



## Bioethics Research Library

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# SCOPE NOTE 1

## Dangerousness: Prediction and Legal Status

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The verdict in the trial of John Hinckley has generated renewed controversy over the relationship between justice and punishment as it exists in the context of mental illness. Five major issues dominate discussions of this issue: the ability of psychiatric personnel to predict future dangerousness, the concomitant hazard to the public welfare, the assault of the “not guilty by reason of insanity” verdict on our philosophical idea of justice, the means of punishment for such offenders, and the ethical dilemma forced upon the psychiatrist who must balance respect for confidentiality against safeguarding members of the public.

Researchers overwhelmingly agree on the inaccuracy and subjectivity of methods to predict dangerousness. However, the courts have generally ruled for lengthy commitment of violent offenders to institutions providing treatment for mental illness. There appears to be growing sentiment as well as the introduction of legislation supporting a “two verdict” system which establishes guilt or innocence for a specific crime then judges the mental competence of the defendant. To date, Michigan, Indiana, Illinois and Georgia have enacted such “alternative” legislation (Newsletter of the Am. Academy of Psychiatry and the Law 7(2): 39, Aug. 1982). Such a system suggests a mandatory period of incarceration in a prison with facilities for the treatment of mental problems. Idaho has eliminated the insanity defense (S.B. 1396, enacted July 1, 1982). Observers have recognized that breaches of confidentiality in the psychiatrist-patient relationship and the placing of liability on the psychiatrist for the welfare of others may lead to increased violence in society since the mentally ill will refrain from confiding with doctors and the practitioners will shy away from accepting such potentially dangerous patients.

The SCOPE NOTE SERIES is intended to present a current overview of issues and viewpoints related to a specific topic in biomedical ethics. It is not designed as a comprehensive review, but rather it offers immediate reference to facts, opinion, and legal precedents (if applicable) for scholars, journalists, medical and legal practitioners, students, and interested laypersons.

## JOURNAL ARTICLES

Bazelon, David L. "**Institutionalization, deinstitutionalization and the adversary process.**" *COLUMBIA LAW REVIEW* 75(5): 897-912, June 1975.

Commitment to an institution for mental illness is often a punitive or retributive judicial response rather than a means of treatment for those judged dangerous or socially undesirable. Two major problems surround commitments for dangerousness: the lack of definition of the term, and the unreliability of predictions. This wide-ranging discussion of involuntary commitment emphasizes the polarity between the treatment needs of the patient and the social protection role forced upon mental hospitals. Bazelon questions standardized treatments and, in regard to the dangerous patient, calls for the tailoring of confinement to the extent of dangerousness.

Birns, Harold, and Levien, Jane S. "**Dangerousness: legal determinations and clinical speculations.**" *PSYCHIATRIC QUARTERLY* 52(2): 108-131, Summer 1980.

The concept of dangerousness as utilized in the civil commitment process is reviewed with special reference to New York State. The authors then discuss the reasons why psychiatric personnel are unable to accurately predict dangerousness. They find a lack of objectivity, reliance on personal value systems, and a susceptibility to the power of suggestion. The Tarasoff decision is analysed. Excellent overview.

Caesar, Berel. "**The insanity defense: the new**

**loop-hole.**" *CRIME AND DELINQUENCY* 25(4): 436-449, October 1979.

Following an analysis of the historical context of the insanity defense and of the stipulations of various state statutes, Caesar advocates a two-part verdict system. If found guilty of an offense, a defendant would be subject to criminal confinement sanctions with treatment provided in a prison setting.

Hays, J. Ray. "**Ethics of prediction of future dangerousness.**" *PSYCHOLOGICAL REPORTS* 49(2): 593-594, October 1981.

In a survey of psychologists in Houston, nearly all respondents believed future behavior could be predicted based on reliable psychological and historical information. They also overwhelmingly agreed that expert testimony should not be given if based on limited facts.

