

June 2012

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Recommended Citation

Murphy, Thomas J. (1984) "Affirmative Duties in Tort Following Tarasoff," *St. John's Law Review*. Vol. 58 : No. 3 , Article 3.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol58/iss3/3>

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NOTES

AFFIRMATIVE DUTIES IN TORT FOLLOWING *TARASOFF*

The duty to come to the aid of another in danger is recognized in most moral systems.¹ Nevertheless, as a general rule, the common law recognizes no legal duty to render assistance to a fellow human in need.² The most common justification for this dichotomy

¹ The best-known example of the moral efficacy of aiding a person in peril is the parable of the Good Samaritan. See *Luke* 10:30-37. Indeed, in discussions of a duty to rescue, the Good Samaritan principle is invariably used to illustrate the moral necessity of rescue, see, e.g., Note, *Professional Obligation and the Duty to Rescue: When Must a Psychiatrist Protect His Patient's Intended Victim?*, 91 *YALE L.J.* 1430, 1433 (1982), and state statutes promulgated to encourage doctors to render emergency aid are known generically as "Good Samaritan" statutes, see, e.g., *ILL. ANN. STAT.* ch. 111, § 4404 (Smith-Hurd 1978); *N.Y. EDUC. LAW* § 6527(2) (McKinney 1972); see also Franklin, *Vermont Requires Rescue: A Comment*, 25 *STAN. L. REV.* 51, 52-53 (1972).

² Even though a person could readily extract another from a position of danger without any risk of harm to himself, because the law has not adopted the moral constraints of common decency, that person is permitted to stand by and witness the other lose his life. See 2 *F. HARPER & F. JAMES, THE LAW OF TORTS* § 18.6, at 1046 (1956); *W. PROSSER & W. KEETON, THE LAW OF TORTS* 375 (5th ed. 1984) [hereinafter cited as *PROSSER*]. The failure to recognize a legal duty is based on the belief that morality cannot be legislated, see Freedman, *No Response to the Cry for Help*, in *THE GOOD SAMARITAN AND THE LAW* 171, 172 (J. Ratcliffe ed. 1981), and a concomitant hope that people will feel compelled to assist in an emergency on the strength of conscience and moral obligation alone, cf. Note, *Duty to Aid the Endangered Act: The Impact and Potential of the Vermont Approach*, 7 *VT. L. REV.* 143, 148-49 (1982). The common-law position on rescue is codified in the Restatement (Second) of Torts § 314: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." *RESTATEMENT (SECOND) OF TORTS* § 314 (1965). This rule applies "irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection." *Id.* § 314 comment c.

Unfortunately, actual examples of people neglecting to help others occur regularly, thereby keeping in the public eye the absence of a legal obligation. See, e.g., *Handiboe v. McCarthy*, 114 *Ga. App.* 541, 544, 151 *S.E.2d* 905, 907 (1966) (landowner under no legal obligation to rescue child licensee from swimming pool); *O'Keefe v. William J. Barry Co.*, 311 *Mass.* 517, 519, 42 *N.E.2d* 267, 268 (1942) (truck owner under no obligation to remove large stone from highway); *Sidwell v. McVay*, 282 *P.2d* 756, 759 (Okla. 1955) (companion under no legal duty to prevent plaintiff from hammering an explosive device). One of the most infamous examples is the murder of Kitty Genovese. See *N.Y. Times*, Mar. 27, 1964, at 1, col. 4. Miss Genovese was ruthlessly stabbed to death over a 35-minute period while at

of obligations rests in the distinction between misfeasance and nonfeasance.³ That is, a party who acts without exercising due care and thereby injures another may be liable at law for the harm resulting from his misfeasance.⁴ In the absence of some preexisting duty, however, a party who simply fails to act for the benefit of another will not be held liable for his nonfeasance.⁵ This tradi-

least 38 neighbors looked on from nearby buildings. *Id.* Although a simple phone call would have alerted the police, the response of most witnesses after the event was that they did not want to get involved. *Id.* at 38, cols. 1-3. Moral strictures having failed, there were no legal grounds to compel their assistance. *Id.* at 38, col. 1.

Not all legal systems refuse to give legal sanction to a duty to rescue. See Rudolph, *The Duty to Act: A Proposed Rule*, 44 NEB. L. REV. 499, 507 & n.21 (1965). A duty to act, enforceable through criminal sanctions, has been created in the majority of civil law nations, as well as in the Soviet Union. See *id.*; Comment, *The Duty to Rescue*, 28 U. PRR. L. REV. 61, 71-73 (1966). In addition, Vermont has abrogated the common-law rule by imposing a general duty to rescue another from "grave physical harm . . . to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others." VT. STAT. ANN. tit. 12, § 519(a) (1973).

³ See RESTATEMENT (SECOND) OF TORTS § 314 comment c (1965); Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219-21 (1908); Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 886 (1934). In addition to the distinction between misfeasance and nonfeasance, various other bases have been offered to explain the lack of a legal duty to rescue. See McNiece & Thornton, *Affirmative Duties in Tort*, 58 YALE L.J. 1272, 1287-88 (1949). Among these are: 1) the common-law view of men as independent individualists, see 2 F. HARPER & F. JAMES, *supra* note 2, at 1046; McNiece & Thornton, *supra*, at 1288, 2) the laissez-faire attitude that government should only prevent men from harming each other, see McNiece & Thornton, *supra*, at 1288, 3) a belief that personal autonomy should not be infringed upon by requiring one to aid another, see *id.*; Note, *supra* note 1, at 1433, and 4) the absence of benefit to the person sought to be held liable, see McNiece & Thornton, *supra*, at 1288.

⁴ Misfeasance entails "active misconduct working positive injury to others." Bohlen, *supra* note 3, at 219. The early common law allowed the imposition of liability for injury to a person caused by an affirmative act of another without any real consideration of whether the acting party was at fault. See RESTATEMENT (SECOND) OF TORTS § 314 comment c (1965). Except in those instances where strict liability applies, however, liability for an affirmative act is imposed today only where the acting party is found to have been negligent or to have acted with wrongful intent. See PROSSER, *supra* note 2, at 31-32. The traditional elements of a cause of action in negligence include: 1) a legal duty to meet a certain standard of conduct to safeguard others from unreasonable risk of harm, 2) a breach of this duty, 3) a proximate causal connection between the breach of duty and the resulting damage, and 4) actual damage suffered by some other party. See C. MORRIS, MORRIS ON TORTS 48 (1953); PROSSER, *supra* note 2, at 164-65. Negligence is defined in the Restatement (Second) of Torts as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." RESTATEMENT (SECOND) OF TORTS § 282 (1965).

⁵ See *supra* note 2 and accompanying text. The commonlaw was slow to develop any type of liability for nonfeasance because of the emphasis common-law judges placed on punishing affirmative, wrongful acts. See RESTATEMENT (SECOND) OF TORTS § 314 comment c (1965). One commentator explained the distinction between misfeasance and nonfeasance in terms of the result for the victim:

In the case of active misfeasance the victim is positively worse off as a result of

tional distinction has led to a number of morally repugnant decisions,⁶ and a corresponding movement for reform.⁷

Some commentators have proposed a virtual synchronization of legal and moral duty.⁸ Others have advocated exceptions that

the wrongful act. In cases of passive inaction plaintiff is in reality no worse off at all. His situation is unchanged; he is merely deprived of a protection which, had it been afforded him, would have benefited him.

Bohlen, *supra* note 3, at 220; see also Ames, *Law and Morals*, 22 HARV. L. REV. 97, 112 (1908).

⁶ See, e.g., *Osterlind v. Hill*, 263 Mass. 73, 74, 160 N.E. 301, 302 (1928) (defendant who had rented canoe to decedent not required to aid decedent even though defendant heard him screaming for help for 30 minutes before he drowned); *Buch v. Amory Mfg. Co.*, 69 N.H. 257, 260, 44 A. 809, 811 (1898) (defendant factory owner not liable for crippling injury to hand of trespassing child where defendant knowingly failed to remove child from premises); *Yania v. Bigan*, 397 Pa. 316, 319, 155 A.2d 343, 346 (1959) (defendant not liable for failing to rescue decedent who had jumped into a trench of water and drowned while defendant stood by). The authors of the Restatement (Second) of Torts provide yet another disturbing example:

A sees B, a blind man, about to step into the street in front of an approaching automobile. A could prevent B from so doing by a word or touch without delaying his own progress. A does not do so, and B is run over and hurt. A is under no duty to prevent B from stepping into the street, and is not liable to B.

RESTATEMENT (SECOND) OF TORTS § 314 comment c, illustration 1 (1965).

⁷ See *infra* notes 8-9 and accompanying text. If the law is not responsive to the stage of societal development, it becomes irrelevant to argue that there is no legal duty, as legislative action should be taken to impose a duty in line with common decency. Comment, *supra* note 2, at 74. Indeed, it has been proposed that affirmative duties should be expanded to include a "duty of humanitarianism." McNiece & Thornton, *supra* note 3, at 1289.

⁸ See, e.g., Murphy, *Evolution of the Duty of Care: Some Thoughts*, 30 DE PAUL L. REV. 147, 177 (1980). Professor Murphy argues that it is "socially irresponsible" in this day and age to take the position that, in the absence of a legal duty, one may act or choose not to act as one pleases. *Id.* He contends that newly recognized duties will arise along the lines proposed by Lord Esher:

"[W]henver one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

Id. at 148 (quoting *Heaven v. Pender*, 11 Q.B.D. 503, 509 (1883)); accord Harper & Kime, *supra* note 3, at 886.

Laymen do not understand why the law does not fully comport with morality, for, by reflecting morality, the law "ministers to an expectation entertained by the majority of citizens." Honoré, *Law, Morals and Rescue*, in *THE GOOD SAMARITAN AND THE LAW* 225, 239 (J. Ratcliffe ed. 1981). One argument against aligning legal and moral duty is that there would be no legitimate means by which to draw standards on the extent of liability. See Prosser, *supra* note 2, at 23. The argument that the law should not recognize a moral duty for the sake of judicial and legislative convenience, however, has been seriously challenged, inasmuch as difficulties in circumscribing the parameters of liability should not foreclose "the enforcement of obvious moral duties." McNiece & Thornton, *supra* note 3, at 1289; cf. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 877

would impose a duty of affirmative action for the benefit of others in specific circumstances.⁹ Indeed, the existence of a "special relationship" may impose a legal duty where conscience would otherwise be the only guide.¹⁰ Moreover, certain of these special relationships have been identified in which one person assumes an affirmative duty to control another for the benefit of a third party.¹¹

In *Tarasoff v. Regents of the University of California*,¹² the

(1939) (fear of a flood of litigation is pitiful reason to deny a remedy to a meritorious claim).

⁹ Proposals for limited acceptance of a duty to act for the benefit of another abound. For example, one argument calls for both civil and criminal liability to be imposed upon any person who fails to extract another from a situation threatening serious bodily harm when he had an opportunity to do so "with little or no inconvenience to himself." Ames, *supra* note 5, at 113. Another theorist contends that the factors that need to be weighed in determining whether a legal duty to rescue exists are: "the gravity of the peril, the chances of successful intervention, the attitude of the victim, and the likelihood that another better-qualified rescuer will act." Honoré, *supra* note 8, at 234. Arguing that the success of the statutory duty to rescue in civil law nations should serve as an impetus to our common law, Professor Rudolph has drafted the following proposal:

A person has a duty to act whenever:

1. The harm or loss is imminent and there is apparently no other practical alternative to avoid the threatened harm or loss except his own action;
2. Failure to act would result in substantial harm or damage to another person or his property and the effort, risk, or cost of acting is disproportionately less than the harm or damage avoided; and
3. The circumstances placing the person in a position to act are purely fortuitous.

Rudolph, *supra* note 2, at 508-09.

Dean Prosser has questioned whether liability can be apportioned under a duty to rescue in situations where 50 people fail to come to the aid of one. PROSSER, *supra* note 2, at 376. It has been suggested, however, that this poses no unique problem in tort law because liability may be determined by resort to joint and several liability with a right to contribution among tortfeasors. See Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247, 262 (1980).

¹⁰ See *infra* note 78 and accompanying text; see also PROSSER, *supra* note 2, at 376 (fear of creating unworkable rule of universal application has tended to limit liability for failure to aid another to recognized special relationships); Comment, *Tarasoff and the Psychotherapist's Duty to Warn*, 12 SAN DIEGO L. REV. 932, 937-38 (1975) (rather than institute generalized duty to aid others, special relationships have been recognized one-by-one to carve out exceptions to general rule).

¹¹ See RESTATEMENT (SECOND) OF TORTS § 315 (1965); *infra* note 24.

¹² 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). The plaintiffs in *Tarasoff* were the parents of a young woman, Tatiana Tarasoff, who was murdered by Prosenjit Poddar, a fellow student. *Id.* at 430, 551 P.2d at 339, 131 Cal. Rptr. at 19. Although the two students saw each other regularly for some time, Tatiana was not interested in a serious relationship with Poddar and told him so. *People v. Poddar*, 10 Cal. 3d 750, 753, 518 P.2d 342, 344, 111 Cal. Rptr. 910, 912 (1974) (criminal prosecution of same underlying facts). Poddar became emotionally disturbed over his unrequited feelings and eventually sought psychological help. *Id.* at 753-54, 518 P.2d at 344, 111 Cal. Rptr. at 912. The plaintiffs alleged that, while receiving his voluntary outpatient treatment, Poddar informed his therapist that he intended to

Supreme Court of California broke new ground by holding that a psychotherapist may occupy a special relationship with his patient¹³ sufficient to impose upon the psychotherapist a duty to warn third parties endangered by the conduct of the patient.¹⁴ Al-

kill a woman, whom the court determined was readily identifiable as Tatiana. *Tarasoff*, 17 Cal. 3d at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21. The therapist had Poddar taken into custody by the police, but the police chose to release him on his promise to leave Tatiana alone. *Id.* Subsequently, the director of the psychiatric department decided that no further action was to be taken to commit Poddar. *Id.* Neither Tatiana, who was away in Brazil at the time, nor her parents, were warned of the threat made by Poddar. *Id.* at 433, 551 P.2d at 341, 131 Cal. Rptr. at 21. Shortly after Tatiana's return, Poddar went to her home and stabbed her to death. *Poddar*, 10 Cal. 3d at 754, 518 P.2d at 345, 111 Cal. Rptr. at 913.

