

# GETTING TO *TARASOFF*:

## *A Gender-Based History of Tort Law Doctrine*

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### INTRODUCTION

When Tatiana Tarasoff began her sophomore year at the University of California-Berkeley, she never could have guessed that her last name would soon become synonymous with a new legal doctrine which would be the subject of analysis and criticism for decades to come. But everything changed when Prosenjit Poddar, a fellow student, killed her on October 27, 1969. In the legal case that followed, the Supreme Court of California concluded that mental health professionals have a duty to protect third parties who are at risk from their patients.<sup>1</sup> California's decision was followed in a majority of other states.<sup>2</sup> This decision raised issues of patient privacy, burdens on mental health professionals, and the possible effects of deterring patients from sharing information with their doctors.

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This paper was awarded second place in the California Supreme Court Historical Society's 2021 CSCHS Selma Moidel Smith Student Writing Competition in California Legal History.

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<sup>1</sup> *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976).

<sup>2</sup> Rebecca Johnson et al., *The Tarasoff Rule: The Implications of Interstate Variation and Gaps in Professional Training*, 42 J. AM. ACAD. PSYCHIATRY L. 469, 470 (2014).

Many legal scholars and professionals in the psychotherapy field have written about the impact of the *Tarasoff* decision and how its imposition of duties on third parties impacted the field of psychology. Additional scholarship tends to view the case from a medical or mental illness angle. For example, Glenn S. Lipson and Mark J. Mills have discussed Poddar's behavior from a psychiatric perspective, writing about Poddar's erotomania and examining issues of cultural differences.<sup>3</sup>

However, a few sources discuss *Tarasoff* from the perspective of gender-based violence. *Tarasoff* has been interpreted as a case about violence against women by Stephanie W. Wildman, who argued that in tort cases such as *Tarasoff*, courts ignored or minimized the issue of the abuse of women and saw these issues as "marginal to legal discussion."<sup>4</sup> She also posed the question of whether gender of victims in other cases, such as *Dillon v. Legg*, influenced their outcomes.<sup>5</sup> Mary McNeill in "Domestic Violence: The Skeleton in *Tarasoff's* Closet" also argues that *Tarasoff* and similar cases that came after involve domestic violence issues that are not addressed by the courts in judicial opinions or by legal commentators.<sup>6</sup> These understandings are relevant for examining legal developments of the past, as well as contemporary issues. For example, contemporary issues arise around "rejection killings," which are not sufficiently analyzed or even tracked.<sup>7</sup> These types of killings, generally stemming from a man killing a woman for cutting off a romantic relationship with him or failing to reciprocate his romantic feelings, are precisely the type of situation that gave rise to *Tarasoff*.

In this gender-based context, the questions raised by *Tarasoff* can be broadened into both the past and the future. How does *Tarasoff* fit into the trends of California tort law over the twentieth century, particularly

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<sup>3</sup> Glenn S. Lipson & Mark J. Mills, *Stalking, Erotomania, and the Tarasoff Cases*, in *THE PSYCHOL. OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES* 257–73 (1998).

<sup>4</sup> Stephanie M. Wildman, *Review Essay: The Power of Women*, 2 *YALE J.L. & FEMINISM* 435, 444 (1990).

<sup>5</sup> *Id.* at 444–45.

<sup>6</sup> Mary McNeill, *Domestic Violence: The Skeleton in Tarasoff's Closet*, in *DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE* 197, 199 (Daniel Jay Sonkin ed., 1987).

<sup>7</sup> Jessica Valenti, "Rejection Killings" Need to Be Tracked, *MEDIUM* (Nov. 21, 2018), <https://gen.medium.com/revenge-killings-need-to-be-tracked-37e78a1cf6ce>.

involving torts that are committed disproportionately against women? How did the California courts use tort law to expand duties owed to others, especially in the context of protecting women?

In this paper I will argue that *Tarasoff* represents the culmination of an expansion of tort law doctrines in California to include recovery for situations that disproportionately affect women, including torts that relate to intimate partner violence, and torts that disproportionately affect women in a caretaker role, such as emotional damage in the context of a familial death caused by negligence. Following *Tarasoff*, there was a retreat from this expansion due to political shifts on the Supreme Court. In addition to this discussion of *Tarasoff*, I will examine broader questions about how feminists have engaged with the legal system and the differing ideological opinions of feminist groups regarding expanding tort and criminal liability for intimate partner violence.

I will begin by examining existing feminist scholarship regarding tort law, as well as the battered women's movement, which demonstrates the interactions between the women's rights movement and the legal system. Next, I will discuss current issues relating to gender-based crimes and torts related to intimate relationships. I will also examine the historical development of tort laws relating to gender and emotional harm, particularly "breach of promise" cases. Then, I will trace the developments coming from the California Supreme Court over the twentieth century to demonstrate a case study of expanding tort doctrine that culminated in *Tarasoff*. I will discuss reactions to *Tarasoff* and shifts in the California Supreme Court that led to a retraction of the prior tort law expansion, although *Tarasoff* has not been overruled. Through these lines of cases, I will examine how the legal system has engaged with torts that are primarily committed against women and how political and social changes have influenced changes in these types of laws.

## TORT HISTORY AND FEMINIST TORTS SCHOLARSHIP

Duty is a central concept in tort law. As a general rule, a person does not owe a duty to another person. Tort law creates the exceptions to this rule, such as when a person creates the danger or when the two parties are in

a special relationship. The expansiveness of these duties has changed over time in response to societal shifts and new legal understandings.

Although torts are not always seen as a gendered topic, there are certain torts that are disproportionately committed against women. These include torts around emotional harm, which frequently results from an injury or death of a family member, as well as those related to intimate partner violence.

Feminist torts scholarship seeks to bring a gender-based analysis to this field. In 1988, Professor Leslie Bender published an article entitled “A Lawyer’s Primer on Feminist Theory and Tort.” In this article, she applied feminist theory to different aspects of tort law. For example, she discussed the implicitly male norms that have been imposed in negligence law through the articulation of the reasonable person standard as the “reasonable man” standard.<sup>8</sup> She notes that the “reasonable man” standard was postulated by men and was written into judicial opinions, treatises, and casebooks by men.<sup>9</sup> As such, even a change in wording to “reasonable person” still means “reasonable man.” Additionally, the concept of “reasonableness” is inherently gendered, due to the traditional attribution of reason to men, while emotion is attributed to women.<sup>10</sup> In 1993, Bender published another article titled, “An Overview of Feminist Torts Scholarship.”<sup>11</sup> She discussed how, at that point, feminist legal scholars had just begun to “apply feminist theories and methods to analyzing and ‘revising’ tort law.”<sup>12</sup> She discussed works including Martha Chamallas and Linda Kerber’s analysis of the gendered aspects of the law of fright and negligent infliction of emotional distress, as well as Carl Tobias’s work on interspousal tort immunity doctrine.<sup>13</sup> Bender applied the feminist importance of “ending power imbalances stemming from systematic practices that subordinate groups of people” to argue that courts should intervene to balance the relative power of the parties, particularly in mass tort litigation involving defendant

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<sup>8</sup> Leslie Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, 38 J. OF LEGAL EDUC., 3, 20–21 (1988).

