

THE DUTY TO WARN IN OKLAHOMA:
A SURVEY OF LAW ACROSS LICENSED OR CERTIFIED
PSYCHOTHERAPISTS

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Recent mass murders have sparked debate throughout the country over what anticipatory measures could have been taken to prevent an individual from inflicting harm on the general public. The duty of a mental health professional to provide warning to potential victims of violent acts by a patient has recently been thrust to the forefront of this discussion due to the unique ability of a therapist to observe and predict a patient's violent behavior before any harm occurs. This Article examines the duty to warn across licensed or certified psychotherapists in Oklahoma in order to determine whether the current common law and statutory scheme effectively protects the public health and welfare. Extensive analysis of the laws applicable to mental health professionals who provide psychotherapy in Oklahoma revealed significant shortcomings that carry potentially life-threatening consequences. As a result, prompt legislative reform aimed at resolving ambiguities and inconsistencies among the laws pertaining to separate but related mental health professions is required to bring the current duty-to-warn statutes in line with the purported goals of duty-to-warn legislation.

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I. INTRODUCTION

In the 1976 landmark case of *Tarasoff v. Regents of the University of California*,¹ the practice of psychotherapy² across mental health disciplines profoundly changed. In opposition to longstanding common law principles,³ the court imposed a duty on a psychotherapist⁴ to warn a third party who had been the subject of a violent threat made by a patient during the course of treatment.⁵ Paul Herbert and Kathryn Young's state-by-state survey on the duty to warn cited Oklahoma as having a "mandatory" duty to warn;⁶ however, the authors referenced only the profession of licensed psychology—*omitting* other licensed or certified mental health professions that are statutorily allowed to provide psychotherapy.⁷ Not only has *Tarasoff* created uncertainty and lack of uniformity among states,⁸ but statutes governing the practice of psychotherapy within states lack consistency as well.⁹ Elisia Klinka concluded, "It is a heavy burden, but practicing psychotherapists need to know the scope of their states' applicable *Tarasoff*-model law; it is insufficient to rely on general knowledge about the duty, given the varied statutory language and inconsistent applications by courts."¹⁰ "The courts are generating new law pertaining to this issue, but not a coherent body of law that provides guidance for therapists who wish to practice lawfully."¹¹ Moreover, Claudia Kachigian and Alan Felthous admonished that "[d]espite the lack of a well-defined duty resulting from *Tarasoff* statutes, clinicians are well advised to be familiar with the

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

2. For purposes of this Article, the terms "therapy," "psychotherapy," and "psychotherapeutic services" refer to the broad concept of mental health counseling.

3. See *Tarasoff*, 551 P.2d at 343.

4. For purposes of this Article, the terms "therapist," "psychotherapist," "practitioner," and "mental health professional" refer to licensed or certified professionals who engage in the practice of psychotherapy.

5. *Tarasoff*, 551 P.2d at 340.

6. Paul B. Herbert & Kathryn A. Young, *Tarasoff at Twenty-Five*, 30 J. AM. ACAD. PSYCHIATRY & L. 275, 277-78 (2002).

7. *Id.* at 278.

8. *Id.* at 280.

9. See Paul B. Herbert, *The Duty to Warn: A Reconsideration and Critique*, 30 J. AM. ACAD. PSYCHIATRY & L. 417, 417 (2002).

10. Elisia Klinka, Note, *It's Been a Privilege: Advising Patients of the Tarasoff Duty and Its Legal Consequences for the Federal Psychotherapist-Patient Privilege*, 78 *FORDHAM L. REV.* 863, 930 (2009).

11. ALAN R. FELTHOUS, *THE PSYCHOTHERAPIST'S DUTY TO WARN OR PROTECT* 5 (Ralph Slovenko ed., 1989).

statute(s) in their states, and any case law preceding or following enactment[s].”¹²

The purpose of this Article is to address these concerns by examining the duty to warn across licensed or certified mental health professions allowed to provide psychotherapy in Oklahoma. Part II provides a brief description of the *Tarasoff* decision and the subsequent Oklahoma case law dealing with the duty to warn. Part III provides a survey of the current law across licensed or certified mental health professions with a focus on the inconsistency among the laws of each respective profession. Finally, Part IV explains why—given the current statutory scheme—uniformity across mental health professions is needed to facilitate adequate public protection and compliance with the law in a practical setting.

II. BACKGROUND

A. *The Tarasoff Decision*

Justice Tobriner’s holding in *Tarasoff v. Regents of the University of California*¹³ is widely recognized as a landmark statement in modern American tort law.¹⁴ Interpreting the holding and the underlying rationale has proved a more controversial issue.¹⁵ While knowledge of the holding is essential to comply with the law, knowledge of the analysis is essential to identify when the law should apply.¹⁶ More importantly, the specific

12. Claudia Kachigian & Alan R. Felthous, *Court Responses to Tarasoff Statutes*, 32 J. AM. ACAD. PSYCHIATRY & L. 263, 273 (2004).

13. “When a therapist determines, or pursuant to the standards of [the] profession should determine, that [the] patient presents a serious danger of violence to another, [the therapist] incurs an obligation to use reasonable care to protect the intended victim against such danger.” *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976).

14. See, e.g., Peter F. Lake, *Revisiting Tarasoff*, 58 ALB. L. REV. 97, 97 (1994).

15. Compare *id.* at 103–04 (arguing that properly interpreting the *Tarasoff* decision requires an analysis which goes beyond the “more or less precise holding” and “policy” rationale), with John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties To Aid or Protect Others*, 1991 WIS. L. REV. 867, 890–91 & n.97 (arguing that the Supreme Court of California decided *Tarasoff* under a dualistic approach which combined the “special relationship” theory with policy rationale), and James P. Murphy, *Evolution of the Duty of Care: Some Thoughts*, 30 DEPAUL L. REV. 147, 173 (1980) (arguing—without reference to a policy rationale—that the *Tarasoff* decision rests primarily on a combination of the “special relationship” theory and the “fundamental principle”).

16. Cf. Lake, *supra* note 14, at 104–05 (citing *Tarasoff*, 551 P.2d at 342, 347) (stating

holding in *Tarasoff* is merely a conclusory statement that a legal duty exists; the mechanics of Justice Tobriner's analysis reveal *why* the legal duty exists.

