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BEYOND THE SYMPTOMS: FINDING THE ROOT CAUSE OF THE CHAOTIC *TARASOFF* LAWS

Taylor Gamm[*]

I. INTRODUCTION

On July 19, 2010, James Holmes entered a movie theater in Denver, Colorado.[1] He purchased a ticket for a showing of "The Dark Knight Rises" days earlier.[2] Soon after the show began, he exited the theater through a rear door.[3] Eighteen minutes into the film, Holmes reentered theater #9, threw two cans of tear gas into the theater, and opened fire.[4] By the time he surrendered to the police, about seven minutes later, twelve people were left dead and seventy were injured.[5]

Horrifying events like these typically invoke one question: how could this have been prevented? In attempting to answer this difficult question for atrocities, such as those committed by Holmes, people tend to look to those closest to the killer.[6] It is only natural for the nation to wonder whether anyone had been told of the killer's plan, whether the victims could have been warned, or whether any of the people closest to the killer could have prevented the killer from executing the plan.[7]

While family members often become the target of these inquiries, they also have been directed towards the killer's therapist with some frequency. Unlike when these suspicions are directed at close family members, there are massive legal implications for mental health professionals and their patients. Demonstrably, James Holmes' therapist, Lynne Fenton, faced at least one lawsuit by the wife of one of Holmes' victims, who alleged that Fenton breached her "duty to use reasonable care to protect the public at large."[8] This was not the first time a therapist has been the recipient of such an accusation; rather, the Aurora Shooting lawsuit was the product of a line of cases that began roughly

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1. *Colorado Theater Shooting Fast Facts*, CNN, http://www.cnn.com/2013/07/19/us/colorado-theater-shooting-fast-facts/ (last updated Nov. 30, 2017).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Kelley Wallace, *After mass shootings, do parents shoulder some of the blame?* CNN (October 7, 2015), http://www.cnn.com/2015/10/07/health/oregon-shooting-parents-blame/. For example, the parents of the killers in both the Sandy Hook and after the mass shooting in Roseburg, Oregon, faced a lot of scrutiny for not taking more proactive roles in preventing these disasters. *Id*.

7. *Id*.

8. First Amended Complaint at 3, Blunk, v. Fenton, No. 13-cv-00080 (D. Colo. Mar. 25, 2013),2013 WL 1313894.

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fifty years ago.[9]

In the 1970s, the tragic murder of a young woman and the accompanying search for an explanation led to a lawsuit that opened the door to holding therapists liable for the violence of their patients. In *Tarasoff v. Regents of University of California,* the California Supreme Court held for the first time that the therapist of a murderer could be liable for failing to warn the victim about potential harm.[10] Today, courts and legislatures remain unsure how to balance the desire to prevent horrific events like the Aurora Shooting with the need to preserve the confidential therapist-patient relationship.

This article explores the legal principles behind a therapist's duty to protect against their patients' violence and the reason there is no consensus across the United States on the issue. To do so, Section II contains the necessary background information, including relevant tort principles and details of the infamous *Tarasoff* case. Section III(A) summarizes the variant *Tarasoff* laws; Section III(B) identifies the defects in the reasoning of the opinion; and Section III(C) argues that those defects are the reason this area of law is in a state of disarray. Part IV first illuminates the missteps of the *Tarasoff* court, and then argues that the court's failure to adequately address the elements of duty and causation produced an insufficient basis for the subsequent codifications of the *Tarasoff* duty. Finally, this article concludes that the fifty jurisdictions within the United States must become more coherent so that sound legal reasoning is established regarding the duty of therapists in protecting third parties against the violence of their patience.

II. BACKGROUND

An in depth understanding of both the legal and factual underlaying of *Tarasoff* are indispensable to an effective determination of how *Tarasoff* laws developed. Therefore, this section first discusses the key principles of tort law, and more specifically, the negligence principles, which are pertinent to a mental health professional's liability. Secondly, this section details the horrific set of facts that was brought in front of the California Supreme Court that led to a revolutionary holding, which will also be described at length.

9. Holmes' therapist was not ultimately held liable. On August 8, 2016, the Plaintiff voluntarily dismissed her case against Fenton and Colorado University. Notice of Voluntary Dismissal of Case by Plaintiff, *Blunk*, 13-cv-00080 (D. Colo. Aug. 11, 2016).

10. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 344-45 (Cal. 1976).

A. Tort and Negligence Principles

Modern tort law can be traced back to Oliver Wendell Holmes, who made one of the first persuasive arguments for tort liability based upon ancient common law notions of "eye-for-an-eye" justice.[11] Though tort law has evolved drastically from its original form, even later developments of tort law, such as negligence, are founded in this same theory, termed "reciprocity."[12] Thus, the definition of "negligence" incorporates the quintessentially human response that when a person fails to adhere to certain standards set by society, there must be retribution.[13] Negligence is "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation."[14] The law that governs negligence claims is not uniform across the United States; rather, each state has developed its own common law that dictates how any single case may be resolved. Nevertheless, a basic negligence claim in any jurisdiction has four elements that must be proved by the plaintiff: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) causation; and (4) the plaintiff was harmed.[15] A failure-to-warn claim against a mental health professional is a claim rooted in negligence; however, the four elements detailed below have different implications for this specific claim.

1. Duty

Duty is an existential element of negligence, and yet is an elusive term to define.[16] The notion of duty has developed considerably over the years, and although courts are moving towards a more uniform definition, its exact contours still provide a source of confusion and disagreement among courts and legal scholars.[17] Nowhere is this debate

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11. M. A. Geistfield, *Hidden in Plaint Sight: The Normative Source of Modern Tort Law*, 91 N.Y.U.L. Rev. 1517, 1519 (2016).

12. *Id*. at 1550-1561.

13. *Id.*

14. *Negligence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

15. *Id*.

16. Aetna Life Ins. Co. v. Lavoie, 470 So. 2d 1060, 1079 (Ala. 1984) (Torbert, C.J., dissenting) ("Tort duties are difficult to judicially define or confine; although most courts are content with the enunciation of standards, such as 'reasonable care,' in defining tort duties, wherever courts enunciate particular concrete rules, the process becomes endless, with attempts to cover each fact situation specifically as it arises, ultimately causing more confusion than clarity as the specific rules inevitably conflict.").

17. Peter Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503, 1508 (1997).

as eminent as in the context of whether or to what extent a psychotherapist owes a duty to potential victims of patients.[18] Beginning with the basic premise of duty is helpful to form a complete understanding of this confusion. Thus, this section explores the Restatement of Tort's definition of duty, the prevailing definition of duty as espoused by Justice Cardozo, and an alternate view of duty, as explained by Justice Andrews.

a. Restatement of Torts

The Restatement of Torts defines duty in terms of what an "actor" is required to do.[19] Section four of the Restatement explains that duty:

> denotes the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause.[20]

In the Restatement (Second), duty is not an element of negligence,[21] rather it derives legal significance from its use in defining what negligence means or what standard of care is owed.[22] One scholar summarily described the Restatement's use of duty as a term "integrated into the identity of other primary concepts."[23] The Restatement clearly expresses that there is no general duty "to control the conduct of a third person as to prevent him from causing physical harm to another . . . ."[24] However, there are two exceptions to this rule.[25] First, a duty to a third person is owed if "a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct."[26] The second exception, which is meticulously analyzed in determinations of a mental health professional's duty, creates a duty where "a special relation exists between the actor and the other which gives to the other a right to protection."[27]

18. *See e.g.,* Paul B. Herbert & Kathryn A. Young, *Tarasoff at Twenty-Five*, J. AM. ACAD, PSYCHIATRY LAW 30:275–81 (2002).

