IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

VITALY TARASOFF, et al., Plaintiff and Appellant, vs. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants and Respondents.	S.F. No. 23042 Super. Ct. No. 405694

MOTION OF
AMERICAN PSYCHIATRIC ASSOCIATION, AREA VI OF THE ASSEMBLY OF THE AMERICAN PSYCHIATRIC ASSOCIATION, NORTHERN CALIFORNIA PSYCHIATRIC SOCIETY, CALIFORNIA STATE PSYCHOLOGICAL ASSOCIATION, SAN FRANCISCO PSYCHOANALYTIC INSTITUTE AND SOCIETY, CALIFORNIA SOCIETY FOR CLINICAL SOCIAL WORK, NATIONAL ASSOCIATION OF SOCIAL WORKERS, GOLDEN GATE CHAPTER, and CALIFORNIA HOSPITAL ASSOCIATION
FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND
BRIEF AMICUS CURIAE IN SUPPORT
OF PETITION FOR REHEARING

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Psychiatric Association, Area VI of the Assembly of the American Psychiatric Association, the Northern California Psychiatric Society, the California State Psychological Association, San Francisco Psychoanalytic Institute and Society, California Society for Clinical Social Work, National Association of Social Workers, Golden Gate Chapter and the California Hospital Association respectfully request that this Honorable Court grant permission for the filing on their behalf of the Brief Amicus Curiae which accompanies this Motion. Each of Amici Curiae has an

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organizational interest in the matters involved in this case, and specifically in the newly announced duty to warn third persons threatened by patients undergoing psychotherapy. The specific interest of each separate organization is set forth in more detail in the body of the Brief accompanying this Motion.

Through their professional expertise in psychotherapy and related disciplines, Amici Curiae are able to provide the Court with information on the realities of psychotherapeutic practice and with the professional literature which bears upon the questions involved in this litigation. For these reasons, Amici Curiae respectfully request that this Court grant leave to file the attached Brief Amicus Curiae.

Dated: January 7, 1975.

Respectfully submitted,

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I

INTEREST OF AMICI CURIAE

The American Psychiatric Association, founded in 1844, is the nation's largest organization of qualified doctors of medicine who specialize in psychiatry. Approximately 20,000 of the nation's 25,000 psychiatrists are members of the Association.

Area VI of the Assembly of the American Psychiatric Association is the constituent organization representing all California members of the American Psychiatric Association. Area VI includes all California district branches of the

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American Psychiatric Association, including the Northern California Psychiatric Society. It has approximately 3,000 members.

The Northern California Psychiatric Society's jurisdiction includes that portion of California north of San Luis Obispo, with the exception of the Central Valley. Like its parent organization, the Northern California Psychiatric Society is an organization of qualified doctors of medicine who specialize in the practice of psychiatry.

The California State Psychological Association is an organization of California psychologists, the majority of whom are directly involved in psychotherapy. It is a state-wide affiliate of the American Psychological Association.

The San Francisco Psychoanalytic Institute and Society is an affiliate society of the American Psychoanalytic Association. It is the official representative of psychoanalysts in the Northern California area.

The California Society for Clinical Social Work is a state affiliate representing approximately 800 clinical social workers licensed to practice psychotherapy in this state.

The National Association of Social Workers Golden Gate Chapter is the professional organization representing 60,000 social workers nationwide, of whom 1,700 are members of the Golden Gate Chapter, whose jurisdiction comprises Alameda, Contra Costa, Marin, Napa, San Francisco and Solano Counties.

The California Hospital Association is a state-wide association of public and private hospitals, representing approximately

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600 institutions. Many of these hospitals provide psychiatric services and care and provide facilities for treatment by private psychotherapists.

Each of these organizations has a professional commitment to the diagnosis, care and treatment of persons with mental or emotional problems. Each of these organizations is devoted to the maintenance of the highest standards of psychotherapeutic treatment and to the scrupulous adherence to codes of professional ethics applicable to the psychotherapeutic relationship. Recognizing that their high professional callings impose on them extraordinary responsibilities to their patients and society, the amicus organizations and their members are committed to fulfilling those obligations according to the highest prevailing standards of knowledge and skill.

Applicable professional ethics require that psychotherapists keep in strictest confidence revelations made to them by patients seeking help, and prohibit the therapist from doing anything in the course of diagnosis or treatment which might injure the best interests of the patient. Amici are convinced that strictest confidentiality is fundamental to the therapist-patient relationship so that troubled persons may feel free to seek professional help, cooperate fully in treatment, and as a result achieve the benefits of therapy.

Each of the amicus organizations is also committed to the principle that all persons with mental or emotional problems are entitled to receive the highest caliber of psychotherapeutic

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treatment. Amici are convinced that the duty to warn threatened victims enunciated in this Court's opinion will place a serious constraint upon the practice of psychotherapy, and consequently deny a substantial number of disturbed persons the requisite standard of treatment which is not only their need, but their right.

Amici are gravely concerned that the Court's natural sympathy for plaintiffs' misfortune in this most peculiar case should not lead to the enunciation of legal doctrines which will constrain and hinder the proper practice of psychotherapy. The background information on the realities of psychotherapeutic practice which this amicus brief attempts to provide demonstrates that under the impulse of the unfortunate and peculiar facts of this case, the Court has adopted a standard of conduct which is incapable of practical application in the psychotherapeutic relationship. In so doing, the Court has upset the proper balance between the conditions necessary for the effective practice of psychotherapy and the requirements of public safety. For these reasons, amici curiae urge that the Court grant the Petition for Rehearing, and reconsider the opinion previously rendered in this case in the light of the new information provided herein.

II

THE ENUNCIATED DUTY TO WARN ESTABLISHES AN UNWORKABLE STANDARD

The decision in this case holds that "a psychotherapist treating a mentally ill patient... bears the duty to use reasonable

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care to give threatened persons such warning as are essential to avert foreseeable danger arising from his patient's condition or treatment." (Opinion, 15.) This newly established duty to warn imposes an impossible burden upon the practice of psychotherapy. It requires the psychotherapist to perform a function which study after study has shown he is ill-equipped to undertake; namely, the prediction of his patient's potential dangerousness.

Additional problems in the practical application of the duty to warn will arise from its very amorphous formulation in the present opinion. Unaddressed are the problems of whom to warn when no specific victim is threatened, the degree of specificity required in the warning, the type of warning which must be given to those who already know at least to some extent that they are threatened, and so forth.

Nor is the only problem with the standard its failure to define more precisely the warning which must be given. The duty to warn will require psychotherapists to reach premature judgments distinguishing between the patient's thoughts, feelings and impulses and his intention, if any, to act upon them. Furthermore, the very foundation of the test upon what a "reasonable psychotherapist" would do, conflicts with the fundamentally individuated nature of the psychotherapeutic relationship which joins the patient and psychotherapist in a cooperative venture unlike any other.

Finally, the duty to warn imposed by this Court places psychotherapists on the horns of an impossible dilemma.

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Under the new rule, if a psychotherapist fails to warn a third person of threats made to him by the patient, the therapist opens himself to liability imposed in the clear 20/20 vision of hindsight. On the other hand, if the psychotherapist does warn the third person, and it is later deemed that the warning was unnecessary, he subjects himself to liability for wrongful invasion of his patient's right of privacy. Given the inherent unpredictability of violent tendencies, the choice left therapists by this Court's decision is truly Hobsonian.