<sup>9</sup> *Id.* at 22.

<sup>10</sup> *Id.* at 23.

<sup>11</sup> Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV., 575, 575–96 (1993).

<sup>12</sup> *Id.* at 575.

<sup>13</sup> *Id.* at 577–79.

corporations.<sup>14</sup> She also discussed Adrian Howe's proposal of shifting to the concept of social injury to women, rather than the traditional tort notion of individualized, privatized injury.<sup>15</sup> Lucinda Finley also discussed how tort law fails to understand harms to women. Doctrines such as interspousal tort immunity can remove intentional marital injuries from the tort system and force a move to the criminal or family court systems, which would not allow women to recover monetary damages.<sup>16</sup> Additionally, as this paper will discuss in the overview of tort law development in California, courts have failed to provide compensation for women's emotional injuries when their children are negligently killed "because damages are frequently limited to pecuniary losses."<sup>17</sup> These typically are torts that disproportionately affect women, Finley noted, because the "female parenting role closely links self-identity with caretaking duties and children's well-being."<sup>18</sup> Damage calculations also fail to place adequate value on homemaker and caretaking labor and tend to rely on gender bias to underestimate earnings projections of women.<sup>19</sup>

## CURRENT GENDER-BASED TORT AND CRIMINAL LAW ISSUES

Gender-based torts have existed throughout all time periods, but they exist in a unique form today. In the current age of technology, torts and crimes in the context of intimate partner relationships have taken on a different form. In *Jane Doe No. 14 v. Internet Brands, Inc.*, a plaintiff sued for negligence in California after a situation that began online. The plaintiff had posted information about herself on the website modelmayhem.com.<sup>20</sup> She stated that in February 2011, two men used her profile on the site to lure her to a fake audition and proceeded to drug her, rape her, and record the acts.<sup>21</sup> Her claim rested on the fact that the owner of the website, Internet

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<sup>14</sup> *Id.* at 582.

<sup>15</sup> *Id.* at 583.

<sup>16</sup> *Id.* at 585.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 586.

<sup>20</sup> *Jane Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 848 (9th Cir. 2016).

<sup>21</sup> *Id.* at 849.

Brands, knew of the perpetrators's criminal activity but failed to warn her and the other users of the site.<sup>22</sup> She argued that Internet Brands had a special relationship with her that imposed the duty to warn.<sup>23</sup>

Additionally, attention has grown in recent years around revenge porn — the releasing of nude images sent during a relationship, usually by an ex-boyfriend after the relationship has ended as a way of punishing his ex-girlfriend — as well as other types of nonconsensual pornography which could have been obtained originally with or without consent.<sup>24</sup> In our society, which has a “poor track record in addressing harms that take women and girls as their primary target,” revenge porn and other technology-based sexual crimes have been slow to garner attention and legal changes that would allow the perpetrators to be punished.<sup>25</sup> In recent years, there has been some movement toward criminalizing these behaviors and many courts have held that such statutes do not violate the First Amendment.<sup>26</sup> These issues relate to the realm of emotional harm in intimate relationships and how the law should respond to such harm. Although such on-line behaviors do not directly inflict physical violence as in *Tarasoff*, they demonstrate a similar motive of revenge in intimate relationships that has a gender-based component.

Additionally, recent social movements have focused on both criminal and civil law reforms. These movements have also been able to change the consciousness around certain issues relating to crimes and torts against women.

For example, the “battered women’s movement” was able to bring attention to domestic violence in a way that had not previously existed. Feminist organizations in the mid-1970s began emphasizing the problem

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See Danielle Citron and Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV., 345, 346 (2014).

<sup>25</sup> *Id.* at 347.

<sup>26</sup> See, e.g., *People v. Austin*, No. 124910, 2019 WL 5287962, at \*12-\*14, \*17 (Ill. 2019) (holding, *inter alia*, that statute served substantial government interest in protecting privacy of persons who had not consented to dissemination of their private sexual images, was narrowly tailored to serve that substantial government interest, and was not unconstitutionally overbroad under the First Amendment); *State v. Van Buren*, 214 A.3d 791, 814 (Vt. 2019) (holding that nonconsensual pornography statute was narrowly tailored to serve compelling state interest as needed to survive facial challenge to its constitutionality under the First Amendment).

of domestic violence against women, with the National Organization for Women forming a National Task Force on Battered Women / Household Violence at its eighth annual conference in October 1975.<sup>27</sup> Around this time, other groups had been organizing to provide shelter and crisis services to women who needed assistance fleeing from their abusive partners. In 1972, Women's Advocates, Inc. established a telephone crisis hotline in St. Paul, Minnesota to aid women who were victims of domestic violence.<sup>28</sup> Other groups such as the Rainbow Retreat in Phoenix and the Haven House in Pasadena began in the early 1970s as shelters to help women beaten by alcoholic husbands and later expanded to women suffering from physical abuse in general.<sup>29</sup>

The battered women's movement achieved success in legislation to increase criminal penalties for domestic abuse, as well as strengthening civil protections and making it easier for women to file charges in these circumstances.<sup>30</sup> Additionally, U.S. government agencies have created or extended programs for battered women, and information has expanded on the factors that could place a woman at risk for domestic violence and how such violence can be combated.<sup>31</sup> Writing in 1982, Kathleen Tierney described how "wife beating has been transformed from a subject of private shame and misery to an object of public concern."<sup>32</sup> She examined articles from *The New York Times* and noted that there "was not a single reference to wife beating as a social or community issue from 1970 to 1972," and the only references to violence against wives were present in reports of assaults or murders by assailants who were married to or living with their victims; however, some mentions of domestic violence began in 1973 and more intense coverage started in 1976.<sup>33</sup> This increasing visibility of domestic violence helped to create an understanding of the pervasiveness of the issue and raise discussion about how to end it. Through the new understanding of domestic violence brought from the battered women's

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<sup>27</sup> Kathleen J. Tierney, *The Battered Women Movement and the Creation of the Wife Beating Problem*, 29 *SOCIAL PROBLEMS*, 207, 208 (1982).

<sup>28</sup> *Id.* at 207.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 209.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 210.

<sup>33</sup> *Id.* at 212-13.

movement, domestic violence was seen as a pervasive concept throughout history and was put into broader understandings of legal history. A document from 1999 put out by SafeNetwork: California's Domestic Violence Resource showed a "herstory of domestic violence" and presented a timeline of violence against women that linked the battered women's movement to practices of the past.<sup>34</sup>

The participants in the battered women's movement did not always share an ideological background. Some entered the movement from a women's rights perspective that sought equality with men where it could be gained through reform of existing social and legal institutions; others possessed a more radical notion of feminism that saw the division of labor and power between men and women as the basis for other forms of exploitation.<sup>35</sup> Socialist feminists saw the root of women's oppression within the material reality of this division of labor and believed that only sweeping societal transformation, including a restructuring of the family, would be able to end violence against women.<sup>36</sup> Additionally, women who were the victims of domestic violence themselves could be involved in the movement to end violence against women but did not always consider themselves to be feminists or aligned with a certain ideology.<sup>37</sup>

Partly due to these ideological differences, movements relating to the criminal law, such as the battered women's movement, have faced internal debates within feminist circles about strengthening the power of the state. Policies advocated by those who support strong state intervention can include mandatory arrest, mandatory prosecution, and mandatory reporting by medical personnel.<sup>38</sup> In response, others have argued for a survivor-centered model that includes acceptance, respect, reassurance,

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<sup>34</sup> SafeNetwork, *Herstory of Domestic Violence: A Timeline of the Battered Women's Movement* (Sept. 1999), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.208.6955&rep=rep1&type=pdf>.

