The Dangerous Patient Exception And The Duty To Warn: Creation Of A Dangerous Precedent?

INTRODUCTION

A psychiatric patient reveals that he intends to harm a certain person. Should the psychiatrist be required to warn the intended victim? The California Supreme Court decided in *Tarasoff v. Regents of University of California*[1] that the psychiatrist is so required. But the court, in its analysis, presented an even more perplexing question: in a case of failure to warn, should a rule of evidence be relied on to support the finding of liability?

Tatiana Tarasoff kissed Prosenjit Poddar on New Year's Eve. A foreign student at the Berkeley campus of the University of California, Poddar had met her at folk dancing classes. He took the kiss to mean more than she intended. When she explained that she was not interested in a serious relationship with him, Poddar became deeply disturbed. He went to the psychiatrists at the out-patient clinic on campus while Tarasoff was away for the summer, and revealed that he intended to kill her when she returned. The psychiatrists alerted the campus police who took Poddar into temporary custody, but released him when he promised to stay away from Tarasoff. The psychiatrists and the police took no further action to detain Poddar, who discontinued psychotherapy. When Tarasoff returned, Poddar went to her home and killed her.[2]

Tarasoff's parents sued the campus psychiatrists for failing to warn them that Poddar intended to kill their daughter. The California District Court of Appeal affirmed a lower court dismissal of the action, concluding that the psychiatrists owed no duty of care to the plaintiffs.[3] The Supreme Court of California, overturning that decision, held that the psychiatrists had a duty to warn the intended victim

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[1] Tarasoff v. Regents of Univ. of Calif., 529 P.2d 553, 118 Cal. Rptr. 129 (1974), rehearing granted March 12, 1975.

[2] People v. Poddar, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. 910 (1974).

[3] Tarasoff v. Regents of Univ. of Calif., 108 Cal. Rptr. 878, 886 (1st Dist. 1973), hearing granted.

or those who might have been able to notify her.[4] The court held that the psychotherapist-patient relationship should be included among those special relationships on which courts have imposed an affirmative duty of conduct.[5] To overcome the argument that a duty to warn would infringe upon the confidentiality of the psychotherapist-patient relationship, the court relied on Evidence Code section 1024[6] as an indication that the legislature has deemed the interests of the potential victim more important than the interests of the patient.[7] Section 1024, often referred to as the dangerous patient exception, defeats the psychotherapist-patient privilege when the psychotherapist has reasonable cause to believe that the patient may be a danger to himself or to others.[8]

Shortly after the California Supreme Court decided for the plaintiffs, it granted a rehearing[9] which nullified the decision. The reasoning in the opinion, however, has far-reaching implications which the court may not have intended. There is a danger that the reasoning will have a residual influence on other courts. Unless the California Supreme Court in its new opinion expressly repudiates its use of the dangerous patient exception to support liability of the psychiatrists, other courts may rely on a similar analysis to find a professional civilly liable for negligent failure to warn.

This article will deal with the questions raised by the decision in three parts. Part one will analyze how the court found a duty to warn. Part two will explore the effects on other privileges which may result from the court's use of section 1024 to support its conclusion. The final part will discuss the competing policy considerations which the court should have balanced in determining whether the psychiatrists should be held liable.

The thesis of this article is that had the court weighed all the competing policy considerations instead of simply relying on section 1024, it would not have found a duty to warn intended victims. A psychotherapist's duty should be owed only to the appropriate authorities. The decision whether or not to warn an intended victim

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[4] 529 P.2d at 561, 118 Cal. Rptr. at 137.

[5] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed., 1971) § 56 [hereinafter cited as PROSSER].

[6] *See* note 41, *infra.*

[7] 529 P.2d at 560-61, 118 Cal. Rptr. at 136-37.

[8] The dangerous patient exception is unique to the psychotherapist-patient privilege. The other privileges in the Evidence Code do not include a parallel exception.

[9] The order for a rehearing was signed by all seven justices. Advance sheets of California Supreme Court No. 9, March 27, 1975, 6. Where a rehearing is granted, the case stands as though there had not been a previous hearing. The California Supreme Court does not reveal why it grants a rehearing. Telephone conversation with Keith Hawkes, Deputy, Clerk's Office, California Supreme Court, April 27, 1976.

or the parents of the victim should be at the discretion of the psychotherapist, who is best able to judge whether such a warning would do more harm than good.

I. FINDING THE DUTY TO WARN

The court in *Tarasoff* found the psychiatrists liable by reasoning first, that a special relationship exists between the psychotherapist and his patient, and second, that the underlying policy behind the dangerous patient exception justifies the breach of trust. The court noted that the psychiatrists might be held liable on the alternative ground that the psychiatrists, having taken affirmative steps to treat the patient, had a duty to avoid making his situation worse. Although this may have been a more convincing argument, the court relied on the special relationship theory as the primary basis for imposing the duty to warn.

A. DUTY TO WARN BASED ON SPECIAL RELATIONSHIP

The court recognized that under common law, one has no duty to control the conduct of another or to act for the protection of another.[10] An exception is made where the actor has entered a special relationship in which he exercises some control over either the person who threatens the harm or the person exposed to the harm.[11] Under these circumstances, the law may impose a duty to take affirmative steps to prevent the harm.[12] The court thought that the relationship between the psychotherapist and patient was a special relationship which justified imposing a duty to warn a third party.[13]

In arguing that the psychotherapist-patient relationship should be among those special relationships in which courts have recognized a duty to protect a third party, the court relied on cases from other jurisdictions holding that a physician's relationship to his patient was sufficient to support a duty to warn a third party of dangers arising from the patient's illness. The court failed to note the factual distinctions between these cases and the situation in *Tarasoff*.

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[10] Tarasoff v. Regents of Univ. of Calif., 529 P.2d 553, 118 Cal. Rptr. 129, 133; *see* Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886, 887 (1934).

