duty toward Tatiana. *Id.* at 444, 551 P.2d at 349, 131 Cal. Rptr. at 29. The court contended that a duty to warn the potential victim could not be imposed upon the police officers because the officers did not have a special relationship to either Tatiana or Poddar. *Id.*

28. *Id.* at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25. The *Tarasoff* court asserted that the matter "should not be governed by any hard and fast rule." *Id.* at 439 n.11, 551 P.2d at 345 n.11, 131 Cal. Rptr. at 25 n.11. "[T]he adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances." *Id.* at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25.

29. *Id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

30. *Id.* The exercise of reasonable care included warning "others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." *Id.* See also Givelber, *supra* note 4, at 450.

31. 17 Cal. 3d at 437-38, 551 P.2d at 344-45, 131 Cal. Rptr. at 24-25. Additionally, the majority rejected the defendant therapists' allegation that the giving of a warning constituted a breach of confidentiality, thereby adversely affecting the practice of psychotherapy. *Id.* at 440-42, 551 P.2d at 346-47, 131 Cal. Rptr. at 26-27. The court recognized that free and open communication encouraged patients to express threats of violence to their therapists. However, the court further contended that psychotherapists should not be routinely encouraged to reveal confidential information; they should make disclosures to third parties only when necessary to avert danger to others. *Id.* at 441, P.2d at 347, 131 Cal. Rptr. at 27. The court concluded, "The protective privilege ends where the public peril begins." *Id.* at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.

32. *Id.* at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.

33. *Id.* The court acknowledged that professional opinion and judgment might differ regarding whether or not a patient presented a serious danger of violence. *Id.* As a result, the court asserted that therapists were free to exercise their own best judgment without incurring liability; a wrongful judgment was insufficient to established negligence. *Id.*

In a strongly worded dissent, Justice Mosk argued that a psychotherapist should not be held to a professional standard for predicting patient violence.³⁴ Mosk contended that there was extensive literature "demonstrat[ing] that psychiatric predictions of violence are inherently unreliable."³⁵ He argued that a duty toward third parties should arise only if therapists do, in fact, predict violence, not if they should have predicted violence.³⁶

A. *The Prediction of Dangerousness*

The ability of psychotherapists to determine which patients are seriously prone to violence is an ongoing controversy in the medical and legal communities.³⁷ Extensive literature exists ex-

34. *Id.* at 451, 551 P.2d at 354, 131 Cal. Rptr. at 34. (Mosk J., concurring and dissenting).

35. *Id.* In formulating his dissent, Mosk relied upon *People v. Burnick*, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488, *reh'g denied*, (1975). In *Burnick*, the court was called upon to determine the proper standard of proof in commitment proceedings of alleged mentally disordered sex offenders. *Id.* at 310, 335 P.2d at 354, 121 Cal. Rptr. at 490. The court strongly argued that predictions of dangerous behavior were both inaccurate and unreliable. *Id.* at 325-28 & nn.16-18, 335 P.2d at 365-66 & nn.16-18, 121 Cal. Rptr. at 501-02 & nn.16-18. The majority concluded that, in order for the court to commit an allegedly dangerous sex offender, the plaintiff must prove the charge beyond a reasonable doubt. *Id.* at 332, 335 P.2d at 369, 121 Cal. Rptr. at 505.

36. 17 Cal. 3d at 452, 551 P.2d at 354, 131 Cal. Rptr. at 34. "The majority's expansion of that rule will take us from the world of reality into the wonderland of clairvoyance." *Id.*

37. *See supra* notes 8-9 and accompanying text. The California Supreme Court's imposition of a legal duty for psychotherapists to diagnose and predict patient dangerousness in order to protect third parties is just one of many contexts in the mental health and criminal justice systems in which questions regarding the prediction of dangerousness arise. *See Wettstein, supra* note 8, at 292. The prediction of dangerousness "is currently used to assist in making a wide variety of legal decisions, from civil commitment to the imposition of the death penalty." *See J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR*, 19 (1981).

In *Barefoot v. Estelle*, 103 S. Ct. 3383, *reh'g denied*, 104 S. Ct. 209 (1983), the U.S. Supreme Court rejected challenges to state court impositions of the death penalty partly premised upon the prediction of future violent crimes. *Id.* at 3388. In *Barefoot*, the defendant was convicted of the murder of a police officer in Texas. A separate sentencing hearing was held to determine whether the death penalty should be imposed. Under Texas state law, one of the grounds for imposing the death penalty is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE CRIM. PRO. ANN. art. 37.071 (Vernon 1981). Based upon the expert testimony of two psychiatrists for the prosecution, the jury found that the defendant should be sentenced to death. *See Curran, Uncertainty in Prognosis of Violent Conduct: The Supreme Court Lays Down the Law*, 310 NEW ENG.

amining the difficulties therapists encounter in making such predictions.³⁸ Research in the early 1970's indicated that psychotherapists "were vastly overrated as predictors of violence."³⁹ According to this "first generation"⁴⁰ of research, the number of accurate predictions was unimpressive.⁴¹ A subsequent study indicated that, with few exceptions, there was "no empirical evidence" to support the position that psychiatrists had any special expertise in accurately determining dangerousness.⁴²

J. MED. 1651, 1651 (1984).

The defendant alleged that the death penalty should be set aside because the U.S. Constitution barred the testimony of the psychiatrists at the punishment hearing. 103 S. Ct. at 3395. The American Psychiatric Association (APA), in an amicus brief, alleged that the Supreme Court should bar from courtrooms, on Constitutional grounds, all testimony by psychiatrists on the prediction of future violent conduct. *See Curran, supra*, at 1651. The APA relied upon numerous studies demonstrating that psychiatric evaluation was unreliable in predicting dangerousness of convicted defendants. *Id.*

The majority of the Supreme Court firmly dismissed the arguments of the APA and upheld imposition of the death penalty. 103 S. Ct. at 3396-99. The majority contended that the suggestion to reject all psychiatric testimony regarding a defendant's future dangerousness "[was] somewhat like asking us to disinvent the wheel." *Id.* at 3396. The majority observed that such a position was contrary to the Court's cases. *Id.*

38. *See supra* note 8. Virtually all of those who have written about the prediction of dangerousness have held the terms violence and dangerousness synonymous. *See J. Monahan, supra* note 37, at 3.

39. *See J. Monahan, The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy*, 141 AM. J. PSYCHIATRY 10, 10 (1984).

40. *Id.*

41. *Id.* "Even in the best of circumstances—with lengthy multidisciplinary evaluations on patients who had already manifested their violent proclivities on several occasions—psychiatrists and psychologists seemed to be wrong at least twice as often as they were right when they predicted violence." *Id.*

42. *See Coccozza and Steadman, supra* note 8, at 1099. A summary of the methods and results of the Coccozza and Steadman study demonstrates the difficulties psychotherapists encounter in predicting patient dangerousness. The study resulted from a New York State statute which "mandated a determination of dangerousness for all indicted felony defendants found incompetent to stand trial." *Id.* at 1094. The courts based their determination of dangerousness upon psychiatric testimony. *Id.* Out of 257 indicted felons found incompetent to stand trial during the first year of the new statute, the courts agreed with the psychiatric testimony on 223 cases. *Id.* at 1095. It was the prediction of dangerousness in these 223 cases that the authors evaluated. *Id.*