Justice Tobriner began his analysis of the negligent failure to warn claim with a number of critical statements regarding the nature of legal duties, framing the core of his subsequent arguments.¹⁷ A legal duty can be characterized as an expression of the attachment of liability on an actor for engaging in certain classes of conduct.¹⁸ Determining whether attachment occurs is, in a broad and abstract context, dependent upon whether a sufficiently close nexus exists between the victim's interests and the tortfeasor's conduct.¹⁹ Justice Tobriner concluded his canvass of the nature of legal duties by restating an oft-quoted passage from William Prosser emphasizing that the sufficiency of the nexus required to justify liability is grounded in policy considerations and not notions of natural—or immutable—principles of law.²⁰

The opinion then turned to a corollary analysis of what Justice Tobriner described as a “fundamental principle” of liability.²¹ The “fundamental principle” analysis is actually an extension of the major premise of the preliminary legal duty analysis set forth in the preceding paragraph of the opinion.²² The progression that logically follows the essential question in the legal duty analysis—whether there is a sufficiently close nexus to justify protection of the plaintiff's interests—is that liability should attach when lack of ordinary care results in injury to another.²³ In effect, the “fundamental principle” states that plaintiffs are entitled to protection when another actor's failure to use ordinary skill or diligence occasions injury, and protecting the plaintiff's interests necessitates imposing a legal duty on another.²⁴

that Justice Tobriner's analysis is essential to an understanding of any interpretation of the case).

17. See *Tarasoff*, 551 P.2d at 342.

18. *Id.*

19. *Id.*

20. *Id.* “[Duty] is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.” *Id.* (alteration in original) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 332–33 (3d ed. 1964)).

21. *Id.*

22. *Id.*

23. *Id.* (discussing *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968); *Heaven v. Pender*, [1883] 11 Q.B. 503 at 509 (Eng.)).

24. See *id.*

The following paragraph in the opinion outlined what is commonly referred to as “The Principle of ‘Departure’ from the ‘Fundamental Principle’”²⁵ of liability.²⁶ However, conceptualizing the principle of “departure” as a set of considerations that bear on the necessity of imposing a legal duty is more accurate than conceptualizing it as an exception to the general rule. For example, Justice Tobriner initially stated: “We depart from ‘this fundamental principal’ only upon the ‘balancing of a number of considerations.’”²⁷ He then provided an extensive list of policy considerations and concluded that “[t]he most important of these considerations in establishing duty is foreseeability.”²⁸ Reading this section of the opinion as a whole shows that Justice Tobriner was not discussing a “principle of departure”; he was discussing a balancing component of the legal duty analysis. It is true that the foreseeability of harm may necessitate departing from the “fundamental principle” of liability;²⁹ however, it is also true that the foreseeability of harm may necessitate strict adherence to the “fundamental principle.”³⁰

The final piece to the *Tarasoff* puzzle is the notion of the “special relationship.” Ordinarily, a legal duty is imposed on one actor based primarily on considerations of the foreseeability of harm that is likely to occur based on that actor’s conduct.³¹ This duty is usually characterized as the obligation to avoid harming “all persons who are foreseeably endangered by [the] conduct.”³² Satisfying this obligation most commonly requires *the actor* to take measures to protect foreseeable victims from potential harm or to forbear from engaging in harmful conduct altogether.³³ The point of conflict between the policy considerations underlying the imposition of a legal duty and the scope of the legal duty itself occurs when one person—for example, a therapist—can prevent foreseeable harm to another only by warning of the harm or controlling a third party’s conduct.³⁴ The therapist in this situation would owe no duty to the potential victim under the general rules of liability

25. Lake, *supra* note 14, at 118.

26. *Tarasoff*, 551 P.2d at 342.

27. *Id.*

28. *Id.*

29. See *Wofford v. E. State Hosp.*, 1990 OK 77, 795 P.2d 516, 521 (holding that the foreseeability of harm was too remote for liability to attach).

30. *Tarasoff*, 551 P.2d at 342.

31. *Id.*

32. *Id.* (quoting *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669, 680 (Cal. 1974)).

33. See *id.*

34. *Id.* at 342–43.

because the therapist is not engaging in conduct that poses a threat of harm to the potential victim.³⁵ However, when the therapist stands in a “special relationship” to the potential victim or the third party, the law imposes a legal duty on the therapist in order to reconcile the incongruity between policy and practice.³⁶

The final analysis is rather simple when the essential parts of Justice Tobriner’s discussion are extracted from the entire opinion. First, certain interests should be protected against certain classes of conduct if relevant policy considerations justify imposing a legal duty on an actor.³⁷ Second, an interest should be protected against a class of conduct when failure to exercise ordinary care while engaging in such conduct occasions injury.³⁸ Third, when injury results from the failure to exercise ordinary care, policy considerations—primarily the notion of foreseeability—must justify imposing a legal duty.³⁹ Finally, when the foreseeability of harm justifies imposing a legal duty requiring an individual to warn of the harm or control a third party’s conduct, a “special relationship” must exist between the individual and the potential victim or the third party for liability to attach.⁴⁰

Some commentators critical of the duty to warn have incorrectly conceptualized its fundamental basis.⁴¹ Framing the duty to warn as predicating liability on the practitioner for the criminal conduct of the patient fails to capture the essence of the *Tarasoff* decision. This argument mistakenly shifts the focus of the duty to the patient’s conduct. By contrast, modern duty to warn statutes couch the obligation in terms of the reasonableness of the practitioner’s conduct.⁴² The duty is therefore more properly characterized as an obligation to take affirmative action *before* the criminal conduct occurs when reasonable professional judgment indicates that such conduct *will* occur.⁴³

Conceptualizing the duty in terms of liability on the practitioner for the patient’s criminal conduct also implicates a corollary argument. That is, imposing liability on a practitioner for the criminal conduct of his

35. *Id.*

36. *See id.* at 343 (citing RESTATEMENT (SECOND) OF TORTS §§ 315–320 (1965)).

37. *See id.* at 342.

38. *See id.*

39. *See id.*

40. *See id.* at 342–43.

41. *See* Herbert, *supra* note 9, at 420.

42. *See* OKLA. STAT. tit. 59, § 1376(3)(b) (OSCN through 2012 Leg. Sess.).

43. *See Tarasoff*, 551 P.2d at 342.

patient when the practitioner knows the conduct is likely to occur cannot be reconciled with the absence of such liability in the same context but where the communicator is a friend or coworker.⁴⁴ In other words, the presence of a confidential relationship permits disclosure of confidential information while the absence of such a relationship imposes no affirmative obligation.⁴⁵ Again, this argument operates on the presumption that the eventual criminal conduct gives rise to the practitioner's liability. It is precisely because of the confidential relationship that the duty to warn finds justification. A patient is more likely to divulge truthful information to his psychotherapist during a therapeutic session than a bar patron is to divulge truthful—and potentially incriminating—information to a stranger at the local pub. Practically, it seems less burdensome to require a practitioner to disclose relatively more reliable information obtained from a patient than it would be to require the tavern owner to disclose every feigned threat overheard during the course of a busy Friday night.