[11] Courts have found that the defendant may stand in such a relation toward another as to give him a definite control over the other's actions; this relationship carries with it a duty to exercise that control for the protection of the plaintiff. Such relationships include employer to employee, owner of car to driver, doctor to assistants. The same should apply to guards of prisoners. PROSSER, *supra* note 5, § 56, at 349-50.

[12] 529 P.2d at 557, 118 Cal. Rptr. at 133.

[13] 529 P.2d at 555, 118 Cal. Rptr. at 131. Justice Clark's dissenting opinion protested that "[o]verriding considerations of policy compel the conclusion that the duty to warn a potential victim may not be founded on the mere existence of a psychiatrist-patient relationship." 529 P.2d at 566, 118 Cal. Rptr. at 142.

Several cases[14] cited by the court involve a physician's failure to properly diagnose or adequately advise the patient of a contagious disease. The physician was held liable to members of the patient's family who consequently contracted the disease. A decision in another case[15] went even further, saying that a physician who prescribed for a bus driver a drug having possible side effects might be liable to an injured passenger. The physician would be liable if the jury found that he failed to warn his patient of the drug's side effects, which caused the accident. In each of these cases, the physician breached his duty to provide certain information to the patient. But the physician's liability is not confined to the party to whom the misrepresentation or nondisclosure is directed; it extends to those who may reasonably be expected to be endangered by it.[16]

The circumstances of the *Tarasoff* case, however, are substantially different. The social dangers of a patient with a physical illness are considerably more forseeable than is the social danger of a psychiatric patient. Because of the organic nature of physical disease, a physician can determine with some accuracy the existence and danger of a disease in his patient. The social dangers of a psychiatric patient, on the other hand, cannot be as easily identified or predicted.[17] Thus, holding the physician liable for failing to determine his patient's contagious physical condition is more justifiable than holding a psychiatrist liable for failing to determine his patient's tendency toward violence. Moreover, the cases cited by the *Tarasoff* court involve a physician misleading the patient either by actively misrepresenting that he did not have a contagious disease, or by negligently failing to disclose that he was so infected. The psychiatrists in *Tarasoff*, however, did not mislead Poddar either by misrepresentation or nondisclosure.

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[14] Davis v. Rodman, 147 Ark. 385, 227 S.W. 612 (1921) (physician advised parents of typhoid fever patient to put patient among the other children); Hofman v. Blackmon, 241 So. 2d 752 (Fla. App. 1970) (physician's failure to diagnose tuberculosis in his patient resulted in the patient's child contracting the disease); Skillings v. Allen, 143 Minn. 323, 173 N.W. 663 (1919) (physician advised nonpatient plaintiff that it was safe to move the contagious patient home); Wojcik v. Aluminum Co. of America, 18 Misc. 2d 740, 183 N.Y.S. 2d 351 (Sup. Ct. 1959) (physician's failure to disclose to patient that examination revealed tuberculosis resulted in patient's wife contracting the disease); Jones v. Stanko, 118 Ohio St. 147, 160 N.E. 456 (1928) (physician assured plaintiff that there was no danger of contagion in attending to the patient).

[15] Kaiser v. Suburban Transp. Sys., 65 Wash. 2d 461, 398 P.2d 14 (1965).

[16] PROSSER, *supra* note 6, § 33, at 178. The court in Wojcik v. Aluminum Co. of America, 183 N.Y.S. 2d at 357-58, said: "The risk of the plaintiff-wife contracting tuberculosis from her husband, when unaware that he was so inflicted . . . is within the range of probability and apprehension of an ordinarily prudent person."

[17] Comment, *Tarasoff v. Regents of Univ. of Calif.—Risk Allocation in Mental Health Care: Whether to Treat the Patient or His Victim*, 1975 UTAH L. REV.

In addition to the physician-patient cases, the *Tarasoff* court relied on cases which held that a defendant, in charge of a dangerous person, had a duty to warn third parties. One federal case[18] concerned a hospital's release of a mental patient to work on a ranch without warning the ranchowner of the patient's background. The employer permitted the patient to come and go freely. When the patient sought out his own wife and killed her, the hospital was found negligent for having failed to take proper precautions. The hospital, which had custody of its patient, was under a duty to warn others who might reasonably have been expected to rely on the hospital's tacit assurance of safety.

The three California cases which the *Tarasoff* court cited in a footnote also involved failure to warn others of the dangerousness of one under the defendant's control. Where parents failed to warn a babysitter of the violent proclivities of their child,[19] where the state failed to warn foster parents of the dangerous tendencies of their ward,[20] and where a sheriff who promised to warn the victim before releasing a dangerous prisoner failed to do so,[21] the court in each case upheld a cause of action against the party failing to warn. The plaintiff-victim in each case relied on the nondisclosure of the parent, the state, or the sheriff as a tacit assurance that he was in no position of danger.[22]

In contrast with those cases in which defendant's affirmative act was responsible for the plaintiff's vulnerable position, the psychiatrists in *Tarasoff* did not place the victim in a position of danger.[23] Nor did the victim or her parents rely on the psychiatrists to warn them of any threats made against her life. The psychiatrists gave no assurances of safety, expressed or implied, to the victim. Since the cases relied on by the court are factually distinguishable from *Tara-*

553, 564 (1975); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom* 62 CALIF. L. REV. 693, 711-16 (1974).

[18] Merchants Nat. Bank & Trust Co. of Fargo v. United States, 272 F. Supp. 409 (D.N.D. 1967).

[19] Ellis v. D'Angelo, 116 Cal. App. 2d 310, 253 P.2d 675 (1st Dist. 1953).

[20] Johnson v. State, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).

[21] Morgan v. County of Yuba, 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (3d Dist. 1964).

[22] The court in Johnson v. State, 69 Cal. 2d 782, 797 n.10, 447 P.2d 352, 363 n.10, 73 Cal. Rptr. 240, 251 n.10,(1968)recognized that

> . . . the relationship between the parole officer and the plaintiff in the instant case was such that a failure of the officer to mention any dangerous propensities in the youth constituted a functional equivalent, in terms of the probability of detrimental reliance by the plaintiff, to an explicit representation that no such propensities existed.