19. Lake, *supra* note 17, at 1518.

20. RESTATEMENT (SECOND) OF TORTS, § 4 (AM. LAW INST. 1979).

21. *Id.*at § 281.

22. Lake, *supra* note 17, at 1514.

23. *Id*.

24. RESTATEMENT (SECOND) OF TORTS, § 315 (AM. LAW INST. 1979).

25. *Id.* at § 315(a)-(b).

26. *Id*.

27. *Id*.

In many ways, the Restatement's treatment of duty is deficient compared to the intricate analysis courts typically engage in. This is largely because duty was not given much weight as a tool by which courts could limit liability until after the Restatement was published.[28] Therefore, case law is responsible for developing duty into the concept as we know it today.[29] No person was responsible for this development more than Justice Cardozo.[30] His description of duty, articulated in a case perhaps more iconic than *Tarasoff—Palsgraf v. Long Island R. Co*—represents the view that most courts have since adopted.[31]

b. Cardozo on Duty

Justice Cardozo's view of duty focused on a "zone of danger" and the primary consideration was whether the plaintiff was foreseeable.[32] More specifically, according to Cardozo, duty extends only as far as the reasonably vigilant eye would perceive an "orbit of danger."[33] For example, in *Palsgraf*, Cardozo refused to extend a duty from the railroad worker who inadvertently dropped a box of explosives to a woman who was injured from the explosion despite being many sections away in the station.[34] Contrary to some former jurisprudence, Cardozo held that a determination of liability was always anterior to a finding that a duty existed between the parties.[35]

Cardozo's espousal of duty, however, left many questions.[36] A line of California tort cases that interpreted and applied his notion of duty created a multi-factor balancing test,[37] which can now be seen in some form in most states.[38] The California Supreme Court has consistently

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28. Lake, *supra* note 17, at 1512-13.

29. *Id*.

30. *Id*. at 1510-1512.

31. Palsgraf v. Long Island R. Co., 162 N.E. 99 (N.Y. 1928).

32. *Id.* at 100-01 ("The risk reasonably to be perceived defines the duty to be obeyed.").

33. *Id*. at 100.

34. *Id*. at 101.

35. *Id*. at 99.

36. Lake, *supra* note 17, at 1513.

37. *Id*. at 1516 ("Dillon, Rowland, Biakanja and particularly Tarasoff Link to the text of the note have become famous and widely cited for several foundational points with respect to duty.").

38. *See e.g.,* Taylor v. Smith, 892 So. 2d 887, 891-92 (Ala. 2004) ("The existence of a duty is determined by a number of factors, including (1) the nature of the defendant's activity; (2) the relationship between the parties; and (3) the type of injury or harm threatened. The key factor is whether the injury was foreseeable by the defendant."); Wertheim v. Pima Cnty., 122 P.3d 1, 6 (Ariz. Ct. App. 2005) ("Courts traditionally fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability."); Gast v. Fountain, 870 P.2d 506, 508 (Colo. App. 1993) ("Several factors are relevant in making this [duty] determination including the risk involved, the

laid out six factors which are dispositive to the question of whether a duty exists:

> 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.[39]

c. Andrew's Version of Duty

In his dissent in *Palsgraf,* Justice Andrews espoused a notion of duty very different from that of Justice Cardozo.[40] Rather than limiting liability on the basis of whether the defendant owed some ethereal duty to the plaintiff, Justice Andrews preferred to limit liability on a causation determination.[41] Duty was an inappropriate way to cut off liability, according to Andrews, because "[e]veryone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others."[42] Thus, under his theory, there could never be a finding that a defendant did not owe a duty to a plaintiff.[43] Justice Andrews criticized Justice Cardozo's "zone of danger" limitation on duty as a defectively narrow construction of the word on the grounds that negligence is a cause of action based on the relationships between human beings.[44] Andrews explained that there is a relationship not only between a man and those he reasonably expects to injure, but also "between him and those whom he does in fact injure. If his act has a tendency to harm someone, it harms him a mile away as surely as it does those on the scene."[45] Therefore, the key factor in determining if a plaintiff has a viable negligence claim is a policy determination, coined "proximate cause."[46] A later section discusses proximate cause in more

foreseeability and likelihood of injury as weighed against the social utility of defendant's conduct, the magnitude of the burden required to guard against the injury, and the consequence of placing the burden upon the defendant.").

39. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976).

40. *Palsgraf*, 162 N.E. at 101-05 (Andrews, J., dissenting).

41. *Id*.

42. *Id*. at 102-03.

43. *Id*.

44. *Id*. at 102.

45. *Id*.

46. *Id*. at 354. Justice Andrews describes proximate cause indefinitely, referencing first as

detail.

2. Breach

The second element a plaintiff must prove is that the defendant breached the legal duty that was owed.[47] Breach of duty is "the act or omission, however broad or general, [that] must be averred to have been negligently done; it will not suffice to say that due to defendant's negligence, plaintiff was injured."[48] The determination of whether a defendant breached the duty is, unlike that of whether a duty is owed, a factual one made by the jury.[49] Further, the reasonable care owed in each case is the same; however, whether that duty was breached is a fact specific inquiry that varies with each case.[50] This element may be proved through a myriad of ways. For example, a plaintiff may offer evidence that the breach was a defendant's failure to adhere to a statute[51] or to an industry custom.[52]

3. Causation

The third element a plaintiff must prove in a negligence claim is that the defendant's breach of duty *caused* the plaintiff's harm.[53] Typically, in determining if the defendant's conduct was the cause of the plaintiff's harm, two separate inquiries must be made: first as to the cause in fact and, second, as to the proximate cause.[54] Though these determinations are not made uniformly across jurisdictions, there are some general procedures that courts follow.

In establishing cause in fact, a plaintiff must show that but-for the

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something "must be, at the least, something without which the event would not happen." *Id*. He then lists a number of factors determinative to proximate cause: The court must ask itself whether there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated? Is the cause likely, in the usual judgment of mankind, to produce the result? Or by the exercise of prudent foresight could the result be foreseen? Is the result too remote from the cause, and here we consider remoteness in time and space." *Id*.

47. Ladd v. San Mateo, 911 P.2d 496, 497-98 (Cal. 1996).

48. Walter G. Schwartz, *Negligence Pleading: Alleging Defendants Breach of Duty*, 35 CAL. L. REV. 2, 269 (1947).

49. Cabral v. Ralphs Grocery Co., 248 P.3d 1170, 1172-73 (Cal. 2011).

50. *Id*.

