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Ewing v. Goldstein and the Therapist's Duty to Warn in California

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NOTE

EWING v. GOLDSTEIN AND THE THERAPIST'S DUTY TO WARN IN CALIFORNIA

INTRODUCTION

In June 2001, Geno Colello, who was severely depressed, shot and killed Keith Ewing and then turned the gun on himself.[1] This tragic murder-suicide resulted in litigation against the mental-health professionals who treated Colello in his last days, alleging that they had failed to protect the victim from the patient.[2] After hearing the facts in *Ewing v. Goldstein*, the California Court of Appeal for the Second District reversed the trial court's grant of summary judgment to the defendant psychotherapist.[3] In this case, the plaintiffs (Ewing's parents) alleged that Colello's father had informed the defendant therapist of a threat made against the victim by his son, and that this should have triggered the therapist's duty to warn of impending harm.[4] Ultimately, the appellate court agreed with the plaintiffs and held that "[a] communication from a patient's family member to the patient's therapist" that relays a threat of violence against an identifiable victim imposes a duty to warn upon the therapist.[5] This decision expanded the

[1] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 867 (Ct. App. 2004).

[2] Two suits were filed, one against Colello's private practice therapist and one against the hospital where he was eventually admitted. *See* Ewing v. Goldstein, 15 Cal. Rptr. 3d 864 (Ct. App. 2004) and Ewing v. Northridge Hosp. Med. Ctr., 16 Cal. Rptr. 3d 591 (Ct. App. 2004).

[3] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 875-76 (Ct. App. 2004).

[4] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 867 (Ct. App. 2004). It should be noted that the defendant denies ever having received such a communication from Colello's father, Defendant's Petition for Review, or Alternatively, Depublication at 5-6, Ewing v. Goldstein, 15 Cal. Rptr. 3d 864 (Ct. App. 2004) (No. S127363 Civ. B163112).

[5] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 868 (Ct. App. 2004).

criteria that trigger the duty to warn under California Civil Code Section 43.92 and in its wake has left confusion in the mental-health community about when and how the duty arises.[6] As a consequence of this decision, California therapists are now burdened by an expanded threat of civil liability on two fronts: (1) if the therapist fails to issue a warning triggered by a family member's communication, he or she may have breached a court-created duty; and (2) if the therapist does issue a warning, he or she may be sued for breach of confidentiality.[7]

The *Ewing* court erroneously expanded the types of events that can trigger a therapist's duty to warn, making it more difficult for mental-health professionals to determine when this duty is invoked. The necessity and value of confidentiality in the context of the patient-therapist relationship demands that mental heath professionals have clear guidelines regarding any duty they have to breach this confidentiality. Part I of this Note reviews California law concerning the treatment of potentially dangerous patients, including both the duty to warn and the civil commitment process.[8] Part II examines the impact of the *Ewing* decision on the therapist's duty to warn.[9] Part III proposes the Lanterman-Petris-Short Act ("LPS Act") as a suitable framework for dealing with potentially dangerous patients that, if used correctly, obviates the need to expand the triggering criteria for the duty to warn and circumvents the negative ramifications of the *Ewing* decision.[10] The Note concludes that this framework provides a superior compromise, better protecting both patient confidentiality and potential victims.[11]

I. THE TREATMENT OF DANGEROUS PATIENTS

California law provides for two parallel approaches that mental-health professionals and law enforcement can, and in some cases must, take when a patient being treated for mental illness becomes a threat to

[6] Letter from Dr. A. Steven Frankel, Ph.D., J.D., Legal Counsel of the California Association of Psychology Providers, to The Hon. Ronald M. George, Chief Justice – Associate Justices of the California Supreme Court (Sept. 23, 2004) (on file with the author); "Prior to the Second District's decision it was clear to psychologists that the duty to warn arose only when a patient made a serious threat of physical violence. That certainty is now lost." *Id.*

[7] *Psychotherapists: Duty to Warn: Hearing on A.B. 733 Before the Assembly Committee on the Judiciary*, 2005-06 Regular Sess. (Cal. 2005) (statement of Assemblyman Joseph Nations, member, Assembly Committee on the Judiciary).

[8] *See infra* notes 12-75 and accompanying text.

[9] *See infra* notes 76-154 and accompanying text.

[10] *See infra* notes 155-182 and accompanying text.

[11] *See infra* Part IV.

self or to others.[12] These two approaches, which came into being at about the same time thirty years ago, are the therapist's duty to warn, commonly called a *Tarasoff* warning, and the civil commitment process.[13]

A. THE THERAPIST'S DUTY TO WARN

Tarasoff v. The Regents of the University of California established the therapist's duty to warn.[14] The facts in *Tarasoff* were tragic.[15] Tatiana Tarasoff and Prosenjit Poddar were both students at the University of California at Berkeley ("the University") in the late 1960's.[16] They met while attending folk dancing classes at the International House and saw each other weekly during the fall of 1968.[17] On New Year's Eve, Tarasoff and Poddar kissed, and Poddar misunderstood this as a sign of a serious relationship.[18] Tarasoff quickly made it clear that she was not romantically interested in Poddar.[19] At about this time, he began to manifest serious emotional and psychological problems.[20]

The following summer, Tarasoff went abroad and Poddar was encouraged by friends to seek psychological treatment.[21] He began seeing Dr. Lawrence Moore, a clinical psychologist at the University's student health center.[22] In late August, Dr. Moore notified the campus police that he believed that Poddar might be a danger to himself or others.[23] This warning was based on Poddar's communication in therapy that he intended to kill a girl, readily identifiable as Tatiana Tarasoff, when she returned from Brazil.[24] The campus police arrested Poddar

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[12] *See infra* notes 14-75 and accompanying text.

[13] CAL. CIV. CODE § 43.92 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.) and CAL. WELF. & INST. CODE §§ 5000-5579 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

[14] Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (1976).

[15] For a good review of the *Tarasoff* case, *see* Brian Ginsberg, *Tarasoff at Thirty: Victim's Knowledge Shrinks the Psychotherapist's Duty to Warn and Protect*, 21 J. CONTEMP. HEALTH L. & POL'Y 1 (2004); Sheri Morgan and Carolyn I. Polowy, *Social Workers and the Duty to Warn*, NAT'L ASS'N OF SOC. WORKERS, LEGAL ISSUE OF THE MONTH (February 2005), http://www.naswdc.org/ldf/legal_issue/default.asp.

[16] People v. Poddar, 518 P.2d 342, 344 (1974).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Tarasoff v. Regents of the Univ. of Cal., 529 P.2d 553, 556 (1974).

[23] People v. Poddar, 518 P.2d 342, 345 (1974).

[24] Tarasoff v. Regents of the Univ. of Cal., 529 P.2d 553, 556 (1974).

based on this information.[25] Despite Dr. Moore's warning that Poddar could at times appear quite rational, the police released him because he appeared reasonable and promised to stay away from Tarasoff.[26] Poddar then stopped seeing Dr. Moore for treatment.[27] The psychiatric staff of the student health center made no further attempt to civilly commit Poddar for treatment.[28] On October 27, 1969, Poddar went to Tarasoff's house and was told by her mother to leave.[29] He returned later that day when Tarasoff was home alone.[30] When she refused to speak to him, Poddar shot her with a pellet gun and stabbed her to death.[31]

Tarasoff's parents brought suit against the University asserting that the treating professionals had a duty to warn their daughter of the impending danger that Poddar had posed.[32] Initially, the California Supreme Court agreed and held that, "[w]hen a doctor or a psychotherapist, in the exercise of his professional skill and knowledge, determines, or should determine, that a warning is essential to avert danger arising from the medical or psychological condition of his patient, he incurs a legal obligation to give that warning."[33] This new rule disturbed many in the mental-health treatment community, particularly given concerns about how accurately mental-health professionals could predict future violent behavior and fears that informing patients of the limits of confidentiality attendant to the duty to warn would result in reluctance to discuss harmful thoughts and feelings, thereby increasing the very danger that the California Supreme Court sought to prevent.[34]

After its initial decision in *Tarasoff*, the California Supreme Court agreed to rehear the case. On rehearing, the court rendered a decision

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[25] *Id.*

[26] *Id.*

[27] People v. Poddar, 518 P.2d 342, 344-345 (1974).

[28] Tarasoff v. Regents of the Univ. of Cal., 529 P.2d 553, 556 (1974).

[29] People v. Poddar, 518 P.2d 342, 345 (1974).

[30] *Id.*

[31] *Id.*

[32] Tarasoff v. Regents of the Univ. of Cal., 529 P.2d 553, 556 (1974).