[23] [I]f defendant's own negligence has been responsible for the plaintiff's situation, a relation has arisen which imposes a duty to make a reasonable effort to give assistance and avoid further harm.

PROSSER, *supra* note 5, § 56, at 342.

soff in terms of predictability of danger, acts of misrepresentation or nondisclosure, and the victim's reliance on the defendant for safety, the court has only weak support for its finding of a duty to warn based on a special relationship between the psychotherapist and patient.

The court, however, seemed to indicate a basic dissatisfaction with the common law rule that one has no duty to act for the protection of another,[24] and a willingness to carve further exceptions into that general rule.[25]

> In this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal.[26]

Whereas this may have been the court's genuine rationale for imposing the duty to warn, the court still faced the question whether the patient's interest in keeping communications confidential should outweigh the duty based on the special relationship, or whether a psychiatrist should be held liable despite the confidential nature of communications between the psychiatrist and his patient.[27]

B. COPING WITH CONFIDENTIALITY

By requiring the psychotherapist to tell the intended victim what was disclosed to him in confidence by the patient, the court would force the psychotherapist to breach the trust between himself and his patient. Communications between doctor and patient have traditionally been considered to be confidential. Professional ethics require that the psychotherapist keep secret any information which he

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[24] Tarasoff v. Regents of Univ. of Calif., 529 P.2d 553, 561, 118 Cal. Rptr. 129, 137; Note, *Tarasoff v. Regents of Univ. of Calif.: The Psychotherapist's Peril*, 37 U. PITT. L. REV. 155, 167 (1975).

[25] During the last century, liability for "nonfeasance" has been extended still further to a limited group of relations, in which customs, public sentiment and views of social policy have led the courts to find a duty of affirmative action. It is not likely that this process of extension has ended.

PROSSER, *supra* note 5, § 56, at 339. *See, e.g.*, Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); Rodriguez v. Bethlehem Steel, 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

[26] 529 P.2d at 561, 118 Cal. Rptr. at 137.

[27] The defendants presented two main arguments: first, that although patients often express thoughts of violence, they rarely carry out these ideas; and second, that free and open communication is essential to psychotherapy. The court disposed of the first argument by pointing out that only a few psychiatric patients will ever present a serious risk of violence. A psychotherapist's decision whether or not to warn will be measured by the standard of medical care in the community. 529 P.2d at 560, 118 Cal. Rptr. at 136. The next section of the article deals with how the court disposed of the second argument by relying on section 1024 of the Evidence Code.

learns in his professional capacity.[28] This ethical rule is reinforced by the privilege against disclosure which such communications enjoy under the Evidence Code. The California legislature, in creating the psychotherapist-patient privilege, recognized the importance of confidential communications in the relationship:[29]

> Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. . . . Unless a patient . . . is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment depends.[30]

The privilege assures the patient that his communications to the psychiatrist will not be disclosed in the courtroom. Confidentiality is essential to the psychotherapist-patient relationship. The patient is encouraged to drop reservations and to reveal his thoughts without regard to the social and legal consequences of what he might say.[31]

The patient wants protection from disclosure both of what he says to the psychotherapist and of the very fact that he is undergoing therapy.[32] The psychiatric patient's interest in privacy is even higher than the medical patient's.[33] This is so for two reasons. First, although physical ailments can be treated with some effectiveness by a doctor whom the patient does not trust, effective psychotherapy requires that the psychiatrist have the patient's utmost trust.[34] Second, by the very fact of his visit to a psychiatrist, a stigma is attached to the patient which can severely damage his reputation in the community.[35] Without the protection of confidentiality, persons may be

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[28] The code of ethics for psychiatrists is the same as that for other physicians; it reads:

> A physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of his patients, unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community.

American Medical Association, Principles of Medical Ethics, § 9 (1957).

[29] CAL. EVID. CODE § 1014 (West 1968): ". . . the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . . ."

[30] CAL. EVID. CODE § 1014, Law Rev. Comm'n Comment (West 1968).

[31] Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 185-88 (1960) [hereinafter cited as Slovenko].

[32] *Id.* at 188.

[33] The psychotherapist-patient privilege provides much broader protection than the physician-patient privilege. The psychotherapist-patient privilege has fewer exceptions than the physician-patient privilege. Unlike the physician-patient privilege, the psychotherapist-patient privilege applies in all proceedings, including criminal proceedings. *See* CAL. EVID. CODE § 1014, Law Rev. Comm'n Comment (West 1968).

[34] Taylor v. United States, 222 F.2d 398, 401 (D.C. Cir. 1955).

[35] By and large, people in the community, even those who are well-informed on other matters, consider a person's treatment by a psychiatrist as evidence of his "queerness" or even insanity. A person

deterred from seeking help.[36]

In the physician-patient cases cited by the court, the importance of the issue of confidentiality was weakened by the widely recognized duty to report communicable diseases. In many states, statutes or regulations of a state board of health require physicians to report all infectious or communicable diseases to local health boards or officers,[37] and such an obligation justifies the breach of confidence by the physician.[38] Conversely, a physician cannot claim the physician-patient privilege as a defense in an action against him for failure to report a case of a contagious disease.[39] Moreover, a physician whose patient is infected with a contagious disease has a legal duty to give detailed instructions to members of the household with regard to precautionary measures to be taken for preventing the spread of the disease.[40] A physician acting under this requirement, which is similar to the duty to report to local officials, would be justified in breaching confidence by warning members of the patient's family. A psychotherapist is not under a corresponding legal duty to warn

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> may hesitate to visit a psychiatrist out of fear that he might be set apart from his fellow men.

Slovenko, *supra* note 31, at 188.

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

M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 272 (1952).

