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"Tarasoff" Defendants: Social Justice or Ethical Decay?

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ABSTRACT: In 1976, the California Supreme Court ruled in *Tarasoff v. Regents of the University of California* that a duty to protect arises when a psychotherapist's patient poses a serious danger of physical harm to an identifiable third party. Discharging this duty by the issuance of a warning breaches the confidentiality of the psychotherapist-patient relationship. However, the potential benefit to society offsets the possible harm caused by the breach of confidentiality. Until recently, such warnings have served little purpose outside of possibly preventing harm. However, the cumulative effect of three recent California Supreme Court cases has been to permit the use of these confidentiality breaches in criminal proceedings to fulfill prosecutorial goals. Nonetheless, the cost of achieving social justice may be at the expense of other important ethical values for both the psychotherapeutic professions and society in general.

KEYWORDS: psychiatry, duty to protect, testimony, justice, ethics, privilege, dangerousness

Three recent decisions by the California Supreme Court in *People v. Clark* [*1*], *People v. Wharton* [*2*], and *Menendez v. Superior Court* [*3*] have heightened the potential for the further intrusion by the legal system into the psychotherapist-patient relationship in California. These decisions have allowed the prosecution to admit into evidence the so-called *Tarasoff* [*4*] or similar warnings and related clinical material into criminal proceedings.

In California, the psychotherapist's *Tarasoff* duty to protect [*4*], that arises when a psychotherapist's patient poses a serious danger of physical harm to an identifiable third party, may be discharged by warning that foreseeable victim and notifying the police [*5*]. While discharging this duty violates the confidentiality of the psychotherapist-patient relationship in order to avert harm to a third party by the psychotherapist's patient, the potential benefit to society by this breach of confidentiality has some ethical justification

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[6]. Subsequent to California's *Tarasoff* ruling, other states have also established a *Tarasoff*-type duty to protect [6,7].

The *Clark, Wharton,* and *Menendez* cases have departed from the original intent of the *Tarasoff*-generated breach of confidentiality of defusing an imminent danger to allowing the prosecution to call the psychotherapist as a witness in the criminal trial of the psychotherapist's patient at a time when the danger has passed. We have therefore classified such defendants as "*Tarasoff*" defendants because a *Tarasoff*-type situation arose that prompted the psychotherapist to breach confidentiality and this subsequently permitted the psychotherapist to testify for the prosecution.

In California, the legal procedure by which a psychotherapist becomes a prosecution witness involves two separate situations. First, the confidentiality cloaking the psychotherapist-patient relationship is breached when the patient poses a "serious" danger of physical harm to others and the psychotherapist discharges the duty to protect by notifying the intended victim [4,5]. Second, according to recent court decisions [1–3], the "dangerous patient" exception statute found in the California Evidence Code [8], negates the psychotherapist-patient privilege in cases where a *Tarasoff* or similar warning has been issued [2,3] so that the psychotherapist can now testify against the patient in a criminal trial. It should be noted that because the psychotherapist-patient privilege in California was enacted several years prior to the establishment of the duty to protect in *Tarasoff,* there had not been debate over the admissibility of private communications between psychotherapist and patient in a criminal trial until these recent court decisions.

The holder of the privilege is ordinarily granted control over the information exchanged in a confidential relationship, such as the psychotherapist-patient, physician-patient, attorney-client, or priest-penitent relationship, unless specific situations in which the privilege is automatically waived arise. In the case of the psychotherapist-patient privilege, the patient holds the privilege. California's "dangerous patient" exception statute negates the psychotherapist-patient privilege: "There is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger [8]." The apparent intent of the "dangerous patient" exception statute was to permit the psychotherapist to testify at civil commitment hearings while the danger posed by a patient is presumably ongoing and necessitates continued involuntary hospitalization. Nonetheless, the "dangerous patient" exception statute appears to have expanded in applicability to the first step of the process that allows the psychotherapist to waive the psychotherapist-patient privilege with a dangerous patient in order to discharge a *Tarasoff*-type duty [9]. The *Wharton* and *Menendez* cases have rendered this statute applicable to criminal trials and in situations where the danger posed by the defendant-patient has been neutralized, at least while they are in custody and awaiting trial.