[33] *Id.*; Note that under CAL. EVID. CODE § 1010 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.) the term "psychotherapist" encompasses a range of professionals who provide mental-health services, including, but not limited to, psychiatrists, psychologists, clinical social workers, and marriage and family therapists.

[34] Daniel J. Givelber, William J. Bowers & Carolyn L. Blitch, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443, 450 (1984); "The California Supreme Court has erected new barriers to . . . treatment [of violence-prone patients] by creating a vaguely defined liability that will deter all those who attempt to provide such psychotherapy, as well as the many private and public agencies which employ them. Further, by restricting the assurance of confidentiality available when treatment is given, the court's holding limits the effectiveness of that treatment." *Id.*

that, despite the concerns of the mental-health community, expanded the duty to warn even further.[35] The court held that, "[w]hen a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, *he incurs an obligation to use reasonable care to protect the intended victim against such danger.*"[36] This broadened the duty imposed upon therapists from one of warning a potential victim to one that called for the active protection of the potential victim.[37]

Coming close on the heels of the rehearing of *Tarasoff* was the case of *Hedlund v. Superior Court*.[38] In *Hedlund*, defendant therapists were sued for failing to warn a victim of their patient's threat against her.[39] The California Supreme Court's unique holding in this case was its conclusion that the therapists' duty of care extended beyond the intended victim to her minor child because it was foreseeable that he could be near her and emotionally traumatized by an attack against his mother.[40] The court concluded that when a therapist evaluates the risk of harm posed and takes steps to protect the potential victim, this must include a consideration of the risk of trauma to individuals who are "in close relationship" to the object of the threat.[41]

The expanding liability imposed upon therapists under *Tarasoff* and *Hedlund* motivated the introduction of Assembly Bill ("A.B.") 1133 in 1985.[42] The author of the bill, citing the California Medical Association ("CMA"), stated that, "[t]he rulings in *Tarasoff* and *Hedlund* have placed mental health therapists in a very real dilemma. While having to be ever mindful of protecting the public, therapists must also be concerned that

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[35] Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 340 (1976).

[36] *Id.* (emphasis added); The court defined "reasonable care" in the following manner: "The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." *Id.*

[37] Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 340 (1976).

[38] Hedlund v. Superior Ct., 669 P.2d 41 (1983). At first glace, the *Ewing* court's discussion of *Hedlund* is interesting in that the latter case focuses on imposition of a duty to foreseeable victims, while the former involves the expansion of the criteria that trigger the duty to warn. The court likely discussed the case not because *Hedlund* was analogous to *Ewing*, but because the earlier case was integral to the ultimate codification of a narrowed duty under CAL. CIV. CODE § 43.92, the statute at issue in *Ewing*.

[39] Hedlund v. Superior Ct., 669 P.2d 41, 43 (1983).

[40] *Id.* at 46-47.

[41] *Id.* at 47.

[42] *Psychotherapist Liability for Failure to Warn: Hearing on A.B. 1133 Before the Assembly Committee on the Judiciary*, 1985 Regular Sess. (Cal. 1985) (statement of Assemblyman McAlister, member, Assembly Committee on the Judiciary).

requiring them to warn potential victims will frequently result in the breach of patients' confidentiality." [43] The bill's author also pointed out that the CMA went on to contend that the public is better protected "when troubled persons are encouraged to seek therapy, unafraid that their every utterance could lead to hospitalization or police involvement." [44] California Civil Code Section 43.92, the legislation that emerged from A.B. 1133, codified a duty to warn that narrowed therapist liability from the expansive holdings of *Tarasoff* and *Hedlund*.[45] This new statute established that the duty to warn would arise only when the patient communicated a threat of physical violence against a potential victim.[46]

Despite Section 43.92, in the recent case of *Ewing v. Goldstein* the court of appeal has once again begun to expand the application of the duty to warn, as the California Supreme Court had done in the *Tarasoff* and *Hedlund* decisions, this time broadening the events that would trigger the duty.[47] In *Ewing*, the court ruled that a patient threat can trigger the duty to warn if this communication is relayed to the therapist by a patient's family member and not by the patient himself.[48]

The facts of the case that led to this decision are as dreadful as those in *Tarasoff*.[49] Geno Colello was a patient of Dr. David Goldstein for four years.[50] Colello was a former Los Angeles Police Department officer and was treated over that period for problems related to both his work and his ex-girlfriend, Diana Williams.[51] In 2001, Colello's depression and anger problems increased when he learned that Williams had begun a relationship with a new man, Keith Ewing.[52] As Colello's condition

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[43] *Id.* at 2.

[44] *Id.*

[45] *Id.* at 1.

[46] The full text of CAL. CIV. CODE § 43.92 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.) states: "(a) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims. (b) If there is a duty to warn and protect under the limited circumstances specified above, the duty shall be discharged by the psychotherapist making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency."

[47] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 866 (Ct. App. 2004); "We conclude that the trial court too narrowly construed section 43.92." *Id.*

[48] *Id.*

[49] *Id.* at 866-68.

[50] *Id.* at 866.

[51] *Id.*

[52] *Id.*

deteriorated, Dr. Goldstein became concerned that Colello might harm himself, and he suggested that the patient consider voluntary in-patient treatment.[53] Soon thereafter, Colello's father allegedly contacted Dr. Goldstein to report that his son had communicated that he was feeling suicidal and was considering harming Williams's new boyfriend.[54] Goldstein urged Colello's father to admit his son for in-patient treatment, and Colello agreed to enter Northridge Hospital Medical Center that same evening.[55] The next day, the treating psychiatrist at Northridge Hospital, Dr. Gary Levinson, decided to discharge Colello.[56] When Goldstein was informed of this development he immediately contacted Levinson and urged him not to discharge the patient.[57] Nevertheless, over Goldstein's objections, Levinson discharged Colello, concluding that the patient was not suicidal.[58] The next day, Colello shot Ewing and then committed suicide.[59]

The *Ewing* court, faced with these dreadful facts, held that, "[a] communication from a family member to a therapist, made for the purpose of advancing a patient's therapy, is a 'patient communication' within the meaning of section 43.92."[60] Beyond the facts of the *Ewing* case, this holding broadens the instances in which a therapist has a duty to warn, imposing a duty based not only on threats made by the patient but also on communications from third parties made about the patient's alleged threats.[61]

B. THE CIVIL COMMITMENT PROCESS

The Lanterman-Petris-Short Act ("LPS Act") provides for civil commitment to a psychiatric facility under certain conditions and may be used to protect against the risk posed by a potentially violent mentally ill individual.[62] This act came into force in 1969, just a few years before the *Tarasoff* case, and emerged as part of the trend toward

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[53] *Id.* at 867.

[54] *Id.* Again, note that Goldstein denies ever having received such a communication from Colello's father. Defendant's Petition for Review, or Alternatively, Depublication at 5-6, Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 868 (Ct. App. 2004) (No. S127363 Civ. B163112).

[55] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 867 (Ct. App. 2004).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 866.

[61] *Id.*

[62] CAL. WELF. & INST. CODE §§ 5000-5579 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

deinstitutionalization that swept the country during the 1960's and 70's.[63] Deinstitutionalization refers to the movement to shift the treatment of the mentally ill away from large psychiatric hospitals toward community-based treatment models.[64] The effect of deinstitutionalization was to decrease the number of people treated in psychiatric hospitals by eighty-five percent over a period of four decades, while the population as a whole grew by thirty-six percent during that same time.[65] The LPS Act exemplified California's "preference for liberty" and was intended to end the indefinite and involuntary detention of the mentally ill.[66] It remains virtually unchanged as the law regarding the civil commitment of the mentally ill in the state today.[67]

The LPS Act provides that upon probable cause an individual may be taken into custody and placed in a mental-health facility on a short-term basis if it is determined that, as a result of a mental disorder, the individual is "gravely disabled" or is a danger to self or to others.[68] The initial detention spans seventy-two hours and is intended to provide for observation and crisis management.[69] To establish probable cause, the committing authority, usually a staff psychiatrist or psychologist, considers information about the historical course of the individual's mental disorder among other factors, including information provided by the patient's family members.[70] If, after the initial period of detention, the treating professionals determine that the individual continues to pose a danger to himself or others, he may be detained for a further fourteen-day involuntary commitment.[71] Within four days of the start of the fourteen-day hold, a certification hearing before a Hearing Officer must take place to allow for review of the probable cause.[72]

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[63] *Id.*; For a good review of the process of deinstitutionalization and the LPS Act, *see* Meredith Karasch, *Where Involuntary Commitment, Civil Liberties, and the Right to Mental Health Care Collide: An Overview of California's Mental Illness System*, 54 HASTINGS L. J. 493 (2002).