[37] AM. JUR. *Physicians & Surgeons* § 101 (1962). In California, a physician who knows of anyone carrying a contagious communicable disease (listed in 17 CAL. AD. CODE § 2500 (10-7-72)) is under a statutory duty to report to the county health officer. CAL. HEALTH & SAFETY CODE § 3125 (West 1970).

[38] 58 OPS. CAL. A.G. 904 (1975). The California Attorney General, in arguing that a private physician would not be liable in a medical malpractice suit for breach of the confidential physician-patient relationship if the physician reported the occurrence of a contagious and communicable disease or condition, stated:

> It seems clear that the Legislature did not intend that a private physician would be liable for prosecution for failure to report a case of a disease or condition designated as "reportable" pursuant to section 3125 and 17 California Administrative Code section 2500 and yet be considered to have breached the physician-patient relationship were he to report that same case. Such an absurd result must be avoided.

[39] In People v. Shurly, 131 Mich. 177, 91 N.W. 139 (1902), the Michigan Supreme Court held that in an action against a physician for failing to report a case of a contagious disease, a statute which prohibited a physician from disclosing any information acquired while treating a patient constituted no defense.

[40] 17 CAL. AD. CODE § 2514 (10-28-72). See Derrick v. Ontario Community Hospital, 47 Cal. App. 3d 145, 154, 120 Cal. Rptr. 566, 571 (4th Dist. 1975).

either the police or those individuals who may be expected to be harmed by a dangerous patient.

The *Tarasoff* court, in deciding that there is a duty to warn, looked to section 1024 of the Evidence Code to justify the breach of trust between the psychotherapist and his patient. Section 1024 is an exception to the psychotherapist-patient privilege, often referred to as the dangerous patient exception, which states:

> There is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.[41]

The court, relying on section 1024, balanced the public interest in safety from violent assault against the public interest in effective treatment of mental illness and the patient's interest in confidentiality. The court found that the legislature, by creating the dangerous patient exception to the psychotherapist-patient privilege, had already balanced the conflicting interests and determined that the interest in safety should be placed above the interest in confidentiality. This use of section 1024 tipped the balance in favor of a duty to warn intended victims.[42]

The court's use of section 1024 in this fashion raises troublesome questions about the validity of a court's use of a rule of evidence, not to regulate the admission of proof in a courtroom,[43] but solely to support the finding of liability. Broadly stated, the issue is whether an exception to an evidentiary privilege should influence the balancing process determining whether a professional should be held liable in tort for failing to warn a party threatened by the holder of the privilege. The authorities and cases which discuss the function of evidentiary privileges suggest that an exception should not be so used.

C. USE OF EVIDENCE CODE TO SUPPORT FINDING OF LIABILITY

Inquiry into the validity of using a rule of evidence to support a finding of a duty to warn should begin with a determination of the

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[41] CAL. EVID. CODE § 1024 (West 1968).

[42] The court found in Evidence Code section 1024, not only a duty to disclose, but an expression of the legislative policy favoring the interests of the intended victim over the patient's interests in confidentiality. The duty itself is based on general principles of tort liability. Section 1024 was relied on "for the purpose of countering the claim that the needs of confidentiality are paramount and must therefore defeat any such hypothetical duty." Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025, 1063 (1974). *See* Tarasoff v. Regents of Univ. of Calif., 529 P.2d 553, 561 n.11, 118 Cal. Rptr. 129, 137 n.11.

[43] "The law of evidence is the system of rules and standards by which the admission of proof at the trial of a lawsuit is regulated." E. CLEARY et al., MCCOR-

policy underlying the rule. Much of the law of evidence consists of rules of exclusion designed to keep irrelevant or unreliable material from the trier of fact.[44] In contrast to these exclusionary rules, the evidentiary privileges are not designed to protect the trier of fact from misleading evidence. Rather, evidentiary privileges keep out facts to protect certain relationships[45] which are considered important enough to justify the sacrifice of some sources of facts.[46] The policy underlying the evidentiary privileges is to encourage free and open communication, or confidentiality, between the parties.[47] The criminal defendant, knowing that his attorney cannot testify about what he learns in his professional capacity, admits facts damaging to his case. The psychiatric patient reveals his secret thoughts in the belief that his communications will not be disclosed publicly.

A privilege granted under the Evidence Code, however, advances its underlying policy by a specific, limited means. It prevents the disclosure of confidential information in any proceeding where the giving of testimony can be compelled by law.[48] It does not operate to prevent disclosures outside of the courtroom.[49] Thus, a physician

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MICK'S HANDBOOK OF THE LAW OF EVIDENCE § 1, 1 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)].

[44] Prominent rules of exclusion are the hearsay rule, the opinion rule, the rule rejecting proof of bad character as evidence of crime, and the rule excluding secondary evidence until the original document is shown to be unavailable. *Id.*, § 72, at 151.

[45] California recognizes five relationships which are entitled to the evidentiary privilege: lawyer-client, husband-wife, physician-patient, psychotherapist-patient, and clergyman-penitent. CAL. EVID. CODE § 950 *et seq.* (West 1968).

[46] MCCORMICK (2d ed.), *supra* note 43, § 72, at 152; Barnhart, *Theory of Testimonial Competency and Privilege*, 4 ARK. L. REV. 377 (1950).

[47] Wigmore says there are four tests for a legitimate privilege:

> (1) The communications must originate in a confidence that they will not be disclosed.
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
> (3) The relation ought to be one which in the opinion of the community ought to be sedulously fostered.
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285 at 527 (McNaughton rev. 1961).

[48] A "proceeding" is characterized as including "all proceedings of any nature in which testimony can be compelled by law to be given." CAL. EVID. CODE § 910, Law Rev. Comm'n Comment (West 1968).