51. Thomas v. McDonald, 667 So. 2d 594, 596 (Miss. 1995) ("Violations of statutes generally constitute negligence per se").

52. The T. J. Hooper, 60 F.2d 737 (2d Cir. 1932).

53. RESTATEMENT (SECOND) OF TORTS § 281 (AM. L. INST. 1979).

54. Semi-Tech Litig., LLC v. Bankers Tr. Co., 353 F. Supp. 2d 460, 482 (S.D.N.Y. 2005) ("Causation of course has two major components: cause-in-fact, or 'but-for' cause, and proximate cause.").

defendant's negligence, the injury would not have occurred.[55] Thus, for example, where a plaintiff proved only that he *might not* have fallen off a bridge if a railing had been built higher, he failed to prove but-for causation.[56] But-for causation is a jury determination, unless reasonable minds could not differ.[57]

Proximate cause, however, is a legal determination reserved for the judge.[58] In jurisdictions that do not analyze the element of duty as the primary limitation on liability, proximate cause stands in its place.[59] This method is embodied in Justice Andrews dissent in *Palsgraf*.[60] In that case, Justice Cardozo, writing for the majority, held that "causation, remote or proximate, is thus foreign to the case before us."[61] However, because Justice Andrews asserted that duty incorporated a much broader range of relationships, proximate cause was the appropriate way to cut off liability.[62] Proximate cause is a balancing of policy considerations based on certain factors, which are dispositive as to whether the defendant's actions were too remote to be deemed the proximate cause of the plaintiff's harm.[63]

Factors that tend to demonstrate proximate cause are: (1) establishment of but-for causation; (2) a natural and continuous sequence between cause and effect; (3) the act was a substantial factor in the result; (4) there was a direct connection, as opposed to intervening events, between the cause and effect; (5) there was a high likelihood of injury; and (6) the defendant could have foreseen that harm to the plaintiff would have resulted.[64] For example, after a consideration of these factors, where a plaintiff burned herself carrying boiling water, the court held a landlord-defendant was not liable because his failure to provide heat was not direct enough to be considered the proximate cause

55. Cay v. Dep't of Transp., 631 So. 2d 393, 396 (La. 1994).

56. *Id*.

57. *Id*. at 396

58. Brown v. Phila. Coll. of Osteopathic Med., 760 A.2d 863, 868 (Pa. Super. Ct. 2000). "Proximate cause 'is primarily a problem of law' and 'it is a Pennsylvania court's responsibility to evaluate the alleged facts and refuse to find an actor's conduct the legal cause of harm when it appears to the court highly extraordinary that [the actor's conduct] should have brought about the harm.'" *Id*. Thus, proximate cause must "be determined by the judge and it must be established before the question of actual cause is put to the jury." *Id.*

59. *See e.g.,* First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 769 (2d Cir. 1994) ("Central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his acts were 'a substantial factor in the sequence of responsible causation,' and whose injury was "reasonably foreseeable or anticipated as a natural consequence") (internal citations omitted).

60. Palsgraf v. Long Island R. Co., 162 N.E. 99, 101 (N.Y. 1928) (Andrews, J., dissenting).

61. *Id*.

62. *Id*.

63. *Id*.

64. *Id*.

of the plaintiff's injury.[65]

4. Harm

The final element a plaintiff must prove before recovering monetary damages is that he or she experienced some physical or emotional harm. The Restatement of Torts frames this element as an "invasion."[66] A comment in the Restatement states that there is a "requirement that the interest which is invaded must be one which is protected, not only against acts intended to invade it, but also against unintentional invasions."[67] Thus, one limitation on liability through this element is that the law does not generally provide recourse where a plaintiff suffered only economic harm.[68]

Though there are minor variations within each jurisdiction, courts do not generally stray from this general paradigm of a negligence action. Of course, for every general rule, there are exceptions; one of which was created by the Supreme Court of California in *Tarasoff*.

B. The Facts of Tarasoff v. Regents of University of California

At the time it was decided, *Tarasoff* was arguably the most expansive application of Cardozo's version of duty.[69] To appreciate how the Supreme California Court reached its holding, however, it is imperative to be fully informed of the facts of the case, which are as catastrophic as the holding was revolutionary. Thus, this section details the facts that catalyzed the lawsuit and the resulting holding.

On October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff.[70] Poddar and Tatiana first met in August 1968 at folk dancing classes hosted by the university they both attended—The University of California. The two began seeing each other regularly, and on New Year's Eve Tatiana kissed Poddar, who took this to be a sign that they had become involved in a romantic relationship.[71] However, Tatiana disenchanted him of this belief when she informed him that she was

65. Laureano v. Louzoun, 560 N.Y.S.2d 337 (N.Y. App. Div. 1990).

66. RESTATEMENT (SECOND) OF TORTS § 281 (AM. L. INST. 1965).

67. *Id*.

68. 532 Madison Ave Gourmet Foods, Inc v Finlandia Center, Inc., 750 N.E.2d 1097, 1100-01 (N.Y. 2001).

69. Fillmore Buckner & Marvin Firestone, "*Where the Public Peril Begins": 25 Years After TARASOFF*, J. LEGAL MED. 21: 2 (2001) ("The majority's expansion of that rule takes us from the world of reality into the wonderland of clairvoyance").

70. People v. Poddar, 518 P.2d 342, 344-46 (Cal. 1974).

71. *Id.*

seeing other people and was uninterested in a committed relationship.[72]

This rejection caused him deep emotional distress.[73] Poddar became disheveled and reclusive; he let his health and schooling go by the wayside; and he often spoke disjointedly and wept.[74] Poddar met with Tatiana multiple times throughout the spring and taped the meetings to ascertain her reasons for not wanting a relationship.[75]

Poddar's state continued to deteriorate until Tatiana left for South America that summer.[76] At the suggestion of a friend, Poddar began seeing a therapist.[77] During these sessions, Poddar revealed to his therapist, Dr. Moore, his intentions of killing an unnamed girl readily identifiable as Tatiana[78] when she returned home from her trip in Brazil.[79] Unbeknownst to his therapist, Poddar had also convinced Tatiana's brother to share an apartment with him.[80] In October, Tatiana returned home from her trip and Poddar quit seeing his psychiatrist.[81] Dr. Moore, with the concurrence of two other psychiatrists, wrote to the campus police to recommend that Poddar be civilly committed because, in his opinion, Poddar was suffering from acute and severe schizophrenia and was a dangerous person.[82]

Three officers detained Poddar; however, satisfied that he was rational and upon Poddar promising that he would stay away from Tatiana, the officers released Poddar.[83] The officers did not warn Tatiana or her family of the potential danger posed against her.[84] The Director of the Department of Psychiatry at Cowell Memorial Hospital directed that the note warning the police, along with any notes by Poddar's therapist, Dr. Moore, be destroyed, and that no action be taken to detain Poddar.[85]

On October 27, 1969, Poddar went to Tatiana's home but was turned

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72. *Id*.

73. *Id*.

74. *Id*.

75. *Id.*

76. *Id*. at 344-45.

