

“YOU GOT NO SECRETS TO CONCEAL”: CONSIDERING THE APPLICATION OF THE *TARASOFF* DOCTRINE ABROAD

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INTRODUCTION

Recent years have seen a dramatic increase in the level of interest in the United States about the law of other nations.¹ Much of this interest has been spurred by the pitched battle in the U.S. Supreme Court between Justice Kennedy and Justice Scalia on the question of the extent to which foreign law should inform US constitutional decisionmaking, a battle that has played out in such volatile areas as the death penalty² and gay rights.³ But there has also been new interest (concededly, with much less drama) in the relationship between international human rights law and mental disability law.⁴ Much of the interest has been spurred by a series of decisions by international courts and commissions that have drawn liberally on such documents as the United Nations General Assembly’s 1991 “Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care” (the “MI Principles”).⁵ Most, though not all, of these cases have focused on

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1. See, e.g., Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005).

2. See, e.g., *Atkins v. Virginia*, 536 U.S. 304 (2002) (death penalty unconstitutional in cases of persons with mental retardation); *Roper v. Simmons*, 543 U.S. 551 (2005) (death penalty unconstitutional in cases of juveniles).

3. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional).

4. See, e.g., Eric Rosenthal & Leonard S. Rubenstein, *International Human Rights Advocacy Under the “Principles for the Protection of Persons with Mental Illness,”* 16 INT’L J.L. & PSYCHIATRY 257 (1993); Bruce Winick, *Therapeutic Jurisprudence and the Treatment of People with Mental Illness in Eastern Europe: Construing International Human Rights Law*, 21 N.Y.L. SCH. J. INT’L & COMP. L. 537, 556–59 (2002); Eric Rosenthal & Clarence J. Sundram, *International Human Rights in Mental Health Legislation*, 21 N.Y.L. SCH. J. INT’L & COMP. L. 469, 527–31 (2002); Jennifer Fischer, *A Comparative Look at the Right to Refuse Treatment for Involuntarily Hospitalized Persons with a Mental Illness*, 29 HASTINGS INT’L & COMP. L. REV. 153, 183 (2006).

5. *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental*

issues of commitment, institutional conditions, and the right to refuse treatment—the staples of U.S.-based constitutional mental disability law.⁶

Little attention has been paid, however, to the relationship between *private* U.S.-based mental disability law and international human rights law. And the law that is the topic of this symposium—tort law as it relates to the existence of a psychotherapist's duty to protect/duty to warn, as articulated originally in the *Tarasoff v. Regents of the University of California* case⁷—is certainly private law. Indeed, because of our perception that “tort culture” is a uniquely U.S.-based phenomenon,⁸ it should not be a surprise that, until now, there has *never* been a discussion in *any* American law review of the *Tarasoff* principles in the context of European law.⁹

Health Care, G.A. Res. 46/119, U.N. Doc. A/46/49 (Dec. 17, 1991), available at <http://www.un.org/documents/ga/res/46/a46r119.htm>; see, e.g., Matter of Victor Rosario Congo, Case 11.427, Inter-Am. C.H.R., Report No. 63/99/OEA/Ser.L./V/II.102, doc. 36 (Apr. 13, 1999) (Ecuador).

It can be expected that there will be more such attention paid in the future as a result of the recent adoption of the United Nations Convention on the Rights of Persons with Disabilities. See UN Enable, <http://www.un.org/esa/socdev/enable/> (last visited Jan. 30, 2007) (UN Convention).

6. See MICHAEL L. PERLIN ET AL., INTERNATIONAL HUMAN RIGHTS LAW AND COMPARATIVE MENTAL DISABILITY LAW: CASES AND MATERIALS (2006).

7. See generally, 3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL §§ 7C-2 to 7C-2.10, at 446–99 (2d ed. 2000) (discussing *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) and its progeny); Michael L. Perlin, *Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990's*, 16 L. & PSYCHOL. REV. 29, 35–36 (1992).

8. See, e.g., Mark Mildred, *Litigation Rules and Culture: The European Perspective*, 23 N.Y.U. REV. L. & SOC. CHANGE 433, 442 (1997) (in the context of product liability law):

[T]here remain many significant differences between the two systems, such as: different procedural and substantive laws; different degrees of access to the courts; and different socio-cultural attitudes toward litigation. These differences continue to influence the direction of tort liability laws in Europe. It remains to be seen how well Europeans have balanced the need for judicial constraints on procedures and awards against the need for individuals to obtain justice and compensation.

Id.

9. A WESTLAW JLR search (TARASOFF /P EUROPE CONTINENT “UNITED KINGDOM” ENGLAND) revealed no article in any US-based publication, and only two articles from elsewhere that made this connection. Westlaw Homepage, <https://www.westlaw.com> (last visited June 21, 2006). See, e.g., James Dawson, *Randomised Controlled Trials of Mental Health Legislation*, 10 MED. L. REV. 308, 310 (2002) (“Even in England there is a chance that health professionals may be found liable to a person harmed, where injuries are clearly foreseeable to specific individuals in the immediate proximity of the patient.”) (citing *Palmer v. Tees Health Auth.*, [2000] P.I.Q.R. 1 (A.C.), discussed *infra* notes 83–87); Gehan Gunasekara, *Whistle-blowing: New Zealand and UK Solutions to a Common Problem*, 24 STATUTE L. REV. 39, 42 (2003) (“It has been accepted, in New Zealand as elsewhere, that privacy is not an absolute right and that the public interest must always be balanced against it and override it where necessary. This is especially so where public health or safety are involved.”) (citing *Tarasoff*, 551 P.2d at 334).