[49] It must be remembered, however, that we are not dealing with a question of medical ethics or professional etiquette pertaining to the conduct of the physician *outside* the courtroom; on the contrary, we are concerned only with a testimonial privilege, created by the legislative enactment, which prohibits a disclosure by the physician, when called to testify in a lawful proceeding, of confidential communications made to, or information acquired by, him in the course

who gossips in social gatherings about a patient's ailments or who writes about them in detail in a medical journal may be violating the ethics of his profession, but he is not violating the physician-patient privilege. The privilege is totally ineffective in preventing public disclosures of medical secrets outside of a courtroom.[50] A civil action for defamation or invasion of privacy[51] might be brought against the physician for public disclosure of the patient's ailments, but the protection provided by the evidentiary privilege does not extend beyond the courtroom to enable a patient to sue for violation of that privilege.[52]

Similarly, the psychotherapist-patient privilege does not prevent the psychiatrist from discussing his patient's communications outside the courtroom. The psychiatrist may disclose information given in confidence if the psychiatrist thinks that his patient is dangerous.[53] Under such circumstances, the psychiatrist need not rely on the dangerous patient exception to make the disclosure, since a disclosure outside of the courtroom does not need to be sanctioned by an ex-

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of his professional attendance upon the patient.

DeWitt, *Privileged Communications Between Physician and Patient*, 10 WEST. RES. L. REV. 488, 490-91 (1959) [hereinafter cited as DeWitt] [emphasis original].

[50] *Id.* at 491-92. *See* Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand*, 52 YALE L. J. 607 (1973) [hereinafter cited as Chafee]. *See also* Maryland Cas. Co. v. Maloney, 119 Ark. 434, 178 S.W. 387, 389 (1915); American Republic Life Ins. Co. v. Edenfield, 228 Ark. 93, 306 S.W. 2d 321 (1957), Noble v. United Ben. Life Ins. Co., 230 Iowa 451, 297 N.W. 881 (1941).

[51] A patient suing for defamation or invasion of privacy is unlikely to be awarded damages. In many cases, a court will not grant damages unless the patient can show a deliberate intent on the part of the psychotherapist to do injury. Iverson v. Frandsen, 237 F.2d 898 (10th Cir. 1956) (psychologist's report of plaintiff's mental level to officials of school plaintiff attended was held privileged under tort law); Kenney v. Gurley, 208 Ala. 623, 95 So. 34 (1923) (school medical director's communication to the school dean and plaintiff's parents that examination showed plaintiff had gonorrhea was held privileged); Shoemaker v. Friedberg, 80 Cal. App. 2d 911, 183 P.2d 318 (4th Dist. 1947) (physician's statement to plaintiff in the presence of plaintiff's landlady that she was suffering from a severe case of gonorrhea was held privileged, since malice could not be inferred from the communication); Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920) (physician's warning to the owner of hotel where plaintiff was staying that plaintiff had a contagious disease, after plaintiff failed to leave the hotel as promised, was held to be justified on the basis of physician's moral obligation to speak). *See* Slovenko, *supra* note 31, at 175, and Chafee, *supra* note 50, at 617.

[52] Chafee, *supra* note 50, at 616-17.

[53] If a psychotherapist becomes convinced during a course of treatment that his patient is a menace to himself or to others because of his mental or emotional condition, he is free to bring such information to the attention of the appropriate authorities. The privilege is merely an exemption from the general duty to *testify* in a proceeding in which testimony can ordinarily be compelled to be given.

Calif. Law Rev. Comm'n, Reports, Recommendations and Studies, vol. 6, at 240 (1964) [emphasis original].

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Although the psychiatrist may freely report a potentially dangerous patient to the appropriate authorities, he is under no statutory duty to do so. The dangerous patient exception does not impose a duty on the psychotherapist to give such a warning.[54] The exception to the privilege, like the privilege itself, was created for a specific, limited purpose: to enable the psychotherapist to initiate commitment proceedings and to testify in those proceedings when he feels the patient may be a danger to himself or to others.[55]

Although there are very few reported cases dealing with the dangerous patient exception, the recent California case of *People v. Hopkins*[56] does illustrate how one court has used section 1024. The defendant, charged with burglary and intentional infliction of great bodily injury, contended during the trial that his confession to a psychiatrist shortly after the crime was privileged and therefore could not be testified to by the psychiatrist. The appellate court concluded that the defendant was "in such mental and emotional condition as to be dangerous to himself or to the person or property of another" without the meaning of section 1024, which provides that there is no privilege under such circumstances. The defendant's confession to the psychiatrist, therefore, was held admissible under the dangerous patient exception. Section 1024 operated in this case to allow into evidence a confession of a past crime, which would not have been admitted under the future crimes exception to the psychotherapist-patient privilege.[57]

The *Tarasoff* court, however, used section 1024, not to admit the testimony of the psychiatrist, but rather to overcome the policy argument that the confidential nature of the psychotherapist-patient relationship outweighs any duty to warn. In so using section 1024, the court not only lost sight of the narrow context in which the privilege was designed to operate, but also failed to keep in mind the limited function of the exception to the privilege.

In looking to the policy underlying the dangerous patient exception, the court suggested that the legislature had already struck a balance between the patient's interests and the public's interests. But that legislative balancing was made in the context of a courtroom disclosure. The legislature questioned whether society's interest in protection from dangerous patients should be favored at the expense of

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[54] *See* note 42, *supra*.

[55] Telephone conversation with John H. DeMoully, Executive Secretary, California Law Revision Commission, March 19, 1976.

[56] People v. Hopkins, 44 Cal. App. 3d 669, 119 Cal. Rptr. 61 (1st Dist. 1975).

[57] CAL. EVID. CODE § 1018 (West 1968). The future crimes exception applies only to communications made by a patient to a psychotherapist for the purpose of furthering a criminal act.

public disclosure of the patient's communications *in a courtroom.* The merits or demerits of public disclosure outside a courtroom to an intended victim were not considered in the legislative balance. Thus, the court should not have relied on the dangerous patient exception to support liability in tort for failure to warn intended victims.