The New York statute defined a dangerous person as "an incapacitated person who is so mentally ill or mentally defective that his presence in an institution operated by the department of mental hygiene is dangerous to the safety of other patients therein, the staff of the institution or the community." N.Y. CRIM. PRO. LAW § 730.10(2) (McKinney 1971) (omitted in the 1974 statute). The authors found this statutory definition of dangerousness vague. *See Coccozza and Steadman, supra* note 8, at 1095. Consequently they examined a wide range of variables which influenced psychiatric decisions. The authors studied psychiatric diagnosis, social and demographic variables, physical characteristics, and past contact with the criminal justice and mental health systems. *Id.* at 1095-96. The defendant's current alleged offense was the only factor which showed a significant association with the psychiatric prediction of dangerousness. *Id.* at 1096. The authors found

Based upon these early studies, the mental health and legal professions have concluded that psychotherapists cannot rely upon their predictions of dangerousness.⁴³ However, recent "second generation"⁴⁴ literature indicates that the value of these early studies is limited if applied to situations such as *Tarasoff* in which mentally ill individuals receive outpatient psychotherapy and continue to function in the community.⁴⁵ On the contrary, "first generation" research focused upon patients who were institutionalized after demonstrating their violent proclivities⁴⁶; most of those studied had significant histories of mental illness and dangerous behavior.⁴⁷

Additionally, "second generation" literature suggests that predictive accuracy may be better than previously thought.⁴⁸ One recent study that "proposes to substitute data for rhetoric"⁴⁹ contends that, contrary to claims made by *Tarasoff* oppo-

this association to be problematical. *Id.* Although the psychiatrists used the seriousness of the alleged offense as the principal factor in assessing dangerousness, they only mentioned it in approximately one third of the cases. *Id.* Additionally, the authors contended that the use of this factor undermined the supposed expertise of psychiatrists; a lay person, provided with only the alleged offense, could make similar predictions of dangerousness. *Id.*

The crucial question presented by the study was whether those defendants found to be dangerous proved to be more dangerous than those found to be nondangerous. *Id.* To determine the accuracy of psychiatric predictions of dangerousness, the researchers relied on data from five sources: "(1) the maximum security hospitals to which both groups were initially sent; (2) civil hospitals to which some members of both groups were transferred immediately after the maximum security facilities; (3) hospital readmission records; (4) inpatient records of all subsequent hospitalization; and (5) subsequent arrest records." *Id.* at 1097. The results showed that the patients evaluated as dangerous by the psychiatrists were not more dangerous than those evaluated as nondangerous. *Id.* "There was no significant difference between the two groups on any of the measures of assaultiveness examined." *Id.* at 1098. For a Table summarizing the results of the study, see *id.*

43. See J. Monahan, *supra* note 39, at 10.

44. See *id.*

45. See Kroll and Mackenzie, *When Psychiatrists are Liable: Risk Management and Violent Patients*, 34 HOSP. AND COMM. PSYCHIATRY 29, 32; J. Monahan, *supra* note 39, at 11; Wettstein, *supra* note 8, at 300.

46. See J. Monahan, *supra* note 39, at 11; Wettstein, *supra* note 8, at 300-01.

47. See Wettstein, *supra* note 8, at 301. For a further discussion of the limited relevance of "first generation" studies in the duty to protect third parties context see *id.* at 300-03.

48. See J. Monahan, *supra* note 39, at 11.

49. See Givelber, *supra* note 4, at 446. The Givelber study, in part, investigated *Tarasoff's* impact on psychotherapeutic practice. *Id.* at 461-90. One purpose of the study was "to determine the accuracy of criticisms that *Tarasoff's* ruling . . . was unworkable because therapists lack agreed-upon criteria to assess dangerousness . . ." *Id.* The authors surveyed 2,875 psychiatrists, psychologists and social workers located in the eight

nents, therapists are rather confident in predicting future dangerousness by outpatients.⁵⁰ Furthermore, psychotherapists appear to believe that even if they cannot define dangerousness, they can employ objective professional standards for evaluating its potential likelihood.⁵¹

Therapists' confidence may not, however, reflect their abilities. Although recent literature suggests that the determination of patient dangerousness may not be as problematic as *Tarasoff* critics assert, optimism generated by current research is understandably guarded.⁵² Despite an increase in published research analyzing the prediction of violent behavior in different settings,⁵³ prediction in outpatient community settings has been largely unexplored.⁵⁴ Furthermore, clinicians, when evaluating populations referred from the general community, erroneously predicted future violent behavior more frequently than they cor-

largest standard metropolitan statistical areas as of the 1970 census. *Id.* at 454. The sample was selected from the directories of the American Psychiatric Association, the American Psychological Association and the National Association of Social Workers; 59.5% of the sample responded. *Id.* at 455. The respondents were well distributed in terms of the sampling criteria—"profession, location, experience, and type of practice." *Id.*

50. *Id.* at 463. "When asked to indicate the firmest prediction they would be willing to make about the possibility that an outpatient of theirs might physically harm another, only 5% of [the] respondents felt that there was 'no way to predict' such behavior, and over three-quarters felt that they could make a prediction ranging from 'probable' to 'certain.'" *Id.*

51. *Id.* at 464.

[T]herapists appear to believe that there are objective professional standards for evaluating dangerousness or, at a minimum, that dangerousness is a little like hard core obscenity in that they "know it when they see it," even if they can't define it. If therapists believe there are common professional standards or practices, it is difficult to fault a court for believing so also.

Id.

52. See J. Monahan, *supra* note 39, at 11.

No one thinks that the prediction of violence is on the verge of attaining a validity comparable to that of the prediction of the weather There may indeed be a ceiling on the level of accuracy that can ever be expected of the clinical prediction of violent behavior. That ceiling, however, may be closer to 50% than to 5% among some groups of clinical interest.

Id.

53. See Wettstein, *supra* note 8, at 312. For a discussion of studies dealing with clinical assessment of dangerousness in other than inpatient institutional settings, see *id.* at 303-07.

54. See J. Monahan, *supra* note 39, at 11.

rectly predicted it.⁵⁵ Additionally, the existence of discrepancies in the very definition of dangerousness complicates any attempt to make accurate determinations.⁵⁶

The absence of evidence indicating that patient dangerousness can be validly predicted in institutional settings does not preclude the possibility of valid predictions in community settings.⁵⁷ However, the accuracy of predictions of dangerousness in *Tarasoff* outpatient situations remains uncertain until more comprehensive and definitive studies are published.

B. *Defining the Scope of the Psychotherapists' Duty After Tarasoff*

Tarasoff established the duty of psychotherapists to protect third parties from dangerous patient conduct, but failed to outline criteria for defining the limits of that duty.⁵⁸ Subsequent

55. See Wettstein, *supra* note 8, at 308. One such study examined the relationship between the California Commitment Statute (the Lanterman-Petris-Short Act) classification of "dangerousness to others" and the occurrence of acts that indicate dangerousness to others. Yesavage, Werner, Becker and Mills, *Short-Term Civil Commitment and the Violent Patient*, 139 AM. J. PSYCHIATRY 1145, 1146 (1982) [hereinafter cited as Yesavage]. The Lanterman-Petris-Short Act provides that, after evaluations by a police officer or authorized medical professional, a mentally disordered person may be involuntarily committed for a 72 hour period of treatment and evaluation if there is probable cause that person "is a danger to others, or to himself, or gravely disabled." CAL. WELF. & INST. CODE § 5150 (West 1984).

The authors studied prospectively, over a period of six months, 84 patients hospitalized at the Psychiatric Intensive Care Unit of the Veterans Administration Medical Center, Palo Alto, California. See Yesavage, *supra*, at 1146. Forty-six of the patients had been involuntarily admitted as dangerous to others, and 38 had been admitted for other reasons. *Id.* The nursing staff was required to chart all instances of assault-related behavior on the ward. *Id.* The results indicated that 65% of the group considered dangerous to others had at least one assault-related event during the week following admission, and 47% of the group not considered dangerous to others had one such event. *Id.* The authors concluded that patients labeled dangerous for purposes of involuntary commitment "were no different in the extent of their dangerous behavior on the ward than were patients labeled nondangerous." *Id.* at 1147.

