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The Wrong To Confidentiality[1]

Any question regarding the appropriateness of a patient's right to confidentiality--and particularly when the case lies in the

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[1]Contrary to the belief you expressed in class, this paper was not written without reference to the reading material. Indeed, simply because I have the honesty to admit that I sometimes get behind in my reading--as a result of an excessive work load and a acutely developed sense of obligation to do the best I can--I wonder how you justify your public claim that I procrastinate and shirk the reading of assigned material. I wonder even more, since this is the second class I take with you, that experience seems to have taught you nothing of either my intent nor actions. If you feel indignant at students who avoid work, I suggest you direct that indignation in the appropriate direction. My academic record is demonstrative of neither a genius who can succeed without work nor a unconscientious student who does as little as possible. It shows rather a hard worker who succeeds by being a hard worker. Yes, sometimes I might fall behind in my reading, but I always catch up, and by the end of the session I have <u>always</u> read not less than was required but more. The lack of my customary wit in this essay is a response to your misdirected and undeserved censure. Please do not feel obliged to comment upon this note.

realm of psychiatric treatment--should seek resolution from the vantage of both teleological deontological ethics: for if an accord can be reached from both these systems of evaluation, we might with some degree of certainty deem it valid. The facts and circumstance of Tarasoff v. Regents of the University of California render it a relatively elementary ethical dilemma, and the certainty with which we conclude, in this instance, that the right to confidentiality is superseded by the obligation to divulge might then be extended to other more Daedalian cases.

Tatiana Tarasoff was murdered by Prosenjit Poddar, a patient of psychotherapists employed by the University of California. The Tarasoff family complained that the doctors and police had failed to warn them that their daughter was in danger from Poddar, who, two months earlier, had confided to his doctor his intention to kill Tatiana. Doctor Moore reported the danger to campus police, who detained Poddar for a few hours, decided he was "rational" and consequently released him.[2]

In examining this case first from the standpoint of teleological ethical theory we must tread carefully, for the relative goodness or badness[3] of consequences might change as we

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[2]This summery of the case is meant only for my own future reference.

[3]We need not concern ourselves too greatly with defining the terms goodness and badness. Certainly Bentham's hedonistic formula might give way, for the sake of common sense, to the

widen the scope of those assumed consequences. If we first focus uniquely on the particulars of Tarasoff v. Regents of the University of California, it can hardly be disputed that the greatest good would have resulted in full disclosure--full in the sense of including the Tarasoff family. In his dissenting opinion, Justice William P. Clark writes:

> Both the legal and psychiatric communities recognise that the process of determining potential violence in a patient is far from exact, being fraught with complexity and uncertainty.(171)[4]

The point we must bear in mind though is that in this particular case the assessment had already been made: the doctor had accurately determined the likelihood of threat and had, as a result, reported to the campus police. Although the ability to predict the likelihood of actual violence arising from a threat of violence might be a general consideration, our present occupation is solely with the Tarasoff case, and here this difficulty of prediction is nothing more than a red-herring. What we should consider is whether notification of only the campus police was a sufficient response. Certainly, in hind sight, this clearly was not so. But even at the time of the

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somewhat more workable prescription of Mill's which defines good and bad essentially as happiness and unhappiness respectively.

[4]The format of my quotations follows the M.L.A (Modern Language Association) convention which does not specify single spacing.

incident, it seems obvious that the doctor's action was not only insufficient but verging on the ludicrous and the immoral. Essentially, Dr. Moore negated his own ability to assess danger by leaving the final decision to unqualified campus police. If Dr. Moore felt unqualified to decide upon the authenticity of Poddar's threat, then surely, by this same logic, he was unqualified to decide that the threat warranted report to the police. Perhaps Dr. Moore felt he had effectively washed his hands of guilt, but he had in truth merely closed his eyes to the problem. We can only wonder how Dr. Moore and his superior expected the untrained police to discover in a few hours what a trained psychotherapist had found during a lengthy period.

In the very narrow sphere of Tarasoff v. Regents of the University of California we see that common logic does not allow for such limited response on the part of either the doctor nor head of his department; and that the greatest possible good to the greatest number would indeed have resulted from warning the Tarasoff family.

We might now extend our horizons and examine the extended consequences of establishing "a system of warnings"(170) on the general practice of psychotherapy. Justice Clark suggests that:

> While offering virtually no benefit to society, such a duty [to inform] will frustrate psychiatric treatment, invade fundamental patient rights and increase violence. (170)

It seems patently ludicrous to deem the saving of innocent life of "no benefit to society." Certainly, society is what society

does, and in abjuring protection of the innocent, society itself is debilitated.

Moore's next point asserts that a system of divulgence would "frustrate psychiatric treatment." In explanation:

> . . . those seeking it [treatment] will be inhibited from making revelations necessary to effective treatment; and forcing the psychiatrist to violate the patient's trust will destroy the interpersonal relationship by which treatment is effected. (171)

We should first bear in mind that Justice Clark is not a psychiatrist and any assertions he makes regarding the practice of psychiatry are the assertion of the layman and so at the very least questionable. Indeed, Justice Clark seems to be unaware of the nature of a patient's revelations, which are often "a cry for help."(Quote from class discussion). Since a cry is an unrehearsed action and not one resulting from reason, and since the crier does wish his cry to be heard, it is doubtful whether the existence of a system of divulgence--which would lie much like a safety net, noticed mostly by those who fall into it and ignored by the rest--would gag that voice. It is then far from certain that the effectiveness of therapy would be diminished by a system of warnings, and since this is the case, the extended assertion that such a system would lead to more violence is equally questionable. Indeed, the effectiveness of treatment even when absolute confidentiality is held as a sacred trust seems far from clear. Andrew Billen, in an article from the

London Observer suggests that “psychoanalysis might cause more problems than it solves.” In the same article, Desmond Kelly, a consultant psychiatrist in London, submits that the Freudian tradition has failed to make a single important advance in the last twenty years. We might wonder at the soundness of the empirical footing for such a system of treatment that can make no more forward strides. It is, in conclusion, far from clear that the possibility of divulgence in relatively few cases would upset the general effectiveness--or lack--of psychoanalysis.