A. Psychotherapists Cannot Predict Violence.

The Court's formulation of the duty to warn fundamentally misconceives the skills of the psychotherapist in its assumption that mental health professionals are in some way more qualified than the general public to predict future violent behavior of their patients. Unfortunately, study after study has shown that this fond hope of the capability accurately to predict violence in advance is simply not fulfilled. The burden of this new duty to warn, therefore, is formulated and imposed without reference to the actual ability of the therapist to sustain it.

As the very recent American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual reported:

> Neither psychiatrists nor anyone else have reliably demonstrated an ability to predict future violence or "dangerousness." Neither has any special psychiatric "expertise" in this area been established. (American Psychiatric Association Task Force Report 8,

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Clinical Aspects of the Violent Individual (July, 1974), 28.)1/

To the same effect, it was recently stated:

> [B]ecause some ex-patients are involved in murders, rapes and other violent crimes, we call upon psychiatrists to predict which ones will become violent. Unfortunately, the assumption that psychiatrists can accurately predict such behavior . . . lacks any empirical support. Rappeport presents the problem: "There are no articles that would assist us to any great extent in determining who might be dangerous, particularly before he commits an offense." Seymour L. Halleck adds: "Research in the area of dangerous behavior . . . is practically non-existent. Prediction studies which have examined the probability of recidivism have not focused on the issue of dangerousness. If the psychiatrist or any other behavioral scientist were asked to show proof of his predictive skills, objective data could not be offered." (Steadman & Cocozza, Stimulus/Response: We Can't Predict Who Is Dangerous, 8 Psychology Today 32, 35 (January, 1975); emphasis added.)

Other recent research reinforces the conclusion that therapists have no special expertise in the prognosis of violence. From an in-depth study of 256 cases of incompetent, indicted felony defendants for whom psychiatric determinations of dangerousness were necessitated by New York law, H. J. Steadman concluded:

> A question that might be raised at this point is whether our data can address the issue of the abilities of psychiatrists to make these

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1/ A copy of this report which summarized much of the important literature has been filed with the Clerk of the Court, since the report is not otherwise readily available. Counsel for amici will be happy to supply the Court with copies of any other professional literature at its request.

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> predictions as to dangerousness. This question rests on the assumption that there are bases in psychiatric training, perspective, and skills that give psychiatrists a special ability to make such predictions. In the 256 cases studied here we have examined how the psychiatric prediction of dangerousness is actually being done. . . . There seemed to be little in the way of special abilities evident in these cases. It is our opinion that our data, together with a lack of documentation in the literature for psychiatric abilities to accurately predict dangerousness, seriously question any assumption that there is such a special psychiatric expertise. (Steadman, Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychology, 1 Journal of Psychiatry and Law 409, 421-2 (1973); emphasis added.)

What these studies and numerous similar ones[2/] show is that

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2/ See Ennis & Litwack, Psychiatry and The Presumption of Expertise: Flipping Coins In The Courtroom, 62 Cal.L.Rev. 693, 711-716 (1974) and authorities cited therein; Steadman, Follow-Up On Baxstrom Patients Return to Hospitals for the Criminally Insane, 130 Am.J. Psychiatry 317 (1973); Steadman & Cocozza, The Criminally Insane Patient: Who Gets Out?, 8 Social Psychiatry 230 (1973); Steadman and Keveles, The Community Adjustment and Criminal Activity of the Baxstrom Patient: 1966-70, 129 Am.J. Psychiatry 304 (1972); Steadman & Halfon, The Baxstrom Patient: Background and Outcome, Three Seminars in Psychiatry 376 (1971); Halfon, David & Steadman, The Baxstrom Women: A Four Year Follow-Up of Behavior Patterns, 45 Psychiatry Q. 518 (1971); Wenk, et al., Can Violence Be Predicted, 18 Crime and Delinquency, 393 (1972); McGarry, The Fate of Psychiatric Offenders Returned for Trial, 127 Am.J. Psychiatry, 1181 (1971); Shah, Crime and Mental Illness: Some Problems In Defining and Labelling Deviant Behavior, 53 Mental Hygiene 21 (1969); von Hirsch, Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons, 21 Buffalo L.Rev. 717 (1971); Livermore, Malmquist & Meehl, On Justification for Civil Commitment, 117 U.Pa.L.Rev. 75; Rosen, Detection of Suicidal Patients: An Example of Some Limitations and the Prediction of Infrequent Events, 18 J. Consulting Psychology 397; Steadman & Cocoza, Careers of The Criminally Insane (Lexington Books) 1974; Rappeport, The Clinical Evolution of the Dangerousness of the Mentally Ill (Chas. C. Thomas, Springfield, Ill.) 1967; Rubin, Prediction of Dangerousness in Mentally Ill Criminals, 27 Arch. Gen. Psychiatry 397 (1972).

absent a prior history of violence, no therapist can accurately predict whether his patient is in fact dangerous or not. This Court's newly formulated duty to warn directly conflicts with this growing body of scientific evidence. In the first place, it assumes that a "reasonable" psychotherapist will under certain circumstances be able to predict violence. In fact, the above-cited studies show that the reasonable therapist acting in conformity with the present standards of his profession cannot make any reliable prediction as to the possibility of his patients' future violence in the absence of a history of prior violent behavior.

The newly imposed duty to warn is also inconsistent with the finding of scientific research that no special professional ability or expertise has yet been demonstrated in the prognosis of dangerousness. Instead, the few studies which have been done "strongly suggest that psychiatrists are rather inaccurate predictors; inaccurate in an absolute sense, and even less accurate when compared with other professionals . . . and when compared to actuarial devices, such as prediction or experience tables." (Dershowitz, The Law of Dangerousness, 23 J. Legal Ed. 24, 46 (1970).)[3/] The California Legislature and the professions

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3/ See also Hakeem, Prediction of Parole Outcome From Summaries of Case Histories, 52 J.Crim.L.C.&P.S. 145, 149-50 (1961); Morris, The Confusion of Confinement Syndrome, 17 Buffalo L.Rev. 651 (1968).

As observed in Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Cal.L.Rev. 693, 733 (1974):

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involved have recognized this problem by the passage of the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000, et seq.) which greatly restricts the authority of psychotherapists to commit patients to mental institutions. (See p. 42-43, infra.)

Thus, the "special relationship" between the psychotherapist and his patient cannot be seen as giving rise to a duty to warn a threatened person since there is nothing "special" in that relationship which gives rise to an ability to predict violence.[4/] Indeed, if the Court is intent upon finding a duty to warn of potential aggressive acts, that duty should more properly attach to members of professions such as correctional officers, actuaries or members of the general public who have proven more able to make such predictions. (Cf., Dershowitz,

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3/ (cont'd.)

> Unlike the task of formulating a diagnosis psychiatrists are not even trained in the assessment or prediction of "dangerousness".... [T]raining and experience do not enable psychiatrists adequately to predict dangerous behavior.