There has been at least one case, however, in which a court allowed use of an evidentiary privilege for a purpose other than the exemption from testifying. In *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors,*[58] the plaintiff journalists argued that the Board of Supervisors, in holding a closed meeting with the county counsel and members of a labor union, had violated that state's public meeting law requiring that meetings of local legislative bodies be open to the public. The defendants relied on the policy behind the statutory attorney-client privilege to justify their holding the closed meeting. Although the court affirmed the grant of a preliminary injunction against future closed meetings of the Board members to discuss public business, it said that the privilege's policy of assuring confidentiality was just as important to public as to private clients:

> Plaintiffs do not dispute the availability of the lawyer-client privilege to public officials and their attorneys. They view it as a barrier to testimonial compulsion, not a procedural rule for the conduct of the public affairs. The view is too narrow.[59]

In this case, the court regarded the attorney-client privilege as not just a rule of courtroom procedure, but a rule of substantive law,[60] which can be raised to defend against possible encroachment upon the rights of the parties protected by the privilege. Specifically, the court relied on the policy underlying the attorney-client privilege in upholding defendant's right to confer with the county counsel in a closed meeting.

This use of the policy behind the privilege in a non-courtroom context to *protect* the holders of the privilege was justified. The policy of maintaining confidentiality is compelling; it was recognized by the lawyer, the physician, and the psychotherapist long before the privileges were created. The evidentiary privileges merely gave the policy legal recognition. The exceptions to the privileges, on the

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[58] 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (3d Dist. 1968).

[59] *Id.*, at 53, 69 Cal. Rptr. at 489.

[60] The patient-physician privilege is more than a rule of procedure since it goes to relationships established and maintained outside the area of litigation, and "affect[s] people's conduct at the stage of primary private activity and should therefore be classified as substantive or quasi-substantive."

Massachusetts Mutual Life Insurance Co. v. Brei, 311 F.2d 463, 466 (2d Cir. 1962) quoting H. Hart & H. Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 678 (1953).

other hand, were not created to reinforce a widely recognized policy in the legal and medical professions. Rather, they were created by the legislature in the belief that certain narrowly-defined circumstances justified compelled disclosure in the courtroom despite the importance of confidentiality. The limited policies underlying these exceptions, therefore, should not be raised to challenge confidentiality in other, more general contexts.

In contrast to the *Sacramento Newspaper* case, the *Tarasoff* court relied on the dangerous patient exception to *encroach* on the patient's and psychiatrists' right to maintain a confidential relationship. The court raised the underlying policy of protecting the public from dangerous psychiatric patients, not to compel disclosure in a courtroom, but rather for the broader purpose of finding a duty to warn intended victims. The legislature, in enacting the dangerous patient exception, did not intend such an expanded application into the area of tort law. A distinction should be made between using the policy behind a privilege as a shield, and using the policy behind an exception to a privilege as a sword.

D. SUMMARY

The *Tarasoff* court concluded that the special relationship between the psychotherapist and patient could support a duty to warn an endangered victim. The court's conclusion, however, was based on cases which are factually distinguishable from the situation in *Tarasoff*. The next step in the court's analysis was to determine whether such a duty should be recognized despite its significant conflict with the policy of encouraging confidential communications. The court relied on Evidence Code section 1024 to suggest that "the Legislature had undertaken the difficult task of balancing the countervailing concerns"[61] and determined that the interests of the intended victim outweigh the interests of the patient. Because of the facts in the *Tarasoff* case and the problems of confidential communications if a duty to warn were imposed on the psychiatrists, the reliance on section 1024 was crucial to the court's finding of liability for failure to warn. The court's use of section 1024 in this context is highly questionable; unless it is explicitly rejected upon rehearing, it may lead to misuse of other exceptions to the evidentiary privileges.

II. EFFECT ON THE OTHER PRIVILEGES

This section of the article will examine the implications which the *Tarasoff* reasoning may have on the other privileges. It will examine how a court might use the future crimes exception to the lawyer-

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[61] Tarasoff v. Regents of Univ. of Calif., 529 P.2d 553, 560, 118 Cal. Rptr. 129, 136.

client privilege to support a finding of liability. The future crimes exception to the physician-patient and husband-wife privileges could be similarly analyzed.

The lawyer-client[62] privilege has a future crimes exception[63] from which a court using reasoning similar to that in *Tarasoff* could conclude in a negligence action against a professional that the legislature has implicitly undertaken a balancing test and determined that the interests of society are more important than the interests of the holder of the privilege. The future crimes exception provides that there is no privilege if the communications were made in furtherance of a crime. A court could, upon determining that the special relationship between lawyer and client supports a duty of the lawyer to warn an intended victim, use the future crimes exception to overcome the argument in favor of confidentiality.

The lawyer-client privilege,[64] which affords even greater protection than the psychotherapist-patient privilege,[65] was created to encourage the client to freely discuss with the lawyer the facts essential to proper representation of the client.[66] Without such assurances of confidentiality, a client might withhold an acknowledgment of guilt for fear the lawyer will be forced to repeat the facts on a witness stand.[67] The client's interest in confidentiality, moreover, is protected by the code of ethics of the bar which requires that the lawyer preserve inviolate the confidences of his client.[68]

The legislature has made an exception to the privilege when the professional services of the lawyer are sought to aid in the commission of future crime.[69] The rationale for this exception is that a law-

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[62] CAL. EVID. CODE § 956 (West 1968): "There is no privilege . . . if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud."

[63] The psychotherapist-patient privilege also has a future crimes exception (CAL. EVID. CODE § 1018 (West 1968)) which is the same as the future crimes exception to the physician-patient privilege (CAL. EVID. CODE § 997 (West 1968)).

[64] CAL. EVID. CODE § 950 *et seq.* (West 1968).

[65] The lawyer-client privilege has fewer exceptions than the psychotherapist-patient privilege. *See* CAL. EVID. CODE §§ 905-62 (West 1968).

[66] MCCORMICK (2d ed.), *supra* note 43, § 87, at 175. ABA Code of Professional Responsibility No. 4.

[67] MCCORMICK (2d ed.), *supra* note 43, § 87, at 176.