B. Oklahoma's Duty to Warn History

1. Prelude to Wofford

Oklahoma courts have only addressed the precise issue in *Tarasoff* on a few occasions. By contrast, at least six of the ten major professions that provide psychotherapeutic services in Oklahoma have statutory law alluding to the obligations owed by a practitioner to a patient.⁴⁶ This is probably the case because the practical considerations implicated by *Tarasoff* cast an omnipresent shadow over mental health service providers.⁴⁷ However, practitioners who are not well versed in the law may find difficulty in navigating the complex and often ambiguous statutory scheme. For example, Oklahoma courts have yet to interpret section 1376 of the Psychologists Licensing Act—leaving glaring questions regarding the nature and extent of the legal duty owed by a psychologist to patients and third parties.⁴⁸ The result is that the plain

44. Herbert, *supra* note 9, at 420–21.

45. *Id.*

46. *See infra* Table 1.

47. FELTHOUS, *supra* note 11, at 123; Herbert, *supra* note 9, at 422.

48. A.G. Harmon, *Back from Wonderland: A Linguistic Approach to Duties Arising from Threats of Physical Violence*, 37 CAP. U. L. REV. 27, 31 (2008) (contending that “case law has done surprisingly little to explain what factors are determinative [in

language of each profession's applicable statute may be insufficient for purposes of compliance with the law in a practical setting. Therefore, a proper analysis of Oklahoma case law dealing with the duty to warn is critical in order to better understand a practitioner's daily obligations.

Nguyen v. State essentially laid the groundwork for imposing a duty to warn on a mental health professional practicing psychotherapy in Oklahoma.⁴⁹ However, the *Nguyen* court did not directly address the issue of whether such a duty was permissible. Rather, the case involved the question of whether a psychiatrist employed by the State of Oklahoma could be held liable for the negligent release of a mental patient who subsequently injured an unforeseeable third party.⁵⁰ The court analyzed the question of liability under the exemptions provided for in the Governmental Tort Claims Act,⁵¹ thereby rendering the issue of common law liability for breach of a duty owed to a third party unnecessary.⁵² The court ultimately did not confront the issue of the nature and scope of the psychiatrist's legal duty.⁵³ However, *Nguyen* is nevertheless a foundational case in Oklahoma because the court "did not negate the possibility" that a duty to warn could exist.⁵⁴

2. *Wofford v. Eastern State Hospital*

The Supreme Court of Oklahoma finally addressed the precise issue in *Tarasoff* shortly after it declined to address the issue in *Nguyen*. Today, *Wofford v. Eastern State Hospital* stands as the only decision in Oklahoma that clearly imposes a duty on a *psychiatrist* when the psychiatrist has reason to know that a patient poses a potential threat to a third party.⁵⁵

The facts of the *Wofford* case are not only straightforward but also noticeably brief.⁵⁶ Two doctors—and employees of Eastern State Hospital—treated Billy Wofford for schizophrenia for an unidentified length of time and released him on March 3, 1982.⁵⁷ More than twenty-

triggering]" the duty to warn).

49. See *Nguyen v. State*, 1990 OK 21, 788 P.2d 962, 963.

50. *Id.*

51. See OKLA. STAT. tit. 51, § 155 (OSCN through 2012 Leg. Sess.).

52. See *Wofford v. E. State Hosp.*, 1990 OK 77, 795 P.2d 516, 518.

53. See *id.*

54. *Id.*

55. *Id.* at 520.

56. See *id.* at 517–18.

57. *Id.* at 518.

eight months later Wofford shot and killed his stepfather.⁵⁸ Wofford's mother subsequently brought a claim against the Hospital and its employees for "negligent release and failure to supervise" the patient,⁵⁹ but by the time the Supreme Court of Oklahoma addressed the issue, the hospital was the only defendant remaining.⁶⁰

The *Wofford* court ultimately "held" that psychiatrists have a duty to "exercise reasonable professional care."⁶¹ The court qualified its holding in two significant respects. First, the court relied on prior Oklahoma case law to reaffirm the principle that "the existence of a duty depends on the relationship between the parties."⁶² Second, the court relied on *Tarasoff*, its progeny, and the Restatement of Torts to limit the scope of the duty to foreseeable victims.⁶³ Thus, after carefully crafting a new exception to the common law doctrine that "a person had no duty to prevent a third person from causing physical injury to another,"⁶⁴ the court merely affirmed the trial court's dismissal of the case based on lack of foreseeability.⁶⁵

Two peculiarities, however, detract from *Wofford's* significance as a case of first impression. First, the court specifically stated that its holding applied to psychiatrists—an interesting statement based on the fact that both doctors originally named in the suit were no longer parties to the case when the Supreme Court of Oklahoma rendered its decision.⁶⁶ The second notable concern is that the court framed the issue in terms of the Hospital and its employees' liability for the actions of a released patient.⁶⁷ However, it is important to note that liability in the context of the duty to warn only attaches upon breach of an expressly delineated duty.⁶⁸ Since the duty to exercise the requisite degree of care during the course of the relationship with the patient was the duty at issue in the

58. *Id.*

59. *Id.* at 517.

60. *Id.* at 518.

61. *Wofford*, 795 P.2d at 520 (emphasis added).

62. *Id.* at 518–19 (citing *Union Bank of Tucson, Ariz. v. Griffin*, 1989 OK 47, 771 P.2d 219, 222).

63. *Id.* at 518–19, 520 (citing *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976); *Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185, 194 (D. Neb. 1980); *RESTATEMENT (SECOND) OF TORTS* § 315 (1965)).

64. *Id.* at 518.

65. *Id.* at 521.

66. *See id.* at 518.

67. *Id.*

68. *See id.*

Wofford case, framing the question of liability in terms of the patient's conduct and not the practitioner's conduct is not precisely correct.⁶⁹

3. The Post-*Wofford* Landscape

The nature and scope of the duty owed to a third party by a medical professional who provides psychotherapy is an emerging topic despite Oklahoma's sparse authority on the issue.⁷⁰ Moreover, Oklahoma courts have not addressed the duty to warn issue in the context of a medical professional practicing psychotherapy since the *Wofford* decision. This has left two unresolved issues: First, whether the "holding" in *Wofford* is in fact dictum and therefore unreliable for practical purposes;⁷¹ and second, whether the duty alluded to in the *Wofford* decision extends beyond the practice of psychiatry by a licensed professional. While the first question is beyond the scope of this Article, the second question is one of the major issues driving the discussion below.

Oklahoma case law after *Wofford* did little to clarify issues regarding the scope of the duty owed by a licensed or certified medical professional. In fact, nearly all of the subsequent decisions dealing with the general principle of the duty owed to a third party have further obscured the issue. On one hand, Oklahoma courts have repeatedly held that the relationship of the parties determines whether a legal duty exists⁷²—and only a "special relationship" can extend the scope of the legal duty to a third party.⁷³ In accordance with these principles, Oklahoma courts have affirmatively identified the following relationships as "special" for purposes of the duty owed to a third party: (1) the psychiatrist–patient relationship;⁷⁴ and (2) the school-bus driver–passenger relationship.⁷⁵ However, the court in *J.S. v. Harris* cited dictum from the *Wofford* opinion in concluding that the relationship between a *psychotherapist* and a patient is a recognized "special

69. See *supra* Part II.A.

70. See Harmon, *supra* note 48, at 30–31.

71. See *supra* Part II.B.2.

72. See *Union Bank of Tucson, Ariz. v. Griffin*, 1989 OK 47, 771 P.2d 219, 222; *Wofford*, 795 P.2d at 519; *Johnson v. Fine*, 2002 OK CIV APP 47, ¶ 10, 45 P.3d 441, 443.