Due to the uproar in the psychiatric profession following the Supreme Court of California's first opinion in *Tarasoff*, 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974), vacated 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), the court agreed to rehear the case. See Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263, 294 (1982). After the case was remanded for the second time, the parties settled before trial. *Id.* at 295 (citing personal communication with counsel for the Tarasoffs).

¹³ A psychotherapeutic relationship has been loosely defined as a relationship between two or more persons "where one (or more) is seeking help in the solution of a mental problem caused by psychological and/or environmental pressures from another whose training and status are such as to warrant other persons confiding in him for the purpose of such help." Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 617 (1964). Some states provide a statutory definition of psychotherapist. See Sloan & Klein, *Psychotherapeutic Disclosures: A Conflict Between Right and Duty*, 9 U. TOL. L. REV. 57, 57 n.1 (1977). The California statute defines "psychotherapist" as:

(a) A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry.

(b) A person licensed as a psychologist

(c) A person licensed as a clinical social worker . . . when he or she is engaged in applied psychotherapy of a nonmedical nature.

(d) A person who is serving as a school psychologist and holds a credential authorizing such service issued by the state.

(e) A person licensed as a marriage, family and child counselor

CAL. EVID. CODE § 1010 (Deering Supp. 1984).

¹⁴ 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20. The *Tarasoff* court developed the following standard: "When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger." *Id.* Providing a warning to the person in danger is only one of several means available to satisfy this duty to use reasonable care. See *infra* note 29 and accompanying text. The court based this duty upon the exception to the common law made for special relationships. *Tarasoff*, 17 Cal. 3d at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23 (citing RESTATEMENT (SECOND) OF TORTS §§ 315-320 (1965)). The court stated that a relationship between the therapists and either Tatiana or Poddar would have been sufficient to justify imposing a duty of care. *Tarasoff*, 17 Cal. 3d at 435-36, 551 P.2d at 343, 131 Cal. Rptr. at 23. However, the court did not make clear what aspect of such a relationship warranted treating

though vigorously criticized by the psychotherapeutic community¹⁵ and many legal writers,¹⁶ the *Tarasoff* holding has experienced limited acceptance in other jurisdictions.¹⁷ This Note will analyze the

it as "special." See *infra* note 64 and accompanying text.

¹⁵ See, e.g., Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358, 358-59 (1976). The primary complaint by psychotherapists concerning the *Tarasoff* opinion is that, in an effort to provide a cause of action where a wrong was perceived, the court disregarded the impact on clinical practice, and thereby reduced the utility of psychotherapy for all involved. See *id.* That is, if therapists are threatened with civil liability to nonpatients, they lose an element of flexibility in their potential treatment responses and will take the course that best shields them from liability, even though it might not be best for the patient. See Note, *Tarasoff v. Regents of the University of California: Psychotherapist's Obligation of Confidentiality Versus the Duty to Warn*, 12 TULSA L.J. 747, 757 (1977); see also Roth & Meisel, *Dangerousness, Confidentiality, and the Duty to Warn*, 134 AM. J. PSYCHIATRY 508, 509 (1977) (psychotherapist's decision may be questioned regardless of which course he takes).

Moreover, members of the psychotherapeutic community denounced the opinion because it assumed that they were able to predict violence. See, e.g., Stone, *supra*, at 371-72. They vigorously denied any such ability. *Id.*; see *infra* note 148 and accompanying text. In addition, *Tarasoff* was criticized because it intruded upon the confidentiality of therapist-patient relations. See *Davis v. Lhim*, 124 Mich. App. 291, 301, 335 N.W.2d 481, 489 (1983); Stone, *supra*, at 359.

¹⁶ See, e.g., Merton, *supra* note 12, at 342 (*Tarasoff* exemplifies the unfortunate results that occur when a profession neglects to regulate itself and is forced to comply with rules set by outsiders); Murphy, *supra* note 8, at 175 (by relying on a special relationship to establish a duty to warn, the decision will only impede the ultimate development of an unfettered duty); Note, *supra* note 1, at 1436 (application of special relationships doctrine in psychotherapist/patient context is not supported by theoretical foundation); Recent Decision, *A Psychotherapist Who Knows or Should Know His Patient Intends Violence to Another Incurs a Duty to Warn*, 7 CUM. L. REV. 551, 559 (1977) (*Tarasoff* holding is too broad; court should have limited holding to a duty on the particular facts).

¹⁷ The clearest adoption of *Tarasoff* in another jurisdiction has been in New Jersey. See *McIntosh v. Milano*, 168 N.J. Super. 466, 489, 403 A.2d 500, 511-512 (Law Div. 1979). In *McIntosh*, the defendant psychiatrist was treating Lee Morgenstein on a weekly basis. *Id.* at 472, 403 A.2d at 503. Defendant found Morgenstein to have very possessive feelings about his next door neighbor. *Id.* In fact, Morgenstein had told defendant that he had fired a "BB" gun at her car because he was upset that she was going on a date with her boyfriend. *Id.* at 473, 403 A.2d at 503. Nevertheless, the defendant testified that Morgenstein had never revealed to him an intention to kill the woman. *Id.* at 473, 403 A.2d at 504. Disturbed by a failed attempt to obtain drugs with a prescription he stole from his therapist, Morgenstein convinced the young woman to go to a park with him, where he shot her in the back with a pistol. *Id.* at 474, 403 A.2d at 504. In language reflective of *Tarasoff*, the court held that a therapist may have a duty to take reasonable action to protect a third person when "he determines, or should determine, in the appropriate factual setting and in accordance with standards of his profession established at trial, that the patient is or may present a probability of danger to that person." *Id.* at 489, 403 A.2d at 511-12. In *Commonwealth v. Prendergast*, 385 Mass. 625, 433 N.E.2d 438 (1982), the Supreme Judicial Court of Massachusetts raised the possibility that *Tarasoff* will be adopted in that jurisdiction. See *id.* at 634 n.18, 433 N.E.2d at 446 n.18 (dictum). In *Prendergast*, the court upheld the defendant's conviction, despite defendant's claim that he was not criminally responsible for killing his former girlfriend. *Id.* at 633, 433 N.E.2d at 445-46. In a footnote detailing the defendant's

concepts of special relationships and affirmative duty in the aftermath of *Tarasoff*. By examining the theoretical foundation of the affirmative duty to third parties, this Note will consider the possibility that this obligation will be extended both within and beyond the psychotherapeutic professions. This Note will conclude that further inroads on the common-law rule are analytically justifiable.

THE CONCEPT OF DUTY

It is axiomatic in the law of torts that an action for negligence can be maintained only if the accused party bore a legal duty to exercise reasonable care.¹⁸ But the body of legal duties is elastic.¹⁹ As Dean Prosser wrote, "[c]hanging social conditions lead constantly to the recognition of new duties."²⁰ Indeed, the history of negligence law involves, in part, a tale of incremental recognition of new duties owed among men.²¹ In this tradition, the imposition

various hospitalizations and commitments, the court cited *Tarasoff* while stating that "[i]t is deeply regrettable that although many of these hospital records indicate that the defendant was dangerous, and a suicidal or homicidal risk, no one saw fit to commit him involuntarily . . . or to warn the victim." *Id.* at 634 n.18, 433 N.E.2d at 446 n.18; *see also* Petersen v. State, 100 Wash. 2d 421, 671 P.2d 230, 237 (1983) (psychiatrist liable for injuries to plaintiff due to drug-induced reckless driving by patient released from hospital).

¹⁸ *See, e.g.*, McIntosh v. Milano, 168 N.J. Super. 466, 480-81, 403 A.2d 500, 507 (Law Div. 1979); Palsgraf v. Long Island R.R., 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928); Petersen v. State, 100 Wash. 2d 421, 427, 671 P.2d 230, 236 (1983); *see* Prosser, *supra* note 2, at 164.

¹⁹ *See* *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 434, 551 P.2d 334, 342, 131 Cal. Rptr. 14, 22 (1976) (legal duties are expressive of determination that liability should exist in a given case); Furr v. Spring Grove State Hosp., 53 Md. App. 474, 478, 454 A.2d 414, 418 (1983) (the concept of duty is no longer helpful as an analytical aid, as duty is actually more of a "semantic conclusion"). Dean Prosser has stated that "'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." PROSSER, *supra* note 2, at 358.

²⁰ PROSSER, *supra* note 2, at 359. The judiciary is expected to enlarge the scope of duty as novel situations appear. *See* Harper & Kime, *supra* note 3, at 905; *see also* PROSSER, *supra* note 2, at 359.

²¹ The authors of the Restatement (Second) of Torts realized that, in the area of duties to protect others, "[i]t appears inevitable that, sooner or later, such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule." RESTATEMENT (SECOND) OF TORTS § 314 comment c (1965). Indeed, common sense seems to dictate that a psychotherapist should have a duty to warn threatened individuals for public safety reasons, since, as members of society, they should want to protect society from foreseeable violence. *See* Sloan & Klein, *supra* note 13, at 58-59; *see also* Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025, 1029-30 (1974) (a "mature sense of social responsibility" suggests that the creation of a doctor-patient relationship should require the doctor to protect members of the public as well as his patient). Nevertheless, the extension of duty in *Tarasoff* has been cited as an example of how the Supreme Court of California "ha[s] so far departed from traditional tort

of a "duty to warn" represents another stride toward aligning legal obligations with moral expectations.²² Since the common law has displayed an ability to adjust to the changing needs of society,²³ it is submitted that any radical revision of the concept of duty is unnecessary and unwise. Therefore, any newly identified duties should be derived from the prevailing framework of tort law.

The Foundation of a Duty to Warn

In articulating an exception to the general rule that one has no duty to control the conduct of another, the majority opinion in *Tarasoff* relied upon the special relationship doctrine explained in section 315 of the Restatement (Second) of Torts.²⁴ Acknowledging that, under the facts in that case, no special relationship existed between the psychotherapists and the victim,²⁵ the court stated that the duty owed to her arose from the therapist-patient relationship.²⁶ Thus, the court held that it was not necessary for the

doctrine." *Alegria v. Payonk*, 101 Idaho 617, 623, 619 P.2d 135, 140 (1980) (Shepard, J., dissenting).

Another example of the evolution of a new concept of duty may be found in the rejection of classifying visitors on land as invitees, licensees, and visitors—each being owed a different duty—in favor of the general tort principle of exercising reasonable care toward all who might be harmed. *See, e.g., Rowland v. Christian*, 69 Cal. 2d 108, 117, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968); *Butler v. Acme Mkts., Inc.*, 89 N.J. 270, 277, 445 A.2d 1141, 1144 (1982) (dictum); *Basso v. Miller*, 40 N.Y.2d 233, 240-41, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976). In *Rowland*, the leading case on the issue of landowner liability, the court declared that the common-law categories served only to obfuscate the question of duty. *Rowland*, 69 Cal. 2d at 115, 443 P.2d at 568, 70 Cal. Rptr. at 104. The majority in *Rowland* stated that it "is contrary to our modern social mores and humanitarian values" to decide whether a landowner owes a duty of care based upon the status of the injured person. *Id.*

²² *See supra* note 8 and accompanying text.

²³ *See supra* notes 20-21 and accompanying text.

²⁴ *Tarasoff*, 17 Cal. 3d at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23. Section 315 of the Restatement (Second) of Torts provides:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

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

RESTATEMENT (SECOND) OF TORTS § 315 (1965). By finding a special relationship, the court was able to avoid the question of whether foreseeability alone would have been enough to impose a duty to use reasonable care. 17 Cal. 3d at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.

²⁵ *Tarasoff*, 17 Cal. 3d at 436, 551 P.2d at 343, 131 Cal. Rptr. at 23.

²⁶ *Id.*; *see infra* note 49.

psychotherapist to have a relationship with both the patient and the victim.²⁷ In finding a duty in the absence of a direct relationship, the court opened the door for the victim's parents to amend their wrongful death complaint to state a cause of action against the therapists for neglecting to exercise reasonable care.²⁸

According to the *Tarasoff* court, this duty of reasonable care may be satisfied by any appropriate means, including notifying the police or warning the person whose safety is endangered.²⁹ Writing for the majority, Justice Tobriner implied that this duty extends only to potential victims who are "readily identifiable."³⁰ Subsequent cases in California have made clear that a psychotherapist will not be exposed to liability under *Tarasoff* for failure to warn when, because of the nonspecificity of the patient's threats, the victim cannot be readily identified.³¹ This limitation stands in contrast with the broader test of foreseeability that normally applies in negligence actions.³²

²⁷ *Tarasoff*, 17 Cal. 3d at 436, 551 P.2d at 344, 131 Cal. Rptr. at 24.

²⁸ *Id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20. The court upheld the demurrers by the police defendants, holding that plaintiffs had not alleged any relationship with those defendants that would sustain a duty owed to Tatiana. *Id.* at 431-32, 551 P.2d at 340, 131 Cal. Rptr. at 20.

²⁹ *Id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20. One author argues that, even without the threat of liability, psychiatrists will act to prevent a catastrophe by making some revelation or by hospitalizing the patient. Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 197-98 (1960). The judgment as to the appropriate course of action, he argues, must be left to the psychiatrist. *Id.* at 198.

³⁰ *Tarasoff*, 17 Cal. 3d at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21.

³¹ See *Thompson v. County of Alameda*, 27 Cal. 3d 741, 754, 614 P.2d 728, 735, 167 Cal. Rptr. 70, 77 (1980) (public officials do not have a duty to warn upon releasing inmate with violent history when he has made non-specific threats toward non-specific victims); *Mavroudis v. Superior Court*, 102 Cal. App. 3d 594, 600, 162 Cal. Rptr. 724, 729 (1980) (although victim need not be positively identified, he must be identifiable by a "moment's reflection") (quoting *Tarasoff*, 17 Cal. 3d at 439 n.11, 551 P.2d at 345 n.11, 131 Cal. Rptr. at 25 n.11). Other jurisdictions have adopted the "readily identifiable" victim standard. See *Furr v. Spring Grove State Hosp.*, 53 Md. App. 474, 482, 454 A.2d 414, 420 (1983) (*Tarasoff* only imposed a duty when the doctor knows the victim's identity); *Sherrill v. Wilson*, 653 S.W.2d 661, 666 (Mo. 1983) (court distinguished *Tarasoff* because there was no allegation that the patient represented a threat to the decedent). *But see Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 194 (D. Neb. 1980) ("readily identifiable" requirement rejected in favor of duty extending to all victims doctor could reasonably foresee).