In recent years, I have turned my own attention more and more to the relationship between mental disability law and international human rights law, and have begun to write,¹⁰ teach,¹¹ advise,¹² and speak¹³ in that field. But again, until now, all of that work has focused on questions of public mental health law. As I have continued to work in that area, however, I have started to wonder whether there might also be a relationship between international human rights law and private mental disability law. This speculation was informed, to a significant extent, by the European Court of Human Rights’ (ECtHR)¹⁴ multiple interpretations of Articles 2 and 6 of the European Convention on Human Rights (the Convention).¹⁵ Under those Articles, “[e]veryone’s right to life shall be protected by law,”¹⁶ and, “[i]n the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”¹⁷ Although my interest in the ECtHR was originally and primarily focused on its relationship to substantive and procedural constitutional “mental disability law,”¹⁸ and its construction

10. Michael L. Perlin, *International Human Rights and Comparative Mental Disability Law: The Role of Institutional Psychiatry in the Suppression of Political Dissent*, 39 ISRAEL L. REV. 69 (2006); Michael L. Perlin, *International Human Rights and Comparative Mental Disability Law: The Universal Factors*, SYR. J. INT’L L. & COM. (forthcoming 2007) (Perlin, *Universal Factors*). PERLIN ET AL., *supra* note 6.

11. I am now teaching a course, *International Human Rights and Mental Disability Law*. See www.nyls.edu/mdl.

12. I am on the Board of Advisors of Mental Disability Rights International, a US-based NGO (see www.mdri.org), and under the aegis of that organization have traveled frequently to Central and Eastern Europe and to South America to do site visits to psychiatric institutions and to train advocates in international human rights law principles. See New York Law School Profile: Michael Perlin, <http://www.nyls.edu/pages/389.asp> (last visited Mar. 12, 2006).

13. See Elizabeth Katz, *Human Rights Abuses in Mental Institutions Common Worldwide*, Perlin Says, http://www.law.virginia.edu/home2002/html/news/2006_spr/perlin.htm (reporting on presentation at University of Virginia Law School, co-sponsored by the American Constitution Society, the Human Rights Program, and the Institute for Law, Psychiatry, and Public Policy, Feb. 22, 2006).

14. See generally, Clemens Rieder, *Protecting Human Rights Within the European Union: Who Is Better Qualified to Do the Job—The European Court of Justice or the European Court of Human Rights?* 20 TUL. EUR. & CIV. L.F. 73 (2005).

15. On the ECHR as a source of the right to equality, see Alexander H.E. Morawa, *The Evolving Human Right to Equality*, 1 EUR. Y.B. MINORITY ISSUES 157 (2001).

16. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, pmbl., Europ. T.S. No. 5, art. 2, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> [hereinafter Convention for Human Rights]; see generally, Paul McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S.F. L. REV. 1 (2005).

17. Convention for Human Rights, *supra* note 16, at art. 6. See also, Lawrence Gostin & Lance Gable, *The Human Rights of Persons with Mental Disabilities: A Global Perspective on the Application of Human Rights Principles to Mental Health*, 63 MD. L. REV. 20 (2004).

18. I define this as the law as it affects persons subject to institutionalization because of mental disability (or perceived disability), persons so institutionalized, and the release of such persons to the

by the ECtHR in a wide range of cases involving, inter alia, civil commitment, the right to treatment, and the right to refuse treatment,¹⁹ I began to wonder if this connection—which I believe to be important and robust—also applied to private law matters.

But it was not until the summer of 2005, when I attended the 19th International Congress of Law and Mental Health, that I realized that this was a “live” topic. Professor Colin Gavaghan spoke at that Congress on *The Development of the Tarasoff Principle and Its Application in Europe*,²⁰ and his talk illuminated for me the insight that there *were* significant connections between international human rights law and “private law,” and that those connections were definitely worthy of future study.

Through this paper, I hope to build on Professor Gavaghan’s initial research and to answer these questions: (1) what is the status of *Tarasoff* abroad, and (2) what are the implications of my answer? As I will demonstrate below, I have found that, in fact, there *is* life in *Tarasoff* abroad. At this point in time, certainly, there is not the extensive collection of commentary and cases we find in the U.S., but clearly, there are nascent developments that I fully expect to expand in coming years. And I think—no matter how you feel about the actual *Tarasoff* decision—this is a good thing.

My paper will proceed in this way: In Part I, I will discuss briefly the standard American psychiatric “take” on *Tarasoff*,²¹ and will ask whether this “take” reflects primarily American values or whether it is more universalist. In Part II, I will briefly look at how related confidentiality issues are looked at outside the US. In Part III, I will consider how the United Kingdom’s Human Rights Act—an important factor in UK “duty to protect/duty to warn” law—relates to international human rights law in a “dualist” system.²² In Part IV, I will look at the (still modest) caselaw that broadly applies *Tarasoff* in an international context. In Part V, I will conclude and will offer some modest predictions for future developments in this area of tort law.

My title comes from Bob Dylan’s masterpiece, *Like a Rolling Stone*, which, according to critic Greil Marcus, is “the greatest record ever made, perhaps, or the greatest record that ever would be made.”²³ I

community.

19. See generally, PERLIN ET AL., *supra* note 6.

20. See Prof. Colin Gavaghan, Presenter at ABSTRACTS OF THE XXIXTH INTERNATIONAL CONGRESS ON LAW AND MENTAL HEALTH, presentation 54.3, at 162 (2005).

21. For a full consideration of the facts and holding of the *Tarasoff* case, see generally 75 U. CIN. L. REV. 429, 429–661 (2006).

22. See *infra* text accompanying notes 44–47.

23. Guardian Unlimited Homepage, <http://www.guardian.co.uk/arts/fridayreview/>

turned to it for this paper because of the line, "you got no secrets to conceal." Patients go to mental health professionals with secrets, many of which they have concealed for years.²⁴ Mental health professionals have traditionally seen the promise and expectation of secrecy as one of the essential lynch-pins of the therapist-patient relationship. But *Tarasoff* suggests to the patient that, in some limited but highly important situations, "you [the patient] [in fact, do] got no secrets to conceal."