56. See Coccozza and Steadman, *supra* note 8, at 1085-87; see also Wettstein, *supra* note 8, at 293. "Many have decried the inconsistency, overinclusiveness, and vagueness with which the law has defined dangerousness and have admonished the courts and legislatures to more precisely delineate the nature, severity, frequency, and imminence of the conduct under question." *Id.* See also Birns and Levien, *Dangerousness: Legal Determinations and Clinical Speculations*, 52 PSYCHIATRIC QUARTERLY 108 (1980).

57. See J. Monahan, *supra* note 39, at 11.

58. See Cooper, *Duty to Warn Third Parties*, 248 J. A.M.A. 431, 431 (July 23/30

California cases have addressed emerging problems, and have attempted to establish guidelines defining the nature of the duty psychotherapists owe potential victims.⁵⁹

In *Thompson v. County of Alameda*,⁶⁰ the California Supreme Court refused to extend the psychotherapists' duty to protect to include probation officers.⁶¹ The parents of a young child sued the county for the wrongful death of their son.⁶² The child was killed within twenty-four hours after a juvenile offender, James F., was released from confinement into the temporary custody of his mother.⁶³ The county knew James had stated he would kill at random, a child in the community; but nonetheless, county officials released him without warning local police, parents, or James' mother.⁶⁴

Distinguishing *Thompson* from precedent that imposed a duty toward third parties,⁶⁵ the *Thompson* majority refused to

1982); Mills, *supra* note 10, at 238.

59. See *infra* notes 60-153 and accompanying text. Although the *Tarasoff* decisions have caused great concern, "it is those cases that have arisen subsequent to *Tarasoff*, though grounded in its reasoning, that have caused the greatest concern." See Mills, *supra* note 10, at 238.

60. 152 Cal. Rptr. 226 (1979), *vacated*, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980).

61. See Note, *Affirmative Duty After Tarasoff*, 11 HOFSTRA L. REV. 1013 (1982-1983); Note, *Thompson v. County of Alameda: Tort Plaintiffs' Paradise Lost?*, 76 NW. U.L. REV. 331 (1981-1982).

62. 27 Cal. 3d at 746, 614 P.2d at 730, 167 Cal. Rptr. at 72. The plaintiffs' complaint alleged that the minor child's death was caused by the county's "reckless, wanton and grossly negligent" actions in releasing James, failing to advise and/or warn James' mother, the local police, or "parents of young children within the immediate vicinity" of James' mother's residence, failing to exercise due care in maintaining custody and control over James through his mother, and failing to exercise reasonable care in selecting James' mother as his custodian. *Id.*

63. *Id.* Prior to killing the plaintiffs' son, James had been confined, pursuant to a court order, in a county institution. *Id.* The reason for James' custody was, for some reason, not apparent. 152 Cal. Rptr. at 228.

64. 27 Cal. 3d at 746, 614 P.2d at 730, 167 Cal. Rptr. at 72. The county also knew that James 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.*

65. *Id.* at 750-58, 614 P.2d at 733-38, 167 Cal. Rptr. at 75-80. In concluding that the county owed no duty to warn the plaintiffs of James' release, the court distinguished *Thompson* from *Tarasoff* and *Johnson v. State of California*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240, *reh'g denied*, (1968). In *Johnson*, the state released a minor parolee with homicidal tendencies and a background of violence and cruelty into the Johnsons' home without giving warnings of the parolee's latent, dangerous qualities. The youth assaulted Mrs. Johnson, whereupon she brought a suit against the state for her

impose "blanket liability."⁶⁶ The court argued that liability may be imposed only "[i]n those instances in which the released offender posed a predictable threat of harm to a named or readily identifiable victim. . . ."⁶⁷ On the contrary, James had made a "generalized threat to a segment of the population."⁶⁸ Furthermore, the court asserted that a special relationship did not exist between the county and either the plaintiffs or their deceased son.⁶⁹ Relying on *Tarasoff*, the court found such a relationship essential to sustain an affirmative duty to protect third parties.⁷⁰

Justice Tobriner, who wrote for the majority in *Tarasoff*, dissented in *Thompson*.⁷¹ Tobriner contended that the majority misread controlling precedent.⁷² According to Tobriner, the court failed to recognize that the county stood in a special relationship to James because he was in their custody.⁷³ This rela-

injuries. *Id.* at 784-85, 447 P.2d at 354, 73 Cal. Rptr. at 242. The court sustained the plaintiffs' cause of action and claimed that the state owed her a duty of care. *Id.* at 786, 447 P.2d at 355, 73 Cal. Rptr. at 243. The *Johnson* court contended that "the state's relationship to plaintiff was such that its duty extended to warning of latent, dangerous qualities suggested by the parolee's history or character." *Id.* at 785, 447 P.2d at 355, 73 Cal. Rptr. at 243. Furthermore, the court asserted that a duty would be imposed upon those who created a "foreseeable peril." *Id.* at 786, 447 P.2d at 355, 73 Cal. Rptr. at 243.

66. 27 Cal. 3d at 753, 614 P.2d at 734, 167 Cal. Rptr. at 76. Prior to examining the plaintiffs' contention that the county was liable for its failure to warn persons of James' release, the court found that the county's decision to release James, its selection of his custodian, and its supervision of her activities were statutorily immunized from liability. *Id.* at 747-49, 614 P.2d at 730-32, 167 Cal. Rptr. at 72-74. Nevertheless, the court inquired whether, in spite of this immunity, the county had a duty to warn for the protection of the plaintiffs. *Id.* at 749, 614 P.2d at 732, 167 Cal. Rptr. at 74.

67. *Id.* at 758, 614 P.2d at 738, 167 Cal. Rptr. at 80.

68. *Id.* at 750, 614 P.2d at 733, 167 Cal. Rptr. at 75. The court argued that warnings to a broad segment of the population would be ineffective and difficult to issue. *Id.* at 755, 614 P.2d at 736, 167 Cal. Rptr. at 78. See also Le Blang, *The Duty to Warn Third Parties Threatened by a Patient*, 10 LEGAL ASPECTS OF MED. PRACTICE 1, 2-3 (Aug. 1982).

69. 27 Cal. 3d at 753, 614 P.2d at 734, 167 Cal. Rptr. at 76. "Unlike *Johnson* and *Tarasoff*, plaintiffs here have alleged neither that a direct or continuing relationship between them and [c]ounty existed . . . nor that their decedent was a foreseeable or readily identifiable target of the juvenile offender's threats." *Id.*

Additionally, the court based its decision upon public policy considerations. *Id.* The court noted there is an ever present danger of parole violations. *Id.* at 754, 614 P.2d at 735, 167 Cal. Rptr. at 77. However, probation programs are such an integral part of the correctional system that the general public must bear the risks created by rehabilitative efforts. *Id.* at 753, 614 P.2d at 735, 167 Cal. Rptr. at 77.

70. See *supra* note 23 and accompanying text.

71. 27 Cal. 3d at 759, 614 P.2d at 738, 167 Cal. Rptr. at 80 (Tobriner, J., dissenting).

72. *Id.* at 759-60, 614 P.2d at 738, 167 Cal. Rptr. at 80.

