BACK FROM WONDERLAND: A LINGUISTIC APPROACH TO DUTIES ARISING FROM THREATS OF PHYSICAL VIOLENCE

A.G. HARMON, J.D., Ph.D.*

I. Introduction

The tragedy of school shootings and violent rampages over the past few years always raises the same grim questions: "How could this have been prevented?" "Didn't somebody know the person was disturbed?" "Weren't there some signs in what he said or in the way that he acted?" The recent shootings at Virginia Tech University in the spring of 2007, and at Northern Illinois University in 2008, are only the latest incidents in a long litany of such events. After studies related to incidents of this nature are completed, undoubtedly some of the violent perpetrators will have been under the care of a therapist; and when that is the case, the law has a forty-year history of determining the therapist's actionable duties. However, the law has never had a clear perspective on exactly how to determine when an event has triggered a duty towards a threatened individual or society at large.

For example, on October 4, 1989, Dennis Little, who had once absconded across state lines with his infant daughter, and who had a history of arson and assault charges, told his mental health counselor that

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¹ Thirty-two people were killed and numerous others wounded before the assailant committed suicide on April 16, 2007. Ian Shapira & Tom Jackman, *Gunman Kills 32 at Virginia Tech in Deadliest Shooting in U.S. History*, WASH. POST, Apr. 17, 2007, at A1.

² Five people were killed and numerous others wounded before the assailant committed suicide on February 14, 2008. Peter Slevin & Kari Lydersen, *Gunman at Illinois College Kills 5 Students, Wounds 16*, WASH. POST, Feb. 15, 2008, at A1.

he "just didn't think things was [sic] going right." Further, he told the counselor that he "was afraid [he] might hurt [his wife]," and that he "was having these stupid thoughts and [felt] like things was [sic] going wrong. [He] described the 'stupid thoughts' as 'when you are depressed and . . . not working, you know, you think about all kinds of stuff, armed robbery, murder, arson [and] . . . suicide." Little indicated that he had "a lot of those [stupid] thoughts."5

The counselor had known Little for five months, during which time he had expressed homicidal and suicidal desires and was in and out of treatment programs due to mental health problems.⁶ But instead of hospitalization. Little was placed in a treatment center, from which he could come and go. One day after being placed in the treatment center, Little appeared at his wife's home, where his wife found him staring at a butcher's knife and contemplating suicide.⁸ Little's wife returned him to the treatment center, informing a staff member of the incident and how she feared both for her own safety and that of Little. The next day, Little returned to his wife's home and attacked her, stabbing her repeatedly.¹⁰ Their minor son was in the house during the attack. 11 Little's wife (hereafter "plaintiff") eventually sued the counseling center¹² claiming that the therapists had breached their duty under the Arizona Duty to Warn statute, which arises whenever "[t]he patient [had] communicated to the mental health provider an explicit threat of imminent serious physical harm

³ Little v. All Phoenix S. Cmty. Mental Health Ctr., Inc., 919 P.2d 1368, 1370 (Ariz. Ct. App. 1995).

⁴ *Id*.

⁵ *Id*.

⁶ *Id*.

⁷ *Id*. ⁸ *Id.* at 1370–71.

⁹ *Id.* at 1371.

¹⁰ *Id*.

¹¹ *Id*.

¹² Id. at 1371. Defendant Phoenix South operated the counseling center, Defendant HDI. Id. at 1370.

¹³ Id. at 1371 (citing ARIZ, REV. STAT. ANN. § 36-517.02(A)(1) (2003)). The plaintiff also contended that she had a common law claim that was unconstitutionally abrogated by (continued)

In its review of a directed verdict in favor of the defendants, ¹⁴ the Arizona Court of Appeals rejected the plaintiff's claim on the following grounds:

In essence, [plaintiff] argues that, to a mental health professional trained to understand mentally ill patients, "an explicit threat" should not be limited to statements such as "I intend to kill my wife immediately." Plaintiff further contends that "the rambling discourse of a schizophrenic patient who asks to be put into a mental hospital because he has 'stupid thoughts' of armed robbery, murder, arson and suicide" is sufficient to meet the requirements of § 36-517.02(A)(1). We disagree. 15

The court referred to the state supreme court's view that "reference to established, respected dictionaries is appropriate in determining the commonly accepted meaning of words in a statute." Consulting the *American Heritage Dictionary*, the court noted that the term *explicit* is commonly defined as "expressed with clarity and precision or 'clearly defined or formulated"; *threat* as "an expression of an intention to inflict pain, injury, evil, or punishment"; and *imminent* as "about to occur; impending." Therefore, the court held the statutory requirement that the threat be *explicit* excluded "non-verbal threats [and] insinuations."

Aside from the fact that different dictionaries express things differently, ¹⁹ and that semantic determination itself is often controversial, ²⁰ the Arizona court's ruling—and perhaps the statutory drafters before it—

the statute. *Id.* at 1372. The court agreed and remanded the case to the trial court because the trial court had based its decision on the now-unconstitutional statute. *Id.* at 1376.

¹⁴ *Id.* at 1369.

¹⁵ *Id.* at 1373.

¹⁶ *Id.* (quoting Sierra Tucson, Inc. v. Pima County, 871 P.2d 762, 767 (Ariz. Ct. App. 1994)).

¹⁷ *Id.* (quoting American Heritage Dictionary 478, 1265, 643 (2d ed. 1991)).

¹⁸ Id

¹⁹ See Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use Of Dictionaries*, 47 BUFF. L. REV. 227, 242 (1999).

²⁰ See David Foster Wallace, Authority and American Usage, in Consider the Lobster and Other Essays, 66, 78–79 (2006).

overlooks entire dimensions of linguistic reality; for meaning can be conveyed in ways other than through semantics. It is a principle of everyday language use that statements, or "locutions," can carry clear meaning when expressed in less than direct ways.²¹ Indeed, a good portion of everyday conversation is intentionally circuitous, 22 adding depth and texture to communication. So what would be the result if the patient in Little had said to his therapist, "My wife might not wake up tomorrow"? That statement too is far less than an "expression of an intention to inflict pain, injury, evil, or punishment," which the Arizona court required to make a claim under the statute. The statement is not an expression of any intention at all, in fact, and it could be construed as simply pure conjecture or speculation. But in the context of a disturbed and historically violent man, the meaning conveyed would be quite clear. Would such a statement fail to trigger a duty to warn in Arizona? Is such a statement not a "threat" only because it is not expressed in conformity to an arbitrary dictionary definition, randomly selected?

Since the landmark case of Tarasoff v. Regents of University of California,²³ which imposed upon mental health professionals an affirmative duty to warn third parties who are the subject of credible threats uttered by their patients, ²⁴ nearly every jurisdiction has made either a common law or statutory rule to address the circumstance.²⁵ These rules range from the mandatory to the discretionary in nature, from the precise to the general, and cover a variety of violent intentions: from third parties, to suicides, to real property. ²⁶ The initial decision, almost thirty-five years

²¹ *C.f. id.* at 92. ²² *C.f. id.* at 110.

²³ 529 P.2d 553 (Cal. 1974) [hereinafter *Tarasoff I*], vacated, 551 P.2d 334 (Cal. 1976) [hereinafter Tarasoff II]. The Tarasoff case has been the subject of immense legal commentary from a variety of perspectives. A recent survey of case law dealing with the matter is that of Damon Muir Walcott, Pat Cerundolo, & James C. Beck, Current Analysis of the Tarasoff Duty: An Evolution Towards the Limitation of the Duty to Protect, 19 BEHAV. Sci. & L. 325 (2001). A recent article focusing on practical dimensions of the case, as well as providing philosophical analysis of the opinion, is that of Marin Roger Scordato, Post-Realist Blues: Formalism, Instrumentalism, and the Hybrid Nature of Common Law Jurisprudence, 7 NEV. L.J. 263 (2007).

²⁴ Tarasoff II, 551 P.2d at 340.

²⁵ See infra Part III.B.

²⁶ See id.

old, has never ceased to be controversial, though some of the strongest fears that it first elicited have been somewhat assuaged.²⁷ Nevertheless, the conflicting duties of the therapist to the patient and to the victim, the policy matters revolving around privileges and public safety, and the expansion of liability on affirmative duty grounds, are still debated.²⁸ In addition, case law has done surprisingly little to explain what factors are determinative of the triggering event. A discussion of exactly what facts are pertinent to the deliberation of whether a threat of the requisite nature has been made, thereby triggering the duty, is rare. Most often the dispute has been resolved on the grounds that the threat to the victim was too ambiguous, as in *Little*.²⁹ But this only postpones the day when factors will be needed. Finally, the relevance of expert witnesses has been called into question, raising the issue of whether the claim is one of simple negligence or professional negligence.³⁰ But if there is no unique ability in the therapist to discern the quality of the threat posed, there is no reason to limit the duty at all. As one judge has opined, if the duty were to turn simply upon knowledge of the threat, what is the reason for not expanding the duty to people other than therapists?³¹

With current figures evidencing the frequency of such tragic events,³² the postponement of the question cannot be indefinite. Eventually, circumstances will arise as they have in other contexts involving

²⁷ See Alan A. Stone, Law, Psychiatry, and Morality 181 (1984); Daniel J. Givelber, et al., Tarasoff, *Myth and Reality: An Empirical Study of Private Law in Action*, 1984 Wis. L. Rev. 443, 489–97 (1984).

²⁸ Scordato, *supra* note 23, at 264.

²⁹ Little v. All Phoenix S. Cmty. Mental Health Ctr., Inc., 919 P.2d 1368, 1370 (Ariz. Ct. App. 1995).

³⁰ Ewing v. Northridge Hosp. Med. Ctr., 16 Cal. Rptr. 3d 591, 600 (Cal. Ct. App. 2004).

³¹ Emerich v. Philadelphia Ctr. for Human Dev., Inc., 720 A.2d 1032, 1046 (Pa. 1998) (Zappala, J., concurring).

³² Statistics on acts of violence by those under psychiatric care are not available, but there were twenty-four school-related shootings in the United States from April 14, 2003 to April 16, 2007. *See* BRADY CTR. TO PREVENT GUN VIOLENCE, NO GUN LEFT BEHIND: THE GUN LOBBY'S CAMPAIGN TO PUSH GUNS INTO COLLEGES AND SCHOOLS app. B at 27–30 (May 2007), *available at* http://www.bradycampaign.org/xshare/pdf/reports/no-gun-left-behind.pdf.

language—most often criminal in nature³³—and interpretation of the language itself will be necessary. For jurisdictions that impose the duty to warn, or absolve the therapist from having to relay the same, all turn upon the occurrence of a singular episode: an event; with either a spoken act or an unspoken composite of acts that, taken together, amount to the same thing.³⁴ And though the establishment of such an event might at first seem to pose only a modest evidentiary hurdle, especially in terms of the speech act, the truth is that "threats," like other speech acts, are subject to a variety of interpretive maxims and conditions.³⁵ In fact, whether a "threat" has actually been uttered is a difficult determination.³⁶

For example, when a troubled middle-aged man states that he fears doing "something stupid" like "getting rid" of someone that is "always going around the house nagging me," is the statement specific enough to qualify as a threat? Are its terms unambiguous, and therefore within a precise semantic field of reference? Does it matter if the man made the statement while smiling or with his back turned? What if he conditions the statement with a preface: "If he wasn't in jail . . ."; or "If he wasn't out of town for two weeks . . ."? What if the statement is not made by a middle-aged man but by a sixteen-year-old boy? A sixteen-year-old girl?

It might be suggested that the consequences of these variations could be distinguished by seeking more information, clarified by asking more questions, probing further, as it were. But when does the probing itself become another type of speech event—subornation—so that whatever statement is ultimately made becomes vulnerable to the charge that it was

³³ See ROGER W. SHUY, LANGUAGE CRIMES: THE USE AND ABUSE OF LANGUAGE EVIDENCE IN THE COURTROOM 1 (1993) (language alone can lead to criminal liability); People v. Toledo, 26 P.3d 1051, 1052 (Cal. 2001) (criminal threats); People v. Hines, 780 P.2d 556, 557–58 (Colo. 1989) (criminal threats). Threats against public officials, political leaders, and the President are also the subject of separate jurisprudential schemes. See United States v. Kelner, 534 F.2d 1020, 1020 (2d Cir. 1976) (threats against a foreign leader); United States v. Roberts, 915 F.2d 889, 890 (4th Cir. 1990) (threats against a judge); United States v. Hoffman, 806 F.2d 703 (7th Cir. 1986) (threats against the President). For a linguistic interpretation of cases involving threats against the life of the President; see Brenda Danet, Kenneth B. Hoffman & Nicole C. Kermish, Threats to the Life of the President: An Analysis of Linguistic Issues, 1980 J. MEDIA L. & PRAC. 180 (1980).

³⁴ See infra Part III.

³⁵ Bruce Fraser, *Threatening Revisited*, 5 FORENSIC LINGUISTICS 159, 169–70 (1998).

³⁶ *Id.* at 171–72.

pulled from the patient, elicited rather than volunteered?³⁷ And what if the speaker will not answer further? What if he refuses to elaborate? With conflicting duties—one owed to the patient,³⁸ to retain the sanctity of the therapeutic privilege, and one owed to the identifiable victim, to warn of a potential threat of violence—the therapist must make a determination. Consequently, if the therapist is sued either by the patient or by the victim, what factors should a judge consider in determining whether the speech act—the "threat"—was truly a "threat"? Again, in those rules that require a communication (and as this article will argue, even those that do not), the

The physician should not reveal confidential information without the express consent of the patient, subject to certain exceptions which are ethically justified because of overriding considerations.

When a patient threatens to inflict serious physical harm to another person or to him or herself and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, which may include notification of law enforcement authorities.

COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION § 5.05 (2008–2009 ed. 2008). However, the confidentiality aspect has proven a sore sticking point for psychotherapists. See Joseph Dubey, Confidentiality as a Requirement of the Therapist: Technical Necessities for Absolute Privilege in Psychotherapy, 131 Am. J. Psychiatry 1093 (1974) (discussing the conflict between the goals of psychotherapy and the goals of parties involved in litigation). The United States Supreme Court has acknowledged the importance of patient candor and trust in the relationship with the therapist. Jaffee v. Redmond, 518 U.S. 1, 10 (1996). The possibility of a negative dynamic—that of the psychotherapist avoiding patients who might trigger the duty—is discussed in D.L. Rosenhan et al., Warning Third Parties: The Ripple Effects of Tarasoff, 24 PAC. L.J. 1165, 1209 (1993). Another possible effect of Tarasoff could be avoiding the triggering conversation itself.

³⁷ See SHUY, supra note 33, at 154–55.

³⁸ The American Psychiatric Association does make an allowance for confidentiality in cases such as those involved in *Tarasoff* contexts: "When in the clinical judgment of the treating psychiatrist the risk of danger is deemed to be significant, the psychiatrist may reveal confidential information disclosed by the patient." Am. Psychiatric Ass'n, The Principles of Medical Ethics: With Annotations Especially Applicable to Psychiatry 6 (1995 ed.). The American Medical Association's ethics rules carry a similar qualification:

duty to the third party under *Tarasoff* is only breached if that determination can be made.

Linguistics, more particularly, the branch known as pragmatics, can provide guidance here. Pragmatics is the study of language in a situational context, as opposed to decontextualized structure, 39 and what it can add to an understanding of meaning through context is crucial to understanding when a Tarasoff duty has arisen. For the objection of the therapist might often fall along the lines of "I didn't know he meant that;" or more precisely, "Considering what I knew, there was no reasonable way to determine that he meant that." Under the laws as written, the catalytic event is whether the therapist *heard* a threat—not whether the therapist should have "thought he would do it," but whether he "heard him say he would"—that triggers the duty. 40 And even when the standard is one of "foreseeability of harm" (not communication of a threat), this article will show that the evidence used for determining the existence of a real "threat" is the same as that necessary for determining the circumstances that implicate foreseeability. In short, pragmatics can help establish whether the triggering event occurred or not.

Although linguists have considered language crimes before, ⁴¹ relating to perjury, ⁴² bribery, ⁴³ and criminal threats, ⁴⁴ a linguistic analysis of speech acts in the civil law *Tarasoff* context has not been attempted. So what exactly is a "threat" in that context? What are its determinatives? How can it be expressed? And in this peculiar legal context, how can it be recognized?

In fact, the very use of the term "threat" for what transpires in a *Tarasoff* context is incorrect from a linguistics perspective. For a "threat" to be a "threat," the speaker must address the intended harm to the hearer. In a *Tarasoff* context, the statement made by the speaker to the hearer concerns harm intended against a third party. So in the vernacular, when a witness tells the police "He threatened he was going to go downtown and shoot his wife," the witness is using the word "threat" to refer to a threat

³⁹ See Stephen C. Levinson, Pragmatics 7–9 (1983).

⁴⁰ See, e.g., Cal. Civ. Code § 43.92(a) (West 2007).

⁴¹ See sources cited supra note 33.

⁴² See SHUY, supra note 33, at 136–56.

⁴³ *Id.* at 20–65.