I. MENTAL HEALTH PROFESSIONALS' REACTION TO THE *TARASOFF* OPINION

Tarasoff unleashed a "torrent" of commentary,²⁵ and the initial professional reaction to the case was, to understate it, "severely critical."²⁶ Some advocated for civil disobedience; others advocated for a lawsuit to be brought by the University of California against the California State Supreme Court in federal court.²⁷ The criticism focused mostly on the unwarranted judicial intrusion into the private sphere of psychotherapeutic practice.²⁸ The major arguments put forth in academic circles included these:

- A mandatory disclosure of confidential information would ultimately harm the public because it would discourage patients from revealing violent tendencies to therapists and discourage them from entering therapy altogether if they were aware of the disclosure procedures.²⁹
- Therapists may become highly oversensitive to dangerous information, overreact and take action too often.³⁰

story/0,12102,1482218,00.html#article_continue (last visited Feb. 9, 2006).

Here is what Bruce Springsteen said about *Like a Rolling Stone* when he inducted Dylan in the Rock & Roll Hall of Fame in 1989: "The first time I heard Bob Dylan, I was in the car with my mother listening to WMCA, and on came that snare shot that sounded like somebody had kicked open the door to your mind." *Id.* See GREIL MARCUS, *LIKE A ROLLING STONE: BOB DYLAN AT THE CROSSROADS* 95 (2005).

24. See Michael L. Perlin, "I'll Give You Shelter from the Storm": *Privilege, Confidentiality, and Confessions of Crime*, 29 LOY. L.A. L. REV. 1699 (1996).

25. James E. George et al., *The Therapist's Duty to Protect Third Parties: A Guide for the Perplexed*, 14 RUTGERS L.J. 637, 637 (1983).

26. 3 PERLIN, *supra* note 7, § 7C-2.3, at 456-67. See also, Perlin, *supra* note 7, at 35-36.

27. Solomon Fulero, *Tarasoff: 10 Years Later*, 19 PROF. PSYCHOL.: RES. & PRAC. 184 (1988). See A. Kovacs, *Implications of the Malpractice Crisis for the Training of Graduate Students*, Presenter at the Annual Meeting of the American Psychological Association (Aug. 1976), discussed in Fulero, *supra*, at 184-85.

28. 3 PERLIN, *supra* note 7, § 7C-2.3, at 457.

29. Fulero, *supra* note 27.

30. *Id.*

- The decision was premised on the “false view”³¹ that therapists would be able to predict future dangerousness with accuracy through professional standards.³²
- Prioritizing the public good over the individual needs of the patient violated central ethics of the practice.³³
- The *Tarasoff* duty compromised the confidentiality essential to successful psychotherapy.³⁴

An empirical survey revealed that, in the immediate aftermath of *Tarasoff*, a majority of respondents reported “increased anxiety when the subject of dangerousness arose during therapy.”³⁵ Over half reported an increased fear of legal liability because of the newly recognized duty to warn; almost a fifth reported feeling tempted to avoid probing into some sensitive areas of therapy, including matters of dangerousness, and over one quarter indicated that *Tarasoff* had led them to change their methods of keeping records, mostly with the goal of seeking to avoid future legal liability.³⁶ However, later surveys concluded that the “data does not support the view that *Tarasoff* represents psychiatric Armageddon,” but that what *Tarasoff* has done is to “crystallize and shape beliefs concerning a therapist’s obligation to protect those at risk from a patient.”³⁷

Over a decade ago, these were my conclusions:

Surveys suggest that therapists have overstated both the *Tarasoff* prescription (as to ways of effectuating the duty) as well as its national precedential applicability. Furthermore, they frequently misstate its holding, construe it to require accurate predictions, and, others believe the duty to be triggered by utterance of *any* threat. Also, it has been argued that professionals have been misled by associational newsletters that have distorted or misstated the holdings of *Tarasoff*’s progeny, and that these misunderstandings serve to further alienate law and psychotherapy.³⁸

The question remains: To what extent will the experience in other nations replicate these American findings?

31. Daniel J. Givelber et al., *The Tarasoff Controversy: A Summary of Findings from an Empirical Study of Legal, Ethical, and Clinical Issues*, in *THE POTENTIALLY VIOLENT PATIENT AND THE TARASOFF DECISION IN PSYCHIATRIC PRACTICE* 35, 37 (James Beck ed., 1985).

32. 3 PERLIN, *supra* note 7, § 7C-2.3, at 457.

33. Givelber et al., *supra* note 31, at 37.

34. Joseph Dubey, *Confidentiality as a Requirement of the Therapist: Technical Necessities for Absolute Privilege in Psychotherapy*, 131 AM. J. PSYCHIATRY 1093 (1974).

35. Toni Pryor Wise, Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165, 181 (1978).

36. *Id.* at 181–82.

37. Givelber et al., *supra* note 31, at 56.

38. Perlin, *supra* note 7, at 57 (citations omitted).

II. DOES CONFIDENTIALITY MATTER?

Even without a specific *Tarasoff* obligation, the expectation of confidentiality is regularly qualified in other circumstances (e.g., when a patient puts her mental state at issue in litigation, or when there is conflict between confidentiality and a police power statute).³⁹ Although it is rarely noted in the relevant debates, unlike the attorney-client privilege (that has its roots in the law of the Roman empire), the priest-penitent privilege (that dates back to medieval Europe) or the spousal privilege (that dates to the earliest days of English common law), the psychotherapist-patient privilege dates only to the 1950s, and “has not produced the expectations of confidentiality created by the long history and deep cultural roots of the other privileges.”⁴⁰

And so is the expectation of confidentiality or of privilege qualified in other nations. By way of example, in Hong Kong, the privilege is qualified where the maker of the statement has a duty (whether legal, social, or moral) to make the statement and the recipient has a corresponding interest to receive it.⁴¹ In India, the privilege will only be recognized if the benefit to society outweighs the costs of keeping the information private.⁴² And in New Zealand, the privilege does *not* apply on a blanket basis to all information disclosed to a psychotherapist.⁴³ In short, we should not expect that the degree to which other jurisdictions were receptive to *Tarasoff* arguments should hinge on concerns about potentially breaching absolute confidentiality.