77. *Id.*

78. Tarasoff v. Regents of Univ. of California, 551 P.2d 334, ?? (Cal. 1976) ("Dr. Moore told said officers that at a psychotherapy session on August 18 Poddar had informed Moore that he was going to kill 'an unnamed girl, readily identifiable as Tatiana Tarasoff, when she returned home to Berkeley from Brazil'").

79. *Id.*

80. *Id.*

81. *Poddar*, 518 P.2d at 344-45.

82. *Id.*

83. *Id.*

84. *Id*.

85. *Tarasoff,* 551 P.2d at 341-42.

away by her mother.[86] Later that day, he returned to her home armed with a pellet gun and a kitchen knife.[87] This time, he found her alone.[88] Tatiana refused to speak with him, and when he persisted she screamed.[89] Poddar shot her with the pellet gun and she took off from the house; Poddar then pursued, caught, and repeatedly stabbed her until she died.[90] Poddar was convicted of second degree murder, but was released five years later after a successful appeal of the jury instructions.[91] California declined to retry the case, contingent upon Poddar's relocation back to India.[92]

After the criminal trial, Tatiana Tarasoff's parents filed a wrongful death suit against a plethora of individuals.[93] The defendants included Dr. Moore, the psychologist who examined Poddar and decided that he should be committed, the two psychiatrists who concurred in Moore's decision, one doctor who countermanded Moore's decision and suggested that no action be taken to confine Poddar, and, finally, the three police officers involved in the detainment and release of Poddar.[94] The Tarasoffs alleged multiple charges against the various parties for the failure to detain Poddar and the failure to warn Tatiana; however, only the failure to warn could withstand scrutiny, as the therapist and police officer defendants could claim governmental immunity against the failure to detain charge.[95]

C. The Decision in Tarasoff v. Regents of University of California

The underlying issue the court resolved was whether the therapist owed a duty to the potential victim of the patient's violence.[96] The court began its discussion reiterating the general rule that:

> whenever one person is by circumstances placed in such a position with regard to another . . . that if he did not use ordinary care and

86. *Poddar*, 518 P.2d at 244-45.

87. *Id.*

88. *Id.*

89. *Id*.

90. *Id*.

91. Douglas Mossman, *The Future of "The Duty to Protect:" Scientific and Legal Perspectives on Tarasoff's Thirtieth Anniversary: Article Critique of Pure Risk Assessment or, Kant Meets Tarasoff*, 75 U. CIN. L. REV. 523, 534 (2006).

92. *Id*.

93. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976).

94. *Id*. at 340 n. 2.

95. *Id*. at 352-53. The court additionally held that as "to the police defendants, we conclude that they do not have any such special relationship to either Tatiana or to Poddar sufficient to impose upon such defendants a duty to warn respecting Poddar's violent intentions." *Id*.

96. *Id*. at 342.

> skill in his own conduct . . . he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.[97]

The court then identified certain situations that warrant departure from the general rule.[98] Although the court balanced a number of considerations, the foreseeability of harm to the plaintiff was foremost in determining whether a departure was justified in this situation.[99] Common law, however, limits this exception by requiring a special relationship between the defendant and the dangerous person or the potential victim.[100] Finding the relationship between a therapist and a patient sufficient to meet this requirement, the California Supreme Court concluded that "such a relationship may support affirmative duties for the benefit of third parties."[101]

Determining what exactly the therapist's duty required was a contentious issue that was resolved in the court's first opinion, though according to defense advocates, with gross injustice.[102] When the court initially considered the issue, it imposed on therapists a specific duty to warn potential victims of their patients' threat.[103] Consequently, the failure of the defendant therapist to warn Tatiana or her family members constituted a cognizable claim.[104] An effort spearheaded by the Northern California Psychiatric Society convinced the court to rehear the case.[105]

Eighteen months later, the court issued a second opinion which purported to allay the concerns of the *amicus curiae*, who argued that the duty to warn would have detrimental effects on the practice of

97. *Id*.

98. *Id*. Specifically, the court mentions that a "a hospital must exercise reasonable care to control the behavior of a patient which may endanger other persons. A doctor must also warn a patient if the patient's condition or medication renders certain conduct, such as driving a car, dangerous to others." *Id*. at 343-44.

99. *Id*. at 342. The other considerations include "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, cost and prevalence of insurance for the risk involved." *Id*.

100. *Id*.

101. *Id*. at 343-44.

102. Daniel J. Givelber, William J. Bowers & Carolyn L. Blitch, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443, 449 (1984).

103. Tarasoff v. Regents of Univ. of Cal., 529 P. 2d 553, 561 (Cal. 1974), *overruled by Tarasoff*, 551 P.2d 334 (Cal. 1976). The complaints can also be amended to assert causes of action against the police defendants for failure to warn on the theory that the officers' conduct increased the risk of violence. *Id.*

104. *Id*.

105. Givelber, Bowers & Blitch, *supra* note 102.

psychiatry.[106] Consequently, to lessen the burden on therapists, the court pronounced a less specific duty—that duty of "reasonable care."[107] The court explained that "the discharge of this duty of due care will necessarily vary with the facts of each case, in each instance the adequacy of the therapist's conduct must be measured against the negligence standard of the rendition of reasonable care under the circumstances."[108] The court further elaborated that if the duty of reasonable care required a therapist to warn a potential victim, patient-therapist confidentiality would not constitute sufficient justification for failing to do so.[109] The court eloquently explained that "the protective privilege ends where the public peril begins."[110]

III. DISCUSSION

Perhaps unbeknownst to the California Supreme Court, its holding in *Tarasoff* would have an impact that reached the opposite coast of the United States and every state in between. This section first describes the different ways *Tarasoff* impacted tort liability in various jurisdictions. Secondly, it discusses the practical consequences of the severe interjurisdictional variance.

A. Effects of Tarasoff

As each state wrangled with the implications of the newfound duty created in *Tarasoff*, various positions emerged. These positions can be categorized three main groups: duty states, permission states, and anti-*Tarasoff* states.[111] This section describes the ways in which *Tarasoff* has been codified across many jurisdictions and details some important variations within each subgroup.

1. Duty States

When California itself codified the *Tarasoff* holding, it both limited and expanded the court of appeal's holding.[112] First, it more clearly and

106. *Tarasoff*, 551 P.2d 334.

107. *Id*. at 345-46 ("once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger").

108. *Id*. at 349-50.

109. *Id*.

110. *Id*. at 347-48.