73. *Id.* at 759, 614 P.2d at 738, 167 Cal. Rptr. at 80.

tionship imposed a duty on the county to warn third parties of potential danger caused by the juvenile offender's release.⁷⁴ Also, Tobriner argued, *Tarasoff* did not hold that the duty to protect runs only to identifiable victims; the duty extends to foreseeable victims.⁷⁵

In *Bellah v. Greenson*,⁷⁶ a California appellate court again declined to extend the holding of *Tarasoff*.⁷⁷ The parents of a young woman who committed suicide brought suit against her psychiatrist for failure to warn them of their daughter's suicidal tendencies.⁷⁸ Although the victim's psychiatrist was aware of and documented his patient's suicidal threats,⁷⁹ the court refused to find a duty on the part of the psychiatrist.⁸⁰

Relying primarily upon *Tarasoff*,⁸¹ the *Bellah* court decided not to impose liability where the danger presented was that of self-inflicted harm or property damage.⁸² According to *Bellah*, *Tarasoff* did not require therapists to warn others of the likelihood of any and all harm.⁸³ Rather, the court noted, *Tarasoff* required a therapist to disclose confidential information if "the strong interest in confidentiality [was] counterbalanced by an even stronger public interest . . . [in] safety from violent assault."⁸⁴ The court recognized that the therapeutic relationship could be compromised if therapists revealed that their patients manifested suicidal tendencies.⁸⁵ Furthermore, the need for con-

74. *Id.*

75. *Id.* at 760, 614 P.2d at 739, 167 Cal. Rptr. at 81. "The principles underlying the *Tarasoff* decision indicate that . . . the existence of an identifiable victim is not essential to the cause of action. [The] decision rested upon the basic tenet of tort law that a 'defendant owes a duty of care to all persons who are *foreseeably* endangered by his conduct . . .'" *Id.*

76. 141 Cal. Rptr. 92 (1977), *aff'd*, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535, *reh'g denied*, (1978).

77. 81 Cal. App. 3d at 622, 146 Cal. Rptr. at 540.

78. *Id.* at 618, 146 Cal. Rptr. at 537. The decedent had been under the care of the defendant psychiatrist for an unspecified period of time. *Id.* At the time of the decedent's death, her parents were living in another state, and were unaware that their daughter was contemplating suicide. *Id.*

79. *Id.*

80. See *infra* notes 81-86.

81. 81 Cal. App. 3d at 620-23, 146 Cal. Rptr. at 538-40.

82. *Id.* at 621-22, 146 Cal. Rptr. at 538-40.

83. *Id.* at 621, 146 Cal. Rptr. at 539.

84. *Id.*

85. *Id.*

fidentiality would not be outweighed by the risk of suicide or property damage.⁸⁶

The *Bellah* opinion was not surprising considering the balancing of interests executed by the *Tarasoff* court. The *Tarasoff* decision was premised upon the majority's desire to discourage threatened violent attacks upon unsuspecting individuals.⁸⁷ This objective would not be served if the threat were of self-inflicted harm or property damage.

Two recent California cases may signal a trend to extend the psychotherapists' duty to protect third parties.⁸⁸ The U.S. Court of Appeals for the Ninth Circuit, applying California tort law, broadened this duty in *Jablonski by Pahls v. United States*.⁸⁹ Jablonski threatened to rape Pahls, the mother of his girlfriend.⁹⁰ Pahls notified the police with whom she discussed possible psychiatric treatment for Jablonski.⁹¹ Subsequently, Jablonski consented to outpatient evaluation at the Veterans Administration Hospital (the hospital).⁹² The police spoke to the Chief of Psychiatry at the hospital, and told him of Jablonski's recent threats of violence.⁹³ The Chief of Psychiatry failed to relay the information to the psychiatrist who ultimately evaluated Jablonski.⁹⁴

During a preliminary session at the hospital, Jablonski's doctor diagnosed him as having an "antisocial personality" and being "potentially dangerous."⁹⁵ Jablonski refused recommendations for voluntary commitment, and after his psychiatrist deter-

86. *Id.* at 622, 146 Cal. Rptr. at 540.

87. 17 Cal. 3d at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27. "Our current crowded and computerized society compels the interdependence of its members. In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal." *Id.*

88. *Jablonski by Pahls v. United States*, 712 F.2d 391 (9th Cir. 1983); *Hedlund v. Superior Court*, 34 Cal. 3d 695, 669 P.2d 41, 194 Cal. Rptr. 805, *reh'g denied*, (1983).

89. 712 F.2d 391.

90. *Id.* at 393. Jablonski's girlfriend was actually his common-law spouse. *See Mills, supra* note 10, at 249.

91. 712 F.2d at 393.

92. *Id.*

93. *Id.* In addition to the attempted rape, Jablonski threatened his girlfriend's mother with a sharp object and made obscene telephone calls to her. *Id.*

94. *Id.* Jablonski's psychiatrist testified that had he received the details of his patient's history, he would have sought his involuntary hospitalization. *Id.*

95. *Id.*

mined no emergency existed, he directed Jablonski to return in two weeks.⁹⁶ The psychiatrist made no attempt to obtain his patient's prior medical records which documented that Jablonski had a "homicidal ideation towards his wife," and that "future violent behavior was a distinct probability."⁹⁷

Following the preliminary session, Jablonski's girlfriend told his psychiatrist that she was concerned about Jablonski's unusual behavior.⁹⁸ The psychiatrist suggested that she leave Jablonski, at least during the evaluation period, but she told him she loved Jablonski.⁹⁹ Subsequently, Jablonski's girlfriend's mother complained to Jablonski's psychiatrist that his patient be seen before the next scheduled visit.¹⁰⁰ Jablonski's psychiatrist agreed to see him four days later.¹⁰¹ Meanwhile, Jablonski's girlfriend moved out of the apartment that she had shared with Jablonski, but continued to see him intermittently.¹⁰²

On his second visit, Jablonski met with his psychiatrist and his psychiatrist's supervisor. The supervisor believed Jablonski was an "'antisocial personality with explosive features,' . . . was dangerous and [constituted] an 'emergency.'"¹⁰³ The psychiatrists again found no basis for involuntary commitment, and they advised Jablonski to continue outpatient evaluation.¹⁰⁴ Two days later Jablonski attacked and murdered his girlfriend.¹⁰⁵

96. *Id.*

97. *Id.* Prior medical records revealed that Jablonski had received extensive care at an Army hospital in El Paso. The final diagnosis at the time concluded, in part, that Jablonski had a "schizophrenic reaction; undifferentiated type; chronic, moderate; manifested by homicidal behavior toward his wife." *Id.* at 393-94. Dr. Thompson, an expert witness for the decedent's daughter, testified that, according to professional standards in the community, Jablonski was potentially very dangerous, and that prior medical records should have been obtained. *Id.* at 393.

98. *Id.*

99. *Id.* The psychiatrist gave Jablonski's girlfriend no further warnings because he believed she would be non-compliant because of her emotional attachment to Jablonski. *Id.*

100. *Id.* at 394.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* Jablonski remained vague about his prior psychiatric treatment and again refused a request for his voluntary admission as an inpatient. His psychiatrists scheduled more tests and prescribed Valium. *Id.*

105. *Id.*

The victim's minor daughter brought suit for the wrongful death of her mother.¹⁰⁶ She alleged that the Veterans Administration psychiatrists were negligent in treating Jablonski and proximately caused her mother's death.¹⁰⁷ The district court ruled in favor of the plaintiff, and held that the psychiatrists negligently failed to obtain Jablonski's prior records, failed to record warnings by the police concerning their patient, and failed to warn the victim.¹⁰⁸

On appeal, the hospital contended that it had no duty to warn the victim because Jablonski made no specific threats against her.¹⁰⁹ The court reasoned that the *Jablonski* case "falls somewhere between the extremes of *Tarasoff* and *Thompson v. Alameda*," but closer to *Tarasoff*.¹¹⁰ Unlike Poddar in *Tarasoff*, who made specific threats directed at a specific victim, Jablonski did not threaten any particular person.¹¹¹ However, the *Jablonski* court asserted that Jablonski had a markedly violent history toward his wife which meant his girlfriend was "targeted" to a greater extent than the children in *Thompson*.¹¹² Furthermore, the court concluded that the logistical difficulties of warning an intended victim which existed in the *Thompson* case, were absent in *Jablonski*.¹¹³

The *Jablonski* decision is significant because the court imposed liability, for failure to protect a potential victim, even though a mentally ill patient made no actual threats against a particular individual. The court reviewed Jablonski's conduct in therapy and his past medical record and concluded that his doctors should have determined that he was dangerous. Significantly, the court relied upon the district court judge's finding that the psychiatrists negligently failed to obtain Jablonski's prior medical record.¹¹⁴ The court agreed that the medical rec-

106. *Id.* at 392.