We present short synopses of the three recent California cases. We follow with a discussion of the potential sequelae of these cases for the psychotherapeutic professions, for the legal system, and for society in general.

People v. Clark

Mr. Clark was arrested for having set fire to the home of his former psychotherapist. As a result, the psychotherapist's husband died and she suffered considerable burn injuries. Mr. Clark was charged with having committed capital murder, and if convicted he would be either sentenced to death or to life in prison without the possibility of parole.

Defense counsel retained several expert witnesses, including a clinical psychologist. The psychologist's task was to determine if there was any psychiatric or psychological

evidence to assist in Clark's defense. The psychologist was confidentially retained under both the attorney-client and psychotherapist-patient privileges. During his evaluation, Clark told the psychologist of his plan to kill two persons—one whom he believed was responsible for the dissolution of a prior marriage and the other whom he thought had encouraged his former psychotherapist to terminate his treatment. Several months later, the psychologist discharged her perceived *Tarasoff* duty by having her attorney notify these two potential victims.

At trial, Clark was convicted of capital murder. During the penalty phase of the trial to determine Clark's sentence, the trial judge allowed the psychologist to testify about Clark's homicidal threats. The judge allowed the *Tarasoff* warning into evidence on the basis of the "dangerous patient" exception to the psychotherapist-patient privilege. The judge ruled that Clark had no psychotherapist-patient privilege with respect to the *Tarasoff* warning because he had expressed the threats. The judge did not rule that Clark had waived his attorney-client privilege, but allowed the psychologist's testimony anyway. Clark was condemned to death.

On appeal, the California Supreme Court affirmed the death sentence. While the admissibility of the psychologist's testimony about the *Tarasoff* warnings was not central to the Court's ruling, the Court opined that once confidential information is disclosed to others, it forever loses its privileged status. The Court did find that the psychologist's testimony had been wrongly admitted into evidence because the attorney-client privilege had not been waived. However, this was ruled to have been a harmless error.

Clark was the first case to introduce through dicta the concept of admitting *Tarasoff* warnings into a criminal trial. The *Wharton* and *Menendez* cases described below further defined the issue.

People v. Wharton

Mr. Wharton and Ms. S had been cohabiting when Wharton sought treatment from a clinical psychology intern and psychiatrist for his anger and fear of physically harming Ms. S. During his second session with the psychologist, Wharton agreed to bring Ms. S to the next session in order to discuss his violent thoughts about her. Nevertheless, the psychologist telephoned Ms. S and issued a *Tarasoff* warning, telling her that she was in danger and should stay away from Wharton. Although Ms. S had previously been physically attacked and threatened by Wharton, she failed to heed the warning. Soon thereafter, Wharton killed Ms. S.

At issue in Wharton's trial was whether the prosecution could prove the elements of premeditation and deliberation required for a first-degree murder conviction. Over defense objections, the trial judge permitted the psychologist and the psychiatrist to testify about the information obtained during their treatment of Wharton that led to the issuance of the *Tarasoff* warning. The trial judge ruled that the "dangerous patient" exception to the psychotherapist-patient privilege applied, and the psychotherapists were permitted to testify about all the material relating to the *Tarasoff* warning.

The jury returned a verdict of first-degree and capital murder. During the sentencing phase, the prosecution relied heavily on the testimony of Wharton's psychotherapists to support the argument in favor of the death penalty, with which the jury agreed.

On appeal, the California Supreme Court affirmed the death penalty, finding that no violation of the psychotherapist-patient privilege had occurred. The Court held that the "dangerous patient" exception statute allowed previously confidential information, including material related to the *Tarasoff* warning, to become nonprivileged and presented as evidence in the criminal trial.

Menendez v. Superior Court

The parents of brothers J. Menendez and E. Menendez were killed on August 20, 1989. The Menendez brothers were arrested shortly after the police served a search warrant on their clinical psychologist on March 8, 1990 demanding the psychologist's audiotapes. The audiotapes in question contained notes relating to sessions with both brothers on October 31, 1989 and November 2, 1989, notes from a session with E. Menendez on November 28, 1989, and an actual session with the brothers on December 11, 1989.