111. Herbert & Young, *supra* note 18, at 277.

112. Cal. Civ. Code § 43.92 (Lexis 2013).

narrowly set out that a psychotherapist's[113] duty is triggered only when "the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims."[114] However, the California Statute also explicitly required that when a psychotherapist's duty to a third party is triggered, that duty is discharged when the therapist makes "reasonable efforts to communicate the threat to the victim or victims *and* to a law enforcement agency."[115] In so doing, the legislature placed a more stringent requirement on therapists to warn specific people, whereas under the *Tarasoff* holding no such duty was in place. California, along with twenty-eight other states, falls under the category of a "duty state."[116]

The general formula for the duty espoused in these jurisdictions is that a psychotherapist has a duty to warn either the victim or law enforcement after a patient makes an explicit and specific threat of physical harm.[117] One important variation within these jurisdictions is whether the state incorporates the therapist's judgment into when the duty is triggered.[118] For instance, Idaho's *Tarasoff* statute requires the therapists to make a determination of whether the patient "has the apparent intent and ability to carry out such a threat" before the therapist's duty to warn the victim is initiated.[119] Other jurisdictions, contrarily, impose a duty to warn almost as a functional matter

113. Interestingly, California uses this term differently than the American Psychologist Association. Psychotherapy was previously a contentious area of the field, but has recently been validated by the APA. According to the APA, psychotherapy is the informed and intentional application of clinical methods and interpersonal stances derived from established psychological principles for the purpose of assisting people to modify their behaviors, cognitions, emotions, and/or other personal characteristics in directions that the participants deem desirable." The only guidance provided in California law regarding who constitutes a "psychotherapist" is found in the state's rules of evidence, which define psychotherapist the way that most states define the mental health professional. *Recognition of Psychotherapy Effectiveness*, AMERICAN PSYCHOLOGIST ASSOCIATION (August, 2012), http://www.apa.org/about/policy/resolution-psychotherapy.aspx (quoting Norcross, 1990, p. 218-220).

114. Cal. Civ. Code § 43.92. Arguably, subsequent interpretation of the language re-expanded when the duty kicks in. *See* Barry v. Turek, 267 Cal. Rptr. 553, 555 (Cal. Ct. App. 1990) (interpreting this language to mean "whether [the plaintiff] has sufficiently shown that [the defendant] ought to have been aware that [the patient] presented a serious threat of physical violence").

115. Cal. Civ. Code § 43.92 (emphasis added).

116. National Conference of State Legislatures "Mental Health Professional's Duty To Warn" (Apr. 23, 2017), http://www.ncsl.org/research/health/mental-health-professionals-duty-to-warn.aspx. The other "Duty States" are: Washington, Idaho, Montana, Utah, Colorado, Arizona, Nebraska, Minnesota, Iowa, Missouri, Louisiana, Alabama, Tennessee, Kentucky, Illinois, Wisconsin, Michigan, Indiana, Ohio, Virginia, Pennsylvania, Maryland, Delaware, New Jersey, Massachusetts, Vermont, New Hampshire, and New York. *Id*.

117. Herbert & Young, *supra* note 18, at 277.

118. *Id*.

119. Idaho Code § 6-1902 (Lexis 2016).

whenever an explicit threat is made.[120]

2. Permission States

A second subgroup of jurisdictions are those which permit, but do not require, a therapist to breach the duty of confidentiality to warn a third party of the patient's violence.[121] A minority of sixteen states belong to this group, which provides much more discretion in the hands of the therapist.[122] A key variation within this group, however, is how much discretion the statute affords therapists.[123] In Illinois, for example, the therapist may disclose a patient's communications "when, and to the extent, in the therapist's sole discretion, disclosure is necessary to warn or protect a specific individual against whom a recipient has made a specific threat of violence."[124] The subgroup with statute's like Illinois' essentially provide therapists with the ability to breach confidentiality, while also providing immunity from third party claims when they chose to remain silent.[125]

On the other side of the spectrum, within this group, there are states that do not explicitly give discretion to therapists.[126] Therapists in these jurisdictions may not be able to escape liability to third parties because, although the language of the statutes is permissive, it is possible that courts may interpret this ambiguous language to impose some positive duty to warn when the therapist receives a threat of physical violence.[127]

3. Anti-*Tarasoff* Jurisdictions

The final group contains an even smaller group of states. In fact, only Nevada, North Dakota, Maine, and North Carolina have rejected a *Tarasoff* duty.[128] North Carolina has judicially eliminated the *Tarasoff* duty, whereas the remaining states do not have explicit *Tarasoff* rules, but strictly enforce confidentiality.[129] In these states, mental health

120. *See e.g.*, Mont. Code Ann. § 27-1-1102 (LexisNexis 2015) ("A mental health professional has a duty to warn of or take reasonable precautions to provide protection from violent behavior only if the patient has communicated to the mental health professional an actual threat of physical violence by specific means against a clearly identified or reasonably identifiable victim.").

121. Herbert & Young, *supra* note 18, at 278-79.

122. *Id*.

123. *Id*. Other states with similar statutes are Oregon, New York, and Texas.

124. Ill. Comp. Stat. Ann. Ch. 740, § 110/11(viii) (2015).

125. § 110/3.

126. Herbert & Young, *supra* note 18, at 279. These states include Alaska, Connecticut, the District of Columbia, Florida, Rhode Island, and West Virginia. *Id*.

127. *Id*.

128. *Supra* note 116.

129. *See* Gregory v. Kilbride, 565 S.E.2d 685, 692 (N.C. 2002) (specifically not recognizing

professionals are forced to make judgments about whether to warn potential victims, attempting to balance their obligation to keep their client's information confidential with the fear of a potential lawsuit from a victim of their patient.

B. Implications of Tarasoff *Laws and the Need for Consistency*

The drastic interjurisdictional variance of *Tarasoff* laws is cause for concern. First, upon the recognition that states codified some version of the *Tarasoff* to achieve some specific policy aims,[130] one question necessarily results: which state has the correct policy aim?[131] *Tarasoff* statutes govern matters of life or death, and it is consequently of the upmost importance to determine which policy aim promotes the most good. This inquiry dictates another serious inquiry—how to measure the success of the *Tarasoff* statutes. The number of deaths *Tarasoff* has prevented is, as a practical matter, impossible to quantify;[132] however, whether the implementation of a duty to warn effected the homicide rate of the respective state has been studied.[133] The results suggest that *Tarasoff* laws may actually be counterproductive to the goal they set out to achieve.[134] In fact, one researcher found that imposing a mandatory duty to warn on mental health professionals is associated with a five percent increase in the homicide rate.[135] Therefore, the majority position imposing mandatory reporting may not necessarily represent the most successful legislation.

Yet, another significant practical concern that cannot be overlooked is the effect of the ambiguous and inconsistent *Tarasoff* laws on the day-to-day practices of mental health professionals. Foremost criticisms against *Tarasoff* laws are questions regarding therapists' ability to determine whether a patient is indeed "dangerous" and the corresponding risk of false positives.[136] While some studies suggest

Tarasoff duty to protect in a case where a patient made an explicit threat to murder his wife and himself in the thirty-six hours he was with his therapist leading up to the deaths).

130. Ronald D. Richards Jr. and Madhvi P. Richards, *A Tale of Two States: Beware of Tarasoff Extension for Hearsay Communications,* 2(5) PSYCHIATRY (EGMONT) 40-6 (2005).

131. Herbert & Young, *supra* note 18.

132. Griffin Edwards, *Doing Their Duty: An Empirical Analysis of the Unintended Effect of Tarasoff v. Regents on Homicidal Activity*, 57 J. LAW & ECON. 321 (2014) (explaining that his results may be exaggerated if *Tarasoff* does prevent some murders, but unable to specify that effect).