³² See *Davis v. Lhim*, 124 Mich. App. 291, 298, 335 N.W.2d 481, 488-89 (1983). The role of foreseeability in negligence has been defined such that "the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty." *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 343, 162 N.E. 99, 100 (1928). The distinction between a readily identifiable victim and a foreseeable victim is that the former must be a person the therapist can identify specifically, see *Davis*, 124 Mich. App. at 298, 335 N.W.2d at 489, while any person could subsequently be deemed to have been foreseeable, see PROSSER, *supra* note 2,

Growth of the Duty to Warn Within the Psychotherapeutic Professions

In a recent opinion, the Supreme Court of California expanded the liability of psychotherapists beyond the "readily identifiable" victim limitation set forth in *Tarasoff*. In *Hedlund v. Superior Court*,³³ the plaintiffs, LaNita Wilson and her minor son, alleged that a patient, Stephen Wilson, who was undergoing joint therapy with LaNita, had expressed to the defendant-psychologists his intention to cause LaNita grave physical harm.³⁴ When Stephen Wilson later assaulted LaNita with a shotgun, she used her body to shield her son, who was in the seat next to her.³⁵ Although he was spared physical injury, the son averred in his complaint that he suffered extreme emotional harm as a result of the event.³⁶ In light of the mother's allegation that Stephen had declared to the defendants his intent to harm her, she—and not her son—occupied the role of the "readily identifiable" victim.³⁷ Nevertheless, the court determined that the boy stated a cause of action against the psychologists on the basis of an obligation to the son that derived from their duty to warn his mother.³⁸

at 298.

³³ 34 Cal. 3d 695, 669 P.2d 41, 194 Cal. Rptr. 805 (1983).

³⁴ *Id.* at 700, 669 P.2d at 42-43, 194 Cal. Rptr. at 806-07. The defendant psychologists asserted that plaintiffs' claim was time-barred under California's 1-year statute of limitations for personal injury actions. *Id.* at 699, 669 P.2d at 42, 194 Cal. Rptr. at 806. Plaintiffs, however, contended that their action sounded in "professional negligence" against a "health care provider," and, therefore, was governed by a 3-year statute of limitations. *Id.* at 699-700 & n.2, 669 P.2d at 42-43 & n.2, 194 Cal. Rptr. at 806-07 & n.2. Plaintiffs' argument was that the duty enunciated in *Tarasoff* requires that the therapist realize the danger and then provide a warning. *Id.* at 703, 669 P.2d at 45, 194 Cal. Rptr. at 809. The defendants contended that professional negligence would arise only if they failed to diagnose the patient's dangerousness; a subsequent failure to warn would then represent ordinary negligence and would be governed by the 1-year statute. *Id.* at 702, 669 P.2d at 44, 194 Cal. Rptr. at 808. The court agreed with the plaintiffs that the diagnosis and subsequent warning are so intertwined that the distinction posed by the defendants was not realistic. *Id.* at 703, 669 P.2d at 45, 194 Cal. Rptr. at 809. Therefore, the court concluded that the plaintiffs stated a claim for professional negligence. *Id.* at 704, 669 P.2d at 46, 194 Cal. Rptr. at 810.

³⁵ *Id.* at 704-05, 669 P.2d at 46, 194 Cal. Rptr. at 810.

³⁶ *Id.* at 705, 669 P.2d at 46, 194 Cal. Rptr. at 810.

³⁷ *Id.* at 700, 669 P.2d at 43, 194 Cal. Rptr. at 807. The young boy did not allege that the psychologists were under a duty to warn him directly. *Id.* at 705 n.7, 669 P.2d at 46 n.7, 194 Cal. Rptr. at 810 n.7.

³⁸ See *id.* at 706, 669 P.2d at 47, 194 Cal. Rptr. at 811. The issue, as formulated by the court, was:

whether a therapist who negligently fails to fulfill his duty to warn an identifiable potential victim that a patient has threatened violence may be liable not only to

The risk of harm to the young boy, the majority held, was foreseeable as a matter of law.³⁹ The court apparently established a two-tier system for determining to whom a duty is owed under *Tarasoff*. The first tier includes the readily identifiable victim.⁴⁰ The second tier, derived from the primary obligation to the readily identifiable victim, consists of those individuals who are harmed in an attack upon an identifiable victim and whose injuries are deemed to have been reasonably foreseeable to the psychotherapist in the event of a breach of the duty to warn.⁴¹ Contending that they are unable to predict when a patient will be violent, psychotherapists will surely view *Hedlund* as an unjustified expansion of an already unrealistic obligation.⁴² Examined in light of traditional tort law, however, it is submitted that the *Hedlund* opinion represents a principled amplification of the duty to warn.

the person against whom the threat is made, but also to persons who may be injured if the threat is carried out.

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

³⁹ *Id.* The court referred to the son as "both foreseeable and identifiable" as a person who might be harmed in the event his mother was attacked. *Id.* The court determined the question of liability, however, by referring to the foreseeability of the son's injury. *Id.* at 706, 669 P.2d at 47, 194 Cal. Rptr. at 811. It is unclear, therefore, whether the court would have reached the same result had the victim been the plaintiff's friend or acquaintance, rather than son, i.e., if the friend had been foreseeable, but not identifiable, to the psychologists. *See id.* at 705, 669 P.2d at 46, 194 Cal. Rptr. at 810. In fact, the majority made clear that the facts of the case did not require them to decide "whether a duty exists as to all bystanders who might be injured." *Id.*

⁴⁰ *See* 34 Cal. 3d at 704, 669 P.2d at 45, 194 Cal. Rptr. at 809; *supra* notes 36-39 and accompanying text.

⁴¹ *See* 34 Cal. 3d at 705-06, 669 P.2d at 46-47, 194 Cal. Rptr. at 810-11. The plaintiff son claimed "that because it was foreseeable that if [the patient] carried out his threat against [the boy's mother] a risk of harm to bystanders and those in close relationship to [the mother] existed, they owed a duty which 'extended' to him." *Id.* at 705 n.7, 669 P.2d at 46 n.7, 194 Cal. Rptr. at 810 n.7.

⁴² *See supra* note 15. In his dissent in *Hedlund*, Justice Mosk noted that psychotherapy has not developed to the point where future dangerousness can be predicted with even a minimal degree of accuracy. 34 Cal. 3d at 709, 669 P.2d at 49, 194 Cal. Rptr. at 813 (Mosk, J., dissenting); *see* Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 451-52 (1974); DuBose, *Of the Parens Patriae Commitment Power and Drug Treatment of Schizophrenia: Do the Benefits to the Patient Justify Involuntary Treatment?*, 60 MINN. L. REV. 1149, 1214 (1976); Gardner, *The Right to Be Punished—A Suggested Constitutional Theory*, 33 RUTGERS L. REV. 838, 854 n.82 (1981); *infra* notes 148-57 and accompanying text. Critics have expressed the concern that the *Tarasoff* holding could effectively result in strict liability for therapists since juries, in absence of a clear standard for the prediction of violence, will find negligence based on the fact of injury. *See, e.g.,* Sloan & Klein, *supra* note 13, at 69; *see also* Cairl v. State, 323 N.W.2d 20, 23 n.3 (Minn. 1982) (without tort immunity, threat of liability will undermine treatment at state-run, open-door facility); Sherrill v. Wilson, 653 S.W.2d 661, 664 (Mo. 1983) (threat of liability will cause doctors to resolve all questions in favor of continued commitment).

Due to the impracticability of a general public warning of a patient's dangerous tendencies, the duty to warn normally applies only when a threat has been directed toward a specific individual.⁴³ *Hedlund* does not alter this norm.⁴⁴ Instead, the majority in *Hedlund* acknowledged that if the patient has specified a victim, the therapist cannot escape liability simply because the person ultimately harmed was not also directly threatened.⁴⁵ The court explained: "It is equally foreseeable when a therapist negligently fails to warn a mother of a patient's threat of injury to her, and she is injured as a proximate result, that her young child will not be far distant and may be injured"⁴⁶

In essence, the *Hedlund* court has done no more than engraft upon the duty to warn a readily identifiable victim a variation of the long-accepted tort principle that demands due care toward those who foreseeably might be harmed by a breach of duty.⁴⁷ That is, the duty to warn embraces those who are in some way connected to the readily identifiable victim and who foreseeably might be harmed if the threat were fulfilled.⁴⁸ This duty extends to the foreseeable victims only when the risk of harm to them derives from their relationship or proximity to the person actually threatened; they are not entitled to recompense independent of this relation.⁴⁹ The majority also implied that those foreseeably close to the specified target need not be given individualized warn-

⁴³ See *infra* note 57 and accompanying text.

⁴⁴ See *Hedlund*, 34 Cal. 3d at 700, 669 P.2d at 43, 194 Cal. Rptr. at 807.

⁴⁵ *Id.* at 705-06, 669 P.2d at 46-47, 194 Cal. Rptr. at 810-11. The son's relationship to his mother, the court concluded, and the defendants' failure to warn her of her peril were sufficient bases for a negligence action, see *id.* at 706, 669 P.2d at 47, 194 Cal. Rptr. at 811, notwithstanding the defendants' contentions that they owed the son no duty because the patient had not threatened him, and that he had no right to be warned of the threat against his mother, see *id.* at 705, 669 P.2d at 46, 194 Cal. Rptr. at 810.

⁴⁶ *Id.* at 706, 669 P.2d at 47, 194 Cal. Rptr. at 811.

⁴⁷ See *supra* note 32 and accompanying text.

⁴⁸ The *Hedlund* court stated that it was reasonable to recognize a duty to people closely related to the person threatened, since the therapist should take them into consideration anyway in deciding the seriousness of the threat and the protective measures that should be taken. *Hedlund*, 34 Cal. 3d at 706, 669 P.2d at 47, 194 Cal. Rptr. at 811.

⁴⁹ The majority analogized the situation in *Hedlund* to cases in which a doctor treating a patient with a communicable disease acquired a derivative duty to warn family members whom he should expect to be near his patient. *Id.* at 707, 669 P.2d at 47, 194 Cal. Rptr. at 811; see *Hofmann v. Blackmon*, 241 So. 2d 752, 753 (Fla. Dist. Ct. App. 1970) (physician owes duty to family members of patient suffering from contagious disease); *Wojcik v. Aluminum Co. of Am.*, 18 Misc. 2d 740, 746, 183 N.Y.S.2d 351, 357-58 (Sup. Ct. Erie County 1959) (failure to warn husband that he had tuberculosis was negligent to him and his wife who subsequently contracted disease).

ings, because a warning to the readily identifiable person would be sufficient to satisfy the therapist's obligations to warn.⁵⁰ It seems, therefore, that in the event there is no readily identifiable victim, a therapist would encounter no new obligations under *Hedlund*.

Other decisions based on facts similar, but not identical, to *Tarasoff* seem to have gone further beyond the readily identifiable victim limitation.⁵¹ In *Petersen v. State*,⁵² the Supreme Court of Washington cited *Tarasoff* and its progeny in imposing upon a psychiatrist "a duty to take reasonable precautions to protect anyone who might foreseeably be endangered by [the patient's] drug-related mental problems."⁵³ Within five days of being released from the hospital, the patient in *Petersen*, apparently under the influence of drugs, accidentally drove into the plaintiff's car.⁵⁴ Since it was purely a matter of coincidence that this particular driver happened to be the victim of the patient's negligence, she clearly was not "readily identifiable" to the doctor when he discharged the patient.⁵⁵ In this case, the only conceivable warning that would have sufficed would have entailed notice to all people within the area in which the patient might foreseeably travel. Of course, such a course of action would have been plainly unrealis-

⁵⁰ See 34 Cal. 3d at 707, 669 P.2d at 47, 194 Cal. Rptr. at 811. The son's cause of action was upheld on the basis of his relationship to his mother and her allegation that the duty to warn her had been breached, *id.*, not on the ground that the psychologists owed him an independent duty to warn, *id.* at 705 n.7, 669 P.2d at 46 n.7, 194 Cal. Rptr. at 810 n.7.

⁵¹ See *infra* notes 52-62 and accompanying text.

⁵² 100 Wash. 2d 421, 671 P.2d 230 (1983).

⁵³ *Id.* at 428, 671 P.2d at 237.