107. *Id.*

108. *Id.* at 397. According to the Court of Appeals, any one of the findings, if not clearly erroneous, would support a judgment for the plaintiff. *Id.*

109. *Id.* at 398.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* The *Jablonski* court argued that warning Jablonski's girlfriend "would have posed no difficulty for the doctors, especially since she twice expressed her fear of Jablonski directly to them." *Id.*

114. *Id.*

ord provided necessary information for determining that Jablonski's girlfriend was a foreseeable victim, and therefore, the failure to obtain the record was integral to the conclusion that the psychiatrists breached their duty to protect third parties.¹¹⁵

Also significant was the court's willingness to impose liability even though the victim had received warnings from a variety of sources.¹¹⁶ As noted previously, *Tarasoff* established that a direct warning to the victim could discharge the psychotherapists' duty to protect.¹¹⁷ However, the *Jablonski* court established that a warning, *per se*, might not discharge this duty. On the contrary, if a warning were "unspecific and inadequate under the circumstances," the psychotherapist could still be liable.¹¹⁸

The second case expanding the psychotherapists' duty to protect is *Hedlund v. Superior Court of Orange County*.¹¹⁹ In *Hedlund*, the California Supreme Court ruled that "a young child injured during a violent assault on his mother may state a cause of action under *Tarasoff*" ¹²⁰ In 1977, La Nita Wilson and Stephen Wilson (no relation) received therapy from the two defendant psychologists.¹²¹ In the course of treatment, Stephen told the psychologists of his intent to commit serious bodily injury upon La Nita.¹²² The defendants did not communicate these threats to the intended victim.¹²³ Subsequently, Stephen shot La Nita, who sustained severe internal and lower extremity injuries.¹²⁴ Just prior to the blast, La Nita threw herself on top of her two year old son, Darryl, seated next to her in a car, to

115. *Id.* at 399.

116. *Id.* at 398. For a complete list of those who provided warnings, see Kamenar, *Psychiatrists' Duty to Warn of a Dangerous Patient: A Survey of the Law*, 2 BEH. SCIENCES AND THE LAW 259, 268.

117. See *supra* note 29 and accompanying text.

118. 712 F.2d at 398. The court's decision to impose liability upon the VA psychiatrists might have been influenced by the fact that the government was a defendant. Such a defendant would provide a "deep pocket" from which the plaintiff could obtain recovery. Additionally, the court might have concluded that the defendants breached their duty to protect Jablonski's girlfriend because the court was appalled that the psychiatrists did not obtain Jablonski's old medical records.

119. 34 Cal. 3d 695, 669 P.2d 41, 194 Cal. Rptr. 805.

120. *Id.* at 705, 669 P.2d at 46, 194 Cal. Rptr. at 810.

121. *Id.* at 700, 669 P.2d at 43, 194 Cal. Rptr. at 807.

122. *Id.*

123. *Id.*

124. *Id.* See 6 NAT'L L.J. 4 (Oct. 17, 1983).

protect him.¹²⁵ The child sustained no physical injuries.¹²⁶

A year and a half after the incident, La Nita learned that Stephen had told their therapists of his intent to harm her.¹²⁷ La Nita brought suit against the psychologists on her behalf as well as on behalf of her young son, who she claimed suffered serious emotional and psychological injuries.¹²⁸ The superior court overruled the defendant psychologists' demurrer which charged that the one year statute of limitations for personal injury barred La Nita's claim.¹²⁹ The court also dismissed the psychologists' claim that they owed no duty to warn Darryl of the threat made to his mother.¹³⁰

The California Supreme Court affirmed the superior court ruling, and concluded that La Nita, as well as Darryl, could state a cause of action.¹³¹ The court initially addressed the statute of limitations issue and ruled that a psychotherapist who fails to comply with the *Tarasoff* duty to warn commits professional negligence rather than ordinary negligence.¹³² The court reasoned that the implementation of adequate means to protect an intended victim is as much a component of a psychotherapist's duty as is the diagnosis of patient violence; both facets involved the rendering of professional services.¹³³ Therefore, the three year statute of limitations for professional negligence, rather than the one year statute of limitations for ordinary negligence, ap-

125. 34 Cal. 3d at 705, 669 P.2d at 46, 194 Cal. Rptr. at 810.

126. *Id.*

127. See NAT'L L.J. *supra* note 124.

128. 34 Cal. 3d at 705, 669 P.2d at 46, 194 Cal. Rptr. at 810. La Nita's claim alleged that the psychotherapists, "in the exercise of the professional skill, knowledge and care possessed by members of their specialty, should have known that Stephen presented a serious danger of violence to her." *Id.* Furthermore, the psychotherapists "owed her and other foreseeable victims a duty to diagnose Stephen's condition, to realize that he presented a serious threat of violence to her, and to recognize that the requirements of their profession required them to notify her of the danger." *Id.*

129. *Id.* at 699, 669 P.2d at 42, 194 Cal. Rptr. at 806. La Nita and her son were injured on April 9, 1979. La Nita did not learn about Stephen's threats of violence toward her until more than a year and a half later; she did not file suit until Nov. 12, 1980. *Id.* at 700, 669 P.2d at 42-43, 194 Cal. Rptr. at 806-07. See also NAT'L L.J. *supra* note 124.

130. 34 Cal. 3d at 699, 669 P.2d at 42, 194 Cal. Rptr. at 806.

131. *Id.* at 704, 707, 669 P.2d at 46-47, 194 Cal. Rptr. at 810-11.

132. *Id.* at 699-705, 669 P.2d at 42-46, 194 Cal. Rptr. at 806-10.

133. *Id.* at 703, 669 P.2d at 45, 194 Cal. Rptr. at 809. The statute of limitations did not interfere with Darryl's cause of action because the limitation period was tolled while he was a minor. *Id.* at 705, 669 P.2d at 46, 194 Cal. Rptr. at 810.

plied, and the court upheld La Nita's claim.¹³⁴

The court then turned to Darryl's complaint which reiterated allegations made by his mother.¹³⁵ The defendants claimed they had no duty to warn the boy because Stephen had made no threat against him.¹³⁶ Therefore, the defendants argued, Darryl's complaint failed to state a cause of action in negligence.¹³⁷ However, the court asserted that Darryl was both a foreseeable and identifiable victim of an assault upon his mother, and therefore, the therapists owed him a duty.¹³⁸

In formulating its conclusion that injury to Darryl was foreseeable, the majority relied upon supporting precedent in *Dillon v. Legg*¹³⁹ and *Molien v. Kaiser Foundation Hospitals*.¹⁴⁰ In *Dillon*, a mother claimed that she suffered emotional trauma and physical injury as a result of witnessing the death of her young child who was struck by a negligently driven automobile.¹⁴¹ The *Dillon* court listed several factors to consider when determining whether or not injury to a third party was foreseeable, and in applying those factors found the injuries to the decedent child's mother foreseeable.¹⁴² The *Hedlund* court reasoned that the minor boy's emotional trauma was as foreseeable as the mother's emotional trauma in *Dillon*.¹⁴³ In fact, the *Hedlund* majority as-

134. *Id.* at 704, 669 P.2d at 46, 194 Cal. Rptr. at 810.