⁴⁴ *Id.* at 97–117.

uttered by another only; "threat" here is only a manner of speaking. In the strict sense, a speaker cannot threaten someone who is not there. What is actually happening in a *Tarasoff* context is that the speaker is reporting to the hearer a claim of intended violence against a third party, or a "pledge to harm," as will be explained in the next part. Despite this fact, an understanding of the nature of "real" threats, known as "felicitous" threats in the pragmatics field, is necessary in order to understand the nature of a felicitous "pledge to harm," as the latter triggers the duty to warn.

The following analysis intends to explain what is happening at the level of language when a speaker (in the *Tarasoff* context, always a patient) has communicated to a hearer (in the *Tarasoff* context, always some kind of mental health provider) a "threat" or "pledge to harm" a victim. It seeks to clarify how statutes comport or fail to comport with that reality, and will provide a concrete scheme by which triers of fact can determine compliance with a standard of care. As Justice Mosk stated in *Tarasoff* with regard to the imposition of what he considered inexact and imprecise duties, we have moved "from the world of reality into the wonderland of clairvoyance." With that assessment in mind, this article also attempts to show the danger lying in the affirmative duty and in the strange genesis of that duty. This article also attempts to emphasize the care judges must take in acknowledging from whence such a duty arises—by whom and to whom it is owed. Only then can we move from the wonderland back to the world.

Part II will explain the areas of linguistics that most impact the statements that the layman understands to be a "threat." Part III will analyze the mandatory "Duty To Warn" rules, both statutory and common law, that sprang up after *Tarasoff* to put limits on the duty. It will also

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⁴⁵ This term was coined by John Austin in his groundbreaking work on speech acts, *How To Do Things with Words*. J.L. Austin, How To Do Things With Words 14 (Oxford University Press 1967) (1962).

⁴⁶ As has been stated, the term "threat" is incorrect in relation to what is happening in the *Tarasoff* context, but as the term is used in its vernacular sense in this area, it is retained in conjunction with its more proper characterization, a "pledge to harm." For brevity's sake, the slashed term "threat/pledge" is used for what is commonly (and incorrectly) known in the law as a "threat."

⁴⁷ Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 354 (Cal. 1976) (Mosk, J., concurring and dissenting).

explain the extent to which such rules comport with linguistic reality. Part IV reviews cases in which communications were analyzed under the respective statutes. It will explain two ways that courts have failed both to articulate factors by which they are determining the communication to be a "threat" and to understand the significance of direct threats made by indirect means. Part V will explain the dangers in some current understandings of the duty's genesis and the importance of expert testimony. Part VI will propose a new means by which to evaluate whether a certain statement triggers a duty, incorporating linguistic imperatives and professional standards into the scheme. Part VII will restate the importance of this new perspective.

II. LINGUISTICS AND THE LAW

A. Pragmatics: Implicature

Intending to convey meaning by implication is so commonly understood that to the layperson any explanation would seem unnecessary. But for linguists, an intricate, albeit unconscious, process of communication is related between the speaker and the hearer. Philosopher Paul Grice gave the name "implicature" to a proposition's implication that is not part of the utterance and does not necessarily follow from it.⁴⁸

For example, a client might ask his accountant whether he needs to report certain cash income on his income tax return for the year, to which the accountant could reply: "Do you want to get audited?" Obviously, a layperson would suggest, the accountant is really saying: "The law requires you to report that income." But at the level of language, a great deal must take place in order for that meaning to be conveyed in the indirect way that it is.⁴⁹ First, the implicature, "The law requires you to report that income" is not part of the accountant's utterance; by definition, the implication is always unspoken. Second, the implicature is not "entailed." That is, the implicature does not follow as a matter of course from the utterance. If the accountant had responded to the client's question: "You have to report that income on page two of your return," then the broader answer, "The law requires you to report that income," would be entailed within the answer

⁴⁸ H.P. Grice, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41, 43–44 (Peter Cole & Jerry L. Morgan eds., 1975).

⁴⁹ Sarcasm is typical of the kind of speech that uses indirectness to achieve its effect; some types of humor, such as satire, are other examples.

given. In the above exchange, by responding to the client's question with another question—"Do you want to get audited?"—the accountant is said to "raise the implicature" that the income must be reported.

Where implicature and violent "threats" intersect relates to whether certain principles of language are observed in a particular exchange. As Grice points out, conversations between two people can only take place if the conversants are "cooperative" with each other—giving the amount and type of true information that is called for, and in the manner that is expected under the circumstances. ⁵⁰ The philosopher identified the following "maxims":

Maxim of Quality: The conversant responds with true information. ⁵¹

Maxim of Quantity: The conversant responds with the amount of information—no more and no less—that is called for.⁵²

Maxim of Relation: The conversant responds with relevant information (the example above and the explanation below). 53

Maxim of Manner: How the conversant responds.⁵⁴

But when a conversant intentionally replies in a way that breaks one of these maxims, he or she is said to have "flouted" that maxim. ⁵⁵ By flouting the maxim of relation, the accountant in the example above "raises the implicature" that taxes are owed. The client unconsciously reasons as follows: To my question about reporting cash income, Accountant did not answer yes or no, but asked me a question about something other than reporting income—i.e. whether I wanted to get audited, which of course I don't. I asked him about one thing and he told me about something else. He intentionally did this, so I infer that if I don't report the income, I risk an audit.

⁵⁰ Grice, *supra* note 48, at 45–46.

⁵¹ *Id.* at 46.

⁵² *Id.* at 45–46.

⁵³ *Id.* at 46.

⁵⁴ *Id*.

⁵⁵ Id. at 49.

In the example above, the maxims of both relation and manner are flouted, in that the accountant answered with unrelated information and answered a question with a question rather than with a direct statement. In response to the client's question, other ways to flout maxims and yet imply the same meaning would be:

Maxim of Quality: Accountant replies "Of course not. The IRS only cares about non-cash income, not cash income" (an obvious lie).

Maxim of Quantity: Accountant replies with the expression "Duh" (less information than is called for).

Maxim of Manner: Accountant replies by singing "Folsom Prison Blues" (singing instead of stating a response; this example also flouts relation).

As can be seen, conversational implicature involves a swift cognitive process transpiring within the hearer. What seems a sophisticated procedure actually happens with common occurrence in everyday communication. But the clarity of the meaning, as well as its sincerity, is no greater or no less than if the speaker had spoken more directly. And that fact is significant for the *Tarasoff* context. For in twenty-three out of the twenty-seven rules that imply a mandatory duty, the duty arises only upon the communication of the "threat" from the speaker to the hearer. 56 Much time is spent deliberating whether the professional "should have" been aware under professional standards that a duty to warn has arisen, but that is only another way of saying that the mental health professional should have understood the statement or circumstances to pose a felicitous threat/pledge. That is, whether the professional heard something that amounted to that class of locutions or witnessed some thing or things that If so, the duty will arise, whether the amounted to the same. communication is made directly or through implicature. Examples of raising the implicature of intended violence in a Tarasoff context include the following:

Flouting the Maxim of Quality:

THERAPIST: "Do you intend to harm X?

⁵⁶ See infra note 151 and accompanying text.

PATIENT: "I love X and I'm glad he'll get to live a long, happy life with the only girl I've ever really cared about."

Flouting the Maxim of Quantity:

THERAPIST: "Do you intend to harm X?"

PATIENT: "I'd like to pluck every hair from X's head and then every lash from X's eyebrows and then every fingernail from . . ." etc.

Flouting the Maxim of Relation:

THERAPIST: "Do you intend to harm X?"

PATIENT: "X might drive off a cliff."

Flouting the Maxim of Manner:

THERAPIST: "Do you intend to harm X?"

PATIENT: "Ashes to Ashes, Dust to Dust."

The trouble caused by maxim-flouting is that meanings implied via implicature are no less "explicit" than a more direct form of communication. And while a statutory or common law duty might require "explicitness" as an element of the duty, as in *Little*,⁵⁷ it must be understood that this form of communication—via implicature—is only less direct, not less explicit, than a "yes" or "no" answer. Criteria may be applied, as discussed below in Part V, to determine whether the locution via implicature should have given rise to a duty, but a duty nevertheless arises. How a particular therapist or other defined health care professional understands such statements and what information could help in discerning matters such as capability, sincerity, etc., must follow an examination of another area of pragmatics—speech acts.

⁵⁷ Little v. All Phoenix S. Cmty. Mental Health Ctr., Inc., 919 P.2d 1368, 1373 (Ariz. Ct. App. 1995); *see also supra* notes 12–18 and accompanying text.

B. Pragmatics: Speech Act Theory

1. Illocutionary Acts

Other means by which a "pledge to harm" can be made involve the field of study known as "speech acts." The British philosopher John Austin has explained that while there are statements that seek to describe a reality—and can be judged "true" or "false"—there are also statements that not only *say* something, but also *do* something. If the accountant in the example above decided that his retort ("Do you want to get audited?") was a bit sarcastic (especially when made to a paying client), he might immediately add: "Sorry for being such a jerk." According to Austin, the accountant is not only *saying* something—the words of the apology; he is actually *doing* something—making the apology itself. This statement involves two things: the *locutionary act* (i.e., what is said) and the *illocutionary act* (i.e., what is done; here, the apology). What is interesting about the illocutionary act is that it can be one of several types, depending upon which *force* is meant to be conveyed: a question, a command, a confession, etc. Austin's pupil, the philosopher John

[T]he [addressee's] belief in the unfavourableness of the resulting state of the world and the intention to intimidate are seldom explicitly present. To perform an indirect threat, the speaker is under no such obligation [to make them explicit] and sentences covering a wide range of topics in every syntactic form can count as indirect threats, providing a connection can be made between what is said and the unfavourable act and results.

Fraser, supra note 35, at 169.

⁵⁸ AUSTIN, *supra* note 45, at 98–99.

⁵⁹ Austin termed such acts "performatives"; i.e., locutions that "perform" the act that they name. *Id.* at 6–7. For example, it is impossible to use the word "promise" without making a "promise." The use of the word performs the act it intends. Although there are some aspects about threats that are more "performative" in essence than constantive—e.g., they can only be performed in words—according to Bruce Fraser a threat is not a performative because it can never be explicitly stated:

⁶⁰ See AUSTIN, supra note 45, at 98.

⁶¹ John R. Searle, *A Classification of Illocutionary Acts*, 5 LANGUAGE SOC'Y 1, 2 (1976).

Searle, 62 set up a classification of illocutionary acts that will be followed here:

- 1. Representatives: A statement by which speakers commit themselves to the truth of the proposition made. ⁶³
 - E.g., "The sky is blue." (Under this category would fit illocutionary acts such as asserting, confessing, admitting, forecasting, etc.)
- 2. Directives: A statement by which speakers intend to get their hearers to do something. ⁶⁴
 - E.g., "Go to the grocery store for me." (Under this category would fit illocutionary acts such as insisting, demanding, requesting, advising, etc.)
- 3. Commissives: A statement by which speakers commit themselves to certain expressed acts. ⁶⁵
 - E.g., "I'll help you with your homework." (Under this category would fit illocutionary acts such as promising, vowing, pledging, etc.)
- 4. Expressives: A statement by which speakers convey their internal psychological states or feelings. ⁶⁶
 - E.g., "You have my sympathy for your loss." (Under this category would fit illocutionary acts such as apologizing, congratulating, condoling, objecting, etc.)

 64 Id. at 11. Searle includes questions—requests for information—as directives. Id. at 11 n.2.

⁶² Searle is of the opinion "that the basic unit of human linguistic communication is the illocutionary act." *Id.* at 1.

⁶³ *Id.* at 10.

⁶⁵ *Id.* at 11. Searle notes G.E.M. Anscombe's point that each illocutionary act seeks either to match the "world to the words" (I am going to make my statement come true in the world) or the "words to the world" (I am going to make my words resemble some truth in the world). *Id.* at 3–4, 10–11. A pledge, as a commissive, seeks to make the boast, or bet, or pledge, become objectively true in the world, and therefore its "direction of fit" is "world to words." *Id.* at 11; *see also* G.E.M. ANSCOMBE, INTENTION (Basil Blackwell 1957).

⁶⁶ Searle, *supra* note 61, at 12.

5. Declarations: A statement by which speakers change the status of some entity. ⁶⁷

E.g., "You're under arrest." (Under this category would fit illocutionary acts such as christening, surrendering, excluding, bestowing, etc.)

A true "threat" would fall under the category of "commissives," as the speaker commits himself to do something, i.e., harm the hearer. Indeed, for a true threat, linguist Bruce Fraser sets out the following criteria:

- 1. The speaker's expressed intention to commit an act or to have it committed. ⁶⁸
- 2. The speaker's belief that the act will be unfavorable to the hearer (regardless of whether it truly will be or not). ⁶⁹
- 3. The speaker's intention to intimidate the hearer through the hearer's awareness of the speaker's intention.⁷⁰

However, in order to perform the locutionary act with the requisite illocutionary force, Austin also noted that certain conditions must be present, depending upon the class to which the statement belonged. For example, if someone other than an ordained priest or minister attempted to baptize a child with the words "I name thee Mary Anne," the act of "declaring" would fail, since a requisite condition is absent; the utterance is said to be "invalid" or "infelicitous." These requisite conditions are called "felicity conditions" and they correspond as follows:

1. Preparatory Conditions: condition(s) that precede the utterance.⁷⁴ E.g., for a valid confession (in the religious

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⁶⁷ *Id.* at 13–14.

⁶⁸ Fraser, *supra* note 35, at 160–61.

⁶⁹ *Id.* at 161.

⁷⁰ *Id*.

⁷¹ AUSTIN, *supra* note 45, at 14.

⁷² See id. at 34.

⁷³ JOHN R. SEARLE, SPEECH ACTS 54–74 (1969). Searle provides an in-depth discussion on the "structure of illocutionary acts." *Id*.

⁷⁴ *Id.* at 58–60.

sense), the penitent must have done something wrong under the code of his faith.

- 2. Sincerity Conditions: conditions that relate to the speaker's state of mind.⁷⁵ E.g., for a valid confession (in the religious sense), the penitent must be truly sorry for the wrong he has done.
- 3. Essential Conditions: conditions that require the utterance be recognizable as the type of illocutionary act in question. E.g., for a valid confession (in the religious sense), the penitent must express his contrition in a confessional booth or some other dedicated space, to a priest or minister, using language or formulary phrases that imply regret —"I confess that . . ."
- 4. Propositional Content Conditions: conditions that relate to the proper context of the statement. Fig., for a valid confession (in the religious sense), the penitent's utterance must predicate the penitent's *past* act—"I'm sorry that *I lied* to my wife."

With this understanding of both the criteria for a "true threat," as well as the necessity of meeting felicity conditions, it becomes apparent that what lawyers, jurists, and legislators refer to as a violent "threat" towards a third party is not really a "threat" at all. One of the preparatory conditions of a "threat" is that the threatened party be present—indeed, he must be the addressee—the "hearer." In the *Tarasoff* context, the intended victim is absent. In addition, the speaker must seek to intimidate the addressee/hearer through the utterance. In the *Tarasoff* context, the speaker does not seek to intimidate the therapist, who is the addressee/hearer; in fact, intimidation is not part of the motivation at all.

⁷⁵ See id. at 60.

⁷⁶ *Id.* at 60.

⁷⁷ *Id.* at 62–63.

⁷⁸ See Fraser, supra note 35, at 160–61.

⁷⁹ For a caveat, see *id*. at 163 (pointing out that an "overheard" threat that applies to the hearer can be intimidating). The event Fraser discusses can never happen in a *Tarasoff* context.

⁸⁰ Id.

Therefore, a proper linguistic classification of the illocutionary act performed in a *Tarasoff* context would be a "pledge," a type of "commissive," since the speaker commits himself to harm a third party.⁸¹

Just as with implicature, the relevance of speech acts in the *Tarasoff* context is that illocutionary acts can be made in indirect ways. Again, these utterances are no less explicit for that fact. Searle noted that indirect speech acts are made when the syntactic form of the locution fits one classification but carries the illocutionary force of another. ⁸² For example, if all of the felicity conditions for a "pledge to harm" are present, the illocutionary force of the commissive "I'll kill him" can take the syntactic form of all of the other classes:

Representative: "He deserves to die." or "He's going to

wind up getting himself killed."

Expressive: "I worry that I'm going to kill him."

Question: "Why should someone like him get to live?" **Directive:** (To a picture of the intended victim) "Die!

Die!"

Declaration: "He's dead." (i.e., "He's as good as dead.").

Note that the above utterances retain all of the semantic power of the commissive threat/pledge, and they all trigger a duty to warn under every iteration of that rule, whether statutory or common law. In normal contexts, these utterances might be considered somewhat ambiguous, and a hearer might be exonerated for doubting their sincerity. But in a *Tarasoff* context, with a therapist whose professional standards require the acquisition of information as well as its proper assessment, these types of utterances pose hard problems. It is crucial to know whether—at the level

⁸¹ Arguably, the utterance "I'm going to kill X" can also be classified as a "report" or a "claim"—the passing of information to the hearer, which would make it a "representative." It could, depending upon the intention of the speaker, also be meant as a "plea," with the speaker hoping to be stopped—"I'm afraid I'm going to kill X"—and therefore a type of "directive." This seems to be the case in *Little v. All Phoenix S. Cmty. Mental Health Ctr.*, *Inc.*, 919 P.2d 1368, 1370 (Ariz. Ct. App. 1995) (speaker requested hospitalization because he feared he might harm his wife). Little's directive plea had the force of a commissive.