⁵⁴ *Id.* at 426, 671 P.2d at 235. At the time of the accident, the patient, Larry Knox, was on probation, the conditions of which required him to seek mental health counseling and to refrain from using controlled substances. *Id.* at 425, 671 P.2d at 234. Approximately one month before the accident, Knox had been hospitalized following an attempt to emasculate himself while under the influence of "angel dust." *Id.* at 425, 671 P.2d at 234-35. Diagnosed as suffering from delusional tendencies, Knox was involuntarily placed in a psychiatric hospital for 72 hours. *Id.* at 426, 671 P.2d at 235. His doctor learned of his angel dust use, placed him on an antipsychotic medication, and later petitioned for and received permission to hold Knox for another 14 days. *Id.* at 427, 671 P.2d at 235. Knox was allowed to leave the hospital for one day, but when he returned that night he was found driving recklessly on hospital property. *Id.* at 426, 671 P.2d at 235. Despite this incident, the doctor released Knox the next morning, believing him to be recovered from his drug reaction. *Id.* at 427, 671 P.2d at 235. Plaintiff's complaint alleged that her injuries were proximately caused by the doctor's decision not to seek additional confinement and by his failure to disclose Knox's parole violation. *Id.*

⁵⁵ The court made clear that Knox's driving was negligent; there was no intent on his part to inflict injury upon the particular plaintiff. See *id.* at 427, 671 P.2d at 235-36.

tic,⁵⁶ and was not suggested by the court. It appears, therefore, that the holding in *Petersen* does not imply any expansion of the therapist's duty to warn.⁵⁷

Warning potential victims, however, is only one possible means of fulfilling the duty to use reasonable care recognized in *Tarasoff*.⁵⁸ Thus, although a warning was impractical, the doctor in *Petersen* was not insulated from liability. The court held that the duty to use reasonable care to safeguard "intended victim[s]"⁵⁹ can be extended to any reasonably foreseeable victim.⁶⁰ Since the court found that the doctor failed to exercise reasonable care by neglecting to petition for further confinement or take other reasonable precautions, the doctor was held liable for the plaintiff's injuries.⁶¹

Petersen and other cases employing a foreseeability test, however, can be distinguished from *Tarasoff* in that they involve the negligent discharge or release of a dangerous person from a custodial setting, rather than a failure to warn in an outpatient setting.⁶² Thus, it seems that the defendant's degree of control over

⁵⁶ Cf. *Davis v. Lhim*, 124 Mich. App. 291, 301, 335 N.W.2d 481, 489 (1983). In accepting the "readily identifiable" victim limitation, the *Davis* court stated that "[w]e seriously doubt that a warning to the public-at-large about a patient's threats would be of much benefit." *Id.*

⁵⁷ Declining to mandate a general public warning is in accord with the position of the Supreme Court of California. See *Davidson v. City of Westminster*, 32 Cal. 3d 197, 203, 649 P.2d 894, 897, 185 Cal. Rptr. 252, 255 (1982); *Thompson v. County of Alameda*, 27 Cal. 3d 741, 754-55, 614 P.2d 728, 735-36, 167 Cal. Rptr. 70, 77-78 (1980) (en banc). In *Thompson*, the defendant county was aware that a certain juvenile offender had violent sexual tendencies toward young children. *Id.* at 746, 614 P.2d at 730, 167 Cal. Rptr. at 72. Moreover, the boy had said that if he were released he would kill a child living in his mother's neighborhood; he did not, however, identify any particular child. *Id.* Nevertheless, the defendant allowed the boy to be released without any warning to his mother, the police, or parents of young children in the vicinity. *Id.* Within 24 hours of his release, he murdered a neighbor's son. *Id.* Noting that the possibility of parole violations always exists, the court held that "public entities and employees have no affirmative duty to warn of the release of an inmate with a violent history who has made nonspecific threats of harm directed at nonspecific victims." *Id.* at 754, 614 P.2d at 735, 167 Cal. Rptr. at 77 (emphasis in original). Requiring a warning or notice to the public, the court stated, is both "unwieldy and of little practical value." *Id.*

⁵⁸ See *supra* note 29 and accompanying text.

⁵⁹ *Petersen*, 100 Wash. 2d at 428-29, 671 P.2d at 237. "Intended victim" is the language used in the standard formulated by the *Tarasoff* court. 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20; see *supra* note 15.

⁶⁰ *Petersen*, 100 Wash. 2d at 428, 671 P.2d at 237.

⁶¹ *Petersen*, 100 Wash. 2d at 429, 671 P.2d at 237.

⁶² See, e.g., *Semler v. Psychiatric Inst.*, 538 F.2d 121, 121 (4th Cir.), cert. denied *sub nom.*, 429 U.S. 827 (1976); see also *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 187 (D. Neb. 1980). In *Semler*, the patient's 20-year sentence for kidnapping was suspended on the condition that he receive treatment while being confined to the defendant Institute. 538

the patient defines the ambit of potential liability to third parties.

Potential Expansion of the Duty to Warn Outside the Psychotherapeutic Professions

It is submitted that, in concluding that a special relationship exists between a psychotherapist and patient sufficient to invoke the special relationship doctrine of section 315 of the Restatement (Second) of Torts, the *Tarasoff* court neglected to develop a well-reasoned basis for its determination.⁶³ The court addressed the issue in conclusory terms, treating the presence of a special relationship as more or less self-evident.⁶⁴ The majority justified the hold-

F.2d at 123. The Institute's supervision of the patient, however, was relaxed and eventually he was treated as an outpatient, with the restriction that he attend group therapy sessions twice a week. *Id.* at 123-24. Six weeks after his release as an outpatient, the patient killed the plaintiff's daughter. *Id.* at 124. The court held that the state occupied a custodial position akin to that described in § 319 of the Restatement (Second) of Torts, inasmuch as the patient's sentence was conditioned on confinement under the supervision of the state. *Id.* at 124-25. By allowing the patient to leave without court approval, the defendants breached their "duty to exercise reasonable care to control the third person to prevent him from doing such [bodily] harm [to others]." *Id.* at 125 (quoting RESTATEMENT (SECOND) OF TORTS § 319 (1965)).

In *Lipari*, a patient who was under psychiatric care in a VA hospital purchased a shotgun at the defendant store. 497 F. Supp. at 187. Approximately six weeks after abandoning treatment that had lasted for less than one month, the patient entered a nightclub and fired the shotgun, wounding the plaintiff and killing her husband. *Id.* The district court held that Nebraska would apply the special relationship doctrine of § 315 of the Restatement (Second) of Torts to the therapist-patient relationship. *Id.* at 190-91. However, the court rejected the "readily identifiable" victim limitation, holding that the therapist's duty should extend to all reasonably foreseeable victims. *Id.* at 194.

In both *Semler* and *Lipari*, liability attached without a previously identified victim. See *Semler*, 538 F.2d at 124; *Lipari*, 497 F. Supp. at 193. Although the *Petersen* court did not address the issue in such terms, it appears that the duty breached in *Petersen*, as in *Semler*, was the obligation to use reasonable care to control a person who is already in a custodial setting. See RESTATEMENT (SECOND) OF TORTS § 319 (1965). Such a custodial relationship is deemed to be within "relations between the actor and a third person which require the actor to control the third person's conduct." *Id.* § 315; see *id.* § 315 comment c; see also *Ryan v. State*, 134 Ariz. 308, 311, 656 P.2d 597, 599 (1982) (en banc) (any duty owed by state for injuries caused by youth who escaped custody would likely be based on Restatement (Second) of Torts § 319); *Rausch v. McVeigh*, 105 Misc. 2d 163, 166, 431 N.Y.S.2d 887, 889 (Sup. Ct. Albany County 1980) (a cause of action is stated under Restatement (Second) of Torts § 319 when one who takes charge of another fails to use reasonable care to control him).

⁶³ See Note, *supra* note 1, at 1436 (no theory justifies enlarging the doctrine of special relationships to include psychiatrists). But see Ayres & Holbrook, *Law, Psychotherapy and the Duty to Warn: A Tragic Trilogy?*, 27 BAYLOR L. REV. 677, 683 (1975) (legal propriety of court's reliance on special relationships doctrine should not be questioned).

⁶⁴ See *Tarasoff*, 17 Cal. 3d at 437, 551 P.2d at 344, 131 Cal. Rptr. at 24. The court concluded that "by entering into a doctor-patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself,

ing by the need to prevent "the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal."⁶⁵ Therefore, although *Tarasoff* remains a viable, albeit a minority, holding, it is submitted that the basis of the "duty to warn" is insufficiently explained by relying primarily on social policy and can better be justified in light of traditional tort principles.

The duty to control the conduct of another for the benefit of a third person, where applicable, is an affirmative obligation.⁶⁶ Those affiliations in which a duty to control another is imposed are collected in the Restatement (Second) of Torts:⁶⁷ the duty of a parent to control the conduct of a child,⁶⁸ the duty of a master to control the conduct of a servant,⁶⁹ the duty of a possessor of land or chattels to control the conduct of a licensee,⁷⁰ and, the duty of those

but also of any third person whom the doctor knows to be threatened by the patient.' " *Id.* (quoting Fleming & Maximov, *supra* note 21, at 1030-31); see also *Buford v. State*, 104 Cal. App. 3d 811, 821, 164 Cal. Rptr. 264, 270 (1980) (policy underlying duty to aid "is founded upon the existence of relationships of dependence or of mutual dependence").

⁶⁵ 17 Cal. 3d at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27; see Sloan & Klein, *supra* note 13, at 64 n.33. The *Tarasoff* panel bolstered its reliance upon the special relationships doctrine by emphasizing that a duty to warn would help protect the public from violence. 17 Cal. 3d at 440, 551 P.2d at 346, 131 Cal. Rptr. at 26; see Note, *supra* note 1, at 1436. Indeed, the court conceded that "the ultimate question of resolving the tension between the conflicting interests of patient and potential victim is one of social policy." 17 Cal. 3d at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25 (quoting Fleming & Maximov, *supra* note 21, at 1067). It has been argued that, for society's sake, the law cannot neglect to give a legal backbone to moral duties, or a "complete breakdown of moral sanctions" may result. Rudolph, *supra* note 2, at 499; see also HonorXe, *supra* note 8, at 232 (if law does not encourage a duty to rescue, it will surely discourage it).

⁶⁶ See Harper & Kime, *supra* note 3, at 886.

⁶⁷ See RESTATEMENT (SECOND) OF TORTS § 315 comment c (1965).

⁶⁸ *Id.* § 316; see, e.g., *Ellis v. D'Angelo*, 116 Cal. App. 2d 310, 315, 253 P.2d 675, 679 (1953) (babysitter held to have stated claim against parents for injuries caused by child whose parents did not warn of child's propensity for violent attacks against others); *Mitchell v. Wiltfong*, 4 Kan. App. 2d 231, 234, 604 P.2d 79, 82 (1979) (parents may be liable for torts of child if negligent in failing to control); *Eldredge v. Kamp Kachess Youth Servs., Inc.*, 90 Wash. 2d 402, 406, 583 P.2d 626, 629-30 (1978) (en banc) (liability imposed on parents if they have knowledge of child's dangerous tendencies and fail to control them).

⁶⁹ RESTATEMENT (SECOND) OF TORTS § 317 (1965); see, e.g., *Giles v. Smith*, 80 Ga. App. 540, 542, 56 S.E.2d 860, 861 (1949) (master liable for torts of servant committed within scope of employment); *Hyde v. Southern Grocery Stores*, 197 S.C. 263, 267, 15 S.E.2d 353, 356 (1941) (master liable for wrongful acts of servant committed while doing master's work); *Kelsey-Seybold Clinic v. Maclay*, 466 S.W.2d 716, 720 (Tex. 1971) (medical clinic owed duty of reasonable care to stop any partner or employee engaged in tortious interference with family relations).

⁷⁰ RESTATEMENT (SECOND) OF TORTS § 318 (1965); see, e.g., *Huyler v. Rose*, 88 App. Div. 2d 755, 755, 451 N.Y.S.2d 477, 479-80 (4th Dep't 1982) (landowner liable for injuries sustained by plaintiff pushed into bonfire on landowner's property); *Mangione v. Dimino*, 39

having custody of a person with dangerous propensities to control the behavior of that person.⁷¹ The common denominator in relations that entail an affirmative duty has been described as the "benefit principle."⁷² That is, a positive legal obligation to act arises from what otherwise would be only a moral responsibility because the party exposed to the potential liability received some benefit from the relationship.⁷³

In an attempt to elucidate a conceptual foundation for the holding in *Tarasoff*, one commentator, embracing the benefit principle, proposed a "principle of professional obligation."⁷⁴ In essence, this theory posits: by choosing an occupation in which people seeking help are likely to be encountered, a professional

App. Div. 2d 128, 131, 332 N.Y.S.2d 683, 687 (4th Dep't 1972) (plaintiff stated claim for injuries against property owners based on owners' failure to control other guests who threw plaintiff in pool).

⁷¹ RESTATEMENT (SECOND) OF TORTS § 319 (1965); see, e.g., *Liuzzo v. United States*, 565 F. Supp. 640, 646 (E.D. Mich. 1983) (government may be held liable if FBI agent fails to use reasonable care in directing activities of informant); *Grimm v. Arizona Bd. of Pardons and Paroles*, 115 Ariz. 260, 267, 564 P.2d 1227, 1234 (1977) (having undertaken custody of violent criminal, parole board owes duty to the public not to be grossly negligent in releasing him).

⁷² See McNiece & Thornton, *supra* note 3, at 1282. Dean McNiece and Professor Thornton postulated that a legal duty arises only when a benefit has been conferred, while a moral duty may arise without a benefit. *Id.* at 1287. There is no obligation to act unless one has voluntarily brought himself into a relation that is "materially beneficial to him." Bohlen, *supra* note 3, at 243-44; see McNiece & Thornton, *supra* note 3, at 1282-83.

⁷³ See *Murphy v. Godwin*, 303 A.2d 668, 674 (Del. Super. Ct. 1973). In *Murphy*, the court held that a doctor had a duty, ancillary to his normal medical duties, to use reasonable care in handling an insurance form that the plaintiff patient needed to finalize her family's health insurance policy. *Id.* The court found that a duty to act is imposed by social policy in those relationships in which "the party to be held liable has by some foregoing voluntary act brought himself into a relationship with others from which he obtains or expects benefits." *Id.*

⁷⁴ See Note, *supra* note 1, at 1439. Relying on Ronald Dworkin's thesis that law subsumes a system of principles and that judicial decisionmaking should not be based on policy considerations, see *id.* at 1431-32, one commentator labels the *Tarasoff* opinion unprincipled because it fails to construct a reasoned argument to support its designation of the therapist-patient relationship as "special," see *id.* at 1436-38. Of extreme importance to this argument is what the author terms the "liberty principle"; the refusal of the common law to require rescue because such an obligation violates an individual's free choice to bind or not bind himself. *Id.* at 1433. This commentator contends that the *Tarasoff* court has made therapists the "uncompensated servants of another." See *id.* (citing Hale, *Prima Facie Torts, Combination, and Non-feasance*, 46 COLUM. L. REV. 196, 214 (1946)). By basing its decision on policy considerations, this commentator asserts, the *Tarasoff* court adopted the personal prejudices of the majority at the expense of a principled, consistent holding. See Note, *supra* note 1, at 1432-33; cf. Sloan & Klein, *supra* note 13, at 69 (without a standard to measure therapist's conduct, liability for negligent diagnosis will be determined based on hindsight).

acquires an affirmative duty to act for the benefit of any third party he discovers to be imperiled through his professional contact with his client or patient.⁷⁵ Stressing the free and conscious nature of choosing a career, this critic of *Tarasoff* suggested that the duty to warn arises from an individual decision to pursue a particular type of career, since the individual will be able to foresee the likelihood that he will be required to protect others and will be able to regulate his fees to cover the resultant risk.⁷⁶ It is suggested that this emphasis on benefit neglects the primary relationship that is necessary to justify an extension of an affirmative duty to a third person.⁷⁷

The traditional primary relationships in which a benefit conferred on one party will suffice to impose upon that party a duty to exercise reasonable care toward a second party include those between: a common carrier and passenger; an innkeeper and guest; a possessor of land open to the public and the public; and, a custodian and person in custody.⁷⁸ In each of these circumstances, the duty arises because of the direct relationship between the parties.⁷⁹ These "special relations," which require one member of the rela-

⁷⁵ See Note, *supra* note 1, at 1439. The "principle of professional obligation" resolves the implications for the liberty principle that the author finds unresolved in *Tarasoff*: "When a person enters an occupation in which he can reasonably expect to face an increased probability of discovering a helpless or endangered person, he is required to take steps to protect identified endangered persons." *Id.* The voluntary nature of selecting one career over another addresses the liberty issue in that the choice to take on an obligation to third parties is purely voluntary. See *id.*

⁷⁶ *Id.* The author analyzes business or professional relationships in which an affirmative duty overrides the liberty principle, and concludes that they arise:

because the service-provider 1) has made a general choice about how to exercise his labor by entering a trade, 2) reasonably can foresee that other people will need particular forms of affirmative protection associated with the running of that business, and 3) can adjust his compensation to cover the costs (risks) of providing that protection.