133. *Id.*

134. *Id.*

135. *Id.*

136. Vanessa Merton, *Law and Psychiatry Part II: Confidentiality and the "Dangerous" Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 EMORY L.J. 263, 266-68 (1982); *but see* Mossman, *supra* note 91, at 570 (introducing the argument that it is better to have ten people be detained due to false warnings rather than one person be murdered because of a "false negative").

therapist feel confident in their ability to assess this risk, others present this as a serious downfall to *Tarasoff* laws.[137]

A secondary source of discomfort among therapists caused by *Tarasoff* laws is a sense of infringement on their professional judgment.[138] Specifically, therapists in strict jurisdictions find the constraint *Tarasoff* laws impose on their discretionary abilities in how to deal with patients who are "dangerous" to be unnecessarily limiting.[139] It cannot be meritoriously argued that therapists in mandatory warning jurisdictions are more competent in making this determination; thus, imposing this requirement on only some therapists is justifiably seen as an injustice. The variation in laws produces an element of unpredictability that mental health professionals must endure, especially in those jurisdictions that have not clearly codified the duty.

Lastly, the effects of the inconsistent *Tarasoff* laws on the relationship between patients and their therapists must be acknowledged. In fact, it is the degradation of this relationship that is posited as the reason why mandatory warning states have an increased homicide rate.[140] The same unpredictability faced by therapists because of the ambiguously codified duties will necessarily effect their patients, as well. The symptoms of the disorderly state of the law are these complications and to resolve the problem, it is vital to address not only the symptoms, but the root cause. The remainder of this article posits that the root cause of the inconsistent *Tarasoff* laws is the defective legal reasoning utilized in *Tarasoff* itself.

IV. ARGUMENT

Though granularly analyzing the legal reasoning behind a decision may appear to have theoretical implications only, *Tarasoff* demonstrates the palpable effects that a mishap in analysis can have. This section sets out those missteps of the *Tarasoff* court in finding that Poddar's therapist was subject to liability because of the murder of Tatiana Tarasoff. It then argues that the court's failure to adequately address the

137. *See e.g.*, Givelber, Bowers & Blitch, *supra* note 102 ("Thus, therapists appear to believe that there are objective professional standards for evaluating dangerousness or, at a minimum, that dangerousness is a little like hard core obscenity in that they 'know it when they see it,' even if they can't define it."); compare to Merton, *supra* note 136 ("Conceding the low reliability and questionable validity of psychiatric diagnoses—what detractors have called psychiatric 'labels'—some psychiatrists maintain that susceptibility to error is even more pronounced in their prognoses, and most problematic of all when their task is the prediction of violent behavior").

138. Merton, *supra* note 136 ("What seems most disturbing to the psychiatrists who oppose the *Tarasoff* doctrine, however, is not just their potential liability for wrong choices, but the infringement on their professional discretion to make such choices.").

139. *Id*. at 304-06.

140. Edwards, *supra* note 132.

elements of causation and duty produced an insufficient basis for the subsequent codifications of the duty found in *Tarasoff*. This section accomplishes this by taking the *Tarasoff* reasoning to its logical ends.

A. What Tarasoff *Got Wrong*

There are two main flaws plaguing the *Tarasoff* decision. First, this section argues that the opinion was erroneous due to the absence of a discussion on the element of causation. Secondly, it posits that the court's analysis on the element of duty was, at best, incomplete.

1. Causation Analysis

Perhaps the most defective part of the court's opinion in *Tarasoff* is what is absent from it. Despite the court establishing that "Plaintiffs can state a cause of action against defendant therapists for negligent failure to protect," it failed to discuss one of the four elemental parts to a typical claim for negligence.[141] Plaintiffs are typically required to prove that the defendant's misconduct was both the "but-for" and the "proximate" cause of the harm;[142] however, this causation requirement was overlooked for the plaintiff in *Tarasoff*.

Whether causation could have been proved by the plaintiff in *Tarasoff* is dubious. To conclude, notwithstanding the therapist's failure to warn Tatiana or her family, that the murder would have never happened is speculative. It was entirely feasible that the therapist's warning would have been unsuccessful in preventing the horrific murder. Yet, the court replaced this "but-for" causation analysis with a discussion of whether the victim was a foreseeable plaintiff and rested its decision almost entirely upon the affirmative answer to that question. To create a new tort that departs from settled law and foregoes a basic tenet of the underlying law without any justification was a questionable judicial leap.

Perhaps an inclusion of Justice Andrew's analysis of proximate cause would have provided more stability to *Tarasoff* laws. As previously established, Justice Andrews held that a determination of duty was an improper basis to limit liability; instead, under his method, proximate cause provided a more tangible method to deny a plaintiff's claim. As will become clear when this section takes *Tarasoff* to its logical ends, a limit on the duty to protect third persons was the key element missing in the decision. Rather than assuming that this element was met, requiring

141. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 349 (Cal. 1976).

142. *Supra* Part II(A)(3).

the plaintiff in *Tarasoff* to prove that the therapist's failure to take reasonable care in protecting Tatiana was the cause of her death was a potential limiting factor on liability. Yet, the court failed to engage in any discussion of causation, establishing precedent for future claims to similarly ignore this essential element of negligence.

2. Duty Analysis

In *Tarasoff*, the dispositive issue was whether Poddar's therapist owed a duty to warn Tatiana of her impending murder; therefore, the bulk of the opinion was focused on duty. As mentioned previously, there are many ways to perceive this intangible element.[143] The *Tarasoff* court adhered to the majority approach, embodied by Justice Cardozo's description of the term in *Palsgraf*, which described duty as the "sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."[144] Therefore, the court perceived duty as the chief way to limit the liability of defendants in a negligence claim.

The court departed from the "general principle" that a person has no duty to control the conduct of another person, or to warn of that person's conduct.[145] To justify the parting from well-settled law that this duty existed only when the defendant had a special relationship between both the potential victim and dangerous person, the court utilized various tactics, some less persuasive than others. In doing so, the court highlighted that other jurisdictions have held "that the single relationship of a doctor to his patient is sufficient to support the duty to exercise reasonable care to protect others against dangers emanating from the patient's illness."[146]

The court found most persuasive a North Dakota case involving a "dangerous mental patient." There, the Veterans Administration ("VA") placed a man whom they knew to be dangerous to work with a farmer, but failed to warn the farmer of the man's mental health background.[147] The farmer allowed the man to use his car, which the man used as transportation to kill his wife.[148] The North Dakota Court found that the VA breached a duty notwithstanding the lack of a special relationship between the VA and the wife.[149]

143. *Supra* Part (II)(A)(1).
144. *Tarasoff*, 551 P.2d at 342 (*quoting* William L. Prosser, LAW OF TORTS 3d., 332-33 (1964)).
145. *Id*.
146. *Id*. at 344.
147. *Id*.
148. *Id*.
149. *Id*.