73. See *Joyce v. M & M Gas Co.*, 1983 OK 110, 672 P.2d 1172, 1173; *Cooper v. Millwood Indep. Sch. Dist. No. 37*, 1994 OK CIV APP 114, 887 P.2d 1370, 1374; *J.S. v. Harris*, 2009 OK CIV APP 92, ¶ 10, 227 P.3d 1089, 1092.

74. *Wofford*, 795 P.2d at 520.

75. *Cooper*, 887 P.2d at 1374.

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relationship” in Oklahoma.⁷⁶ Since there are no licensed psychotherapists in Oklahoma, it is unclear whether the *Wofford* and *Harris* courts intended the duty to extend to the practice of psychotherapy or simply mistakenly characterized the profession of licensed psychiatry. On the other hand stands the body of statutory law governing individual mental health professions in Oklahoma.⁷⁷ As revealed below, the tension between the limited number of common law “special relationships” in Oklahoma and the numerous statutes that establish affirmative duties to warn is a source of considerable confusion among practitioners attempting to practice in accordance with the law.

III. A SURVEY OF LAW ACROSS LICENSED OR CERTIFIED PSYCHOTHERAPISTS IN OKLAHOMA

A. Introduction

Statutes regulate the following professions with respect to the practice of psychotherapy in Oklahoma: Licensed Psychologists, Licensed Professional Counselors, Licensed Marital and Family Therapists, Licensed Behavioral Practitioners, Licensed Social Workers, Licensed Alcohol and Drug Counselors, Licensed Medical Doctors, Licensed Doctors of Osteopathy, Certified School Psychologists, and Certified School Counselors.⁷⁸ In stark contrast to Oklahoma case law, which indicates that the nature of the practitioner–client relationship dictates whether a duty to warn applies,⁷⁹ Oklahoma statutory law prescribes legal duties based on the characterization of services that the professional provides.⁸⁰ Furthermore, some professions that provide psychotherapeutic services are statutorily exempt from regulation.⁸¹ While it is noteworthy that mental health professions cite a *Tarasoff*-like

76. See *Harris*, 2009 OK CIV APP 92, ¶ 13 (citing *Wofford*, 795 P.2d at 518).

77. See *infra* Table 1.

78. See *infra* Table 1.

79. See *supra* Part II.B.2.

80. See *infra* Table 1.

81. For example, pastoral counselors engage in the practice of psychotherapy but are statutorily exempt from the requirements of the Psychologists Licensing Act, OKLA. STAT. tit. 59, § 1353(2) (OSCN through 2012 Leg. Sess.), and the Licensed Behavioral Practitioner Act, § 1932. Although the Psychologists Licensing Act and the Licensed Behavioral Practitioner Act also specifically exempt members of other professions, pastoral counselors are the only professionals that are both statutorily exempt and unregulated by other statutory law.

duty to warn among the provisions of their codes of ethics,⁸² those guidelines are “unlikely to be determinative.”⁸³

Table 1: *The Duty to Warn Across Mental Health Professions in Oklahoma Referenced by Statute*, provides an overview of the professions discussed in the following subparts, and it provides references to the governing statutes:

Table 1:
The Duty to Warn Across Mental Health Professions in Oklahoma Referenced by Statute

Profession	Subpart <i>Infra</i>	Governing Statute(s) in OKLA. STAT.	Reference to Duty to Warn
Psychologists	III.B.1	tit. 59, §§ 1351–1376	§ 1376
Licensed Professional Counselors	III.B.2	tit. 59, §§ 1901–1920	§ 1910
Licensed Marital and Family Therapists	III.B.2	tit. 59, §§ 1925.1–1928	§ 1925.11
Licensed Behavioral Practitioners	III.B.2	tit. 59, §§ 1930–1949.1	§ 1939
Social Workers	III.B.2	tit. 59, §§ 1250–1273	§ 675:20-1-5†
Alcohol and Drug Counselors	III.B.2	tit. 59, §§ 1870–1885	§ 38:10-3-3†
Medical Doctors	III.C	tit. 59, §§ 480–518	*
Doctors of Osteopathy	III.C	tit. 59, §§ 620–645	*
Certified School Psychologists	III.C	tit. 70, § 3-104	*
Certified School Counselors	III.C	tit. 70, § 3-104	*
* No specific reference †Oklahoma Administrative Code ‡Pastoral Counselors statutorily exempt			

82. See OKLA. ADMIN. CODE § 210:20-29-3 (2011); AM. PSYCHIATRIC ASS’N, THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY § 4(8) (rev. ed. 2009).

83. Herbert & Young, *supra* note 6, at 276. *But see* Kachigian & Felthous, *supra* note 12, at 273 (contending that “the best course of action is to practice within the proper standard of care and be guided by professional ethics”).

B. Statutes Expressly Referencing a Duty to Warn

1. The Psychologists Licensing Act

A survey of statutes governing the practice of psychotherapy in Oklahoma produced six professions that allow a psychotherapist to breach the duty of confidentiality in the event a patient poses a risk to himself or a third party.⁸⁴ The Psychologists Licensing Act provides the most comprehensive language among the laws in title 59 with regard to the imposition of a duty to warn and the method by which a licensed mental health professional can discharge that duty.⁸⁵ The statute's overarching framework provides the mutual advantages of protecting the public welfare and elucidating the licensee's obligations to facilitate compliance in a practical setting.⁸⁶ Section 1376 of the Act expresses the general proposition that all communications between the psychologist—including any “colleague, agent or employee of any psychologist, whether professional, clerical, academic or therapeutic”—and the patient are confidential.⁸⁷ This obligates the psychologist to inform the patient at the *initiation of the therapeutic relationship* of the limitations of confidentiality imposed by law.⁸⁸ The important caveat of the statute is a mandated⁸⁹ breach of the duty of psychologist–patient confidentiality “[u]pon the need to disclose information to protect the rights and safety of self or others” in certain circumstances.⁹⁰

The first of such circumstances requiring disclosure of confidential information is contained in section 1376(3)(a). The psychologist is required to disclose confidential information if evidence indicates that the patient poses “a clear and present danger to himself and refuses explicitly or by behavior to voluntarily accept further appropriate

84. *See supra* Table 1.