Id. Therefore, under this commentator's theory, an affirmative duty would flow to a third person as a result of the first person's decision to realize an economic benefit by pursuing a certain livelihood.

⁷⁷ It should be noted that imposing an affirmative duty to act simply because the person has chosen a career in which he will encounter troubled individuals is no less a social policy decision than the *Tarasoff* rationale.

⁷⁸ See RESTATEMENT (SECOND) OF TORTS § 314A (1965); McNiece & Thornton, *supra* note 3, at 1273-82. The four special relations listed above, however, "are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found." RESTATEMENT (SECOND) OF TORTS § 314A comment b (1965); see also 2 F. HARPER & F. JAMES, *supra* note 2, at 1048-49. Clearly, the Restatement contemplates that these exceptions will be extended as circumstances require.

⁷⁹ See RESTATEMENT (SECOND) OF TORTS § 315 comment c (1965).

tionship to act to protect the other, are thus distinguishable from those previously mentioned relationships that are deemed to impose upon one party a duty to control the conduct of another for the good of a third person.⁸⁰ In the latter situation, the duty flows to a party who is indirectly related to the person under the duty.⁸¹ Acceptance of the "principle of professional obligation" would justify imposing a duty to protect a third person, not as the indirect beneficiary of a preexisting primary relationship of control, but rather as the direct beneficiary of an obligation supposedly assumed by all people who choose certain occupations.⁸²

Notwithstanding criticism of the rationale in *Tarasoff*, it is suggested that the basis of a duty to warn can nevertheless be properly supported by reference to the "special relationship" doctrine. The psychotherapist-patient relationship is fiduciary in nature.⁸³ As a fiduciary, the therapist occupies the position of a trusted adviser.⁸⁴ He is required to act with the "utmost good faith" in regard to matters concerning his patient,⁸⁵ always considering the best interests of the patient.⁸⁶ By exercising reasonable

⁸⁰ See *supra* notes 67-71 and accompanying text.

⁸¹ In the special relationship between a parent and child, see *supra* note 68, the parent's duty to control the child under certain conditions is the result of their direct relationship, which gives rise to a duty that flows to the third party as an indirect beneficiary of the primary relation, see PROSSER, *supra* note 2, at 914-15.

⁸² The "principle of professional obligation" would have duty run directly to the threatened person because the psychiatrist chose to be a psychiatrist, not because the psychiatrist was treating a distraught, violent patient. See Note, *supra* note 1, at 1441 (patient's intended victim, whose peril is revealed because of purposeful action by psychiatrist, is person to whom duty is owed).

⁸³ See, e.g., Wade, *Public Responsibilities of the Learned Professions*, 21 LA. L. REV. 130, 131 (1960); Comment, *The Patient-Physician Relationship: Present Law and Trends for the Future Implied in Cobbs v. Grant*, 8 U.S.F.L. REV. 320, 333 (1973).

⁸⁴ See *Christison v. Jones*, 83 Ill. App. 3d 334, 335, 405 N.E.2d 8, 10 (1980). It is frequently argued that, due to the sensitive, personal nature of the information conveyed by a patient to a psychotherapist, the maintenance and preservation of a relationship of trust between the two is of supreme importance to the success of any treatment. See, e.g., Sloan & Klein, *supra* note 13, at 60 (because trust is the essence of psychotherapeutic treatment, confidentiality is even more important than in the usual physician-patient relationship); Slovenko, *supra* note 29, at 184 (more than any other physician, a psychiatrist must maintain his patient's confidences); Note, *supra* note 15, at 755 (assurance of confidentiality in a psychotherapeutic setting has a curative effect).

⁸⁵ See Wade, *supra* note 83, at 131-32; Comment, *supra* note 83, at 333.

⁸⁶ See H. REUSCHLEIN & W. GREGORY, *HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP* 121 (1979); see also RESTATEMENT (SECOND) OF AGENCY § 13 comment a (1958) (by agreeing to act for the principal, the agent becomes a fiduciary, which imposes a duty, "created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking").

care to control his patient or to warn the intended victim, a therapist diminishes the likelihood that the patient will carry out his threat.⁸⁷ Preventing the patient from committing a criminal act is undoubtedly in the patient's best interest, as it saves the patient from criminal liability, social opprobrium, and increased emotional suffering.⁸⁸ In addition, a warning is less obtrusive on the patient's liberty than involuntary commitment.⁸⁹ Thus, a knowing failure to act on the part of the therapist can be construed as a breach of his fiduciary obligations.⁹⁰

A fiduciary relationship is clearly a special relation in the eyes of the law. However, for a special relationship to satisfy all the elements of section 315 of the Restatement (Second) of Torts, it also must be one that "imposes a duty upon the actor to control the third person's conduct."⁹¹ Therefore, for the law to impose a duty

⁸⁷ The *Tarasoff* court left the means of controlling the patient to the discretion of the therapist. See *Tarasoff*, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20. Thus, a warning is not required in all instances. See *id.* Implicit in the rationale of the court, however, was the assumption that if the therapist had conveyed to Tatiana the danger she faced, she could have acted to protect herself. See *id.* at 433, 551 P.2d at 341, 131 Cal. Rptr. at 21. For example, the court stated:

the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger.

Id. at 441, 551 P.2d at 347, 131 Cal. Rptr. at 27 (emphasis added).

One commentator, pointing out that no form of treatment has been shown to be particularly effective in diminishing violent behavior, has argued that, because much of the progress made in psychiatric consultations "is due to the passage of time rather than the therapy itself," a duty to warn, since it will prolong the therapy, may promote public safety better than total protection of psychiatrist-patient confidentiality. Comment, *supra* note 10, at 949.

⁸⁸ See, e.g., Comment, *Tort Liability of the Psychotherapist*, 8 U.S.F.L. REV. 405, 434 (1973). A duty to warn, in some instances, "might protect the patient himself from carrying out bad impulses and thereby exacerbating his condition." *Id.* Indeed, it has been argued that strict confidentiality should give way when there is a distinct threat, because the patient who discloses his intentions to the therapist generally hopes that the therapist will protect the patient from himself and others from the patient. See Slovenko, *Psychotherapy and Confidentiality*, 24 CLEV. ST. L. REV. 375, 393 (1975). If the disclosure averts threatened physical injury, "[s]ooner or later, [even] the patient . . . will come to realize that the doctor has acted in his interest." Slovenko, *supra* note 29, at 198.

⁸⁹ See Note, *Untangling Tarasoff: Tarasoff v. Regents of the University of California*, 29 HASTINGS L.J. 179, 207 (1977) (standard for warning should be less than for seeking commitment, since there is no loss of liberty when only a warning is given).

⁹⁰ See *supra* notes 85-86 and accompanying text. For the fiduciary to be held liable for failure to give a warning, it is submitted, the information giving rise to that duty must have been received within the scope of his representation or treatment of the patient.

⁹¹ RESTATEMENT (SECOND) OF TORTS § 315(a) (1965).

on a psychotherapist to control a patient that would inure to the benefit of a third party, it appears that the psychotherapist must have "a special power to control" his patient.⁹² Historically, the instances in which a third party has an action for the failure of one person to exercise control over another embrace relationships containing just such a peculiar ability to control.⁹³ For instance, a parent may be liable for neglecting to control his child when he has the ability to control the child and is aware of the opportunity and necessity for exercising that ability.⁹⁴ Proponents of a paternalistic role for professionals often liken the affiliation of physician and patient to that of parent and child.⁹⁵ Although this analogy is not completely apposite, the nature of the control practiced by a physician is in many respects similar to that asserted by a parent.⁹⁶ This peculiar ability of a physician to control his patient, it is suggested, is cognizable on both practical and theoretical grounds.

On the practical level, physician-patient relationships histori-

⁹² See PROSSER, *supra* note 2, at 914-15.

⁹³ See *Seibel v. City and County of Honolulu*, 61 Hawaii 253, 258, 602 P.2d 532, 537-38 (1979). An actor's duty to control another because of their relationship, the *Seibel* court explained, is founded in the ability of the actor to foresee risk posed by the other and to act to prevent it by exercising "de facto or de jure custody or control" over the other. Therefore, although parents are not vicariously liable for the torts of their children, see PROSSER, *supra* note 2, at 912, they may be liable for their own negligence in failing to exercise reasonable care in controlling the child under certain conditions, see *Harper & Kime, supra* note 3, at 893.

⁹⁴ RESTATEMENT (SECOND) OF TORTS § 316 (1965). In *Davis v. DuBosch*, 283 Or. 363, 583 P.2d 1133 (1978), the plaintiffs, citing § 316 of the Restatement, alleged that the defendants, parents of the drunk driver who had killed the plaintiffs' son, had failed to use the reasonable care to curtail their boy's drinking that was necessary to prevent an unreasonable risk of harm to third parties. *Id.* at 363, 583 P.2d at 1134-35. Plaintiffs did not recover on their claim, however, because they failed to make the essential allegations that defendants knew they had the ability to control their child and knew of the need to exert that control. *Id.* at 364, 583 P.2d at 1135. Nevertheless, even if these allegations are properly made, a parent is not responsible for controlling conduct that is beyond his or her ability to control. See RESTATEMENT (SECOND) OF TORTS § 316 comment a (1965); see also *supra* note 68 and accompanying text.

⁹⁵ See, e.g., Hanley & Grunberg, *The Client and the Practitioner (Medicine)*, in PROFESSIONALIZATION 203, 204 (1966) (stereotype of "omnipotent doctor" is one who treats all his patients as children); cf. R. RUBENSTEIN & H. LASSWELL, THE SHARING OF POWER IN A PSYCHIATRIC HOSPITAL 5 (1966) (doctors justify their tremendous control over the lives of patients "by describing the mentally ill as fragile, childlike, irresponsible, and dangerous to themselves and others").

⁹⁶ The physician, like a parent, possesses knowledge and experience not held by the patient (child). See Note, *Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship*, 79 YALE L.J. 1533, 1535-36 (1970). The analogy is not complete, however, due to the limited function a doctor plays, i.e., dealing with health problems, as opposed to the general role played by a parent. *Id.*

cally have involved autonomous decisionmaking by the physician and passive acquiescence in a course of treatment by the patient.⁹⁷ This model is one manifestation of a broader philosophy whose adherents contend that the traditional professionals—doctors and lawyers—must be allowed to make decisions for their patients and clients because only they possess the special knowledge necessary to make the correct choices.⁹⁸ Taken to the extreme, this view allows the doctor to make all judgments in the treatment process.⁹⁹ Moreover, even when the patient is permitted a choice among several alternative forms of treatment, he must rely on the doctor's explanation or recommendation as to which form will be most efficacious.¹⁰⁰

In recognition of the doctor's fundamental power over patients, many jurisdictions have adopted the doctrine of informed consent.¹⁰¹ Stated simply, no treatment may be undertaken on behalf of a patient without consent, given with full knowledge of all the options.¹⁰² Still, informed consent is not an absolute necessity

⁹⁷ The traditional model of doctor-patient relations has been dubbed the "Model of Activity-Passivity." Szasz & Hollender, *A Contribution to the Philosophy of Medicine*, 97 ARCHIVES INTERNAL MED. 585, 586 (1956). Within this framework, the physician diagnoses and treats; the patients receive the physician's ministrations. *Id.* In the opinion of the authors who labelled this model, this type of therapeutic interaction remains valuable in certain circumstances. *Id.* at 591.

⁹⁸ See, e.g., Becker, *The Nature of a Profession*, in 2 EDUCATION FOR THE PROFESSIONS: THE SIXTY-FIRST YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION 27, 38-39 (N. Henry ed. 1962). A professional relationship in our society demands that the client stand back and accord the professional autonomous control over the subject matter of the representation. *Id.*; see also PROFESSIONALIZATION, *supra* note 95, at 197 (editorial commentary) (client often cannot define his own needs and, therefore, must be directed by a professional in position of authority); Note, *supra* note 96, at 1537 & n.12 (authors with sociological perspective have favored professional relationship in which the professional takes charge as the optimum means of furthering the client's interests).

⁹⁹ See Szasz & Hollender, *supra* note 97, at 586.

¹⁰⁰ See E. RAYACK, PROFESSIONAL POWER AND AMERICAN MEDICINE: THE ECONOMICS OF THE AMERICAN MEDICAL ASSOCIATION 4 (1967). Rayack posits: "The consumer has no way of knowing which alternative is best for him—he must rely upon his faith in the integrity and competence of the physician." *Id.* Even those psychiatrists who believe the patient should have a participatory role in the treatment process, see, e.g., R. RUBENSTEIN & H. LASSWELL, *supra* note 95, at 5-6, do not deny that the therapist must assume a leadership role. See D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 10-11 (1977). Rather, "[t]hey point out that the psychotherapist knows more about the 'wider context' of the patient's illness than the patient knows himself and that this knowledge must be used to lead the patient to the point where he can assume effective responsibility." *Id.* at 11 (footnote omitted).

¹⁰¹ For a synopsis of those states that have enacted informed consent statutes, see Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 47 n.26 (1979).