4/ The present situation is therefore unlike those cases cited by the Court (Opinion, 13-14) where some quality of the relationship or some expertise of one of the parties gave him special knowledge of a very high probability of danger. In the psychotherapeutic relationship there is no such expertise with regard to the prediction of violence, and the probability of forseeing danger is very low. As the California Law Revision Commission put it: "The field of psychotics is relatively new and standards of diagnosis and treatment are not as well defined as where physical illness is involved." (4 Cal. L. Revision Com. 830.)

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supra; Hakeem, supra.)

The damage done by the imposition upon psychotherapists of this new duty to warn is not simply confined to the monetary losses which the psychotherapeutic community will incur as a result of being asked to perform a duty of which it is incapable. Far more tragically, as will be shown below (see p. 39-42, infra), the imposition of this duty will reinforce the already observed tendency of the psychotherapist to overpredict violence, thus leading to numerous breaches of the psychotherapeutic confidentiality, making effective treatment impossible, forcing the patient to terminate therapy prematurely and thus increasing, rather than decreasing, the danger to society.

B. Duty to Warn Potential Victim Is Incapable of Operational Definition.

Even if psychotherapists could accurately predict violent tendencies in their patients, the duty to warn threatened third persons imposed by the Court is incapable of workable definition. The practical problems of whom and how to warn defy description in terms which may be implemented in the day-to-day practice of psychotherapy.

To be sure, it might be possible to implement the duty to warn in the extraordinary situation presented in simplified form by the pleadings in this case. However, the more usual circumstance confronting the psychotherapist is not thus amenable to application of the standard developed in this

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Court's opinion.

In the first place, most often the target of a potentially violent person's aggressive tendencies will not be clearly identified as in the instant case. Indeed, research shows that the victim of violence is as unpredictable as the violence itself.[5/] In most situations, there will not be a single person threatened, but rather a more generalized threat to commit violence upon a class of persons or upon the public in general. In these cases, which will by far outnumber those in which a single person is identified as the object of a threat, the duty to warn the threatened person is simply incapable of practical fulfillment.

Even where a particular individual is the target of the patient's aggressive tendencies, that person will rarely be identified. The Court surely does not intend to suggest that a psychotherapist must divide his concentration while engaged in treatment of his patient to undertake a collateral investigation in order to ascertain the identities of persons

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5/ Coleman, Perspectives on the Medical Research of Violence, Am.J. Orthopsychiatry 675 (Nov. 1974); Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Cal.L.Rev. 693, 733-4 (1974); Greenland, Evaluation of Violence and Dangerous Behavior Associated with Mental Illness, 3 Seminars in Psychiatry 345 (1971); Halleck, Psychiatry and the Dilemmas of Crime (Harper & Row, N.Y.) 1967; Jeffrey, Criminal Responsibility and Mental Disease (Chas. C. Thomas, Springfield, Ill.) 1967; Blackman et al., The Sudden Murder 8 Arch. Gen. Psychiatry 289 (1963); McDonald, The Threat to Kill, 120 Am.J. Psychiatry 125 (1963).

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who might be the subject of his patient's threats. Psychotherapists have no qualifications to perform such functions, and the diversion of their time and energy from their proper role as healer would harm society far more than the minimal gains recouped by their untrained efforts at criminal investigation and enforcement. Thus, in the more usual case in which the threat of violence is made against an unidentified person, the duty to warn the threatened person cannot realistically be fulfilled by the psychotherapist.

Furthermore, the duty to warn presents serious practical problems relating to the form, content and urgency with which the warning is conveyed, even in cases of an identified individual victim. As illustrated by Merchants Nat. Bank & Trust Co. of Fargo vs. United States, 272 F.Supp. 409 (D.N.D. 1967), in most such cases, the threatened person has prior knowledge of the threat through other sources. Where the threatened person has learned to live in the relationship in the face of that threat, a simple statement that the threat exists, has intensified or seems more real may achieve little, except exacerbating the potential victim's anxiety.6/

6/ In the vast majority of violent crimes, the victim plays an active role in provoking the violence, normally during the course of a complex, mutually frustrating relationship with the perpetrator. (Sheppard, The Violent Offender: Let's Examine The Taboo, Fed. Probation 12 (Dec., 1971); Lion, Evaluation and Management of the Violent Patient (Chas. C. Thomas, Springfield, Ill.) 1972; McDonald, Homicidal Threats, ch. 5 (Chas. C. Thomas, Springfield, Ill.); McDonald, The Threat to Kill, 120 Am.J. Psychiatry

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Must a psychotherapist then not only attempt to predict his patients' violence but also be compelled to diagnose the the potential victim in order to ascertain the kind of warning which must be given? The mere statement of the question reveals the impossible task which this Court's duty to warn imposes on psychotherapists.

C. The Duty to Warn is Inconsistent With the Nature of Psychotherapeutic Communication.

The novel duty to warn which this Court imposes upon the psychotherapeutic community by its opinion in this case is fundamentally inconsistent with the proper practice of psychotherapy. The opinion appears to be based on a model of psychotherapeutic communication composed of direct factual statements between the patient and his psychotherapist upon which some prediction of future conduct might properly be based. This model, however, bears little or no relationship to the communications between practicing psychotherapists and their patients. Instead, as this Court previously observed in In re Lifschutz (1970) 2 Cal.3d 415, 431, the psychotherapeutic relationship concerns itself at least as much with non-factual matters as with what may be termed "reality statements." Thus, the patient "lays bare his entire self, his dreams, his fantasies, his sins, and his shame." (Id.)

7/ 125 (1963).) Obviously, these "victims" know of the danger in advance but do not seek help or heed warnings; nor are they often willing to confront their own participation in the initiation of the violence. (McDonald, supra; Lion, supra; Sheppard, supra.)

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While the ultimate aim of psychotherapy may, in some cases, be to enable the patient to better distinguish between fact and fantasy, the treatment itself, at least initially, accords equal and undifferentiated weight to each. To gain the patient's trust essential to treatment[7/], the therapist must approach the patient's revelations as a form of communication, as an expression of trust, not distinguishing between the factual and fantasy elements thereof. The duty to warn would impose upon psychotherapists a new function disruptive of proper treatment. It would require therapists to make premature judgments attempting to sort from the numerous thoughts, feelings, fantasies and impulses revealed by the patient those few on which the patient intended to act.[8/]

Not only is this task new and burdensome, but fulfilling it would also interrupt the psychotherapy by requiring the psychotherapist to distance himself from the patient and the therapy. Attempts by the therapist to draw the distinction mandated by the Court will properly be viewed by the patient as a rejection of the therapy, a breach of the trust relationship upon which treatment is, and must be, based. (See n. 7,

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7/ See Adler & Shapiro, Some Difficulties in the Treatment of the Aggressive Acting-Out Patient, 27 Am.J. Psychotherapy 548 (1973); Halleck, Psychiatry and the Dilemma of Crime, 301-339 (Harper & Row) 1967.

8/ See Ennis & Litwack, supra, 62 Cal.L.Rev. 693, 733-4 n. 145..

supra.)

Because psychotherapy does not and cannot properly involve such a fact-fantasy separation, the duty to warn is inappropriate in the psychotherapeutic context and would greatly disrupt the proper treatment of patients throughout the state.