135. *See supra* note 128.

136. 34 Cal. 3d at 705, 669 P.2d at 46, 194 Cal. Rptr. at 810.

137. *Id.*

138. *Id.* at 705-06, 669 P.2d at 46-47, 194 Cal. Rptr. at 810-11.

139. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

140. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980).

141. 68 Cal. 2d at 731, 441 P.2d at 914, 69 Cal. Rptr. at 74.

142. *Id.* at 740-41, 441 P.2d at 920-21, 69 Cal. Rptr. at 80-81. The factors to be considered in determining if an accident is reasonably foreseeable are:

- (1) [w]hether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it.
- (2) [w]hether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.
- (3) [w]hether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

Id.

143. 34 Cal. 3d at 706, 669 P.2d at 47, 194 Cal. Rptr. at 811. The *Hedlund* court also argued that it was not unreasonable to impose a duty to persons in close relation to the object of a patient's threat. *Id.* The court reasoned that therapists must consider the

serted that the *Dillon* opinion compelled the *Hedlund* conclusion.¹⁴⁴

In *Molien*, the plaintiff claimed that he suffered emotional distress after his wife was misdiagnosed as having syphilis.¹⁴⁵ The *Molien* court ruled that the physicians' duty to warn extended to the patient's husband because it was foreseeable that a close member of the patient's family would be emotionally distressed by such a diagnosis.¹⁴⁶ The *Hedlund* court contended that the psychotherapists' duty to protect extended to La Nita's son because emotional injury to him was no less foreseeable than emotional injury to the patient's husband in *Molien*.¹⁴⁷ Additionally, the *Hedlund* court relied upon *Molien* to sustain a cause of action in negligence for emotional distress without associated physical injuries.¹⁴⁸

The majority opinion is significant because the California Supreme Court extended the psychotherapists' duty to protect third parties to include persons other than just the intended victim. The court in *Hedlund*, for the first time, established that liability may exist not only for harm to a threatened victim, but also for harm to others foreseeably injured if the threats were carried out.¹⁴⁹ Considering the holdings of *Dillon* and *Molien*, it is not surprising that the *Hedlund* court broadened the psychotherapists' duty to protect third parties. Although not surprising, the *Hedlund* decision is somewhat troubling. A psychotherapist has a legal duty to do whatever is reasonable under the circumstances to protect an intended victim of violent threats made by a patient in the course of therapy. The *Tarasoff* deci-

presence of such persons "both in evaluating the seriousness of the danger posed by the patient and in determining the appropriate steps to be taken to protect the named victim." *Id.*

144. *Id.* at 706, 669 P.2d at 46, 194 Cal. Rptr. at 810.

145. 27 Cal. 3d at 920, 616 P.2d at 815, 167 Cal. Rptr. at 833. During a routine physical exam, Mrs. Molien's physicians erroneously examined and tested her for syphilis. The physicians instructed her to tell her husband of the diagnosis; Mr. Molien was required to have a blood test to determine whether he was the source of his wife's purported venereal disease. Mr. Molien claimed that his wife started to suspect that he had engaged in extramarital sex, and their marriage dissolved. He also alleged a loss of consortium. *Id.* at 919-20, 616 P.2d at 814-15, 167 Cal. Rptr. at 832-33.

146. *Id.* at 923, 616 P.2d at 817, 167 Cal. Rptr. at 835.

147. 34 Cal. 3d at 707, 669 P.2d at 47, 194 Cal. Rptr. at 811.

148. *Id.* at 706 n.8, 669 P.2d at 47 n.8, 194 Cal. Rptr. at 811 n.8.

149. *Id.* at 705-07, 669 P.2d at 46-47, 194 Cal. Rptr. at 810-11.

sion mandates that action.¹⁵⁰ However, the court's imposition of liability for foreseeable injury to persons other than the intended victim may extend the *Tarasoff* duty to protect to an unwarranted and unworkable extreme.

Although the *Hedlund* court significantly extended the duty to protect, it provided minimal guidelines defining the scope of foreseeable injury for which psychotherapists may be liable. For example, the *Hedlund* court did not decide whether or not psychotherapists have a duty to protect all injured bystanders.¹⁵¹ On the contrary, the court premised its decision that injury to Darryl was foreseeable upon the fact that he was the threatened victim's minor child.¹⁵² As a result, the courts are left to decide whether or not to impose liability if injury is to an ordinary bystander rather than to a close member of an intended victim's family. If the courts continue their recent trend to broaden the scope of the psychotherapists' duty to protect third parties, they may extend the duty to all injured bystanders.¹⁵³

C. *The State of the Law Today*

These recent cases defining the scope of the psychotherapists' duty to protect leave many unanswered questions. The *Tarasoff* duty to protect third parties is firmly entrenched in California law. However, *Tarasoff* did not clearly define the parameters of this duty.¹⁵⁴ The *Tarasoff* majority fashioned a vaguely defined liability around a narrow set of facts.¹⁵⁵ As a re-

150. See *supra* text accompanying note 27.

151. 34 Cal. 3d at 705, 669 P.2d at 46, 194 Cal. Rptr. at 810. The *Hedlund* court asserted that it need not decide whether a duty exists as to all bystanders because "[t]he question posed by Darryl's claim [was] narrower because there could be no reasonable difference of opinion that the risk of harm to him was foreseeable." *Id.*

152. *Id.*

153. Another related issue is whether or not the courts, when faced with an injured victim, will be tempted to premise the foreseeability of harm somewhat upon the severity of injury; a court may be more willing to label an injury foreseeable if it is severe rather than minor.

154. See *supra* note 58 and accompanying text.

155. In *Tarasoff*, the plaintiffs' complaint alleged that defendant psychotherapists did predict that their patient would kill. 17 Cal. 3d at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25. Also, the victim was readily identifiable. See *supra* text accompanying note 15. Furthermore, the treating psychotherapist notified the police that his patient was dangerous. 17 Cal. 3d at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21. "[O]n the facts of

sult, the courts must define the scope of the duty to protect each time they address a unique fact pattern. Thus, this area of the law is very unsettled.

The *Jablonski* and *Hedlund* decisions significantly broadened the scope of the duty psychotherapists owe toward persons other than their patients.¹⁵⁶ The psychotherapeutic community is troubled by the consistent broadening of this duty.¹⁵⁷ This concern, as well as objections to the courts' expectation that psychotherapists accurately predict patient dangerousness,¹⁵⁸ precipitated introduction of A.B. 2900.¹⁵⁹

III. THE NEED FOR LEGISLATION

A. *Assembly Bill 2900*

On February 13, 1984 Assemblyman Alister McAlister introduced A.B. 2900,¹⁶⁰ originally sponsored by the California State

Tarasoff it is difficult to see what the therapist did that was wrong other than fail to warn the family." See Givelber, *supra* note 4, at 484.

156. See *supra* notes 88-153 and accompanying text.

157. See Mills, *supra* note 10, at 239.

158. See Press Release from Assemblyman McAlister (March 7, 1984) (copy on file at Golden Gate University Law Review Office) [hereinafter cited as Press Release]. For excerpts from McAlister's Press Release, see *supra* text accompanying notes 162-63.

159. See Press Release, *supra* note 158.

160. See A.B. 2900, *supra* note 12. A.B. 2900 reads in its entirety:

Section 1. Section 43.92 is added to the Civil Code to read:

43.92 (a) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist an actual threat of physical violence against a reasonably identifiable victim or victims.

