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# The *Tarasoff* Dilemma in Criminal Court

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**ABSTRACT:** The duty to protect, or *Tarasoff* duty, has been conceptualized as arising solely in the context of a clinical setting. A recent California Supreme Court ruling in *People v. Clark* adds legal, clinical, and ethical dilemmas to the oftentimes contentious *Tarasoff* issue.

Though the *Tarasoff* issue is but a minor legal point in *Clark*, a possible consequence of *Clark* is that a *Tarasoff* warning could be deemed nonconfidential and admissible in a criminal trial. Psychotherapists could therefore be testifying in criminal courts as prosecution witnesses. While the possibility of a chilling effect on patients' disclosure of violent ideation in the context of psychotherapy first caused apprehension after the California Supreme Court's 1976 decision in *Tarasoff v. Regents of the University of California*, this same Court's ruling in *People v. Clark* some 14 years later may ensure that this fear finally becomes realized.

**KEYWORDS:** psychiatry, jurisprudence, privacy, doctor-patient privilege, duty to protect, testimony, dangerousness, confidentiality, privilege, ethics, psychotherapy

The duty to protect, or *Tarasoff* duty, has been conceptualized as arising from the psychotherapist-patient relationship in the context of a clinical setting. The second California Supreme Court *Tarasoff v. Regents of the University of California* decision of 1976, considered the ultimate *Tarasoff* decision, states that this duty is triggered when a psychotherapist learns that his or her patient poses a serious danger of foreseeable physical harm to an identified person [*1*]. The discharge of the *Tarasoff* duty should involve appropriate clinical interventions to reduce the degree of danger as well as warning any persons targeted by the patient [*2*].

Since the 1976 California Supreme Court's *Tarasoff* decision, courts in several other states have ruled similarly. These decisions, popularly known as *Tarasoff* progeny or *Tarasoff*-type cases, have for the most part expanded the domain of the duty to protect [*3*]. The escalation of the scope of the *Tarasoff* duty prompted several states to enact legislation limiting the civil liability of psychotherapists whose warnings to potential victims failed to prevent actual harm [*4*].

The recent California Supreme Court case of *People v. Clark* concerns a forensic examiner in a criminal case in which the *Tarasoff* duty became both a clinical and legal issue [*5*]. We briefly summarize *Clark* before discussing some of the possible ethical and legal implications of this decision with respect to the *Tarasoff* duty.

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**The Case of Mr. C**

Mr. C, the defendant, was a 42-year-old white male who on 6 Jan. 1982 threw gasoline into the home occupied by Mr. and Mrs. G and their infant daughter. Mrs. G, a licensed social worker and marriage and family counselor, had been Mr. C's psychotherapist. Mr. C ignited the gasoline vapors with a highway flare. In the ensuing inferno, Mr. G suffered second and third-degree burns over 90% of his body and died six days later. Mrs. G suffered serious burns resulting in the loss of her fingers and nose. She required ten months of hospitalization. Rescued by a neighbor, the G's infant daughter escaped physical injury.

As is the case with many potential capital cases, especially those in which defendants have psychiatric histories, defense counsel obtains psychiatric consultation to assist in preparation for the guilt and penalty phases of California's bifurcated trial. One of the forensic examiners was Dr. W, a forensic psychologist, who was appointed confidentially at the request of defense counsel under both the attorney-client privilege [*6*] and the psychotherapist-patient privilege [*7*] statutes of California.

Though Mr. C was not a disciplinary problem during childhood, the defendant had always been a "closed" person and did not discuss his thoughts with family or few close friends. Two significant events occurred during his undergraduate college career. The first happened in 1966 when he fired two shots at other drivers on the freeway in order to experience the emotions of a person who kills. The second occurred in 1967 when Mr. C burned an automobile because his psychotherapist at the time objected to his dating of another group therapy patient. Nevertheless, Mr. C graduated summa cum laude from Bradley University in January 1967 and then briefly attended graduate school in English literature. After marrying in 1968, he left school to become an insurance underwriter and discontinued psychotherapy.

Mr. C reentered psychiatric treatment in 1979 when he and his wife separated and subsequently divorced. At that time, Mrs. G treated Mr. and Mrs. C as a couple for their marital problem. Mrs. C then sought individual therapy from another therapist, while Mrs. G continued to treat Mr. C individually, first with regard to the marriage, but later, after the marraige could not be saved, for his own emotional difficulties. Mrs. G became the first person with whom Mr. C felt comfortable sharing his private thoughts, and he consequently became extremely dependent upon her.