¹⁰² See *id.* at 42; Comment, *supra* note 83, at 328-29.

in all cases. A doctor is not required to obtain consent when he determines, in the exercise of his professional discretion, that disclosure in a given instance would not be in the patient's best interests.¹⁰³ The doctor, therefore, has great control over the flow of information to the patient even within the strictures of informed consent.¹⁰⁴

If the fact of control is acknowledged, the issue then becomes: Does the physician have an obligation to control his patient? Although it is impossible to formulate a generalization to encompass all relationships,¹⁰⁵ a physician may, in certain instances, have a duty to control a patient in furtherance of the patient's best interests. For example, one psychiatrist, discussing the "right to refuse treatment," acknowledged that there are occasions "when the involuntary administration of treatment is life-saving or so important in restoring full health that there must be some provision which allows the physician to override a refusal of treatment"¹⁰⁶ In other words, given extreme circumstances, the psychiatrist must control the patient and decide what is best for him, despite direct opposition by the patient.¹⁰⁷ A credible threat to

¹⁰³ See, e.g., DEL. CODE ANN. tit. 18, § 6852(b)(3) (Supp. 1982); N.Y. PUB. HEALTH LAW § 2805-d 4(d) (McKinney 1977); PA. STAT. ANN. tit. 40, § 1301.103 (Purdon Supp. 1984-85). In *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972), the court explained that an exception was necessary because "patients occasionally become so ill or emotionally distraught on disclosure as to foreclose a rational decision, or complicate or hinder the treatment, or perhaps even pose psychological damage to the patient." 464 F.2d at 789; see also *Taber v. Riordan*, 83 Ill. App. 3d 900, 904, 403 N.E.2d 1349, 1353 (1980); *Scott v. Bradford*, 606 P.2d 554, 558 (Okla. 1979).

¹⁰⁴ Many commentators caution that the privilege of nondisclosure must be carefully circumscribed in order to prevent a paternalistic attitude on the part of the doctor from negating the purpose of informed consent. See, e.g., Waltz & Scheuneman, *Informed Consent to Therapy*, 64 Nw. U.L. REV. 628, 642 (1970); Comment, *Informed Consent: The Illusion of Patient Choice*, 23 EMORY L.J. 503, 504-05 (1974). Nevertheless, these same commentators admit that in certain circumstances a doctor must, in the best interests of the patient, have the power to deny information to that patient. See Waltz & Scheuneman, *supra*, at 642-43; Comment, *supra*, at 521.

¹⁰⁵ See PROFESSIONALIZATION, *supra* note 95, at 225 (editorial commentary) (each professional and each client will interact in a unique manner); Szasz & Hollender, *supra* note 97, at 592 ("different types of doctor-patient relationships are necessary and appropriate for various circumstances").

¹⁰⁶ Arons, *Working in the "Cuckoo's Nest": An Essay on Recent Changes in Mental Health Law and the Changing Role of Psychiatrists in Relation to Patient and Society*, 9 U. Tol. L. REV. 73, 91 (1977).

¹⁰⁷ Involuntary commitment statutes are perhaps the clearest illustration of the state policy judgment that a patient's desires must be superseded by the interests of society and indeed of the patient himself. See Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 695 (1974); see also T.

cause serious bodily injury or death to a third person certainly involves extreme circumstances.¹⁰⁸ The therapist may wish to inform the patient of his intention to warn the target and, if possible, obtain the patient's consent.¹⁰⁹ However, in the event the patient withholds his consent, or the therapist determines it would be better not to disclose the warning to the patient, it is submitted that the therapist must, as a function of the control afforded him by the special fiduciary relationship, exercise reasonable care to protect the potential victim.¹¹⁰

SZASZ, LAW, LIBERTY, AND PSYCHIATRY 40 (1963) ("[t]ruly voluntary hospitalization is virtually nonexistent in public mental institutions in the United States").

¹⁰⁸ See Slovenko, *supra* note 88, at 392. Professor Slovenko believes that *Tarasoff* will not have a great impact on the psychotherapeutic community because the facts of the case are extreme and unusual. *Id.* Indeed, he states that "the decision does not drastically affect the psychiatrist as it has long been the general practice to discreetly warn appropriate individuals or law enforcement authorities when a patient presents a distinct and immediate threat to someone." *Id.* at 392-93; see also Comment, *supra* note 10, at 951 (*Tarasoff* is not likely to result in an increase in warnings because the threat of financial liability is not a greater inducement to warn than the desire to protect a life). In the context of involuntary civil commitment, two commentators have noted that "[t]he kinds of behaviors that rise to the level of dangerousness must be fairly extreme in nature, imminent, and probable." Roth & Meisel, *supra* note 15, at 509. It is submitted, therefore, that the liability resulting from the recently imposed duty to warn will not be unduly burdensome if only because the instances of a truly credible threat are so infrequent. Cf. Note, *Tarasoff v. Regents of the University of California: The Psychotherapist's Peril*, 37 U. Prrt. L. Rev. 155, 166 (1975) (therapist should only choose to warn "on infrequent occasions when there is an apparent reality to the threat . . . and where continued therapy is not likely to lessen the probabilities of violence").

¹⁰⁹ See Roth & Meisel, *supra* note 15, at 511 ("[s]ome patients, when apprised of the psychiatrist's fears and necessity to act to protect others, are willing to warn potential victims"). Slovenko asserts: "A patient in treatment has the right to expect from his therapist a rescue intervention in the face of realistic danger. To be the perpetrator of a homicide is one of the most self-destructive actions one can take." Slovenko, *supra* note 88, at 393 n.59 (quoting Tanay, *Psychiatrist News*, April 16, 1975, at 2); cf. Note, *supra* note 103, at 164-65 (patients who assert they will commit a crime rarely follow through with that assertion, but rather, are calling for help) (quoting Godstein & Katz, *Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 36 CONN. B.J. 175, 188 (1962)).

¹¹⁰ See *Tarasoff*, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20; *McIntosh v. Milano*, 168 N.J. Super. 466, 489-90, 403 A.2d 500, 511-12 (Law Div. 1979); cf. *Ellis v. D'Angelo*, 116 Cal. App. 2d 310, 253 P.2d 675 (1953). In *Ellis*, the plaintiff was a babysitter who was attacked by defendant's child the first time she worked for the defendant. 116 Cal. App. 2d at 314, 253 P.2d at 679. Plaintiff alleged that the defendant knew of the child's propensity for violent behavior from past occurrences and neglected to inform the plaintiff. *Id.* In overruling defendant's demurrer, the court recognized that a parent could be liable for his or her own negligence in failing to exercise reasonable care to prevent the child from injuring another. *Id.*; see also *Zuckerberg v. Munzer*, 197 Misc. 791, 791-93, 95 N.Y.S.2d 856, 857-58 (Sup. Ct. Kings County) (parent liability situations), *aff'd*, 277 App. Div. 1061, 100 N.Y.S.2d 910 (2d Dep't 1950). It is submitted that the analogous special relationship of control between a therapist and patient should properly be held to demand the same exer-

A therapist should not be burdened with a duty to control solely because, as a fiduciary, he has an ability to control; his role as fiduciary must carry a benefit for him.¹¹¹ Thus, a therapist will not be subjected to a risk without receiving some compensation in exchange.¹¹² In addition, he will be able to regulate the parameters of his liability, inasmuch as he is free to choose not to enter a fiduciary relationship with a given patient.¹¹³

Therefore, it is submitted, the proper basis for the duty to warn enunciated in *Tarasoff* is found when there is a special, fiduciary relationship that affords a peculiar ability to control the patient and is also beneficial to the psychotherapist. In this vein, this Note proposes the following standard for the duty to warn:

- 1) A special, fiduciary relationship must exist, imposing upon the fiduciary a duty to act in the party's best interest;
- 2) The fiduciary must be receiving a benefit for his services;
- 3) The fiduciary relationship must be one that creates a peculiar ability to control the party's affairs;
- 4) The fiduciary must know of the need to exercise this control for the benefit of a readily identifiable third party;
- 5) The threat against the third party must become manifest to the fiduciary within the scope of his representation.

This proposal provides a framework for the duty to warn that adheres to the traditional tort principles of imposing a duty to control when a special relationship imparting a peculiar ability to control exists, and of acknowledging an affirmative obligation when the burdened party is receiving a benefit.

cise of reasonable care for the protection of third parties.

¹¹¹ See *supra* notes 72-77 and accompanying text.

¹¹² The benefit flowing to the fiduciary need not be provided by the patient or person asserting the right. See McNiece & Thornton, *supra* note 3, at 1283; cf. Note, *supra* note 1, at 1440 n.55 (addressing a similar issue in relation to the principle of professional obligation). Thus, a therapist paid by an outside source would be held to the same standard as a therapist paid directly by an individual client. By requiring that the therapist receive a benefit from the relationship, the law will place the therapist in an analogous position with others who are burdened with an affirmative duty to control. See Bohlen, *supra* note 3, at 243-44. Indeed, the only such relation in which a material benefit is not present to the burdened party is in the duty to control the conduct of a child. See *id.* at 243. Even so, the decision to raise a child evidences a freely exercised choice to become a parent and to take on an affirmative duty to control. See *id.*

¹¹³ It is submitted that the voluntariness of the therapist-patient relationship satisfies the liberty principle. See *supra* note 74. That is, by deciding to treat a particular patient, the therapist has freely chosen to expose himself to the possibility that the course of treatment may place him in a situation where he will have to give a warning. Cf. Note, *supra* note 1, at 1440-41.

Although a factual determination would have to be made in each case, several groups other than psychotherapists might fall within these guidelines.¹¹⁴ It is suggested, however, that a duty to warn outside the psychotherapeutic professions is most likely to arise under the standard proposed by this Note in the context of an attorney-client relationship.¹¹⁵ The relationship of attorney and

¹¹⁴ See, e.g., *Sewell v. Ladd*, 158 S.W.2d 752, 756 (Mo. Ct. App. 1942) (priest and penitent among relationships readily deemed to be fiduciary); *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962) (fiduciary relationship may arise from informal moral or personal relationships if facts of relation justify such a finding). Proper application of the proposed standard would require the trier of fact to determine: 1) whether the fiduciary actually possessed a peculiar ability to control in the relationship, 2) whether the fiduciary knew of the need to act in light of the particular facts, and 3) whether the fiduciary failed to exercise reasonable care to control his charge by warning the threatened victim, or by taking some other protective action. The possibility that a duty to warn may be extended to include groups other than psychotherapists has been suggested by several commentators. See, e.g., Merton, *supra* note 12, at 284 (following *Tarasoff*, there was pressure to impose a duty on attorneys to disclose confidences to protect third parties); Sloan & Klein, *supra* note 13, at 71-72; Note, *Imposing a Duty to Warn on Psychiatrists—A Judicial Threat to the Psychiatric Profession*, 48 U. COLO. L. REV. 283, 308-09 (1977) (potential negative ramifications of extension of duty to warn).

One example of a relationship that could give rise to a duty to warn is that between cleric and penitent. Cf. *Sewell v. Ladd*, 158 S.W.2d 752, 756 (Mo. Ct. App. 1942). If, it is suggested, a cleric acts as a counselor, rather than a confessor, he may possess sufficient control over a person to justify imposing an affirmative obligation for the benefit of third parties. Indeed, it is readily conceivable that a priest or minister could fall within the definition of a psychotherapist. See *supra* note 13. The priest-penitent privilege would not bar disclosure of a threat since, as with the physician-patient privilege, the privilege only bars disclosure in a judicial setting. See Note, *The Dangerous Patient Exception and the Duty to Warn: Creation of a Dangerous Precedent?*, 9 U.C.D. L. REV. 549, 558-59 (1976); see also Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?*, 52 YALE L.J. 607, 616-17 (1943).

Although Roman Catholic priests are strictly forbidden from revealing the secrets of the confessional, see W. TIEMANN, *THE RIGHT TO SILENCE* 19-20 (1964), credible threats made in other circumstances could give rise to a duty to warn if the facts establish that a "special relationship" exists. Cf. Note, *The Future Crime or Tort Exception to Communications Privileges*, 77 HARV. L. REV. 730, 733-34 (1964) (if priest unable to prevent antisocial act, "he may feel authorized or even compelled to reveal his knowledge in order to prevent the offense").

¹¹⁵ At least one plaintiff has attempted to hold a lawyer liable for the failure to warn readily identifiable victims of potential violence from a client. See *Hawkins v. King County*, 24 Wash. App. 338, 343, 602 P.2d 361, 365-66 (1979). In *Hawkins*, an attorney sought to have his client released on bail despite warnings from the client's mother and a psychiatrist that he was dangerous. *Id.* at 340, 602 P.2d at 363. The attorney made no mention of these warnings at the bail hearing, and shortly after his client was released, the client attacked his mother and attempted suicide. *Id.* The court, however, distinguished *Tarasoff*, and rejected the mother's claim against the attorney, noting that the client's mother was aware of his dangerousness and release, *id.* at 343, 602 P.2d at 365, and that the lawyer had no notice from the client of any violent intentions, *id.* at 344, 602 P.2d at 365-66.

client is clearly fiduciary in nature.¹¹⁶ Accordingly, within the scope of his representation, an attorney is bound to act in the best interests of his client.¹¹⁷ Like the physician, the attorney's position vis-a-vis his client entrusts him with a peculiar ability to assert control.¹¹⁸

In order for a duty to warn third parties to arise out of the attorney's fiduciary role, it must be demonstrated that attorneys have an ability to control their clients similar to the ability asserted by physicians and other parties deemed to be subject to the same duty.¹¹⁹ Again, it is submitted that this ability to control may be found on both a practical and a theoretical plane.

On the practical level, the historical model of the attorney-client relationship assumes that the client will bring his problem to the lawyer and then abdicate any further responsibility on how best to handle his affairs.¹²⁰ The argument has been made that the unique language and technical procedure so essential to the law make it virtually impossible for a layman to direct his own legal affairs competently.¹²¹ In fact, the American Bar Association, while asserting that the client must make any decisions fundamental to his affairs, recognizes that control over the strategy of the repre-

¹¹⁶ See, e.g., Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 541 (1949); Wade, *supra* note 83, at 131; accord MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1976) [hereinafter MODEL CODE].

¹¹⁷ See *supra* note 86 and accompanying text.

¹¹⁸ See *infra* notes 120-23 and accompanying text.

¹¹⁹ See *supra* notes 67-71 and accompanying text.