[64] THOMAS F. OLTMANNS AND ROBERT E. EMORY, ABNORMAL PSYCHOLOGY 2ND ED., 679, (Prentice Hall 1998).

[65] *Id.* at 664. In 1955, more than 500,000 people in the United States were confined to mental hospitals; by 1994 that number had shrunk to fewer than 72,000. *Id.*

[66] Meredith Karasch, *Where Involuntary Commitment, Civil Liberties, and the Right to Mental Health Care Collide: An Overview of California's Mental Illness System*, 54 HASTINGS L. J. 493, 497 (2002).

[67] CAL. WELF. & INST. CODE §§ 5000-5579 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

[68] *See id.* § 5150.

[69] *See id.* §§ 4132, 5150.

[70] *See id.* § 5150.05(a) & (b).

[71] *See id.* § 5250.

[72] *See id.* §§ 5254, 5256.1. Hearing officers are generally not judges; they are typically lawyers or mental-health professionals.

Ultimately, the individual may be confined for up to 180 days under an LPS conservatorship if he or she continues to pose a significant risk of danger.[73] This long period of involuntary confinement is checked through a process of judicial evaluation, in which it must be shown by a preponderance of the evidence that the individual continues to be gravely disabled or a danger to self or others.[74] Therefore, while the LPS Act was enacted to prevent the unjust confinement of the mentally ill, it provides an avenue through which mental-health professionals and law-enforcement officers can protect a patient and potential victims from the consequences of the patient's illness through the use of enforced treatment.[75]

II. THE THERAPIST'S DUTY TO WARN IN THE WAKE OF *EWING*

The *Ewing* court expanded the range of events that can trigger a therapist's duty to warn to include patient threats relayed to the therapist by a family member, thereby exposing therapists to increased liability that will hurt the profession and the people it aims to treat.[76] Instead, the LPS Act, in conjunction with the original interpretation of Section 43.92, should be used as a framework for dealing with dangerous patients without the negative ramifications of the *Ewing* court's decision.

A. THE *EWING* DECISION

The case of *Ewing v. Goldstein* is illustrative of the legal adage, "[b]ad facts make bad law."[77] Faced with a tragic set of circumstances, the appellate court sought to impose liability on the treating therapist and in the process erroneously decided a number of legal points.[78] First, the court did not adhere to the plain meaning of California Civil Code Section 43.92 in its interpretation of the duties mandated under this law, with a resulting emergence of amorphous liability standards.[79] Second, in establishing an expanded duty to warn under California Civil Code Section 43.92, the court failed to define what relationship is required between the patient and the third party in order to trigger the duty to

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[73] *See id.* § 5300.

[74] *See id.* § 5346.

[75] Conservatorship of Rodney M., 58 Cal. Rptr. 2d 513, 516 (Ct. App. 1996).

[76] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 866 (Ct. App. 2004).

[77] Doggett v. United States, 505 U.S. 647, 659 (1992).

[78] Petition for Review, or alternatively, Depublication at 2-3, Ewing v. Goldstein, 15 Cal. Rptr. 3d 864 (Ct. App. 2004) (No. S127363 Civ. B163112).

[79] *Id.* at 14-17.

warn.[80] Finally, the court incorrectly relied on the testimonial privilege for family-member communications established in *Grosslight v. Superior Court* to find a duty to warn when a family member communicates an alleged threat made by an adult patient.[81]

1. The Plain Meaning of Cal. Civ. Code §43.92

When the language of a statute is clear, the court must adhere to its plain meaning.[82] The judiciary must heed the intent of legislators by applying the law as it is unambiguously written.[83] With this in mind, California Civil Code Section 43.92 establishes that in order to initiate the duty to warn *the patient must communicate to the therapist* "a serious threat of physical violence against a reasonably identifiable victim or victims." [84] In the examination of Section 43.92, the *Ewing* court surprisingly conceded that, "[s]ection 43.92 refers only to a patient's communication to his or her psychotherapist . . . . Read literally, section 43.92 would preclude the imposition of liability if information about the patient's violent intentions . . . . were received by a therapist from any source other than the patient."[85] Without identifying the specific statutory language it considered ambiguous, the court nonetheless concluded that the phrase "the patient has communicated to the therapist" should be read to include communications made by family members to the therapist. [86] This contradicts the plain meaning of California Civil

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[80] *See* Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 866 (Ct. App. 2004) where the term "family member" is not defined; "A communication from a family member to a therapist, made for the purpose of advancing a patient's therapy, is a patient communication within the meaning of section 43.92." *Id.*; "We are not faced with and do not address the situation in which a third party who is not a member of the patient's immediate family, but who may be involved in his therapy in some manner (an intimate or close friend), conveys the information of the patient's potential dangerousness to the therapist." *Id.* at 873 n.10.

[81] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 872 (Ct. App. 2004); Grosslight v. Superior Court, 140 Cal. Rptr. 278, 281 (Ct. App. 2004).

[82] *See* Dafonte v. Up-Right, Inc., 828 P.2d 140, 144 (1992), *citing* Rojo v. Kliger, 801 P.2d 373, 377 (1990), *quoting* Solberg v. Superior Court, 561 P.2d 1148, 1158 (1977).

[83] Day v. City of Fontana, 19 P.3d 1196, 1199 (2001), *citing* People v. Lawrence, 6 P.3d 228, 235 (2000); "[the judiciary must] presume the lawmakers meant what they said, and the plain meaning of the statute governs." *Id.*

[84] CAL. CIV. CODE § 43.92 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.) (emphasis added).

[85] Ewing v Goldstein, 15 Cal. Rptr. 3d 864, 869 (Ct. App. 2004).

[86] *Id.* at 868; The *Ewing* court's only mention of statutory ambiguities was the statement that "Section 43.92 does contain certain facial ambiguities." *Id.*; "Notably, the *Ewing* court never identified the ambiguous word or phrase within Civil Code Section 43.92. The *Ewing* court could not identify any ambiguous language." Defendant's Petition for Review, or Alternatively, Depublication at 15, Ewing v. Goldstein, 15 Cal. Rptr. 3d 864 (Ct. App. 2004) (No. S127363 Civ. B163112); Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 866 (Ct. App. 2004).

Code Section 43.92 and was therefore an unnecessary and unauthorized act of interpretation.[87]

The *Ewing* court's questionable decision regarding how to interpret Section 43.92 was accompanied by a review of the legislative history of the statute.[88] The court stated that its ostensible goal was to interpret the statute in such a way as to remain faithful to the original intent of the law makers.[89] This statement is belied by the court's ultimate conclusion that, "the fact that the family member is not technically a 'patient' is not crucial to the statute's purpose."[90]

A careful review of the legislative history of Assembly Bill 1133, which was enacted as Section 43.92, reveals that this supposition is inaccurate.[91] The first sentence of the analysis provided by the bill's author states, "[t]his bill narrows the liability of certain mental health professionals for failing to warn persons foreseeably endangered by the violence of their patients." [92] The author of the bill affirmed that the decisions in *Tarasoff* and *Hedlund* placed mental-health practitioners in a "very real dilemma" and that the bill sought to "limit the psychotherapist's liability for failure to warn." [93] Prior to *Ewing*, courts had also concluded that Section 43.92 was enacted to limit the liability of therapists for failure to warn.[94] In its interpretation of the duty to warn, the *Ewing* court expanded, rather than limited, the range of circumstances that will trigger the duty, thereby dramatically increasing a psychotherapist's exposure to liability and establishing a precedent counter to the legislative intent behind Section 43.92.[95] This was a violation of the court's own statement that "[t]he primary objective in construing a statute is to ascertain and effectuate the underlying legislative intent." [96]

The court's decision to open Section 43.92 to interpretation and to

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[87] *See* Dafonte v. Up-Right, Inc., 828 P.2d 140, 144 (1992), *citing* Rojo v. Kliger, 801 P.2d 373, 377 (1990), *quoting* Solberg v. Superior Court, 561 P.2d 1148, 1158 (1977).

[88] Ewing v Goldstein, 15 Cal. Rptr. 3d 864, 868-71 (Ct. App. 2004).

[89] *Id.* at 869, *citing* Allen v. Sully-Miller Contracting Co., 47 P.3d 639, 642 (2002); The court sought to "[c]hoose the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute." *Id.*

[90] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 872 (Ct. App. 2004).

[91] *Psychotherapist Liability for Failure to Warn: Hearing on A.B. 1133 Before the Assembly Committee on the Judiciary*, 1985 Regular Sess. at 1 (Cal. 1985) (statement of Assemblyman McAlister, member, Assembly Committee on the Judiciary).