85. *See* OKLA. STAT. tit. 59, §§ 1351–1376 (OSCN through 2012 Leg. Sess.).

86. *See id.* § 1376(3); *see also* FELTHOUS, *supra* note 11, at 123.

87. OKLA. STAT. tit. 59, § 1376.

88. *Id.*

89. The obligations contained in section 1376(3) are mandatory by virtue of the phrase “the psychologist shall have a duty.” *Id.* § 1376(3)(a), (b); *see* TIB Corp. v. Edmondson, 1981 OK 76, 630 P.2d 1296, 1297 (stating that “in statutory construction the word ‘shall’ connotes a mandatory duty” in Oklahoma). This is in direct contrast to other language in section 1376 which provides that “[t]he psychologist may also contact members of the patient’s family.” OKLA. STAT. tit. 59, § 1376(3)(a).

90. OKLA. STAT. tit. 59, § 1376(3).

treatment.”⁹¹ Oklahoma courts have yet to address the scope of the psychologist’s duty under 1376(3)(a). Accordingly, there is at least one commentary suggesting that the section contemplates a discretionary duty to disclose suicide threats.⁹² Given the plain language of the statute, such an interpretation is almost certainly incorrect.⁹³ To discharge this duty, the statute requires the psychologist to seek hospitalization for the patient;⁹⁴ the psychologist also has permission to contact family members or other persons of interest who could assist in securing the patient’s safety.⁹⁵

Section 1376(3)(b) appears to address the original intent of the *Tarasoff* decision by requiring the psychologist to breach the duty of confidentiality when a patient expresses an “explicit threat to kill or inflict serious bodily injury upon a reasonably identified person and the patient has the apparent intent and ability to carry out the threat.”⁹⁶ To discharge this duty, the psychologist must take reasonable precautions—defined as one or more of the following actions:

- (1) communicat[ing] a threat of death or serious bodily injury to the reasonably identified person,
 - (2) notif[y]ing an appropriate law enforcement agency in the vicinity where the patient or any potential victim resides,
 - (3) arrang[ing] for the patient to be hospitalized voluntarily,
- or
- (4) tak[ing] appropriate steps to initiate proceedings for involuntary hospitalization pursuant to law.⁹⁷

Section 1376(3)(c) goes one step further, apparently covering the circumstances presented in the 1983 case of *Jablonski v. United States*.⁹⁸ In that case the court found that the patient’s previous history of violence should have alerted the therapist to the danger posed to the patient’s

91. *Id.* § 1376(3)(a).

92. Herbert & Young, *supra* note 6, at 278.

93. *See sources supra* note 89.

94. It is an interesting conundrum that section 1376(3)(a), which was last amended in 2004, refers the practitioner to section 5-401 of title 43A, which was repealed in 1997. *See* OKLA. STAT. tit. 59, § 1376(3)(a), OKLA. STAT. tit. 43A, § 5-401 (repealed 1997).

95. OKLA. STAT. tit. 59, § 1376(3)(a).

96. *Id.* § 1376(3)(b).

97. *Id.*

98. *See generally* *Jablonski ex rel. Pahls v. United States*, 712 F.2d 391 (9th Cir. 1983).

romantic companion.⁹⁹ The court arrived at its decision despite the fact that the patient never communicated an explicit threat during treatment.¹⁰⁰ Section 1376(3)(c) provides that the duty to warn is not based primarily on the practitioner's observance of explicit patient conduct.¹⁰¹ Rather, a psychologist's obligations also extend to cases involving the need to predict a patient's dangerousness based upon a historical record and review of a patient's violent past.¹⁰² The psychologist's duty to warn in (3)(c) is discharged in the same manner as in (3)(b).¹⁰³

Subparagraphs (3)(d) and (e) qualify the mandatory disclosure requirements contained in subparagraphs (a)–(c). Subparagraph (3)(d) states that “nothing contained in subparagraph b of [section 1376] shall require a psychologist to take any action which, in the exercise of reasonable professional judgment, would endanger the psychologist or increase the danger to a potential victim or victims”;¹⁰⁴ subparagraph (e) provides that “the psychologist shall only disclose that information which is essential in order to protect the rights and safety of others.”¹⁰⁵ Essentially these qualifications resolve the tension between the conflicting policy goals of the duty to warn. On one hand, true permissive disclosure of confidential information places greater importance on a therapist's autonomy than on public safety.¹⁰⁶ On the other hand, true duty to warn statutes place public health and welfare over the therapist's ability to “exercise judgment and to individualize risk management.”¹⁰⁷ Subparagraphs (3)(d) and (e) in effect strike a balance between these two countervailing principles.

Finally, section 1376(7) prescribes special rules for circumstances where the patient is an inmate in the custody—either directly or indirectly—of the Department of Corrections.¹⁰⁸ The obligation to breach the duty of confidentiality only arises in this context when “the release of the information is necessary” given certain specific situations.¹⁰⁹

99. *Id.* at 398.

100. *Id.*

101. OKLA. STAT. tit. 59, § 1376(3)(c).

102. *Id.*

103. *See supra* note 97 and accompanying text.

104. OKLA. STAT. tit. 59, § 1376(3)(d).

105. *Id.* § 1376(3)(e).

106. *See FELTHOUS, supra* note 11, at 125–26.

107. *Id.*

108. OKLA. STAT. tit. 59, § 1376(7).

109. *Id.*

According to section 1376(7), release of information is only necessary in the following situations: when the psychologist can reasonably “prevent or lessen a serious and imminent threat to the health or safety of a person or the public,” or when law enforcement officials require the information to apprehend an individual who has escaped from custody.¹¹⁰

Despite the Psychologists Licensing Act’s relative comprehensiveness, a careful examination of the language contained in paragraphs 1376(1) and (3) highlights the inconsistency within statutes governing licensed mental health professionals. Paragraph (1) makes the exceptions to the general duty of confidentiality subject to section 2503 of the Oklahoma Evidence Code.¹¹¹ This inclusion unnecessarily conflates the distinct concepts of privilege and confidentiality.¹¹² Section 1376 provides the substantive law governing Licensed Psychologists¹¹³ whereas section 2503 provides procedural rules governing the admissibility of certain evidence.¹¹⁴ More specifically, section 1376 establishes exceptions to the duty of confidentiality that mandate disclosure of certain confidential information a practitioner obtains during the course of medical treatment.¹¹⁵ Section 2503 merely establishes procedures governing the admissibility of confidential information into evidence during a judicial proceeding.¹¹⁶

A mental health professional reading sections 1376 and 2503 is unlikely to know which set of guidelines governs daily practice. More likely, if the practitioner finds title 12 first he or she may assume that section 2503 actually prescribes the substantive rules regarding disclosure of confidential information.¹¹⁷ In this instance the practitioner would be unable to comply with the substantive rules governing disclosure of confidential information based on the drastic differences

110. *Id.* § 1376(7)(a)–(b).