[68] ABA Code of Professional Responsibility No. 4. California lawyers are governed by the Rules of Professional Conduct of the State Bar of California. CAL. BUS. & PROF. CODE § 6000 *et seq.* (West 1974). "It is the duty of an attorney . . . to maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client." CAL. BUS. & PROF. CODE § 6068(e). Where a client's threat of commiting a future crime is imminent, the lawyer is permitted to make immediate disclosure. Guides to Professional Conduct for the New California Practitioner (1961).

[69] Some commentators have suggested that the future crimes exception should apply upon mere proof that the client informed the lawyer of an intention to commit an illegal act, without further demonstrating that the lawyer's assistance

yer's advice pertaining to illegal conduct is not the kind of communication which a client should be allowed to request from the lawyer.[70] Such advice would not be a professional service, but rather a participation in a criminal conspiracy.[71] Thus, for example, no privilege would attach to a communication in which the client reveals an intention to bribe a witness or perjure himself on the witness stand.[72]

Although the future crimes exception could compel a lawyer to testify on the witness stand about communications made by a client in furtherance of an illegal aim, the lawyer is under no statutory obligation to warn those who may be endangered by the criminal act. There may be an ethical obligation, however, to make such a warning. The code of ethics of the bar expressly permits a lawyer to reveal "the intention of his client to commit a crime and the information necessary to prevent the crime."[73] The American Bar Association has suggested that not only is the lawyer free to reveal this information, but "where the crime is one which would seriously endanger life or safety of any person or corrupt the processes of the courts he . . . must report the matter to the authorities."[74]

Even without a statutory duty to warn, how might a court proceed to find a lawyer liable for failing to warn an intended victim of the client? Suppose that a client consults his lawyer about what punishment the law would impose on a person for killing his wife. From the consultation, the attorney is convinced that the client intends to kill his wife. Subsequently, the client commits that act. Even prior to the killing, the future crimes exception removes this communication from the protection of the evidentiary privilege, and the lawyer could be compelled to disclose the information in a courtroom.[75] But should the lawyer be held liable in tort because he did not warn the wife? In a civil action by a relative of the deceased wife against the lawyer for failing to warn, a court using the *Tarasoff* reasoning could rely on the legislative intent behind the future crimes exception to support a finding of liability.

A court could overcome the first hurdle in finding a lawyer liable for failure to warn an intended victim without much difficulty. To find a duty to warn based on a special relationship, a court could

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was requested or given. *See* Note, *The Future Crime or Tort Exception to Communications Privileges*, 77 HARV. L. REV. 730, 732 (1964) [hereinafter cited as Harvard Note].

[70] *Id.* at 730.

[71] MCCORMICK (2d ed.), *supra* note 43, § 95, at 199.

[72] Harvard Note, *supra* note 69, at 732.

[73] ABA Code of Professional Responsibility, DR 4-101.

[74] ABA Project on Standards for Criminal Justice, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 221-22 (1970).

[75] The patient's communication of an intention to kill his former girlfriend in the

determine that there exists a fiduciary relationship[76] between the lawyer and client that gives rise to a duty to warn. A lawyer may be in a position to learn of planned illegal activity, particularly if he is defending a person accused of a crime.[77] He is more likely to be solicited to assist in a planned criminal act than is a physician or priest, simply because a lawyer's knowledge is more useful to planning a crime.

To find liability, however, a court must also overcome the policy favoring confidential communications between a lawyer and his client; it must determine that society's interest in protection from harm is more important than is maintaining the client's confidence. By relying on the supposed legislative intent of the future crimes exception, a court could suggest that a balance in favor of compelled disclosure has already been struck by the legislature. A court could thereby conclude that a lawyer is required to warn intended victims. Moreover, a court could do this without carefully balancing the competing interests.

That this would be a misuse of the future crimes exception is clear when the policy underlying the exception is considered. The balance was struck by the legislature in favor of compelled disclosure only in the context of giving testimony in the courtroom. Whether the balance would have been struck in favor of compelled disclosure to an intended victim is a matter for speculation.[78] In sum, a court should not look to an exception to an evidentiary privilege intended for courtroom use to support liability for failing to warn outside the courtroom. Such an exception was designed to permit a professional to testify about confidential communications only under narrowly-defined circumstances, and was not intended to support a finding of liability in tort for failure to warn.

III. WEIGHING THE POLICY CONSIDERATIONS

The *Tarasoff* court was not necessarily incorrect in finding that the psychiatrists had a duty to warn when their patient revealed an intention to harm another. The question is whether that duty should be owed to the intended victim.

The court recognized the policy considerations in determining whether to impose a duty to warn the intended victim:

Tarasoff case would have come within the future crimes exception had the psychiatrists been asked to testify in court.

[76] ABA Code of Professional Responsibility, DR 4-101 n. 16.

[77] Harvard Note, *supra* note 69, at 732.

[78] This use of the future crimes exception would enable a court to overcome the argument that confidence is essential to encourage a client to reveal all the facts, even those which he may think are unfavorable to his case. A duty to disclose a client's intention to commit a criminal act would inhibit complete confidence, thereby seriously hampering the lawyer-client relationship and the administration of justice.

> [T]he principal considerations [include]: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved."[79]

However, these considerations played no meaningful part in the court's decision. The court failed to evaluate the impact that a duty to warn intended victims would have on the mental health field and on society in general.[80] Based on a thorough analysis of these policy considerations, particularly "the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care", the court should have concluded that the psychiatrists owed no duty to warn the intended victim.

When one considers the varied situations in which the duty to warn arises, the burden of such a duty on the psychotherapist becomes clear. Often, a patient will not threaten a particular person, but rather a class of persons or society at large.[81] Or a patient may threaten a person who is not readily identifiable by the psychiatrist. The *Tarasoff* court held that the duty is owed to the endangered victim or to those who might reasonably be able to notify that person. On the facts of *Tarasoff*, the court clearly intended that either the victim or her parents should have been notified. But the court left unclear the precise scope of the duty, that is, whether under different facts, a psychiatrist would be required to alert a more distant relative, a friend, or even a roommate if the victim could not be located.

