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The Psychotherapist's Duty to Protect the Public: The Appropriate Standard and the Foundation in Legal Theory and Empirical Premises

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Robert F. Schopp*

The Psychotherapist's Duty to Protect the Public: The Appropriate Standard and the Foundation in Legal Theory and Empirical Premises

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I. INTRODUCTION

Several states have established a duty on the part of psychotherapists to protect the public from harm caused by their dangerous pa-

* I am grateful to my colleagues at the University of Nebraska College of Law and Department of Psychology who commented on an earlier presentation of these ideas at a faculty colloquium. David Wexler provided helpful comments on an earlier draft of this Article, although I reluctantly refrained from altering the title as he suggested. Thanks also to Dennis Moynihan who provided capable research assistance. Mike Quattrocchi provided detailed responses to an earlier draft of this Article, but he said he was tired of appearing in my footnotes, so I won't mention him this time.

tients.[1] The Supreme Court of California initially articulated this duty in the widely discussed *Tarasoff* case where the court stated:

> 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. This discharge of this duty may require the therapist . . . to warn the intended victim or others . . . to notify police, or to take whatever other steps are reasonably necessary. . . .[2]

Recent cases have sought an appropriate standard by which to measure this duty. Some courts have adopted a standard which holds that the duty attaches only when the patient makes specific threats toward identifiable victims (STIV).[3] The two most recent major decisions, however, have applied the zone of danger (ZOD) test. According to this standard, the duty applies whenever the patient poses a foreseeable danger and it extends to all victims in the zone of danger. These courts have explicitly rejected the STIV standard on the basis of legal theory and policy analysis.[4] While these two lines of cases differ in that the former endorses the STIV standard while the latter applies the ZOD test, they agree insofar as all accept the underlying duty of therapists to protect the public from their patients.

This Article will assume for the sake of argument that the *Tarasoff* duty applies and that some duty to protect third parties is justified. It will examine the rationales for the STIV and ZOD standards as provided by the recent court opinions, and it will argue that: (1) *Schuster* and *Hamman* both misconstrue the question as a choice between STIV and ZOD as alternative standards for the same *Tarasoff* duty, (2) rather than competing tests for the same purpose, these two standards address two different duties that have developed from the *Tarasoff* line of cases, (3) under certain circumstances, both the STIV and the ZOD standards might appropriately apply, (4) evaluation of the STIV standard turns primarily on empirical premises that cannot be resolved by appeal to legal theory or policy analysis alone; contrary to the recent court opinions, the ZOD and STIV standards share a common foundation in legal theory and policy,[5] and (5) both the

1. S. J. Brakel, J. Parry & B. A. Weiner, The Mentally Disabled and the Law 582-89 (3d ed. 1985).
2. Tarasoff v. Regents of the Univ. of Cal., 17 Cal. 3d 425, 431, 551 P.2d 334, 340, 131 Cal. Rptr. 14, 20 (1976).
3. *E.g.*, Brady v. Hopper, 570 F. Supp. 1333 (D. Colo. 1983), *aff'd*, 751 F.2d 329 (10th Cir. 1984); Thompson v. County of Alameda, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980).
4. *E.g.*, Hamman v. County of Maricopa, 161 Ariz. 58, 775 P.2d 1122 (1989); Schuster v. Altenberg, 144 Wis. 2d 223, 424 N.W.2d 159 (1988).
5. One who prefers to think of empirical premises as part of policy analysis can rephrase the claim in the following manner. Policy analysis, on this understanding, includes both normative evaluation of policy priorities and the relevant empirical premises. In these terms, the ZOD courts have erroneously evaluated the

courts and the relevant professions should construe their respective responsibilities regarding these issues differently than they have in the past.

Although this Article relies heavily on clarification of the concepts and arguments involved in several court opinions, the conclusions carry prescriptive as well as conceptual significance. In this manner, this Article pursues the agenda of therapeutic jurisprudence, an approach to mental health law that encourages legal actors to formulate substantive and procedural law and to fulfill their legal roles in a manner designed to promote the therapeutic mission of the mental health system insofar as doing so is consistent with the normative principles underlying the law.[6] The fifth claim listed above endorses a revised legal analysis by the courts and a research agenda for professional organizations, both of which are intended to improve the practical effects of tort-regulation of psychotherapy.

The argument will proceed in the following manner. Part II will analyze the two most recent major cases—*Schuster* and *Hamman.* Part III will examine previous cases in order to identify the legal principles and factual circumstances that courts found compelling in selecting standards in those situations. Part IV will clarify two important underlying conceptual issues and advance alternative analyses both of the appropriate role of the two standards and of the relevant policy considerations and empirical premises that support these standards. Part V will summarize the arguments and conclusions of the Article.

II. *SCHUSTER* and *HAMMAN*

A. *Schuster* v. *Altenberg*

The therapist's outpatient was involved in an automobile accident while driving, killing herself and seriously injuring her daughter who was one of the plaintiffs. The patient's family sued the therapist, alleging that he causally contributed to the accident through negligent diagnosis and treatment, as well as through negligent failure to protect others either by warning the family of the patient's condition and

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STIV standard as an issue of legal theory and normative policy analysis, when it is more accurately understood as a matter for empirical policy analysis.

6. D. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); Wexler, *Inducing Therapeutic Compliance Through the Criminal Law*, 14 L. & PSYCHOLOGY REV. 43 (1990); Wexler & Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Malpractice Litigation: Some Preliminary Observations*, 7 BEHAVIORAL SCI. & L. 485 (1989) [hereinafter *Juror Hindsight Bias*]; Schopp & Wexler, *Shooting Yourself in the Foot with Due Care: Psychotherapists and Crystallized Standards of Tort Liability*, 17 J. PSYCHIATRY & L. 163 (1989) [hereinafter *Crystallized Standards of Tort Liability*].

its implications or by seeking civil commitment.[7]

The issue of concern to this Article is the duty to warn or to protect third parties. The trial court applied the STIV standard, holding there was no duty to warn or protect third parties absent a readily identifiable victim.[8] The Supreme Court of Wisconsin explicitly rejected the STIV standard in favor of the ZOD standard on the basis of the legal theory underlying Wisconsin tort law. The court reasoned that Wisconsin accepts the broader theory of duty advanced in the *Palsgraf* dissent rather than the narrower conception of duty endorsed by the *Palsgraf* majority, and further, that this broad notion of duty precluded restrictive standards such as the STIV.[9]

The critical distinction between the STIV and ZOD tests involves the type of evaluation the court applies in determining whether the defendant had a duty toward the plaintiff. While the STIV standard specifies a relatively clearly formulated criteria for attaching the duty in this type of situation, the ZOD courts require a case by case retrospective analysis of the circumstances in each case. ZOD courts review the conduct of the defendant in light of the surrounding circumstances and attribute a duty of reasonable care to that defendant if the situation was such that reasonable persons in the defendant's position would have foreseen the risks to other parties created by their conduct. This duty extends to all potential plaintiffs within the zone of danger. A person falls within the zone of danger if they are foreseeably endangered by the defendant's conduct or if they are a member of a category of persons foreseeably endangered.[10]

Driving an automobile, for example, involves foreseeable risks to other motorists and to pedestrians. Thus, drivers have a duty to operate their vehicles with reasonable care in light of the circumstances.

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7. Schuster v. Altenberg, 144 Wis. 2d 223, 226-27, 424 N.W.2d 159, 160-61 (1988).
8. *Id.* at 234, 424 N.W.2d at 164.
9. *Id.* at 234-40, 254, 424 N.W.2d at 164-66, 172. *See generally* Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928). The majority opinion in *Palsgraf* held that negligence concerns the relationship between the parties. The plaintiff can recover from the defendant only if the defendant violated a right of the plaintiff by creating an unreasonable risk of injury to that person. *Id.* at 344, 162 N.E. at 100. Justice Cardozo also suggested that the interest harmed must be the same interest that was foreseeably threatened by the negligence. *Id.* at 347, 162 N.E. at 101. Justice Andrew's dissent contended that the duty to avoid unreasonably risky behavior was a duty to the world at large and, therefore, that one who engages in negligent conduct is liable for all injurious consequences of that action to any injured party. *Id.* at 350, 103 N.E. at 103. Both the majority and the dissent agreed that defendants incur a duty when they act unreasonably by creating a foreseeable risk of injury to another. They disagreed, however, as to the scope of the duty.
10. Hamman v. County of Maricopa, 161 Ariz. 58, 64, 775 P.2d 1122, 1128 (1989); Schuster v. Altenberg, 144 Wis. 2d 223, 233-40, 424 N.W.2d 159, 163-66 (1988); W. PROSSER & W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 169-73, 356-59 (5th ed. 1984).

This duty extends to all motorists and pedestrians in the zone of danger; that is, all those who would be endangered by the driver. If driver Davis injured pedestrian Peterson by driving negligently, Davis incurred a duty of reasonable care when he engaged in the foreseeably dangerous activity of driving a car, and he violated this duty by driving negligently. Peterson was within the zone of danger by virtue of her membership in the foreseeably endangered class of pedestrians regardless of whether Davis could have foreseen that Peterson would be walking in the area.