¹²⁰ See Becker, *supra* note 98, at 38-39; see also Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1080 (1979) (while the client holds certain preconceived preferences when seeking legal advice, "[h]e ha[d] no decision before he sees his lawyer"). According to one commentator, the symbol of absolute control is not realistic because the client reserves some measure of judgment. Becker, *supra*, at 42. Others assert that the legal profession merely pays lip service to the idea of client control over the relationship. See Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RESEARCH J. 1003, 1003. Indeed, in many instances the client is not able to ascertain what he needs, and must rely on the attorney's advice. See Hanley & Grunberg, *supra* note 95, at 197 (editorial commentary); Lehman, *supra*, at 1080-81. Moreover, the client is often unaware of the attorney's action on his behalf simply because he is normally absent when the lawyer is acting for him. See Spiegel, *supra* note 101, at 49 n.31.

¹²¹ See, e.g., A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 126 (1980) (technical maneuvering tends to alienate clients from participating in their representation); Caplan, *Lawyers and Litigants: A Cult Reviewed*, in *DISABLING PROFESSIONS* 93, 93 (1977) ("[t]he easiest way to create a monopoly is to invent a language and procedure which will be unintelligible to the layman").

sentation must lie with the lawyer.¹²² Furthermore, those commentators who favor greater client participation in the decisionmaking process demonstrate by implication that the current system is geared toward decisionmaking by the attorney.¹²³

Conceding the de facto control exercised by an attorney, the theoretical issue is the proper degree of control a lawyer may exercise over his client's affairs. One position holds that the attorney's duty to represent his client zealously¹²⁴ means that the attorney should champion any lawful cause for the client.¹²⁵ In this role, the attorney does not interpose his own moral beliefs concerning what should be done for the client.¹²⁶ Rather, the client takes the lawyer's advice concerning the likely legal consequences of various op-

¹²² See MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.2 (Proposed Draft 1983), reprinted in 52 U.S.L.W. 1, 3 (Aug. 16, 1983) [hereinafter MODEL RULES]; MODEL CODE, *supra* note 116, EC 7-7. The decisions clearly within the control of the client are, in a civil case, whether to accept a settlement and, in a criminal case, whether to accept a plea bargain. See MODEL CODE, *supra* note 116, EC 7-7; MODEL RULES, *supra*, Rule 1.2 comment. Theoretically, the distinction is between ends and means; the client sets the objectives and the attorney chooses the means to achieve them. See MODEL RULES, *supra*, Rule 1.2 comment. In practice, however, the demarcation is not nearly so clear. For example, counsel in a civil case may refuse to call a witness if the attorney believes the testimony would be detrimental to the client's case, despite the client's protests to the contrary. See, e.g., *Nahhas v. Pacific Greyhound Lines*, 192 Cal. App. 2d 145, 146, 13 Cal. Rptr. 299, 300 (1961); *State v. Pratts*, 145 N.J. Super. 79, 88-89, 366 A.2d 1327, 1333 (App. Div. 1975), *aff'd*, 71 N.J. 399, 365 A.2d 928 (1976). Clients are often uncertain of their exact objectives when they consult an attorney, and, therefore, their ends will largely be defined by what the attorney tells them they can achieve. Spiegel, *supra* note 101, at 102. In practical terms, the extent to which the attorney makes essential decisions depends on who the client is. See Mazor, *Power and Responsibility in the Attorney-Client Relation*, 20 STAN. L. REV. 1120, 1138 (1968). "A lawyer may hesitate to take a step before consulting his large corporation client that he would take on his own responsibility for a client who had wandered into his office." *Id.*

¹²³ See, e.g., Spiegel, *supra* note 101, at 140.

¹²⁴ See MODEL CODE, *supra* note 116, EC 7-1.

¹²⁵ See A. GOLDMAN, *supra* note 121, at 90. Professor Freedman argues that the duty of zealous advocacy requires an attorney knowingly to allow his client in a criminal trial to commit perjury in response to the attorney's direct examination if the client so insists. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475-78 (1966). *Contra* MODEL CODE, *supra* note 116, EC 7-5 (1976) (attorney cannot "knowingly assist the client to engage in illegal conduct"). Therefore, attorneys who subscribe to this position will, under certain conditions, have to help their clients champion unlawful causes.

¹²⁶ Professor Freedman, concluding that professionalism and decency may coexist, posits that the point at which the lawyer must make a personal moral choice is at the time he decides whether to represent a particular client. Freedman, *Lawyer and Client: Personal Responsibility in a Professional System*, in THE ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION, FINAL REPORT OF THE ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES: ETHICS AND ADVOCACY 56 (1978).

tions and then directs his counsel to pursue the chosen course.¹²⁷ The argument is made that if an attorney makes moral judgments in directing his client's affairs, rather than simply pursuing the client's legal rights, the attorney will distort the adversary process by effectively usurping the function of judicial and legislative officers.¹²⁸ Instead, the lawyer should assume the role of mechanic guiding his client through a technical maze the client could not effectively navigate by himself.¹²⁹ Critics charge this portrayal reduces the role of the legal counselor to finding loopholes and acting as a "mouthpiece."¹³⁰

The alternative point of view posits that an attorney must assert some control in the client's decisionmaking process.¹³¹ Indeed, one scholar envisions an attorney and client haggling over their positions until they reach a tacit common ground upon which the representation can proceed in an atmosphere of trust.¹³² Others urge that even without a radical alteration in the current system of advocacy, a lawyer must assert his ethical concerns in client decisionmaking.¹³³ Concluding that attorneys' roles as professionals

¹²⁷ See *id.*

¹²⁸ See A. GOLDMAN, *supra* note 121, at 96; Freedman, *supra* note 126, at 1482.

¹²⁹ See Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1491 (1966). In response to Professor Freedman's contention that a criminal defense attorney may be required to allow his client's perjury, one author argues that Freedman had defined the role of lawyers as that of "moral automatons." *Id.* at 1492.

¹³⁰ Noonan, *supra* note 129, at 1491. By conveying the impression that a lawyer is never essential in deciding the proper course of action for a client, the Model Code of Professional Responsibility, it has been argued, portrays attorneys as lackeys searching for loopholes to satisfy their clients' demands. See G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 151 (1978). Other professions do not paint a similar image of their members. *Id.*

¹³¹ See, e.g., A. GOLDMAN, *supra* note 121, at 127 (view that calls for client moral autonomy is inadequate to consider the moral autonomy of others); G. HAZARD, *supra* note 130, at 151 (attorney is an "actor" when he gives legal advice and is to be held accountable therefor); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 132 (under proposed "principle of non-professional advocacy," client should expect opposition when his objectives conflict with those of the attorney).

¹³² See Simon, *supra* note 131, at 133. The principle of non-professional advocacy does not require that the lawyer and client always agree. *Id.* Rather, "non-professional advocacy should . . . increase the client's concern for the impact of his conduct on others, and . . . enlarge the minimal role which norms such as reciprocity and community now play in attorney-client decisions." *Id.*

¹³³ See, e.g., Noonan, *supra* note 129, at 1492. An attorney, Noonan argues, cannot deny his own role in society by hiding behind the perceived boundaries of the adversary system and acting out "a technician's role." *Id.* Simply because our system of justice is adversarial in nature does not mean that participants may justify actions that suppress the truth: "[T]he lawyer must act with regard for the requirements of the adversary system and with concern for his own standards as a human person, as well as with regard for the require-

cannot justify measuring their actions by a different moral standard from the rest of mankind,¹³⁴ Professor Goldman asserted that divorcing the lawyer from moral concerns in the interest of protecting the moral autonomy of the client may well promote immoral results.¹³⁵ He argued that "the client may in fact lose his own sense of moral responsibility when he sees his most partisan interest warmly embraced and given institutional respectability by his lawyer."¹³⁶ If the client were required to justify his moral position to his lawyer, the issue of moral responsibility would likely be addressed.¹³⁷ Without a discussion of moral issues between attorney and client, however, each can rely on his role in the relationship to rationalize their joint failure to consider the effect of their actions on others. Under Goldman's hypothesis, lawyers would respect their own moral autonomy by refusing to act in a manner that would impinge upon the rights of third parties in the guise of zealous representation of their clients.¹³⁸

By ignoring the opportunity to exercise control over the client in the face of a credible threat, not only does the lawyer risk harm to the third party, but he also allows his client to act in a manner clearly at odds with the client's best interests.¹³⁹ In theory, then, the attorney achieves the greatest good for all involved if he pre-

ments of the society which the system serves." *Id.*

¹³⁴ Professionals often defend against charges of misconduct by arguing they must adhere to unique professional norms that set them apart from others in society. *See, e.g.,* Freedman, *supra* note 126, at 1475-78 (because of the strictures of the adversary system, attorneys must sometimes engage in what would be akin to subornation of perjury for a nonlawyer). One author posits that the right to be judged by specialized standards applies to people in "strongly differentiated" roles. A. GOLDMAN, *supra* note 121, at 2. Judges' roles, he explains, are strongly role-differentiated because they should subordinate their personal moral beliefs in an effort to apply the law strictly. *Id.* at 49. Attorneys, however, are not entitled to this type of special deference.

¹³⁵ A. GOLDMAN, *supra* note 121, at 126.

¹³⁶ *Id.*

¹³⁷ *Id.*; accord Lehman, *supra* note 120, at 1081 (lawyers who fail to perform critical examination of their clients' grievances are acting contrary to clients' interests); Simon, *supra* note 131, at 135 (questioning client about the propriety of his objectives is likely to "enhance the client's understanding of his own ends").

¹³⁸ *See* A. GOLDMAN, *supra* note 121, at 132-33. The mode of advocacy developed by Goldman does not demand that attorneys refuse to represent clients whose morals they do not accept, as this might relegate extremely unpopular individuals or causes to a limited pool of legal resources. *See id.* at 133. Rather, lawyers operating under this concept are obliged only to avoid trammeling the moral rights of others in pursuit of their clients' goals. *See id.*

¹³⁹ *Cf. supra* notes 87-90 and accompanying text (patient benefits when a psychiatrist prevents a criminal act).

vents the consummation of his client's threat.

It is submitted, therefore, that attorneys not only have a great deal of control over their clients as a practical matter, but they are also conceptually justified in exerting control at times to protect the interests of parties outside the relationship.¹⁴⁰ If, then, it can be proved that an attorney had the ability to exercise control over his client, in addition to the other elements of a duty to warn, he should be held to owe a duty to third parties injured by his failure.¹⁴¹ The ability to control a client's affairs need not rise to the level of physical control that a parent has over a child; the degree of control simply must be sufficient to require him to act in the client's best interests and override the client's own desires if necessary.¹⁴² In other words, even if the client refused to pay heed to the attorney, the attorney still has the ability to control the client's actions indirectly; that is to say, through a warning or other reasonable precaution.

In addition to the ability to assert control, the lawyer would have to receive an economic benefit for his services,¹⁴³ and he would have to know of the need to exert his ability to control in

¹⁴⁰ Although the duty to control the client's conduct within the scope of the representation will inure to the benefit of the threatened party, the warning is entirely in accord with the lawyer's duty to act in his client's best interests, since it reduces the likelihood that the client will act to his own detriment. See *supra* notes 87-88 and accompanying text; cf. Blinick, *Mental Disability, Legal Ethics, and Professional Responsibility*, 33 ALB. L. REV. 92, 101 (1968) (no ethical problem exists when attorney breaches confidences to reveal client's intended suicide, since client is really pleading for help and hoping to be stopped).

¹⁴¹ In considering whether attorneys have the ability to control their clients sufficiently to impose a duty to take affirmative measures to protect others, it is helpful to contrast relationships that have not been deemed special. In *Seibel v. City and County of Honolulu*, 61 Hawaii 253, 602 P.2d 532 (1979), the Supreme Court of Hawaii ruled that no special relationship was created between the city and the person harmed by a criminal defendant who had been acquitted and conditionally released. *Id.* at 257, 602 P.2d at 536-38. The court held that "past prosecution and knowledge of [the released person's] suspected involvement in a new offense do not create a special relationship of the nature that would impose a duty upon the City." *Id.* at 257, 602 P.2d at 536. In *Mangeris v. Gordon*, 94 Nev. 400, 580 P.2d 481 (1978) (per curiam), the decedent cabdriver had driven a man to a massage parlor. *Id.* at 401, 580 P.2d at 482. The decedent later picked up the same passenger, who subsequently killed him. *Id.* According to the court, plaintiff's allegation that defendants, owners of the massage parlor, knew the passenger was a dangerous fugitive and nevertheless failed to report him to the police was not substantial enough to find a special relationship. *Id.* at 402, 580 P.2d at 483. It is suggested that in neither *Mangeris* nor *Seibel* did the party charged possess a peculiar ability to control the other sufficient to impose a duty to protect third parties.

¹⁴² Cf. *supra* notes 87-90 and accompanying text.

¹⁴³ See *supra* notes 72-73 and accompanying text.

the given instance.¹⁴⁴ Lastly, to transform a right to warn into a duty to warn, the attorney should have learned of the threat in the course of his representation so that it falls within the ambit of his fiduciary obligations.

Nevertheless, the objection remains that attorneys are not trained to determine when their clients will pose a danger to another, and, thus, they can never actually know when they must exercise their ability to control their client's affairs by providing a warning.¹⁴⁵ The standard enunciated by the *Tarasoff* court demands that "[w]hen a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger."¹⁴⁶ The inclusion of a "should have known" requirement marks one of the principal points of attack upon the *Tarasoff* holding.¹⁴⁷ As explained in Justice Mosk's separate opinion, the psychotherapeutic professions vigorously deny an ability to predict violence accurately.¹⁴⁸ Justice Mosk argued that the duty to warn

¹⁴⁴ See *supra* note 94 and accompanying text. In the analogous special relationship of control between a parent and child, the parent cannot be held liable for failing to exercise control unless it is proven that the parent knew or should have known of the need to exercise his or her control over the child. See RESTATEMENT (SECOND) OF TORTS § 316(b) (1965).

¹⁴⁵ Liability for failure to use reasonable care to protect third parties from a person over whom one has control should not be imposed on the basis of the control alone; the party with the control must have knowledge that the person is likely to harm another. See *Estate of Mathes v. Ireland*, 419 N.E.2d 782, 784 (Ind. App. 1981); see also *infra* note 149 and accompanying text.

¹⁴⁶ *Tarasoff*, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20 (emphasis added).