Mr. C increased the number of sessions with Mrs. G to thrice weekly. He accepted a promotion that entailed a move to Atlanta in 1980, but left that job almost immediately to return to Los Angeles and therapy with Mrs. G. In addition to the sessions, Mr. C had made numerous "emergency" telephone calls to Mrs. G for her advice. As his reliance on her increased, he began to develop "rape fantasies" about both his ex-wife and Mrs. G. Mrs. G encouraged him to discuss these thoughts, assuring him that she would not reject him regardless of what he revealed in treatment. In his diary he recorded feeling "terrified" at that time that Mrs. G would terminate the therapy. Mr. C's rape fantasies gradually shifted to Mrs. G alone, and she continued to encourage its exploration in sessions.

In October 1981, Mr. C expressed a desire to rape Mrs. G, stood up, and started to cross the room toward Mrs. G, before responding to her remonstration by returning to his seat. Mrs. G continued the session and elicited a promise from him that in the future he would call her to warn her if he felt that he might act on his wish to rape her. However, later that evening and the next day by telephone, Mrs. G told Mr. C that continuing therapy would not be in their best interest. Mrs. G then sent Mr. C two letters: the first terminating the therapeutic relationship and the second explaining her decision. Mr. C was nonetheless uncertain as to the specific reasons. Mr. C made several attempts to contact Mrs. G by telephone and in person to answer his questions. When these efforts proved unsuccessful, Mr. C pursued Mrs. G by car. He was able to force her car to the

side of a freeway, where he used an ice axe to break the window in an attempt to pull her from the car. However, other motorists interrupted this attack. On 19 Nov. 1981, Mr. C raped his ex-wife after using a false pretence to enter her residence.

In Mr. C's mind, Mrs. G was the first person whom he had absolutely trusted and who had now broken her promise that she would never reject him. He became obsessed with a need to show her how much she had hurt him, and he decided to do so by causing her to suffer similar emotional pain. Mr. C considered suicide and plans of killing strangers and mailing their severed heads to Mrs. G, with an explanatory note attributing the reason for his actions as her termination of therapy. Mr. C also thought of killing Mrs. G's child. In mid-December 1981, Mr. C decided that he should kill Mrs. G's husband in her presence. By early January 1982, Mr. C was receiving psychotherapy from a male therapist, Dr. S. When Dr. S told him that Mrs. G would not talk with him, he decided to kill Mr. G.

The confidentially retained defense psychologist, Dr. W, evaluated this history during Mr. C's incarceration in jail while awaiting trial. Mr. C told her of his plan to kill both Mrs. G's brother and the employer of Mr. C's ex-wife. Mr. C revealed this information without having had a *Miranda*-type warning given to him in specific reference to the existence of a *Tarasoff* duty. When Dr. W informed Mr. C that she might have to reveal his threats to others besides his attorney, Mr. C expressed satisfaction that this would cause the potential victims to worry. Several months later, Dr. W's attorney notified the identified potential victims in order to satisfy what Dr. W construed as her *Tarasoff* duty.

Mr. C was found guilty in his trial of having committed rape of his ex-wife; first-degree murder of Mr. G, with two special circumstances; attempted murder of Mrs. G and her daughter; and arson. In California, a finding of at least one special circumstance renders a defendant eligible to receive the death penalty during sentencing.

During the first penalty phase of the trial to determine Mr. G's sentence, the judge allowed the testimony of Dr. W about Mr. C's disclosure of homicidal threats. The judge ruled that an exception to the psychotherapist-patient privilege had occurred [*8*] and that the defendant had waived his privilege by expressing the threats. Though the trial judge overruled Mr. C's effort to invoke attorney-client privilege in order to prevent Dr. W from testifying about his homicidal threats, the judge did not rule that the defendant had waived this privilege. In response to a question about whether Mr. C had thoughts of killing anyone, Dr. W testified that Mr. C told her that if he were not in jail he would like to kill two individuals—his ex-wife's employer, whom he believed had encouraged her to leave him, and Mrs. G's brother, whom he believed had encouraged Mrs. G to terminate his therapy. Further, Dr. W testified that Mr. C stated that if he were sent to prison he would consider finding a prisoner who was about to be released and arrange for the killings to take place. However, at trial, Mr. C had testified that he had no true intent to harm anyone.