According to Wisconsin negligence law, actors incur a duty whenever their acts or omissions cause foreseeable risks to others.[11] Although the *Schuster* opinion is somewhat ambiguous about the scope of this duty, it extends at least to all foreseeable injuries and victims.[12] The *Schuster* court analyzed the duty to warn and the duty to initiate civil commitment together as two comparable means of protecting the public from foreseeable injury by dangerous patients.[13] Thus, the defendant in this case was negligent if a psychiatrist exercising due care would have foreseen that failing to warn or confine would result in harm to someone. If harm is foreseeable in this sense, then the defendant is liable to all those who fall within the zone of danger and possibly to others as well.[14]

According to the court, Wisconsin tort law precludes the STIV standard because the basic principle holds that the actor is liable for all foreseeable consequences of his act except as those consequences are limited by policy factors.[15] The court interpreted the STIV standard as precluding liability for some foreseeable harms by ruling out those cases in which the harm was foreseeable, but the patient did not articulate a threat toward an identifiable victim. The court concluded, therefore, that once foreseeability raises the duty, the STIV standard

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11. Schuster v. Altenberg, 144 Wis. 2d 223, 235-40, 424 N.W.2d 159, 164-66 (1988).
12. *Compare id.* at 235, 424 N.W.2d at 164 *with id.* at 236, 424 N.W.2d at 164-65. The court stated that a negligent defendant who has created unreasonable risk to someone is liable for unforeseeable consequences of that negligent conduct and to unforeseeable plaintiffs. The court also asserted, however, that the plaintiff is liable for all foreseeable consequences except those that are precluded by policy considerations. This latter claim seems to suggest that the defendant is not liable for unforeseeable injuries. Thus, it is not clear whether the court holds that liability in Wisconsin extends to unforeseeable consequences of negligent conduct. The *Schuster* court endorsed a standard at least as broad as the ZOD; that is, the negligent defendant is liable at least for all foreseeable consequences of the negligent conduct and to all foreseeable plaintiffs — those in the zone of danger. Liability might also extend beyond those in the foreseeable zone of danger to unforeseeable plaintiffs and consequences. This Article will treat *Schuster* as a ZOD case because the court clearly rejected the STIV standard in favor of a case by case evaluation of foreseeability under the circumstances.
13. *Id.* at 234, 424 N.W.2d at 163-64.
14. *Id.* at 240, 424 N.W.2d at 166.
15. *Id.* at 236-40, 424 N.W.2d at 164-66.

cannot limit that duty and create an exemption from liability for foreseeable harm merely because the patient did not articulate a threat or identify a victim.[16]

Finally, the court rejected the proposition that public policy arguments support limiting the duty to cases in which the STIV test applies. It rejected the contention that dangerousness is not foreseeable by appealing to the Wisconsin civil commitment law which the court understood as requiring predictions of dangerousness and by citing a recent law review article in which the authors reported that a survey demonstrates that clinicians believe they can predict dangerousness.[17] The court rejected the requirement of a specific threat to an identifiable victim by reasoning that clinicians have the ability to prevent harm to unidentifiable victims or to the general public by issuing warnings to the patient's family or by initiating emergency detention under the statute.[18]

B. *Hamman v. County of Maricopa*

The plaintiffs brought their adult son to the admission ward of the county hospital. The defendant psychiatrist refused admission to the inpatient ward, prescribed medication, and sent the patient home with the plaintiffs. The patient attacked his stepfather two days later. The plaintiffs alleged that the defendant advised them that the patient was harmless and that he negligently diagnosed and treated the patient, resulting in injury to the plaintiffs. The lower court and the supreme court agreed that if the defendant had negligently advised the plaintiffs that the patient was harmless, this would give rise to a cause of action by the plaintiffs against the defendant. The issue of interest to this Article is the negligent diagnosis and treatment claim and particularly whether the defendant owed a duty to the plaintiffs arising out of that claim.[19]

The Arizona Court of Appeals applied the STIV standard and concluded that the defendant had no duty to the plaintiffs absent a specific threat.[20] The Arizona Supreme Court reversed the court of appeals, rejecting the STIV standard. In doing so, the supreme court endorsed the duty to protect third parties as articulated by the *Tarasoff* court, and it framed the issue in this case as one of selecting the STIV or ZOD standard for this *Tarasoff* duty.[21]

The court rejected the STIV in favor of ZOD because it concluded the plaintiffs were foreseeable victims despite the lack of a specific

16. *Id.* at 238-40, 252-53 n.9, 424 N.W.2d at 165-66, 171-72 n.9.
17. *Id.* at 244-48, 424 N.W.2d at 168-70.
18. *Id.* at 254-56, 424 N.W.2d 172-73.
19. Hamman v. County of Maricopa, 161 Ariz. 58, 59-61, 775 P.2d 1122, 1123-25 (1989).
20. *Id.* at 60, 775 P.2d at 1124.
21. *Id.* at 62-64, 775 P.2d at 1126-28.

threat. The court asserted the defendant was aware that the patient was of a type ("schizophrenic-psychotic") prone to unexpected episodes of violence and that the plaintiffs were readily identifiable victims by virtue of their constant physical proximity to the patient. The court concluded, therefore, that the defendant should have determined that the patient was dangerous and that the plaintiffs were likely victims. Thus, the plaintiffs were foreseeable victims in the zone of danger.[22] The court apparently reasoned that these plaintiffs were foreseeable victims, but the STIV test would exclude them. Therefore, the STIV cannot constitute an appropriate measure of liability because it would relieve therapists of a duty to prevent foreseeable harm merely because the patient did not verbalize a specific threat.[23]

C. The Common Foundation of *Schuster* and *Hamman*

The *Schuster* and *Hamman* courts agreed that the therapist's duty to protect potential victims from injury by dangerous patients arises by virtue of foreseeability when the therapist determines or should determine that the patient presents a danger. Both courts explicitly rejected the STIV standard in favor of the ZOD test because they interpreted the STIV as a standard that would illegitimately preclude liability for foreseeably harmful conduct merely because the patient did not articulate a specific threat or because this particular plaintiff was not an identifiable victim. Neither found the policy arguments for limiting liability to those cases addressed by the STIV standard to be persuasive.

A critic might advance the following obvious objection. Both cases predicated liability on foreseeable harm, but the general inability of clinicians to predict dangerous conduct refutes the contention that either danger was foreseeable. A duty on the part of therapists to prevent foreseeable harm by dangerous patients is vacuous, according to this objection, because dangerous conduct is not foreseeable. This has been one of the basic objections to the *Tarasoff* duty in general and it is quite plausible in both of these cases. The *Hamman* court provided no basis for its claim that patients like the defendant are prone to violent episodes and particularly none that showed a propensity to violence that would justify emergency detention under the statute. The *Schuster* court relied on very questionable arguments in concluding dangerousness is foreseeable in principle.[24] In addition, the concur-

22. *Id.* at 62-64, 775 P.2d at 1126-28.
23. *Id.* at 63-64, 775 P.2d 1127-28.
24. *See infra* notes 73-77 and accompanying text for a critique of the court's argument based in the civil commitment statute. The court also cited a recent law review article which reported that clinicians who responded to a survey believed they could predict dangerousness. Schuster v. Altenberg, 144 Wis. 2d 223, 248, 424

ring opinion suggests that the claim of foreseeability in this particular case is weak.[25] However, if one accepts the contention that the duty arises from foreseeability, the claim that dangerousness is generally not predictable actually constitutes an objection to the existence of a *Tarasoff* duty to protect the public rather than an objection to a particular standard. Having accepted by assumption that some *Tarasoff* duty to protect applies, arguments that danger is never sufficiently foreseeable to trigger the duty are eliminated by hypothesis for the purpose of this Article.

In short, the *Schuster* and *Hamman* courts explicitly rejected the STIV in favor of the ZOD. Both courts evaluated the STIV and ZOD standards as alternative tests for the same purpose, and both rejected the STIV because they concluded it would preclude liability for some foreseeable injuries. Part III will review the earlier court opinions that have developed these standards in order to demonstrate that the *Schuster* and *Hamman* courts misconstrued the relationship between the STIV and ZOD tests. This review of these cases demonstrates that, contrary to *Schuster* and *Hamman*, one cannot select from between these standards on the basis of legal theory and policy analysis because the two tests share a common foundation in theory and policy. The two lines of cases that have generated the STIV and ZOD tests reflect judicial responses to divergent factual circumstances and to differences in the manner in which the parties or the courts framed the issues.

III. PREVIOUS CASES

A. STIV Cases

In *Thompson v. County of Alameda*, the Supreme Court of California held that the duty to warn arises only when the patient specifically threatens an identifiable victim. The holding was narrow, however, because the case addressed the liability of a public body carrying out the parole program pursuant to a legislative directive. Not only was there a basis in policy for the release program, it was one with a spe-

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N.W.2d 159, 169-70 (1988)(citing Givelber, Bowers & Blitch, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443 (1984)). This argument, however, suffers from two difficulties. First, the issue of central concern is the clinician's actual ability to predict dangerousness, not what they believe they can predict. Neither the court nor the article cited presented any reason to believe that the survey responses reported by this article accurately portray the abilities of the respondents. Second, reports of an unspecified ability to predict do not address the concern that is central to tort law which must ask whether a particular danger is foreseeable enough for a particular purpose. *See infra* notes 71-77 and accompanying text for an account of this purpose-specific nature of foreseeability in this area of discourse.

25. Schuster v. Altenberg, 144 Wis. 2d 223, 268-69, 424 N.W.2d 159, 178 (1988)(Steinmetz, J., concurring).

cific legislative mandate.[26]

A parole program by its very nature involves release from custody, eliminating the possibility of decreasing danger by seeking or retaining custodial control. Thus, the court specifically addressed a duty to warn rather than a broad duty to protect. The court held that when a public body is carrying out a legislatively mandated parole program, the duty to warn arises only when there is a specific threat to an identifiable victim.[27]

In *Brady v. Hopper*, the court ruled that the duty to protect third parties depends upon the foreseeability of the risk and on whether this foreseeable danger embraced this specific harm caused. The court reasoned that the danger becomes foreseeable and the duty attaches when the patient threatens an identifiable victim.[28] The court emphasized the foreseeability of the harm and the identifiability of the victim. It adopted the specific threat requirement as a criteria of foreseeability in order to avoid creating unpredictable liability.[29]

In *Hasenei v. United States*, the court held the therapist had no duty to control a patient's conduct unless the relationship provided the therapist with the ability to exert such control and, further, this ability only arises when the therapist can predict with reasonable certainty that the patient would cause harm.[30] On this interpretation, the duty arises from the ability to control, and foreseeability creates that ability. Although the court discussed the therapist's inability to control the patient's conduct,[31] it also stated the psychiatrist who predicts danger to an identifiable victim should take reasonable steps to prevent harm.[32] Presumably, the court would include in the category of "reasonable steps to prevent harm" certain actions such as warnings which do not actually control the patient's conduct, but attempt to prevent injury that might result from that conduct.