111. *Id.* § 1376(1); *see* OKLA. STAT. tit. 12, § 2503 (OSCN through 2012 Leg. Sess.).

112. *See* George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote*, 74 WASH. L. REV. 33, 35 (1999).

113. *See* OKLA. STAT. tit. 59, § 1376.

114. *See* OKLA. STAT. tit. 12, § 2503.

115. OKLA. STAT. tit. 59, § 1376(3)(a).

116. *See* OKLA. STAT. tit. 12, § 2503.

117. The language in section 2503 is ambiguous to the extent that its progression may be misleading to a medical professional. In ordinary terms the statute provides the following: certain information is confidential; a patient has a privilege to prevent a therapist from disclosing confidential information; the patient’s privilege does not apply in four specific circumstances. *Id.* § 2503(A)(4)–(D)(5).

between section 1376 and section 2503.¹¹⁸ Since licensing laws aim to protect public health and welfare,¹¹⁹ they should be drafted in a way that promotes compliance in a practical setting by professionals not well versed in statutory interpretation. The discrepancy between the Psychologists Licensing Act and section 2503 shows one of many instances where the laws governing licensed or certified mental health professionals fail to accomplish the intended purposes.

The plain language of section 1376(3)(b) also leaves three ambiguities that should be resolved for the sake of clarity. First, it is unclear whether the legislature intended the phrase “explicit threat” to encompass both verbal and non-verbal communications.¹²⁰ A broad interpretation of “explicit threats”—including verbal and non-verbal, direct and indirect threats—best serves the statute’s intended purpose.¹²¹ Second, psychologists have no guidance in determining whether an anticipated victim is reasonably identifiable. The distinction between the standard of “reasonable identification” used in section 1376 and “clear identification” used in other duty to warn statutes¹²² indicates that a lower threshold of certainty is required to trigger the psychologist’s duty in Oklahoma.¹²³ Finally, the language is ambiguous to the extent that it is unclear whether the term “apparent” modifies both the intent and the ability of the patient to carry out the threat.¹²⁴ Resolving this ambiguity rests primarily with the legislature; until that time, a psychologist’s assessment of the patient’s sincerity and capability¹²⁵ should receive

118. For example, section 1376 provides that disclosure of confidential information is mandatory if “the patient presents a clear and present danger to himself and refuses explicitly or by behavior to voluntarily accept further appropriate treatment,” or “the patient has communicated to the psychologist an explicit threat to kill or inflict serious bodily injury upon a reasonably identified person and the patient has the apparent intent and ability to carry out the threat.” OKLA. STAT. tit. 59, § 1376(3)(a)–(b). Section 2503 of title 12 makes no mention of either of these two critical exceptions. *See* OKLA. STAT. tit. 12, § 2503(D).

119. *See* FELTHOUS, *supra* note 11, at 123.

120. *See* Harmon, *supra* note 48, at 55 & n.127; OKLA. STAT. tit. 59, § 1376(3)(b).

121. This interpretation facilitates proper compliance with the statute by alleviating the tension between strict duty to warn obligations and therapist autonomy. *See supra* notes 106–07 and accompanying text.

122. *See* MINN. STAT. § 148.975 (2011).

123. The standard of clear identification connotes an ability of the psychologist to conspicuously or unambiguously identify a potential victim, whereas the standard of reasonable identification requires a lesser degree of accuracy in identifying a potential victim. *See* Harmon, *supra* note 48, at 55.

124. *Id.*

125. *See id.* (equating the term “sincerity” to apparent intent and the term “capability”

considerable deference.

2. Other Professions with Some Statutory Guidance

A review of the laws governing the practice of psychotherapy in other professions alluded to exceptions allowing for breach of the duty of confidentiality in the event that a patient may be at risk to themselves or others. These professions include Licensed Professional Counselors, Licensed Marital and Family Therapists, Licensed Behavioral Practitioners, Social Workers, and Alcohol and Drug Counselors. A comprehensive view of the statutes governing these professions highlights the inconsistency across licensed mental health professions in Oklahoma because each statute significantly lacks the clarity of language as adumbrated in the Psychologists Licensing Act.

The Oklahoma State Board of Health governs the Licensed Professional Counselors Act,¹²⁶ Marital and Family Therapist Licensure Act,¹²⁷ and Licensed Behavioral Practitioner Act.¹²⁸ Section 1910(A)(4) of the Licensed Professional Counselors Act and section 1939(A)(4) of the Licensed Behavioral Practitioner Act have the exact same language regarding the circumstances that require disclosure of confidential information. Those sections impose a duty upon the practitioner “[w]hen failure to disclose such information presents a danger to the *health* of any person.”¹²⁹ The Marital and Family Therapist Licensure Act expands upon this general proposition by providing that disclosure of confidential information is only required when “[f]ailure to disclose such information presents a *clear and present* danger to the health *or safety* of any person.”¹³⁰

The Social Worker’s Licensing Act¹³¹ provides for certain exceptions to the duty of confidentiality that do not relate to the duty to warn.¹³² However, title 675 of the Oklahoma Administrative Code pertaining to the State Board of Licensed Social Workers details a Code of Professional Conduct which simply mentions the words “duty to warn”

to apparent ability).

126. OKLA. STAT. tit. 59, §§ 1901–1920 (OSCN through 2012 Leg. Sess.).

127. *Id.* §§ 1925.1–1925.18.

128. *Id.* §§ 1930–1949.1.

129. *Id.* §§ 1910(A)(4), 1934(A)(4) (emphasis added).

130. *Id.* § 1925.11(A)(2) (emphasis added).

131. *See generally id.* §§ 1250–1273.

132. *See id.* § 1261.6.

without elaboration.¹³³ Similarly, the Licensed Alcohol and Drug Counselors Act¹³⁴ provides for a duty of confidentiality that is further elaborated in title 38 of the Oklahoma Administrative Code pertaining to the Oklahoma Board of Licensed Alcohol and Drug Counselors.¹³⁵ Like the rules prescribed for Licensed Social Workers, the rules governing disclosure of confidential information by a Licensed Alcohol and Drug Counselor simply mention “duty to warn” without further explanation.¹³⁶

C. Statutes That Do Not Appear to Expressly Reference the Duty to Warn

A review of the statutes governing Medical Doctors¹³⁷ and Doctors of Osteopathy¹³⁸ revealed that no statute expressly mentions a “duty to warn.” However, the State Board of Medical Licensure and Supervision regulations in the Oklahoma Administrative Code prohibits “[w]illfully or negligently violating the confidentiality between physician and patient to the detriment of a patient *except as required by law.*”¹³⁹ Similarly ambiguous, section 637(A)(2) of the Oklahoma Osteopathic Medicine Act prohibits “unethical conduct or unprofessional conduct, as may be determined by the Board.”¹⁴⁰ Thus, it is unclear whether the language provided in these regulations encompasses external authority—such as *Wofford*—that requires disclosure of confidential information under certain circumstances.