(b) If there is a duty to warn and protect under the limited circumstances specified above, the duty shall be discharged by the psychotherapist making reasonable efforts to communicate the threat to the victim or victims.

Id. This is the final amended form of A.B. 2900 (amended in Senate) (Aug. 15, 1984). In its original form, A.B. 2900 provided immunity from liability, "as against all foreseeable victims . . . except where the patient has communicated . . . an actual knowledge that the patient has a history of dangerous violent behavior." See A.B. 2900 *supra* note 12. Also, the bill provided that the duty would be discharged by communication of the

Psychological Association.¹⁶¹ McAlister proposed the bill primarily "to abolish the expansive rulings of *Tarasoff* and *Hedlund* to the effect that a therapist can be held liable for the mere failure to predict and warn of potential violence by his patient."¹⁶² According to McAlister, "[s]uch extremely broad and open-ended liability is premised upon a degree of confidence in the predictive ability of psychologists and psychiatrists that is simply unjustified in the light of our best scientific and common sense knowledge."¹⁶³ At a hearing on A.B. 2900, McAlister alleged there is no scientific knowledge enabling therapists to make precise and certain predictions of patient fulfillment of threats of violence.¹⁶⁴ McAlister claimed that his bill did not exactly reverse *Tarasoff*.¹⁶⁵ He perceived A.B. 2900 as "a respectable middle road" that attempted to narrow the broadening of psychotherapist liability.¹⁶⁶

Other proponents of A.B. 2900 expressed various reasons for legislative intervention.¹⁶⁷ Dr. David Allen, Professor of Psychiatry at the University of California, claimed that A.B. 2900 would provide better protection for the public because physicians would be less reluctant to work with violent patients who would, in turn, be more likely to seek help.¹⁶⁸ He alleged that since *Tarasoff*, there had been an expanding tort liability which infringed upon the civil rights of patients.¹⁶⁹ Additionally, he expressed the belief that psychotherapists must offer the public some protection, but that it was impossible to warn everyone with whom a violent patient comes into contact.¹⁷⁰ According to Allen, professional ethics themselves provided sufficient guide-

threat by the psychiatrist or psychologist to the identified victim "or local law enforcement agency." *Id.*

161. See Press Release, *supra* note 158, at 1.

162. See *id.* at 6.

163. *Id.*

164. *Hearing on A.B. 2900 Before the Sen. Comm. on Jud.*, Cal. Leg. Reg. Sess. (1983-1984) (attended by the author Aug. 7, 1984) (notes of the *Hearing* on file at Golden Gate University Law Review Office).

165. *Id.*

166. *Id.*

167. See *infra* notes 168-81 and accompanying text. For a list of several groups supporting the bill, see Analysis of A.B. 2900 for Sen. Comm. on Jud. prepared by Gene Wong (Consultant to Sen. Comm. on Jud.) (copy on file at Golden Gate University Law Review Office) [hereinafter cited as Analysis of A.B. 2900].

168. See *supra* note 164 (statement of Dr. David Allen).

169. *Id.*

170. *Id.*

lines for psychotherapists' decisions whether or not to warn third parties.¹⁷¹

According to a representative of the California State Psychological Institute (CPI), A.B. 2900 would foster the obligation of a psychotherapist to warn victims and to protect patients' rights.¹⁷² The CPI predicted that more warnings would occur as a result of A.B. 2900.¹⁷³ Furthermore, the CPI contended that the psychotherapeutic community clearly needed "succinct and specific language" to replace the ambiguity which existed.¹⁷⁴ A representative of the California State Psychological Association (CSPA), which also supported the bill,¹⁷⁵ argued that the legislature should devise a clear set of statutory guidelines for psychotherapists' utilization in discharging responsibility to public and clients.¹⁷⁶

The California Medical Association (CMA) was another proponent of A.B. 2900.¹⁷⁷ According to the CMA, the bill "would place some reasonable boundaries in an unclear area of liability that California's judicially active [s]upreme [c]ourt has created and continues to expand."¹⁷⁸ The CMA contended that psychotherapists "have been caught in a real dilemma" since *Tarasoff* and *Hedlund*.¹⁷⁹ Also, the bill "represent[ed] an important clarification of the extent of the therapist's duty to warn and how that duty may be discharged."¹⁸⁰

Opposition to A.B. 2900 was voiced by the Citizens' Commission on Human Rights (CCHR).¹⁸¹ The CCHR claimed that

171. *Id.* The American Psychiatric Association's Principles of Medical Ethics states, "[p]sychiatrists at times may find it necessary, in order to protect patient or community from imminent danger, to reveal confidential, information disclosed by the patient." See *Principles of Medical Ethics*, 130 AM. J. PSYCHIATRY 1063 (1973).

172. See *supra* note 164 (statement of a CPI representative).

173. *Id.*

174. *Id.*

175. See *supra* note 164 (statement of a CSPA representative).

176. *Id.*

177. See *infra* notes 178-80 and accompanying text.

178. See letter from Tim Shannon (Assoc. Director of the CMA) to Governor Deukmejian (Aug. 28, 1984) (copy on file at Golden Gate Law Review Office).

179. *Id.* "While having to be ever mindful of protecting the public, therapists must also be concerned that requiring them to warn potential victims will frequently result in the breach of patients' confidentiality." *Id.*

180. *Id.*

181. See *supra* notes 182-85 and accompanying text. "The [CCHR] . . . reflect[s]

A.B. 2900 was an “emotional piece of legislation which open[ed] the door to potential violence by removing current protection afforded the public.”¹⁸² According to the CCHR, “crime is on the rise,” and legislation should preserve rather than abrogate the psychotherapists’ duty to warn.¹⁸³ The CCHR also asserted that psychotherapists, who hold themselves out as experts, “should be held accountable as experts when their actions or inactions result in injury to another.”¹⁸⁴ At the very least, psychotherapists “should be held accountable to notify law enforcement agencies of potential violent acts on the part of their patients.”¹⁸⁵

In spite of extensive support from the psychotherapeutic community, Governor Deukmejian vetoed A.B. 2900.¹⁸⁶ The Governor claimed that the bill would narrow the *Tarasoff* decision and limit psychotherapists’ liability, thereby increasing the likelihood of danger to the public.¹⁸⁷ He was concerned that a requirement to warn third parties only if an actual threat were communicated “may excuse conduct which should be actionable.”¹⁸⁸ The Governor recognized that the psychotherapists’ duty toward third parties is a difficult area of the law.¹⁸⁹ However, he asserted, the standard should be refined to give greater protection to the public.¹⁹⁰

B. *Critique of A.B. 2900*

A.B. 2900 sought to provide immunity to a licensed psychotherapist for failure to warn or protect third parties unless the patient “ha[d] communicated to the psychotherapist an actual threat of violence against a reasonably identifiable victim or vic-

the views of many individual letter writers” See Analysis of A.B. 2900, *supra* note 167, at 6. For a list of others opposing the bill, see *id.* at 1.

182. See *supra* note 164 (statement of Cynthia Denkler) (a CCHR representative).

183. *Id.*

184. See Analysis of A.B. 2900, *supra* note 167, at 6.

185. *Id.*

186. See Governor’s Memo *supra* note 13.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

tims.”¹⁹¹ In so limiting the potential for liability, A.B. 2900 would have significantly impacted the *Tarasoff* decision and subsequent California cases interpreting *Tarasoff*, in several ways.

First, the *Tarasoff* court imposed liability not only if therapists failed to protect third parties after they had actually determined patient dangerousness, but also if therapists failed to protect after they “should have determined” patient dangerousness.¹⁹² The “should have determined” language of *Tarasoff* has generated extensive opposition because psychotherapists contend that there is no agreed upon standard for predicting patient dangerousness.¹⁹³ A.B. 2900 would have alleviated the problem of predicting dangerousness. By imposing liability only if an actual threat of violence were communicated, the bill would have placed significantly fewer demands upon the predictive abilities of psychotherapists.