This court addressed the identifiable victim requirement, but in contrast to the *Thompson* and *Brady* courts, it did not discuss specific threats. On this court's analysis, foreseeability—described as the abil-

26. Thompson v. County of Alameda, 27 Cal. 3d 741, 749-58, 614 P.2d 728, 732-38, 167 Cal. Rptr. 70, 74-80 (1980).

27. *Id.* at 758, 614 P.2d at 738, 167 Cal. Rptr. at 80. Of course, the defendants could have retained custody of this particular individual and pursued the legislative mandate by paroling other individuals. The court found the defendants immune by statute regarding the release decision, however, addressing the duty to warn as an independent issue.

28. Brady v. Hopper, 570 F. Supp. 1333, 1338 (D. Colo. 1983), *aff'd*, 751 F.2d 329 (10th Cir. 1984).

29. *Id.* at 1338. *See also* Eckhardt v. Kirts, 179 Ill. App. 3d 863, 534 N.E.2d 1339 (2 Dist. 1989). This Article will not review the *Eckhardt* opinion separately because it closely followed the *Brady* reasoning and holding.

30. Hasenei v. United States, 541 F. Supp. 999, 1011-12 (D. Md. 1982).

31. *Id.* at 1011.

32. *Id.* at 1012 n.24.

ity to predict with reasonable certainty—creates the ability to prevent harm, and the ability to identify the potential victim constitutes one element in this ability to predict with reasonable certainty.

In *Hasenei*, the plaintiff claimed the defendant had been negligent in failing to hospitalize a patient who later caused an accident while driving. Although the court included the identifiable victim factor in its description of the duty,[33] foreseeability of harm, rather than identifiability of the victim, seems to be the central issue regarding hospitalization. Warnings require some identifiable person to warn, but preventive steps such as hospitalization that actually limit the conduct of the patient do not require knowledge of the potential victim's identity.

In short, this case did not directly address specific threats or the duty to warn. The court emphasized the therapist's ability to control the patient's conduct, foreseeability of harm, and identifiability of the victim, with the last two factors apparently seen as necessary for the first. It remains unclear whether the court distinguished the ability to control from the ability to prevent harm or realized that the ability to identify the potential victim carries different significance for the former than for the latter.

The court also emphasized the requirement of an identifiable victim in *Leedy v. Hartnett*.[34] The court reasoned that in order to contain the *Tarasoff* duty within workable limits, those in charge of dangerous people must be able to know who to warn. The court reasoned that when a particular victim can be identified, there is good reason to impose on the therapist a duty to warn, but such a duty does not apply in cases such as this one where the plaintiffs were not identified or part of an identifiable class.[35]

The plaintiffs claimed the hospital had a duty to warn them of the assaultive tendencies of a patient discharged by the hospital. The hospital denied that it had a duty to warn, and the court addressed this specific dispute regarding the duty to warn. Protective measures other than warnings were not addressed in the case.[36] The court emphasized the identifiability of the victim as the foundation for the duty, but it did not require a specific threat. The court apparently considered identifiability to be necessary for an effective warning which was the only method of harm prevention at issue.

The Supreme Court of Vermont issued an opinion in *Peck v. Counseling Services of Addison County* establishing a duty to prevent foreseeable harm to identifiable victims.[37] The trial court found the

33. *Id.* at 1012 n.24.
34. Leedy v. Hartnett, 510 F. Supp. 1125 (M.D. Pa. 1981).
35. *Id.* at 1130.
36. *Id.* at 1127, 1130.
37. Peck v. Counseling Servs. of Addison County, 146 Vt. 61, 499 A.2d 422 (1985).

defendant's failure to warn the plaintiffs constituted a breach of the duty to protect them. In light of this finding at the trial court level and the factual background, the supreme court discussed the defendant's duty in terms of warnings and considerations relevant to warnings, including the ability to predict, the identifiability of the victim, and the duty of confidentiality.[38] The court held that mental health professionals have a duty to exercise reasonable care to protect third parties when they know or should know that their patients pose a serious risk of danger to an identifiable victim.[39] The court's reasoning emphasized foreseeability of harm to an identifiable victim, but it did not require a specific threat. While the holding articulated a general duty to protect, the court's reasoning directly addressed a duty to warn, and this focus of attention on warnings may explain the requirement of an identifiable victim.

In *Williams v. Sun Valley Hospital*, the court decided that "[w]here there is no allegation of a threat or danger to a readily identifiable person, we . . . are unwilling to impose a blanket liability upon all hospitals and therapists for the unpredictable conduct of their patients with a mental disorder."[40] The court predicated liability on "a threat or danger"; it did not specifically require a threat. Again, the court emphasized the predictability of the harm and the identifiability of the victim. In this case, a voluntary patient left the hospital and precipitated an accident in which the plaintiff was injured. The plaintiff sued the hospital for failing to adequately confine and supervise the patient.[41] The court concluded, however, that there was no duty to confine without a valid commitment order and that there was no allegation of failure to seek a commitment order. Finally, the court found that there was no duty to warn absent a foreseeable harm to an identifiable victim.[42] Therefore, as the court framed the issues, the only available harm-preventing method was warning, and foreseeability of harm to an identifiable victim was a necessary condition for protection through warning.

In *Sellers v. United States*, the court issued an opinion that resembled *Williams* insofar as it addressed the duties to warn and to confine separately.[43] The court held the defendants had no duty to confine the patient who harmed the plaintiff because that patient had been on voluntary status.[44] The court also concluded the defendants had no duty to warn the plaintiff because the victim was not one who was

38. *Id.* at 65-68, 499 A.2d at 425-27.
39. *Id.* at 68, 499 A.2d at 427.
40. Williams v. Sun Valley Hosp., 723 S.W.2d 783, 787 (Tex. Ct. App. 1987).
41. *Id.* at 784.
42. *Id.* at 787.
43. Sellers v. United States, 870 F.2d 1098 (6th Cir. 1989).
44. *Id.* at 1104-05. It was not clear why the court concluded that the patient's voluntary status precluded a duty to confine through involuntary commitment. The

foreseeably endangered by the patient who caused the harm.[45] The court recognized a therapist's duty to protect third parties from dangerous patients, and it applied a rule limiting this duty to those who are "readily identifiable as foreseeably endangered."[46] The court did not require specific threats, nor did it consider this issue.

Several consistent trends manifest themselves in this series of earlier STIV cases. First, the specific threat played a secondary role if any. Either this factor was not mentioned, or it was secondary to the requirements of a foreseeable danger and an identifiable victim. Second, several cases involved circumstances such that warning was the only available means of preventing harm, or the only method explicitly addressed by the courts' reasoning.[47] In these cases, identifiable victims were seen as necessary to give the therapists the ability to deliver warnings. Only *Brady* cited *Palsgraf* and only *Brady* specified that the danger created by the negligence had to embrace the specific harm caused.[48] The *Brady* court, like the other STIV courts, grounded the existence of a duty in the foreseeability of risk, but it explicitly defined the scope of the duty by reference to the *Palsgraf* majority opinion, limiting the duty to foreseeable victims and consequences.[49]

In summary, the STIV cases emphasized foreseeability of harm to third parties as the necessary condition for the duty to protect. When warning was specifically at issue because it was the only available or contested mechanism, identifiability of the victim was necessary to create the ability to effectively protect through this method. Specific threats, if mentioned at all, were discussed by the courts as a criterion of foreseeability.

B. ZOD Cases

In *Petersen v. State*, the Supreme Court of Washington decided a case in which the patient who injured the plaintiff made no specific threat, and there was no basis on which the defendant could have identified the plaintiff as a potential victim. The court held, however, that the defendant had a duty to take precautions to protect anyone who might foreseeably be endangered by the patient's mental disorder.[50] In this case, the therapist failed to petition the court for an ex-

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important point for this Article, however, is that this reasoning led the court to treat the duty to warn separately.

45. *Id.* at 1103.
46. *Id.* at 1102 (quoting Davis v. Lhim, 124 Mich. App. 291, 301, 335 N.W.2d 481, 487 (1983)).
47. *See supra* notes 26-49 and accompanying text regarding *Thompson*, *Leedy*, *Peck*, *Williams*, and *Sellers*.
48. Brady v. Hopper, 570 F. Supp. 1333, 1338 (D. Colo. 1983).
49. *See supra* note 9 regarding the significance of the *Palsgraf* reference.
50. Petersen v. State, 100 Wash. 2d 421, 671 P.2d 230 (1983).

tension of civil commitment despite evidence that the patient was prone to engage in dangerous activities such as driving while under the influence of drugs. Following release, the patient injured the plaintiff during an automobile accident.[51]

Warning was not an option because the allegedly foreseeable danger took the form of the propensity to engage in activities that endangered the public at large. Neither the plaintiff nor anyone else was an identifiable victim of this activity, but extending commitment would have provided an opportunity to prevent harm by controlling the patient's conduct.

Lipari v. Sears, Roebuck & Co., like *Petersen*, involved circumstances in which the patient who injured the plaintiffs had made no threats, and the plaintiffs were not identifiable victims until after the injury occurred.[52] There was no opportunity to warn due to the lack of a threat or identifiable victim. The alleged negligence involved failure to detain or initiate civil commitment. The court based the duty on foreseeability in that it arose when the therapists knew or should have known that the patient created an unreasonable risk of harm to the plaintiffs or to a class of persons of which the plaintiffs were members.[53] In this case, as in *Petersen*, the preventive method at issue was confinement of the patient, so a specifically identifiable victim was not a necessary condition for effectively carrying out the protective measure.