The final point, the invasion of a patient’s fundamental rights is an aspect which belongs most properly to deontological ethics, and will for the moment be suspended.

As we have seen then, using the utilitarian measure, it is only the assertion that a system of warnings would undermine the effectiveness of treatment and thus result in additional violence perpetrated by untreated or less treated patient that demands any real consideration. We must realise though that this is an untested hypothetical prediction, whereas it is certain that warning the threatened innocent third parties would at least sometimes prove effective.

Turning now to the viewpoint of Deontological ethics, we might first tackle the problem using Kant’s “Categorical Imperative.” The question then is: Would we wish betrayal of confidentiality to become a maxim of a universal law? And at once we see not the problem of this case but the problem of the “Categorical

Imperative." How can we wish such betrayal to become a universal principle? The problem is whether we should make Kantian ethics the uncomfortable bed-mate of situation ethics. This seems particularly absurd when we note that they belong to polarised families: Deontological and Teleological respectively. And yet the "Categorical Imperative" does seem largely unworkable when it pays no heed to circumstance. Even if we use another common formulation of the "Categorical Imperative" which decrees that we act to treat humanity and self as a means and an ends, we find resolution even further obscured by the vastness of the picture.

Essentially, the best assessment we can make is this: If betrayal of confidence results in the possible saving of innocent life, then we would have it a controlling principle in a universal rule. Of course, we are not here being true to the Kantian spirit, and have in truth becomes propounders of prima facie duties.

We should realise that the right to privacy is not a sacred right written in stone. It carries the weight of honest dealings between people, but this must be placed on the scale with the possible harm that could result from that privacy. In Tarasoff v. Regents of the University of California the threat to Tatiana Tarasoff certainly outweighs any resultant problems caused by breach of confidentiality in respect of Poddar. LeRoy Walters, in his article "The Principle of Medical Confidentiality" also tackles this subject according to prima facie duties:

> There are, in my view, three general reasons which might conceivably justify violating the principle of confidentiality. The first is that the principle may come into conflict with the patients himself. . . . A second . . . that it might conflict with the right of an innocent third party. . . . A third . . . is a serious conflict between the principle and the rights or interests of society in general.(163)

Although prima facie ethics seems the most workable system, for it most closely mimics the way we internally evaluate relative goodness and badness, it does possess one serious shortcoming. Since it is a system whose single characteristic is comparison, weighing one thing against another, it cannot provide a solution when the ethical dilemma is composed of two very similar adversarial choices. But if the psychotherapist feels that a patient might prove a genuine threat to an innocent third party--as was the case with Dr. Moore and Poddar--then the balance of the scale has already been tipped and the principle of confidentiality must give way to the moral obligation to preserve innocent life. Even if the danger is deemed only possible and not likely, that possible danger to the third party is a mortal one, whereas the negative effect of divulgence upon the patient would, in all likelihood, prove to be more psychological. The scales then weigh the possibility of corporal murder against psychological damage. We are, of course, overlooking the larger possible consequences that suggest an

undermining of the general practice of psychoanalysis by a system of divulgence to which we will now turn our attention.

In the final analysis, even if we admit that Justice Clark's main point--that a system of warnings would undermine psychoanalysis and result in more violence--is at least possible--for it is certainly not provable--we admit then that there exists the opposition of two potentialities: that the patients of psychiatrists will be harmed by the existence of a system of divulgence which might lead to endangering more innocent victims versus the chance of innocent victims being harmed by the absolute interdiction of disclosure. But even within this scenario of doubt, it seems that we should still choose the former--the system of divulgence--for two reasons: firstly, the threat to unseen victims in the unseen future by unseen patients who abstain from therapy or find a less effective therapy because of the system of divulgence seems a much more hypothetical and uncertain danger--and certainly much less immediate--than that faced by the named victim by the named patient. Secondly, to enter a more metaphysical timbre: by virtue of our common humanity, we each of us are born with a debt of dependence to our fellow man that we must return throughout our lives. Justice Mathew O. Tobriner's "Majority Opinion in Tarasoff v. Regents of the University of California" supporting the thesis that endangered third parties should be notified offers the view:

> Although . . . under the common law, as a general

> rule, one person owed no duty to control the conduct of another nor to warn those endangered by such conduct, the courts have carved out an exception to this rule in cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct. (167)

His argument, steeped in legal law rather than moral law, falls short of the target, for it seems that the exception to the rule should rather be the rule itself. When a passer-by sees a total stranger struggling for life in a deep and rapid flowing river, he rushes to his aid unconsciously, neither evaluating the "specialness" of his relationship to the victim nor counting the cost, for that debt is part of what we are and what we must pay for being human. Similarly, any psychoanalyst who hears of possible peril to an innocent third party must likewise act upon that knowledge. The human debt is not paid by passing the buck--if we might carry the analogy to its ridiculous conclusion--and this is precisely what Dr. Moore attempted by relinquishing his responsibility to the unqualified hands of the campus police. The psychotherapist in a situation like that of Dr. Moore must take care of real mortal dangers and not refrain from action from fear of hypothetical ghosts of what might be.[5]

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[5]Works Cited page is ommitied for the sake of saving paper. Page references, of course, refer to the textbook Biomedical

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Ethics. If you insist upon the inclusion of this missing section, I will be happy to print it out.