Although psychotherapists would no longer have to comply with an inconsistent standard for predicting dangerousness, A.B. 2900 would have created associated problems. A hypothetical example illustrates this point. Suppose, in the course of therapy, a patient with a known history of violent behavior toward women tells his treating psychotherapist “I’m feeling violent. I don’t know what I’m capable of doing.” The patient storms out of the office, goes home, and kills his wife. Under A.B. 2900, the psychotherapist would not have incurred a duty to protect because the patient did not communicate an actual threat of violence. Such a result is unreasonable. In spite of the absence of an actual threat, liability should be imposed if a patient manifests an intent to commit violent attacks.¹⁹⁴

Second, *Tarasoff* established that psychotherapists might incur a duty to protect “intended” and “foreseeable” victims.¹⁹⁵ The *Hedlund* court extended this duty to persons who stand in

191. See *supra* note 136.

192. See *supra* text accompanying note 24.

193. See *supra* note 8.

194. See *supra* text accompanying note 188 (Governor Deukmejian expressed a similar concern when he vetoed A.B. 2900).

195. 17 Cal. 3d at 438 n.11, 551 P.2d at 345 n.11, 131 Cal. Rptr. at 25 n.11.

a close relationship to the victim.¹⁹⁶ Although A.B. 2900 might have narrowed the expanding scope of the duty owed third parties to “a reasonably identifiable victim or victims,”¹⁹⁷ the bill would have raised related objections. A statute that attempts to define the scope of the duty to protect should not premise liability upon whether or not a victim is readily identifiable. The imposition of liability should be based upon whether or not, under the circumstances, a psychotherapist could prevent injury to a third person. Two hypothetical examples illustrate this point. Suppose, in the course of therapy, a patient states “I am going to kill everybody with blue eyes.” A reasonable court should not impose liability upon psychotherapists for failure to warn every blue-eyed person whom their patient might kill. However, suppose another patient states “I am going to kill my girlfriend.” Subsequently, and in the absence of a warning to the girlfriend, the patient shoots and kills her. He also shoots and kills his girlfriend’s housekeeper who is present at the time. The blue-eyed victims and the housekeeper were not readily identifiable. As a result, under A.B. 2900, liability would not have been imposed in either case. However, the two situations are distinguishable. In the former example, the psychotherapist could not have prevented the shootings by issuing warnings. In the latter example, it would have been possible for the psychotherapist to prevent the housekeeper’s death by warning the patient’s girlfriend; the duty to protect should extend to the housekeeper.

Additionally, A.B. 2900 would have significantly limited the manner in which psychotherapists could have discharged their duty toward third parties. The duty could be discharged only if psychotherapists made “reasonable efforts to communicate the threat to the victim or victims.”¹⁹⁸ As a result, A.B. 2900 would have clarified the vague guidelines *Tarasoff* established for discharging the duty to protect.¹⁹⁹ However, if the bill would have been enacted, a related issue would have been raised. Suppose, due to time constraints or the absence of information regarding the whereabouts of the intended victim, psychotherapists were unable to contact the person threatened by their patient. Instead, the police or close members of a potential victim’s family

196. 34 Cal. 3d at 706-07, 669 P.2d at 47, 194 Cal. Rptr. at 811.

197. See Analysis of A.B. 2900, *supra* note 167.

198. See *supra* note 160.

199. See *supra* notes 28-30 and accompanying text.

were able to warn the threatened individual. Even in the absence of a direct warning by a psychotherapist, the public's interest in safety would be adequately served if the psychotherapist used reasonable efforts to notify persons capable of warning the intended victim.

C. *Proposal of a Model Duty to Protect Statute*

In spite of the Governor's veto of A.B. 2900, a statute, designed to remedy the inadequacies of the common law, should be adopted. The psychotherapists' duty to protect third parties, first described in *Tarasoff*²⁰⁰ and subsequently expanded in *Jablonski*²⁰¹ and *Hedlund*,²⁰² is ill-defined. The courts should not bear the burden of defining the duty to protect in future cases. Furthermore, psychotherapists need clear and equitable guidelines providing a consistent definition of the duty to protect and how it can be discharged. There may be less risk to public safety if psychotherapists understand the nature and scope of their legal duty.²⁰³

This Comment proposes a model statute that attempts to strike a favorable balance among the interests at issue. In certain circumstances, psychotherapists may be the only individuals aware of the likelihood of future acts of violence by their patients. In these situations, psychotherapists can play an important role in eliminating threats to public safety. However, there may be times when psychotherapists are unable to utilize their prior knowledge to prevent violent attacks. Therefore, the proposed statute imposes a legal duty to protect only if reasonable efforts can be employed to prevent danger to third parties.

Proposed Model Statute

(a) There shall be no monetary liability on the part of, and no cause of action shall arise against, any persons who are psychotherapists as defined in Section 1010 of the Evi-

200. See *supra* note 26 and accompanying text.

201. See *supra* notes 89-118 and accompanying text.

202. See *supra* notes 119-53 and accompanying text.

203. See Givelber, *supra* note 4, at 466.

dence Code in failing to protect a person or persons other than their patients, from violent assaults by their patients unless, in the course of therapy, a patient, through words or conduct, manifests an intent to violently attack another person.

(b) If there is a duty to protect under the circumstances specified in section (a), the duty will extend to (1) the intended victim or victims and (2) to all others whose injuries were proximately caused by the failure of a psychotherapist to protect the intended victim or victims, but only if their injuries could have been prevented by the psychotherapist using any of the alternatives for discharging the duty to protect listed in section (c) below.

(c) If there is a duty to protect under the circumstances specified in sections (a) and (b), that duty shall be discharged by the psychotherapist making reasonable efforts to communicate the potential for violence either to the intended victim or victims, the police, or close members of the intended victim's family.²⁰⁴

IV. CONCLUSION

In the decade since the 1974 *Tarasoff* decision, California courts have had several opportunities to define the scope of the psychotherapists' duty to warn or protect third parties. Although the courts refused to extend this duty in *Thompson and Bellah*, the recent decisions of *Jablonski*, and particularly *Hedlund* significantly extended the potential for liability. Perceiving what they consider to be a dangerous trend, psychotherapists have voiced multiple concerns. In response to these objections, the legislature approved A.B. 2900. Proponents of the bill hoped

204. The psychotherapists' duty to protect is a difficult area of the law. *See supra* note 189 and accompanying text. Although the proposed statute attempts to balance the complex interests involved, the psychotherapeutic community may perceive the model as an unwarranted extension of their duty beyond that narrowly described in A.B. 2900. Hopefully, the expanded potential for liability is balanced by the added alternative means of discharging the duty.

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that statutory guidelines would eliminate the need for psychotherapists to predict patient dangerousness. They also looked to A.B. 2900 as a means to limit the courts' expansion of the class of potential plaintiffs. In spite of extensive support from the psychotherapeutic community, Governor Deukmejian vetoed A.B. 2900. The Governor expressed concern that the bill would limit the psychotherapists' duty to protect in such a way as to increase the likelihood of danger to the public.

The Governor's veto leaves significant issues unresolved. Psychotherapists are left with a vague and expanding duty toward persons other than their patients. The courts still have to balance the complex interests of psychotherapists, patients, and the public whenever they address and reshape the duty. This Comment proposes a model statute that provides the legal and mental health professions with clear and equitable guidelines that define the scope of the duty to protect. The legislature and the Governor should reexamine the challenges of the *Tarasoff* legacy, and enact a statute that adequately addresses the complex interests involved.

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