D. The "Reasonable" Therapist Standard Is Unrealistic.

Under the test adopted by this Court, the psychotherapist bears a duty to warn a potential victim where a "reasonable" member of his profession in the same or similar locality and under the same or similar circumstances would consider such a warning necessary to avoid foreseeable danger to third persons. (Opinion, 15, 17-18.) Aside from the previously discussed problems which this standard creates because of the basic unpredictability of violence, the formulation cannot be implemented in practice because, in the unique context of evaluating psychotherapeutic communications, no such "reasonable" therapist or therapeutic decision can be constructed.

While the patient's cooperation is helpful and occasionally necessary to somatic medical treatment, the full cooperation and participation of a patient in psychotherapy is absolutely essential. Indeed, such treatment requires the formation of a working alliance between the patient and the psychotherapist in which each is a fully cooperating and participating member of a joint enterprise.[9/]

9/ See n. 7, supra, and McDonald, Homicidal Threats, 96-101 (Chas. C. Thomas, Springfield, Ill.) 1968.

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Amici sympathize with the Court's desire to establish normative standards in order to balance the conflicting social policies in the instant and similar cases. However, psychotherapy deals with the non-normative components of its patients' personalities through the creation of an individuated working alliance between therapist and patient--an alliance as varied as the non-normative behavior components it confronts. Since the psychotherapeutic relationship is thus non-normative and individuated, it is impossible to fit it into the general normative "reasonable psychotherapist standard" adopted by the Court. Normative standards are simply inconsistent with the individuated nature of the relationship between patient and therapist.

E. The Duty to Warn Places Psychotherapists On the Horns of a Dilemma.

By imposing upon psychotherapists a new duty to warn third parties of their patients' potential aggressive tendencies, this Court has placed psychotherapists in an impossible dilemma. On the one hand, they are liable, as in the present case, if they fail to disclose the content of psychotherapeutic communications. On the other hand, if they do make such disclosure, they open themselves to invasion of privacy suits by their wronged patients.

As this Court has recognized (Opinion, 19), the California Legislature has granted statutory protection to the confidentiality of communications between patient and psychotherapist. (Evid. Code § 1014.) The therapist is permitted to breach

that statutorily mandated confidentiality only when he has "reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." (Evid. Code, § 1024.) It is also clear that if a psychotherapist improperly reveals the contents of the psychotherapeutic communications, he may be held liable for the invasion of his patients' privacy. (Roe vs. Doe, ____ N.Y.S.2d ___ (1974); cert. granted, U.S. Supreme Court Docket No. 73-1446; Berry vs. Moench, 331 P.2d 814 (Utah 1959); Feeney vs. Young, 191 App.Div. 501, 181 N.Y.S. 481.)

By imposing the additional and conflicting duty to disclose by warnings, this Court has required the psychotherapist, under threat of potentially enormous civil liability for a mistake in either direction, to make the correct decision in an area fraught with the potentiality of mistake. If his patient exhibits any signs of potential violence, the psychotherapist is now in a position of having to steer a perfect course between the Scylla of too much disclosure and the Charybdis of a failure to warn. If the psychotherapist does warn the potential victim, but no violence ensues and hindsight suggests that he lacked "reasonable cause" to believe that the warning was necessary to avoid foreseeable danger, he subjects himself to liability for invasion of his patient's privacy. Contrarywise, if he improperly concludes that a

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warning is not necessary and therefore gives no warning to the potential victim, he opens himself to liability under the rule of this case.

Given the inherent unpredictability of future violence as indicated by the studies cited above, the psychotherapist will, under the ruling of this Court, be required repeatedly to make judgments as to the existence of potential violence under the threat of liability no matter which way he decides the issue. Furthermore, the threat of liability is enhanced by the fact that his actions will be judged not in the predictive context in which the psychotherapist must decide, but rather with the 20/20 vision of hindsight. "Failure to warn" suits will, of course, only be brought in cases where violence has occurred; similarly, invasion of privacy suits will be brought only where violence has not occurred. Since in each instance the jury will be confronted with evident damage and will not be exposed to the difficulties of predicting future behavior, the threat of large jury verdicts against psychiatrists on a routine basis cannot lightly be dismissed.

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III

THE COURT HAS MISWEIGHED THE BALANCE BETWEEN THE NEED OF PSYCHOTHERAPY AND THE NEED FOR PUBLIC SAFETY

As this Court recognized (Opinion, 8-9), the question whether there does and should exist a duty of a psychotherapist to warn third parties threatened by a patient cannot be answered by a priori reasoning or resort to legal doctrine. Rather, it is essentially a question of social policy, a weighing of the benefits to be achieved for the individual plaintiff and society by the finding of a duty, on the one hand, against the detriment to defendant and society incurred by the imposition of such a duty, on the other hand. (Cf., Dillon vs. Legg (1968) 68 Cal.2d 728, 734; Rowland vs. Christian (1968) 69 Cal.2d 108, 112-13; Opinion, 8-9.) It is the careful pursuit of this cost-benefit analysis which yields the proper answer to the question of whether psychotherapists have a duty to warn.[10/]

10/ In their treatise on the law of torts, Professors Harper and James express the principle as follows:

> Accidents and their consequences today pose a serious social problem. Its solution calls for two things: (1) measures which will cut down accidents; (2) measures which will minimize the bad effects of those accidents which do happen. These measures must not, however, cost society too much in other directions; they must not, for example, unduly inhibit valuable but dangerous activity. (Fns. omitted; emphasis added; 2 Harper & James, The Law of Torts (1956), § 11.5, p. 742-3.)

See also Johnson vs. State of California (1968) 69 Cal.2d

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Amici respectfully submit that in analyzing the costs and benefits to society in this case, this Court has erred significantly. Perhaps as a result of the lack of prior in-depth briefing of the duty to warn issue and the lack of prior input from the psychotherapeutic professions, this Court's opinion unfortunately greatly overestimates the value to society of the prescribed warnings, while it underestimates the value of psychotherapy as a means of preventing violence and further underestimates the seriousness of the breaches of the patients' rights required by its decision. The balance struck will, unfortunately, not significantly add to the protection of society (and may indeed have the opposite effect), but will gravely infringe upon the constitutional rights of psychiatric patients.

The proper solution to this problem has already been pointed out by the California Legislature in the Lanterman-Petris-Short Act. Under that Act, instead of attempting to protect an individual potential victim by the slender thread of a warning, the Legislature has chosen to treat the source of the problem; namely, the potentially violent person. Pursuit of this course of action is the clinically proper, and the legislatively chosen, method for dealing with potentially

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10/(Cont'd.)
782, 786 & n. 2 in which this Court noted that a duty to warn of potential danger would be inappropriate "in cases in which sufficiently important policy objectives, achievable only by silence, outweigh the obvious interest in cautioning persons exposed to danger."

violent mental patients; it results in greater protection for society and lesser invasion of the patients' rights than does the Court's formulation.

A. The Duty to Warn Does Not Significantly Protect Society.

1. Warning victims does not protect them.

In holding that a psychotherapist has a duty to warn potential victims of an aggressive patient, this Court appears to assume that such a warning would be of substantial assistance in protecting the victim against a threat. In fact, however, such is not the case. Even if a particular victim can be identified and warned, there is little indeed that he can do to avoid the threatened violence. (See n. 6, supra, and accompanying texts.) To be sure, the threatened person may seek to invoke the Lanterman-Petris-Short Act provisions (see Welf. & Inst. Code, § 5201), but the sad truth of the matter is that such efforts all too frequently fall on deaf ears.