Both *Schuster* and *Hamman* identified *Jablonski v. United States* as a ZOD case rather than as a STIV case.[54] Certain characteristics of the case, however, render it at least as similar to the STIV cases as it is to the other identified ZOD cases. Although there were no specific threats, the *Jablonski* court found that the therapists knew or should have known that the patient was dangerous and that the victim was identifiable as the likely target.[55] The therapists had opportunities to warn the victim when they discussed the danger with her and suggested that she stay away from the patient.[56] The district court found, however, that these discussions did not constitute warnings that were sufficiently specific under the circumstances.[57] Thus, this case, like the STIV cases, involved a court determination that the therapists failed to adequately warn an identifiable victim of a foreseeable harm.

The ZOD cases, like the STIV cases, demonstrate certain consis-

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51. *Id.* at 422-24, 671 P.2d at 234-35.
52. Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 194-95 (D. Neb. 1980).
53. *Id.* at 194-95.
54. Jablonski v. United States, 712 F.2d 391 (9th Cir. 1983). *See respectively* Schuster v. Altenberg, 144 Wis. 2d 223, 253, 424 N.W.2d 159, 172 (1988); Hamman v. County of Maricopa, 161 Ariz. 58, 63, 775 P.2d 1122, 1127 (1989).
55. Jablonski v. United States, 712 F.2d 391, 398 (9th Cir. 1983).
56. *Id.* at 392-94.
57. *Id.* at 398.

tent patterns. First, all three of the early ZOD cases as well as *Schuster* and *Hamman* based the duty to protect on foreseeability of harm. While *Schuster* and *Hamman* rejected the STIV test as illegitimately limiting duty regarding foreseeable harm, the earlier ZOD cases did not explicitly consider it. Only *Jablonski* directly addressed the duty to warn and only it explicitly claimed that the victim was identifiable. Insofar as it emphasized the duty to warn and the identifiability of the victim, however, it was as similar to the STIV cases as it was to the other ZOD cases. With the exception of *Jablonski*, the early ZOD cases addressed failure to admit, to seek civil commitment, or to seek extension of confinement; that is, they addressed control through custody.

In *Perreira v. State*,[58] the Supreme Court of Colorado adopted the ZOD standard specifically for cases involving custodial control. The opinion explicitly separated outpatient cases from those involving involuntarily committed patients.[59] The court recognized the two lines of authority referred to here as STIV and ZOD, but it did not endorse either as a general rule.[60] Rather, it limited its holding and rationale to the issue of a psychiatrist's liability for harm to a third party by an involuntarily committed inpatient released by the psychiatrist. The court held that in these narrow circumstances, the psychiatrist had a duty to evaluate the danger presented by the patient and to exercise the statutory authority to petition the court for extended confinement in order to protect the public.[61] By framing the issues in this manner, the court recognized both the STIV and the ZOD precedents, but it did not fall clearly into either category because it limited its ruling to a narrow set of circumstances involving negligent discharge of committed patients.

C. Comparison of STIV Cases With Earlier ZOD Cases

All of the ZOD and STIV cases grounded the existence of a duty to protect in the assertion that harm was foreseeable. Several STIV cases involved situations in which warning was either the only harm-preventing method available or the only one contested.[62] These cases focused on the identifiable victim requirement as a necessary condition for the ability to effectively prevent harm through warnings. With the exception of *Jablonski*, the early ZOD cases involved situations in which failure to take, retain, or exercise some variation of custodial control constituted the alleged negligence. These custodial

58. Perreira v. State, 768 P.2d 1198 (Colo. 1989).
59. *Id.* at 1209-15.
60. *Id.* at 1210.
61. *Id.* at 1215-20.
62. *See supra* notes 26-49 and accompanying text.

measures did not depend on the ability to identify likely victims, so courts did not require identifiability.

Jablonski was the only putative ZOD case that involved failure to warn, but arguably this case is at least as consistent with the STIV cases as it is with the other ZOD cases. It grounded the duty in foreseeability of danger, but so did the STIV cases. It also emphasized the identifiability of a specific victim as did the STIV cases. It did not require a specific threat, but neither did most of the STIV cases.

Brady was the only STIV case that emphasized the specific threat clause of the STIV standard. It, however, agreed with the other STIV cases and the ZOD cases that foreseeability was the key to the duty. The *Brady* case stands apart from the ZOD cases and from the other STIV cases as the only one that explicitly identified the specific threat as a workable criterion of foreseeability for the general duty to protect third parties.

In short, all cases in both categories grounded the general duty to protect the public in the finding that the patient presented a foreseeable danger. Those cases that specifically addressed warnings as protective measures emphasized the identifiability of the victim, while cases involving custodial control did not. Neither the ZOD cases nor the majority of STIV cases emphasized specific threats. Only the *Brady* court granted great weight to specific threats, and that court apparently understood this requirement as a criterion of foreseeability rather than as an alternative to it.

IV. ANALYSIS

A. The Duty to Protect and the Duty to Warn

The *Tarasoff* court articulated a duty requiring psychotherapists to take reasonable steps to protect the public from dangerous conduct that they know or should know their patients will perform.[63] Although the court articulated a broad general duty to protect, a prudent therapist would understand the standard the court actually applied as one requiring warnings. The *Tarasoff* defendant took other reasonable steps to protect the victim, including the court's suggested one of notifying the police, yet was found liable for failure to warn.[64] In addition, the court addressed a duty to protect "the intended victim,"[65] a "foreseeable victim,"[66] or "any third person whom the doctor knows to be threatened by the patient."[67] This focus on identifiable

63. *See supra* note 2 and accompanying text.
64. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 431-32, 551 P.2d 334, 340-41, 131 Cal. Rptr. 14, 20-21 (1976).
65. *Id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.
66. *Id.* at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25.
67. *Id.* at 437, 551 P.2d at 344, 131 Cal. Rptr. at 24 (quoting Fleming & Maximor, *The*

victims makes sense only if the required protective step is a warning. That is, warnings require identifiable victims or a limited group of people who comprise the highly probable victims to whom one can direct the warning. Alternative protective steps involving either therapeutic intervention intended to prevent dangerous conduct by the patient or custodial control do not require knowledge of the potential victim's identity.[68]

The series of ZOD and STIV cases that followed *Tarasoff* reflected this relationship between warnings and identifiable victims. The STIV cases examined above addressed allegedly negligent failure to warn and emphasized the importance of identifiable victims, while the ZOD cases addressed questions of custodial control and did not emphasize the identifiability of the victims. For these reasons, prudent therapists will conclude that *Tarasoff* and the cases that followed have established a crystallized duty to warn, but not only a duty to warn.[69] The relevant case law should lead reasonable clinicians to expect that if their patients harm another and the courts decide in retrospect that the harm was foreseeable, then if there was an identifiable victim, warnings will be necessary, but not always sufficient to avoid liability. If there was no identifiable victim, but there was some potential for custodial control, then the duty will take the form of a more diffuse duty to protect. Finally, if there was an identifiable victim and the therapist had the opportunity to exert custodial control, both the broad duty to protect and the crystallized duty to warn apply. The claim here is not that courts should apply the duties in this manner or that all courts invariably will. Rather, the point is that a prudent clinician who wishes to avoid liability would be well advised to anticipate liability under both the generalized and the crystallized duties according to the circumstances described.

On this account, the *Tarasoff* court and those that followed have

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Patient or His Victim: The Therapist's Dilemma, 62 CALIF. L. REV. 1025, 1030 (1974)).

68. David Wexler has argued that therapists might fulfill the *Tarasoff* duty by employing interactional modes of therapy. D. WEXLER, MENTAL HEALTH LAW: MAJOR ISSUES 157-90 (1981). These cases did not directly address this possibility, but to the extent that interactional therapy involving both the patient and the potential victim serves to make the potential victim aware of the danger from the patient, it requires the ability to identify the potential victim and it constitutes one method of issuing a warning. If the therapist managed to engage the potential victim in interactional therapy with the patient without revealing the feared danger, then there is no reason to think that the *Tarasoff* court would find that this therapy was adequate to discharge the therapist's duty to protect the patient.

69. While the traditional professional negligence standard of ordinary care and competence under the circumstances involves a case by case retrospective evaluation of the defendant's conduct, a crystallized duty identifies some relatively specific criteria of due care that effectively establishes a rule of acceptable conduct. *Crystallized Standards of Tort Liability*, *supra* note 6, at 167-84.

established a dual-level duty to protect the public from dangerous patients. First, the courts find a general duty to protect when they conclude the injury was foreseeable. The protective steps required to satisfy this duty vary with the circumstances. Second, the duty to warn constitutes a crystallized requirement to issue warnings when the court finds the victim was identifiable and available to be warned. Warnings constitute a necessary condition for preventing liability in these cases in which the courts conclude the plaintiff was an identifiable victim, particularly in circumstances in which other preventive methods such as custodial control were not available. While the early cases that fell clearly in the ZOD category addressed the duty to protect through custodial control, several of the STIV cases actually addressed the identifiable victim issue (rather than the specific threat), often in circumstances in which warnings were addressed separately by virtue of the manner in which the courts structured their analyses or because warnings were the only method available, or the only one contested.[70]

Brady was a STIV case in which methods were not necessarily limited to warnings and in which the court emphasized the specific threat aspect of the STIV formula. *Schuster* and *Hamman* rejected this approach on the grounds that the STIV would allow the therapist to avoid liability for foreseeable harm merely because the patient did not verbalize a threat. The *Brady* court did not, however, contend that the STIV standard should be accepted as identifying those cases from among the foreseeably harmful ones to which the duty to protect would attach. Rather, the court adopted the standard as a criterion of foreseeability for the purpose of triggering the duty. That is, the *Brady* court, like the ZOD courts, accepted foreseeability as the foundation of the duty to protect, but it identified the STIV test as a measure of foreseeability. The *Brady* court does not, contrary to the assertions of *Schuster* and *Hamman*, contend that liability for foreseeable harm ought to be limited to cases with specific threats. Rather, it contends that harm is only foreseeable when there are specific threats to identifiable victims; that is, it denies that there are cases in which the harm is foreseeable absent specific threats.