[92] *Id.*

[93] *Id.* at 2.

[94] Barry v. Turek, 267 Cal. Rptr. 553, 556 (Ct. App. 1990).

[95] Defendant's Petition for Review, or Alternatively, Depublication at 16, Ewing v. Goldstein, 15 Cal. Rptr. 3d 864 (Ct. App. 2004) (No. S127363 Civ. B163112).

[96] *See* Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 868 (Ct. App. 2004).

broaden the duty to warn has caused uncertainty and confusion in the mental-health community regarding what a therapist is obligated to do and when liability can be imposed.[97] Because defendant Dr. Goldstein executed his duties to the full extent of the then-existing law, current therapists must be left to wonder whether the *Ewing* court's expansion is only the beginning.[98] The effect is to shift the ground under practitioners' feet such that even in trying to follow current law, liability may nonetheless result if a court decides to expand the parameters of a statute based on the facts of a single case. This uncertainty plagues the mental-health profession today.[99]

2. *Failure to Define "Family Member"*

The expanded rule established by the *Ewing* court is that "[a] communication from a patient's family member to the patient's therapist, made for the purpose of advancing the patient's therapy, is a 'patient communication' within the meaning of section 43.92."[100] The court went on to observe that "[w]e are not faced with and do not address the situation in which a third party who is not a member of the patient's immediate family, but who may be involved in his therapy in some manner (e.g., an intimate or close friend), conveys the information of the patient's potential dangerousness to the therapist." [101] The court's failure to define who qualifies as a family member, as well as how to treat individuals who may be close to the patient but not legally related, has left therapists in an untenable situation.[102]

Because therapists are legally prohibited from communicating with third parties, including family members, regarding an adult patient's treatment absent the patient's consent therapists will have no way to

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[97] For a roster of questions raised by the court's decision, *see* Defendant's Petition for Review, or Alternatively, Depublication at 26-27, Ewing v. Goldstein, 15 Cal. Rptr. 3d 864 (Ct. App. 2004) (No. S127363 Civ. B163112).

[98] *See* Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 867 (Ct. App. 2004). Goldstein attempted to have Colello held for seventy-two hours under the LPS Act. *Id.*

[99] *See infra* notes 134-137 and accompanying text for steps taken by the Los Angeles Country Department of Mental Health in the wake of the *Ewing* decision.

[100] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 868 (Ct. App. 2004).

[101] *Id.* at 873 n.10.

[102] *Psychotherapists: Duty to Warn: Hearing on A.B. 733 Before the Assembly Committee on the Judiciary*, 2005-06 Regular Sess., at 2 (Cal. 2005) (statement of Assemblyman Joseph Nations, member, Assembly Committee on the Judiciary); "Following the recent appellate decision, *Ewing v. Goldstein*, which would extend this exception to communications to the therapist made by family members, the current state of the law is an unworkable amalgam of conflicting legal opinions and statutes. We believe that legislation is needed to clarify the legal responsibilities of psychotherapists in such situations." *Id.*

confirm whether the communication is accurate, is made by a family member, or whether the family member is acting maliciously or in the best interests of the patient. [103] The difficulty here is two-fold. First, how does a therapist verify that the individual with whom he or she is speaking is a family member, within the meaning of the rule, as a "condition precedent" to issuing a warning? Second, if the therapist does somehow determine, within the confines of confidentiality, that this individual is a family member, how can he or she immediately verify that the communication is credible if the duty to warn has already been triggered? Significantly, even in the relatively short period of time since the *Ewing* decision was issued, the ambiguity regarding whose communication will trigger a warning has caused practitioners to err on the side of caution and opt to break confidentiality when a communication comes from "any credible source," not just from someone they were able to determine was a family member.[104] Therefore, patients may already be paying the price for the confusion engendered among professionals by the *Ewing* decision.

3. *When Is a Family-Member Communication a Patient Communication?*

The novel holding in the *Ewing* case was the notion that a communication coming from someone other than the patient could trigger the duty to warn.[105] In reaching this conclusion, the Court examined the interplay between two statutory schemes that exist in tension: Section 43.92, which codifies the duty to warn, and California Evidence Code Sections 1010-1014, which codify the legal privilege for communications between a psychotherapist and a patient.[106] In its decision, the *Ewing* court ostensibly sought to find the appropriate balance between these two statutes, one that protects confidentiality and

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[103] Scull v. Superior Court, 254 Cal. Rptr. 24, 26 (Ct. App. 1988); "[I]t is well settled in California that the mere disclosure of the patient's identity violates the psychotherapist-patient privilege." *Id.*; *See also* Letter from Dr. A. Steven Frankel, Ph.D., J.D., Legal Counsel of the California Association of Psychology Providers, to The Hon. Ronald M. George, Chief Justice – Associate Justices of the California Supreme Court (Sept. 23, 2004) (on file with author).

[104] Letter from Marvin J. Southard, D.S.W., Director of Mental Health for the County of Los Angeles Department of Mental Health, to Department of Mental Health Staff (Sept. 30, 2004) (on file with the author).

[105] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 873 (Ct. App. 2004).

[106] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 872 (Ct. App. 2004); "Because section 43.92 was prompted by *Tarasoff* and *Hedlund*, and because *Tarasoff* itself is rooted in the psychotherapist-patient privilege, the two statutory schemes should be accorded complimentary interpretations, if at all possible." *Id.* (internal citations omitted).

the other that may require its breach.[107]

Crucial to the court's analysis in *Ewing* was the case of *Grosslight v. Superior Court*, which broadened the scope of privileged communications to include those made by patient family members.[108] Specifically, *Grosslight* established that, "[w]here . . . the communication to the parent is to further the child's interest in communication with, or is necessary for transmission of information to . . . a psychotherapist, the communication is protected by the pertinent statutory privilege."[109] When the *Ewing* court broadened the duty to warn to include communications made by family members of the patient, it based this expansion largely on what it believed to be the complementary expansion that had occurred with the psychotherapist-patient privilege under *Grosslight*.[110]

The *Ewing* court should not have relied on *Grosslight* for this expansion. In so doing, it may have struck an inappropriate balance between the duty to warn and the duty to maintain confidentiality.[111] It is legally significant that the patient in *Grosslight* was a sixteen-year-old minor *child*.[112] When the child's parents communicated with her therapist regarding treatment, they were acting not merely as interested parties, but were acting as her legal guardians entitled to access confidential information regarding their daughter's care.[113] When the *Ewing* court expanded the criteria that can trigger the duty to warn, it relied on the *Grosslight* analysis, but *Grosslight* involving an *adult* patient.[114] Adult patient treatment is privileged information, even from family members, unless the patient has explicitly waived his right to confidentiality with respect to this party.[115] The status of parental communications for a minor is therefore substantially different than for

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[107] *Id.*; "Our construction harmonizes the competing principles discussed above . . . ." *Id.*

[108] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 872 (Ct. App. 2004) *citing* Grosslight v. Superior Court, 140 Cal. Rptr. 278, 280 (Ct. App. 1977)(emphasis added).

[109] Grosslight v. Superior Court, 140 Cal. Rptr. 278, 280 (Ct. App. 1977) (internal citation omitted).

[110] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 872 (Ct. App. 2004).

[111] Letter from Dr. A. Steven Frankel, Ph.D., J.D., Legal Counsel of the California Association of Psychology Providers, to The Hon. Ronald M. George, Chief Justice – Associate Justices of the California Supreme Court (Sept. 23, 2004) (on file with author).

[112] Grosslight v. Superior Court, 140 Cal. Rptr. 278, 279 (Ct. App. 2004).

[113] *See* CAL. FAM. CODE § 6924(d) (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.); "The mental health treatment or counseling of a minor authorized by this section shall include the involvement of the minor's parent or guardian unless. . . the involvement would be inappropriate . . . ." *Id.*

[114] *See* Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 866 (Ct. App. 2004) (stating that Colello had been employed as a police officer for several years).

[115] CAL. EVID. CODE § 1014(c) (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

an adult patient.[116] The *Ewing* court appears to have dangerously conflated two separate legal issues – the privilege of a parent's communications made in furtherance of a minor child's treatment and the duty to warn that arises when an adult patient communicates a threat.[117] In doing so, the *Ewing* court has tipped the balance too far toward breach at the expense of confidentiality.[118]

B. ISSUES EMERGING FROM THE *EWING* CASE

The California Association of Psychology Providers has asserted that the *Ewing* decision will have ramifications beyond the confines of a single case, because "[t]he Court of Appeals has created a dangerous situation that can subject our members to potential civil suits for either acting or failing to act on threats communicated by supposed family members. This decision will significantly undermine patient confidentiality."[119] A major issue to be examined is whether patient confidentiality may be jeopardized in instances in which it is not currently possible for therapists to predict the likelihood of violence with a sufficient level of accuracy based on family communications.