Similarly, the potential victim might seek to absent himself so as to avoid the threatened violence. But, as the instant case shows, the threat of violence may not dissipate over a short period of time, so that efforts to evade the threat, to be effective, must involve radical changes in the potential victim's life style.

Indeed, from the threatened person's point of view, the warning may be far worse than useless. It may cause him,

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for an indefinite period, to live under extreme anxiety which itself may induce mental illness.

The very case of Merchants Nat. Bank & Trust Co. of Fargo vs. United States, 272 F.Supp. 409 (D.N.D. 1967), upon which this Court relied in its Opinion (Opinion, 14-15), illustrates the futility of warning the victim. In that case, the Veterans Administration had released a patient to work on a local farm without warning the patient's wife, whom the patient had threatened to kill. Nevertheless, a week before her death the patient's wife met the patient in a nearby town and learned of his release from the Veterans Administration Hospital. Despite this knowledge, about a week later she was dead. The sad truth of the matter is that a warning of potential violence is far more likely to create useless anxiety in the potential victim than to enable him to escape the threatened harm.

While the giving of a warning is, therefore, unlikely to protect the potential victim against the threatened harm, it may well spawn more violence. Very often, the threatened person will be one deeply involved in a psychologically unhealthy relationship with the patient. (Sheppard, The Violent Offender: Let's Examine the Taboo, Fed. Protection 12 (Dec. 1971).) The anxiety created by the psychotherapist's warning may break the third person's link with reality, causing him to become disturbed, to panic and to become himself a danger to others specifically, to the patient. (See n. 6, supra.)

Even without such a mental illness component, the same result may follow from the very powerlessness of the victim to protect himself by any means other than preemptive attack from the threatened harm. Additionally, the threatened person's reaction to the warning, though not violent itself, may trigger the otherwise contained violence of the patient. (See n. 6, supra.)

The duty to warn may also increase violence by encouraging self-fulfilling prophecies of dangerousness. When a psychotherapist is compelled to, and does, draw the conclusion that his patient may become violent, the therapist's own actions may well betray this judgment to the patient. Because of the special relationship between therapist and patient, such suggestion by the therapist that the patient is unable to control his violent impulses may alter the balance of the patient's psychological forces and remove the constraints which previously kept the patient from violence. (See Lion, Evaluation and Management of the Violent Patient (Chas. C. Thomas, Springfield, Ill.) 1972.)

Thus, warning will not significantly reduce the incidence of violence, but may instead increase it.

2. Warning will interfere with treatment, thereby also increasing the chance of violence.

There is yet another reason why the giving of a warning as prescribed by this Court will increase, not decrease the public peril. As this Court apparently recognized in another

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context (see Opinion, 16), psychotherapy plays an important role in neutralizing violence-prone persons. Similarly, this Court has, in other cases, recognized that the success of psychotherapy is founded upon full disclosure and cooperation of the patient, which in turn is predicated upon the absolute assurance of confidentiality. (See In re Lifschutz (1970) 2 Cal.3d 415, 431.) As the Assembly Judiciary Committee commented in adopting Evidence Code Section 1014:

> The Law Revision Commission has received several reliable reports that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community. Accordingly, this article establishes a new privilege which grants to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure their patients that their confidences will be protected. (Emphasis added.) 11/

11/ Medical authorities confirm the need for confidentiality in psychotherapy. "Confidentiality is not a hypothetical matter introduced by psychiatrist. . . . [It] is essential to psychiatric treatment." (Adler & Myerson, Confrontation in Psychotherapy (Science House); see also Summary Report of Task Force on Confidentiality of the American Psychiatric Association.) It has also been stated:

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability

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A further recognized prerequisite for effective psychotherapy is a relationship of trust between the patient and the psychotherapist. The patient's trust in the psychotherapist is particularly crucial for patients threatening violence. Such patients generally exhibit paranoid tendencies, but wish, by revealing the threats of violence, to have the psychotherapist help them protect themselves against the violent urges that they feel. If the psychotherapist is not trusted, the violent potential will not be revealed, nor will treatment proceed.[12/]

The duty to warn which this Court has established undermines both these premises of psychotherapy, thereby

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11/(Cont'd.)

> to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule (and we shall discuss them later), there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment. . . . Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this, it must be possible to communicate freely. A threat to secrecy blocks successful treatment. (Fns. omitted; Group for the Advancement of Psychiatry Report No. 45, Confidentiality and Privileged Communication in the Practice of Psychiatry, 92.)

12/ Adler & Shapiro, Some Difficulties in the Treatment of the Aggressive Acting-Out Patient, 27 Am. J. Psychotherapy 548 (1972); Halleck, Psychiatry and the Dilemmas of Crime, 301-339 (Harper & Row) 1967.

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destroying its effectiveness as a tool of violence prevention for society. By giving the victim the required warning, the psychotherapist would breach, in the most harmful possible way, the confidence of his patient. Furthermore, by aligning himself with the potential victim rather than the patient, the psychiatrist undermines the trust relationship.[13/] In most cases, this double assault upon the essential pre-conditions for effective psychotherapy will render impossible further voluntary treatment of the patient at least by the particular psychotherapist involved, and quite possibly for the profession as a whole.

Indeed, this unfortunate probability is illustrated by the facts of the instant case. Here, it is apparent that Poddar's treatment was improving Poddar's mental state and reducing the threat of his violence. (See People vs. Poddar (1974) 10 Cal.3d 750, 754.) This treatment which, this Court has acknowledged, "might have led [Poddar] to abandon his plan to kill Tatiana" (Opinion, 16) was terminated by Poddar for the very reasons mentioned above. By breaching the confidentiality of the psychotherapeutic relationship and by undermining Poddar's trust in his psychotherapist, the warning given by the Cowell Staff to the campus police halted the medical process which represented the best hope for preventing future violence.

13/ Adler & Shapiro, supra.

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Thus, the instant case provides a tragic illustration of the fact that warning, by breaching the essential psychotherapeutic confidentiality and by destroying the trust relationship, undermine the possibility of treatment and enhances, rather than reduces, the likelihood of violence.[14/]

3. Warnings will require greater resort to less effective, involuntary treatment.

As shown above, the giving of warnings totally undermines effective, voluntary treatment by breaching the confidential nature of the relationship and destroying the patient's trust in his therapist. When the foundation of voluntary therapy has thus been weakened, only involuntary treatment remains as a means of attempting to ameliorate the patient's violent tendencies. Thus, by imposing the duty to warn, the court will increase the number of cases requiring such involuntary care.

14/ As medical authorities have noted:

> The importance of sustained professional contacts with such . . . persons even during periods of apparent conformity and adequacy is stressed as a means of helping the inadequate, oversensitive, and overdoubting individual to maintain at least one area of interpersonal relationship where there is sufficient freedom to express and share his doubts about his existence. . . . [T]he psychodynamic pattern of the kind of persons described in this study is such that without such efforts--they are very likely to end as "sudden murders". (Blackman, The Sudden Murderer, 8 Arch. Gen. Psychiatry 289 (1963).)