At first glance, it may seem that any single case in which harm is foreseeable absent a specific threat would serve as a counter-example to this claim. The dispute is considerably more complex than that, however, because the relevant conception of foreseeability embodies both empirical hypotheses and policy considerations. It involves empirical hypotheses insofar as the claim that a particular type of harm is foreseeable under certain conditions constitutes a claim about the correlation between those conditions and dangerous behavior. For exam-

70. *See supra* notes 26-49 and accompanying text regarding *Thompson, Leedy, Williams, Peck* and *Sellers*.

ple, the *Brady* court's claim that specific threats provide an adequate criteria of dangerousness for the purposes of triggering the duty to protect implies a strong positive correlation between threats within psychotherapy and harm, just as the *Hamman* court's claim that the defendant knew of the propensity of "schizophrenic-psychotic" patients toward unexpected episodes of violence implies a strong positive correlation between this diagnostic group and harmful behavior.[71] Neither court provided any reason to believe these claims.

"Foreseeability" also embodies policy considerations, however, because even if we suppose these courts could provide some support for their respective assertions, the correlations would certainly not be perfect. Thus, the strength of association required to trigger the duty would depend on the importance attributed to false positives and false negatives, and on the likelihood of each. In short, whether a particular set of circumstances renders harm foreseeable depends upon the correlation between those circumstances and dangerous behavior and upon the reasons for preferring false positives or false negatives in these conditions. These reasons will include such considerations as the available preventive steps the therapist can take and the likely positive or negative effects of taking those steps.

Each of these issues raises new empirical questions. To ask whether harm is foreseeable under certain circumstances, therefore, is actually to ask whether harm is sufficiently probable under these conditions to justify a particular available action in light of the possible preventive effects, the potential adverse effects, and the probability of each. There may be many cases, for example, in which harm is foreseeable for the purposes of directing careful therapeutic attention to anger or of recommending voluntary hospitalization, although it is not foreseeable for the purpose of seeking involuntary civil commitment. The latter course of action requires a higher probability of harm because it entails a substantial loss of liberty, while the former involves no comparable cost. Thus, one cannot measure or reliably estimate foreseeability independent of the specific harm-prevention technique contemplated. In order to determine whether harm was foreseeable in a particular case, one must ask, for what purpose?

The *Schuster* court apparently lost sight of this action- relative conception of foreseeability when it reasoned that civil commitment and warnings are two methods of fulfilling the broader duty to protect the public, and thus, it analyzed these two issues together as questions of negligence based on foreseeability.[72] It also rejected the claim that danger is not foreseeable by contending that such a position would undermine the traditional role of clinicians in civil commitment, and in-

71. Hamman v. County of Maricopa, 161 Ariz. 58, 64, 775 P.2d 1122, 1128 (1989).
72. Schuster v. Altenberg, 144 Wis. 2d 223, 234, 257-60, 424 N.W.2d 159, 163-64, 173-75 (1988).

deed the civil commitment statute itself, because the statute requires a showing of dangerousness for commitment.[73]

The most obvious response to this argument is simply to say "so much the worse for the statute." When a legal practice flies in the face of empirical data, the reasonable response is to alter the practice, not to ignore the information.[74] There is an alternative response, however, that directly illustrates the point at hand.

The Wisconsin civil commitment statute cited by the *Schuster* court requires, as a condition of commitment for dangerousness to others, that the person to be committed has manifested this dangerousness "by evidence of recent homicidal or other violent behavior, or by . . . a recent overt act, attempt or threat to do serious physical harm."[75] The legislative counsel notes for that statute summarize *Lessard v. Schmidt*.[76] The *Lessard* opinion specifically discusses the inadequacy of predictions of future dangerousness as grounds for confinement and contends that in order to justify civil commitment, the state must bear the burden of proving dangerousness through a finding of a recent overt act, attempt or threat.[77] By so requiring, the *Lessard* court established criteria for the foreseeability of dangerousness for the purpose of civil commitment.

In summary, the *Schuster* court interpreted warnings and civil commitment as comparable techniques for protecting the public from foreseeable harm. In addition, it explicitly rejected the STIV standard as inadequate and supported this decision partially on the basis of the dangerousness requirement in the civil commitment statute. The civil commitment statute in question, however, includes an "overt act, attempt or threat" provision which, like the STIV standard, defines dangerousness in terms of specific behavioral criteria. It seems, therefore, that the Wisconsin civil commitment statute cited by the *Schuster* court as evidence for rejecting the STIV standard actually embodies a requirement very similar to the STIV test as a measure of foreseeability for the purpose of confinement.

The *Lessard* court defined this standard of foreseeability for the purpose of civil commitment in light of the severe infringement of liberty caused by false positives. Some might plausibly argue that the duty to warn does not produce the same type and severity of incursion into individual liberty and thus, the duties to warn and to initiate con-

73. *Id.* at 246-48, 424 N.W.2d at 169-70.

74. Schopp & Quattrocchi, *Tarasoff, the Doctrine of Special Relationships, and the Psychotherapist's Duty to Warn*, 12 J. PSYCHIATRY & L. 13, 27-28 (1984).

75. Schuster v. Altenberg, 144 Wis. 2d 223, 246 n.6, 424 N.W.2d 159, 169 n.6 (1988); WISC. STAT. ANN. § 51.20(1)(a)(2)(b)(West 1987). The emergency detention provision contains the same requirement. WISC. STAT. ANN. § 51.15(1)(a)(2)(West 1987).

76. Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972).

77. *Id.* at 1093.

finement are not actually quite so similar as the *Schuster* court suggests. The point here, however, is that foreseeability of dangerousness for any particular purpose requires analysis of the potential effects of the action taken in response to both accurate and inaccurate predictions of harm. When the probability of inaccurate assessment is relatively high and errors are costly, behavioral criteria of foreseeability, such as the STIV standard adopted by the *Brady* court or the "overt act" requirement of the Wisconsin civil commitment statute, constitute plausible alternatives. In order to determine whether any proposed behavioral criterion provides the optimal standard, one must evaluate both the significance of false positives and negatives and the likelihood of each with this criterion and with the available alternatives. Thus, one cannot legitimately reject the STIV standard in favor of foreseeability; rather, one must evaluate it as a proposed criterion of foreseeability for the purpose of deciding whether the therapist should have determined that the patient was dangerous enough to justify warning or other harm-preventive steps.

B. Determined or Should Have Determined

Hamman, like *Tarasoff*, held that the duty to protect attaches when the therapist determines or should determine the patient poses a serious threat to others.[78] *Schuster* held the therapist is liable for foreseeable danger.[79] To say that the danger was foreseeable to a therapist who practiced to the standards of competence and care in the profession is to say that a competent and careful therapist would have identified the danger under these conditions and thus, that any therapist should have determined the patient was dangerous. In short, to hold that a therapist who did not foresee harm is liable for the harm done by the patient because the danger was foreseeable is just to hold that the therapist should have determined the patient was dangerous. Thus, the *Tarasoff*, *Schuster*, and *Hamman* courts endorsed a duty that arises when the therapist should determine that the patient presents a danger to others. The lack of any actual measure for this ability to predict to the standards of the profession has been one factor cited by advocates of relatively concrete criteria for the duty.[80] While the STIV test does not demonstrate any actual correlation between threats and dangerousness, it does establish a standard by which both courts and therapists can determine that the duty to protect attaches.

Therapists also have a duty to protect third parties when they actu-

78. Hamman v. County of Maricopa, 161 Ariz. 58, 64, 775 P.2d 1122, 1128 (1989); *See supra* note 2 and accompanying text for the *Tarasoff* duty.
79. Schuster v. Altenberg, 144 Wis. 2d 223, 238, 424 N.W.2d 159, 165 (1988).
80. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 450-51, 551 P.2d 334, 353-54, 131 Cal. Rptr. 14, 33-34 (1976)(Mosk, J., concurring and dissenting); Brady v. Hopper, 570 F. Supp. 1333, 1338 (D. Colo. 1983).

ally determine their patients are dangerous. The *Tarasoff* court used this prong of the duty to avoid dealing with the issue of professional standards after it recognized that a body of research denied the existence of the capacity to predict that the duty was predicated upon. The court did not refute or even challenge this data, but the majority reasoned the capacity to predict was not an issue in that case because the therapist had predicted the danger.[81]

This duty does not arise, however, when the therapist thinks, suspects, guesses, or dreams the patient is dangerous. Rather, it arises when the therapist *determines* the patient poses a serious threat to the public. To determine is not merely to form the opinion, expectation, or suspicion. To determine is "[t]o conclude from reasoning, investigation, etc. . . . to ascertain definitely by observation, examination, calculation, etc."[82] To ascertain is "[t]o find out or learn for a certainty by experiment, examination, or investigation."[83] An investigation is "the making of a search or inquiry; systematic examination; careful and minute research."[84] Reasoning is "the process by which one judgement is deduced from another or others which are given;" it is the exercise of the capacity to reason or "to think in a connected, sensible, or logical manner."[85]

Two central concepts underlie these terms. First, one who makes a determination concludes or ascertains that some state of affairs obtains. That is, a determination involves certainty or finality in the sense that the person who makes the determination regards this issue as one that is settled or definite. Second, that settled conclusion is drawn on the basis of some reliable, systematic belief-forming process such as reasoning, investigation, observation, examination, or calculation. In order to determine that a proposition is true or that a state of affairs obtains, therefore, one must derive a settled conclusion to that effect on the basis of some rigorous, reliable belief-forming process.