III. THE NATURE OF DUALIST SYSTEMS

There are basically two European jurisprudential models: nations with monist systems and nations with dualist systems. Nations such as the Netherlands, for example, are considered “monist” where their constitutions expressly provide that certain treaties are directly applied and that in such cases these treaties are deemed superior to all laws,

39. See 3 PERLIN, *supra* note 7, § 7A-5, at 333–34. For an overview of the literature on confidentiality in general, see *id.* at 331–32 n. 351.

40. Daniel A. Cantu, *When Should Federal Courts Require Psychotherapists to Testify About Their Patients? An Interpretation of Jaffee v Redmond*, 1998 U. CHI. LEGAL F. 375, 376 (citing, *inter alia*, DANIEL W. SHUMAN & MYRON F. WEINER, *THE PSYCHOTHERAPIST-PATIENT PRIVILEGE: A CRITICAL EXAMINATION* 49 (1987), and *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1454, 1530 (1985)).

41. *Li Suk Han Hana v. Sun Tien Lun Catherine*, [2005] H.K.C. 758.

42. *Sharda v. Dharmpal*, 2 LRI 173 (Ind. Sup. Ct. 2003).

43. *Ross v. Fryer*, [2003] NZFLR 666 (NZ Fam. Ct.).

including local constitutional norms.⁴⁴ On the other hand, the United Kingdom is generally considered the “prime example”⁴⁵ of a dualist system in which treaties must be implemented through separate legislation in order to have the effect of domestic law.⁴⁶ If domestic law cannot be construed in accordance with Convention law, then the latter overrides domestic law.⁴⁷

IV. TARASOFF ABROAD

The most important developments abroad have come in the United Kingdom, a dualist system. There, the Human Rights Act (HRA) mandates that domestic law must be read and given effect “in a way which is compatible with the [European] Convention [of Human Rights],”⁴⁸ that it is “unlawful for a public authority to act in a way which is incompatible with a Convention right,”⁴⁹ and that domestic courts must “take into account” the jurisprudence of the European Human Rights Courts in deciding cases under the HRA.⁵⁰ Explicitly, passage of the HRA was evidence of Parliament’s determination “to give further effect to ECHR rights in domestic law so that people can enforce those rights in the United Kingdom courts.”⁵¹ The HRA is thus seen as a mechanism, not solely for the “maintenance” of Convention rights, but also for the “further realization of human rights and fundamental freedoms.”⁵² Unquestionably, then, the ECHR applies to cases involving residents of the United Kingdom.⁵³

44. John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT’L L. 310, 320 (1992).

45. *Id.* at 319.

46. Lord Templeman, *Treaty-Making and the British Parliament*, 67 CHI.-KENT L. REV. 459, 481–83 (1991). See also PIETER VAN DIJK & GODEFRIDUS J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 67 (2d ed. 1990).

47. *R. v. Sec’y of State for Transp., ex parte Factortame Ltd.* (No. 2), [1991] 1 AC 603 (H.L.).

48. Human Rights Act § 3 (1998) (U. K.).

49. *Id.* at § 6(1). See, e.g., Lord Gordon Slynn, *The Development of Human Rights in the United Kingdom*, 28 FORDHAM INT’L L.J. 477 (2005); Carolyn Johnston & Jane Kaye, *Does the UK Biobank Have a Legal Obligation to Feedback Individual Findings to Participants?* 12 MED. L. REV. 239 (2004).

50. Human Rights Act § 2(1) (1998) (U. K.).

51. Conor Gearty, *Unraveling Osman*, 64 MODERN L. REV. 159, 159 (2001) (quoting PARL. DEB., H.L., Vol 593, col 1910 (Oct. 28, 1998) (statement by Baroness Symons)).

52. Roger Masterman, *Taking the Strasbourg Jurisprudence Into Account: Developing a Municipal Law of Human Rights” Under the Human Rights Act*, 54 INT’L & COMPAR. L.Q. 907, 910 (2005) (citing ECHR, preamble).

53. See generally, KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001); Roman Kwiecien, *The Primacy of European Union Law Over National Law Under the Constitutional Treaty*, 6 GERMAN L.J. 1479 (2005), available at <http://www.germanlawjournal.com/article.php?id=649> (last visited Mar. 8, 2006).

Beyond this, section 2(1) of the HRA allows for the consideration of jurisprudence from other jurisdictions.⁵⁴ So it should not be surprising that European courts *have* cited *Tarasoff* (and other American duty to protect cases) on several occasions.⁵⁵ Also, in parallel developments, international and comparative law scholars have been urging the creation of a legally integrated body of tort law among European nations.⁵⁶ The emergence of such law will “guarantee . . . individual plaintiffs to have full access to domestic courts in the Contracting States.”⁵⁷ Interestingly, in a paper urging support for such a body of law, Professor Stathis Banakas focused specifically on its potential application to cases in which “a psychiatrist assumes responsibility to a patient that he leads into an emotional or sexual relationship.”⁵⁸

The key variable in any consideration of the *Tarasoff* doctrine abroad is the weight given to international human rights documents such as the European Convention of Human Rights (the Convention), and especially Article 2 that reads, in relevant part, “Everyone’s right to life shall be protected by law.”⁵⁹ From this clause flows the caselaw that we need to think about with regard to the question I have posed: is there a duty to warn or protect in other nations?

Unquestionably, Article 2 is considered “one of the most fundamental provisions in the Convention”⁶⁰ and “enshrines one of the basic values of the democratic societies making up the Council of Europe.”⁶¹ There is no originalist argument to be made: the European Court of Human Rights has consistently stated that the Convention is a “living instrument which . . . must be interpreted in the light of present day conditions”;⁶² what is more, the convention itself assumes that “domestic courts will *also* take a progressive approach to the rights and fundamental freedoms

54. Masterman, *supra* note 52, at 921.

55. See, e.g., *Palmer v. Tees Health Authority*, [2000] P.I.Q.R. 1, P12 (A.C.) (citing *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976); *Thompson v. County of Alameda*, 614 P. 2d 728 (Cal. 1980); and *Brady v. Hopper*, 751 F. 2d 329 (10th Cir. 1984)).