1. The Impact of Ewing *on Therapist-Patient Confidentiality*

The bedrock of effective psychotherapy is confidentiality, which assures the patient that whatever he or she says in therapy will be kept private.[120] It is this knowledge that enables the patient to speak freely and to overcome feelings of embarrassment, fear, or shame.[121] Even the United States Supreme Court has affirmed the importance of

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[116] *Compare* CAL. FAM. CODE § 6924(d) (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.) with CAL. EVID. CODE § 1014(c) (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

[117] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 872-873 (Ct. App. 2004).

[118] Letter from Dr. A. Steven Frankel, Ph.D., J.D., Legal Counsel of the California Association of Psychology Providers, to The Hon. Ronald M. George, Chief Justice – Associate Justices of the California Supreme Court (Sept. 23, 2004) (on file with author); "[W]e believe that the Court of Appeals' decision is contrary to prior decisions of the Supreme Court that have held that intrusions of the psychotherapist-patient privilege are to be limited in scope and narrowly construed. . . . This decision will significantly undermine patient confidentiality." *Id.*

[119] Letter from Dr. A. Steven Frankel, Ph.D., J.D., Legal Counsel of the California Association of Psychology Providers, to The Hon. Ronald M. George, Chief Justice – Associate Justices of the California Supreme Court (Sept. 23, 2004) (on file with author).

[120] Brian Ginsberg, *Tarasoff at Thirty: Victim's Knowledge Shrinks the Psychotherapist's Duty to Warn and Protect*, 21 J. CONTEMP. HEALTH L. & POL'Y 1, 7 (2004); "The cornerstone of . . . therapy . . . has always been confidentiality. For any patient, speaking freely is difficult. The necessary factor in overcoming the natural resistance to complete candidness is the belief that anything said in therapy will be kept in the confidence of the therapist." *Id.*

[121] *Id.*

confidentiality to effective psychotherapy.[122] State and federal judiciaries safeguard therapist-patient confidentiality through an evidentiary privilege protecting communications between these parties.[123] The origins of the privilege can be traced back millennia to

[122] Jaffee v. Redmond, 518 U.S. 1, 10 (1996); "Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Id.*

[123] *For federal privilege see* FED. R. EVID. 501. *For state privileges see* ALA. CODE § 34-26-2 (West, WESTLAW through 2005 First Spec. Sess.); ALASKA RULES OF EVID., R. 504. (West, WESTLAW through 2005 legislation); ARIZ. REV. STAT. ANN. § 32-2085 (West, WESTLAW through January 2006 legislation); ARK. RULES OF EVID., R. 503 (West, WESTLAW through January 1, 2006 amendments); CAL. EVID. CODE § 1010-1028 (West, WESTLAW through 2005 First Spec. Sess.); COLO. REV. STAT. § 13-90-107(G) (West, WESTLAW through end of 2005 First Reg. Sess. of 65th Gen. Assembly); CONN. GEN. STAT. ANN. § 52-146C (West, WESTLAW through 2006 Supp. to Conn. Gen. Statutes); DEL. RULES OF EVID., R. 503 (West, WESTLAW through amendments received by Dec. 1, 2005); D.C. CODE § 14-307 (West, WESTLAW through Jan. 25, 2006); FLA. STAT. ANN. § 90.503 (West, WESTLAW through Chap. 362 (End) of 2005 Spec. 'B' Sess. of Nineteenth Legislature); GA. CODE ANN. § 37-3-166 (West, WESTLAW through end of 2005 Spec. Sess.); HAWAII REV. STAT. § 504.1 (West, WESTLAW through 2004 Reg. Sess.); IDAHO CODE § 54-2314 (West, WESTLAW through 2005 Leg. Sess.); 740 ILL. COMP. STAT ANN. 110/1 (West, WESTLAW through P.A. 94-727 of 2006 Reg. Sess.); IND. STAT. § 25-33-1-17 (West, WESTLAW through 2005 First Reg. Sess. of 114th Gen. Assembly); KY. RULES OF EVID. RULE 507 (West, WESTLAW current with amendments received through Jan. 1, 2006); LA. REV. STAT. § 13:3734 (West, WESTLAW through all 2005 Regular and First Extraordinary Sess. Acts); ME. RULES OF EVID., R. 503 (West, WESTLAW current with amendments received through March 1, 2006); MD. CTS. & JUD. PROC. CODE ANN. § 9-109 (West, WESTLAW through Chap. 17 of 2006 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 233, § 20B (West, WESTLAW through Ch. 43 of the 2006 2nd Annual Sess.); MICH. COMP. LAWS ANN. § 330.1750 (West, WESTLAW through P.A. 2006, No. 1-59); MINN. STAT. ANN. § 595.02 (West, WESTLAW through 2006 Reg. Sess. laws through Chapter 171); MISS. CODE § 73-31-29 (West, WESTLAW through 2005 Fifth Extraordinary Sess.); MO. REV. STAT. ANN. §§ 210.140, 337.055 (West, WESTLAW through 2005 First Extraordinary Sess. of the 93rd Gen. Assembly); MONT. CODE ANN. § 26-1-807 (West, WESTLAW through 2005 Reg. Sess. of the 59th Legislature); NEB. REV. STAT. § 27-504 (West, WESTLAW through the First Reg. Sess. of 99th Legislature (2005)); NEV. REV. STAT. § 49.215-49.245 (West. WESTLAW through 2005 73rd Reg. Sess. and the 22nd Spec. Sess. of Nevada Legislature); N.H. REV. STAT. ANN. § 330-A:19 (West, WESTLAW through 2005 Reg. Sess.); N.J. STAT. ANN. 45:14B-28 (West, WESTLAW through L.2006, c.2); N.M. RULES OF EVID., R. 11-504 (West, WESTLAW current with amendments received through Feb. 1, 2006); N.Y. CIV. PRAC. L. & R. § 4507 (West, WESTLAW current through L.2006, chapters 1 to 6 and 8); N.C. GEN. STAT. § 8-53.3 (West, WESTLAW through 2005 Reg. Sess.); N.D. RULES OF EVID., R. 503 (West, WESTLAW current with amendments received through Feb. 1, 2006); OKLA. STAT. ANN. tit. 12, § 2503 (West, WESTLAW through Chapter 1 of 2005 First Extraordinary Sess.); OR. REV. STAT. § 40.230 (West, WESTLAW current with amendments received through Jan. 1, 2005); 42 PENN. C.S.A. § 5944 (West, WESTLAW current through Act 2005-96); TENN. CODE ANN. § 58-60-114 (West, WESTLAW through end of 2005 First Reg. Sess.); UTAH CODE ANN. § 58-60-114 (West, WESTLAW through end of 2005 First Spec. Sess. 2005); VT. STAT. ANN. tit. 12, § 1612 (West, WESTLAW through First Session of 68th Biennial Session 2005); VA. CODE § 8.01-400.2 (West, WESTLAW through 2005 Reg. Sess. 2005); WASH. REV. CODE § 18.83.110 (West, WESTLAW 2006 legislation through Feb.

the Hippocratic Oath, which states, "[W]hatever I see or hear in the lives of my patients, whether in connection with my professional practice or not, which ought not to be spoken of outside, I will keep secret, as considering all such things to be private."[124] This privilege is legally and ethically recognized because in order for therapy to be successful, the patient must feel safe enough to reveal painful, embarrassing, and disturbing thoughts and feelings to the therapist.[125]

No evidentiary privilege is absolute, and the majority of states permit breach when the health or safety of the patient or a third party is at risk.[126] However, beyond the narrow confines of circumstances in which breach is legally permissible, therapists must maintain client confidentiality.[127] Thus, maintaining client information and records in such a way as to minimize any chance of inappropriate disclosure is of the utmost importance.[128] To this end, a practitioner is generally prohibited even from disclosing the names of the patients he or she is seeing in treatment to any outside party.[129] Participating in psychotherapy continues to carry a social stigma and the protection of confidentiality is the primary way that society enables individuals, despite this perceived "shame," to seek the treatment they need.[130]

15, 2006); WIS. STAT. ANN. § 905.04 (West, WESTLAW through 2005 Act 105); WYO. STAT. ANN. § 33-38-113 (West, WESTLAW through 2005 Reg. Sess.).