In order to determine that one's patient is dangerous, one must do more than just entertain the idea, one must do so on the basis of some principled foundation that renders one's opinion settled and well-grounded. Thus, the fact that in any particular case the therapist thought of her patient as dangerous does not demonstrate that she determined the patient was dangerous. Contrary to the *Tarasoff* court's claim, the fact that the therapist in that case thought the patient was dangerous did not establish that the therapist determined the patient was dangerous because there was no evidence that the therapist had

81. Tarasoff v. Regents of Univ. of Cal., 117 Cal. 3d 425, 436-38, 551 P.2d 334, 344-45, 131 Cal. Rptr. 14, 24-25 (1986).

82. I OXFORD ENGLISH DICTIONARY 705 (compact ed. 1977).

83. *Id.* at 121 (the only current meaning).

84. *Id.* at 1478.

85. II OXFORD ENGLISH DICTIONARY 2432 (compact ed. 1977).

any reliable foundation on which to ground this expectation at the time he formed it.

Ironically, the *Tarasoff* court's reasoning by which it concluded the therapist in that case had a duty to protect the victim provides a demonstration of exactly the kind of hindsight reasoning the court explicitly rejected. The court discounted arguments based on the evidence supporting the claim that therapists are unable to predict dangerousness by asserting therapists would be held to the standards of prediction in the profession and that "proof, aided by hindsight . . . is insufficient to establish negligence."[86] The court also reasoned, however, that standards of prediction were not a problem in this case because the therapist "did in fact predict that Poddar would kill."[87] The court went on to discuss the duty therapists incur when they "in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others."[88]

In these passages, the court derived the proposition that the therapist determined the patient was dangerous from the proposition that the therapist predicted the patient was dangerous. As indicated above, however, to determine that some state of affairs obtains is to acquire knowledge of that fact on the basis of some reliable belief-forming process.[89] The court had evidence to show the therapist had predicted the patient was dangerous in the weak sense of "predict" in which that term means only that one forms an expectation. In this weak sense of the term, virtually anyone can predict virtually anything, and the fact that an event has been predicted provides no good reason to expect it to occur. Predictions in this sense do not entail determinations. How did the court conclude the therapist had predicted dangerousness in the stronger sense of the term that entails a reliable belief-forming process and would enable him to accurately say he had determined his patient was dangerous?[90] The court cited absolutely no evidence to support the claim that the therapist's prediction was the product of rigorous processes that would qualify it as a determination. Rather, the court concluded that the therapist determined the patient was dangerous on the basis of the facts that the therapist predicted the violence and that the violence actually occurred. In short, the court relied on exactly the type of proof by hindsight that it explicitly rejected.

86. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 438, 551 P.2d 334, 345, 131 Cal. Rptr. 14, 25 (1976).
87. *Id.* at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.
88. *Id.*
89. *See supra* notes 82-85 and accompanying text.
90. Schopp & Quattrocchi, *supra* note 74, at 29-31. The authors explicate the equivocation among three different senses of the word "predict" that has complicated the literature regarding the duty to warn.

This Article assumes for the sake of argument that therapists have some duty to protect others from harm by their patients. Hence, the purpose of this analysis of the *Tarasoff* court's reasoning is not to argue the court failed to ground that duty, but to demonstrate that the "determined" disjunct of the disjunctive duty to protect retains the same problem as the "should have determined" disjunct. That is, both ground liability in foreseeability, but neither provides any guidance regarding the appropriate criteria of foreseeability for the purpose of establishing either level of the dual-level duty to protect.

The *Brady* court adopted the STIV standard in an attempt to identify some workable criterion of foreseeability.[91] Several other STIV cases emphasized the requirement of an identifiable victim in circumstances that raised the issue of warnings, but the *Brady* court applied the STIV to the broader duty to protect.[92] These courts may or may not have selected appropriate criteria of foreseeability for their purposes. This matter cannot be effectively settled by asserting that these tests preclude liability for foreseeable harm, however, because these standards constitute proposed criteria of foreseeability for these purposes. In order to justify accepting or rejecting them, one must evaluate the available empirical evidence regarding the correlation between threats to identifiable victims and actual violence as well as the available evidence regarding the relative efficacy of various protective techniques. Finally, one must consider the probability and likely effect of false positives and false negatives. Only this type of analysis can justify accepting or rejecting the STIV as an appropriate criterion of foreseeability for the purpose of issuing warnings or taking other protective steps.

On this interpretation, the *Schuster* and *Hamman* courts have misconstrued the issue when they framed it as a dispute between those who favor the ZOD test which holds therapists liable for foreseeable harm and those who endorse the STIV standard which limits liability to a certain subset of foreseeable harms— those that are preceded by a specific threat to an identifiable victim. On the account presented here, all parties agree that therapists are liable for foreseeable harm, but they disagree about the appropriate measure of foreseeability under at least some conditions. Advocates of the STIV standard want a relatively clearly articulated test of foreseeability, while those who endorse the ZOD standard prefer a traditional analysis of foreseeability on a case-by-case basis. Although *Schuster* and *Hamman* explained their rejection of *Brady* and the STIV test as a matter of legal theory and policy analysis, the critical issue for selecting either the STIV or the ZOD standard does not lie in these areas because all three courts agreed that negligence liability arises primarily from foresee-

91. Brady v. Hopper, 570 F. Supp. 1333, 1338 (D. Colo. 1983).
92. *See supra* notes 26-49 and accompanying text.

able harm. The pivotal issue for selecting the ZOD, the STIV, or some third alternative involves evaluation of the implicit empirical premises.

Advocates of the STIV standard emphasize the lack of professional standards for foreseeability and argue that without the STIV, therapist liability is open-ended and unpredictable.[93] In addition, the empirical data demonstrating pervasive hindsight bias in liability judgments suggests that many courts, like the *Tarasoff* court, will allocate liability on the basis of the harmful results that followed a decision, rather than on the basis of information that was available to the clinician at the time the decision was made.[94] Those who endorse the ZOD approach might respond that the uncertainty of case-by-case evaluations and the danger of hindsight bias apply to all negligence determinations, and thus, there is no reason to provide special relief for therapists.[95]

Advocates of the STIV standard have at least three plausible rejoinders to this claim. First, they can contend that this argument actually supports a call for the broad adoption of specified criteria for negligence. The claim that bias and unpredictability of liability are widespread in the system does not justify this state of affairs, rather it calls for broad reform. Second, they can claim that the problem is particularly acute in cases addressing therapists' liability for harm to third parties due to the acknowledged lack of standards for predictability. Third, they might argue that these dangers are particularly problematic in cases of therapist liability for harm done by their patients because under certain circumstances, regulation of therapy through negligence liability becomes fundamentally self-defeating. The next section of this Article will examine this third response and its ramifications for the tort regulation of psychotherapy in more detail.

C. The ZOD Standard as Self-Defeating

Psychotherapy is a fiduciary relationship in which therapists have a legal duty to set aside their own interests and direct their conduct within the therapeutic relationship solely for the benefit of the patient.[96] Tort regulation of fiduciary relationships such as the therapeutic one creates a pervasive tension. The fiduciaries are expected to ignore their self-interest within the fiduciary relationship, but tort law attempts to motivate people by appealing to their self-interest. That is, negligence law attaches liability to unreasonably risky behavior in

93. *E.g.*, Brady v. Hopper, 570 F. Supp. 1333, 1338 (D. Colo. 1983).
94. *Juror Hindsight Bias*, *supra* note 6, at 487-89. *See supra* notes 86-90 and accompanying text regarding the use of hindsight in the *Tarasoff* decision.
95. *Id.* at 495.
96. *Crystallized Standards of Tort Liability*, *supra* note 6, at 180.

order to motivate people by appealing to their self-interest in avoiding liability in such a manner as to prevent those people from engaging in conduct that is risky to others. When the system works well, liability for negligent behavior causes most actors' self-interest to converge with the interests of others because they can protect their own liability-driven interests by avoiding conduct that is risky to others. For most purposes, the fact that people's concern for the interests of others is motivated by self-interest raises no problem.

The situation becomes more complex with fiduciary relationships, however, because regulation of these relationships through negligence law creates the following conceptual tension. Fiduciaries, including psychotherapists, are required to conduct the fiduciary relationship in a manner calculated to promote the beneficiary's interest. In order to fulfill this fiduciary responsibility, clinicians must act solely for the best interests of their patients, ignoring their own self-interest. Negligence law attempts to enforce the fiduciary duty by applying liability rules that render therapists liable if they attend to their own interests rather than to those of their patients. Thus, negligence law attempts to motivate clinicians through appeal to their self-interest in a manner that will prevent them from responding to appeals to their self-interest. In effect, courts issue directives in the form of liability rules that instruct clinicians to ignore all considerations of the class that includes these directives. In order to follow these directives, clinicians must ignore them.[97]

This conceptual tension creates the following practical dilemma. (1) Negligence law appeals to clinicians' tort-driven interests in order to protect and reinforce the fiduciary relationship by directing clinicians' attention toward their patients' interests and insuring that therapists' conduct their therapeutic relationships in a manner calculated to promote those interests. (2) In any particular case, the clinician either responds to this influence or she does not. (3) If she does not respond to the legal threat of liability, then that threat does not protect or reinforce the fiduciary relationship. (4) If she does respond to the prospect of liability, then negligence law has successfully directed her attention to her own self-interest, actively undermining the attitude that the law is intended to promote. Therefore, the legal threat of negligence liability either fails to protect and reinforce the fiduciary relationship or it actively subverts it. In either case, attempts to legally reinforce the fiduciary therapeutic relationship through the threat of tort liability carry inherently self-defeating force.[98]

This dilemma raises a complex set of issues regarding the tort reg-

97. *Id.* at 181.
98. *Id.*

ulation of psychotherapy that have been discussed elsewhere.[99] For the immediate purposes of this Article only the following points are important. Under ordinary circumstances, this tension takes a benign form because no apparent grounds for concern about tort liability arise, and the therapists can pursue the therapeutic process for the benefit of their patients without attending to issues of liability. In these cases, sentence (3) applies in that tort law does not actively promote the fiduciary relationship, but that creates no problem because it is not needed.