This case is easily distinguishable from the facts of *Tarasoff*. Most importantly, the VA did not have a duty to warn the wife of her potential danger; rather, the VA was negligent in failing to inform the *farmer* of the patient's violent tendencies.[150] The VA placed the patient in a situation where the risk that he would cause great harm was greatly increased, and failed to mitigate the risk they created.[151] While there may have been no special relationship between the VA and the victim, there arguably was a special relationship between the VA and the farmer, which was the foundation of the VA's duty to warn the farmer.[152]

In *Tarasoff,* however, the therapist had no role in creating a risk of harm to a victim. The recipient of the warning was different in these two cases. In *Tarasoff,* the required warning was from the therapist to the victim, Tatiana, or a family member. In the North Dakota case, the warning should have gone to the farmer who the VA placed the dangerous man with. Thus, the court's reliance on this case was unpersuasive and did not provide sufficient justification for the departure from the previously held limitation on duties to third persons.

Beyond a subsequent cite to a law review article, the court provided no further legal justification for this unprecedented expansion of duty.[153] Despite recognizing that duty is a compilation of policy considerations, the court failed to discuss the previous policy justifications behind limiting the duty to control third persons to situations where there exists a special relationship between the defendant, the victim, and the dangerous person.

Furthermore, the court did not grant sufficient validation to the American Psychiatric Association's ("APA") policy concerns regarding the expansion of a therapist's duty. Instead, the court attempted to alleviate qualms regarding a therapist's ability to correctly identify dangerous patients by explaining that requiring a therapist to assess the dangerousness of a patient was the same standard other doctors are held to in diagnosing any other physical disease.[154] The court thus concluded that a therapist may avoid liability merely by exercising the reasonable care.[155]

Critics of *Tarasoff* suggest that the California Supreme Court was in

150. Merchs. Nat'l Bank & Tr. Co. v. United States, 272 F. Supp. 409 (D.N.D. 1967).

151. *Id.*

152. *Id.*

153. *Tarasoff*, 551 P.2d 334. "In their summary of the relevant rulings Fleming and Maximov conclude that the 'case law should dispel any notion that to impose on the therapists a duty to take precautions for the safety of persons threatened by a patient, where due care so requires, is in any way opposed to contemporary ground rules on the duty relationship.'" *Id.*

154. *Id.*

155. *Id.*

no position to evaluate the APA's *amicus* brief due to its lack of clinical or specialized knowledge about the inner-workings of the relationship between a therapist and a client.[156] Others have argued that the court oversimplified the reality of psychological disorders by simply dichotomizing the question of dangerousness.[157] Still, other analysts have identified practical differences between other medical diagnoses and dangerousness that cast doubt over the court's analysis.[158] The medically technical issues are interesting and pose a serious complication to the courts' reasoning, but are beyond the scope of this article, which purports to focus on the legal and analytic issues inherent to *Tarasoff.* The court's elementary comparison between mental health and physical health professionals was also plagued by legal and analytic implications, as well. Taking *Tarasoff* to its logical ends illuminates the flaws of the decision.

3. Logical Extensions of the *Tarasoff* Duty

Tarasoff stands for the general proposition that when a special relationship exists, a person has a duty to take reasonable steps to prevent the misconduct of that person if that misconduct will likely inflict harm to a third party. To demonstrate the potentially endless liability that the espousal of duty found in *Tarasoff* could produce, it is instructive to apply the analysis to similar situations. Imagine: a patient with severe visual impairment tells an Optometrist that he intends to drive his friend in the waiting room without wearing his glasses; a patient tells a doctor about plans to operate heavy machinery on sleep medicine; a drunk bar patron forewarns the bartender that she anticipates driving a friend home. In each of these examples, *Tarasoff* suggests that the optometrist, doctor, and bartender owe a duty to the third party to

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156. *See, e.g.,* Marin Roger Scordato, *Post-Realist Blues: Formalism, Instrumentalism, and the Hybrid Nature of Common Law Jurisprudence*, 7 NEV. L.J. 263, 295 (2007) ("The judges may have no direct experience whatsoever with psychiatrists or therapists, or their patients, or the therapeutic process. Worse still, they personally may have had some direct personal experience with therapists and psychiatric therapy and, as a result, be tempted to over-extrapolate from this very specific personal experience to therapists and patients and therapy in general. Moreover, this utterly uncertain and wholly random possession of specialized knowledge and experience regarding the activity affected by the legal doctrine at issue characterizes as much the attorneys who develop and deliver the arguments to the court as it does the judges who evaluate those arguments and ultimately decide.")

157. Mossman, *supra* note 91, at 544 ("Tarasoff carries this dichotomization beyond the realm of facts about the world - a patient either does or does not commit violence, a therapist either takes or does not take protective action - to the realm of therapists' knowledge about those facts.").

158. For example, there is less of a defined "standard of care" amongst mental health professionals as compared to other medical fields. Furthermore, often times dangerousness does not come with outward physical symptoms like many other diseases. Cynthia Grant Brown & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549, 575 (1996).

take reasonable steps to prevent the specific threatened harm.

Nowhere is the reasoning of *Tarasoff* more impactful than in the context of sexually transmitted diseases, particularly for doctors of patients with Acquired-Immune Deficiency Syndrome (AIDS). Utilizing the rationale in *Tarasoff,* some plaintiffs have successfully sued the doctors of the individual from who they contracted the disease.[159] One of the earliest of these cases came out of California, when a doctor failed to inform the patient, herself, of her condition and she was therefore unaware of the danger she posed to others by engaging in sexual relations.[160]

As this liability has been structured on the framework established in *Tarasoff,* it is unsurprising that the state laws for disclosing HIV/AIDS status is similarly in disarray.[161] For example, Massachusetts prohibits the disclosure of a patient's AIDS status[162] whereas Maryland permits the disclosure only if the affected patient refuses to inform sexual partners of their condition.[163] Interestingly, and in stark juxtaposition to its stance on AIDS disclosure, Massachusetts is a mandatory reporting state for mental health professionals who perceive a threat to a third-party's life by a patient.[164]

One final example hones in on the disconcertingly ambiguous limitation on the *Tarasoff* duty. As described in the introduction, after James Holmes murdered innocent movie-goers in Colorado, his therapist faced liability for breaching the duty she allegedly owed to her patient's victims. At the time of the shooting, the Colorado *Tarasoff* statute imposed a duty on mental health professionals to warn threatened individuals and law enforcement only when the patient made an explicit and specific threat.[165] At the criminal trial of James Holmes, his

159. Reisner v. Regents of Univ. of Cal., 37 Cal. Rptr. 2d 518 (Cal. Ct. App. 1995) (The patient contracted the disease many years prior when she was mistakenly given tainted blood in a blood transfusion. She died years later after engaging in a sexual relationship and transmitting the disease. The patient's sexual partner subsequently filed suit against the doctor.); *see also* DiMarco v. Lynch Homes-Chester Cnty, 559 A.2d 530 (Pa. Super. Ct.1989) (with substantially same facts and resulting liability for the doctor).

160. *Reisner*, 37 Cal. Rptr. 2d 518.