⁸² See John R. Searle, *Indirect Speech Acts*, in 3 SYNTAX AND SEMANTICS: SPEECH ACTS 59, 71 (Peter Cole & Jerry L. Morgan eds., 1975).

⁸³ See infra Part III.

of language—a pledge to harm was made. As will be shown below, ⁸⁴ in the *Tarasoff* context the felicity conditions are affected by jurisprudential influences and depend upon a clear understanding of what criteria relate to each.

This is particularly so because of another pragmatic feature of speech acts, one that the unique workings of the law has made peculiar to the Tarasoff context. This peculiarity exists because the locutionary act (the particular utterance) and the illocutionary act (the particular force of that utterance) are both distinct from the perlocutionary effect (the effect that the utterance has on the hearer—fear, compassion, pity, joy, etc.). 85 In a Tarasoff context, the commissive threat/pledge has not only the perlocutionary effect of alarm on the therapist/hearer (much akin to a physician who sees something in an X-ray that he does not like and must alert the endangered party), 86 but the commissive also has the perlocutionary effect akin to that which would accompany the utterance of a "declaration." For example, if the Queen places a sword upon a kneeling subject's shoulder and utters the words "I dub thee Lord Henry," the words and gestures change the status of the subject from commoner to knight. Similarly, in the *Tarasoff* context, when the Speaker/Patient communicates a pledge to harm—"I'm going to kill X"—the law makes the utterance of the commissive have the perlocutionary effect of a declaration: the duty of privilege to the patient is destroyed and replaced with a duty to warn the intended victim.⁸⁷ In effect, just as the commoner becomes a knight, the hearer/therapist who owes his patient confidentiality becomes, for purposes of the rule, a citizen who owes his fellow citizen a warning. Indeed, from the law's standpoint, the effect on the hearer is of supreme importance, because in a duty to warn lawsuit, the accusation is that the hearer/ therapist should have been alarmed and, consequently, warned the intended victim. 88 From the law's standpoint, in a strict sense, whether the speaker

⁸⁴ See infra Part IV.

⁸⁵ AUSTIN, *supra* note 45, at 101–03.

⁸⁶ This is another reason why the utterance is not a "threat" in the *Tarasoff* context. Instead of fear, the perlocutionary effect is "alarm for another's safety," or "alarm that a duty must be discharged."

⁸⁷ Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 346–47 (Cal. 1976).

⁸⁸ Id. at 345.

actually intends the harm is irrelevant.⁸⁹ If a reasonable therapist, knowing what he should know according to professional standards, would consider the pledge "real," then he must warn.⁹⁰ If he is reasonable, according to the standard proposed in the final section below, he should be exonerated from a suit for breach of privilege, even if the patient swears up and down that he "did not mean it" or "was not capable of it."⁹¹

2. Implied Locutions and Non-literal Locutions

To further illustrate the variability by which meanings can be conveyed, two other dimensions of speech acts are relevant: implied locutions and non-literal locutions. As evidenced by their names, both are less than direct ways of communicating, and both can be used to express a threat/pledge. An implied locution is one in which the propositional content of the utterance is not expressed, but implied via implicature. For example, in the utterance, "I'll bet that Bill's chest can't repel bullets," the speaker seems to be making a "bet," a type of commissive. However, because the speaker is not making a serious wager as to Bill's ability to withstand gunfire, the hearer infers that this talk of "bullets" is irrelevant (the speaker is flouting the maxim of relation) and that the speaker actually intends to harm Bill. Though the locutionary act is implied, the pledge to harm is as real as if it were explicit. 93

Some locutions flout the maxim of quality, stating in the utterance something that is obviously not the case. Such locutions are commonly known in the field as "non-literal locutions." An example is: "If Bill wants to die, he can just keep on bothering me." ⁹⁴ Presumably, Bill does not want to die, and the implicature is that the speaker intends to kill him,

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⁸⁹ Id. at 346.

⁹⁰ *Id.* at 347.

⁹¹ The classic example of perlocutionary effect is that of Austin. The imperative "Shoot her!" may have the illocutionary effect of an order, but it may also have the perlocutionary effect of persuading the hearer to shoot her. Austin, *supra* note 45, at 101–02; *see also* Levinson, *supra* note 39, at 236–37; Nobuhiko Yamanaka, *On Indirect Threats*, 8 Int'l J. Semiotics L. 37, 50–52 (1995).

⁹² See Grice, supra note 48, at 43–44.

⁹³ See id. at 49–50. The examples above in the section on "Implicature" are all implied locutions; instead of answering the yes-no interrogatives, the answers are representatives or expressives with a missing propositional content condition. See discussion supra Part II.A.

⁹⁴ See Grice, supra note 48, at 46, 49, 53.

conditional upon the persistence of his pestering ways. Again, though the utterance is indirect, it is no less real, and would have no lighter consequences in a *Tarasoff* context.⁹⁵

There are other ways to use indirectness in locutions: through passivity of voice ("a match will be thrown..."), through imprecise pronoun reference ("they will be hurt"), through semantic ambiguity ("I'm going to get him"), 96 to name a few. Even the categories set out above are capable of overlapping with each other.⁹⁷ More than one maxim can be flouted in any locution, and a syntactic form might give rise to more than one illocutionary act. 98 In addition, a threat/pledge raises other problems, because it is often placed in the conditional mode: "If you don't pay me by the end of the month, I'll break your legs."99 Some legislators have foreseen the difficulty that a conditional threat/pledge poses, as will be discussed in the next section, and have required "imminence" in a Tarasoff context before a duty to warn arises. 100 But as has been shown, a locution may imply something entirely different from the way it is phrased—a question in form might be a directive in force (e.g., "Could you turn down your radio?"). Similarly, a statement may contain a conditional form, but the condition may turn the threat into a "warning." ¹⁰¹

3. "Warnings" and "Threats"

A distinction between "warnings" and "threats" is a difficult one to make, even for linguists, and much time has been spent arguing for discrete

⁹⁵ See People v. Toledo, 26 P.3d 1051, 1057–58 (Cal. 2001) (discussing attempted criminal threats). In that case, a non-literal locution was uttered as a threat: "You don't want to die tonight, do you?" *Id.* at 1053.

⁹⁶ For an example, see Holt v. United States, 565 A.2d 970, 972 (D.C. 1989) (involving the threat "I'm gonna get you").

⁹⁷ For example, a promise can have the force of both a pledge to another and a reminder to the self: "I promise I'll get to work on time tomorrow."

⁹⁸ For examples, see *supra* Part II.A.

⁹⁹ Yamanaka calls these "negotiation" threats. Yamanaka, *supra* note 91, at 46–47. E.g., "If you give us compensation, we want to put an end (to slandering)." *Id.*

¹⁰⁰ California, whose supreme court decided *Tarasoff*, does not have an imminence dimension to its statute. *See* CAL. CIV. CODE § 43.92(a) (West 2007).

¹⁰¹ A conditional threat is always direct. *See* Phillip Chong Ho Shon, "*I'd Grab the S-O-B by His Hair and Yank Him Out the Window*": *The Fraternal Order of Warning and Threats in Police-Citizen Encounters*, 16 DISCOURSE & SOC'Y 829, 832 (2005).

definitions. The simplest distinction is that, like a "promise," the speaker intends something for the benefit of the hearer in a "warning," whereas in a "threat" the speaker intends something detrimental to the hearer (and correspondingly, to the victim in the threat/pledge). 102 However, it seems that in a threat/pledge, both the consequence of non-compliance, as well as the compliance itself, are detrimental to the hearer (e.g., "If you don't leave her alone," which hearer doesn't want to do-"I'll break your legs"which hearer doesn't want to experience). On the other hand, in the warning, only the consequence is detrimental ("I warn you that cigarettes will be your death."). With a warning, only the non-compliance is bad: death. The compliance—the implied directive to stop smoking and live, is a good thing for the hearer. In any event, a major difference between a warning and a conditional pledge is that the hearer in a Tarasoff context is not the endangered party. In addition, the victim, on whom the condition is imposed, *cannot* comply because he does not know of the condition—as he is not present (i.e., he can only know if the therapist warns). In a Tarasoff context, as will be discussed below, the existence of a condition should not affect a triggering of the duty itself, but only the factor of imminence. ¹⁰³

In sum, a threat/pledge may be made directly, upon which any applicable *Tarasoff* duty may arise. But as has been shown, a pledge may

¹⁰² Fraser, *supra* note 35, at 166. Threats and warnings are the subject of much linguistic interest. *See, e.g.*, Yamanaka, *supra* note 99, at 46 (A statement "referring to the fact that an action has not been performed yet can be taken as an indirect assertion that it will occur sooner or later."); Peter Gingiss, *Indirect Threats*, 37 WORD 153, 153 (1986) (noting that a distinction should be made between threats and warnings ("indirect threats") as the former are illegal); Kate Story, *The Language of Threats*, 2 FORENSIC LINGUISTICS 74, 74 (1995) (positing that warnings are "socially indispensable," while threats are "illegal").

¹⁰³ See discussion infra Part VI. Although felicitous "warnings" are beyond the scope of this article, the sufficiency of the warning given was mentioned in Emerich v. Philadelphia Ctr. for Human Dev., Inc., 720 A.2d 1032, 1045 (Pa. 1998). There, the victim's family claimed that the mental health professional's warning was insufficient, given the victim's own mental impairment. Id. at 1045 n.15. The court did not dispose of the issue as there were no facts alleged in the complaint to such an effect. Id. at 1044. However, an argument over the recognizability of the warning qua warning would be an argument challenging the existence of the essential condition for a felicitous warning. That is, the victim's family in Emerich was suggesting that the doctor failed to put the warning in a form that would make it recognizable, especially considering the diminished capacities of the victim. Id. at 1044 n.15.

be made through implication, or indirection, or by non-literal means. ¹⁰⁴ Whether a *Tarasoff* duty arises in that instance depends upon the degree to which the law in question comports with linguistic reality.

III. DUTY TO WARN LAWS

The facts of *Tarasoff* are well-rehearsed by now, and only a brief recitation will suffice for the purposes here. In the case, the patient made a direct threat/pledge to his therapist against the victim. The therapist tried to have the patient committed, but the patient was released. Ultimately, the patient killed the victim. The California Supreme Court imposed the duty based on the Restatement (Second) of Torts section 315, which suggests that those who have had a special relationship with a third party owe a duty of care to those injured by that third party. The therapist and the patient were said to have such a special relationship, and thus the affirmative duty was imposed. An understanding of the genesis

¹⁰⁴ See discussion supra Part II.

¹⁰⁵ Tarasoff v. Regents of Univ. of Cal., 529 P.2d 553, 554 (Cal. 1974), *vacated*, 551 P.2d 334 (Cal. 1976). Of interest in the *Tarasoff* facts is that the locution that triggered the duty was uttered while the victim was out of the country. *Id.* at 556. The patient attacked the victim two months after uttering the locution. *Id.* at 554. Questions of the threat's imminence, though not raised, would have been germane to the analysis under a rule that included such a feature. Some state legislatures have recognized the importance of imminence. *See* ALASKA STAT. § 08.86.200(a)(3) (2006) ("immediate threat... to an identifiable victim"); FLA. STAT. § 491.0147(3) (2001) ("clear and immediate probability of physical harm"); 740 ILL. COMP. STAT. ANN. § 110/11(ii) (2002 & Supp. 2008) ("imminent risk of serious" harm); TEX. HEALTH & SAFETY CODE ANN. § 611.004(a)(2) (Vernon 2003 & Supp. 2008) ("probability of imminent ... or ... immediate" injury); W. VA. CODE § 27-3-1(b)(5) (Supp. 2008); WYO. STAT. ANN. § 33-38-113(a)(iv) (2007) (disclosure of "an immediate threat of physical violence").

¹⁰⁶ Tarasoff I, 529 P.2d at 554.

¹⁰⁷ Id.

¹⁰⁸ *Id.* at 557–58 (citing RESTATEMENT (SECOND) OF TORTS § 315 (1965)).

¹⁰⁹ *Id.* at 558, 561. This basis of liability is often the turning point on a court's acceptance or rejection of the duty. *Compare* Emerich v. Philadelphia Ctr. for Human Dev., Inc., 720 A.2d 1032, 1043–44 (Pa. 1998) (finding a special relationship) *with* Nasser v. Parker, 455 S.E.2d 502, 506 (Va. 1995) (finding no special relationship). *See also* Peter Lake, *Virginia is Not Safe for "Lovers": The Virginia Supreme Court Rejects* Tarasoff *in* Nasser v. Parker, 61 Brook. L. Rev. 1285, 1285–86 (1995) (noting that *Nasser* "represents the first time any court of last resort has squarely rejected" *Tarasoff*) (footnotes omitted).

of the rule is crucial to understanding its potential consequences, which will be discussed below in Part IV. Such considerations will follow an analysis of the rules themselves.¹¹⁰

In the wake of *Tarasoff*, legislatures passed statutes and courts adopted rules that sought to draw parameters around the duty that a health care

¹¹⁰ Only rules that impose a mandatory duty to warn are analyzed here; discretionary duties, by the very fact that they are discretionary, weaken liability claims and hence are not generative of the type of situations in which parsing of the language used in the incident is of real consequence. Therefore, states with discretionary duties are beyond the scope of this article. These states include: Alaska, ALASKA STAT. § 08.86.200(a)(3) (2006); Connecticut, CONN. GEN. STAT. § 52-146c(c)(3) (2005) (psychologists); id. § 52-146f(2) (psychiatrists); District of Columbia, D.C. Code § 7-1203.03(a) (2008 & Supp. 2008); Florida, FlA. STAT. § 491.0147(3) (2001); Illinois, 740 ILL. COMP. STAT. ANN. § 110/11(ii) (2002 & Supp. 2008); New York, N.Y. MENTAL HYG. LAW § 33:13(c)(6) (McKinney 2006 & Supp. 2008); Oregon, OR. REV. STAT. § 179.505(12) (2007); Rhode Island, R.I. GEN. LAWS § 5-37.3-4(b)(4) (2004 & Supp. 2007); Texas, TEX. HEALTH & SAFETY CODE ANN. § 611.004(a)(2) (Vernon 2003 & Supp. 2008); West Virginia, W. VA. CODE § 27-3-1(b)(5) (Supp. 2008); and Wyoming, WYO. STAT. ANN. § 33-38-113(a)(iv) (2007). The rule in Minnesota looks both ways: it imposes a duty to warn, MINN. STAT. § 148.975(2) (2005), but also allows for discretionary disclosures made in good faith. Id. § 148.975(7). States with no duty to warn include Alabama, but see Morton v. Prescott, 564 So. 2d 913, 916 (Ala. 1990) (leaning toward Tarasoff duty if plaintiff can show the defendant made a "specific threat of harm to the victim or to any identifiable group of which the victim might have been a member"); Georgia, but see Bradley Ctr., Inc. v. Wessner, 296 S.E.2d 693, 695-96 (Ga. 1982) (recognizing duty to control; leaning toward duty to warn); Hawaii, but see Lee v. Corregedore, 925 P.2d 324, 333 (Haw. 1996) (leaning toward a Tarasoff duty though not extending Tarasoff to include situations where there is no risk of bodily harm to third persons); Iowa, compare Anthony v. State, 374 N.W.2d 662, 668 (Iowa 1985) (leaning toward Tarasoff duty) with Cole v. Taylor, 301 N.W.2d 766, 768 (Iowa 1981) ("We have not adopted the rationale in Tarasoff."); New Mexico, but see Wilschinsky v. Medina, 775 P.2d 713, 715 (N.M. 1989) (stating law unsettled); see also Weitz v. Lovelace Health Sys., Inc., 214 F.3d 1175, 1182 (10th Cir. 2000) (repeating that "New Mexico has noted that many courts recognize 'a duty to warn when a specific, identifiable third party [victim] was known to the doctor,' although it does not appear that the state has resolved this question for itself." (citation omitted)); North Carolina, but see Currie v. United States., 836 F.2d 209, 213 (4th Cir. 1987) (implying that North Carolina would recognize a *Tarasoff* duty to warn). Arkansas, Kansas, Maine, Nevada, North Dakota and South Dakota do not have statutory or common law rules that address the duty to warn.

professional owes to those who are not his patients.¹¹¹ Basically, the rules require that the therapist make some kind of warning or attempt to protect a third party when the therapist's patient communicates "a serious threat of physical violence against a reasonably identifiable victim or victims."¹¹² The variables among the duties imposed include whether the duty is discretionary or mandatory;¹¹³ whether the duty arises only from explicit threats or from other criteria as well;¹¹⁴ whether a therapist must report threats communicated by third parties or only those threats communicated by the patient;¹¹⁵ whether the threat includes self-directed harm¹¹⁶ or threats against real property;¹¹⁷ whether the intended victim must be "clearly" identifiable or only "reasonably" identifiable;¹¹⁸ from whom the duty is owed;¹¹⁹ and how the duty can be discharged.¹²⁰

¹¹¹ See, e.g., supra the statutes and case decisions listed in note 110.