Levinson, Richard M., and Ramsay, Georgeann. "**Dangerousness, stress and mental health evaluations.**" *JOURNAL OF HEALTH AND SOCIAL BEHAVIOR* 20(2): 178-187, June 1979.

Reviews studies of the accuracy of psychiatric assessments of dangerousness. Psychiatrists are hampered by contextual, political, cultural, informational, and statistical disadvantages. A study of the predictive ability of mental health service professionals who work in the community rather than in hospitals is presented. They also produced high false-positive rates. Stress events are found to be significantly associated with the occurrence of dangerous behavior.

Pfohl, Stephen J. "**From whom will we be protected? Comparative approaches to the assessment of dangerousness.**" *INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY* 2(1): 55-78, 1979.

Models employed in Ohio and Alabama for the assessment of dangerousness are detailed. Expert judgments by psychiatric personnel are considered to be affected by political, egocentric, and social considerations often unrelated to the patient. Such assessments are exces-

sively subjective and should not be the primary determinant of predictions of dangerousness. Histories of actual behavior should be utilized as important evidence.

Shah, Saleem A. “**Dangerousness: a paradigm for exploring some issues in law and psychology.**” *AMERICAN PSYCHOLOGIST* 33(3): 224-238, March 1978.

Dangerousness is considered as it relates to our legal and social institutions. The areas where dangerousness impinges on the criminal justice and mental health systems are outlined. Major problems are caused by lack of definition, inconsistency of interpretations, and inaccuracy of assessment. The author delineates factors leading to high “false positive” rates, and he explores the potential for social injustice to the disadvantaged in present practices regarding this issue.

Steadman, Henry J. “**Violence, mental illness, and preventive detention: we can’t predict who is dangerous.**” *PSYCHOLOGY TODAY* 8(8): 32-33+, January 1975.

While people continue to be committed to institutions for mental illness and potential dangerousness, the author challenges the assumption that most mental patients are dangerous. In addition, there is not empirical support that psychiatrists can predict violent behavior.

Stone, Alan A. “**The Tarasoff decisions: suing psychotherapists to safeguard society.**” *HARVARD LAW REVIEW* 90(2): 358-378, December 1976.

An increased risk of violence to society will result if a psychotherapist is forced to personally warn potential victims of a dangerous patient. The therapeutic relationship will suffer, effective treatment will be thwarted, and doctors will be less likely to accept such patients. The author advocates police participation in such situations.

Szasz, Thomas. “**Insanity and irresponsibility:**

**psychiatric diversion in the criminal justice system.**” *ALABAMA JOURNAL OF MEDICAL SCIENCES* 16(2): 108-112, April 1979.

“Criminal responsibility” is considered to be synonymous with “punishability.” It is not a trait that can be dependent on mental fitness. The insanity defense is considered to be a “psychiatric diversion” which undermines the social fabric and criminal justice system. Psychiatric detention in lieu of criminal punishment is termed the “medicalization of mayhem.” Szasz calls for the separation of psychiatry and state.

## COURT DECISIONS

*BAXTROM V. HERALD*. 383 U.S. Supreme Court Reports 107 (1966).

Challenged the assumption that potential or actual dangerous behavior is presumed to continue. Supreme Court held that Baxtrom was denied equal protection under the law in being denied a jury review of his mental condition.

*DONALDSON V. O’CONNOR*. 493 Federal Reporter, Second Series 507 (1974).

Affirms right to treatment for patient involuntarily committed, and declares long-term detention must be justified and subject to due process. Physicians must address the patient’s dangerousness and must utilize available resources for rehabilitation.

*McINTOSH V. MILANO*. 403 Atlantic Reporter, Second Series 500 (1979).

Although physician-patient privilege is recognized, exceptions to confidentiality exist for the protection of third persons or the interests of society. Psychiatrist is liable to warn third persons of physical threat or danger from patient.

*MAVROUDIS V. SUPERIOR COURT FOR COUNTY OF SAN MATEO*. 162 California Appeals Reporter, Third Series 724 (1980).