[124] Hippocratic Oath, *available at* http://www.nlm.nih.gov/hmd/greek/greek_oath.html (last modified Feb. 17, 2006).

[125] Sheri Morgan and Carolyn I. Polowy, *Social Workers and the Duty to Warn*, 1, NAT'L ASS'N OF SOC. WORKERS, NASW LEGAL DEFENSE FUND LEGAL ISSUE OF THE MONTH SERIES, (2005), at http://www.naswdc.org/ldf/legal_issue/default.asp.

[126] Brian Ginsberg, *Tarasoff at Thirty: Victim's Knowledge Shrinks the Psychotherapist's Duty to Warn and Protect*, 21 J. CONTEMP. HEALTH L. & POL'Y 1, 10 (2004).

[127] Smith v. Superior Court, 173 Cal. Rptr. 145, 147-48 (Ct. App. 1981).

[128] AM. PSYCHOL. ASS'N ETHICAL STANDARDS, § 4.01 at http://www.apa.org/ethics/code2002.html#4; "Psychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium, recognizing that the extent and limits of confidentiality may be regulated by law or established by institutional rules or professional or scientific relationship." *Id.*

[129] Smith v. Superior Court, 173 Cal. Rptr. 145, 147-48 (Ct. App. 1981); "It is well-settled that the disclosure of the identity of the patient violates the physician-patient privilege where such disclosure reveals the patient's ailment. The instant case presents an analogous situation, for disclosure of the identity of a psychotherapist's patient name inevitably reveals the confidential information, namely, that the patient suffers from mental or emotional problems." *Id.* (citations omitted).

[130] Rhonda Rowland, *First step in beating depression is admitting it*, CABLE NEWS NETWORK (2002) at http://archives.cnn.com/2002/HEALTH/conditions/07/16/cov.depression.ceo/index.html; "They kept their secret [of depression] because of the stigma associated with mental illness. Only their family and closest friends knew. 'I thought it might adversely affect my business relationships or my personal relationships.'" *Id.*; *See also* Smith v. Superior Court, 173 Cal. Rptr. 145, 148 (Ct. App. 1981).

The *Ewing* case has disturbing implications for therapist-patient confidentiality. It has vastly expanded the instances in which a therapist may be compelled to breach confidentiality without providing clear guidelines as to when and how this duty is triggered.[131] A fundamental difficulty that arises is reconciling how a therapist could have contact with a family member who relays news of a patient's threat when the therapist is legally prohibited from communicating with third parties, family or not, regarding an adult patient's treatment without that patient's consent.[132] Further, therapists are left in the dark in determining which individuals are considered "family members" within the scope of the rule and, therefore, which communications can legally compel them to breach confidentiality.[133] This uncertainty has already started to erode the established boundaries of confidentiality, as exemplified by a recent Los Angeles County Department of Mental Health memo.[134] In the wake of the *Ewing* decision the Department advised its staff that a therapist should issue a warning consistent with Section 43.92 not only when threat information is communicated by a patient family member, as required under *Ewing*, but when the information is communicated by any other potentially credible source.[135]

It is important to note that the Los Angeles Department of Mental Health has issued a directive that goes beyond what even the *Ewing* court

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[131] Letter from Dr. A. Steven Frankel, Ph.D., J.D., Legal Counsel of the California Association of Psychology Providers, to The Hon. Ronald M. George, Chief Justice – Associate Justices of the California Supreme Court (Sept. 23, 2004) (on file with the author); "Prior to the Second District's decision it was clear to psychologists that the duty to warn arose only when a patient made a serious threat of physical violence. That certainty is now lost." *Id.*

[132] Scull v. Superior Court, 254 Cal. Rptr. 24, 26 (Ct. App. 1988); "Essential to psychotherapy are confidential personal revelations about matters which the patient is normally reluctant to discuss. Frequently, a patient in analysis will make statements to his psychiatrist which he would not make even to the closest members of his family. . . . It is well settled in California that the mere disclosure of the patient's identity violates the psychotherapist-patient privilege. . . . The rationale for this rule is that the harm to the patient's interest of privacy is exacerbated by the stigma that society often attaches to mental illness." *Id.*

[133] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 874 (Ct. App. 2004).

[134] Letter from Marvin J. Southard, D.S.W., Director of Mental Health for the County of Los Angeles Department of Mental Health, to Department of Mental Health Staff (Sept. 30, 2004) (on file with the author).

[135] Letter from Marvin J. Southard, D.S.W., Director of Mental Health for the County of Los Angeles Department of Mental Health, to Department of Mental Health Staff (Sept. 30, 2004) (on file with the author); In relevant part, the letter states, "When a patient, a patient's family member, or *other credible informant* communicates to any staff in a DMH program a serious threat of physical violence against a reasonably identifiable victim or victims, then actions consistent with Civil Code section 43.92, the Tarasoff Decision, and Welf. & Instit. Code section 5328(r), which permits the disclosure of confidential information to avert serious threat based on communications from sources other than the patient, must be implemented in order to protect the third party." *Id.* (emphasis in original).

established as law in advising its staff to treat a communication from "any credible informant" as a patient communication for the purposes of the duty to warn. [136] This type of risk-management strategy, which anticipates a further expansion of the duty to warn, is disturbing but not surprising. Even thirty years ago in the *Tarasoff* decision, one of the dissenting justices noted that, "given the decision not to warn or commit must always be made at the psychiatrist's civil peril, one can expect that most doubts will be resolved in favor of the psychiatrist protecting himself."[137] This added encumbrance on therapist-patient confidentiality may ultimately end up endangering the very people that the *Ewing* court sought to protect – potential victims – by discouraging individuals with disturbing or aggressive impulses from seeking the treatment they so desperately need.[138]

2. *Predicting Patient Violence*

Justice Mosk's concurring and dissenting opinion in *Tarasoff* indicated several concerns about holding therapists to a standard of violence prediction, including the following:

> In the light of recent studies it is no longer heresy to question the reliability of psychiatric predictions. Psychiatrists themselves would be the first to admit that however desirable an infallible crystal ball might be, it is not among the tools of their profession. It must be conceded that psychiatrists still experience considerable difficulty in confidently and accurately *diagnosing* mental illness. Yet those difficulties are multiplied manyfold when psychiatrists venture from diagnosis to prognosis and undertake to predict the consequences of such illness.[139]

In the almost thirty years since the *Tarasoff* decision was issued,

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[136] *See* Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 866 (Ct. App. 2004); Letter from Marvin J. Southard, D.S.W., Director of Mental Health for the County of Los Angeles Department of Mental Health, to Department of Mental Health Staff (Sept. 30, 2004) (on file with the author).

[137] Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 361(1976) (Clark, J., dissenting).

[138] Request for Judicial Notice to Cal. Sup. Court, Ewing v. Goldstein, 15 Cal. Rptr. 3d 864 (Ct. App. 2004) (After a Decision by the Court of App. 2d Dist., Div. 8, 2d Civ. No. B163112), attaching a Letter from Howard Gurevitz, President, California Psychiatric Association, to Senator Bill Lockyear, Senate Judiciary Committee (June 27, 1985) (on file with the author); "A patient who is disturbed about confusing, aggressive thoughts must be able to discuss this condition thoroughly with the psychotherapist. Such persons could be reluctant to seek treatment if confidentiality were to be breached and to allow such a person to continue without treatment could be potentially dangerous." *Id.*

[139] Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 354 (1976) (*quoting* People v. Burnick, 535 P.2d 352, 365 (1975)).

research in the field of violence prediction and risk assessment has yielded considerable advancements.[140] This research has identified actuarial instruments, or systematized decision-making scales, as the best tools for the prediction of violence.[141] These tests statistically assess an individual for risk of violence, analyzing such factors as age, childhood behavior problems, and prior violent offenses, and they typically have a predictive value of between .75-.77 (with 0.5 being equal to chance).[142] Examples of instruments of this type currently used in the field are the Violence Risk Appraisal Guide ("VRAG") and the HCR-20.[143] Scales of this type have been shown in several empirical studies to be superior to the clinical assessment of a patient for risk of violence.[144]

These advances make it tempting to believe that therapists should be able to assess the potential for violence in their patients, at least with a higher level of accuracy than when *Tarasoff* originally came down. Unfortunately, this is not the case.[145] Three principal factors make the application of the actuarial scales described above, the only type of assessment that has shown any validity, of questionable utility within the context of a *Tarasoff* "duty to warn" situation.[146] First, scales such as the VRAG were developed for use among violent recidivists, such as prisoners about to be released from prison.[147] They were not developed for use with individuals who have no history of violence (the population most likely to be in out-patient treatment with a private practice therapist) and as such it is doubtful whether they would be useful in predicting first-time violent acts.[148] Second, actuarial instruments predict the likelihood of violence over a long time span, usually in the range of years.[149] A predictive time span of this length is of limited utility in a duty-to-warn situation where a therapist may be obligated to take

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[140] Randy Borum & Marisa Reddy, *Assessing Violence Risk in Tarasoff Situations: A Fact-Based Model of Inquiry*, 19 BEHAV. SCI. & L. 375, 376 (2001).