<sup>35</sup> Susan Schechter, *The Roots of the Battered Women's Movement: Personal and Political*, in *APPLICATIONS OF FEMINIST LEGAL THEORY* 296, 302 (D. Kelly Weisberg ed., 1999).

<sup>36</sup> *Id.* at 303.

<sup>37</sup> *Id.* at 304.

<sup>38</sup> See generally, Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 *HARV. L. REV.* 550 (1999).



engagement, resocialization, empowerment, and emotional responsiveness.<sup>39</sup> An approach to domestic violence that advocates for increased policing, prosecution, and imprisonment as the solution to ending violence against women is deemed “carceral feminism.” Opponents of carceral feminism note that women who are already more marginalized, such as immigrants and women of color, are more likely to be arrested or mistreated themselves by the legal system.<sup>40</sup> Therefore, they argue that additional law enforcement involvement in these situations does not always make victims safer. Additionally, critics of criminal justice policies such as mandatory arrest and mandatory prosecution have argued that these policies give police and prosecutors the power to determine victimhood.<sup>41</sup> Other laws surrounding domestic violence situations can unfairly target women. For example, “failure to protect” laws that punish survivors of domestic violence for failing to protect their children from being exposed to domestic violence or failing to stop their abuser from also abusing the victim’s children disproportionately punish mothers.<sup>42</sup> Critics of such laws discuss how they are administered in a gender-biased manner, although some critics see the issue with these laws as broader, because the laws themselves “rest on deeply entrenched gendered ideologies of motherhood.”<sup>43</sup> More broadly, critics argue that these laws function as a criminalizing ideology, based on the notion that individuals can and should be punished for the actions of another.<sup>44</sup>

Such debates can also arise in the field of tort law. Those who oppose carceral feminism would also recognize the potential impact of a decision such as *Tarasoff* on individuals with mental health issues. A criticism of

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<sup>39</sup> *Id.*

<sup>40</sup> Krishna de la Cruz, *Exploring the Conflicts Within Carceral Feminism: A Call to Revocalize the Women Who Continue to Suffer*, ST. MARY’S L. REV. & SOC. JUST. 79, 98 (2017).

<sup>41</sup> Deborah M. Weissman, *The Politicization of Domestic Violence*, in THE POLITICIZATION OF SAFETY: CRITICAL PERSPECTIVES ON DOMESTIC VIOLENCE RESPONSES, 38, 46 (Jane K. Stoever ed., 2019).

<sup>42</sup> Alisa Bierria & Colby Lenz, *Battering Court Syndrome: A Structural Critique of “Failure to Protect,”* in THE POLITICIZATION OF SAFETY: CRITICAL PERSPECTIVES ON DOMESTIC VIOLENCE RESPONSES, 91, 91 (Jane K. Stoever ed., 2019).

<sup>43</sup> *Id.* at 94–95.

<sup>44</sup> *Id.* at 97.

the duty to protect third parties could also raise issues similar to domestic violence policing, such as a greater impact on patients of color, whose statements may more easily be interpreted as having violent intent or as having the potential to endanger others.<sup>45</sup> Additionally, a feminist approach to tort law would not just advocate for higher recoveries in general, but also would focus on the differential impact on women throughout all points of the legal system.

Another contemporary issue relating to duty and violence against women occurred in recent years in Nebraska. In an article that frequently discusses *Tarasoff*, Gretchen S. Obrist wrote in 2004 about the Nebraska Supreme Court case *Bartunek v. State*. In this case, George Andrew Piper broke into the home of DaNell Bartunek, his former girlfriend, and violently attacked her, stabbing her with a butcher knife and attempting to rape her before being confronted by a police officer who responded to Bartunek's 911 call.<sup>46</sup> Piper was on intensive supervision probation ("ISP") at the time of the attack for a January 1997 burglary.<sup>47</sup> For this charge he served sixty days in jail, followed by ISP.<sup>48</sup> After his release from jail, he moved in with Bartunek and her two children from a previous marriage.<sup>49</sup> Piper began violating the terms of his probation almost immediately, including in the form of physical abuse directed at Bartunek's youngest child and later through harassment and threats against Bartunek.<sup>50</sup> Piper's ISP officer, Fred Snowardt, was informed of the child abuse and the harassment, but Snowardt did not report any violations to his supervisors or to

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<sup>45</sup> For example, in considering the implication of *Tarasoff* warnings regarding persons with AIDS, one article notes that recent research suggested that "a patient's sex, race, and sexual orientation may significantly control whether a physician decides to reveal that such person carries the AIDS virus." Michael Perlin, *Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990's*, 16 L. & PSYCHOL. REV. 29, 44 (1992).

<sup>46</sup> Gretchen S. Obrist, *The Nebraska Supreme Court Lets Its Probation Department off the Hook in Bartunek v. State*, 266 Neb. 454, 666 N.W.2d 435 (2003): "No Duty" As a Non-Response to Violence Against Women and Identifiable Victims, 83 NEB. L. REV. 225, 220 (2004).

<sup>47</sup> *Id.* at 230.

<sup>48</sup> *Id.* at 231.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 232–34.

the sentencing court.<sup>51</sup> When Bartunek attempted to go to the police for help, they told her that they could do little to aid her because Piper was the responsibility of Snowardt.<sup>52</sup>

Obrist described how the Court in this case “missed an opportunity to impose a narrowly defined yet workable duty on the state probation service to act with reasonable care while supervising violent felons on intensive supervision probation.”<sup>53</sup> Obrist argued that there was legal support for imposing a duty based on either a special relationship between Bartunek and the State or between the State and Bartunek’s attacker, the basis for which is found in section 315 of the Restatement (Second) of Torts and subsequent case law.<sup>54</sup> She noted that “imposing or withholding a duty is also an expression of public policy.”<sup>55</sup> This case involved more egregious and pervasive behavior than in *Tarasoff*, with more of an opportunity to prevent the attack, and an individual who was in an even better position to prevent the violence than the therapist in the *Tarasoff* case — a parole officer. Despite the expansion that has taken place in some areas, such as with mental health professionals in *Tarasoff*, the imposition of duties is not pervasive enough to allow liability for many situations in which women are harmed. Obrist argues that, although violence against women is pervasive both in Nebraska and the rest of the country, the “legal analysis and ensuing public policy set forth in *Bartunek* deny this reality.”<sup>56</sup> She states that using a legal analysis that incorporates the reality of violence against women is the best way to see the duty that state actors should have and quotes Leslie Bender’s statement that “[i]f something is factually incoherent from women’s experiences and understandings, then it must also be legally incoherent,” concluding that *Bartunek* is an example of a legal system where male-centered perspectives dominate.<sup>57</sup>

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<sup>51</sup> *Id.* at 234–35.

