



Is There a Worldwide Duty to Warn of Dangerous Behavior?

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"You look like this sketch of someone who's thinking about committing a crime."

Social science techniques are used in law to identify likely wrongdoing and predict future dangerousness

- profiling uses social science to determine present facts – the likelihood of a crime occurring at the moment
 - dangerousness predictions use social science to assess future facts
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Profiling

- Profiling is purportedly based on empirical data about groups of people most likely to be presently committing an offense
 - Example: traffic stops on the highway --“Driving While Black?”
 - Similar statistical and clinical approach taken to predictions of dangerousness
 - Such predictions are used in a variety of ways by the courts, to determine bail, involuntary commitment, sentencing, the treatment of sexually violent offenders
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Typical Profiling Case

- Police use behavioral and other characteristics of known offenders to identify possible current offenders
 - A person matches these characteristics
 - Person is stopped, and illegal activity is discovered
 - A suppression hearing evaluates the constitutionality of the police stop
 - If it violates a constitutional provision, then the evidence of illegal activity cannot be used at the person's trial
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Illustrative Research on Profiling

- Researchers Gross and Barnes (2002) studied the proportion of African Americans who were stopped by police on I-95 highways in USA
 - Blacks constitute 17% of drivers on I-95
 - 60% of motorists searched on I-95 are black
 - They used evidence of similar national rates of drug use across races to imply similar base rates of drug possession on I-95
 - Concluded that disparity was large enough that race must be a factor in police decisions to search
- Barnes did a follow-up study (2004) in which she calculated the probability of a search given a stop by police on I-95 highway
 - Strong link to racial and gender characteristics – black and hispanic men were especially likely to be searched
 - Preference for searching members of certain subgroups was unexplained by the typical search results for demographic subgroups

Predicting Future Dangerous Behavior

- Prediction studies show relatively low rates of accuracy
 - Clinical predictions – where a clinical psychologist or psychiatrist attempts to predict whether a client will be violent in the future – are most difficult, and not very accurate
 - Statistical models, which use a person's characteristics (such as demographic variables and past history of violent behavior) do somewhat better
 - More recent models, which attempt to predict dangerous behavior occurring in a short time frame, have had somewhat better success
- Post-dictions – that is, judgments made after the fact about how likely it was that a dangerous event would occur – are affected by the hindsight bias
- Conclusion of the experts – very difficult to predict dangerousness

With this background, consider *Tarasoff v. Regents of University of California* (California, 1974, 1976)

- Unusual and distinctive facts
 - Complex procedural history
 - Holdings of “duty to warn” and “reasonable care” has state and national implications for psychologists and psychiatrists
 - Evidence of similar duties in other countries
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Tarasoff facts

- UC Berkeley graduate student Prosenjit Poddar developed love interest in Tatiana Tarasoff, which was not reciprocated.
 - Poddar experienced serious psychological problems and sought counseling
 - Psychologist Dr. Lawrence Moore saw Poddar for 7 sessions
 - During the sessions, Poddar made threats to kill Tarasoff
 - Moore recommended that Poddar be involuntarily committed because of the threats and the danger Poddar posed to others
 - Moore asked UC Berkeley police to begin the commitment process
 - Police interviewed Poddar, decided he was not a threat, and released him, warning him to stay away from Tarasoff
 - Subsequently, Poddar killed Tarasoff
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Tarasoff procedural history

- Criminal trial
 - Defense attempted to have anthropologist testify about Poddar's cultural background and how it helped to explain his difficulties in coping with Tarasoff's actions
 - Trial judge denied anthropological testimony, saying that a psychologist or psychiatrist instead could testify about Poddar's diminished capacity
 - Poddar convicted of second degree murder
 - Conviction reversed and remanded for new trial, on grounds of the trial judge's failure to instruct the jury about how diminished capacity might have affected specific intent necessary to commit second-degree murder
 - Second criminal trial never occurred; Poddar returned to India
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Tarasoff civil case

- Tarasoff family, using information from criminal trial, brought civil lawsuit against University of California, Dr. Moore, and the police
 - Tarasoff family's civil claims were initially dismissed, but reinstated by California appeals court (*Tarasoff* 1974, using “duty to warn” language)
 - Amicus brief by psychiatric organization asked for rehearing, citing serious negative consequences of the decision
 - *Tarasoff* 1976 ruling further elaborated and specified what was meant by the duty, holding that psychologists and psychiatrists had a duty to exercise “reasonable care” – which included duty to protect specific foreseeable victims of their clients
 - Duty based on relationship with the client
 - Controversial ruling, much protest among the mental health professions!
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Tarasoff Court offered multiple considerations that must be balanced in determining the duty to exercise reasonable care:

- 1) foreseeable harm to Plaintiff
 - 2) degree of certainty that Plaintiff suffered injury
 - 3) connection between Defendant's conduct & injury suffered
 - 4) moral blame attached to Defendant's conduct
 - 5) policy of preventing future harm
 - 6) Burden on Defendant
 - 7) Consequences to community of imposing duty
 - deter therapy
 - harm therapist-patient relationship
 - prevent open disclosure
 - lead to "defensive" therapy
 - 8) availability of insurance
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Perlin – discovers evidence that “The Duty to Protect” is found in other countries

- Argues that the European Convention of Human Rights and the European Court of Human Rights are important elements in encouraging individual European states to adopt international standards protecting human rights
 - Illustrates with case of *Osman v UK*
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Osman v. United Kingdom (Eur Ct H R 1998)

- Mrs. Osman sued police for failing to protect her husband
 - Their son's teacher, Mr. Paget-Lewis, formed "obsessive attachment" to the son
 - Police, school officials, and school psychologist were all aware of the situation and the potential danger
 - Paget-Lewis killed Mr. Osman
 - Mrs. Osman's suit against the police was rejected by UK courts, and she petitioned for a hearing in the European Court of Human Rights
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Osman v. United Kingdom (Eur Ct H R 1998)

- ECHR concluded plaintiff could proceed with case under one of the articles of the Convention, asserting that plaintiffs had a right derived from negligence law to seek a hearing about the foreseeability of Mr. Osman's murder
 - Much disagreement among the judges on the Court
 - Controversial opinion
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Other European cases in which duty to protect has been considered favorably

- Austria, contractor's accident case, individual may owe duty of care to particular 3rd parties
 - Greece, attack in a business's parking lot, saw a duty to protect the company's customers
 - Finland, duty to warn about dangers of smoking
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Conclusion

- Growing awareness internationally of the desirability of private and public authorities to actively protect citizens
 - Duty to exercise reasonable care increasingly seen as duty to protect foreseeable victims
 - Still much resistance to making police and other public officials responsible for harms caused by individuals
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