During the first penalty phase trial, to avert the death penalty, the defense strategy involved showing that Mr. C had a borderline personality disorder and that Mrs. G had provided incompetent therapy. Those factors could have contributed to the commission of the instant offense and perhaps he perceived by the jury as a mitigating factor, favoring a sentence of life imprisonment without the possibility of parole. The jury could not reach a consensus about whether to recommend the death penalty. After the first penalty phase trial, Mr. C sent threatening letters to Mrs. G's relatives. A second penalty phase jury was then impaneled.

Prior to the second penalty phase trial, the court granted Mr. C's request for self-representation. For the second penalty phase trial, Mr. C did not rely on psychiatric testimony to demonstrate the possible mitigating factor of incompetent therapy by Mrs. G. Instead, Mr. C stipulated that Mrs. G provided him with the "highest possible quality of counseling" and offered other laudatory remarks about Mrs. G's handling of the

therapy, indicating that she played no part in the instant offense. This time the jury found that Mr. C qualified for the death penalty.

As with all death sentences, there was an automatic review by the California Supreme Court. While there were several contentions of legal error raised by the defense, only those dealing with Mr. C holding the privilege about his homicidal threats disclosed to Dr. W are relevant to this paper's discussion of the *Tarasoff* duty. In the text of the decision, four of the seven justices (J. Eagleson, C. J. Lucas, J. Panelli, and J. Kennard) rejected the defense argument that Mr. C's revelation of homicidal thoughts towards identified third parties to Dr. W remained confidential for trial, despite their revelation by Dr. W. The justices ruled that once confidential information is disclosed to others (in this case, the identified potential victims) in a nonprivileged communication, it is no longer confidential. The California Supreme Court agreed with the defense contention that the attorney-client privilege claim over the defendant's expression of homicidal intent remained intact, because California law [9] only allows waiving this 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." The court did not believe that Mr. C's statement of intent to commit a crime qualified as an exception to the attorney-client privilege. Nevertheless, the Court ruled that these statements were only a minor aspect of the overwhelming evidence of aggravating factors and were therefore not prejudicial, even if erroneously admitted. The three justices (J. Mosk, J. Broussard, and J. Kaufman), who did not concur with the majority Court opinion, did not comment on either the psychotherapist-patient or attorney-client privilege with regards to the admissibility of the psychologist's testimony about the defendant's homicidal threats.

After hearing all the arguments, the court found merit in the defense argument that one of the special circumstance findings was improper and reversed it. However, because the other special circumstance was upheld, the death penalty, as well as all other trial court findings, were affirmed.

## Discussion

*Clark* raises several dilemmas, including the following:

1. Does the *Tarasoff* duty take precedence over confidentiality in a forensic setting?
2. What is the role of a *Miranda*-type warning prior to issuing a *Tarasoff* warning?
3. Does the *Clark* ruling apply to non-forensic (clinical) settings?

We will explore aspects of each of these dilemmas.

### *Confidentiality*

There have been no prior cases from which to assess the role of a duty to protect arising from a pretrial forensic psychiatric or psychological evaluation of a criminal defendant. In addition, there are no previous decisions involving the duty to protect when the traditional psychotherapist-patient relationship was not in effect. In *Clark*, Dr. W was confidentially retained by the defendant's counsel under the auspices of both the psychotherapist-patient and attorney-client privilege. Dr. W was not hired to provide treatment or other clinical interventions that are associated with our usual conception of the psychotherapist-patient relationship. Operating under both cloaks of secrecy, defense counsel reasonably expects that no adverse information will be available to the prosecution without the defense's authorization. In fact, since the attorney-client privilege in California has only one exception, it can be considered a stronger protector of confidentiality than the psychotherapist-patient privilege. In this sense, the attorney-client privilege encompasses all of the restrictions of the psychotherapist-patient privilege and more.

In *Clark*, the attorney-client privilege would seem to be more stringent, as the California Supreme Court held that the admission of information gathered through the process of a confidential forensic evaluation under the auspices of the attorney-client privilege was not admissible for purposes of the trial, despite having been previously publicized during a *Tarasoff* warning. *Clark* implies that, for forensic examiners appointed confidentially under only the psychotherapist-patient privilege, the *Tarasoff* warning and the reasons for issuing it would be admissible in court after the warning has been delivered.