<sup>52</sup> *Id.* at 236–37.

<sup>53</sup> *Id.* at 226.

<sup>54</sup> *Id.* at 227.

<sup>55</sup> *Id.* at 242.

<sup>56</sup> *Id.* at 293.

<sup>57</sup> *Id.*

## BREACH OF PROMISE

Emotional harm and intimate relationship torts coalesced in a past line of cases. In a reverse of the cases around hurt feelings of men in a relationship, cases of the tort of “breach of promise” focused on the emotional harm done to a woman when a man broke off an engagement to marry. In 1639, the case of *Stretch v. Parker* was likely the first case that allowed an action in this circumstance.<sup>58</sup> Although this action was based on a contracts concept of the breach of an agreement, the aspects of damages were largely grounded in tort.<sup>59</sup> Damages were allowed based on mental anguish and injury to feelings, as well as losses of opportunity.<sup>60</sup>

Other provisions in some jurisdictions’ enforcement of this action also show the importance of gender dynamics in these cases involving interpersonal relationships. In an 1870 Wisconsin Supreme Court case, the defendant claimed in his answer that during the period in which the plaintiff stated she had been waiting for him to marry her, she was actually attempting to marry a man named McGill and she also “receive[d] visits from different men with a view to matrimony.”<sup>61</sup> The defendant asked for a jury instruction stating that if they found that the defendant had failed to show that the plaintiff “engaged herself to McGill while engaged to [the defendant], this should not aggravate the damages which they might find for the plaintiff.”<sup>62</sup> The defendant likely sought this instruction because he did not want the jury to increase the damages for what they could interpret as an untrue attack on the character of the plaintiff. The court did not give the instruction requested by the defendant and the Supreme Court of Wisconsin considered this issue. In this case, the Court concluded that the instruction was correct and should have been given.<sup>63</sup> However, the Court also discussed a line of cases which concluded that “where the defendant attempts to justify the breach of promise of marriage by proving that the plaintiff was guilty of lascivious conduct with other men, *of which he knew that she*

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<sup>58</sup> Columbia Law Review Association, Inc., “Contracts” to Marry, 25 COLUM. L. REV., 343, 343 (1925) (citing *Stretch v. Parker*, 1 Rolle Abr. 22 (1639)).

<sup>59</sup> *Id.* at 345.

<sup>60</sup> *Id.*

<sup>61</sup> *Simpson v. Black*, 27 Wis. 206, 207 (Wis. 1870).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

*was not guilty*, this was a circumstance which aggravated the damages.”<sup>64</sup> Although this did not affect the outcome of this case, because there was no reason to believe that the defendant was lying about McGill and the others, this doctrine and the Supreme Court of Wisconsin’s affirmation of it show the way that the law was involved with interpersonal relationships and how this doctrine inherently contains a gendered aspect. Language in other opinions demonstrates the female plaintiff’s portrayal of herself as innocent and of the male defendant as cruel. A Kentucky case in 1872 describes the plaintiff’s petition and states that “at the time of making [the marriage] contract she was chaste and virtuous, but the defendant, not regarding his promise, and wrongfully, wickedly and fraudulently intending at the time by craft and artifice to deceive and injure her, and blight her reputation, did not, nor would not at the time aforesaid, nor since, consummate said agreement.”<sup>65</sup>

Breach of promise was actionable only when the promise was mutual; the consideration of the one promise was the other promise.<sup>66</sup> Therefore, the plaintiff had to prove mutual promises. A Kentucky court held that, on the female plaintiff’s side, “her carrying herself as one consenting and approving was sufficient evidence of her having mutually promised, and that no other evidence is usually given.”<sup>67</sup> In a discussion of proof, a New Hampshire court in 1850 noted that “young marriageable ladies, at least prudent ones, do not allow themselves to be engaged in correspondence with unmarried men, unless they suppose a marriage contract exists between them.”<sup>68</sup> As such, the court held that correspondence between the parties was “competent to be submitted to a jury.”<sup>69</sup> This discussion again illuminates the gendered expectations of interpersonal relationships at the time. The evidence considered in these cases and the language used by the courts in their decisions conform closely to gender roles of the times and expectations of respectability, especially for women.

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<sup>64</sup> *Id.* at 208.

<sup>65</sup> *Squires v. Hancock*, 5 Ky.Op. 767, 769 (Ky. Ct. App. 1872).

<sup>66</sup> *Hoitt v. Moulton*, 21 N.H. 586, 593 (Super. Ct. of Judicature of N.H. 1850).

<sup>67</sup> *Id.* at 593–94.

<sup>68</sup> *Id.* at 595.

<sup>69</sup> *Id.*

## SIGNIFICANT TORT LAW DEVELOPMENTS IN CALIFORNIA PRIOR TO 1976

Several early-twentieth-century cases in California demonstrate the initial limitations on recovery for torts that disproportionately affect women and how the possibilities for recovery expanded over the years. Many of these cases focused on emotional harm suffered by women. Gendered thinking influenced decisions in this area, but gender issues in the cases were not examined by the courts and are rarely discussed by present legal scholarship, as Martha Chamallas and Linda Kerber argue.<sup>70</sup> Because injuries of this sort are socially constructed, and courts or the legislature must make a determination of when these emotional injuries are actionable, the gender of the plaintiff can affect the way the legal system conceptualizes harm.<sup>71</sup> The English case *Lynch v. Knight* in 1861 held that an emotional injury alone is not an actionable legal harm. Some opinions in the case itself demonstrate ideas of gender inherent in English society at the time and, therefore, in the legal decision-making process. Lord Campbell's opinion drew a distinction between the tortious consequences of adultery for men and for women. He stated that "by the adultery of the husband, the wife does not necessarily lose the consortium of her husband," so the betrayed wife could not sue her husband's lover for loss of consortium, "whereas condonation of conjugal infidelity is not permitted to the husband, and, by reason of the injury of the seducer, the consortium with the wife is necessarily for ever lost to the husband."<sup>72</sup> Chamallas and Kerber describe this analysis as demonstrating that the harm to the woman in loss of consortium is conceived of as inside her own mind and subjective, while the same harm to the man is viewed as objective.<sup>73</sup> An understanding of gendered legal thinking can also illuminate the decision-making in tort cases in California.

Many tort cases for emotional harm in California arose from a mother's fear for herself or her children. In 1918, the California Supreme Court decided *Lindley v. Knowlton*. In this case, O. P. Lindley and his wife Lillian sued for damages relating to personal injuries "alleged to have been

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<sup>70</sup> Martha Chamallas & Linda Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 815 (1990).

<sup>71</sup> See *id.* at 816.