Unfortunately, there is general scientific agreement that involuntary treatment is far less satisfactory than voluntary therapy.[15/] In the involuntary situation, resistance to treatment is increased, and the problems of establishing the necessary climate for constructive therapy are greatly exacerbated.[16/] In recognition of this fact, California has adopted the Lanterman-Petris-Short Act, which acknowledges the advantages of voluntary care and the goal of decreasing the use of involuntary therapy.

The duty to warn will have the unintended effect of deterring many persons who seek and continue therapy as a means of averting or resolving problems with their violent impulses or thoughts. This deterrent effect will not be

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15/ Rosenblatt & Mayer, The Recidivism of Mental Patients: A Review of Past Studies, 44 Am.J. Orthopsychiatry No. 5 (OCT 1974); American Psychiatric Association, Position Statement on Involuntary Hospitalization of the Mentally Ill, 128 Am.J. Psychiatry 11 (1972); Brakel & Rock, The Mentally Disabled and The Law, Report of the American Bar Foundation (Univ. Chi. Press) 1971; Chayet, Legal Neglect of the Mentally Ill, 125 Am.J. Psychiatry 785; McGarry, Competency for Trial and Due Process via the State Hospital, 122 Am.J. Psychiatry 623 (1965); Special Committee to Study Commitment Procedures of the Bar Association of New York City, Report and Recommendation on Admission to Mental Hospitals Under New York Law: Mental Illness and Due Process (Corn. Univ. Press) 1962.

16/ Carney, Three Important Factors in Psychotherapy With Criminal Patients, 27 Am.J. Psychotherapy, 220 (1973); Berlin, Treatment for the Violent Offender, 4 Crime and Delinquency 101 (1972); Kalogerakis, The Assaultive Psychiatric Patient, 45 Psychiatry Q. 372 (1971).

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confined to the small number of persons who might actually be violent, but owing to the difficulty and imprecision of predicting violence, the rule will deter many others who may appear to be, or express themselves as, violent, but for whom therapy provides an effective and constructive alternative.[17] Amici submit that the court's decision will, in effect, reduce the opportunity to deal therapeutically with the violent prone individual and complicate the therapy for much larger group of persons for whom psychotherapy is, to begin with, harder to initiate, maintain and successfully conclude, than is the case where other types of behavior are dealt with.[18]

B. The Duty to Warn Seriously Infringes Patients' Rights.

As shown above, warnings to potential victims will generally be ineffective in protecting those persons against violence threatened by psychotherapeutic patients. Furthermore, rather than reducing the amount of violence and protecting society against aggressive acts, warnings may well increase the danger to society by forcing potentially violent persons away from psychotherapy and by inducing violence by the patient or the potential victims. Thus, the societal benefit

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17/ McDonald, The Threat to Kill, 120 Am.J. Psychiatry 125 (1963).

18/ Adler & Shapiro, Some Difficulties in the Treatment of the Aggressive Acting-Out Patient, 27 Am.J. Psychotherapy 548 (1973); McDonald, supra, n. 17.

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to be gained by imposing the duty to warn upon psychotherapists is small indeed.

On the other hand, imposition of the duty to warn will require massive invasions of the patients' constitutional rights to privacy. It will necessitate numerous breaches of patients' right to the confidentiality of their psychotherapeutic communications. It will also deny to a large number of persons badly in need of treatment their right to psychiatric care of their choosing. While the number of actually violent patients may be very small, these invasions of the patients' rights will not be so limited, since the potential liability for failure to warn will reinforce the already existing tendency of psychotherapists to overpredict violence. For these reasons, the detriment to society incurred by the imposition of the new duty to warn will greatly exceed the minimal benefits conferred.

1. The patients' constitutional right to confidentiality.

It requires little argument to demonstrate the proposition that the confidentiality of psychotherapeutic communications has constitutional underpinnings. Both under the Federal Constitution and under the State Constitution, a patient has a right of privacy which encompasses the right to prevent disclosure of revelations made to a psychotherapist.

Indeed, this Court has been a leader in recognition of this constitutional right. In In re Lifschutz (1970) 2 Cal.3d 415,

431-2, this Court stated:

> We believe that a patient's interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots than the California statute and draws sustenance from our constitutional heritage. In Griswold vs. Connecticut (1965) 381 U.S. 479, 484. . . the United States Supreme Court declared that "Various guarantees [of the Bill of Rights] create zones of privacy," and we believe that the confidentiality of the psychotherapeutic session falls within one such zone. [Citation.]

Both at the state and at the federal level, this right to the privacy of psychotherapeutic communications has received renewed recognition and greater emphasis since the Lifschutz decision. Despite this Court's broad reading of the right to privacy in the Lifschutz case and in City of Carmel-by-the-Sea vs. Young (1970) 2 Cal.3d 259, 266-7, the people of the State of California have since determined that that right requires even more emphasis and more protection. To insure that privacy would not be abridged, the people adopted a constitutional amendment on November 7, 1972, changing the language of Article I, Section 1, of the California Constitution to confer upon "all people" the "inalienable right" of "pursuing and obtaining . . . privacy." Likewise, recognizing the social, as well as constitutional importance of protecting patients' rights to confidentiality in psychotherapy, the State Legislature has recently added further safeguards against disclosure of any information obtained in the course of psychotherapy. (See Welf. & Inst. Code, § 5328, et seq.,

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as amended by Stats. 1972, Ch. 1627.)

Similarly, on the federal level, the constitutional right of the patient to the privacy of his communications with his doctor has received renewed attention since 1970. In striking down the abortion laws of Texas and Georgia in Roe vs. Wade (1973) 410 U.S. 113 and Doe vs. Bolton (1973) 410 U.S. 179, the United States Supreme Court has again recognized the role of the constitutional right of privacy in the doctor-patient relationship. By so doing, the Supreme Court adopted in essence the theory of Justice Douglas' dissent in Poe vs. Ullman (1961) 367 U.S. 497, 513, in which that justice observed:

> Of course a physician can talk freely and fully with his patient without threat or retaliation by the State. The contrary throught--the one endorsed sub silentio by the courts below--has the cast of regimentation about it, a cast of war with the philosophy and presuppositions of this free society.

Similarly, in his concurring opinions in Roe vs. Wade and Doe vs. Bolton, Justice Douglas noted:

> The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be in the priest-penitent relationship. (410 U.S. 179 at 219.)

As the Second Circuit has more recently noted in Roe vs. Ingraham, 480 F.2d 102, 108 n. 8 (2d Cir. 1973):

> Indeed, there is language in Doe vs. Bolton, supra, 410 U.S. at 194, 93 S.Ct. 739, from which it could be argued that the Court has already taken the step of extending constitutional protection to the privacy of the doctor-patient relationship.

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Thus, the state and federal constitutional right to the privacy of psychotherapeutic communications, recognized in Lifschutz, has in the years since 1970 been strengthened under both state law and federal decisions. As will be shown below, this constitutional right of the patient, one "implicit in the concept of ordered liberty" (Palko vs. Connecticut (1937) 302 U.S. 319, 325; quoted with approval in City of Carmel-by-the-Sea vs. Young (1970) 2 Cal.3d 259, 266), is most seriously infringed by the judicially imposed duty to warn. At the very least, such a basic societal value should not be sacrificed for so dubious a societal benefit as that conferred by the warnings required by this Court.