The dilemma becomes problematic, however, when some aspect of the therapeutic process alerts therapists to the potential for tort liability, diverting their attention away from their fiduciary responsibilities and toward their own tort-driven interests. In these cases, sentence (4) applies in that potential tort liability actively undermines the fiduciary attitude. Certain combinations of legal rules and factual circumstances can create direct conflicts between therapists' tort-driven interests and the interests of the patient or society. Specific rules of negligence, including the crystallized duty to warn, can give rise to such conflicts. If one of these crystallized duties attaches and the action required by the law conflicts with the patients' best interests, then negligence law motivates therapists to abandon their fiduciary duty to the patients in order to protect themselves from liability. Under these circumstances, negligence law undermines the fiduciary relationship it is designed to protect.[100]

Consider for example the duty to warn. If the argument presented above is approximately correct, the prudent psychotherapist will interpret the *Tarasoff* duty to protect as including a crystallized duty to warn when a probable victim is identifiable.[101] It is a crystallized duty to warn insofar as therapists who do not warn can expect to be held liable for harm done by their patients even if they took alternative steps to prevent harm. Thus, tort law will motivate prudent therapists to issue warnings for the purpose of avoiding liability even if they think that these warnings will undermine the patient's interests without preventing harm. In cases such as these, negligence law that is intended to reinforce and protect the fiduciary relationship can actively undermine that relationship by establishing a crystallized duty that can cause therapists' tort-driven interests to diverge from those of the patient and of society.

A defender of the *Tarasoff* duty could respond by arguing that the duty to warn represents a general rule intended to define the boundary at which society wants the therapist to abandon the fiduciary duty

99. *See id.* for a more thorough explication of this tension and its general significance for the regulation of psychotherapy through negligence law.
100. *Id.* at 181-82.
101. *See supra* notes 63-70 and accompanying text.

in favor of protecting innocent third parties. This defender might accept the contention that certain cases will arise in which prudent therapists will protect themselves from liability through warnings that serve neither the patient nor society, but on balance, the defender will contend, this rule protects the public.

This claim about the effects of the rule in the long run may or may not be correct. It is at bottom an empirical claim about the effects of warnings on both the therapeutic project and the probability of harm. Absent adequate data, the arguments on both sides remain speculative. Notice, however, that even if one accepts that the duty to protect includes a crystallized duty to warn, this duty is crystallized in only one sense. When harm is foreseeable, the therapist must warn, but that in itself provides no reliable criterion for determining when the duty attaches.

A fully crystallized standard of negligence contains two crystallized components. The crystallized duty identifies some specific action the individual must take in order to discharge the duty of reasonable care and avoid tort liability. A crystallized trigger identifies some specific event or set of circumstances that gives rise to the duty. Thus, a fully crystallized standard of care requires that certain actors respond to some previously identified precipitating events (the crystallized trigger) by engaging in specified conduct (the crystallized duty). When courts adopt the STIV standard for the duty to warn, they establish a fully crystallized standard of care, and when they adopt the STIV for the general duty to protect, they establish a crystallized trigger for a broad general duty. Analogously, when courts adopt the ZOD standard for the duty to protect, they crystallize neither the duty nor the trigger, and when they apply the ZOD standard to the duty to warn, they establish a crystallized duty without a crystallized trigger.

By applying the ZOD standard with case-by-case retrospective analysis of foreseeability to the dual level *Tarasoff* duty, courts have established a crystallized duty to warn without a crystallized trigger. Arguably, this approach draws the worst from both worlds, undermining the fiduciary relationship in two different ways. First, the crystallized duty to warn creates the potential for situations where therapists' tort-driven interests diverge from the interests of the patient and of society. This conflict arises when therapists encounter circumstances in which they have good reason to believe that warnings will exacerbate the danger of harm or prevent them from applying other approaches that seem likely to benefit the patients and decrease the probability of harm. In such cases, warnings will not protect the public interest, but they are likely to promote the therapists' tort-driven interests.

A fully crystallized standard that requires well-defined action in response to some specified trigger will motivate therapists to protect

their interests by taking that action when that event occurs. Most therapists can concentrate on their fiduciary responsibilities most of the time, however, because they can wait for the specified trigger to alert them of these threats to their self-interest. When a crystallized duty lacks any specified triggering event that signals the attachment of the duty, it also undermines the fiduciary relationship in a second way, because it encourages prudent therapists to practice their professions with a wary eye toward potential liability rather than with full attention on their patients' interests.

Both STIV and ZOD courts have accepted the broader underlying duty to protect third parties. Thus, these cases share a common policy analysis insofar as they accept the duty to protect the public as a limit on therapists' duty to promote the interests of their patients. Therapists' tort-driven interests, however, can conflict with this duty just as they can with the fiduciary duty to the patient. To the extent that successful therapy might diffuse the patient's anger or direct the potentially dangerous patient toward less injurious conduct, a state of affairs that undermines effective therapy also frustrates the policy foundation for the duty to protect. A consistent body of research indicates that successful therapy depends heavily on a therapeutic relationship in which the patient perceives the therapist as concerned about and dedicated to the patient's well-being.[102] If the crystallized duty to warn dilutes therapists' attention to their patients' well-being by directing the therapists' attention and concern to their own tort-driven interests, then it might undermine successful therapy to the detriment of both the patients and the public that needs protection from dangerous patients.

Prudent therapists can reasonably be expected to maintain an ongoing vigilance for any event that might later be interpreted as evidence of danger in response to which the therapists should have foreseen danger and issued a warning. If therapists respond to the duty in this way, the duty to warn would dilute the fiduciary nature of the therapeutic relationship in a much broader variety of circumstances than a defender of the duty might expect or intend. The central point here is that to the extent therapists are conscious of the threat of tort liability, especially when it takes a form that they do not think they can address through the careful and competent practice of therapy, they can reasonably be expected to turn their attention from the interests of their patients and of society toward their own tort-driven interests. To the extent that this occurs, regulation of psychotherapy through negligence law undermines its own purpose by diluting the relationship that apparently constitutes an important factor in secur-

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102. *Crystallized Standards of Tort Liability*, *supra* note 6, at 183.

ing therapeutic results for the benefit of the patient and of the public that needs protection from that patient.

The STIV standard can be understood as an attempt to limit this self-defeating effect of tort-liability by providing a crystallized trigger that clearly identifies cases in which the crystallized duty to warn applies. Recall that several of the STIV cases have directly addressed the duty to warn rather than the more general duty to protect. If therapists are concerned about protecting themselves from liability for failing to warn, and if this concern dilutes their dedication to the fiduciary relationship by encouraging them to direct a significant proportion of their attention and energy toward avoiding this liability, then courts may be able to limit this undesirable effect by adopting some relatively clear criteria for determining when the duty attaches. Therapists could then put this concern aside until the triggering conditions occurred and issue warnings when the duty attached. In this way, therapists could attend to their fiduciary responsibilities most of the time, but sacrifice these concerns when the duty to warn demanded it. Court decisions applying the STIV test to the duty to warn represent one plausible attempt to establish a fully crystallized standard of care.

The STIV standard contains two components. The identifiable victim element constitutes a necessary condition for issuing warnings to the victim. Thus, if the court addresses a case in which warnings to the victim seem to be the only available nontherapeutic harm-preventing method, it constitutes a necessary condition for any extra-therapeutic attempt to prevent harm. In many of these cases, the identifiable victim requirement may provide a component in the criteria for application of the duty. If the patient clearly names or describes the object of his anger or intentions, then the therapist knows that this aspect of the STIV standard is fulfilled.

The identifiable victim component does not provide an adequate criteria of application, however, for two reasons. First, if the description of the victim is not clear, the therapist has no means of deciding whether the court will decide in retrospect that the victim was identifiable. If therapists resolve this issue by concentrating therapeutic attention on identifying potential victims whenever they think there might be any danger to anyone, they will again have redirected their attention from the patients interests to their own tort-driven interests. Perhaps the more serious deficiency in the identifiable victim criteria, however, is that it tells the therapist who to warn, but not whether to warn. Suppose, for example, that Jones verbalizes great anger at her boss and reports fantasies about shooting him. By doing so, she might provide an identifiable victim, but this indicates who the victim might be if Jones engages in violence without telling the therapist whether the probability of violence is sufficient to justify a warning. The spe-

cific threat component of the STIV test provides a relatively clear answer to the latter question.[103]

On this interpretation, the STIV standard does not compete with foreseeability as grounds for attaching the duty to protect. Rather, the general duty to take reasonable action to protect third parties from harm caused by one's patients arises on the basis of foreseeability, and the therapist can fulfill that duty by taking any of several appropriate steps including increased frequency of therapeutic contact, therapeutic efforts to diffuse anger or promote more adaptive responses to that anger, change in therapeutic modality, etc. As long as these steps are therapeutic ones, no conflict arises among the duty to protect third parties, the fiduciary duty to the patient, and the therapist's tort-driven interests. The therapist can reasonably be expected, therefore, to take such steps in response to even minimal indications of danger. If the therapist fails to do so and harm results, then the ZOD standard provides the usual and reasonable measure of liability.