Forensic examiners can be confidentially appointed under either or both the psychotherapist-patient privilege and the attorney-client privilege. The *Clark* ruling seems to suggest that if a defense attorney wants to ensure that the forensic examiner be immunized from testifying about a *Tarasoff* warning, then the forensic examiner should be appointed only under the attorney-client privilege. With this situation, even if a *Tarasoff* warning had been issued and no psychotherapist-privilege had been waived, the confidential nature of the attorney-client privilege would still be intact.

What is left unanswered is this question: when the forensic examiner is appointed only under the attorney-client privilege and not the psychotherapist-patient privilege, would the forensic examiner still be permitted to carry out his or her *Tarasoff* duty and be immunized from liability for breeching confidentiality? The *Clark* Court did not rule that a *Tarasoff* warning was impermissible in the context of a confidential forensic evaluation performed under both the attorney-client and psychotherapist-patient privileges. *Clark* also stated that only the holder of the attorney-client privilege (the defendant) can allow the *Tarasoff* warning to be admitted into evidence during trial.

### *Miranda-Type Warnings*

In *Clark*, it was mentioned that Mr. C was not forewarned about the existence of the *Tarasoff* duty prior to his disclosure of homicidal thoughts. However, the justices did not go further in addressing this oftentimes vexing dilemma of issuing warning about the potential uses of information obtained from an examination. Such warnings have also been called *Miranda*-type warnings because they are based upon the landmark United States Supreme Court case of *Miranda v. Arizona* [*10*]. *Miranda* outlines specific information that the police are required to provide to potential criminal defendants. While there is little guidance from the past on the use of a *Miranda*-type warning prior to issuing a *Tarasoff* warning in a capital case, we can find some guidance from considerations of *Miranda*-type warnings with respect to its use in capital case evaluations and its use prior to issuing a *Tarasoff* warning.

The United States Supreme Court in *Estelle v. Smith* [*11*] ruled that forensic examiners had to inform the examinee of the potential disclosure of the contents of the forensic evaluation during future courtroom proceedings. Discussing *Clark* in connection with *Estelle v. Smith*, Sharma and Silva raised possible Fifth-Amendment (self-incrimination) concerns when forensic examiners issue a *Tarasoff* warning on the basis of their evaluation without a prior *Miranda*-type warning [*12*]. However, while both *Estelle v. Smith* and *Clark* are capital cases involving pretrial psychiatric evaluations, they are fundamentally dissimilar. The major difference between the two cases is that the forensic examiner in *Estelle v. Smith* was appointed nonconfidentially in order to provide a pretrial evaluation of the defendant's competency to stand trial. Given that it was a nonconfidential appointment, psychiatric ethical considerations would make the obligation of informing a defendant of the limits of confidentiality clear. In *Clark*, the forensic examiner was appointed confidentially; and in such cases, the defendant should have been informed by both his attorney and the forensic examiner about the confidential nature of the evaluation. Another difference between *Estelle v. Smith* and *Clark* is that a Sixth-Amendment (right to counsel) violation was found in the former, while it clearly is not an issue in the latter.

Though Sharma and Silva suggest issuing a *Miranda*-type warning about the *Tarasoff* duty in order to minimize (legal) harm to the defendant in capital cases [*12*], their concern appears to be counterbalanced by the need to assure an unimpeded flow of information from the defendant to the attorney through the forensic examiner. Without full disclosure, the forensic examiner may not be able to elicit a true picture of the defendant and therefore not be able to provide the attorney with a complete, accurate assessment. Of course, even providing a warning about the *Tarasoff* duty may be pointless, as slippage, the decrease of the effect of a *Miranda*-type warning, can occur during forensic evaluations; and, certainly, slippage could easily occur when lengthy evaluations are performed, as when examining capital case defendants. Then, the dilemma of continuous "re-Mirandizing" the defendant will arise and cast the forensic examiner in the role a police officer rather than an expert witness appointed by defense counsel [*13*]. Deciding whether a *Miranda*-type warning should be given to defendants facing less serious non-capital charges is more problematic, as an ethical analysis concerning *Miranda*-type warnings about the *Tarasoff* duty in the ordinary clinical setting yields no straightforward solutions [*14*].