School Psychologists and School Counselors—professions certified by the Oklahoma State Board of Education¹⁴¹—do provide psychotherapy in the scope and practice of their professions. However, the State Department of Education’s Standards of Performance and Conduct for Teachers does not expressly include a “duty to warn” for these certified professionals.¹⁴² The regulations governing school

133. OKLA. ADMIN. CODE § 675:20-1-5(e)(2) (2011).

134. OKLA. STAT. tit. 59, §§ 1870–1885.

135. OKLA. ADMIN. CODE § 38:10-3-3 (2011).

136. *Id.* § 38:10-3-3(f)(2)(ii).

137. *See generally* OKLA. STAT. tit. 59, §§ 480–518.

138. *See generally id.* §§ 620–645.

139. OKLA. ADMIN. CODE § 435:10-7-4(14) (2011) (emphasis added).

140. OKLA. STAT. tit. 59, § 637(A)(2).

141. OKLA. STAT. tit. 70, § 3-104(6) (OSCN through 2012 Leg. Sess.).

142. *See* OKLA. ADMIN. CODE § 210:20-29-3 (2011). The relevant statutes governing the education profession are silent with respect to any obligation to disclose confidential information in certain circumstances. *See generally* OKLA. STAT. tit. 70. It should be noted that section 24-100.4 of title 70 does mention the Psychologists Licensing Act’s section on mandatory disclosure of confidential information. However, section 24-100.4

psychologists and school counselors only provide that a certified professional “[s]hall not disclose information about students obtained in the course of professional service, unless disclosure serves a *compelling professional purpose* and is *permitted by law or is required by law*.”¹⁴³ Similar to the regulations governing M.D.s and D.O.s,¹⁴⁴ it is unclear whether the phrase “permitted or required by law” in the regulations governing the education profession encompasses Oklahoma case law that requires disclosure of confidential information in certain circumstances.¹⁴⁵ It is also important to note that school psychologists and school counselors who provide psychotherapy have no clear guidance in determining whether a compelling professional purpose necessitates disclosure of confidential information.

Certified School Psychologists and Counselors lack statutory guidance regarding mandatory disclosure of certain confidential information. However, there is persuasive authority¹⁴⁶ that indicates such professionals are subject to duty to warn requirements.¹⁴⁷ In 1995 the Attorney General of Oklahoma issued an opinion regarding the scope and practice of a school psychologist.¹⁴⁸ The opinion addressed the precise question of whether a Certified School Psychologist is substantially equivalent to a Licensed Psychologist and therefore subject to the Psychologists Licensing Act.¹⁴⁹ The Attorney General ultimately concluded that the Psychologists Licensing Act applies to Certified School Psychologists¹⁵⁰ because the Act defines the terms “psychologist”¹⁵¹ and “practice of psychology”¹⁵² in a way which clearly

merely provides that a mental health professional is required to comply with the Psychologists Licensing Act and the duty to warn when that professional provides information requested by the school concerning a student’s mental health evaluation. *Id.* § 24-100.4(5).

143. OKLA. ADMIN. CODE § 210:20-29-3(b)(8) (emphasis added).

144. *See* OKLA. STAT. tit. 59, §§ 480–518, 620–645.

145. *See generally* Wofford v. E. State Hosp., 1990 OK 77, 795 P.2d 516.

146. “[I]n many states . . . an Attorney General’s opinion is merely advisory” State *ex rel.* York v. Turpen, 1984 OK 26, 681 P.2d 763, 765 (citing *Rasure v. Sparks*, 1919 OK 231, 183 P. 495, 498 (Okla. 1919)). However, in Oklahoma “such an opinion is binding upon the state official affected by it and it is their duty to follow and not disregard those opinions.” *Id.* (citing *Sparks*, 183 P. at 498).

147. *See* OKLA. STAT. tit. 59, § 1376.

148. Op. No. 95-38, 1995 OK AG 38, 25 Okla. Op. Att’y Gen. 95, 95.

149. *Id.*

150. *Id.* at 98.

151. *Id.* at 95–96 (quoting OKLA. STAT. tit. 59, § 1352(2) (providing that a psychologist is a “person who represents himself or herself to be a psychologist by using any title or description of services incorporating the words ‘psychology’, ‘psychological’, or

encompasses the services provided by a Certified School Psychologist.¹⁵³

The practical implications of the Attorney General's opinion highlight the need for reform of inconsistent laws both across and within licensed or certified mental health professions in Oklahoma. A school counselor is likely only to know the requirements set forth in the Department of Education's regulations. Yet the Attorney General's opinion subjects the school counselor to the requirements of the Psychologists Licensing Act¹⁵⁴—despite the fact that school counselors are not licensed pursuant to that act. As with all licensing laws, the purpose and practical effect should be to promote compliance in a practical setting. The fact that school psychologists and counselors are subject to two drastically different sets of guidelines—one of which they are unlikely to be aware of—makes compliance practically improbable.

D. Summary

While the Psychologists Licensing Act defines a practitioner's legal obligations in a relatively clear and comprehensive manner, a survey of other statutes revealed inconsistencies across and within the laws governing licensed or certified psychotherapists in Oklahoma. The practical implications of these inconsistencies present two related problems. Initially, ambiguity in the laws and regulations governing a profession results in confusion about proper daily practice. Consequently, the intent of those laws and regulations—designed to protect the public health and welfare—goes unfulfilled. Given the current state of duty to warn statutes, it is clear that prompt legislative action is required to address these glaring issues.

'psychologist', or by offering to the public or rendering to individuals or to groups of individuals services defined as the practice of psychology").

152. *Id.* (quoting OKLA. STAT. tit. 59, § 1352(3) (providing that the practice of psychology includes "psychological testing and the evaluation or assessment of personal characteristics, . . . diagnosis and treatment of mental and emotional disorder . . . and psychoeducational evaluation, therapy, remediation, and consultation . . . without regard to whether payment is received for services rendered").

153. *See id.* at 96 (quoting OKLA. STAT. tit. 59, § 1353(5)). Individuals certified by the State Department of Education may use the term "certified school psychologist." Thus, the definitions of "psychologist" and "practice of psychology" in the Psychologists Licensing Act clearly encompass the scope and practice of a certified School Psychologist. *See* OKLA. STAT. tit. 59, § 1352(2)–(3).

154. *See State ex rel. York v. Turpen*, 1984 OK 26, 681 P.2d 763, 765 (citing *Rasure v. Sparks*, 1919 OK 231, 183 P. 495, 498).