[141] Martin Grann et al., *Actuarial Assessment of Risk for Violence: Predictive Validity of the VRAG and the Historical Part of the HCR-20*, 27 CRIM. JUST. & BEHAV. 97, 98 (2000).

[142] *Id.*

[143] *Id.* at 99.

[144] *Id.* at 98.

[145] Randy Borum & Marisa Reddy, *Assessing Violence Risk in Tarasoff Situations: A Fact-Based Model of Inquiry*, 19 BEHAV. SCI. & L. 375, 378 (2001); "[T]he *Tarasoff* language suggests that the clinician should be held to the existing standards of his or her profession, despite the fact that no such explicit standards for these situations currently exist." *Id.*

[146] *See infra* notes 147-153 and accompanying text.

[147] Martin Grann et al., *Actuarial Assessment of Risk for Violence: Predictive Validity of the VRAG and the Historical Part of the HCR-20*, 27 CRIM. JUST. & BEHAV. 97, 99 (2000).

[148] Randy Borum & Marisa Reddy, *Assessing Violence Risk in Tarasoff Situations: A Fact-Based Model of Inquiry*, 19 BEHAV. SCI. & L. 375, 378 (2001).

[149] *Id.* at 377.

reasonable steps to inform a potential victim immediately.[150] Finally, actuarial risk assessment is not designed to identify risk with regard to a particular victim or a particular level of violence.[151] Rather, these tools seek to assess the risk of general violence that the patient may be involved in at some point in the future.[152] Again, this type of information is not useful within a *Tarasoff* warning situation, which requires that the victim be "reasonably identifiable" and that there be a "serious threat of physical violence."[153]

Under the rule of *Ewing*, the therapist's ability to predict violent behavior on the part of the patient becomes an issue of heightened importance. *Ewing* asks the therapist not only to be able to assess the risk of violence with the patient in front of him or her, which is an uncertain endeavor to begin with, but also to potentially act on a violence risk assessment based on a third-party communication about the patient.[154] This added level of complexity imposed upon the already difficult business of risk assessment could move prediction from the realm of challenging to mere guesswork.

III. A PROPOSED ALTERNATIVE

This Note is not intended to definitively state where the balance between therapist-patient confidentiality and the protection of the public welfare should lie. The judiciary has already commented on this question when it stated that, "[t]he protective privilege ends where the public peril begins."[155] However, what is needed and what can be proposed is a means of clarifying therapists' duties and rights regarding the treatment of potentially violent patients, enabling those in the profession to enact proper risk-management procedures, and allowing their patients genuine informed consent for treatment.

To this end, the therapist's duty to warn under Section 43.92 should be narrowly construed, as it was before the *Ewing* decision, and the duty should not be triggered by family-member communications to the therapist. If a therapist is somehow confronted with a communication of a threat relayed by a family member that he or she believes is genuine, the option of temporary civil commitment under the LPS Act should be considered as a more appropriate and

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[150] *See* CAL. CIV. CODE § 43.92 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

[151] Randy Borum & Marisa Reddy, *Assessing Violence Risk in Tarasoff Situations: A Fact-Based Model of Inquiry*, 19 BEHAV. SCI. & L. 375, 377 (2001).

[152] *Id.*

[153] CAL. CIV. CODE § 43.92(a) (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

[154] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 866 (Ct. App. 2004).

[155] Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 347 (1976).

already existing alternative to expanding the criteria that trigger the duty to warn.

A. A RETURN TO THE PRE-EWING UNDERSTANDING OF THERAPIST'S DUTY TO WARN

The *Ewing* court's decision resulted in a duty to warn that went beyond the intent of Section 43.92 and has resulted in considerable confusion in the mental-health community.[156] This uncertainty in the field could act as a deterrent for those who desperately need treatment but who are dissuaded by the lack of clear guidelines regarding the confidentiality of sensitive communications.[157] Any proposed remedy must address the need for clarity under Section 43.92.

At this point, a clarification of Section 43.92 by statute is the most effective means of spelling out therapists' duties.[158] After the appellate court's decision in *Ewing*, the defendant petitioned the California Supreme Court for review.[159] This petition was denied, and the Supreme Court also declined the alternative request to depublish the lower court's decision.[160] Thus, a statutory remedy is required to delineate the scope of the duties under Section 43.92 and how they are triggered.

Assembly Bill No. 733 was introduced to the California Assembly in February 2005 with the sponsorship of the California Association of Marriage and Family Therapists; the bill sought to "clarify and affirm the original intent of the psychotherapists' duty to warn."[161] The author of the bill stated that "[t]he *Ewing* decision is at odds with current law, is unworkable in practice, and will have an adverse effect on the ability of

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[156] *Psychotherapists: Duty to Warn: Hearing on A.B. 733 Before the Assembly Committee on the Judiciary*, 2005-06 Regular Sess., at 3 (Cal. 2005) (statement of Assemblyman Joseph Nations, member, Assembly Committee on the Judiciary).

[157] Brian Ginsberg, *Tarasoff at Thirty: Victim's Knowledge Shrinks the Psychotherapist's Duty to Warn and Protect*, 21 J. CONTEMP. HEALTH L. & POL'Y 1, 13 n.65 (2004).

[158] *Psychotherapists: Duty to Warn: Hearing on A.B. 733 Before the Assembly Committee on the Judiciary*, 2005-06 Regular Sess., at 2 (Cal. 2005) (statement of Assemblyman Joseph Nations, member, Assembly Committee on the Judiciary); "Following the recent appellate decision, *Ewing v. Goldstein*, which would extend this exception to communications to the therapist made by family members, the current state of the law is an unworkable amalgam of conflicting legal opinions and statutes. We believe that legislation is needed to clarify the legal responsibilities of psychotherapists in such situations." *Id.*

[159] Defendant's Petition for Review, or Alternatively, Depublication, Ewing v. Goldstein, 15 Cal. Rptr. 3d 864 (Ct. App. 2004) (No. S127363 Civ. B163112).

[160] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 864 (Ct. App. 2004).

[161] *Psychotherapists: Duty to Warn: Hearing on A.B. 733 Before the Assembly Committee on the Judiciary*, 2005-06 Regular Sess., 1-2 (Cal. 2005) (statement of Assemblyman Joseph Nations, member, Assembly Committee on the Judiciary).

psychotherapists to treat patients effectively."[162] The proposed language of A.B. 733 seeks to limit the instances in which the duty to warn is invoked to those threats against potential victims that are communicated to the therapist directly by the patient.[163] This additional language would further clarify the intent of the legislature and would restore transparency and certainty to the application and scope of Section 43.92.

Unfortunately, the bill was amended in the Assembly in May 2005 to add the following potentially problematic language: "(c) Notwithstanding subdivision (a), if a patient's threat has been communicated to the therapist by a third party, *the therapist is encouraged, but not required*, to contact the patient to the extent that the therapist reasonably believes is necessary to assess whether the patient poses a serious threat of physical violence against a reasonably identifiable victim or victims." [164] The difficulty with this language, and one of the likely reasons that the bill has been sidelined for a two-year review, is that it introduces ambiguity to the reading of the statute with suggestive but non-binding language.[165] Ultimately, this would have the result of perpetuating, not remedying, the confusion surrounding Section 43.92 after *Ewing*.

In sum, the intent of the proposed amendment of Section 43.92(a) under A.B. 733 is desirable and would correctly result in a firm clarification of the duties under Section 43.92 as they existed prior to *Ewing*.Under the proposed language, a therapist would not be required to issue a warning based solely on potentially unreliable hearsay information received from a third party.[166] This portion of the amendment should be retained and ultimately adopted. The proposed addition of Section 43.92(c) under A.B. 733, however, should not be adopted. To include suggestive but non-binding language in the statute, as this section of the amendment does, is to invite continued vagueness into the interpretation of the statute. Ultimately, if the proposed

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[162] *Id.* at 1.

[163] *Introduction of A.B. 733*, 2005-06 Regular Sess., at 2 (proposed Feb. 17, 2005) (proposal by Assemblyman Joseph Nations to amend Cal. Civ. Code § 43.92 (a)); "(a) There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except where the patient *himself or herself* has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." *Id.* (emphasis added).