### *Clinical Issues*

What may be potentially most troubling about the *Clark* ruling is its extension and application to ordinary therapeutic situations. As mentioned, almost all *Tarasoff*-type situations arise in the therapeutic or clinical setting where there is no attorney-client privilege and only the psychotherapist-patient privilege is operative. Deleterious effects of a *Tarasoff* warning are possible since, for example, the warned third party may then be provoked into retaliating against the patient or the patient may be incited to attack the psychotherapist. Another dimension that warrants consideration is the legal harm that can be caused to one's patient as a result of a *Tarasoff* warning. The *Clark* ruling could conceivably allow a patient's psychotherapist (in California) to testify as a percipient witness if the patient later carried out his or her threat after a *Tarasoff* warning had been issued.

If psychotherapists were permitted to testify against their patients when a *Tarasoff* warning had been given to a harmed victim, some patients may withhold important information and miss the opportunity to reduce the threat of harm through treatment. While such a chilling effect upon the psychotherapeutic relationship had been raised after the *Tarasoff* ruling, there had not yet been any cases in which the patient in a criminal matter wished to exclude a *Tarasoff* warning from the courtroom proceedings. However, now that an actual case has been published, such a chilling effect may be possible. In fact, in the capital case of *People v. Wharton* [*15*], now pending before the California Supreme Court, the defendant's psychotherapists, who had provided a *Tarasoff* warning to the later victim of homicide, were permitted to be prosecution witnesses despite the defendant-patient's objections. Unless the legislature enacts corrective statutory changes or the California Supreme Court modifies its opinion in *Clark* that the psychotherapist-patient privilege does not prohibit the admissibility of a *Tarasoff* warning during a trial, defendant Wharton and future defendants will be exposed to legal harm when confidentiality is breeched twice: first at the time of the *Tarasoff* warning and second during the trial.

In their risk-benefit analysis, Sharma and Silva argue that the decision to issue a *Tarasoff* warning should be balanced against the possible legal harm to the defendant facing the death penalty [*12*]. They do not, however, further explore this problem. A utilitarian calculation using the *Clark* paradigm would suggest that breeching confidentiality in a bona fide *Tarasoff* situation does not pose major legal or ethical problems because the prevention of further physical harm is a legal as well as a moral priority. The second breech of confidentiality in the courtroom is part of a disturbing trend requiring psycho-

therapists to perform more social control functions beyond the traditional scope of their psychotherapist role [*16*].

As *Clark* now stands, psychotherapists can face uncomfortable conflicts when dealing with potentially violent patients. Decisions such as *Clark* could further dissuade psychotherapists from examining or treating these patients. An unspoken matter in *Clark* is the *Tarasoff* warning itself. The facts as given in *Clark* indicate that the *Tarasoff* warning took place several months after Mr. C disclosed the homicidal threats. Such a delayed warning reflects the clinician's ambivalence as well as the difficulty of determining a time limit within which the warning should be given. For example, should Dr. W have waited until Mr. C was either found not guilty and about to released from jail to warn the third parties or, if Mr. C was convicted, waited until he was in prison, since his murder plans involved himself if freed or if convicted hiring another inmate who was about to be released to do the killing? Or should Dr. W have issued an immediate warning upon discovering the homicidal plan?

Also what other alternatives could Dr. W have carried out instead of issuing a *Tarasoff* warning? *Tarasoff* does not require a warning, only that the identified potential victim be protected. Should Dr. W have alerted the jail mental health staff? Or does *Clark* infer that Dr. W should have informed Mr. C's attorney and let the attorney (and the American Bar Association) decide upon a course of action, since the attorney-client privilege seems to govern what information may be disclosed? Finally, there are no reported studies of the probability that an identified person will become the victim of physical harm perpetrated by the threatening patient. The cases that have come to our attention are the result of tort action filed by the injured party (or their heirs if they are killed). We do not learn of *Tarasoff* warnings that are issued when the identified third party is not the recipient of physical harm perpetrated by the patient. In addition, a study of the likelihood of a specifically targeted person becoming an actual victim did not yield sufficient data to make reasonably accurate predictions [*17*]. Thus, there is not yet the empirical research required to confirm the value of *Tarasoff* warnings.

## Conclusion

The recent California Supreme Court ruling in *Clark* has sparked legal, clinical, and ethical dilemmas in discharging the duty to protect through a confidentiality-breeching *Tarasoff* warning. The potential chaos propagated by the *Clark* decision strongly suggests that the scope of the *Tarasoff* concept should be limited to a duty to protect potential victims and not intrude into the criminal trials of our patients.

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