Therapist’s duty to protect his patient’s in-

tended victim arises whenever therapist determines that patient presents a serious danger to another. A specific victim need not be named if the therapist can readily assume the identity of such. Disclosure of psychiatric records to court is authorized. Public interest in confidentiality must yield to public interest in safety.

*SHAW V. GLICKMAN*. 415 Atlantic Reporter, Second Series 625 (1980).

Rules that disclosure of communications relating to treatment, diagnosis, or state of patient's mental disorders belongs to the patient, not the psychiatrist or psychologist. Doctor is not obligated to warn others of potential dangerousness of patient in the absence of specific threats. Right of confidentiality is affirmed.

*STATE OF NEW JERSEY V. KROL*. 344 Atlantic Reporter, Second Series 289 (1975).

Differentiates "dangerous" from "criminal" conduct. Dangerousness involves "significant physical or psychological injury to persons or substantial destruction of property." Persons may not be indefinitely incarcerated if they present a risk of only socially undesirable future conduct.

*TARASOFF V. REGENTS OF THE UNIVERSITY OF CALIFORNIA*. 17 California Reports, Third Series 425 (1976).

The psychotherapist-patient relationship imposes on the therapist duties to control the patient and to protect the patient's would-be victim if detailed threats are revealed during treatment. A special relationship exists between psychotherapist and patient which imposes liability for the welfare of third persons.

*U.S. V. ECKER*. 543 Federal Reporter, Second Series 178 (1976).

After multiple confinements in mental hospitals, Ecker committed a rape-murder. He was tried in 1968 and found not guilty by reason

of insanity. In 1976 mental health experts agreed that the patient had recovered and could be released to the community for a few hours a day. St. Elizabeth's hospital in Washington, D.C. certified Ecker's conditional release. The trial judge rejected the opinions of the expert witnesses and ordered Ecker held. D.C. Circuit Court of Appeals upheld the trial judge. Even dissenters to opinion conceded the court's authority to order continued confinement.

## BOOKS

Bromberg, Walter. **THE USES OF PSYCHIATRY IN THE LAW: A CLINICAL VIEW OF FORENSIC PSYCHIATRY**. Westport, Conn.: Quorum Books, 1979, pp. 178-181, 290-306.

Within this broad consideration of the place of psychiatry in the legal process, Bromberg examines the unreliability of predictions of dangerousness, criteria, the determination procedures, the right to appeal and review, principles of incarceration and harmful behavior. Relevant cases are reviewed.

The Dangerous Patient. Special issue: *PSYCHIATRIC QUARTERLY* 52(2): 77-157, Summer 1980.

Discussions of the problem of prediction of dangerousness open the issue. A critical analysis of reports suggesting that mental patients may be more dangerous than the average citizen follows. The legal view of dangerousness is viewed in light of the Tarasoff decision. Treatment of violent offenders at Central New York Psychiatric Center is detailed. A proposed alternative to the insanity defense and the "not guilty" verdict concludes the volume.

Gaylin, Willard. **THE KILLING OF BONNIE GARLAND: A QUESTION OF JUSTICE**. New York: Simon and Schuster, 1982.

In 1977 a Yale student, Richard Herrin, brutally murdered his girlfriend, then he enlisted the help of classmates and Catholic clergy to aid in his defense. Herrin was convicted of

manslaughter with parole eligibility in a few years. Gaylin uses this case as a context to consider such issues as justice, punishment, the insanity defense, the contemporary meaning of guilt.

Hofling, Charles K., ed. **LAW AND ETHICS IN THE PRACTICE OF PSYCHIATRY**. New York: Brunner/Mazel, 1981.

The problems surrounding disclosure, confidentiality, and the impact of the Tarasoff

decision are deliberated by Jerome S. Beigler, Jay Katz, and George E. Dix. Another section is devoted to three considerations of the psychiatrist as expert witness. The collection closes with two articles on the responsibility of the psychiatrist to society.

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