<sup>72</sup> *Id.* at 818 (citing 11 Eng. Rep. 854 (1861)).

<sup>73</sup> *Id.* at 818–19.

sustained by Mrs. Lindley because of fright occasioned by the appearance and acts of a chimpanzee owned by Knowlton.”<sup>74</sup> Mrs. Lindley did get a financial recovery in this case, but this recovery was based on the fact that she must have feared for herself. The court understood that if Mrs. Lindley only feared for the lives of her children, no recovery would be justified.<sup>75</sup>

Other plaintiffs were not able to receive favorable legal results as Mrs. Lindley did, because they did not fear that they were in danger themselves or because their emotional harm did not happen at the time of the injury. A later case that clarified limits on recovery for emotional harm in California arose in 1932 and involved a male plaintiff. George Kallag had been driving when he attempted to make a left-hand turn and collided with the defendant’s car.<sup>76</sup> Kallag’s claim included a bruised shoulder and some nervous shock while his wife, Dorothy Kallag, had a slight scar above the right eyebrow along with some bruising around the hip and both children had been cut on the face by broken glass.<sup>77</sup> The trial court had issued a jury instruction that Kalleg was “not entitled to recover because of grief, sorrow, or resentment . . . on account of any injury sustained by his wife or children . . . or because of . . . any scars, blemishes or disfigurement on the faces of the wife or children.”<sup>78</sup> Kalleg argued that this instruction limited the jury in considering the element of “nervous shock” and cited *Lindley* along with *Easton v. United Trade School Contracting Company*. *Easton* was decided in 1916 and, among other things, held that a woman involved in a collision between a buggy and an automobile was entitled for recovery based on her fright because it was due not only to concern for her child, but also fright for herself as she suffered physical injuries from the collision.<sup>79</sup> The *Kalleg* court drew a distinction between the case at hand and *Lindley* and *Easton*, each of which involved a parent’s fear for herself and for her child at the time of an accident, while the situation in *Kalleg* involved “the

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<sup>74</sup> *Lindley v. Knowlton*, 179 Cal. 298, 299 (Cal. 1918).

<sup>75</sup> See *id.* at 302. This would later be confirmed in *Amaya v. Home, Ice, Fuel & Supply Co.*

<sup>76</sup> *Kalleg v. Fassio*, 13 P.2d 763, 764. (Cal. Dist. Ct. App. 1932).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Easton v. United Trade Sch. Contracting Co.*, 159 P. 597, 202 (Cal. 1916) (“Fright here was but a natural and direct consequent of the defendant’s injurious trespass, which trespass resulted in direct physical injury to Mrs. Easton.”).

element of grief and sorrow after the collision and . . . subsequent distress by the contemplation of scars or disfigurements on the faces of the other members of the family.”<sup>80</sup>

Many of the cases where plaintiffs failed to get a recovery for emotional harm involved female plaintiffs. Another car accident case, *Clough v. Steen*, arose in 1934. The plaintiff was in a car accident in which she was injured and her son was killed.<sup>81</sup> The court held that the trial court should not have included in the judgment damages for the “grief and shock and consequent damage suffered by the plaintiff when she learned of the death of her child.”<sup>82</sup> Instead, she was only entitled to recovery for her own mental and physical injuries proximately caused by the accident.<sup>83</sup> The court drew a distinction between this case and *Lindley*, deciding that this case was more similar to *Kalleg*.<sup>84</sup> Cases such as this demonstrate the limitation that courts drew on mental suffering that occurred after the time of the accident or injury.

Another similar emotional harm case from 1963, *Amaya v. Home, Ice, Fuel & Supply Co.*, would later be overruled by *Dillon v. Legg* in 1968.<sup>85</sup> In *Amaya*, a mother pursued legal action due to her fright, nervous shock, and bodily injury when she was “compelled to stand helpless and watch her infant son be struck and run over by the defendants’ truck.”<sup>86</sup> She stated that she became “violently ill and nauseous and was hurt and injured in her health, strength and activity, sustaining injury to her body and shock and injury to her nervous system and person.”<sup>87</sup> When the court offered her attorneys an opportunity to state that the fear she suffered was fear for her own safety, they stated that the plaintiff’s fright and shock were rather the “result of being compelled to watch her infant child crushed beneath the wheels of an ice truck” and it was the result of her fear for the safety of her child, rather than fear for her own safety.<sup>88</sup> The court held that she

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<sup>80</sup> *Kalleg*, 13 P.2d at 764.

<sup>81</sup> *Clough v. Steen*, 39 P.2d 889, 889 (Cal. Dist. Ct. App. 1934).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 889–90.

<sup>84</sup> *Id.* at 890.

<sup>85</sup> *Dillon v. Legg*, 441 P.2d 912, 914 (Cal. 1968).

<sup>86</sup> *Amaya v. Home, Ice, Fuel & Supply Co.*, 379 P.2d 513, 514 (Cal. 1963).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*



could not recover based on her own fright.<sup>89</sup> The dissent conceded that a defendant who negligently injures someone should not be liable to any other person who is shocked by the accident, but notes that “the plaintiff is not just anyone” but rather is the mother of a 17-month-old child.<sup>90</sup> Although the dissent acknowledged the prior case authority that denies liability in situations such as this case, the dissenter noted that this is “partly due to the sheer inertia caused by the doctrine of stare decisis, and the apparent reluctance of appellate courts to disturb the status quo.”<sup>91</sup> The dissenting justice stated that “old cases, no matter how numerous, should not stand, if, under modern and different conditions, they cannot withstand the impact of critical analysis.”<sup>92</sup> This statement foreshadowed further broadening of tort law, both in *Dillon*, with its departure from the former line of cases that *Amaya* was part of, and in *Tarasoff*, which emphasized the differing circumstances of modern society. Cases such as *Amaya* emphasize the feminist critique that tort law has traditionally failed to value the “emotional interests inherent in the parent-child relationship,” a relationship which, particularly in the mid-twentieth century, would likely have the mother as the primary caretaking parent.<sup>93</sup>

Not all cases of emotional harm were devoid of physical injuries. One such case of physical injury resulting from emotional harm took place in 1957. The plaintiff suffered both “severe emotional strain, mental shock and fright” as well as a miscarriage which were the “direct and proximate result” of seeing a car crash that her husband was involved in.<sup>94</sup> At the time of the accident, she was approximately 130 feet away from the point of impact.<sup>95</sup> Because she was far enough away that she was not in fear for her own safety, but solely for the safety of her husband, the court held that she was not entitled to recovery for her mental and physical injuries.<sup>96</sup> As Lucinda Finley argues, even when a woman suffers physical injury, such

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<sup>89</sup> *Id.* at 525.

<sup>90</sup> *Id.* at 526 (Peters, J., dissenting).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See Lucina M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 50 (1989).

<sup>94</sup> *Reed v. Moore*, 319 P.2d 80, 81 (Cal. Dist. Ct. App. 1957).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 82.

complaints have “often been dismissed as emotional or hysterical complaints” and are less likely to be treated seriously than the physical harm that men may experience.<sup>97</sup> Therefore, even physical injuries claimed by women in a tort suit would be less likely to receive compensation.