The duty to warn, however, constitutes a crystallized duty within the general duty to protect, and it can create a tension between therapists' tort-driven self-interest and either their fiduciary duty to their patients, their duty to protect the public, or both. The STIV standard represents one possible means of limiting the degree to which this tension undermines the fiduciary therapeutic project by establishing a relatively clear criterion of application for this particular duty. A crystallized trigger would allow therapists to pursue their therapeutic responsibilities in an undiluted manner in most cases. When the criterion occurred, therapists could then alter their priorities, attending first to protecting the public and secondly to promoting the patients' interests. Ideally, this would maximize both patient services and public protection because the therapist would devote primary attention to each task when it was most pressing. With this type of fully crystallized standard, the therapeutic project of the mental health system and the public safety mission of the legal system would converge to the degree that the crystallized duty and the trigger for its application accurately represented the conduct most likely to signal dangerous situations and prevent harm.

In order to determine whether the STIV standard constitutes the best available crystallized trigger for pursuing this goal, the legal system needs empirical evidence addressing a series of questions such as the following. Do threats correlate more highly with violence than alternative indicators such as diagnosis, verbalizations of violent fantasies, deterioration in reality testing, etc.? Do warnings decrease or increase the probability of harm more or less than alternative

103. The STIV criteria is only relatively clear because in some cases it may be difficult to determine what constitutes a threat.

techniques? Do warnings affect the opportunity to apply these alternative approaches? How do therapists adjust their practice in response to legal rules such as the STIV or ZOD standards?

Absent fully adequate data regarding these issues, courts will have to decide cases and establish legal rules on the basis of less satisfactory information including professional testimony, available data regarding related issues, the facts in previous cases, or common sense and experience. At the very least, courts that recognize these decisions rest upon pivotal empirical assertions may be more likely to seek and evaluate relevant evidence rather than attempting to justify their decisions by appeal to distinctions of legal theory that do not adequately address the relevant issue. In addition, professional groups and organizations with the expertise needed to acquire relevant data may be more likely to do so if they realize that these cases actually turn on empirical premises. Such data might prove helpful not only to the determination of the proper legal standard for tort liability, but also to the therapeutic efforts of the therapists who encounter the problematic clinical circumstances and for addressing difficult issues involving civil commitment.

Any civil commitment statute that includes dangerousness as a criteria for involuntary confinement requires that clinicians or courts estimate the probability that a particular individual will engage in harmful behavior. Any data regarding either the incidence of dangerous conduct following particular indicators or the relative efficacy of various responses to those indicators may enhance our ability to employ civil commitment when, but only when, it is the least restrictive means of protecting innocent parties from harm.

V. SUMMARY AND CONCLUSIONS

The *Tarasoff* case explicitly recognized a duty on the part of psychotherapists to protect the public from harm caused by their patients. That decision precipitated extended and heated controversy about the justification, advisability, and contours of this duty to protect. Two lines of cases have developed regarding the scope of this duty. The STIV cases have held that the duty attaches only when there is a foreseeable danger to an identifiable victim, and the *Thompson* and *Brady* courts have also required specific threats. The ZOD cases have held that the duty applies whenever the patient creates a foreseeable danger and extends to all those within the zone of danger as determined by a retrospective case-by-case evaluation.

The supreme courts of Wisconsin and Arizona have recently handed down opinions in which they framed the issue as one of selecting either the ZOD standard or the alternative STIV as the appropriate test for the duty to protect third parties. Both courts rejected the STIV in favor of the ZOD, construing the STIV as an illegitimate pre-

clusion of liability for foreseeable harm merely because the patient failed to verbalize a specific threat to an identifiable victim. The Wisconsin Supreme Court explicitly justified its reasoning as required by the underlying theory of Wisconsin tort law which holds an actor liable for all foreseeable harm, and the Arizona Supreme Court appears to have appealed implicitly to the same premise.

This Article contends that these courts have misconstrued the question when they framed the issue as a choice between the ZOD and the STIV as two competing standards for the same duty. As a result of misconstruing the question in this manner, the courts have produced an answer appealing to misguided arguments from the underlying legal theory and have failed to recognize and address the empirical premises that provide the conceptual links between that legal theory and the appropriate roles of the ZOD and STIV standards.

The duty of psychotherapists to protect the public from dangerous patients has actually developed into two separate types of duties. First, the broad general duty to take reasonable steps to prevent harm has developed out of the holding that the *Tarasoff* court articulated. Second, the *Tarasoff* court and others have applied a crystallized duty to warn identifiable potential victims. This Article argues that the ZOD and STIV tests can be most clearly understood as two distinct standards for these two separate duties. In some cases, therefore, both the ZOD and the STIV might appropriately apply because both duties might attach.

Contrary to the reasoning by the Wisconsin and Arizona Supreme Courts, these two standards share a common foundation in legal theory and policy analysis. Both ground liability in foreseeability, and both direct the therapist to give priority to protecting potential victims rather than to the fiduciary duty to the patient when these two goals conflict. The STIV standard represents a special application of the principles underlying the ZOD, but most courts have applied it only to the crystallized duty to warn. The putative justification for both this duty to warn and the STIV standard rests on a series of unsubstantiated empirical premises. These premises include, for example, the contentions that specific threats within psychotherapy are highly correlated with dangerous behavior, that warnings decrease rather than increase the probability of harm, that warnings do not preclude the opportunity to take potentially more effective protective steps, and others.

The rational evaluation of the justifications for these duties and of their applicable standards requires investigation into the evidence available or acquirable to confirm or deny these premises. The appropriate evidence may range from formal research to testimony by professional witnesses, experience from prior cases, or ordinary commonsense observation. Honesty requires that anyone making these deci-

sions evaluate all available evidence regarding these premises and that the decision-makers recognize the nature of their choices as inferences from incomplete evidence as opposed to conclusions of law drawn from some independently adopted legal theory or normative policy analysis. Inferences from incomplete information remain open to refutation or refinement through additional evidence.

A relatively large and consistent body of evidence supports the contentions that psychotherapy has a positive effect and that the integrity of the therapeutic relationship makes an important contribution to this effect.[104] This evidence supports at least a weak presumption against legal rules that interfere with the therapeutic relationship. Courts should not adopt such rules, therefore, absent some evidence supporting the contention that these rules protect more important social goals. Court opinions in the *Tarasoff* line of cases have usually accepted the premise that they ought not interfere unnecessarily with the opportunity to secure effective mental health services. They have also accepted, however, the contentions that the need to protect the public overrides this value of therapeutic services and that the duty to warn advances this more pressing purpose. They have appealed to no evidence supporting this last premise, however, apparently failing to realize that it is an empirical assertion rather than a statement of policy priorities. These courts have provided no evidence, therefore, to override the presumption against undermining the provision of services. Absent any evidence, courts should be hesitant to establish a crystallized duty, particularly one that lacks a specified trigger, for the reasons given in the body of this Article.[105]

Courts, by virtue of their social roles, must come to some decision in some timely manner. One cannot legitimately criticize them, therefore, for deciding on the basis of inadequate evidence when that is the

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104. *See supra* note 102 and accompanying text.

105. In my opinion, the crystallized duty to warn somewhat increases the danger to the public for two reasons. First, successful therapy can have a preventive effect in that the therapist can direct angry or frightened patients away from injurious conduct in some cases if they can maintain therapeutic contact. Some of these patients, however, refuse to continue therapy when warnings are issued or refuse to divulge matters that might precipitate such warnings. These effects are compounded by the dilution of therapists' focus on the therapeutic process in response to concern for their own tort-driven interests as discussed earlier. Second, I have seen no reason to think that warnings to victims decrease the probability of injury, while I have seen some evidence to suggest that such warnings increase the probability of violent confrontation. When informed of threats and provided with no reliable source of protection, some people conclude that preemptive attacks are reasonable responses.

This opinion reflects only my own clinical experience and that of others with whom I have conferred. That experience may or may not be representative of the broader field. That, of course, is precisely the point insofar as it reflects the nature of the dispute as one that rests on unsubstantiated and often unstated empirical premises.

only available information. If the members of professional groups affected by these decisions consider the opinions to be misguided or inadequately supported, it would be appropriate for them to pursue research designed to secure additional evidence regarding the relevant empirical premises. While controlled experimental inquiry into these issues may be difficult, it seems plausible that one could gather survey information regarding the incidence of threats in psychotherapy, the results of warnings or alternative protective steps, the correlation between dangerous conduct and threats as opposed to proposed alternative indicators of dangerousness, etc. If successful, such research might provide important information not only for legal determination of tort liability, but also for improved therapeutic intervention in dangerous situations and more appropriate decisions regarding civil commitment. Thus, it would promote both legal and therapeutic aims.

Fully articulated judicial opinions often require integration of interdependent legal theory, policy analysis, and empirical premises. Legal theory and policy analysis generate decisions about specific cases when empirical premises provide the conceptual link between the law and the facts. Similarly, the significance that a decision-maker attaches to empirical data appropriately depends on that decision-maker's understanding of the larger argument of theory and policy in which it is advanced as evidence. If researchers do not provide rigorous data for the courts to consider, the courts must decide on admittedly unsatisfactory grounds. If researchers collect relevant data, but courts fail to acknowledge its significance, then one can legitimately criticize the judicial decision. The analysis advanced in this Article suggests that courts ought to recognize that the current dispute is one that turns heavily on empirical premises and, hence, that they cannot settle it by appeal to legal theory or normative policy analysis alone.[106] Rather, they should recognize the unsubstantiated empirical premises that ground their analysis and consider any available evidence that supports or undermines these claims.

106. The *Schuster* and *Brady* courts probably hold different theories of negligence derived from the *Palsgraf* dissent and majority respectively. These differences, however, address the scope of the duty rather than the role of foreseeability in raising a duty. A fully adequate analysis requires careful evaluation of both legal theory and empirical premises.