56. Walter van Gerven, *The Emergence of a Common European Law in the Area of Tort Law: The EU Contribution*, in *TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE* 125, 135–36 (Duncan Fairgrieve et al. eds., 2002).

57. *Id.* at 146.

58. Stathis Banakas, *European Tort Law: Is It Possible?* 10 EUR. REV. PRIV. L. 363, 370 (2002). See also, Vassilis Hatzopoulos, *Is It Healthy to Have an EU Health Law?* 30 EUR. L. REV. 697 (2005).

59. It must be emphasized that these rights are not guaranteed solely to minorities; they are secured to “everyone.” On this point, see Roberta Medda-Windischer, *The Jurisprudence of the European Court of Human Rights*, 1 EUR. Y.B. MINORITY ISSUES 487, 487 (2001).

60. *Osman v. United Kingdom*, 29 Eur. Ct. H.R. 245, 277 (1998).

61. *Id.*

62. Masterman, *supra* note 52, at 911 (citing *Tyrer v. United Kingdom*, 2 Eur. Ct. H.R. 1, 1 (1979–80)).

it contains.”⁶³ Beyond this, it is clear that the potential use of the HRA as a “tool for the development of domestic common law standards is not in doubt.”⁶⁴

The first, and by far most important, case to consider is *Osman v. United Kingdom*.⁶⁵ There, Mrs. Osman sued a local police force for failure to protect her husband (who was shot by Paget-Lewis, their son’s teacher who had formed an obsessive attachment to the son),⁶⁶ notwithstanding ample communication between the Osman family, the police, school officials and a school psychologist.⁶⁷ Mrs. Osman argued that the police had been put on adequate notice of Paget-Lewis’s danger to their family, but that they had failed to adequately protect the family. The Court of Appeals struck the action (on the grounds that the police could not be found negligent for failure to investigate a crime).⁶⁸ Subsequently, Mrs. Osman—as she is allowed to do in a dualist system—petitioned the European Court of Human Rights on the grounds, *inter alia*, that the appellate court’s decision violated Article 6 of the Convention, providing that “[i]n the determination of [one’s] civil rights and obligations . . . everyone is entitled to a . . . hearing . . . by [a] . . . tribunal.”⁶⁹

In a fractured decision, the European Court of Human Rights rejected the plaintiff’s argument under Article 2, concluding that the plaintiff had “failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis.”⁷⁰ According to the court:

For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not

63. *Id.* at 911.

64. *Id.* at 913.

65. *Osman*, 29 Eur. Ct. H.R. at 245. The HRA did not incorporate the ECHR until 2001, three years after the *Osman* case was decided. Although it is beyond the scope of this paper, it is probably worthwhile to consider the post-*Osman* furor—see *infra* text accompanying notes 76–82—in this context.

66. *Osman*, 29 Eur. Ct. H.R. at 252–56 (recounting incidents in which Paget-Lewis photographed the Osmans’ son, stalked him, left obscene graffiti about him on multiple occasions around the school, stole files that contained the son’s new address, and changed *his* name to Osman).

67. *Id.* at 257. The school psychologist noted that the teacher “must indeed give cause for concern,” and did have “personality problems,” but recommended he remain as a teacher at the school. *Id.*

68. *Id.* at 263–64.

69. *Id.* at 285.

70. *Id.* at 308.

impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.⁷¹

The court also rejected the plaintiff’s application under Article 8 (“Everyone has the right to respect for his private . . . life . . .”), concluding that there was no breach of any “positive obligation” under this Article.⁷² However, the Court ruled further that the plaintiff’s rights under Article 6 *were* violated:

[T]he Court considers that the applicants must be taken to have had a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, [and] that the harm caused was foreseeable . . . In the view of the Court the assertion of that right by the applicants is in itself sufficient to ensure the applicability of Article 6(1) of the Convention.⁷³

There were multiple concurrences and dissents. In one, three judges argued that there was enough evidence that for several months, authorities were “well aware of the strange and worrying behaviour of Mr Paget-Lewis,” and that “they could have had hardly any doubts that further, more serious, harm was to be foreseen.”⁷⁴ Interestingly, for the purposes of this symposium, they suggested a remedy that would have fit within the dictates of *Tarasoff*: “[The police] should have taken Mr. Paget-Lewis into custody before it was too late in order to have him

71. *Id.* at 305.

72. *Id.* at 309–11.

73. *Id.* at 313.

74. *Id.* at 324–25 (DeMeyer, Lopes Rocha, and Casadevall, JJ.s, partially dissenting and partially concurring).

cared for properly. Instead they let things go until he killed two persons and wounded two others.”⁷⁵

Importantly, the holding of *Osman* focused on the issue of immunity-from-suit, and *not* on the substantive law of negligence, and the court ultimately concluded that the *Osmans* had the right, under the ECHR, to *proceed with* their case. Nonetheless, the case became a barometer for public attitudes about the *substantive* expansion of negligence-based liability. It thus quickly inspired a cottage industry of commentary.⁷⁶ One analysis characterized *Osman* as “extraordinary,”⁷⁷ seeing it as having “alerted tort lawyers to the potential significance of the HRA, [and as a potential] springboard for broader common law development.”⁷⁸ On the other hand, in a lecture to the Common-Law Bar Association, Lord Hoffman candidly admitted *Osman* filled him with “apprehension,”⁷⁹ and served to “reinforce the doubts I have had for a long time about the suitability, at least for this country, of having questions of human rights determined by an international tribunal made up of judges from many countries.”⁸⁰ Indeed, one British review article concluded that *Osman* “mystified many members of the senior judiciary in this country,”⁸¹ noting that one judge of the House of Lords characterized the *Osman* case as “extremely difficult to understand.”⁸²

The year after *Osman* was decided, in *Palmer v. Tees Health Authority*, the British Court of Appeals rejected a plaintiff’s claim in a case in which the plaintiff’s daughter was abducted, sexually assaulted,

75. *Id.* at 325. *See id.* at 269–71 (setting out involuntary civil commitment criteria).