¹¹² E.g., CAL. CIV. CODE § 43.92(a) (West 2007). The identifiability of the victim was first prominently discussed in *Thompson v. County of Alameda*, 614 P.2d 728, 735–36 (Cal. 1980) (determining public employees have no affirmative duty to warn about the nonspecific threats made by a released inmate).

¹¹³ See supra the discussion in note 110.

¹¹⁴ E.g., IND. CODE § 34-30-16-1 (1999) (allowing conduct or statements other than explicit threats to trigger duty); MD. CODE ANN., CTs. & JUD. PROC. § 5-609(b) (LexisNexis 2006) (allowing "speech, conduct, or writing" to trigger duty); MASS. GEN. LAWS, ch. 123, § 36B(1) (2003) (triggering the duty when there is a history of physical violence and "a reasonable basis to believe" serious bodily injury against a specific victim will imminently occur); N.J. STAT. ANN. § 2A:62A-16(b) (West 2000) (allowing circumstances to establish the threat that triggers the duty).

¹¹⁵ E.g., MINN. STAT. § 148.975(2) (2005) (allowing the duty to arise where "other person[s]" communicate the threat); OHIO REV. CODE. ANN. § 2305.51(B) (LexisNexis 2005) (allowing the duty to arise where "a knowledgeable person has communicated . . . an explicit threat"); Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 867 (Cal. Ct. App. 2004).

¹¹⁶ E.g., MINN. STAT. § 148.975(7) (2005); N.J. STAT. ANN. § 2A:62A-16 (West 2000); OKLA. STAT. tit. 59 § 1376(3)(a) (2000 & Supp. 2007).

¹¹⁷ E.g., N.H. REV. STAT. ANN. § 329.31(I) (2003) (psychiatrists); *id.* § 330-A:35(I) (psychologists); *see* Peck v. Counseling Serv. of Addison County, Inc., 499 A.2d 422, 427 (Vt. 1985).

¹¹⁸ See Ariz. Rev. Stat. Ann. § 36-517.02 (2003) ("clearly"); Cal. Civ. Code § 43.92(a) (West 2007) ("reasonably"); Del. Code. Ann. tit. 16, § 5402(a)(1) (2003) ("clearly"); IDAHO CODE Ann. § 6-1902 (2004) ("clearly"); Ind. Code § 34-30-16-1 (1999) ("reasonably"); La. Rev. Stat. Ann. § 9:2800.2(A) (Supp. 2008) ("clearly"); Mass. Gen. Laws, ch. 123, § 36B(1) (2003) ("reasonably"); MICH. Comp. Laws § 330.1946(1) (1999) (continued)

("reasonably"); MINN. STAT. § 148.975(2) (2005) ("clearly"); MISS. CODE. ANN. § 41-21-97(e) (2005) ("clearly identified or reasonably identifiable"); NEB. REV. STAT. § 38-3132(1) (2007) ("reasonably"); N.H. REV. STAT. ANN. § 329.31(I) (2003) ("clearly identified or reasonably identifiable"); id. § 330-A:35(I) ("clearly identified or reasonably identifiable"); N.J. STAT. ANN. § 2A:62A-16 (West 2000) ("readily identifiable"); OHIO REV. CODE. ANN. § 2305.51(B) (LexisNexis 2005) ("clearly"); OKLA. STAT. tit. 59 § 1376(3)(b) (2000 & Supp. 2007) ("reasonably identifiable"); TENN. CODE. ANN. § 33-3-206(1) (2007) ("clearly"); UTAH CODE ANN. § 78B-3-502(1) (2002) ("clearly identified or reasonably identifiable"); WASH. REV. CODE. § 71.05.120(2) (2008) ("reasonably"); Bradley v. Ray, 904 S.W.2d 302, 312 (Mo. Ct. App. 1995) ("readily identifiable). "Clearly" and "identifiable" are not the only standards used. See Colo. Rev. Stat. § 13-21-117 (2008) ("specific person or persons"); MD. CODE ANN., CTS. & JUD. PROC. § 5-609(b) (LexisNexis 2006) ("specified victim or group of victims"); Emerich v. Philadelphia Ctr. for Human Dev., Inc., 720 A.2d 1032, 1040 (Pa. 1998) (just states "intended victim"); Bishop v. South Carolina Dept. of Mental Health, 502 S.E.2d 78, 81 (S.C. 1998) (just states "potential victim"); Peck, 499 A.2d at 427 (just states "identifiable victim"). Wisconsin has no requirement for an identifiable target. See Schuster v. Altenberg, 424 N.W.2d 159, 166 (Wis. 1988) (duty to warn arises when necessary for the protection of the public).

119 Some states impose a duty upon some variant of the defined term "mental health professional." ARIZ. REV. STAT. ANN. § 36-517.02 (2003) ("mental health provider"); COLO. REV. STAT. § 13-21-117 (2008) ("mental health professional"); DEL. CODE. ANN. tit. 16, § 5402(a)(1) (2003) ("mental health services provider"); IDAHO CODE ANN. § 6-1902 (2004) ("mental health professional"); IND. CODE § 34-30-16-1 (1999) ("provider of mental health services"); Ky. Rev. STAT. ANN. § 202A.400(1) (West 2006) ("mental health professional"); MD. CODE ANN., CTS. & JUD. PROC. § 5-609(b) (LexisNexis 2006) ("mental health care provider"); MASS. GEN. LAWS, ch. 123, § 36B(1) (2003) ("mental health professional"); OHIO REV. CODE. ANN. § 2305.51(B) (LexisNexis 2005) ("mental health professional or mental health organization"); TENN. CODE. ANN. § 33-3-206(1) (2007) ("mental health professional or behavior analyst"); Bradley, 904 S.W.2d at 312 ("psychologist or other health care professional"); Emerich, 720 A.2d at 1040 ("mental health professional"); Peck, 499 A.2d at 427 ("mental health professional").

Other states impose the duty upon some variant of psychotherapists/psychologists/psychiatrists. Cal. Civ. Code § 43.92 (West 2007) ("psychotherapist"); Neb. Rev. Stat. § 38-3132(1) (2007) ("psychologist"); N.H. Rev. Stat. Ann. § 329.31(I) (2003) ("psychiatrists"); *id.* § 330-A:35(I) ("psychologists"); Okla. Stat. tit. 59 § 1376(3)(b) (2000 & Supp. 2007) ("psychologist"); Utah Code Ann. § 78B-3-502 (1) (2002) ("therapist"); *Schuster*, 424 N.W.2d at 166 (uses "psychotherapist" and "psychiatrist" interchangeably).

(continued)

But from the linguistic approach being applied here, the relevant parts of the rules are those that relate to the pragmatic features outlined above, i.e., those that track the reality that is taking place at the level of the language in a *Tarasoff* context. The statutes and their common law counterparts tie the duty to the occurrence of an event: a speech act, verbal or non-verbal, that amounts to some kind of threat/pledge. In well-drawn rules, all dimensions of the speech event that trigger the duty are as transparent as possible. That is, the best rules are those that most closely track that reality, and comport with it by observing the permutations that can occur through implication, indirection, etc. As with the perlocutionary effect of threats/pledges (a commissive that the law gives the effect of a declaration)—while the law can add dimensions to the linguistic reality, it should not ignore or deny its key aspects.

A. Four Linguistic Dimensions of Duties to Warn

As stated above, Bruce Fraser sets out the criteria for a felicitous threat:

Some states impose the duty on psychotherapists as well as marriage and family therapists, licensed professional counselors and social workers. LA. REV. STAT. ANN. § 9:2800.2(A) (Supp. 2008) ("psychologist or psychiatrist, or board-certified social worker"); MISS. CODE. ANN. § 41-21-97(e) (2005) ("physicians, psychologists...or licensed master social workers").

Other states impose the duty on defined licensees and licensed practitioners. MINN. STAT. § 148.975 (2005) ("licensee"); N.J. STAT. ANN. § 2A:62A-16 (West 2000) ("licensed practitioner").

South Carolina imposes the duty on an individual who "has the ability to monitor, supervise, and control an individual's conduct" because it gives rise to a "special relationship." *Bishop*, 502 S.E.2d at 81.

The state of Washington statute lists a large group of persons: "officer of a public or private agency, . . . the superintendent, professional person in charge, his or her professional designee, or attending staff of any such agency, . . . any public official performing functions necessary to the administration of this chapter, . . . peace officer responsible for detaining a person pursuant to this chapter, . . . any county designated mental health professional." WASH. REV. CODE. § 71.05.120(1) (2008).

¹²⁰ E.g., CAL. CIV. CODE § 43.92(a) (West 2007) ("warn of and protect").

¹²¹ See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 5-609(b) (LexisNexis 2006) (duty to warn arises where the patient indicates an intention to harm "by speech, conduct, or writing....").

- a. The speaker's expressed intention to commit an act or to have it committed;
- b. The speaker's belief that the act will be unfavorable to the hearer;
- c. The speaker's intention to intimidate the hearer through the hearer's awareness of speaker's intention. 122

By way of comparison, these requirements are helpful in establishing the criteria for a felicitous pledge to harm in a *Tarasoff* context. For in order to relate that pledge to harm, the speaker must also express an intention to commit an act or to have it committed. However, the act committed must be unfavorable to a *third party*, the intended victim, not the hearer. There is no intention to intimidate the hearer in the *Tarasoff* threat/pledge. In addition, *Tarasoff* duties add certain dimensions to limit or expand the context. Typically, those dimensions include requirements that:

- 1. The harm be "physical" or "serious" or some other expression to ensure "gravity," which would not be part of an ordinary "pledge." ¹²³
- 2. The threat be "sincere" or that there be some real "apparent intent" to perform the harm, to ensure earnestness. 124 This would be a part of the ordinary pledge, fulfilling its sincerity condition.
- 3. The speaker be capable of performing the stated harm. 125 This too would be part of an ordinary pledge.
- 4. The danger be imminent, whereas the temporal implication for an ordinary pledge would characteristically be for a duration of time, even for a lifetime (e.g., "I pledge allegiance..."). 126

¹²⁴ See, e.g., Idaho Code Ann. § 6-1902 (2004); La. Rev. Stat. Ann. § 9:2800.2(A) (Supp. 2008); Mich. Comp. Laws § 330.1946(1) (1999).

¹²² See supra text accompanying notes 68–70.

¹²³ See statutes cited *infra* note 144.

 $^{^{125}}$ See, e.g., OKLA. STAT. tit. 59 § 1376(3)(b) (2000 & Supp. 2007); TENN. CODE. ANN. § 33-3-206(1) (2007).

¹²⁶ See sources cited infra note 136.

Some rules also require that the "threat" be "explicit," but as has been seen, threats can be made indirectly and still be explicit. 128

B. A Statutory Example: The Arizona Duty to Warn Law

A rule typical of those that "front" all aspects of the felicity conditions, making them requirements, is that of Arizona:

There shall be no cause of action against a mental health provider nor shall legal liability be imposed for breaching a duty to prevent harm to a person caused by a patient, unless both of the following occur:

- 1. The patient has communicated to the mental health provider an explicit threat of imminent serious physical harm or death to a clearly identified or identifiable victim or victims, and the patient has the apparent intent and ability to carry out such threat.
- 2. The mental health provider fails to take reasonable precautions. 129

This statute anticipates sincerity ("apparent intent"), capability (apparent ability—although it is ambiguous whether the word "apparent" modifies both "ability" and "intent"), gravity ("physical harm or death"), and imminence. Finally, the victim must be "clearly" identifiable, not only reasonably so. What the statute leaves in question is whether by "explicit" the legislators mean to disqualify non-verbal threats, or those gleaned from the circumstances. ¹³⁰

Regardless, indirect threats, as explained above, are verbal, and should still trigger the duty. Legislators and courts that comfort themselves with requirements for "specific threats" ignore the linguistic reality of explicit dangers being communicated through indirection or implication.

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¹²⁷ See, e.g., Ariz. Rev. Stat. Ann. § 36-517.02 (2003); Idaho Code Ann. § 6-1902 (2004); Ohio Rev. Code. Ann. § 2305.51(B) (LexisNexis 2005); Okla. Stat. tit. 59 § 1376(3)(b) (2000 & Supp. 2007).

¹²⁸ See supra note 95 and accompanying text.

¹²⁹ ARIZ. REV. STAT. ANN. § 36-517.02(A) (2003), *invalidated by* Little v. All Phoenix S. Cmty. Mental Health Ctr., Inc., 919 P.2d 1368, 1370 (Ariz. Ct. App. 1995).

¹³⁰ There is no legislative history on this matter.

The condition of "sincerity" is covered in various ways. Some rules use the term "apparent intent" (as does Arizona above) to cover that aspect. 131 The word "serious" may also be read to cover "sincerity, "132 as may the term "actual." Of all the conditions, sincerity's coverage is the most fluidly expressed, and not all rules include it, ¹³⁴ perhaps due to the lay assumption that for a threat/pledge to be a threat/pledge, it must be sincerely meant. In other words, lay people would argue that "sincerity" is part of what a "threat" is. But then, the same argument could be made against the necessity of terms to ensure gravity, or imminence, or capability, etc.—i.e., "Everyone knows" that a 'real' threat is only one in which the person means to hurt you physically, and soon," etc. This "everyone knows" assumption only begs the question as to what the felicity conditions for a threat/pledge really are. 135 It also underscores the necessity of clear thinking and the consultation of linguistic analysis to determine that point. Otherwise, the statutory rule will not anticipate all possible objections to its clarity or application.

Another troublesome condition is that of "imminence." While the term is included in many iterations, ¹³⁶ it is covered by "clear and present danger" in Massachusetts and Oklahoma, and in those rules only if the

¹³¹ See supra note 124.

¹³² See, e.g., CAL. CIV. CODE § 43.92(a) (West 2007). In Arizona, it seems the term "serious" is meant to modify physical harm, in the sense of "grave."

¹³³ See, e.g., Ky. Rev. Stat. Ann. § 202A.400(1) (West 2006); Ind. Code § 34-30-16-1 (1999); Miss. Code. Ann. § 41-21-97(e) (2005); Mont. Code Ann. § 27-1-1102 (2007); Utah Code Ann. § 78B-3-502 (1) (2002); Wash. Rev. Code. § 71.05.120(2) (2008).

¹³⁴ See, e.g., WYO. STAT. ANN. § 33-38-113(a)(iv) (2007).

¹³⁵ Cf. Ewing v. Northridge, Hosp. Med. Ctr., 16 Cal. Rptr. 3d 591, 597-99 (Cal. Ct. App. 2004) (discussing the difficulty in predicting a patient's tendencies pursuant to standards of the profession).

¹³⁶ Many states simply use "imminent" or "immediate." *See* COLO. REV. STAT. § 13-21-117 (2008) ("imminent"); DEL. CODE. ANN. tit. 16, § 5402(a)(1) (2003) ("imminent"); IDAHO CODE ANN. § 6-1902 (2004) ("imminent"); IND. CODE § 34-30-16-1 (1999) ("imminent"); MD. CODE ANN., CTS. & JUD. PROC. § 5-609(b) (LexisNexis 2006) ("imminent"); N.J. STAT. ANN. § 2A:62A-16 (West 2000) ("imminent"); OHIO REV. CODE. ANN. § 2305.51(B) (LexisNexis 2005) ("imminent"); Emerich v. Philadelphia Ctr. for Human Dev., Inc., 720 A.2d 1032, 1039–40 (Pa. 1998) ("immediate, known and serious risk").

threat is circumstantial.¹³⁷ In thirteen states, the condition is not included at all.¹³⁸ The difficulty here is that, like the condition of sincerity, which overcomes the objection that the patient was "just kidding" (and therefore not pledging to harm anyone "in reality"), "imminence" as a condition overcomes the objection that the harm intended was not "immediate," and therefore required no warning. It is one of the things essential to a threat/pledge being recognizable as such.¹³⁹ Likewise, the speaker's capability to inflict the stated harm, while essential for a threat/pledge to be understood as a threat/pledge, has only found its way into the iterations of nine of the twenty-seven rules.¹⁴⁰

A point might be anticipated: a hearer might say he did not think a threat was "serious," meaning "sincere," because it was not immediate, or because the speaker was incapable of carrying out the threat due to some physical or geographic limitation. Such a statement implies that "sincerity" is the overarching condition to all *Tarasoff* threats/pledges; in other words, all other aspects are entailed within that term. But such a

¹³⁷ MASS. GEN. LAWS, ch. 123, § 36B(1) (2003) ("clear and present danger" where there is "a history of physical violence"); OKLA. STAT. tit. 59 § 1376(3)(b) (2000 & Supp. 2007) ("clear and present danger" standard where patient presents a "danger to himself").