In addition to their familial roles, women and girls are disproportionately in caretaker roles for non-family members, such as babysitting. Cases resulting from harm in these non-familial caretaker roles demonstrate issues involving warning, an aspect also prominently present in *Tarasoff*. In *Ellis v. D’Angelo* in 1953, the plaintiff brought not only a count of battery by a four-year-old defendant, but also a count seeking to recover from the parents of the child accused of battery for their negligence in “failing to warn or inform plaintiff of the habit of the child violently attacking other people.”<sup>98</sup> Another case of harm in a caretaker role took place in *Johnson v. State* in 1968. In this case, a female foster parent brought an action against the state based on assault by a sixteen-year-old boy placed in her home.<sup>99</sup> The court held that the state was not immune from liability in this situation and remanded the case to the trial court.<sup>100</sup>

The California Supreme Court expanded other general tort doctrines during the mid-twentieth century. In *Rowland v. Christian*, decided in 1968, the Court abolished the old distinctions between different types of persons entering land. Instead, the court imposed a general duty of care regarding negligence.<sup>101</sup> Similarly, in 1975, the court rejected the strict doctrine of contributory negligence and instead embraced the doctrine of comparative negligence.<sup>102</sup>

One of the best-known cases that expanded tort liability was *Dillon v. Legg*, which was decided in 1968. Similar to some prior cases, this case involved a mother who witnessed a truck run over her child, who subsequently died.<sup>103</sup> This case represents a turning point in the expansion of recovery for emotional damage. An analysis of this opinion reveals a more

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<sup>97</sup> Finley, *supra* note 82, at 65.

<sup>98</sup> *Ellis v. D’Angelo*, 253 P.2d 675, 675 (Cal. Dist. Ct. App. 1953).

<sup>99</sup> *Johnson v. State*, 447 P.2d 352, 354 (Cal. 1968).

<sup>100</sup> *Id.* at 363.

<sup>101</sup> *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968).

<sup>102</sup> *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1243 (Cal. 1975).

<sup>103</sup> *Dillon*, 441 P.2d at 914.

liberal view of the potential of expanding liability. The Court discussed the history of the concept of duty and quoted Prosser's statement in *Law of Torts* that 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."<sup>104</sup> The *Dillon* Court also acknowledged the way that the law of torts had evolved, noting that "the successive abandonment of these positions exposes the weakness of artificial abstractions which bar recovery contrary to general rules."<sup>105</sup> The Court also stated that "legal history shows that artificial islands of exceptions, created from the fear that the legal process will not work, usually do not withstand the waves of reality and, in time, descend into oblivion."<sup>106</sup> This demonstrates a contrast from prior cases that stuck firmly to rules limiting recovery in these emotional damage cases. The dissent points out that all of the arguments in the *Dillon* opinion had recently been considered by the California Supreme Court and rejected only five years previously in *Amaya*.<sup>107</sup> However, this time the Court was ready to bring about change in these types of recoveries.

*Tarasoff* was initially decided in 1974. The Supreme Court of California vacated and remanded the case, issuing a new opinion with a slightly different holding in 1976. A case involving intimate partner violence also arose in the year between the two *Tarasoff* decisions. On September 4, 1972, Ruth Bunnell called the San Jose Police Department to report that her estranged husband, Mack Bunnell, had called her to say that he was coming to her house to kill her.<sup>108</sup> Less than an hour later, Mack Bunnell carried out his threat.<sup>109</sup> The San Jose police had made at least twenty responses to Mrs. Bunnell's home during the year before her death, due to complaints about Mr. Bunnell's violent acts committed on her and her two daughters.<sup>110</sup> The administrator of Mrs. Bunnell's estate brought a wrongful death action against the city, but it was not successful. He argued that

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<sup>104</sup> *Id.* at 916.

<sup>105</sup> *Id.* at 925.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* (Burke, J., dissenting).

<sup>108</sup> *Hartzler v. City of San Jose*, 46 Cal.App.3d 6, 8 (Cal. Ct. App. 1975).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

the police department was liable for its omission due to its special relationship with Mrs. Bunnell, “based on the fact that the department was aware of Mack Bunnell’s violent tendencies, since decedent had called police 20 times prior to the night of her death, complaining of threats of violence made by Bunnell, and since the department had on one occasion arrested him for assaulting her.”<sup>111</sup> Similar to *Johnson v. State*, the court found no liability on behalf of the state actors to prevent this foreseeable injury. The court stated that the allegation of twenty police responses did not show that the police department had assumed a duty toward Mrs. Bunnell that was greater than the duty owed to another member of the public.

### THE *TARASOFF* DECISION

Prosenjit Poddar was born in India as a member of the “untouchable” caste and came to UC Berkeley as a graduate student in September 1967.<sup>112</sup> He met Tatiana Tarasoff at a folk dancing class in the fall of 1968; the two became friends and saw each other weekly.<sup>113</sup> On New Year’s Eve, they shared a kiss which Poddar interpreted to be a recognition of a serious relationship.<sup>114</sup> However, Tatiana told him that she was not interested in such a relationship with him.<sup>115</sup> Poddar subsequently suffered an emotional crisis.<sup>116</sup> He continued talking with Tatiana and tape-recorded many of their conversations to listen to later and attempt to figure out why she did not return his love for her.<sup>117</sup>

In the summer of 1969, Tatiana went to South America.<sup>118</sup> At the urging of his friend, Poddar sought psychological assistance that summer, which he stopped in October 1969.<sup>119</sup> His psychologist wrote to campus police saying Poddar was suffering from paranoid schizophrenia and gave his recommendation that Poddar should be civilly committed.<sup>120</sup>

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<sup>111</sup> *Id.* at 10.

<sup>112</sup> *People v. Poddar*, 518 P.2d 342, 344 (Cal. 1974).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 344–45.

<sup>120</sup> *Id.* at 345.

On October 27, 1969, Poddar went to Tatiana's house.<sup>121</sup> First, she was not home and her mother told him to leave, but he returned later when Tatiana was alone.<sup>122</sup> She refused to speak with him and Poddar shot her with a pellet gun.<sup>123</sup> After she ran away, he fatally stabbed her.<sup>124</sup> Poddar was convicted of second-degree murder, which was later overturned on the grounds that the jury was inadequately instructed.<sup>125</sup> He was released on the condition that he would return to India, which he did.<sup>126</sup>

Tatiana's parents, Vitaly and Lydia Tarasoff, filed a civil suit against the university. The first opinion was issued on July 6, 1973. On appeal, the California Supreme Court issued the decision known as *Tarasoff I* on December 23, 1974. The opinion provides very little detail as to the background that started the situation, merely stating, "On October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff."<sup>127</sup> Although the defendants argued that they owed no duty of care to Tatiana, the court cited *Dillon* to restate that "legal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done."<sup>128</sup> In this sense, the *Tarasoff* decision represents a similar expansion as seen in the *Dillon* decision. Additionally, the Court recognized particular elements of the era in which they were writing that weighed toward imposing additional duties in situations such as this. The decision noted that the "current crowded and computerized society compels the interdependence of its members."<sup>129</sup> The Court continued on to state that in this "risk-infested society" they could not tolerate the potential danger that would come from a therapist concealing knowledge of the potential danger his patient could inflict.<sup>130</sup> The Court held that, "if in the exercise of reasonable care the therapist can warn the endangered party or

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Tamonud Modak et al., *The Story of Prosenjit Poddar*, 21 J. OF MENTAL HEALTH AND HUM. BEHAV. 138, 138 (2016).