76. *See* Rosalind English, *Forensic Immunity Post-Osman*, 64 MOD. L. REV. 300, 305 (2001) (discussing commentary).

77. Tom R. Hickman, *Tort Law and Human Rights*, 13 KING’S C. L.J., 253, 253 (2002).

78. *Id.* at 261. On the other hand, the same author also speculated that it might otherwise be viewed as a “narrow adjunct to the law of tort.” *Id.*

79. Lord Hoffmann, *Human Rights and the House of Lords*, 62 MOD. L. REV. 159, 164 (1999).

80. *Id.*

81. Gearty, *supra* note 51, at 184.

82. *Id.* (citing *Barrett v. London Borough of Enfield*, [1999] P.I.Q.R. P272, P276 (H.L.) (scope of duty owed to child in foster placement)). In *Barrett*, the House of Lords stated that claims should be struck only when there are clear grounds for doing so. *Id.* at P283. This decision represented a fundamental shift in favor of an expanded duty-of-care in negligence-based cases. *See e.g.*, Robin Cooke, *The Road Ahead for the Common Law*, 53 INT’L & COMP. L.Q. 273, 281 (2004).

Later, in *Z v. United Kingdom*, 34 Eur. Ct. H.R. 3, 126 (2002), a case involving actions by abused children against local authorities who allegedly owed them a duty of care breached by their failure to prevent the abuse (at the hands of the children’s’ parents), based on legal arguments characterized as “novel and entirely speculative,” the European Court of Human Rights narrowed the range of circumstances in which decisions to strike claims could be seen as breaching Article 6. *See generally*, Richard Mullender, *Tort, Human Rights, and Common Law Culture*, 23 OXFORD J. LEG. STUD. 301, 307 (2003). Nonetheless, *Osman* is still seen as the leading case in this area of the law.

and murdered—and her body mutilated—by Armstrong.⁸³ Plaintiff had sued a hospital where Armstrong had been previously psychiatrically treated, and alleged that defendants “failed to diagnose that there was a real, substantial and foreseeable risk of Armstrong committing serious sexual offences against children and of causing serious bodily injury to any child victims,’ and consequently failed to provide him with adequate treatment to reduce the risk of him committing such offences.”⁸⁴ The Court of Appeal distinguished *Osman* because there was no relationship between the perpetrator and the victim. Although Armstrong had said during treatment that he had “sexual feelings towards children and that a child would be murdered after his discharge,”⁸⁵ there was no relationship between Armstrong and the *specific* victim, so the requisite proximity was absent.⁸⁶

Interestingly, *Palmer* distinguished *Tarasoff* “where the court [had] held that there was a duty to warn an *identified* victim.”⁸⁷ The court elaborated:

An additional reason why in my judgment in this case it is at least necessary for the victim to be identifiable . . . to establish proximity, is that it seems to me that the most effective way of providing protection would be to give warning to the victim, his or her parents or social services so that some protective measure can be made. . . . [T]he ability to restrict and restrain a psychiatric patient is subject to considerable restriction under the Mental Health Act 1985 . . . and are not unlimited in time. . . . It may be a somewhat novel approach to the question of proximity, but it seems to me to be a relevant consideration to ask what the defendant have done to avoid the danger, if the suggested precautions, *i.e.* committal under section 3 of the Mental Health Act or treatment are likely to be of doubtful effectiveness, and the most effective precaution cannot be taken because the defendant does not know who to warn. This consideration suggests to me that the Court would be unwise to hold that there is sufficient proximity.⁸⁸

Tarasoff has been cited in a bare smattering of other occasions in British cases. In *W. v. Edgell*,⁸⁹ for example, the plaintiff, who had pled guilty to manslaughter in a multiple homicide case and was subsequently

83. [2000] P.I.Q.R. 1 (A.C.).

84. *Id.* at P1.

85. *Id.* at P3.

86. *Id.* at P11. Proximity, of course, is an element of tort claims in the United Kingdom. See e.g., Caroline Johnston & Jane Kaye, *Does UK Biobank Have a Legal Obligation to Feedback Individual Findings to Participants?* 12 MED. L. REV. 239, 246 (2004).

87. *Palmer*, [2000] P.I.Q.R. at P12 (emphasis added).

88. *Id.* at P12–P13.

89. [1990] Ch. 359 (C.A.).

institutionalized in a secure hospital, retained a psychiatrist to submit a report supporting the plaintiff's petition for transfer to a regional facility. When the psychiatrist indicated he could not support the transfer, the plaintiff withdrew his application to the tribunal and refused to consent to the defendant disclosing the report to the medical officer at the secure hospital. The doctor disclosed the report, and the plaintiff subsequently sued him for breach of confidentiality. The trial judge found that the duty of confidence owed by the defendant to the plaintiff not to divulge the contents of the report was overridden by the public interest in protecting the public by placing the report before the proper authorities, and he dismissed the actions.⁹⁰

The plaintiff's appeal was dismissed, the appellate court, citing *Tarasoff*, holding that "[t]he balance of public interest clearly lay in the restricted disclosure of vital information to the director of the hospital and to the Secretary of State who had the onerous duty of safeguarding public safety."⁹¹ In language that tracks the "public peril begins" language from *Tarasoff*, the court concluded on this point:

Although it may be said that Dr. Egdell's action in disclosing his report . . . fell within the letter of paragraph 81(b) [of the Medical Council's confidentiality rules], the judge in fact based his conclusion on what he termed "broader considerations"—that is to say, the safety of the public. I agree with him.⁹²

Then, in *D v. East Berkshire Community Health NHS Trust*,⁹³ the parents of young children brought actions for negligence against healthcare authorities, claiming damages for alleged psychiatric harm caused by unfounded allegations made by healthcare and child care professionals that the parents had abused their children. The House of Lords affirmed the dismissal of the parents' case, noting:

In some American jurisdictions it has been accepted that a doctor may owe a duty to a person who is not his patient [citing, inter alia, *Tarasoff*, and *Sullivan v. Moody*,⁹⁴ an Australian case]. . . . In the present case acceptance of that proposition is implicit in acceptance of a potential duty to the child. So the question is whether, in diagnosing the child's condition in a case of possible abuse, the position of the child is so different from that of the parent that a duty may sensibly be owed to the

90. *Id.* at 364.