¹³⁸ See Cal. Civ. Code § 43.92(a) (West 2007); Minn. Stat. § 148.975(2) (2005); Miss. Code. Ann. § 41-21-97(e) (2005); Mont. Code Ann. § 27-1-1102 (2007); Neb. Rev. Stat. § 38-3132(1) (2007); N.H. Rev. Stat. Ann. § 329:31(I) (2003); Tenn. Code. Ann. § 33-3-206(1) (2007); Utah Code Ann. § 78B-3-502 (1) (2002); Wash. Rev. Code. § 71.05.120 (2008); Bradley v. Ray, 904 S.W.2d 302, 312 (Mo. Ct. App. 1995); Bishop v. South Carolina Dept. of Mental Health, 502 S.E.2d 78, 81 (S.C. 1998); Peck v. Counseling Serv. of Addison County, Inc., 499 A.2d 422, 427 (Vt. 1985); Schuster v. Altenberg, 424 N.W.2d 159, 166 (Wis. 1988).

¹³⁹ Interestingly, the California legislature changed its statute from actual to serious threats to make sure to include any conditional threats; however, it did not recognize any temporal requirement by including imminence as an element. *See* Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 870 (Cal. Ct. App. 2004) (referencing *Hearing before the Assembly Comm. on Judiciary*, 1985–86 Reg. Sess. at 4 (1985) (Analysis of Assembly Bill No. 1133)).

¹⁴⁰ See Ariz. Rev. Stat. Ann. § 36-517.02(A) (2003); Del. Code. Ann. tit. 16, § 5402(a)(1) (2003); Idaho Code Ann. § 6-1902 (2004); La. Rev. Stat. Ann. § 9:2800.2(A) (Supp. 2008); Mass. Gen. Laws, ch. 123, § 36B(1) (2003); Mich. Comp. Laws § 330.1946(1) (1999); Ohio Rev. Code. Ann. § 2305.51(B) (LexisNexis 2005); Okla. Stat. tit. 59 § 1376(3)(b) (2000 & Supp. 2007); Tenn. Code. Ann. § 33-3-206(1) (2007).

point is merely academic, as what exactly *made* the threat/pledge *seem* "insincere" in a given situation would still require a determination of imminence, or capability, etc. That is, it is a distinction without a difference to claim that the speaker was "incapable" of the harm, as opposed to claiming the speaker was insincere because he *seemed* incapable.

Of all the statutory conditions, "gravity" is the least linguistically related. An ordinary pledge does not anticipate harm, let alone physical harm or death. However, the counterpart to gravity in a normal pledge is that a pledge is generally meant to imply "solemnity" (e.g., a "pledge of allegiance," or a "pledge of honor," etc.). Here the law requires that the pledge be of a certain *type*, i.e., harmful, for the duty to be triggered—which is owing to its understanding of the term "threat." A threat, by common understanding, intends harm towards the addressee. As has been shown, the *Tarasoff* context does not actually concern "threats," since the intended victim is absent, but rather concerns "pledges" or "reports." Still, this residue of "harm," which is within the semantic field surrounding the term "threat," is anticipated in the rules. Hence this article's use of the specific term "pledge" is meant to connote a "pledge to harm," rather than simply "pledge." Gravity, as a condition, is included in most rules.

¹⁴¹ Fraser, *supra* note 35, at 164.

¹⁴² THE AMERICAN HERITAGE DICTIONARY 1049–50 (3d ed. 2006).

¹⁴³ Fraser, supra note 35, at 160; see also supra note 78 and accompanying text.

¹⁴⁴ See ARIZ. REV. STAT. ANN. § 36-517.02(A) (2003) ("physical harm"); CAL. CIV. CODE § 43.92(a) (West 2007) ("physical violence"); COL. REV. STAT. § 13-12-117 (2008) ("physical violence"); DEL. CODE. ANN. tit. 16, § 5402(a)(1) (2003) ("kill or seriously injure"); IDAHO CODE ANN. § 6-1902 (2004) ("physical harm or death"); IND. CODE § 34-30-16-1 (1999) ("physical violence or other means of harm"); KY, REV. STAT. ANN. § 202A.400(1) (West 2006) ("physical violence"); LA. REV. STAT. ANN. § 9:2800.2(A) (Supp. 2008) ("physical violence"); MD. CODE ANN., CTS. & JUD. PRO. § 5-609(b) (LexisNexis 2006) ("physical injury"); MASS. GEN. LAWS, ch. 123, § 36B(1) (2003) ("kill or inflict serious bodily injury"); MICH. COMP. LAWS § 330.1946(1) (1999) ("physical violence"); MINN. STAT. § 148.975(2) (2005) ("physical violence"); MISS. CODE. ANN. § 41-21-97 (2005) ("physical violence"); MONT. CODE ANN. § 27-1-1102 (2007) ("physical violence"); NEB. REV. STAT. § 38-3132(1) (2007) ("physical violence"); N.H. REV. STAT. ANN. § 329.31(I) (2003) ("physical violence or substantial damage to real property"); id. § 330-A:35(I); N.J. STAT. ANN. § 2A:62A-16 (West 2000) ("physical violence"); OHIO REV. CODE. ANN. § 2305.51(B) (LexisNexis 2005) ("physical harm or death"); OKLA. (continued)

However the rules are iterated, it must be restated that it is whether the hearer should have understood the speaker to be making a "threat" that triggers the duty. It is the perception of the hearer, not the expression or belief of the speaker, that is the focus for determining liability. Just as the states have adopted and iterated their rules in various ways, fronting some or all conditions, ignoring others at the cost of conflicting with linguistic reality, the courts have variously interpreted those rules. Judicial expression of clear factors for determination of any given requirement—sincerity, capability, imminence, gravity—are practically non-existent. Perhaps most troublesome of all, a vague understanding of the type of duty required, and from whence the duty springs, has contributed to a pernicious possibility within the enterprise of the affirmative duty. 146

IV. JUDICIAL INTERPRETATIONS OF DUTIES TO WARN

A. Lack of a Proper Framework

Judicial parsing of duty to warn rules has at best demonstrated only a muddled appreciation of the importance of the terms involved in a felicitous threat/pledge—sincerity, imminence, capability, and gravity. While precedent in the area of language crimes, such as criminal threats, extortion, bribery, etc. has looked to linguistic expertise for explanation of

STAT. tit. 59 § 1376(3)(b) (2000 & Supp. 2007) ("kill or inflict serious bodily injury"); UTAH CODE ANN. § 78B-3-502 (1) (2002) ("physical violence"); WASH. REV. CODE. § 71.05.120 (2008) ("physical violence"); Emerich v. Philadelphia Ctr. for Human Dev., Inc., 720 A.2d 1032, 1039–40 (Pa. 1998) ("lethal harm"); Peck v. Counseling Serv. of Addison County, Inc., 499 A.2d 422, 427 (Vt. 1985) ("serious risk of danger"). Neither Missouri nor South Carolina defines the type of violence. *See* Bradley v. Ray, 904 S.W.2d 302, 312 (Mo. Ct. App. 1995) ("future violence"); Bishop v. South Carolina Dept. of Mental Health, 502 S.E.2d 78, 81 (S.C. 1998) ("dangerous conduct"). Tennessee only mentions "bodily harm." TENN. CODE. ANN. § 33-3-206(1) (2007).

¹⁴⁵ See, e.g., Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334 (Cal. 1976); Bradley, 904 S.W.2d 302; Emerich, 720 A.2d 1032; Bishop, 502 S.E.2d 78.

¹⁴⁶ Duty to warn laws are impacted by other legislation, such as information privacy laws. *See* 45 C.F.R. §§ 160, 164 (2008). A possible objection to a duty to warn could be anticipated in jurisdictions in which a "Megan's Law" is in place. *E.g.*, N.J. STAT. ANN. § 2C:7-1 to -19 (West 2000). It is possible that a therapist—who had heard a threat/pledge stated by a listed sex offender—might argue that the community was already on warning, thereby making the duty moot.

what is happening at the level of language, ¹⁴⁷ the law of civil liability, to which *Tarasoff* duties pertain, makes no such consultation. Most cases in the area that impose the duty skip over this initial enquiry—whether a "threat" was understood by the therapist at all—to conclude that a reasonable therapist would have protected or warned the intended victim given the evidence. ¹⁴⁸

But that evidence, according to the rules as written, is only pertinent to whether the doctor should have understood that a felicitous "threat" was communicated. ¹⁴⁹ In other words, courts fail to attach liability to what the defendant should have understood from the speech act, which is what triggers the obligation under all duty to warn rules. This is perhaps due to confusion about where "foreseeability" should come into play, a general tort standard that weaves in and out of judicial rationales. ¹⁵⁰ But foreseeability is only another way of saying that, given the evidence of what the therapist knew of his patient, he should have understood the circumstance to pose a threat/pledge, and he should have acted according to what the rule requires of him.

Of the twenty-seven non-discretionary rules, only four do not predicate the liability upon some "communication" of a threat/pledge, ¹⁵¹ which makes the enquiry of whether the speech act occurred their common catalytic feature. Given the circumstances, and what the therapist knew or should have known of his patient (depending upon the rule's iteration), all evidence should be marshaled towards a determination of whether the

¹⁴⁷ See sources cited *supra* note 33; see also John Gibbons, Forensic Linguistics: An Introduction to Language in the justice system (Blackwell Publishing, Ltd. Publishers, Inc. 2003) (1993); Lawrence M. Sloan & Peter M. Tiersma, Speaking of Crime: The Language of Criminal Justice (2005).

¹⁴⁸ See Emerich, 720 A.2d at 1044; Bishop, 502 S.E.2d at 82; see also Bradley, 904 S.W.2d at 312 (allowing for liability where the therapist knew or should have known); Peck, 499 A.2d, at 426 (same).

¹⁴⁹ See statutes cited supra notes 136–40.

^{150 &}quot;Foreseeability" is the standard in those jurisdictions that allow proof by "circumstances," such as Delaware, Indiana, Maryland, Massachusetts and New Jersey. DEL. CODE. ANN. tit. 16, § 5402(a)(1) (2003); IND. CODE § 34-30-16-1 (1999); MD. CODE ANN., CTS. & JUD. PROC. § 5-609(b) (LexisNexis 2006); MASS. GEN. LAWS, ch. 123, § 36B(1) (2003); N.J. STAT. ANN. § 2A:62A-16 (West 2000).

¹⁵¹ Bradley, 904 S.W.2d at 312; Bishop, 502 S.E.2d at 82; Peck, 499 A.2d, at 427; Schuster v. Altenberg, 424 N.W.2d 159, 166 (Wis. 1988).

therapist should have understood a threat to have been communicated. Once more, that is what triggers the duty. For even in the jurisdictions whose rules do not use the words "communicate," "speech," or some other term, but rather predicate the liability on some kind of "foreseeability," the distinction is without a difference. Evidence in any situation will pertain to whether the therapist heard a threat or saw a composite of circumstances that amount to a non-verbal threat/pledge (which is only another form of communication). That is, questions as to whether the circumstances betrayed a "sincere" or "imminent" or "grave" threat/pledge, or whether or not the patient was "capable," must perforce determine the "foreseeability" of threatened danger, just as they determine the felicity of the spoken communication. To that end, factors for determining such conditions must be articulated; those factors are sorely missing from case rationales.

B. Problems of Interpretation

A good portion of duty to warn cases dispense with the initial linguistic enquiry because of a feature in the rules that requires specificity of the intended victim. ¹⁵² If the threat/pledge is not against either a clearly or reasonably identifiable victim, the duty does not arise. Other cases, however, skirt the determination of the four conditions altogether, fail to elaborate upon which of the conditions is missing, or fail to elaborate upon what evidence has been used to establish them. ¹⁵³ Even when a determination is attempted, it is often circuitous. The courts grapple with the issue, but lack the language to articulate what they are grappling with, and in any event fail to tie the analysis to the speech event. The following cases are representative.

¹⁵² See, e.g., Thompson v. County of Alameda, 614 P.2d 728, 734 (Cal. 1980); Durapau v. Jenkins, 656 So. 2d 1067, 1069 (La. Ct. App. 1995). An interesting twist to the "identifiability of victim" occurred in Wisconsin, when a patient threatened an entire class of people at a bar. State v. Agacki, 595 N.W.2d 31, 33 (Wis. Ct. App. 1999). The court held that the therapist's warning was permissible. *Id.* at 38.

¹⁵³ See, e.g., Jenks v. Brown, 557 N.W.2d 114, 117 (Mich. Ct. App. 1996) (considering only gravity); Little v. All Phoenix S. Cmty. Mental Health Ctr., Inc., 919 P.2d 1368, 1373–74 (Ariz. Ct. App. 1995) (failing to discuss sincerity and capability).

1. A case of a Non-Verbal Threat

Barry v. Turek, 154 involved a suit under California's Duty to Warn statute brought against a therapist and a hospital by a staff member who was molested by a patient. The patient could not speak English, 156 and the evidence considered by the court to determine whether or not the therapist "should have known" the patient posed a "serious threat of physical violence" against the victim 157 included the patient's diminutive size, his past acts vis-à-vis the threatened class, the patient's response to reprimands and therapy, and the consensus view of the threatened class as to the patient's potential for danger. 158 But in finding that the evidence would not have provided the therapist any indication that the patient would act as he did, 159 the court fails to state what aspect of the statute was missing, thereby ignoring the occurrence of the non-verbal threat. Instead, the court states in blanket form that there was no "serious threat of physical violence". Lause that could include the conditions of both sincerity and gravity. But it is arguable that by mentioning the patient's size in the statement of facts, ¹⁶¹ the court was considering the aspect of capability, including it in the determination of whether the threat was "serious," in the sense of "real," rather than "serious," in the sense of "sincere." This guessing-game illustrates the difficulty that courts have in classifying the evidence within statutory requirements that are broad, vague, or By contrast, had the court analyzed the non-verbal threat/pledge in terms of the conditions necessary for the existence of a threat/pledge, it would be clear in what way the communication failed to satisfy. Did the patient's size defeat any reasonable perception of his capability? Did the staff's indifferent opinion as to his "dangerousness," taken together with his offensive, though relatively minor, attempts to kiss and touch them, make the non-verbal acts somehow less than what a

¹⁵⁴ 267 Cal. Rptr. 553 (Cal. Ct. App. 1990).

¹⁵⁵ *Id.* at 553–54.

¹⁵⁶ Id. at 553.

¹⁵⁷ The court held that the plaintiff was identifiable. *Id.* at 555. The California statute does not require capability or imminence. CAL. CIV. CODE § 43.92(a) (West 2007).

¹⁵⁸ Barry, 267 Cal. Rptr. at 553-56.

¹⁵⁹ *Id.* at 556.

¹⁶⁰ Id.

¹⁶¹ *Id.* at 553.

reasonable person would consider grave? Did his response to reprimand affect how serious, in the sense of "sincere," the therapist took the "threat" to be? It is unclear from the opinion what exactly about the situation failed to establish the requisite "threat," though it is clear that the court is trying to say that the doctor never received a communication of the threatening nature that would trigger the duty. ¹⁶²

2. A Case of an "Expressive" Threat

In *DeVasier v. James*, ¹⁶³ the therapist physician was sued by the estate of his patient's victim for failing to comply with Kentucky's Duty to Warn statute. ¹⁶⁴ The statute reads:

No monetary liability and no cause of action shall arise against any mental health professional for failing to predict, warn of or take precautions to provide protection from a patient's violent behavior, unless the patient has communicated to the mental health professional an actual threat of physical violence against a clearly identified or reasonably identifiable victim, or unless the patient has communicated to the mental health professional an actual threat of some specific violent act. ¹⁶⁵

The evidence included the following:

The critical information communicated by Cissell [the patient] to members of Dr. James's staff included his patient history given to Intake Nurse, Gregory Howell, and Licensed Clinical Social Worker, Hiro Tanamachi. Howell testified that Cissell appeared as a man in crisis, that he was non-responsive to questions about homicidal and suicidal ideation, and that he was beating his legs with his fist and had clenched teeth. Howell stated that he concluded Cissell was the highest-level priority patient, and he recorded on the intake form that Cissell was a

¹⁶² See id. at 554.

 $^{^{163}\,\}mathrm{Nos.}$ 2001-CA-000846-MR, 2001-CA-000922-MR, 2007 WL 78984 (Ky. Ct. App. Jan. 12, 2007).

¹⁶⁴ *Id.* at *2.

¹⁶⁵ Ky. Rev. Stat. Ann. § 202A.400(1) (West 2006).

Level 3 priority, indicating the most serious. Tanamachi testified that Cissell communicated to him that he had run Crady [the victim] off the road in a car the previous week, that he had cut Crady's throat with a knife the previous day, that he felt he "could not help himself," and he asked to be admitted to the hospital to get help. Cissell's patient history, as communicated to Dr. James's staff by Cissell, as a part of the regular and customary treatment of a patient, was then communicated to Dr. James by the staff... in the treatment of patients. 166

Although the issue before the court was whether the communication of these events to a third party, rather than directly to the therapist himself, was sufficient to give rise to the duty, ¹⁶⁷ the case is a classic example of the types of things a patient presents in the form of verbal and non-verbal acts that may sustain the felicity conditions for a threat/pledge. Under a pragmatic analysis, evidence as to the patient's appearance, refusal to respond, physical acts, history vis-à-vis the intended victim, request for medical help, impressions of the staff, and the expressed locution—he "could not help himself"—would amount to an indirect illocutionary act and meet the gravity and sincerity conditions required by the Kentucky statute. That is, in the response to the question about homicidal ideations, the pledge to harm was being communicated in the form of an expressive, rather than a commissive:

THERAPIST: "Do you intend to harm X?