The prosecution attempted to have the audiotapes admitted into evidence claiming, among other things, that the "dangerous patient" exception [*8*] negated the psychotherapist-patient privilege and thus allowed them to be admitted into evidence. On August 6, 1990, a Superior (trial) Court judge ruled that the psychotherapist-patient privilege did not apply to each and every one of the audiotapes. The judge found that the "dangerous patient" exception applied to the October 31 and November 2 sessions, because the psychologist has reasonable cause to believe that the Menendez brothers were dangerous because of threats aimed at the psychologist as well as collaterally endangering the psychologist's spouse and the psychologist's lover because of their relationships to the psychologist. The psychologist subsequently warned these two other persons after having reasonable cause to believe that disclosure of psychotherapist-patient communications made at these two sessions were necessary to prevent harm. The judge ruled that the "dangerous patient" exception did not apply to the latter two sessions of November 28 and December 11. However, drawing upon *People v. Clark*, the judge ruled that as a result of the prior loss of confidentiality caused by the warnings to the two other persons, the confidential status of the latter two sessions was negated.

The Menendez brothers filed an appeal on August 14, 1990, which was denied on March 28, 1991 [*10*]. The Court of Appeal agreed with the trial court that the "dangerous patient" exception applied to portions of the audiotapes dealing with the October 31 and November 2 sessions and as a result there was no psychotherapist-patient privilege for these sessions. The Court of Appeal declared that the latter two sessions of November 28 and December 11 were not psychotherapy but a "charade," thus automatically rendering the psychotherapist-patient privilege inapplicable. *People v. Wharton* was not decided until April 29, 1991 in which the California Supreme Court explicated the "dangerous patient" exception. On June 27, 1991, the California Supreme Court agreed to review the Court of Appeal ruling in *Menendez* [*10*].

On August 27, 1992, the California Supreme Court affirmed in part and reversed in part the Court of Appeal ruling [*3*]. The Court found that the psychotherapist-patient privilege applied at the outset of each of the four sessions. The California Supreme Court agreed with the lower courts that the audiotapes concerning the October 31 and November 2 sessions lost their "confidential" status when the "dangerous patient" exception was met as a result of the psychologist having had "reasonable cause to believe" that the Menendez brothers were dangerous to the psychologist and to the psychologist's spouse and psychologist's lover collaterally, and that disclosure to the two other persons was necessary to prevent any harm [*11*]. The California Supreme Court commented that the determination of what constituted a "reasonable cause to believe" was an objective test based on all the relevant circumstances and prevailing norms among psychotherapists as a group, but with broad discretion given to the individual psychotherapist [*12*]. In contrast to the audiotapes concerning the first two sessions, the California Supreme Court ruled that those dealing with the latter two sessions of November 28 and December 11 were protected by the psychotherapist-patient privilege as the "dangerous patient" exception did not apply to these sessions. The California Supreme Court rejected the trial court's application of *People v. Clark* to the latter two sessions. The California Supreme Court also rejected the Court of Appeal's argument that these latter two sessions were

not psychotherapy, stating that "As a general matter, the dispositive fact is *what* the participants do, not *why* [*13*]."

Discussion

Implications for Psychotherapists

Even before the California Supreme Court rendered its recent decision in *Menendez*, the specter of psychotherapists as prosecution witnesses against their patients in California already had raised considerable concern [*14–17*]. The *Menendez* decision solidified and expanded the earlier *Wharton* ruling that first defined the conditions under which the "dangerous patient" exception statute to the psychotherapist-patient privilege applied. In *Menendez*, the court ruled that the entire contents of the two psychotherapy sessions in which the defendants had satisfied the "dangerous patient" exception statute were admissible into evidence at the patient's criminal trial. What is particularly disconcerting is how dicta in the *Clark* decision was expanded to permit the introduction into evidence of both the *Tarasoff* warning itself and the reason for the warning in *Wharton* to the contents of two entire psychotherapy sessions in *Menendez*. The evolution of these cases indicates a distinct trend towards weakening the legal privacy of the psychotherapist-patient relationship in favor of prosecutorial objectives.