¹⁴⁷ See, e.g., *Hedlund v. Superior Court*, 34 Cal. 3d 695, 708, 669 P.2d 41, 48, 194 Cal. Rptr. 805, 812-13 (1983) (Mosk, J., concurring and dissenting) ("should have known" standard incorrectly assumes that psychotherapists can predict dangerousness of an individual the same way doctors can determine physical disorder); S. HALLECK, LAW IN THE PRACTICE OF PSYCHIATRY 80 (1980) (*Tarasoff* presumes professional expertise in an area where such expertise does not exist); Roth & Meisel, *supra* note 15, at 509 (psychiatrists who warn may be liable for defamation and invasion of privacy).

¹⁴⁸ *Tarasoff*, 17 Cal. 3d at 451, 551 P.2d at 354, 131 Cal. Rptr. at 34 (Mosk, J., concurring and dissenting). The holding in *Tarasoff* has "galvanized the psychiatric profession into efforts to educate courts and legislatures about the limits of psychiatrists' capacity to assure public safety." Merton, *supra* note 12, at 275; see, e.g., Sloan & Klein, *supra* note 13, at 68 (a workable standard for predicting future violent conduct has not been formulated); Recent Case, *Torts—Duty to Act for Protection of Another—Liability of Psychotherapist for Failure to Warn of Homicide Threatened by Patient*, 28 VAND. L. REV. 631, 638 (1975) (unreasonable for *Tarasoff* court to analogize to duty of doctor to warn of a contagious disease since disease can be diagnosed but future violence cannot be predicted); see also Murel v. Baltimore City Criminal Court, 407 U.S. 355, 365 n.2 (1972) (Douglas, J., dissenting from dismissal of certiorari) ("predictions of dangerous behavior . . . are incredibly inaccurate")

was proper in instances where there had been an actual prediction of violence.¹⁴⁹ He declared that a "should have known" standard "will take us from the world of reality into the wonderland of clairvoyance."¹⁵⁰ Cases following *Tarasoff*, however, indicate that courts, apparently accepting the inability of therapists to predict dangerousness without some concrete indicator of violent behavior, are looking for actual knowledge of dangerousness before imposing liability for failure to warn.¹⁵¹

Their inability to predict, however, has not relieved therapists of the duty to warn.¹⁵² Instead, they are held to the standard of a reasonable member of that profession.¹⁵³ In this regard, it is argued

(quoting Bruce J. Ennis, Staff Attorney of the New York Civil Liberties Union and Director of the Civil Liberties and Mental Illness Project); cf. von Hirsch, *Prediction of Criminal Conduct and Preventative Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717, 725-26 (1972) (lack of clear legal standard of dangerousness allows psychiatrists to commit patients on the basis of their personal predilections). The only indication of future dangerousness that offers any degree of reliability is past violent conduct. See D. ROBINSON, *PSYCHOLOGY AND LAW* 139 (1980); Derschowitz, *Preventative Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1313 (1973); Comment, *supra* note 10, at 942 (quoting Kozol, Boucher & Garafalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME AND DELINQUENCY 384 (1973)); accord *McIntosh v. Milano*, 168 N.J. Super. 466, 482, 403 A.2d 500, 508 (Law Div. 1979) (psychotherapist cannot predict dangerousness perfectly, but an opinion can be formed from "the history of the patient and the course of treatment").

¹⁴⁹ *Tarasoff*, 17 Cal. 3d at 452, 551 P.2d at 354, 131 Cal. Rptr. at 34 (Mosk, J., concurring and dissenting).

¹⁵⁰ *Id.* (Mosk, J., concurring and dissenting).

¹⁵¹ Compare *Shaw v. Glickman*, 45 Md. App. 718, 723, 415 A.2d 625, 630 (1980) (patient did not reveal his intent to kill another to psychiatrist); and *Cairl v. State*, 323 N.W.2d 20, 25-26 (Minn. 1982) (dictum) (no duty to warn because patient made no specific threat); and *Sherrill v. Wilson*, 653 S.W.2d 661, 666 (Mo. 1983) (*Tarasoff* and *McIntosh* distinguished because plaintiff did not allege that defendants knew patient represented a threat to the particular victim); with *Davis v. Lhim*, 124 Mich. App. 291, 303, 335 N.W.2d 481, 490 (1983) (note from aunt in patient's file indicated he had been threatening his mother, therefore mother was identifiable victim to psychiatrist); and *McIntosh v. Milano*, 168 N.J. Super. 466, 477-78, 403 A.2d 500, 506 (Law Div. 1979) (plaintiff's expert at trial opined that dangerousness was not "a prediction, but a known fact"). But see *Mavroudis v. Superior Court*, 102 Cal. App. 3d 594, 601, 162 Cal. Rptr. 724, 730 (1980) (*Tarasoff* "should have known" standard reaffirmed).

¹⁵² See *Tarasoff*, 17 Cal. 3d at 439, 551 P.2d at 346, 131 Cal. Rptr. at 26; Ayres & Holbrook, *supra* note 63, at 685.

¹⁵³ See, e.g., *Tarasoff*, 17 Cal. App. 3d at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25; *McIntosh v. Milano*, 168 N.J. Super. 466, 482, 403 A.2d 500, 508 (Law Div. 1979); see also Ayres & Holbrook, *supra* note 63, at 686 (psychotherapists do not have to predict with scientific accuracy as long as they are only held to standards of their profession); Note, *Psychiatrists' Duty to the Public: Protection from Dangerous Patients*, 1976 U. ILL. L.F. 1103, 1120-22 (uncertainty of psychiatric prediction does not obviate duty; it should be weighed only in establishing a diagnostic standard of care).

that psychotherapists are little better equipped than average laymen to predict dangerousness.¹⁵⁴ Thus, it is submitted that attorneys confronted with a threat of violence would be able to discern its credibility as accurately as a psychotherapist would in the same situation.¹⁵⁵ Even assuming psychotherapists are better able to recognize potential dangerousness than are attorneys, attorneys would still only be held to the standards of reasonable members of the legal profession. In other words, attorneys would not become insurers of the conduct of their clients; they would be required only to exercise that degree of control over their clients that they actually possess.¹⁵⁶ Therefore, it is suggested that if an attorney learned of his client's threat to kill or injure another, and a reasonable attorney in the same circumstances would find the threat credible, the attorney then has reason to know he should act to prevent harm to the third person, and his special relationship of control should be considered to impose upon him a duty to act.

Confronted with the possibility of a duty to warn, attorneys will undoubtedly attempt to shield themselves with the profession's mandate of confidentiality in attorney-client relations.¹⁵⁷

¹⁵⁴ See, e.g., Arons, *supra* note 106, at 75 (citing Laves & Cohen, *A Preliminary Investigation into the Knowledge and Attitudes Toward the Legal Rights of Mental Patients*, 1 J. PSYCHIATRY & L. 49, 51 (1973)) (psychiatrists are not able to predict dangerousness "any better than the judges and lawyers who have sought the psychiatrist's expert advice"); Ennis & Litwack, *supra* note 107, at 696 ("there is little or no evidence that psychiatrists are more 'expert' in making the predictions relevant to civil commitment than laymen").

¹⁵⁵ See Sloan & Klein, *supra* note 13, at 71-72.

¹⁵⁶ See *supra* note 114 and accompanying text. In the analogous context of the psychiatrist-patient relationship, one court made clear that *Tarasoff*-type liability should not be without limits. See *Cole v. Taylor*, 301 N.W.2d 766, 766 (Iowa 1981). In *Cole*, the plaintiff was convicted for the murder of her ex-husband. *Id.* at 768. One of the theories of her action against her psychiatrist was that, under *Tarasoff*, he had breached a duty to her by failing to warn her victim that she posed a danger of harm to him. *Id.* at 767. The court rejected this argument, noting that, even if the *Tarasoff* doctrine was adopted in that jurisdiction, the duty under *Tarasoff* runs only to the intended victim, not to the patient." *Id.* at 768.

¹⁵⁷ In the interest of promoting full disclosure by the client to his counsel, attorney-client communications are privileged. See C. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 87, at 205 (3d ed. 1984); 8 J. WIGMORE, *WIGMORE ON EVIDENCE* § 2290, at 547-50 (3d ed. 1940). A privilege, unlike an evidentiary rule of exclusion, operates to keep relevant material from the trier of the facts in an effort to protect relationships deemed to have great social significance. See McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 447-48 (1938). Therefore, the revelation of client confidences by an attorney is strictly proscribed. See MODEL CODE, *supra* note 116, DR 4-101(b) (1976). For a discussion of the generally accepted elements of the privilege, see UNIF. R. EVID. 26, reprinted in C. McCORMICK, *supra*, § 87, at 206-07 n.10.

Long before *Tarasoff*, one author argued that psychiatrists should have an unqualified privilege due to their special need to protect confidence. Slovenko, *supra* note 29, at 184.

Citing an attorney's dual obligations of confidentiality and zealous representation, one commentator contended that lawyers trapped in a "Tarasoff bind" should not be faced with the same duties to reveal as psychotherapists.¹⁵⁸ One long-standing exception to an attorney's duty to keep secret his client's confidences—also present in the physician-patient context¹⁵⁹—allows an attorney to expose the client's intention to commit a future crime.¹⁶⁰ Nevertheless, this exception provides only that an attorney has an ethical right to reveal a future crime; it does not impose a duty to disclose the intended crime.¹⁶¹ It is submitted, however, that the duty to warn is narrower in scope than the future crimes exception. Although there is considerable controversy over the breadth of the future crimes exception,¹⁶² the duty to warn is clearly narrower, since it is

This assertion remains one of the primary bases for attempting to discredit the *Tarasoff* holding. See, e.g., *Tarasoff*, 17 Cal. 3d at 458-60, 551 P.2d at 358-60, 131 Cal. Rptr. at 38-40 (Clark, J., dissenting); Sloan & Klein, *supra* note 13, at 58, 65 (*Tarasoff* inappropriately converted what was a therapist's option to disclose into duty); Stone, *supra* note 15, at 374 (therapists' pre-*Tarasoff* right to decide issues of confidentiality provided adequate protection to third parties).

¹⁵⁸ See Merton, *supra* note 12, at 284. Except in extreme circumstances, Professor Merton states she would not reveal her client's threat for fear of increasing the client's chances for conviction. *Id.* at 331.

¹⁵⁹ See AMA, CANONS OF MEDICAL ETHICS § 9 (1959), reprinted in Ayres & Holbrook, *supra* note 63, at 692 n.45. It has been suggested that this exception should only be applicable in the event there is a distinct danger to the safety of third parties. See Note, *supra* note 89, at 209; Note, *supra* note 153, at 1125.

¹⁶⁰ See MODEL CODE, *supra* note 116, DR 4-101(C)(3); MODEL RULES, *supra* note 122, Rule 1.6(b)(1). In a formal opinion, the American Bar Association has determined that the future crimes exception should be read to require the attorney to disclose only when he has facts that lead him to believe beyond a reasonable doubt that his client will commit a crime. ABA Comm. on Professional Ethics, Formal Op. 314 (1965); accord Note, *The Application of the Tarasoff Duty to Forensic Psychiatry*, 66 VA. L. REV. 715, 725 n.61 (1980).

¹⁶¹ The language of the future crimes exception makes clear that disclosure of such an intent is discretionary, stating that "[a] lawyer may reveal." MODEL CODE, *supra* note 116, DR 4-101(C) (emphasis added). In an analogous situation, however, it has been argued that the dangerous patient exception to psychiatrist-patient confidentiality in California can be taken as evidence of a legislative intent to require the psychiatrist to speak out when he learns of a threat to a third party. See Fleming & Maximov, *supra* note 21, at 1063. "If the need for the therapist's evidence is deemed so high as to deny him a privilege in the courtroom, there is all the more reason to release him from his bond of confidentiality when he must act, if at all, instantly." *Id.* But see *Shaw v. Glickman*, 45 Md. App. 718, 723, 415 A.2d 625, 630 (1980) (if privilege applies in judicial proceedings, no lesser standard should be expected outside those proceedings).

Professor Merton has noted that, following *Tarasoff*, there was an unsuccessful attempt to burden attorneys with a "mandatory obligation," rather than a "discretionary power" to expose confidences of a client when done to protect a third party. Merton, *supra* note 12, at 284.

¹⁶² Compare MODEL CODE, *supra* note 116, DR 4-101(C)(3) with MODEL RULES, *supra*

addressed only toward threats of imminent physical harm.¹⁶³ It is suggested that a duty is justified in such instances because a consummated threat of serious physical harm can never be adequately redressed, while effective remedies do exist to compensate a victim of most non-violent crimes. Therefore, since principled grounds for a legal duty to reveal or warn can be enunciated on the basis of an attorney's special relationship of control,¹⁶⁴ the ethical constraint of confidentiality should be overcome.¹⁶⁵

CONCLUSION

To the extent that any duty to warn threatened third parties is embraced, the gap between legal duties and commonly accepted moral obligations is narrowed. As applied to the psychotherapeutic community, recent cases interpreting the duty to warn represent reasoned extensions of liability based upon prior case law and the traditional tort concept of foreseeability. In addition, a proper explication of the special relationship created between a therapist and patient lies in the ability to control the patient's affairs that is conferred upon the therapist by his fiduciary status. Under this type of special relationship, members of other professions, particularly attorneys, may also be subject to affirmative legal obligations. Because of their position of trust, attorneys should shoulder responsibility for the harmful actions of their clients if they neglect to exercise their ability to control the client for the good of others.

Thomas J. Murphy

note 122, Rule 1.6(B)(1). The future crimes exception, as stated in the old ABA Model Code, provides:

A lawyer may reveal:

The intention of his client to commit a crime and the information necessary to prevent the crime.

MODEL CODE, *supra* note 116, DR 4-101(C)(3). The ABA's proposed Model Rules permit disclosure only when necessary to prevent "imminent death or substantial bodily harm." MODEL RULES, *supra* note 122, Rule 1.6(b)(1). The new rules, however, have not received widespread acceptance among the states.

¹⁶³ See *Tarasoff*, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

¹⁶⁴ See *supra* notes 115-45 and accompanying text.

¹⁶⁵ See Note, *supra* note 1, at 1440 n.57; see also *McIntosh v. Milano*, 168 N.J. Super. 466, 491-92, 403 A.2d 500, 513 (Law Div. 1979) (concerns of confidentiality are not sufficiently important to override the duty to protect the victim); accord Comment, *supra* note 10, at 948 (arguments for breaching patient's confidence are more forceful "where there is still a possibility of averting a tragedy").