PATIENT: "I can't help myself" (an expressive) rather than "I'm going to kill X" (a commissive).

Had the statute required imminence and capability, those conditions might be satisfied by the state of agitation (relating to imminence), and the demographic attributes of the patient (relating to capability). ¹⁶⁸

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¹⁶⁶ DeVasier, 2007 WL 78984, at *5 (Johnson, J., dissenting) (emphasis added).

¹⁶⁷ Id. at *4 (majority opinion). The court held liability did not arise in such situations.

¹⁶⁸ See discussion infra Part VI.

3. A Case Questioning "Specificity"

In *Riley v. United Healthcare of Hardin, Inc.*¹⁶⁹ a Kentucky hospital was sued by the executrix of a victim who claimed a duty to warn had been breached.¹⁷⁰ The court set out the evidence:

The Hospital records indicated that Sean [the patient] was a disturbed young man and prone towards violence. Records made on Sean's admission to the Hospital indicated that he and his mother had frequent quarrels, and "although he has not hit her, he has certainly thought about it." In addition, Mary [the patient's mother and the victim] presented the Hospital with lyrics to "songs" that Sean had written, including references to lifeless bodies, death, and killing. In his initial psychiatric evaluation of Sean, Dr. Thomas Cassidy [the therapist] noted that "problems related to increased irritability and anger have become more and more evident with his mother" and noted that sometimes Sean "feels like he wants to strike out." Sean testified at his deposition that he told Hospital staff that if he were forced to return to Mary's house, "he might do something he would regret later."

During his stay at Lincoln Trial Hospital, Sean was both uncooperative and defiant, attempting to escape on two occasions and once succeeding in stealing a truck and going shoplifting. He exhibited volatile behavior, stating that he was going to hit his roommate and requesting a room change. Later, the Hospital staff placed Sean in seclusion because he was "threatening to go off." . . .

Prior to killing his mother, Sean had never communicated any specific threats to harm her to anyone in his family or to the professionals at Lincoln Trail Hospital. 171

From a linguistic standpoint, this last statement provokes a question: in what way was a specific threat/pledge not made? What does the court

¹⁶⁹ No. 97-5860, 1998 WL 598733 (6th Cir. Aug. 27, 1998).

¹⁷⁰ *Id*. at *1.

¹⁷¹ *Id.* at *2.

mean by "specific threat"?¹⁷² The court held that the intended victim was not clear, and that at any rate the family knew of the child's propensities¹⁷³:

The circumstances of this case fail to satisfy the third element necessary under the Kentucky statutes to trigger a duty to warn. Sean never communicated any threat of a specific act of violence to the Hospital staff, nor did he articulate a direct threat of physical harm against his mother or any other reasonably identifiable victim. The record reflects that the Hospital knew that Sean had thought about hitting his mother when they had argued in the past, that he occasionally perceived the need to "strike out," that he had written disturbing song lyrics, and, as his Hospital behavior confirmed, that he had a propensity toward violent conduct. This knowledge, however, does not constitute an actual threat of future physical harm to Sean's mother. At most, the Hospital had available a record of Sean's past aggressive behavior and emotional instability, traits of which Sean's family was already well aware. Although Sean testified that he told Hospital staff he "might do something [he] might regret later" upon his release, this statement would not satisfy the requirements triggering the statutory duty to warn, since the statement specifies neither an intended victim nor a violent act. Under these circumstances, Kentucky law imposes no duty on the Hospital or professionals at the Hospital to warn the Rock family. The family was already aware of Sean's Therefore, the entry of summary judgment against the estate on the failure to warn claim was not error. 174

 $^{^{172}}$ The patient also abused drugs and alcohol and this fact was known by the hospital. See *id.* at *1.

¹⁷³ An "assumption of the risk" defense in the *Tarasoff* context is discussed in an article by Brian Ginsburg. *See* Brian Ginsberg, *Tarasoff at Thirty: Victim's Knowledge Shrinks the Psychotherapist's Duty to Warn*, 21 J. CONTEMP. HEALTH L. & POL'Y 1, 19–20 (2004).

¹⁷⁴ Riley, 1998 WL 598733, at *4 (footnote omitted).

Although the court does not quibble with the sincerity of the statements, it says that they could not be understood to be against the patient's mother, nor could they be understood as grave in intention. The court does not express why the communication/locution did not rise to the level of a threat/pledge that would trigger the duty. Basically, the court is saying that the locution did not "sound like a threat." But it is also saying that no specific act of violence was articulated. This is more problematic, because the patient's statement that he "might do something he would regret later," in context, amounts to a conditional commissive. Apparently, the court is troubled by this, but gets around the problem by saying that the victim of this commissive is too vague to trigger the duty, i.e., even if one factor for satisfying the essential condition is extant, word choice, another is missing and defeats it: specificity of victim. Additionally, the court brings an assumption of the risk rationale into play, something the statute does not reflect.

4. A Case of Good Faith

Culberson v. Chapman¹⁷⁵ involved a counselor's "good faith" disclosure of a patient's threat against his employer.¹⁷⁶

During a group session with Mattson [one of the counselors] on or around December 22, 1989, respondent [the patient] stated that if he could "get away with it," he would kill "him" or follow "him" when "he" was driving after drinking and advise the police of the driving conduct. Respondent did not identify the person referred to as "him." Mattson advised respondent that if his comment was serious, she would have to report it. Respondent did not respond because he assumed Mattson knew he was not serious. Mattson's notes in respondent's chart do not make reference to this incident.

Later that day during the afternoon group session, conducted by Chapman [another counselor], respondent repeated the prior statement, although he again did not identify the person referred to as "him." Respondent never stated directly in any group session that he wanted to kill

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^{175 496} N.W.2d 821 (Minn. Ct. App. 1993).

¹⁷⁶ Id. at 822.

or harm Mr. O'Neil [the person Chapman believed to be responsible for his termination]. Chapman never asked respondent if he was serious and never mentioned the statement to him. 177

The patient sued for the damages he alleged were suffered because of the disclosure. 178 The court held that Minnesota's rule, which allows for a "good faith effort to warn against or take precautions against a client's violent behavior," required a showing of actual malice to destroy the therapist's statutory immunity. 180 From a procedural standpoint, the case is interesting because of the counselor's questioning the patient's seriousness and advising the patient a disclosure would be made if he was serious. 181 The court relates that the patient did not answer the counselor, and assumed she understood he was not serious. 182 The fact is, under the rule as written, whether the patient was "serious," in the sense of "sincere," is The duty is triggered if the therapist heard a felicitous threat/pledge. 183 The problem with the kind of "probing" of intent illustrated in Culberson is that it implies a duty has not yet arisen, or awaits a "perfected" locution. Attempts to suborn more information, or to elicit a recantation, may or may not have an effect on the duty that has already arisen. The point is that the duty has arisen upon the utterance of the felicitous threat/pledge.

5. A Case of Composite Evidence

In *Marshall v. Klebanov*, ¹⁸⁴ New Jersey's Supreme Court considered whether the threat/pledge of suicide posed by a patient was sufficiently imminent to impose a duty to warn under the New Jersey statute. ¹⁸⁵ Under that iteration of the rule, a duty arises either when:

¹⁷⁷ *Id.* at 822–23.

¹⁷⁸ *Id.* at 823.

¹⁷⁹ MINN. STAT. § 148.975(7) (2005).

¹⁸⁰ Culberson, 496 N.W.2d at 825.

¹⁸¹ Id. at 822.

¹⁸² Id. at 822-23.

¹⁸³ Id. at 824–25.

^{184 902} A.2d 873 (N.J. 2006).

¹⁸⁵ Id. at 875, 880.

- 1. [t]he patient has communicated to that practitioner a threat of imminent, serious physical violence against a readily identifiable individual or against himself and the circumstances are such that a reasonable professional in the practitioner's area of expertise would believe the patient intended to carry out the threat; or
- 2. [t]he circumstances are such that a reasonable professional in the practitioner's area of expertise would believe the patient intended to carry out an act of imminent, serious physical violence against a readily identifiable individual or against himself.¹⁸⁶

The second section would include circumstantial evidence of a homicidal or suicidal tendency. Therefore, the first section should delineate verbal or non-verbal communications of a "threat"; the second section should delineate neither of those things, but instead impose a duty based on a composite of circumstantial evidence that indicated homicidal or suicidal tendencies to a reasonable professional.

On its way to preserving a common law right to sue for breach of professional standards of care, over and apart from the statutory duty, ¹⁸⁷ the court held:

Viewing the facts in the light most favorable to plaintiff, we agree with the trial court's findings on imminency. The decedent's husband testified that, in the two weeks preceding his wife's suicide, he did not perceive an imminent threat of her taking her life. The decedent's mother similarly stated that when she spoke with her daughter over the phone on the morning of her suicide, she did not do or say anything that seemed alarming and that "[s]he sounded pretty good." Moreover, although plaintiff's expert, Dr. Simring, found that defendant assessed a "high risk of suicide" when he examined the decedent on January 7, 2000, Dr. Simring's report does not assert that defendant should have recognized the decedent as an imminent threat to herself. Finally, it is the alleged

¹⁸⁶ N.J. STAT. ANN. § 2A:62A-16 (West 2000).

¹⁸⁷ Marshall, 902 A.2d at 882.

abandonment by defendant of the decedent that prevented defendant from determining whether an imminent threat of suicide existed. 188

As there is no record of a verbal communication to the therapist, the court is attempting to assess the composite evidence. But the exonerating evidence presented and analyzed—the impressions of family members as to the imminence of the patient's threat to herself—was never communicated to the therapist. Indeed, it was the charge in *Marshall* that the therapist effectively abandoned his patient. As such, there was no speech act, and liability could only proceed from the second part of the statute, based upon the foreseeability of the event. Finally, the other conditions of the requisite speech event—sincerity and gravity of physical harm—are not discussed.

The charge of abandonment in *Marshall* suggests similar scenarios, ones in which therapists, even those keeping close contact with their patients, avoid circumstances or conversations that might trigger a duty to warn. That was an early, and still somewhat persistent, criticism of such duties by the psychiatric profession: to skirt potential liability, therapists might be hesitant to enter those areas of therapy that could pose *Tarasoff* duties—an evasion that would be detrimental to their patients. Whether or not a therapist can successfully "not know" or "not hear" a felicitous

¹⁸⁸ Id. at 883.

¹⁸⁹ See generally id.

¹⁹⁰ See generally id.

 $^{^{191}}$ Id. at 875. The court remanded the decision for a determination on common law grounds. Id. at 882–83.

¹⁹² Marshall, 902 A.2d at 882.

¹⁹³ The word "serious" seems to modify the type of physical harm here, and carries no semantic value of "sincerity" as it does in other statutes; New Jersey appears to require sincerity by the word "intends." N.J. STAT. ANN. § 2A:62A-16 (West 2000). Capability is not part of the New Jersey statutory conditions. *Id*.

¹⁹⁴ See Rosenhan et al., supra note 38, at 1188–89 (*Tarasoff* may lead to a reduction in patients seeing therapists and may affect the way therapists approach their patients.). But see John G. Fleming & Bruce Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CAL. L. REV. 1025 (1974) ("[I]t is far from clear whether qualified confidentiality has disturbed the effectiveness of psychotherapy.").

threat/pledge would seem to present another dilemma, one of adequate care, as the *Marshall* case represents.

6. A Case of Prior Knowledge

In *McIntosh v. Milano*, ¹⁹⁵ the New Jersey Superior Court adopted a duty to warn rule. ¹⁹⁶ Evidence sent back for consideration included the patient's statements to his therapist, over a two-year period, that he had fantasies "on various subjects, including fantasies of fear of other people, being a hero or an important villain, and using a knife to threaten people who might intimidate or frighten him." ¹⁹⁷ The patient also related to the therapist "experiences and emotional involvements" with the victim (which the therapist came to believe), admitted to shooting a B.B. gun at a car belonging to the victim or her boyfriend, and showed the therapist a knife he carried to protect himself and intimidate others.

The therapist stated:

[The patient] wished Miss McIntosh [the victim] would "suffer" as he did and had expressed jealousy and a very possessive attitude towards her, was jealous of other men and hateful towards her boyfriends, had difficulty convincing himself that fights or things were really over or finished, [but the therapist] denied that Morgenstein [the patient] ever indicated or exhibited any feelings of violence toward decedent or said that he intended to kill her or inflict bodily harm. Morgenstein was also very angry that he had not been able to obtain Miss McIntosh's phone number when she moved from the family home.

Subsequent to an incident in which the patient stole a prescription sheet from a pad in the doctor's office and sought to obtain a prescription for Seconal (which he abused), the patient killed the victim with a pistol. The therapist stated that though he had never talked to the victim or her

¹⁹⁹ Id. at 503-04.

¹⁹⁵ 403 A.2d 500 (N.J. Super. Ct. Law Div. 1979).

¹⁹⁶ *Id.* at 509.

¹⁹⁷ Id. at 503.

¹⁹⁸ *Id*.

²⁰⁰ Id. at 504 & n.5.

parents, he had talked to the patient's parents from time to time about his statements in therapy. ²⁰¹ The expert witness for the defense opined that:

[e]ven though a diagnosis of dangerousness is...a complex determination, in his opinion that [dangerousness] was not an issue since Morgenstein demonstrated his dangerousness by (a) firing a weapon at Miss McIntosh's car, (b) exhibiting a knife to Dr. Milano, (c) forging a prescription, and (d) verbalizing threats towards Miss McIntosh and her boyfriends. In light of this and the commission of a violent act, i.e., firing the gun, dangerousness was not in his opinion a prediction, but a known fact. ²⁰²

Though prior to the enactment of the duty to warn statute, the expert witness here set out facts of which the therapist was aware, ones that pertain to conditions necessary for establishing a felicitous threat/pledge: the preparatory condition of capability, exhibited by the patient's possession of a weapon and propensity to use the same, as well as his abuse of Seconal; the sincerity condition, exhibited by past violent acts and violent delusions in therapy; and the essential condition of word choice and demeanor, exhibited by rage, obsessiveness, and locutions that he wished the patient "to suffer as he had," entailing physical harm against a reasonably identifiable victim. The propositional content condition of imminence is at question, but evidence as to the non-conditionality of the threat, the exclusive, obsessive focus of the patient's intentions, and the fact that the patient had committed a crime the very day of the incident, would inform the temporal context necessary for determining imminence.

7. A Case of Imminence

The temporal context, which is relevant to a determination of imminence, as it concerns how impending the danger is, was again at issue in *Little*.²⁰³ Also at issue was the immediate context, which concerns the

²⁰² *Id.* at 506.

²⁰¹ *Id*.

²⁰³ Dennis Little appeared at his wife's house on two consecutive days despite being admitted into a treatment program; he stabbed her several times during the second (continued)

expression of the locution, and therefore the recognizability of the threat/pledge *as* a threat/pledge.²⁰⁴ Regarding the question of imminence, the court said:

Evidence concerning defendants' first contact with Dennis in May 1989 does not support a liability claim under [Arizona Revised Statutes] § 36-517.02, which requires a threat of "imminent" physical harm or death. Thus, HDI's May 11, 1989 assessment that "[c]lient appears at risk of hurting himself or his wife, has made threats to that effect during the last few days, by his own admission & according to his wife," has no bearing on HDI's statutory duty of care in October. 205

However, the patient had said two days before that he "was afraid [he] might hurt [his wife]" and that his "stupid thoughts" included murder and suicide. While the court was careful to conform to the explicit requirements of the detailed Arizona statute, which fronts all conditions, the court rejected linguistic realities by ignoring all context, as well as the fact that locutions may be explicit, though indirect. The patient's statement that he was "afraid [he] might hurt [his wife]," though in the syntactic form of an expressive, articulating his fear (and in the context of requesting help from a hospital, also a directive, in the sense of a "plea"), has the indirect illocutionary force of a commissive, a statement of intention, or pledge to harm. That the expression of fear may weaken an argument for imminence, in that the reticence might indicate some degree of control, would have to be considered in the context of a man who was brought to a treatment center for placing a butcher knife beside his wife's bed. 207

encounter. Little v. All Phoenix S. Cmty. Mental Health Ctr., Inc., 919 P.2d 1368, 1370–71 (Ariz. Ct. App. 1995).

²⁰⁴ See id. at 1373–74.

 $^{^{205}}$ *Id.* at 1374 n.3.

²⁰⁶ Id. at 1370.

²⁰⁷ *Id.* at 1371. Each condition can influence and inform the others. For example, the man's capability (he had access to knives), and his sincerity (having a history of violence towards his family) would affect just how "conditional" the statement was. If it is not truly conditional, then the threat is more imminent.