<sup>126</sup> *Id.*

<sup>127</sup> *Tarasoff v. Regents of Univ. of Cal.*, 529 P.2d 553, 554 (Cal. 1974).

<sup>128</sup> *Id.* at 557.

<sup>129</sup> *Id.* at 561.

<sup>130</sup> *Id.*

those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment.”<sup>131</sup>

In 1975, multiple social work and psychiatric organizations, including the American Psychiatric Association, California State Psychological Association, and California Society for Clinical Social Work, jointly signed onto an amicus brief in support of a petition for rehearing the *Tarasoff* case. This brief argued that the duty to warn enunciated by the Court established an unworkable standard.<sup>132</sup> This was partially due to the lack of clarity in the standard. The brief argued that the issues of whom and how to warn “defy description in terms which may be implemented in the day-to-day practice of psychotherapy.”<sup>133</sup> Additionally, they argued that psychotherapists cannot predict violence, that the duty to warn is not consistent with the nature of psychotherapeutic communication, and that the “reasonable” therapist standard is not realistic.<sup>134</sup> The brief further stated that the California Supreme Court did not properly weigh the balance between the need of psychotherapy and the need for public safety; it argued instead that the Court overestimated the value to society of the warnings that were prescribed and underestimated both the value of psychotherapy as a way of preventing violence and the seriousness of the breaches of patient rights that would result from the duty to warn.<sup>135</sup> The brief also argued that warning victims would not protect them because the victims could do little to prevent the violence; therefore, such a warning may lead to anxiety over an extended period of time.<sup>136</sup> The duty would also infringe on the patient’s right to confidentiality, and the amicus brief argued that the statutory commitment procedure is the proper method for protecting society against violent patients.<sup>137</sup>

The case was re-heard, and the decision known as *Tarasoff II* was issued on July 1, 1976. The California Supreme Court likely took into account the reactions from the mental health community when they altered their holding from their previous “duty to warn” standard. *Tarasoff II* confirmed

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<sup>131</sup> *Id.*

<sup>132</sup> Brief for American Psychiatric Ass’n et al. as Amici Curiae Supporting Petitioner at 4, *Tarasoff v. Regents of Univ. of Cal.*, S.F. No. 23042.

<sup>133</sup> *Id.* at 11.

<sup>134</sup> *Id.* at 16.

<sup>135</sup> *Id.* at 20.

<sup>136</sup> *Id.* at 22–23.

<sup>137</sup> *Id.* at 31–42.

that when a therapist determines or reasonably should determine (pursuant to the standards of the profession) that a patient presents a serious danger of violence to another person, the therapist has an obligation to use “reasonable care to protect the intended victim against such danger.”<sup>138</sup> The *Tarasoff II* Court held that the duty could be fulfilled by various steps, depending on the nature of the case, which may include warning the intended victim or others who are likely to tell the victim of the danger, notifying the police, or taking whatever other steps are “reasonably necessary under the circumstances.”<sup>139</sup>

## AFTER TARASOFF

*Tarasoff* represents a difficult case in which a multitude of interests must be weighed by a court. Mary McNeill notes that the *Tarasoff* case imposed a duty on therapists “to respond to the hidden violence that we all learned to ignore” and sees it as a possible foreshadowing that we all have a duty to respond to potential violence in our midst.<sup>140</sup> At the same time, some feminist scholars, including McNeill, have critiqued the decision for failing to place the issue of violence against women in the forefront. McNeill deemed domestic violence to be “the skeleton in *Tarasoff*’s closet” and states that although “virtually every case that the California Supreme Court relied on in deciding *Tarasoff* involved domestic violence, and nearly every case where psychotherapists have been found liable for failing to protect readily identifiable victims based upon *Tarasoff*’s rationale have involved domestic violence, those facts are consistently unmentioned by commentators.”<sup>141</sup> The *Tarasoff* decision is one of the cases being rewritten in the tort opinions volume of the U.S. Feminist Judgments Project, which seeks to expose how courts, when confronted with issues of gendered harm to women, have “often distorted or misapplied conventional legal doctrine to diminish the harm or deny recovery.”<sup>142</sup>

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<sup>138</sup> *Tarasoff*, 551 P.2d at 340.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 216.

<sup>141</sup> McNeill, *supra* note 6, at 199.

<sup>142</sup> Martha Chamallas & Lucinda M. Finley eds., *FEMINIST JUDGMENTS: REWRITTEN TORT OPINIONS* (2020); *Torts Opinions Rewritten — Authors & Cases*, U.S. FEMINIST

After the *Tarasoff* decisions, legal scholars and those in the mental health community reacted in a largely critical manner. For example, in one law review article authored in 1976, Professor of Law and Psychiatry at Harvard University Alan Stone criticized the decision.<sup>143</sup> Stone stated that that holding of *Tarasoff* would have “adverse consequences for the treatment of potentially dangerous patients” because it would deter those who provide psychotherapy to mentally ill individuals who are thought to be dangerous. Additionally, he stated that the effectiveness of such treatment would be limited by restricting the assurance of confidentiality available when such treatment is given. He stated that there was no “evidence in either [*Tarasoff* decision] of any recognition of the policy of protecting the rights of patients” and that the Court in *Tarasoff II* focused almost wholly on the issue of public safety.<sup>144</sup> The *Tarasoff* decision also raised issues about which other professions could have a duty to protect third parties. For example, one student article from about a decade after *Tarasoff* analyzed the possibility of applying such a duty to clergy.<sup>145</sup> The extension of such a duty to groups like clergy would likely raise similar concerns about confidentiality and rights of the individuals disclosing such information.

Several years after *Tarasoff*, many of the concerns about the impact on the mental health profession appeared to be less damaging than anticipated. According to a 1984 study, between 75 and 80 percent of a sample of 3,000 mental health professionals stated that *Tarasoff*'s requirement of exercising reasonable care to protect foreseeable victims applied as a matter of personal ethics, regardless of what the law proscribed.<sup>146</sup> Additionally, the same study found that the majority of psychiatrists were more likely to continue treating a dangerous patient when they believed that they were legally bound by *Tarasoff*.<sup>147</sup> This refuted Alan Stone's prediction that imposing liability on these psychiatrists would make them more reluctant to take

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JUDGMENTS PROJECT, <https://law.unlv.edu/us-feminist-judgments/series-projects/torts-opinions-rewritten/authors-cases>.

<sup>143</sup> Alan A. Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV., 358–78 (1976).

<sup>144</sup> *Id.* at 363.