161. *See generally*, Jacquelyn Burke, *Discretion to Warn: Balancing Privacy Rights with the Need to Warn Unaware Partners of Likely HIV/AIDS Exposure,* 35 BOSTON COLL. J. OF LAW & SOC. JUSTICE 1-5(discussing the issues of Massachusetts's duty to warn laws).

162. "A facility, as defined in section 70E, physician or health care provider shall not . . . disclose the results of such test to any person other than the subject of the test without first obtaining the subject's written informed consent." Mass. Ann. Laws Ch. 111, § 70F (Lexis 2017).

163. Md. Code Ann. § 18-337 (2010). If an HIV-positive individual refuses "to notify the individual's sexual and needle-sharing partners, the individual's physician may inform the local health officer and/or the individual's sexual and needle-sharing partner of: (1) The individual's identity; and (2) The circumstances giving rise to the notification." *Id*.

164. Ann. Law. Mass. Ch. 123, § 36B (1989).

165. Colo. Rev. Stat. § 13-21-117 (superseded by amendment Jan 1, 2012). A therapist is free

therapist, Linda Fenton, testified that Holmes' threats were not sufficiently specific to prompt any preventative actions;[166] nevertheless, she was forced to fight a lawsuit alleging a violation of the statute.[167] This example demonstrates that imposing a limitation on duty based on the specificity of the threat does not provide a clearly defined line of where a therapists *Tarasoff* duty ends.

Colorado legislatures apparently agreed, and in response to the Aurora shooting, amended its law.[168] In a vain attempt to provide more clarity, the statute was amended to *expand* a therapist's duty to warn when threats include less specific persons who are "identifiable by their association with a specific location or entity."[169] As previously discussed, one way to prove a breach of duty in a negligence claim is to prove that a statute was violated.[170] Colorado's statute now does not only expose therapists to liability if they fail to accurately predict the dangerousness of a patient, but also if they fail to single out persons "identifiable by their association." Knee-jerk legislation that expands a therapist's duty to warn is likely to exacerbate the practical issues discussed previously, especially considering amendments such as these are not a product of sound legal reasoning but rather an explicit response to tragedy.[171]

Proponents of the extended *Tarasoff* duty, such as the Colorado legislature, cling to the notion that the duty-to-warn law promotes public safety; however, empirical research casts doubt on the efficacy of *Tarasoff* statutes. Other proponents rely on alternative barometers to suggest a limit on the duty created in *Tarasoff.* They argue that in the examples of the optometrist or bartender, the threat is not as likely to produce death to a third party at the rate that a threat against life by a

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from liability except "where the patient has communicated to the mental health care provider a serious threat of imminent physical violence against a specific person or persons. When there is a duty to warn and protect under the circumstances specified above, the duty shall be discharged by the mental health care provider making reasonable and timely efforts to notify any person or persons specifically threatened, as well as notifying an appropriate law enforcement agency or by taking other appropriate action including, but not limited to, hospitalizing the patient." *Id*.

166. Ann O'Niel, *Psychiatrist: Holmes thought 3-4 times a day about killing*, CNN (April 25, 2017), http://www.cnn.com/2015/06/16/us/james-holmes-theater-shooting-fenton/.

167. Tom McGhee, *Theater shooting victim's wife sues Holmes' psychiatrist*, DENVER POST (April 25, 2017), http://www.denverpost.com/2013/01/15/theater-shooting-victims-wife-sues-holmes-psychiatrist/.

168. *"House Proposal Would Expand Duty to Report Threats"* DENVER POST (April 26, 2017), http://www.denverpost.com/2014/03/05/house-proposal-would-expand-duty-to-report-threats/ (The Sponsor of the bill, representative Jovan Melton said, "So therefore if a threat is made toward one of our schools, or a theater, or some other public place, the therapist will then be able to have the tools to work with law enforcement and really protect our public interests and public safety.").

169. Colo. Rev. Stat. § 13-21-117.

170. *Supra* Part *(*II)(A)(2).

171. *Supra* note 168.

therapist's patient does, and the duty to warn would consequently not be triggered.[172] Alternatively, it may be argued that in *Tarasoff,* the court's reference to the "sufficient involvement" of a therapist in the lives of their patient as grounds to establish the duty is a limiting factor which would prevent the expansion of duty beyond a therapist.

However, it is difficult to imagine creating a legal standard grounded in either of the likelihood of death or the involvement of the parties. These limits are not only arbitrary and lack definition, but they also seem to require an offensively intense inquiry into the relationship between a patient and doctor. Colorado's recent expansion of its *Tarasoff* law further demonstrates that limiting therapists' duty according to the specificity of their patients' threat is a malleable and unreliable standard. Applying *Tarasoff* in other contexts demonstrates that there is no clear end to the duty it created; yet, looking back at the opinion provides the source of the issue.

B. The Root Cause

The subsequent codifications of a therapist's duty to potential victims of their patients have roots in the *Tarasoff* opinion.[173] Therefore, the statutes themselves stand on unsteady ground as a consequence of spawning from an opinion that suffers severe gaps in legal reasoning. Specifically, it is the court's failure to address causation and its inability to establish a feasible limit on the duty, which has created the serious discord among states as to when a therapist is liable to third parties.[174] When statutes cannot be grounded in sound legal principles and there is no clear policy goal, the result is, as demonstrated by the disarray of *Tarasoff* laws, chaos.

VII. CONCLUSION

Though *Tarasoff* laws directly deal with the monetary liability imposed upon a therapist, the implications of these laws are ultimately matters of life and death. Therefore, the justifications behind them must be carefully scrutinized. Unfortunately, neither the legal reasoning nor

172. Jeffrey E. Barnett, *Ask the Ethicist: Is there a Duty to Warn When Working with HIV-Positive Clients?,* THE SOCIETY FOR THE ADVANCEMENT OF PSYCHOTHERAPY, http://societyforpsychotherapy.org/ask-the-ethicist-duty-warn-working-hiv-positive-clients/.

173. *See, e.g.*, Timothy E. Gammon & John K. Hulston, *The Duty of Mental Health Care Providers to Restrain Their Patients or Warn Third Parties*, 60 MO. L. REV. 749, 751-753 (1995) ("Missouri courts have relied on the reasoning and conclusions in Tarasoff to formulate Missouri law governing the duty a psychiatrist has to warn potential victims.").

174. *Supra* Part (II)(A).

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the practical goals which purport to validate *Tarasoff* laws withstand that scrutiny. The California Supreme Court's rationalization for imposing liability on the therapist in *Tarasoff* not only lacked any discussion of causation, a necessary element of any tort, but also failed to provide convincing justification for the expansion of the duty it created. Worse still, it did not provide any feasible guidance on where the limit of the new duty exists. The consequences of these flaws are imminent.

This article does not set out to conclusively solve the issues that have been created by *Tarasoff*, nor does it purport to adopt one state's policy as the best. Rather, this article's purpose was to argue that the root cause of the symptomatic disarray is the faulty legal reasoning utilized in *Tarasoff*. Going forward, if some coherence among the fifty jurisdictions of the United States is to be found, it is imperative to employ sound legal reasoning to establish the duty of therapists to protect third parties against the violence of their patients.

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