[164] A.B. 733, 2005-06 Regular Sess. (Cal. 2005), as amended in Assembly May 10, 2005.

[165] *View the status of A.B. 733 at* http://www.leginfo.ca.gov/bilinfo.html.

[166] *Introduction of A.B. 733*, 2005-06 Regular Sess., at 2 (proposed Feb. 17, 2005) (proposal by Assemblyman Joseph Nations to amend Cal. Civ. Code § 43.92 (a)).

amendment to subsection (a) is not enacted, therapists will be left to guess when and by whom the duty to warn is triggered, and the resulting confusion will have to be dealt with on a case-by-case basis.

B. CIVIL COMMITMENT UNDER THE LANTERMAN-PETRIS-SHORT ACT ("LPS")

A crucial detail to understand at the outset is that the introduction of the LPS Act as a means of addressing situations involving a dangerous patient and a potential victim is not intended to advocate a blanket expansion of the civil commitment process. Instead, the suggestion is that the LPS Act already provides a mechanism for dealing with an extreme situation such as that raised in *Ewing*, while also containing explicit safeguards that clarify therapists' duties and limit liability, protections not made clear in the amorphous duty-to-warn standard established in *Ewing*.[167] The LPS Act, codified under California Welfare and Institutions Code Sections 5000-5579, is an existing method of dealing with dangerous patients that avoids the problems that have already been raised with the expansion of the triggering criteria for the duty to warn, an expansion that makes an understanding of the duty unworkably vague in practice.

Several features of the LPS Act suggest that it would be a better alternative than expanding the criteria that trigger the duty to warn in situations analogous to *Ewing*. First, and perhaps most significantly, the therapist must consider family-member communications regarding the patient's mental state in making the decision to civilly commit under the LPS Act.[168] This stands in direct contrast to the plain language of the *Tarasoff* warning under Section 43.92, which specifies that the therapist must issue a warning when "the patient has communicated to the psychotherapist" an imminent threat of violence against an identifiable third party.[169] Thus, turning to the LPS Act in situations in which a credible threat is relayed by a family member is permissible within the existing parameters of the Act and would avoid the confusion engendered by the *Ewing* court's interpretation of Section 43.92.

Second, acting under the LPS Act when a family-member communication has triggered a therapist's concern enables the therapist to further verify and assess this risk through the use of the seventy-two-

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[167] CAL. WELF. & INST. CODE §§ 5000-5579 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

[168] *See id.* § 5150.05(b).

[169] CAL. CIV. CODE § 43.92 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

hour hold under Section 5150.[170] This added protection, for both the patient and the therapist, is not present under the current reading of Section 43.92 by the *Ewing* court, which compels a therapist to break confidentiality and warn based solely upon the family-member communication.[171] Moreover, after civilly committing an individual, if the treating professionals conclude that the patient does pose an imminent threat to an identifiable victim, they may still issue a warning, the same level of protection provided by Section 43.92.[172] Thus, the crucial difference between the two responses lies not in the level of protection afforded the potential victim, for warnings can be issued in both cases.[173] Rather, it is the fact that the LPS has the safeguard of further evaluation of the patient, which allows the therapist to assess the credibility and accuracy of the family member's communication before deciding to break confidentiality, instead of being compelled to warn based on the communication alone.[174]

Finally, under the LPS Act there are two explicit safeguards in terms of liability for breaking confidentiality based on family-member communications that are absent from Section 43.92. First, under the LPS Act, if a therapist acting on his or her own assessment and informed by family-member communications decides to issue a warning, he or she is unambiguously protected by the statute against liability for breaking confidentiality.[175] Under the *Ewing* court's interpretation of Section 43.92, there is no overt equivalent protection when a therapist is compelled to issue a warning based on a family-member communication that later turns out to be false.[176] In the same vein, the LPS Act contains an explicit safeguard against a potentially false or malicious family-

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[170] CAL. WELF. & INST. CODE § 5150 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

[171] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 871 (Ct. App. 2004); "If information about the serious threat of grave bodily injury is brought to the therapist's attention through a member of the patient's family rather than the patient, may the therapist be relieved of an obligation to act on the information, no matter how credible, simply because it has not come directly from the 'patient'? We do not believe so." *Id.*

[172] CAL. WELF. & INST. CODE §5328(r) (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.); *compare with* CAL. CIV. CODE § 43.92 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

[173] CAL. WELF. & INST. CODE §5328(r) (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.); *compare with* CAL. CIV. CODE § 43.92 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

[174] CAL. WELF. & INST. CODE §5328(r) (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.); *compare with* CAL. CIV. CODE § 43.92 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

[175] CAL. WELF. & INST. CODE §§5259.3(a), 5259.3(b) (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

[176] Ewing v. Goldstein, 15 Cal. Rptr. 3d 864, 866 (Ct. App. 2004).

member communication by imposing civil liability on a party who lies to the therapist about a potential threat.[177] No such unequivocal deterrent exists under the current law governing the expanded duty to warn under *Ewing*, engendering a serious problem, because as one commentator noted,

> [F]amily members may not have the best interests of the patient at heart, may have many agendas, may not be able to assess and predict future violent behavior . . . . As psychologists, we know the reality is that family members are often the major source of stress to the patients we treat. Family members can cause, and have caused physical, sexual, and emotional abuse, which psychologists end up treating. The Court of Appeals has now empowered these family members to force a psychologist to make a report that could have dire consequences for a patient's emotional health and business interests.[178]

Thus, a family member who may have an ulterior motive for informing a therapist about a purported threat is clearly discouraged from doing so under the LPS Act.[179] This explicit deterrent is not contained within Section 43.92.[180]

All the features of the LPS Act described above, from the consideration of family communications, to providing time for assessment, to overt liability protections, have already gathered loose threads left dangling in the *Ewing* decision.[181] This is accomplished through statutory language that makes explicit both the duties and protections that are at the core of a *Ewing* duty-to-warn scenario, and it suggests that potential victims can be protected without resorting to a problematic expansion of the triggering criteria for the duty to warn.[182]

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[177] CAL. WELF. & INST. CODE § 5150.05(c) (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.); "[T]he person making the statement shall be liable in a civil action for intentionally giving any statement that he or she knows to be false." *Id.*

[178] Letter from Dr. A. Steven Frankel, Ph.D., J.D., Legal Counsel of the California Association of Psychology Providers, to The Hon. Ronald M. George, Chief Justice – Associate Justices of the California Supreme Court (Sept. 23, 2004) (on file with the author).

[179] CAL. WELF. & INST. CODE § 5150.05 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

[180] CAL. CIV. CODE § 43.92 (West, WESTLAW through Ch. 12 of 2006 Reg. Sess.).

[181] *See supra* notes 168-178 and accompanying text.

[182] Integral to the success of the LPS Act in this context, but beyond the scope of this article, are a number of process improvements that the mental-health community should consider regarding the protocols designed for dangerous patients. First, the community should advocate for the expansion of psychology licensing and continuing education requirements to include mandatory training on the LPS Act, ensuring widespread and consistent dissemination of information on its use. Second, the mental-health community should also work to improve the links between private

IV. CONCLUSION

In the careful balance between the welfare of potential victims and the protection of confidential psychotherapy, a bright-line rule should be established. The business of violence prediction is simply too fraught with ambiguity to expect therapists to maintain client confidentiality while attempting to navigate the murky waters of a hasty expansion to the duty to warn. This is precisely the situation that the *Ewing* court created when it expanded the therapist's duty to warn to include communications of a possible threat relayed by a patient's family member. Unless the therapist's legal obligations are clarified in the face of these imprecise expectations, we will likely see a preference for over-protective risk management at the expense of patient confidentiality, a development that could significantly impede the practice and success of psychotherapy. A middle ground, that both protects potential victims and respects the need for confidentiality, is a better alternative. Under this scheme, the triggering mechanisms of the duty to warn would once again be narrowly construed. Instead, the LPS Act should be utilized as a more appropriate and narrowly tailored procedure for dealing with potentially dangerous patients and family communications, providing for crisis management and assessment when the therapist has probable cause to believe that the patient is a danger to self or to others. In the final analysis, neither confidentiality nor victims' rights can conscionably be traded away, because both patients and the public are better served when potentially violent individuals get the treatment they need.

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practitioners and in-patient facilities in order to strengthen private practitioners' ability to advise and consult on LPS holds involving their private patients. The law should be amended to state that if a dispute arises between a hospital staff member and a private practice therapist regarding patient admission or discharge, an LPS Hearing officer would then be called in to neutrally evaluate the probable cause under the LPS Act.

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