<sup>145</sup> See Terry Wuester Milne, *Bless Me Father, for I Am about to Sin . . . : Should Clergy Counselors Have a Duty to Protect Third Parties?*, 22 TULSA L. REV., 139–65 (1986).

<sup>146</sup> McNeill, *supra* note 6, at 207.

<sup>147</sup> *Id.*



on potentially dangerous clients or to continue treating those patients once they were identified as dangerous. Another concern expressed by critics of *Tarasoff* was that the therapeutic community would be unable to predict violence, but over 75 percent in another study stated that they felt they could make a prediction in this area ranging from “probable” to “certain;” only 5 percent felt that it was impossible to predict violence.<sup>148</sup>

The trajectory of tort opinions in California would change in the 1980s. Shortly after *Tarasoff*, the California Supreme Court experienced a rightward shift. Voters removed liberal Chief Justice Rose Bird who served as the chief justice from 1977 to 1987 and two of fellow liberals (Cruz Reynoso and Joseph Grodin) from the Supreme Court in the 1986 general election, mainly due to their opposition to capital punishment.<sup>149</sup> They were the first justices to be removed from the court since 1934, when the California Constitution had been amended to require appointed appellate judges to be periodically reconfirmed by voters.<sup>150</sup> A newspaper article from the time describes the supporters of Bird, Reynoso, and Grodin as denouncing what they deemed “a right-wing effort to ‘politicize’ the court” while the opponents of the justices stated they were only “applying the state constitutional requirement that justices be held accountable to voters.”<sup>151</sup> At the time, legal experts predicted that the more conservative court would “affirm more death sentences, limit the rights of criminal defendants, and be less sympathetic to plaintiffs in civil cases than was the so-called ‘Bird court.’”<sup>152</sup> Nine months after the new Court was seated, *The New York Times* reported that, although the new court was clearly more conservative, “its decisions and actions so far have been deliberate, pragmatic, cautious, and marked by no fervid ideological agenda,” and they reported that the Court’s “most forceful actions have related to the

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<sup>148</sup> *Id.*

<sup>149</sup> Robert Lindsey, “The Elections: The Story in Some Key States; Deukmejian and Cranston Win as 3 Judges are Ousted,” *The N.Y. Times*. Nov. 6, 1986. <https://nyti.ms/2yzziZU>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Scott Armstrong, “California Supreme Court is about to take a turn to the right,” *The Christian Science Monitor*, Boston, Mass. Feb 23, 1987.

death penalty.”<sup>153</sup> Nicholas Georgakopoulos studied the votes of justices around death penalty issues.<sup>154</sup> He notes that the pre-election sample from 1984 and 1985 shows a Court that is reluctant to impose the death penalty, while the opinions after the elections present a very different image.<sup>155</sup>

While the rightward shift of the California Supreme Court may not have been as strong as initially anticipated, the shift did exist, and it impacted areas of law outside the realm of the death penalty. After the new Court took over, a subsequent retraction of certain tort law doctrines that had been expanded in the mid-twentieth century took place. David Eagleson was appointed to the Supreme Court in March 1987 and his role on the court was significant in this rightward shift. In *Thing v. La Chusa*, the Court rejected their development in *Dillon* and established necessary factors for a claim of emotional distress caused by observing a negligently inflicted injury: the plaintiff must be closely related to the victim, the plaintiff must be present at the scene of the injury-producing event at the time it occurs and at the time be aware that the event is causing injury to the victim, and as a result the plaintiff must experience severe emotional distress beyond that which would be anticipated in a disinterested witness.<sup>156</sup> Eagleson authored this opinion and his daughter, Elizabeth Eagleson, later stated that this opinion was most representative of his life philosophy.<sup>157</sup> She discussed Eagleson’s explanation that “emotional distress is a condition of living that simply has to be borne” and compared it to the similar words he had spoken to her as a child, describing his watchword as “no sniveling.”<sup>158</sup> This demonstrates an outlook which leads to the diminishing of emotional injuries and a consideration of a stereotypically male “reasonable person” that feminist tort scholars had previously criticized.

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<sup>153</sup> Robert Reinhold, “No Tilt as Yet From New California High Court,” *The N.Y. Times*, Jan 1, 1988. <https://nyti.ms/2RUrnNF>.

<sup>154</sup> See generally, Nicholas L. Georgakopoulos, *Judicial Reaction to Change: The California Supreme Court Around the 1986 Elections*, 13:405 *CORNELL J.L. & PUB. POL’Y*, 405–30 (2003).

<sup>155</sup> *Id.* at 413, 414.

<sup>156</sup> *Thing v. La Chusa*, 771 P.2d 814, 829–30 (Cal. 1989).

<sup>157</sup> David N. Eagleson, *CAL. SUP. CT. HIST. SOC’Y*, <https://www.cschs.org/history/california-supreme-court-justices/david-n-eagleson> (last visited June 26, 2021).

<sup>158</sup> *Id.*

## CONCLUSION

Tort law, as with other areas of law, has inherently gendered angles that are often ignored. In recent years, more scholarship has emerged that understands the issues of gender that have historically influenced how women relate to the tort system, as with the legal system more broadly. Certain torts have disproportionately affected women, namely those relating to emotional harm and intimate partner relationships. From the past torts of breach of promise to current issues with revenge porn and deepfakes, torts that disproportionately affect women and those that relate to intimate relationships ought to be evaluated from a gender-based perspective.

Additionally, legal changes in these realms have been shaped by social movements and political change. Movements such as the battered women's movement in the mid- to late-twentieth century demonstrate how feminists and women's rights activists organized to change consciousness around a social problem — domestic violence — from something that was an individualized and private issue to something that was a societal problem which needed to be addressed through policy changes. The battered women's movement and changes in the law, particularly in criminal law, also expose debates and differing tactics in feminist activists and thinkers, particularly a divide between those who advocate for greater involvement of law enforcement and those who see this as an expansion of the carceral state that ultimately harms both women and men.

Examining the development of tort law in California demonstrates the expansion of recovery in torts that are disproportionately committed against women, such as a broadening of when plaintiffs could recover from emotional damages resulting from witnessing the negligent injury or death of a family member. *Tarasoff* was one of the cases at the culmination of this era, with its new duties imposed on mental health professionals. Although *Tarasoff* involved an issue of a “rejection killing” and clearly involved gender-based elements, the Court did not frame the case in this way. The reaction to *Tarasoff* was largely critical on the part of mental health professionals, arguing that the decision imposed too high a burden on psychiatrists, would lead to violations of patient confidentiality, and would not adequately protect potential victims or society as a whole. In the 1980s, there was a retraction from the prior tort law expansions, partially owing to the rightward shift on the California Supreme Court at the time.

These changes included a limitation on emotional harm recovery that had previously been established in *Dillon v. Legg*.

As a whole, examining the history of torts that disproportionately affect women and emotional harm cases leading up to *Tarasoff* demonstrates the importance of a gender-based analysis for understanding angles of tort law that are frequently ignored. Looking at the changes in law, the rationales articulated for these changes, and the social movements advocating for change, show the complex social and political elements that influence legal thought and legal change.

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