8. A Case of Capability

Pettus v. Cole²⁰⁸ involved a scenario in which a patient sued his therapists under the medical privacy act for disclosing statements he made to them about his employers.²⁰⁹ Interestingly, the therapists did not claim a duty to warn, and in fact said that the patient had not posed a threat to his supervisors²¹⁰; in fact, a statement made about hitting one of his employers²¹¹ was considered, in context, to be indicia of a normal coping mechanism:

Specifically, Dr. Unger said: "[I]n assessing the possibility that Mr. Pettus [the plaintiff] may do bodily harm to someone, it is important to keep in mind that Mr. Pettus is a man of middle age who has no history of acts of violence. Fantasies of performing violent acts are actually quite common in human experience, and are entertained from time to time by even the most gentle of human beings. Rather than being predictive of future violence, such fantasies actually serve as a psychological 'safety valve,' permitting the vicarious, but safe and harmless discharge of strong emotions. Experiencing the fantasy of taking violent revenge often reduces the impulse of performing the behavior. There is a very great and very crucial difference between merely thinking about performing some action, and the physical doing of that act ",212

In effect, the therapists in *Pettus* argued against the capability and sincerity conditions of the "threat"—using the patient's history and age to be informative factors. The court noted that had the therapists been alerted to a serious threat, they would have had a duty to warn.²¹³

²¹⁰ *Id*. at 60.

²⁰⁸ 57 Cal. Rptr. 2d 46 (Cal. Ct. App. 1996).

²⁰⁹ *Id.* at 55.

²¹¹ See id. at 59 n.11.

²¹² Id. at 60 n.14.

²¹³ *Id.* at 76.

9. Three Cases Involving Gravity

The facts of *McCarty v. Kaiser Hill Co.*²¹⁴ involved a plaintiff-patient who sued his psychologist for disclosing an alleged threat against the plaintiff's supervisors.²¹⁵ The psychologist argued that the Colorado duty to warn statute made him immune from liability.²¹⁶ The statute provides, in pertinent part:

A...psychologist, or other mental health professional...shall not be liable for damages in any civil action for failure to warn or protect any person against a mental health patient's violent behavior, and any such person shall not be held civilly liable for failure to predict such violent behavior, 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.²¹⁷

The patient called the psychologist at 1:30 a.m., talked for more than one hour, and stated that he was "feeling sort of homicidal." He told the psychologist that he was acquainted with martial arts, could kill someone if provoked, and that though his supervisors did not deserve to die, "they [did] deserve to have their ass kicked." The psychologist informed the patient that he had to warn the supervisors and subsequently did so. While the court held that the psychologist had properly discharged his duty, because he had received "a serious threat of imminent physical violence against a specific person or persons," the court did not elaborate upon how it determined that the statement amounted to the requisite statutory standard. Of the four possible elements that comport with the felicity conditions of a threat/pledge—sincerity, imminence, gravity, and capability—the Colorado statute employs only three: sincerity (it would

²¹⁴ 15 P.3d 1122 (Colo. Ct. App. 2000).

²¹⁵ *Id.* at 1123–24.

²¹⁶ See id. at 1124–25.

²¹⁷ COLO. REV. STAT. § 13-21-117 (2008).

²¹⁸ McCarty, 15 P.3d at 1125.

²¹⁹ *Id*.

²²⁰ Id.

²²¹ *Id*.

seem "serious" modifies "threat" here, in the sense of "sincere" rather than "grave," as the requirement that the violence be "physical" seems intended to ensure gravity), imminence, and gravity. However, the factors that the court used to determine these elements go undiscussed. The statement, "[T]hey don't deserve to die but they do deserve to have their ass kicked," is not in the form of a commissive but is arguably a representative with the illocutionary force of a commissive. That is, when said in the context of a man who is "feeling sort of homicidal," the locution is more properly classified as a statement of intention, rather than the representation of a fact. If so, then the essential condition of the threat's recognizabilty as a grave threat/pledge against a specific person is satisfied.

Gravity was also at issue in *Jenks v. Brown*, ²²⁴ a 1996 Michigan appellate decision. The Michigan statute requires the communication of a "threat of physical violence against a reasonably identifiable" victim, coupled with "the apparent intent and ability to carry out that threat in the foreseeable future"²²⁵ Hence, the statute includes all four of the conditions for a threat/pledge: capability ("ability"), sincerity ("intent"), imminence ("foreseeable future"), and gravity (physical violence against a reasonably identifiable victim). The *Jenks* court faced a situation in which the patient sought to kidnap her child, who was in the plaintiff's sole custody, and take him "underground." Although the court did not have

²²² The court here tacitly, and correctly from a linguistic standpoint, finds the statement explicit in a way that the court in *Little* would not.

²²³ In *Peck*, the Vermont Supreme Court held that a mental health agency had a duty to warn the plaintiff, whose son committed arson on his property, even though the patient expressed his locution in a suppositional way. Peck v. Counseling Serv. of Addison County, Inc., 499 A.2d 422, 423–24, 427 (Vt. 1985). When asked how the patient would go about his expressed desire to "get back at his father," the patient replied: "I could burn down his barn." *Id.* at 424. As in *McCarty*, the *Peck* court apparently interpreted the representative statement as an indirect commissive. The sincerity condition, informed by the historic context, though undiscussed, must also have been met. Though the locution is not conditional, other determinatives of its imminence, informed by the temporal context of the speech act, were also left undiscussed.

²²⁴ 557 N.W.2d 114, 117 (Mich. Ct. App. 1996).

²²⁵ MICH. COMP. LAWS § 330.1946(1) (1999).

²²⁶ Jenks, 557 N.W.2d at 116. The Jenks court decided the matter on the grounds that the plaintiff's complaint did not allege a threat against his son, and consequently there was no duty to warn. *Id.* at 117.

to address whether the threatened act was one of "physical violence," ²²⁷ thereby satisfying the requisite level of gravity for the duty, the case provides an example of how only the law, by clear and consistent delineation, can fix the semantic value to a term key to the essential condition. From a linguistic perspective, a pledge need not be "physically violent"; that requirement is solely a legal contribution. For liability to arise, the rules generally say that the "threat" must be of a certain type one that is particularly grave (violence against self, other, or property damage that could lead to loss of life, are the three instantiations of gravity). And as such, the locution that a reasonable therapist must recognize as a threat/pledge is one that intends the delineated gravity. Of the four felicity conditions for a threat/pledge, this informs the parameters of the essential condition. But "physical violence" is a broad term. Does absconding with and sequestration of a child amount to "physical" violence, or only to a type of non-physical, metaphoric violence? Only the legislature could make this determination, or the courts, based on whatever policy determinatives are consistent with the legislative intent.

An example of a case that attempts to set such semantic limits to the term "serious," in the sense of "grave," is *Ewing v. Goldstein*.²²⁸ Using the state's penal code, the *Ewing* court, in dicta, elaborated upon the statute's requirement that the communication be a "serious threat of physical violence." The court suggested a meaning for the kind of gravity required:

Although every case must be decided on its own facts, we conclude a therapist's duty to breach a patient's confidence in favor of warning an intended victim could also arise if the therapist becomes aware the patient intends to commit an act or acts of grave bodily injury short of murder, but akin to "mayhem" or "serious bodily injury" as defined by statute. (See Pen. Code, § 203 ["Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables,

²²⁷ *Id.* The court later notes that "[b]ecause there was no serious danger of violence to the plaintiff, any" duty the psychiatrist might have owed to the plaintiff's son would not encompass the plaintiff as well. *Id.* at 117–18.

²²⁸ 15 Cal. Rptr. 3d 864 (Cal. Ct. App. 2004).

²²⁹ CAL. CIV. CODE § 43.92(a) (West 2007).

disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."], 243, subd. (f)(4) ["Serious bodily injury' means a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement."]).²³⁰

The court went on to hold that though the therapist had not received a communication from the patient regarding an intention to injure the ultimate victim, it was for the trier of fact to determine whether a communication from the patient's father to that effect would have amounted to the requisite threat.²³¹ However, the court was dismissive of an argument suggested by the victim's parents, an argument that gets to the very heart of the problem related to the specific wording in "duties to warn." The parents claimed that the statute was:

ambiguous because it [was] not clear whether the term "serious," as used in the phrase "serious threat of physical violence," refers solely to the patient's state of mind, or whether it must instead be read as a part of the phrase "serious threat," referring to the probability of harm or its magnitude. They also claim the statutory phrase "physical violence against" is unclear because it fails to specify whether a threat of physical injury to an actual person is required as opposed to an item of the target individual's property, or whether the therapist's duty to warn is triggered if a patient's expresses his intention to "gently slap or pinch a victim." 232

The court held such arguments were "[d]ivorced from reality," and that in keeping with legislative intent and policy, the statutory duty arises

²³¹ *Id.* at 875. Among other things, the case is notable for extending the required source of the information from the patient himself to family members of the patient. *Id.* at 873. ²³² *Id.* at 874.

²³⁰ *Id.* at 874–75.

regardless of the definition of "serious." In short, the court implies that the statutory language is clear on its face. But the thrust of the victim's parents' argument is closer to the linguistic reality that the court so forcefully rejects. The locution that must be communicated for a duty to arise must have certain features—felicity conditions—for that locution to be a threat/pledge. Those conditions, as has been stated, involve imminence (uncovered in the California statute); capability (also uncovered); sincerity (which is the subject of the court's perorations, and which is ostensibly covered by the term "serious"); and by way of statutory imperative, gravity.²³⁴ But gravity can also be implied by the term "serious." as in the sense of a "grave threat." in which case the sincerity of the threat/pledge would go uncovered by the language of the statute. Without a clear delineation of discrete terms, the language of the statute would be redundant. Therefore, it matters very much what the legislature meant by "serious." It so happens that in this case, because "physical violence" seems meant to cover gravity, the canons of statutory interpretation would prevent a redundancy by dictating that the term "serious" cover sincerity. But the larger point is that the California legislature does not front all aspects of the linguistic reality that establish a felicitous pledge, let alone the legally-fashioned threat/pledge, because the conditions of capability and imminence are missing. Although the legislature and court might argue that those terms are assumed and covered by "threat," not all courts and legislatures deem them so, as evidenced by more precise articulations of the rule. 235 This is all to say that demands for clarity should not be dismissed. If liability turns upon the communication of the speech act, as it does in California, 236 then a recognition of all of the speech act's dimensions—and a clearer delineation of factors that would determine their existence—should be articulated, not assumed. The final section of this article makes a proposal to supply them.²³⁷

(continued)

²³³ Id

²³⁴ See Cal. Civ. Code § 43.92(a) (West 2007).

²³⁵ See generally supra Part III.

²³⁶ § 43.92(a) (imposing liability only "where the patient has communicated" the threat).

²³⁷ In *Calderon v. Glick*, 31 Cal. Rptr. 3d 707(Cal. Ct. App. 2005), decided one year later and in the same district as *Ewing v. Goldstein*, the court held that a therapist was immune from liability for failure to warn under the California statute after the facts disclosed that the therapist:

V. MISREADINGS OF THE TRIGGERING EVENTS IN DUTY TO WARN LAWS

The aim of this article has been to illustrate that the dilemma *Tarasoff* duties pose for the legal system arises in part from a failure to focus upon the catalytic event: the speech act that triggers the duty. For in both the statutory and common law dedicated to limiting the duty, the utterance of a felicitous threat/pledge is the occasion for imposing liability. Therefore, whether the therapist understood or should have understood the communication to be a felicitous threat/pledge must be the focus of judicial determination. From the preceding cases, it is clear the courts do not understand that to be the case. Instead, they look at prior events statements made or violent history—but without marshalling this evidence towards a determination of whether the communication constitutes a threat/pledge. This is true for both verbal and non-verbal communications, because "foreseeability" is only another way of saying that the composite circumstances have amounted to a non-verbal threat; that is, without a verbal expression, it can only be foreseeable that the patient meant to harm the victim if it is determined that the circumstances involved: 1) a capable patient; 2) sincerely intent on visiting grave harm; 3) on a specific person; 4) imminently.

"looked at [Rodriguez] straight in the face clearly and . . . said, 'Do you have any intention to hurt your former girlfriend, Maria Calderon,' . . . ?" Rodriguez "looked at [Dr. Wright] straight and he said no." Dr. Wright "looked at [Rodriguez's] body language and there was no fluctuation, there was no deviation." He "concluded that at that time [Rodriguez] was not a risk." Accordingly, the trial court properly ruled that the failure to warn causes of action were precluded as a matter of law.

Id. at 712. Here, although another court fails to say why precisely the duty to warn did not arise, this court apparently holds that no communication of a threat/pledge occurred. The therapist, with knowledge of the patient's history, assessed the patient's demeanor and locution—which was in fact a denial—and determined it was sincere. The locution was a representative—a denial of the interrogative posed—and there was no implicature raised of an implied threat/pledge. The kind of assessment that the therapist made in *Calderon* is indicative of the contextual features that inform several of the felicity conditions for a pledge to harm, as will be explained in the final proposal suggested in Part VI.

With this appreciation of the communication's centrality in a Tarasoff context comes a commensurate appreciation of how important it is to determine when a felicitous threat/pledge has been made. This article has attempted to explain what linguistics, particularly in the field of pragmatics, can provide to such a discussion—indeed must provide to such a discussion—in order for legal analysis to comport with linguistic reality. A failure to acknowledge the indispensability of linguistic analysis leaves judicial opinions in a muddled state, with courts overlooking or failing to elaborate upon what precise grounds a particular locution was sufficiently "sincere," "grave," or "imminent," and thereby gave rise to the duty. For however specific a rule meant to limit liability may be written, a threat/pledge may be stated indirectly, implicitly, non-literally, etc. and from a linguistic perspective, is no less explicit as a result. An attempt to ensure that only "explicit" threats trigger the duty can result in a perverse distortion—ones in which the meaning is clear by implication, but the duty is defeated by judicial adherence to dictionary definitions.²³⁸ confusion has given rise on one hand to cases that find threats to be obvious, requiring no need for expert testimony, ²³⁹ and on the other to those that impose a duty, but give no clear basis for that liability, other than to say that the therapist "should have known" or "could have foreseen."²⁴⁰ This only begs the questions: Considering the catalytic event, what precisely should have been known? What should have been foreseen? What made the locution serious, imminent, etc.? What factors went into the courts' determination? What would reasonable professionals have known that would have made them understand the locution to be a felicitous threat/pledge?

Two cases highlight the problem born from failing to understand both what triggers the duty and what limits that duty must have. Though they come to opposite conclusions, together the cases illustrate the mischief that duty to warn rules can potentially work.

²³⁸ See Little v. All Phoenix S. Cmty. Mental Health Ctr., Inc., 919 P.2d 1368, 1370 (Ariz. Ct. App. 1995); see also notes 16–20 and accompanying text.

²³⁹ See, e.g., Ewing v. Northridge, Hosp. Med. Ctr., 16 Cal. Rptr. 3d 591, 600 (Cal. Ct. App. 2004).

²⁴⁰ See, e.g., Emerich v. Philadelphia Ctr. for Human Dev., Inc., 720 A.2d 1032, 1040 (Pa. 1998) ("should have determined").

In Emerich, the Supreme Court of Pennsylvania concluded that predictions of violent behavior were not completely outside the mental health professional's abilities, as evidenced by the fact that mental health professionals must make such assessments under involuntary commitment procedures. ²⁴¹ There, the therapists complained that a duty to warn standard should be rejected because therapists are in no better position than anyone else to make such predictions.²⁴² The court stated that "[s]pecifically, the [Mental Health Procedures Act] in its procedures for involuntary mental health treatment mandates a determination of whether an individual poses a clear and present danger of harm to others or to himself. Obviously, some understanding and prediction of dangerousness is required in making this determination."²⁴³ The court went on to quote McIntosh: "To find that a determination of dangerousness is so uncertain [as] to be no better than a coin toss, and thus, preclude liability, would raise 'serious questions . . . as to the entire present basis for commitment procedures." Finally, the court noted that "mental health professionals are trained to detect, identify, evaluate and deal with threats and violent behavior, thus, setting themselves apart from others who are faced with the knowledge of threats of violence against a third party."245

The unique abilities to assess the danger that the majority found convincing enough to impose the duty were lost on one concurring judge. Justice Zapalla argued that though therapists may have access to more information than other citizens, this is not a basis for imposing the duty and does not create a "special relationship" between the therapist and the patient. More troublesome yet for Justice Zapalla was that, in the event liability were to turn upon access to information concerning a real threat, there would be no reason not to extend the duty further:

If threats are specific and immediate and the person to whom the threats are revealed knows or reasonably should know that there is a serious risk of harm, why would not

²⁴¹ *Id.* at 1041.

 $^{^{242}}$ Id

²⁴³ *Id.* (citation omitted).

²⁴⁴ *Id.* (quoting McIntosh v. Milano, 403 A.2d 500, 514 (N.J. Super. Ct. Law Div. 1979)).

²⁴⁵ *Id.* at 1041–42.