91. *Id.* at 416.

92. *Id.*

93. [2005] 2 A.C. 373 (H.L.).

94. (2001) 207 CLR 562 (Austl.).

one but not to the other.⁹⁵

Neither of these cases, however, has been the subject of commentary that *Osman* has.⁹⁶ And it is clear that *Osman* did lead to a “serious reappraisal of public . . . negligence claims;”⁹⁷ that it required courts to “attach more weight to the interests of claimants;”⁹⁸ that “there are fewer policy arguments against liability available to public bodies than there were before *Osman*,”⁹⁹ and that courts are “now more favourably disposed to claimants in such cases.”¹⁰⁰ After *Osman*, English courts will be more reluctant “to dispose of negligence” claims prior to a hearing on the merits¹⁰¹ as a result of *Osman*’s “pushing back the boundaries of public authority liability.”¹⁰²

Of course, *Osman* was not, strictly speaking, a “*Tarasoff* case.” But there is no question in my mind that it helped create a judicial environment that will be more sympathetic to such claims. One commentator has observed:

What Article 2 may now do . . . is to require judges now to take the decision whether the care and treatment provided was adequate or proper . . . rather than to decide . . . solely whether it was treatment which a responsible body of doctors would have provided . . .¹⁰³

Notwithstanding the rejection of the plaintiffs’ claim in the *Z* case,¹⁰⁴

95. *East Berkshire Cmty Health NHS Trust*, [2005] 2 A.C. at 397.

96. In addition to the articles discussed *supra* text accompanying notes 76–82, and *infra* notes 98–102; see also E.J. Ryan, *Failing the System? Enforcing the Right to Education in New Zealand*, 35 VICT. U. WELLINGTON L. REV. 735 (2004); Tony Weir, *All or Nothing?*, 78 TUL. L. REV. 511 (2003–2004); François du Bois & Daniel Visser, *The Influence of Foreign Law in South Africa*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 593 (2003); J.K. Mason & G.T. Laurie, *Misfeasance in Public Office: An Emerging Medical Law Tort?*, 11 MED. L. REV. 194 (2003); J.A. Weir, *Human Rights and Damages*, 40 WASHBURN L.J. 413 (2001).

97. Andrew Lidbetter & James George, *Negligent Public Authorities and Convention Rights—The Legacy of Osman*, 2001 EUR.HUM.RTS. L. REV. 599, 605.

98. *Id.* at 606.

99. *Id.* at 615.

100. *Id.* at 599.

101. A.C.L. Davies, *The European Convention and Negligence Actions: Osman “Reviewed”*, 117 L.Q. REV. 521, 524 (2001).

102. van Gerven, *supra* note 56, at 146. One commentator grumpily criticized *Osman* as paving the way for subsequent cases that he characterized as potential “compensation-seeker’s charter[s].” Alastair Mullis, *Barrett v. Enfield London Borough Council: A Compensation-Seeker’s Charter?* 12 CHILD & FAM. L. Q. 185 (2000).

For an interpretation of *Osman* in a prison suicide case, see *Keenan v. United Kingdom*, 33 Eur. Ct. H.R. 913 (2001) (immaterial whether risk came from third party or from individual’s propensity for doing harm to himself).

103. Philip Havers, *The Impact of the European Convention on Human Rights on Medical Law*, 70 MEDICO LEGAL J. 57, 68 (2001).

104. See *supra* text accompanying note 82.

Osman's language as to risk, identifiably, and foreseeability remains viable.¹⁰⁵

Also important to note are recent tort decisions from the continent on duty of care and other issues that may also give rise to *Tarasoff*-like obligations.¹⁰⁶ By way of examples, an Austrian court has found (in a contractor's accident case) that an individual may owe a duty of care to specified third parties;¹⁰⁷ a Swiss court has found (in a ski accident case), that a party had no duty to provide safety measures against "unpredictable behavior;"¹⁰⁸ a Greek case (involving an attack in a business's parking lot) mandated a duty to protect the company's clientele;¹⁰⁹ and a Finnish case (involving the need to warn as to the hazards of smoking tobacco) found a potential duty of care.¹¹⁰ In the one case more factually connected to the issues under consideration here (albeit tangentially), another Swiss court, in denying recovery in a suicide case, framed the question as to whether the doctor acted according to general standards of medical expertise.¹¹¹ These and other cases led an editor of a yearbook edited by the European Centre of Tort and Insurance Law to conclude that "there is a growing tendency to accept duties of the public authorities to become active for the protection of the citizens."¹¹²

IV. CONCLUSION

Why is this important? I think this all *is* important for several interlocking reasons. First, the American notion of Europeans (or, better, non-Americans) being tort litigation-phobic may need some reassessment. Second, even though *Tarasoff* has been cited only a handful of times in non-domestic contexts,¹¹³ the idea of a duty to warn or to protect *does* have legitimacy outside our borders. Third, the issue that was the immediate flashpoint of the *Tarasoff* case and its immediate

105. Cf. JANE WRIGHT, TORT LAW AND HUMAN RIGHTS 145 (2001) (after *Z*, focus in *Osman*-type cases likely to shift to other Convention Articles).

106. On the differences in legal cultures in common law and civil law nations, see Pierre Legrand, *Are Civilians Educable?* 18 LEGAL STUD. 216 (1998).

107. EUROPEAN TORT LAW 2001, at 68 (Helmut Koziol & Barbara C. Steininger eds., 2002) [hereinafter ETL] (citing [2001] JBL 525).

108. *Id.* at 466 (citing [2000] Pra. 89, no. 185 (Switz.)).

109. *Id.* at 272 (citing [2001] ChrID A', 310, 311).

110. *Id.* at 184 (citing [2002] LM 100).