Moreover, the duty to warn intended victims would have a dramatic impact on the relationship between the psychotherapist and his patient, as well as on society. Without a guarantee of confidentiality, persons needing psychiatric treatment would be deterred from seeking help.[82] Once a relationship has been established, the duty to disclose would create a tendency to over-predict violence. As pointed out by the dissent:

> [U]nlike this court, the psychiatrist does not enjoy the benefit of hindsight in seeing which few, if any, of his patients will ultimately become violent. Now, operating under the majority's duty, the psychiatrist—with each patient and each visit—must instantaneously

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[79] Tarasoff v. Regents of Univ. of Calif., 529 P.2d 553, 557, 118 Cal. Rptr. 129, 133, quoting Rowland v. Christian, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

[80] 529 P.2d at 566, 118 Cal. Rptr. at 142 (Justice Clark's dissenting opinion).

[81] Brief for Appellants at 12, Tarasoff v. Regents of Univ. of Calif., 529 P.2d 553, 118 Cal. Rptr. 129 (1975).

[82] 529 P.2d at 566, 118 Cal. Rptr. at 142 (Justice Clark's dissenting opinion).

> calculate potential violence . . . . And, given the decision not to warn must always be made at the psychiatrist's civil peril, one can expect all doubts to be resolved in favor of warning.[83]

In addition, a warning to the intended victim may arouse undue fear and anxiety in that person.[84] There may be little that the intended victim can do to avoid the threatened harm other than to initiate commitment proceedings or to avoid contact with the patient. This, in turn, could easily exacerbate the problems of a patient whose dangerous tendencies had been largely dormant.

Because of these problems, when a psychotherapist has reason to believe that the patient may be dangerous to others, disclosure should be made, not to the intended victim, but rather to the appropriate authorities who have the training and power to protect the public.[85] The psychotherapist would not be faced with the problem of whom to warn when the intended victim is unidentified or cannot be located.

The psychiatrists in *Tarasoff*, upon learning of Poddar's intentions, notified the campus police, who in turn took Poddar into temporary custody. Aided by hindsight, the court found the warning to the police insufficient to guard against the threatened danger; the patient managed to kill his intended victim in spite of such warning. But the court should not have looked to the unique facts of *Tarasoff* to determine that a warning to the police is insufficient precaution in all cases.

To resolve any doubts about the liability of a psychotherapist under such circumstances, the legislature should impose a statutory duty on the psychotherapist to disclose the necessary information to the appropriate authorities, and should direct that the information not be disclosed to other parties. The authorities have the power to take all steps necessary to protect the public or any individual. A statutory duty to disclose would nullify claims by the patient that the psychotherapist had breached his confidence; it would also eliminate, in an action against the psychotherapist for failing to warn, assertions by the psychotherapist that confidentiality prevents disclosure.

Whether to warn the intended victim should be a question within the discretion of the psychotherapist. The legislature recognized the

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[83] *Id.* at 568, 118 Cal. Rptr. at 144 (Justice Clark's dissenting opinion).

[84] Brief for Appellants at 23, Tarasoff v. Regents of Univ. of Calif., 529 P.2d 553, 118 Cal. Rptr. 129 (1975).

[85] Under civil commitment procedures in California, all information obtained from the patient is confidential. LANTERMAN-PETRIS-SHORT ACT, WELFARE & INST. CODE § 5000 *et seq.* (West 1969 & Supp. 1976). One of the exceptions permits disclosure to "governmental law enforcement agencies as needed for the protection of federal and state elective constitutional officers and their families." WELFARE & INST. CODE § 5328(g) (West 1969).

effectiveness of psychotherapy by creating the psychotherapist-patient privilege to encourage those who are "seriously disturbed and constitute threats to other persons in the community"[86] to seek treatment. The proper function of the psychotherapist should include the dissuasion of anti-social conduct.[87] Continued therapy may lessen the patient's propensity toward violence and dissuade him from carrying out an intention to harm another. On the other hand, the disruption of the confidential relationship which would result from mandatory disclosure to an intended victim may actually increase the risk of violence. The decision whether to warn the intended victim should be within the discretion of the psychotherapists, based on his judgment about whether the welfare of the community may best be promoted by continued therapy or by disclosure.

IV. CONCLUSION†

Because of the confidential nature of the psychotherapist-patient relationship, the creation of a duty to warn raises a substantial problem. The court in *Tarasoff* relied on the dangerous patient exception to the psychotherapist-patient privilege to overcome the argument that the patient's interest in maintaining confidence is more important than the victim's interest in being warned. By using the dangerous patient exception, not to admit the testimony of the psychiatrist, but rather to overcome the argument in favor of confidentiality, the court established a dangerous precedent. Although a rehearing has been granted in the *Tarasoff* case, there is a danger that courts following similar reasoning may rely on an exception to any of the other privileges to justify imposing a duty to warn at the sacrifice of confidentiality.

Instead, the court should have carefully considered and balanced all the policy considerations of the proposed duty. Had it done so, the court might have concluded that a psychotherapist's duty to warn is owed to the appropriate authorities whose role is to protect the public. The matter of whether to warn the intended victim is best left to the discretion of the psychotherapist, who in his professional judgment may have reason to believe that the probability of violence could be lessened through continued therapy rather than disclosure.

Violet Lee

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[86] CAL. EVID. CODE § 1014, Law Rev. Comm'n Comment (West 1968).

[87] Harvard Note, *supra* note 69 at 733.

†The California Supreme Court handed down its decision just as this volume was about to go to press. On July 1, 1976, more than a year after it had granted a rehearing, the court held that a psychotherapist has a duty to warn an intended victim or those who can reasonably be expected to notify him. The court, in the same manner as the vacated opinion, relied on Section 1024 of the Evidence Code.