2. The patient's right to unhindered treatment.

Not only does the duty to warn violate the patient's right to the confidentiality of psychotherapeutic communications, it also infringes upon another aspect of his constitutional right of privacy; namely, the right to receive without state interference the medical treatment of his choice. This federal constitutional right has been noted by this Court (see People vs. Belous (1969) 71 Cal.2d 954, 963-4), and has recently been thoroughly explored by the United States Supreme Court in Roe vs. Wade, supra, 410 U.S. 113, and Doe vs. Bolton, supra, 410 U.S. 179. In those cases, the Supreme Court held that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." (Roe vs. Wade, supra, 410 U.S. at 153.)

Furthermore, in striking down the provisions of the Georgia abortion statute which required approval of abortions by specially formed hospital committees and a confirmation of the abortion recommendation by two licensed physicians, the Supreme Court recognized the patient's right of privacy in obtaining, unhindered by state interference, the treatment of her and her doctor's choice.

In considering the committee approval provision of the Georgia statute, the Supreme Court noted:

> The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview. (Doe vs. Bolton, supra, 410 U.S. at 197.)

On that basis, the Supreme Court concluded that "the interposition of the hospital abortion committee is unduly restrictive of the patient's rights and needs that, at this point, have already been medically delineated and substantiated by her personal physician." (Doe vs. Bolton, supra, 410 U.S. at 198.) In like manner, the Court struck down the requirement of confirmation by two physicians because it had "no rational connection to a patient's needs and unduly infringes on the physician's right to practice." (Id. at 199.)

As Justice Douglas more fully explained in his concurring opinion:

> Crucial here, however, is state-imposed control over the medical decision whether pregnancy should be interrupted. The good-

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faith decision of the patient's chosen physician is overridden and the final decision is passed on to others in whose selection the patient has no part. This is a total destruction of the right of privacy between physician and patient and the intimacy of relation which that entails.

The right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic to Fourteenth Amendment values. (Id. at 219-20; emphasis added.)

Other recent federal cases have also elaborated upon the patient's right to receive treatment. (See Donaldson vs. O'Connor, 493 F.2d 507 (5th Cir. 1974), cert. granted _____ U.S. _____; Hathaway vs. Worcester City Hospital, 475 F.2d 701 (1st Cir. 1973); Wyatt vs. Stickney, 325 F.Supp. 781 (N.D. Ala. 1971), aff'd. sub. nom. Wyatt vs. Aderholt, ____ F.2d _____ (5th Cir. November 8, 1974); Rouse vs. Cameron, 373 F.2d 451 (D.C. Cir. 1966).)

As will be shown below, the duty to warn infringes upon this constitutionally recognized right of the patient to receive the treatment of his and his physician's choice. By requiring the therapist to warn third parties when, despite his concern that a real threat existed his best judgment is that he can most effectively avoid the danger by continuing to work with the patient on a strictly confidential basis, the state impermissibly intrudes upon the privacy of the medical decision. Furthermore, by requiring disclosure, the duty to warn will result in the denial of proper psychotherapeutic care to a large number of persons seen as potentially violent.

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These intrusions upon the patient's constitutional right to receive the health care of his choice are not justified by any compelling state interest, since, as shown above, warnings will not protect society or its member from patients' violence and less restrictive alternatives will better achieve that result.

3. The duty to warn will require substantial invasions of the patients' constitutional rights.

Both the constitutional right to confidentiality of psychotherapeutic communications and the right to receive medical treatment without state interference will be seriously infringed by the duty to warn third parties.

It needs little discussion to show that a warning to a third party breaches the confidential character of psychotherapeutic communications. Obviously, informing a third person that the patient has made threats against him constitutes a grave exposure of the patient's confidences. Indeed, it appears that this Court has already recognized the seriousness of the intrusion upon the confidential nature of the psychotherapeutic relationship by its duty to warn. (See Opinion, 18-21.)[19/]

19/ As Justice Elkington said in the court below:

> Little imagination is required to recognize the offense against the "psychotherapist-patient privilege" which would result from the rule sought by plaintiffs. Psychiatrists would be legally compelled to divulge their patients'

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Likewise, the duty to warn violates the patient's constitutional right to receive treatment of his and his physician's choice. By requiring the psychotherapist to give such warnings, the Court imposes upon him a duty to act in contravention of his best medical judgment. Such disclosure of patients' revelations to third parties is directly contrary to accepted psychotherapeutic practice. It requires the psychotherapist to harm his patient, rather than help him, and thus forces the therapist to violate what has been called "the first principle of medicine, primum non nocere, "first, no harm."[20/] The disclosure requirement undermines two prerequisites of effective psychotherapy; namely, confidentiality and trust. Consequently, the duty to warn requires the psychotherapist actively to halt the very treatment process he has found necessary.

The duty to warn will further infringe the constitutional right to treatment by denying a large number of potential

19/(Cont'd.)
confidential communications of thoughts or purpose of violence. They would no longer be "able to assure patients that their confidences will be protected." And patients in great need of psychiatric help would tend to avoid doctors in the certain knowledge that disclosure of their ideas and aims of aggression would result in immediate incarceration. (Elkington, J. concurring, 5.)

20/ As even amici in support of plaintiffs admit, "the psychotherapist's primary and overriding obligation is to treat the patient. . . ." (Amici Curiae Brief In Support of Plaintiffs and Appellants, 8.)

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patients the right to ethical treatment. Since a psychotherapist cannot ethically commence or continue treatment when he knows he must breach the twin ethical responsibilities of preserving the patient's confidentiality and preventing any harm to his patient, the effect of imposing a duty to warn may well be to deny the class of persons seen as potentially violent all right to psychotherapy. Even if such patients are begun on a course of treatment, the duty to warn will in many instances force premature termination of treatment. Those seen as potentially violent often exhibit symptoms of masochism, paranoia and depression. In many circumstances, they threaten violence to receive the punishment which, under the influence of their ailment, their sense of guilt and anger requires. In order to treat such persons, the psychotherapist must break out of the punishment-dealing role in which the patient masochistically places others. In imposing upon the psychotherapist the duty to warn, compels Court requires him to adopt this role and thus totally undermines his ability to deal with this type of patient.

In its Opinion, the Court dismisses these serious violations of constitutional rights on the ground that the warning and therefore infringement of constitutional rights will only seldom be required and on the ground that the public interest in safety requires the result. (Opinion, 17, 20-21.) As has previously been shown, the warning does not significantly serve the interest of public safety.

Furthermore, contrary to the Court's assumption that warnings will only infrequently be given under the impetus of the duty to warn, the available medical evidence indicates that warnings are likely to be given in numerous cases where in fact the patient is not violent.

Scientific studies show that since (as demonstrated above) psychotherapists cannot accurately predict dangerousness or violence, they routinely overpredict it. The available statistics show that:

> Because psychiatrists cannot accurately predict who will become violent, they frequently err. Rather than random errors, however, their inaccurate predictions are consistently on the safe side. They overpredict. They assume that since some patients are dangerous, the one under consideration might be. The result of this practice is that as many as twenty harmless persons are incarcerated for every one who will commit a violent act. (Steadman & Cocozza, Stimulus/Response: We Can't Predict Who Is Dangerous, 8 Psychology Today 32, 35 (Jan. 1975).)