111. *Id.* at 468 (citing [2000] Pra. 89, no. 155 (Switz.)).

112. Helmut Koziol, *Comparative Remarks*, in ETL, *supra* note 107, at 522.

113. See *Palmer v. Tees Health Auth.*, [2000] P.I.Q.R. 1 (A.C.); *W. v. Egdeell*, [1990] Ch. 359 (A.C.); *D. v. East Berkshire Cmty Health*, [2005] 2 A.C. 373 (H.L.).

progeny—the concern that lack of absolute confidentiality might do irreparable harm to the patient-psychotherapist relationship—does not appear to even be a consideration outside of the U.S.¹¹⁴

Fourth, contrarily, the underlying issues of public agency liability—especially as articulated in *Osman*—are the central issues abroad. Fifth (and, perhaps most significantly), the European court system appears to have no problem whatsoever in intertwining what we see as “private law” issues (even if, as in *Tarasoff*—though not in many of its progeny¹¹⁵—the party defendant is a public entity) with what we see as public law issues (which we often treat as “civil rights cases”)¹¹⁶. The reliance on the ECHR as the lynchpin for the *Osman* decision tells us that the potential deprivation of a forum in a *Tarasoff*-case is seen as a violation of international human rights. This conclusion may have profound implications for future developments in this area.

Sixth, as discussed earlier, there is a current raging controversy as to the extent to which international law should have an impact on domestic law.¹¹⁷ If European courts continue to maintain a keen interest in this area, fallout from the current battle may ultimately have an impact on the extent to which U.S. courts are willing to consider the European cases in future *Tarasoff*-type litigation. Finally, other domestic courts across the continent appear to be comfortable with the notion of a duty to warn or protect in many other areas of tort law,¹¹⁸ and there appears to be nothing to suggest that these courts would be adverse to the creation of a *Tarasoff*-type duty.

As stated earlier, in the past several years, there has been a significant increase in the intersection between international human rights law and mental disability law.¹¹⁹ Most of this new attention has focused on the wretched institutional care to which persons with mental disabilities are subjected around the globe.¹²⁰ But some has also begun to focus on

114. This issue, of course, was not present in *Osman*. Cf. *Queen R (on the Application of Ann S.) v. Plymouth City Council*, [2002] EWCA (Civ) 388 (C.A.) (action by mother of adult son seeking the disclosure of confidential information from local social service authority).

115. See, e.g., *McIntosh v. Milano*, 403 A.2d 500 (N.J. Law Div. 1979), discussed extensively in 3 PERLIN, *supra* note 7, § 7C-2.4a, at 462–64.

116. See e.g., 42 U.S.C. § 1983.

117. See, e.g., Calabresi & Zimdahl, *supra* note 1.

118. See *supra* text accompanying notes 107–112.

119. See PERLIN ET AL., *supra* note 6; UN Convention, *supra* note 5.

120. See, e.g., Rosenthal & Sundram, *supra* note 4; Winick, *supra* note 4; Angelika C. Moncada, Comment: *Involuntary Commitment and the Use of Seclusion and Restraint in Uruguay: A Comparison with the United Nations Principles for the Protection of Persons with Mental Illness*, 25 U. MIAMI INTER-AM. L. REV. 589, 591 n.6 (1994); Oliver Lewis, *Mental Disability Law in Central and Eastern Europe: Paper, Practice, Promise*, 8 J. MENTAL HEALTH L. 293(2002).

community issues.¹²¹ It is not particularly provocative to predict that there is a good chance that this will lead to a greater focus on this entire related area of law and on the legal regulation of psychiatric practice (which remains at the heart of the *Tarasoff* decision).¹²²

Some 14 years ago, I wrote this about the *Tarasoff* case in a domestic context:

The impact of heuristic thinking¹²³ on *Tarasoff* decisionmaking (and on clinician response to *Tarasoff*),¹²⁴ the complex therapeutic jurisprudential implications of the decision, the paucity of empirical data bases upon which litigators, lawmakers, and judges can draw: these are areas crying out for new research, new ideas, and new reforms. It is to these questions that our attention must now turn.¹²⁵

I expect these same prescriptions apply to the international arena as well.

I conclude by returning to my title. The chorus that follows the line quoted in my title (the final chorus) reads:

121. See, e.g., Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT'L L. & COM. 241 (2003); PERLIN ET AL., *supra* note 6, ch. 11; Perlin, *Universal Factors*, *supra* note 10; see generally UN Convention, *supra* note 5, at art. 19:

States Parties to this Convention recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Id.

122. Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 645 n.86 (1993) (compare Lawson R. Wulsin et al., *Unexpected Clinical Features of the Tarasoff Decision: The Therapeutic Alliance and the "Duty to Warn"*, 140 AM. J. PSYCHIATRY 601, 601 (1983) ("[T]he clinician . . . is understandably disturbed by the concept of therapeutic approaches being disruptively influenced from remote judicial benches."), with Richard J. Bonnie, *Professional Liability and the Quality of Mental Health Care*, 16 L. MED. & HEALTH CARE 229, 236 (1988) (*Tarasoff* litigation "has made a beneficial contribution to [patients'] quality of care.")).

123. See, e.g., Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence*, 8 NOTRE DAME J.L., ETHICS & PUB. POL'Y 239, 241–42 (1994).

124. See e.g., Michael L. Perlin, "For the Misdemeanor Outlaw": *The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 228 (2000).

125. Perlin, *supra* note 7, at 63.

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How does it feel
How does it feel
To be on your own
With no direction home
Like a complete unknown
Like a rolling stone?¹²⁶

It is not a stretch to think about the victims’ families in such cases—the Tarasoffs, the Osmans—to feel as if they are on their own. With no direction home. (To the legal system), complete unknowns. Perhaps the infusion of life into the *Tarasoff* doctrine in other nations will make them feel somewhat less like a rolling stone.

126. BOB DYLAN, *Like a Rolling Stone, on HIGHWAY 61 REVISITED* (1965) (lyrics at <http://bobdylan.com/songs/rolling.html>).