In the *Menendez* case, there was technically no *Tarasoff* warning issued, because the psychotherapist, and "collaterally" the psychotherapist's spouse and the psychotherapist's lover were the alleged targets of the threats by the Menendez brothers. *Tarasoff* warnings inform third parties of a threat by a psychotherapist's patient. When the danger is directed towards the psychotherapist, there is no third party, only the psychotherapist as a second party (with the first party being the patient). Although a psychotherapist's family and friends are technically third parties and not second parties, threats that are directed towards them may be construed as threats directed at the psychotherapist since these people are extensions of the psychotherapist and the patient intends to hurt the psychotherapist by harming his or her loved ones and not a third party with no relation to the psychotherapist as is the traditional *Tarasoff* target. However, the psychotherapist in *Menendez* carried out a de facto *Tarasoff* warning since he notified himself, his spouse, and his lover. The *Menendez* court did not specifically recognize the psychotherapist as having a duty to protect himself and his immediate family and friends, but ruled that the "dangerous patient" exception statute was applicable [*3*].

The specter of becoming a prosecution witness against one's patient, or former patient, raises several professional conflicts. The possibility of becoming a future prosecution witness adds to the potentially adversarial nature of the psychotherapist-patient relationship. In California and elsewhere, besides a *Tarasoff*-type situation, the privacy of the psychotherapist-patient communications can be breached in other ways [*18*]. However, no matter how noble the cause, converting psychotherapists into police informants and prosecution witnesses further mires the psychotherapist into multiple agency roles. Becoming a prosecution witness adds to the psychotherapist's already heightened social control role [*19*].

Beyond the uneasiness created by multiple agency and social control roles, the *Tarasoff* duty has long been criticized for its chilling effect on the recruitment and retention of patients in treatment [*7*]. It may be necessary to disclose a patient's threat to the intended victim, but quite a different task to testify as a prosecution witness. From the patient's perspective, knowledge that his or her psychotherapist could be instrumental to the prosecution's case could endanger the physical safety of the psychotherapist. The danger posed by the Menendezes to their psychotherapist may have been transformed from an idea into overt behavior if *Wharton* had been decided earlier and known to the

brothers [*16*]. Should psychotherapists inform prospective patients about the possibility of both *Tarasoff* or similar warnings, and that such a warning could form the basis for the psychotherapist testifying at the patient's subsequent criminal trial? While a legislative or judicial solution to this question might appear straightforward, informing a patient about the very real consequences of their threats could directly endanger the psychotherapist.

A psychotherapist may feel defeated or even betrayed when his or her patient commits a violent crime despite the psychotherapist's best efforts to avert the disaster by performing a *Tarasoff* warning. Countertransferential anger by a psychotherapist at the patient or former patient may be actualized through testimony as a prosecution witness. Unless psychotherapists can remain therapeutically neutral, whether it be with patients or former patients in the office or on the witness stand, there is significant likelihood of erosion of professional or even ethical purpose in the psychotherapeutic enterprise.

Although states other then California may not have an identical "dangerous patient" exception statute on which to readily introduce the *Tarasoff* or similar warnings and the contents of psychotherapy sessions into a criminal proceeding, there is no a priori reason why prosecutors in other states will not attempt to apply the *Wharton* and *Menendez* rulings to their cases and eventually obtain similar case law in their respective jurisdictions.

Implications for the Legal System and Society

While the changes for psychotherapists mentioned above evolved gradually, the cumulative impact on the legal system may be substantive. The prosecution has generally involved psychiatric witnesses in an "offensive" manner in the sentencing phase of capital trials. The primary prosecutorial use for the psychiatric witnesses has been to negate psychiatric witnesses called by the defense in the guilt phase of the trial, that is, the "defensive" use of psychiatric witnesses by the prosecution. The prosecution's witness could challenge the opinions of the defense witness by offering conclusions that rebut the validity of an insanity or diminished capacity defense, in those jurisdictions permitting such psychiatric-legal defenses. This legal strategy could accomplish one of two goals for the prosecution in the "battle of the experts:" (1) It could give the jury the impression that there are psychiatric witnesses that differ in opinion, implying that the weight of the evidence is equivocal and suggesting to the jury to reject the psychiatric-legal defense at issue; or (2) It could give a circus-like appearance to the "battle of the experts" so that the jury ignores all psychiatric opinions and chooses not to consider the psychiatric-legal defense in question.