This demonstrated tendency to overpredict violence--that is, to predict violent potential when it in fact does not exist--is not only the result of the psychotherapists' desire to take the "safe" way out. It also results necessarily from the fact that the incidence of violence is extremely low. As stated in the official American Psychiatric Association Task Force Report on Clinical Aspects of the Violent Individual:

> Predictions of dangerousness, like those of suicide, are, with few exceptions, predictions of rare or infrequent events. . . . This means that even if the characteristics of such future violent patients could be specified

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> with fairly great accuracy, predictions based upon such characteristics will identify far more "false positives" than "true positives". Even if an index of violence proneness could be developed so as to correctly identify prior to release fifty percent of those individuals who will violate parole by committing violent offenses, the actual employment of such an index would identify eight times as many "false positives" as "true positives." This means that eight of the nine persons retained in prison as a result of the application of the index would not have committed such offenses if released. (Fns. omitted; American Psychiatric Association Task Force Report 8, Clinical Aspects of the Violent Individual, 23-24 (July, 1974).)21/

Of course, by imposing potentially enormous liability upon psychotherapists for failing to predict and to warn of violence, this Court would only exacerbate the already high level of overprediction of violence.

It necessarily follows that this Court's assumption of a relatively low incidence of warnings, and hence of violations of patients' constitutional rights, is simply incorrect. While the number of truly violent patients is indeed very

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21/ This inherent tendency to overpredict violence has been thoroughly explored, not only in the Task Force Report quoted in the text, but also in the following articles: von Hirsch, Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons, 21 Buffalo L.Rev. 717, 729-737 (1971); Livermore, Malmquist & Meehl, On the Justifications for Civil Commitment, 117 U.Pa.L.Rev. 75, 84; Rosen, Detection of Suicidal Patients: An Example of Some Limitations in the Prediction of Infrequent Events, 18 J. Consulting Psychology 397. This necessary fallibility in predicting violence distinguishes the situation here from those cases of somatic medicine relied upon by the Court. (Opinion, 14.) In such cases predictions can be made with far greater certainty and the number of "false positives" identified is relatively low.

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small, warnings will be given in many more cases because of incorrect predictions of violence. For each patient correctly identified as posing a threat of violence, ten to twenty more will be incorrectly found to be dangerous. Thus, for each true victim warned, the Court will be sacrificing the constitutional rights of ten to twenty patients, an obvious and severe injustice.

C. The Statutory Commitment Procedure Is the Proper Method for Protecting Society Against Violent Patients.

As has been shown above, imposing a duty upon psychotherapists to warn persons threatened by their patients will not significantly reduce the public peril, but rather may increase it. The imposition of such a duty is sure to result in the disruption of psychotherapy for numerous patients and in a violation of those patients' constitutional rights. Where, as here, a duty causes greater social detriment than the benefit conferred, it is inappropriate to allow tort recovery. (2 Harper & James, The Law of Torts, supra, § 11.5, p. 742-3; Dillon vs. Legg (1968) 68 Cal.2d 728, 734; Johnson vs. State of California (1968) 69 Cal.2d 782, 782 n. 2.)

In contradistinction to this Court's duty to warn, which attempts to prevent violence by concentrating on the potential victim, the California Legislature has chosen a more effective, and less detrimental method for achieving public security. Through adoption of the Lanterman-Petris-Short Act, the Legislature has provided a means for segregating

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potentially violent persons from society, while still allowing psychotherapy to proceed in order to cure the patient of the violent tendencies. As plaintiffs themselves, recognize, Welfare and Institutions Code Section 5000, et seq., "establish an orderly procedure by which mental health professionals may carry out their duty to safeguard the public and their patient." (Appellants' Opening Brief in the Court of Appeal, 7; see also Appellants' Reply Brief in the Court of Appeal, 5-6.)

Amici respectfully submit that this legislatively chosen means for protecting society against potential violence committed by mental patients provides a more effective guarantee of social safety, while at the same time imposing less of a burden upon patients. By attempting to treat the potential victim rather than the patient, this Court has adopted a test which not only conflicts with the statutory scheme, but also results in serious detriment to society with a minimum of compensating benefits.

IV

CONCLUSION

Amici have filed this brief in the hope that the scientific data, presented by this brief for the first time in this case, will permit the Court to evaluate more fully the impact of its decision upon the psychotherapeutic community, and to assess more meaningfully the conflicting social policies and factors relevant to the imposition of the duty

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to warn.

Amici submit that in assuring recovery for the plaintiffs in this case, the Court has been drawn by its natural sympathy for their grave misfortune to formulate a standard of conduct which directly conflicts with the best available scientific knowledge. Medical research convincingly demonstrates that psychotherapists are not in a position to predict violent tendencies in their patients and thus cannot reasonably fulfill the newly imposed duty to warn threatened persons.

The adopted rule poses insuperable difficulties in practical application and interjects a new, foreign and disruptive element into psychotherapy. It attempts to impose a general norm upon essentially individual and non-normative relationships, and in the process, threatens psychotherapists with enormous liability for any mistake in decisions they are not qualified to make.

Most importantly, the Court's exclusive concern with the victims of violence leads it to the creation of a duty to warn which will achieve little actual protection at a great societal of infringed constitutional rights and prematurely terminated therapy.

Amici submit that the more beneficial approach to the problem of potentially violent mental patients has already been established by the Legislature in the Lanterman-Petris-Short Act. By focusing on treatment of the source of the problem - the patient - the civil commitment process established by that Act protects

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the patient's rights, continues the necessary psychotherapy, and affords greater protection to society than can any warning of a potential victim.

All this is, of course, not to say that recovery must be denied in the instant case. Rather, amici submit that the rule here must be narrowed to the more particular facts here involved. A suitable duty, consistent with the needs of psychotherapy, might be formulated to require warning of the potential victim where the psychotherapist has already determined to breach the confidentiality of the relationship by seeking to invoke the Lanterman-Petris-Short Act, but for some reason, as here, fails to complete those procedures. Such a rule would avoid the massive breaches of the patient's constitutional rights required by the Court's duty to warn, as well as fit more harmoniously with the existing statutory structure. It would allow recovery in the unique circumstances here without imposing an impossible burden on psychotherapy.

Dated: January 7, 1974.

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned, state that I am a citizen of the United States and employed in the City and County of San Francisco, State of California; that I am over the age of eighteen years and not a party to the within action; that my business address is One Embarcadero Center, San Francisco, California 94111; that on the date set out below, I served an original and ten copies of the attached

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

by hand at the office of its Clerk, State Office Building, State of California, and I served a true copy of said document on the persons listed below by placing said copy enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Post Office mail box at San Francisco, California, addressed as follows:

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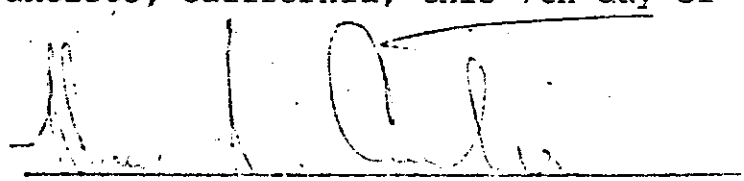
I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, this 7th day of January, 1975.



Mary A. Curtis