²⁴⁶ *Id.* at 1046 (Zappala, J., concurring).

the duty extend to them as well? To be sure, what would be considered reasonable for a mental health professional to know might differ from what would be considered reasonable for someone without specialized training to know, but a difference in what is reasonable for particular parties does not impact on the question of whether a duty should be recognized in the first instance.²⁴⁷

Justice Zapalla's objection is well worth noting, as a failure to find anything unique in the therapist's abilities to make the assessment leaves the extension of the duty only a matter of the right circumstances. For example, a family member who has just as much control over the disturbed person as the therapist, and has just as much access to information about his violent intentions, could be required—mutatis mutandis—to conform to some applicable standard of reasonableness. Likewise, a standard could be imposed upon a criminal defense attorney who has been implicitly apprised of his client's intention to make sure that a certain witness "does not appear" at trial. Without an appreciation of the limits of the rule, an extension of the liability beyond the current therapist/patient parameters only awaits the right court and the right circumstances. And if the "special relation[ship]" posited by the Restatement (Second) of Torts § 315, and adopted for the basis of the duty by the *Tarasoff* court, ²⁴⁸ is not founded on more than mere control, but also on medical expertise and diagnostic powers—as the *Tarasoff* opinion suggests²⁴⁹—the duty could easily be expanded just as Justice Zapalla warns. But as this article stresses, the standard of reasonableness should turn upon whether—given the professional's knowledge of the patient's history, capabilities, etc.—and his skill in assessing the same, he should have understood the locution to be a threat/pledge. That is what triggers the duty.

While *Emerich* found the mental health professional uniquely qualified to assess the threat, the court in *Ewing v. Northridge Hospital*²⁵⁰ held that expert opinion on whether the appellant should have known that his patient

²⁴⁸ Tarasoff v. Regents of Univ. of Cal., 529 P.2d 553, 557–58 (Cal. 1974) (citing RESTATEMENT (SECOND) OF TORTS § 315 (1965), *vacated*, 551 P.2d 334 (Cal. 1976)).

²⁴⁷ Id

²⁴⁹ Id. at 558 (Cal. 1974), vacated, 551 P.2d 334 (Cal. 1976).

²⁵⁰ 16 Cal. Rptr. 3d 591 (Cal. Ct. App. 2004) (a twin case to Ewing v. Goldstein, 15 Cal. Rptr. 3d 864 (Cal. Ct. App. 2004)).

had uttered a threat was irrelevant.²⁵¹ The court held that the standard was one of actual belief:

Today, a psychotherapist may be held liable for failing to warn a third party of a threat of harm only if the plaintiff is able to persuade the trier of fact the psychotherapist actually believed or predicted the patient posed a serious risk of inflicting grave bodily injury upon a reasonably identifiable victim or victims.²⁵²

The court said that lay opinion as to whether a threat was uttered or not is sufficient under a common knowledge standard, and that the lower court was incorrect in requiring expert testimony as to whether the threat should have been considered "serious" or not: "However, 'a serious threat of physical violence' is defined, it is not beyond the layperson's ken to understand that a patient's threat to take another's life, if believed, is 'serious.'"²⁵³ This flies in the face of linguistic analysis. In fact, threats or pledges to harm are among the most difficult linguistic acts to determine, and their expression can be made in a variety of indirect ways.²⁵⁴ But the larger point is that the court fails to appreciate that the proper enquiry is not whether the therapist actually believed there was a danger. According to the language of the California statute itself, the enquiry is whether a threat/pledge was actually "communicated."²⁵⁵ If so, the duty is triggered. The question is whether, given what the therapist knew from the context, he should have understood the locution to be a threat/pledge.

Another danger in the *Ewing* court's dismissal of expert testimony is that there is no longer any reason to limit the duty, or to assign it. If the courts do not tie liability to the therapist's unique skill in assessing information, the basis for the obligation is unmoored. Indeed, the *Tarasoff* duties first arose from a view rooted in diagnostics. The *Tarasoff* court based the duty on Restatement section 315, which assigns a duty running to third parties for injuries they suffer at the hands of those that the liable party was in a "special relationship" with, meaning that a party had a "duty

²⁵³ *Id.* at 600 & n.6 (citation omitted).

²⁵¹ Id. at 600.

²⁵² Id.

²⁵⁴ See Fraser, supra note 35, at 170–71.

²⁵⁵ CAL. CIV. CODE § 43.92(a) (West 2007) (emphasis added).

to control."²⁵⁶ To exemplify a "duty to control," *Tarasoff* cites a case in which a doctor misdiagnosed an illness and was responsible to a third party injured by that misdiagnosis.²⁵⁷ The court said:

The role of the psychiatrist, who is indeed a practitioner of medicine, and that of the psychologist who performs an allied function, are like that of the physician who must conform to the standards of the profession and who must often make diagnoses and predictions based upon such evaluations. Thus the judgment of the therapist in diagnosing emotional disorders and in predicting whether a patient presents a serious danger of violence is comparable to the judgment which doctors and professionals must regularly render under accepted rules of responsibility. ²⁵⁸

So the duty to control in *Tarasoff* carries with it the connotation of something akin to a duty to control the disease (not so much control over movement)—i.e., a duty to assess and treat the patient appropriately—as a reasonable professional would. It is the communication that triggers the duty, which is imposed on the grounds that the therapist has a prerequisite duty to manage the mania, assess it correctly. Particularly, there is a duty to assess correctly the mania's manifestation in the form of communications and threatening circumstances (depending upon the rule). That is why it is incorrect to say the therapist is responsible for not *predicting the violence*—a charge therapists so strenuously reject, citing their inability to predict violence. Instead, the correct basis of liability stems from failing to *assess the communication* correctly, based on what the therapist knew and should have assessed as a reasonable therapist. In other words, the liability does not arise for failure to predict violence; it arises for failure to recognize the locution for what it is: a threat/pledge.

²⁵⁶ Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 343 (Cal. 1976) (citing RESTATEMENT (SECOND) OF TORTS § 315 (1965)).

²⁵⁷ *Id.* at 344 (citing Hofmann v. Blackmon, 241 So. 2d 752, 753 (Fla. Dist. Ct. App. 1970) (imposing liability on third party where physician did not properly diagnose tuberculosis and third party was infected).

²⁵⁸ *Id.* at 345.

²⁵⁹ See id. at 354 (Mosk, J., dissenting).

The locution's recognizability will be a function of what a reasonable professional would have determined it to be, given what he should know of the patient and his ability to assess/weigh those factors (capability, sincerity, imminence, gravity).

Of course, a court is free to reject any kind of special relationship between a doctor and a patient—as the Virginia Supreme Court did in *Nasser v. Parker*²⁶⁰—and thereby reject the duty. But once the rule is established, as in the California case of *Ewing*, it makes no sense to see the duty as arising from anything less than a duty to assess/diagnose. As such, expert opinion *is* required to determine what a reasonable therapist should have understood the patient to have meant by the particular locution.

In addition, such an understanding will limit the expansion of the duty. This is because the liability rests in "assessment of information" capabilities, not just in "access to information." If it were only the latter, the liability could creep further out towards mere knowledge; there would be no reason why close relatives with whom the patient lives, or defense attorneys—people privy to as much if not more information as the therapist—should not also have a duty to warn when they hear a felicitous threat/pledge. But if the liability rests in therapists' unique ability to assess language—which is a skill definitive of the profession—then it is akin to the liability of an engineer brought in to fix a perilous dam. If he undertakes the job, and does not apply the requisite skill in assessing a problem—say a fissure that has formed in the surface—he is liable for injuries that result from the fissure's rupture and the dam's collapse. Likewise, the therapist's liability arises from a failure to meet the professional standards that would rightly understand a threat/pledge for what it is.

VI. A PRAGMATIC PROPOSAL

This judicial confusion over the catalytic event, coupled with the differing opinions as to the assessment powers of therapists and the role such faculties should play, creates a shifting area of jurisprudence. What this article attempts is to couple the proper understanding of the catalytic event with the proper role of the therapist's assessment. For failing to understand that it is the speech act that triggers the duty leaves unanswered the therapist's argument regarding inability to foresee the danger. Also, if

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²⁶⁰ 455 S.E.2d 502, 506 (1995).

the duty does not hinge on both the therapist's unique access to information *and* on his unique ability to assess that information, there is no reason to limit the duty to therapists. But understanding that it is the locution that triggers the duty, and that the felicitousness of the act can be determined based upon the unique cache of information that only the therapist is in a position to have *and* assess, limits the scope of the duty. It also ensures that the reasonableness of professional judgment has a place.

The analysis proposed below necessarily conflates two things: linguistics and professional standards.²⁶¹ It undertakes a pragmatic analysis to determine if "a pledge to harm" occurred at all, but uses special felicity conditions constructed from information that only the therapist would have access to and be able to evaluate, given the professional standards of his field. That is, the felicity conditions below *use* the professional standards of the field to determine if a felicitous threat/pledge has been made. Again, the duty to warn is triggered if a "threat" (i.e., pledge) was communicated.

For a felicitous pledge to harm that would trigger a duty to warn the following conditions would have to exist:

Preparatory Condition: The speaker would obtain satisfaction from something detrimental to the victim and has the capability to accomplish that detriment. The first part of this condition—satisfaction—is academic, subjective, and ultimately indeterminable; only the second part of the condition has legal significance: the speaker's objective capability to perform the act. Therefore, the capability context affects the preparatory condition. Determinatives of this context—all within information available to the therapist—would include:

²⁶¹ A recent article in the psychotherapeutic field has suggested a variety of factors to determine the risk of violent behavior, including "substance abuse, impaired sleep, intense anger, provocative interpersonal perception, delusional justification of harm, explosive aggression occasioned by subtle situational cues, impulsive affect, cognitive schemas dispositional to harm, or tensions associated with family or work relationships." Michael R. Quattrocchi & Robert F. Schopp, *Tarasaurus Rex: A Standard of Care That Could Not Adapt*, 11 Psychol. Pub. Pol'y, & L. 109, 125 (2005); *see also* Michael Craig Miller, *A Model for the Assessment of Violence*, 7 Harv. Rev. Psychiatry 299, 300 (2000) (identifying factors for determining a propensity for violence); M. Dolan & M. Doyle, *Violence Risk Prediction: Clinical and Actuarial Measure and the Role of the Psychopathy Checklist*, 177 Brit. J. Psychiatry 303 (2000) (reviewing checklist of violence predictors).

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Physical Ability (i.e., the speaker is physically capable of doing what he intends)—size, strength, age.

Aptitude (demographic factors that the psycho-therapeutic field considers common to those prone to violence)—gender, race, socio-economic group, existence of substance abuse, whether the speaker lives alone and without support, medical conditions, access to weapons, etc.

The focus of this condition is on the assessment of the speaker himself; that is, in determining that the speaker $can\ do$ what is intended.²⁶²

Sincerity Condition: The speaker wants to inflict the detriment. Again, whether the speaker truly, subjectively wants to inflict the harm or not is legally irrelevant and ultimately indeterminable. What matters is whether objectively he should be taken as sincere. What the hearer knows of the speaker is relevant in determining earnestness, and therefore the historic context²⁶³ affects the sincerity condition. Determinatives of this context—all within information available to the therapist—would include past communications between the speaker and the hearer regarding:

Speaker's past acts in general;

Acts vis-à-vis the intended victim;

²⁶² In criminal contexts, speakers often intentionally front the speaker's capability in order to heighten the intimidation factor. E.g., "You know who and what I am, don't you? As I am a short-tempered and cold-hearted person, I dislike delay."; "I have a remote controlled device for (a stick) of dynamite." Yamanaka, *supra* note 91, at 43; *see also* Kevin S. Douglas & Jennifer L., Skeem, *Violence Risk Assessment: Getting Specific About Being Dynamic*, 11 PSYCHOL. PUB. POL'Y & L. 347 (2005) (reviewing empirical research on violence assessment).

²⁶³ The mental health professional's understanding of the historic context was considered relevant in determining the reasonableness of care in *Little v. All Phoenix S. Cmty. Mental Health Ctr., Inc.*, 919 P.2d 1368, 1374 (Ariz. Ct. App. 1995). In agreeing that the plaintiff had a common law claim, the court in *Little* noted the expert witness's opinion that the therapists had failed to "adequately inquire into [the patient's] history of assaultive/suicidal behavior and past hospitalizations, failure to review [the patient's] prior hospital records and failure to hospitalize him in October." *Id.*

Consensus view of the speaker by others, particularly a threatened class; 264

Speaker's response to treatment;

Speaker's degree of impulsivity;

History of hospitalization/commitment/jail; and

Whether speaker was a victim of abuse in the past.

The focus here is on the seriousness of the speaker's intention. That is, whether or not the speaker *means to do it*.

Essential Condition: The hearer understands the locution to be a threat/pledge. For purposes of the Tarasoff duties, the rules impose additional dimensions to this condition. Whereas in any other context, a threat/pledge need not be limited to physical intentions (indeed, for a pledge, it need not even be harmful), nor need it be absolutely specific as to the threatened party, the Tarasoff rules require that the locution be both grave and against a clearly or reasonably identifiable person. The way that the locution is stated affects its recognizability as a threat/pledge. Therefore, the immediate context of its statement affects this condition. Determinatives of this context—all within information available to the therapist—would include:

Word choice (i.e., semantic choice; as has been shown, meaning can be conveyed in direct or indirect ways, but must at least include words of the requisite nature—implying physical harm, self-harm, etc—and words

²⁶⁴ See Barry v. Turek, 267 Cal. Rptr. 553, 555 (Cal. Ct. App. 1990).

²⁶⁵ In *Bardoni v. Kim*, 390 N.W. 2d 218 (Mich. Ct. App. 1986), the court sent back to the trier of fact the determination of whether the therapist made sufficient inquiries as to the nature of the patient's schizophrenic paranoia. *Id.* at 226–27. It was for the trial court to determine whether, had the doctor made those enquiries, he might have known exactly whom the patient thought was "attacking him (i.e., his brother), and that the patient was laying the groundwork to attack those persons." *Id.* at 227. Here, the court implies that the specificity of the target is something that the therapist cannot leave ambiguous. If all of the other condition—the specificity of the victim—might be something that a jury could find a reasonable therapist should have attempted to obtain.

denoting the requisite specificity as to the victim's identity);

Intonation;

Demeanor;

Gestures;

How involved/detailed the plan to commit the act has become; and

Whether there was a sincere recantation.²⁶⁶

The focus of this condition is on how recognizable the threat/pledge is to the hearer *qua* threat/pledge. At issue is whether *it sounded like/looked like a threat/pledge*.

Propositional Content Condition: The Speaker makes a statement of intention to do something detrimental to the victim in the near future. Imminence of the intended harm is the focus here, and therefore the condition is affected by the temporal context. Determinatives of that context—all within information available to the therapist—would include:

²⁶⁶ The court in *Emerich* commented upon the possible effect of a recantation:

Even though Appellant has pled in his complaint that Joseph was permitted to leave the Center based solely upon his assurances that he would not harm Ms. Hausler, we do not believe that this fact would defeat his assertion of a duty to warn as a matter of law. The recantation of a threat would certainly be relevant to the issue of whether the mental health professional knew or should have known, pursuant to the standards of his profession, that the patient presented a serious danger of violence to a third party. However, we cannot say, in light of the standard for judgment on the pleadings, that an assurance that the patient would not harm a third party, as a matter of law, precludes the finding of a duty to warn.

Emerich v. Philadelphia Ctr. for Human Dev., Inc., 720 A.2d 1032, 1044 n.14 (Pa. 1998). The relevance of recantations, as well as the relevance of subornation of more information is a matter to consider. *See generally Culberson v. Chapman*, 496 N.W.2d 821 (Minn. Ct. App. 1993). The duty is triggered by the utterance; whether or not more information relieves that duty is something to which the rules currently do not speak.

Whether the locution was conditional, and whether the condition is not immediately surmountable;

Whether there are geographic or other impediments to the completion of the act, such as distance (the speaker lives on a different continent) or circumstance (the speaker is in jail), etc.

The point of this condition is to determine that the speaker will not delay.

The determinatives for each condition listed above are not hard and fast. Some might establish both sincerity and capability, for example, or one might be evidence of all four. The list is certainly not exhaustive. With contributions from the mental health care field, the list may be modified, and perhaps even prioritized. One feature might be more important than another, e.g., a tendency towards impulsivity trumping all other determinatives listed in the historic context that inform the sincerity condition. In other words, the analytical paradigm proposed above is organic and amenable to growth. But there has been an attempt to keep the conditions discrete, both for the sake of clarity and in order to make the determinatives useful as factors by which an analysis of speech acts can be made.

VII. CONCLUSION

With an understanding that the catalytic event that triggers the duty is the speech act itself, and that the speech act in the *Tarasoff* context can be assessed in terms of information that the mental professional has unique access and ability to evaluate, the law in this area can become clearer. The determinatives above, used as factors, can be employed to decide whether a reasonable mental health professional should have understood the act to be a felicitous threat/pledge, thereby triggering the duty. Such an analysis limits the scope of the duty to warn—assuaging the fear of liability "creep"—to the mental health care field, while at the same time tying the liability to a concrete event, the speech act, in quantifiable terms. As such, both those in the legal and mental health fields are better equipped to accommodate the rules. Lawyers and judges can better understand when the duty arises, and what evidence speaks for a reasonable disposition of duties, while mental health professionals can plan and document the collection of necessary information for assessing the event. The reasons for these tragic situations are random and mystifying; they often defy any logic, any explanation. But the legal disposition of such matters, some thirty odd years after *Tarasoff*, should now move onto more solid ground.