With the permissibility of entering into evidence *Tarasoff* or similar warnings into the guilt phase of the trial, the prosecution has obtained a potent "offensive" psychiatric weapon. The prosecution does not have to employ the psychiatric witnesses only "defensively" to counter those introduced by the defense. In fact, the use of the patient-defendant's former psychotherapist as a prosecution witness to prove the mens rea of the crime would be difficult for the defense to counter. The defense cannot offer a similarly situated witness in rebuttal.

These three California Supreme Court decisions have in effect created a unique set of defendants, the "*Tarasoff*" defendants, in which the *Tarasoff* or similar warning, medical (psychotherapy) record, and testimony of the psychotherapist can be placed into evidence against them in criminal proceedings. Thus, the prosecution may have a more potent legal weapon than the defense in some cases in which the insanity or diminished capacity defenses are raised. What separates the prosecution psychotherapist witness from the defense psychiatric expert witness is that the prosecution witness in a case involving a "*Tarasoff*" defendant was percipient to the defendant's mental state, while the defense witness in such a case involving an insanity or diminished capacity defense

can only make a retrospective construction of the mental state. In this sense, the apparent value of a percipient psychiatric witness's testimony in a trial involving a "*Tarasoff*" defendant would be of higher validity than that of a defense psychiatric expert witness. Further, there would be less question about whether the defendant was malingering during a session that occured prior to the crime. The trier of fact could in many, if not most cases, give greater credibility and hence weight to the testimony of a percipient than fact witness when it comes to mental state at the time of the crime.

California and several other states have adopted the so-called "*Tarasoff*" immunity statutes [*20*]. These statutes provide the psychotherapist, who discharges a *Tarasoff*-type duty to protect, immunity from civil liability in the event the patient later harms the intended victim. In California, the duty can be discharged by notifying both the intended victim and the police. Until now, action on a *Tarasoff* warning has generally been given low priority status by the police. Perhaps local prosecutors will encourage the police to record and document *Tarasoff* warnings, as they may form a significant part of a future prosecution case. Such recording of *Tarasoff* warnings has the potential for serious misuse by anyone with access to such information. Surely, those with such access, that is, the police themselves as well as their support staff, are not bound by the confidentiality of the psychotherapist-patient relationship.

The "dangerous patient" exception statute allows for wider breaching of the psychotherapist-patient privilege than that dictated solely by the *Tarasoff* duty to protect. The "dangerous patient" exception statute permits such breaches when the patient is "dangerous to himself or the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." This is in contrast to the imminent threat of harm to an identifiable third party that triggers the *Tarasoff* duty. Anticipating prosecutorial creativity, psychotherapists may face novel situations in which they could be called as witnesses, that is, when the patient satisfies as having been dangerous to self or property under the "dangerous patient" exception statute.

Admittedly Wharton committed a heinous crime and the Menendezes may have as well, but what will be the cost to the mental health profession and society to render justice? Is permitting prosecutorial intrusion into the privacy of the psychotherapist-patient relationship a sign of ethical compromise in which a desired legal outcome trumps all other values? While there may be no simple and ready responses to these questions, there are some relevant observations. In Australia's legal system, which is also based on English law, the confidentiality of a therapeutic relationship overrules that of society's need to be informed of a person's dangerousness [*21*]. Furthermore, the law in California and other jurisdictions has not attached the same requirements to the priest-penitent or attorney-client relationships when that individual poses a danger to a known third party. Imposing uniquely on psychotherapists the *Tarasoff* duty and the possibility of being called as prosecution witnesses diminishes any sense of equity and perpetuates the stigma already associated with the status of being a psychiatric patient.

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