IV. CONCLUSION

National reviews have examined the hazards of varied statutory interpretations associated with the lack of clarity and uniformity among duty to warn statutes.¹⁵⁵ This intrastate review of the duty to warn across Oklahoma statutes also revealed, with the exception of the Psychologists Licensing Act,¹⁵⁶ troubling shortcomings.

The inchoate beginnings of duty to warn, which subsequently led to the enactment of statutory laws across the United States, was predicated upon the Supreme Court of California's decision in *Tarasoff* that a psychotherapist has a duty to warn as a matter of public policy and because of the "special relationship" between a psychotherapist and patient.¹⁵⁷ Occupational licensure clearly implicates social policy in an effort to benefit and protect public safety and welfare.¹⁵⁸ However, achieving societal interests only happens when professionals who engage in the practice of psychotherapy are able to discharge their duty to warn based on clearly defined and uniformly applied language. Unfortunately, this review shows that Oklahoma's current duty to warn statutes fall short in satisfying society's interest on all fronts due to ambiguous and inconsistent language. The result is that practitioners do not have the guidance to properly discharge their duty should the need arise. Moreover, statutory ambiguity and inconsistency among laws governing separate but related professions pose unnecessary problems for judicial efficiency.¹⁵⁹

A mental health professional has a unique ability to observe and evaluate the behavior of potentially violent individuals before any harm occurs.¹⁶⁰ However, the nature of the legislation governing these professions drastically impacts whether the practitioner's observations and evaluations are used most effectively. In their review of *Tarasoff* statutes across the United States, Herbert and Young concluded with the following statement that could equally apply to duty to warn laws within

155. See Herbert, *supra* note 9, at 421–22.

156. OKLA. STAT. tit. 59, §§ 1351–1376.

157. See Herbert, *supra* note 9, at 419; see also *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342–43 (Cal. 1976).

158. See FELTHOUS, *supra* note 11, at 123.

159. Kachigian & Felthous, *supra* note 12, at 273 (discussing the impact of internal tension between state appellate and supreme courts).

160. See Harmon, *supra* note 48, at 31 (implying that the duty to warn is based at least partially on the "unique ability [of] the therapist to discern the quality of the threat posed").

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Oklahoma: “[T]he variety of duty-to-warn laws across the nation—with no two states agreeing precisely on a common approach—is virtually unprecedented for any widespread legal doctrine. Confusion is an inevitable product, and confusing law is inefficient at best, and often harmful.”¹⁶¹

Mental illness in Oklahoma has profound consequences for society at large and for professionals who provide mental health services. Psychotherapists frequently confront patients with serious mental illnesses, and many of these patients threaten harm to themselves or others.¹⁶² The following statistics referenced in the Oklahoma State Department of Health’s *2008 State of the State’s Health Report* underscore the seriousness of this issue. According to the World Health Organization, “[m]ental disorders are the leading cause of disability for U.S. adults less than 45 years of age” and “mental disorders affect one in four U.S. adults.”¹⁶³ “In Oklahoma, 8.4 percent of adults have suffered at least one major depressive episode and 13.3 percent have serious psychological distress, ranking Oklahoma among the most mentally unhealthy states in the [United States].”¹⁶⁴ According to mental health studies, between five to nine percent of youth have diagnosable serious mental health problems that impair daily functioning.¹⁶⁵ “Contrary to popular belief, suicide is the most common type of violent death in the [United States] and Oklahoma as well”;¹⁶⁶ suicides claim more than 500 Oklahomans each year.¹⁶⁷

If occupational statutes governing the practice of psychotherapy confer a duty to warn on a psychotherapist, then the legislative custodians of public policy share a duty to perform their roles and draft statutes that inform licensed or certified mental health professionals how

161. Herbert & Young, *supra* note 6, at 280.

162. Herbert, *supra* note 9, at 422.

163. OKLA. STATE DEP’T OF HEALTH, 2008 STATE OF THE STATE’S HEALTH REPORT 60 (2008) (citing WORLD HEALTH ORG., THE WORLD HEALTH REPORT 2004: CHANGING HISTORY 126 annex tbl.3 (2004)).

164. *Id.* (citing *2006 State Estimates of Depression & Serious Psychological Distress: Oklahoma*, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., <http://www.drugabusestatistics.samhsa.gov/2k6State/OklahomaMH.htm> (last visited Feb. 19, 2013)).

165. THE PRESIDENT’S NEW FREEDOM COMM’N ON MENTAL HEALTH, EXECUTIVE SUMMARY 2 (2003).

166. OKLA. STATE DEP’T OF HEALTH, *supra* note 163, at 32 (citing OKLA. STATE DEP’T OF HEALTH, SUMMARY OF VIOLENT DEATHS IN OKLAHOMA: OKLAHOMA VIOLENT DEATH REPORTING SYSTEM, 2004-2006, at 15 (2008)).

167. *Id.* (citing *Injury Prevention & Control: Data & Statistics*, CDC, <http://www.cdc.gov/injury/wisqars/index.html> (last updated Dec. 17, 2012)).

to properly dispense with their obligations. The Oklahoma Children's Code¹⁶⁸ and the Protective Services for Vulnerable Adults Act¹⁶⁹ accomplished similar goals as evidenced by the clarity of the duty to warn language aimed at preventing child and elder abuse and neglect.¹⁷⁰ These are duties that, in their absence, share potential life-threatening consequences.

The Oklahoma Legislature can accomplish statutory improvement by convening an interim study with the benefit of input from practicing professionals, legal scholars, and other interested parties. This study could provide the basis for amending current occupational licensing statutes or drafting a uniform statute regarding duty to warn as it applies to all professions that provide psychotherapy. It may also be prudent to consider amending section 2503 of title 12 to resolve the incongruity between the Oklahoma Evidence Code and the Psychologists Licensing Act.¹⁷¹ Absent sound law to provide proper guidance, practitioners will likely remain confused and will be forced to lean heavily on the advice of their attorneys.¹⁷² Nothing is stronger than an idea whose time has come¹⁷³—it is time to reexamine the duty to warn in Oklahoma.

168. OKLA. STAT. tit. 10A, §§ 1-1-101 to 1-9-122 (OSCN through 2012 Leg. Sess.).

169. OKLA. STAT. tit. 43A, §§ 10-101 to 10-112 (OSCN through 2012 Leg. Sess.).

170. See OKLA. STAT. tit. 10A, § 1-2-101; OKLA. STAT. tit. 43A, § 10-104. These statutes avoid the problems associated with prescribing obligations based on the characterization of services provided by extending the duty to all citizens.

171. See *supra* Part III.B.1.

172. See Kachigian & Felthous, *supra* note 12, at 273.

173. Adapted from VICTOR HUGO, HISTOIRE D'UN CRIME 463 (Paris, Hugues 1879) (“On résiste à l’invasion des armées; on ne résiste pas à l’invasion des idées.” Translating to mean: “One resists an invasion of armies; one does not resist an invasion of ideas.”).