

For Whom the Bell Tolls: Silver Alerts Raise Concerns Regarding Individual Rights and Governmental Interests

Tobias D. Wasser, MD, and Patrick K. Fox, MD

The Silver Alert system was initially created to help protect missing persons who have cognitive impairments, particularly the elderly. The Silver Alert is modeled after the Amber Alert, created to help locate and safeguard missing children. Unlike the Amber Alert, however, in most states the Silver Alert applies to the elderly, adults with a mental impairment, or both, depending on the state. The goal of the Silver Alert system is the quick dissemination of information about missing persons to law enforcement personnel as well as to the general public. Previously, states notified law enforcement personnel of missing persons through teletype to other public safety jurisdictions to enlist their assistance in the retrieval of the missing person. Silver Alert programs substantially expand the notification to include the general public, who receive information through radio and television broadcasts as well as highway billboards. The programs serve a legitimate governmental interest by protecting a vulnerable population from possible harm. Yet, the implementation of these alerts can have unintended consequences, including the possible violation of an individual's right to privacy. Such consequences require careful consideration.

J Am Acad Psychiatry Law 41:421–9, 2013

It is estimated that 5.4 million Americans currently have Alzheimer's disease, the most common cause of dementia in the United States. This disease afflicts 13 percent of Americans over 65 years of age and 43 percent of those over 85.¹ More than 60 percent of those with dementia will, at some point during the course of their illness, wander from their place of living.² In patients who have dementia, wandering has been associated with an increased risk of accidents, institutionalizations, and falls.³ The number of Americans with Alzheimer's disease and other dementias is predicted to grow each year as the proportion of the U.S. population over the age of 65 continues to increase. This age group is expected to increase rapidly in the coming years as the baby boom generation ages. By 2030, the number of people in the United States aged 65 and older with Alzheimer's disease is predicted to reach 7.7 million, a

nearly 50 percent increase in the disease's current prevalence.¹ These sobering statistics and the significant risk of harm to those who wander have served as the impetus for the creation of Silver Alert programs, which have been used increasingly in a growing number of states.

The Origin of Silver Alerts: A Historical Perspective

In April 2004, Mattie Moore, a 68-year-old with Alzheimer's disease wandered from her Georgia home. Her body was later located only 500 yards from her house. Her tragic and arguably preventable death led to the creation of state legislation that served as the precursor to the Silver Alert system. Designed to help in missing persons cases involving individuals with Alzheimer's disease, dementia, and other mental disabilities, the statewide Mattie's Call program was enacted in Georgia in April 2006.⁴ The inception of the first program under the name Silver Alert came in December 2005, when Oklahoma state representative Fred Perry announced his intention to introduce an Amber Alert for seniors, which he dubbed the Silver Alert. He drafted a resolution calling for such a system, which was passed by the Oklahoma House of Representatives in March 2006 and

Dr. Wasser is a Resident in Adult Psychiatry, Department of Psychiatry, Yale University School of Medicine, New Haven, CT. Dr. Fox is Deputy Director for Clinical Services, Office of Behavioral Health, Colorado Department of Human Services, Denver, CO. Address correspondence to: Tobias D. Wasser, MD, Department of Psychiatry, Yale University School of Medicine, 300 George Street, Suite 901, New Haven, CT 06511. E-mail: tobias.wasser@yale.edu.

Disclosures of financial or other potential conflicts of interest: None.

was signed into law in April 2009 by Governor Brad Henry.⁵ In February 2008, Mary Zelter, an 86-year-old Floridian, drove away from her assisted-living facility and never returned. Her body was found a week later, prompting local officials to create a Silver Alert pilot program that later grew into a statewide initiative.⁶

According to published data, the existing Silver Alert programs have been quite effective. The disparate criteria for and implementation of Silver Alert systems makes it difficult to obtain national statistics for the recovery of missing persons as a direct result of Silver Alerts. In North Carolina, 128 Silver Alerts were issued in 2008, resulting in 118 seniors safely recovered.⁷ In Georgia, Mattie’s Call garnered a safe return for 70 of the 71 calls issued between its inception in 2006 and January 2009.⁸ In Texas, the Silver Alert system was invoked 52 times in the first year following its inception in September 2007. Of the missing seniors in those alerts, 48 were located safely, and 13 of those recoveries were directly attributable to the Silver Alert.⁹ In Florida, 554 Silver Alerts have been issued in its first four years (2008–2012), leading to 539 safe recoveries, with 68 of these recoveries directly attributable to the program.¹⁰

Public interest in preventing such tragedies and the successes achieved to date by states that have implemented a Silver Alert system have led to the increasing adoption of such programs, with 37 states having implemented or having plans to implement (legislation pending) a Silver Alert or similar program as of July 2012.^{11,12} The idea has gained sufficient national attention that the National Silver Alert Act is currently pending in the 112th Congress, having been reintroduced by Senator Herb Kohl of Wisconsin and Senator Joe Manchin of West Virginia on June 23, 2011; the bill is currently awaiting consideration in the Senate.¹³

State-to-State Comparison

Although many states refer to their established system for disseminating information to the public about missing adults as a Silver Alert system, the definitions and criteria for persons to whom the Silver Alert system applies varies widely from state to state. Some states require only that the missing person be older than a specified age, whereas other states require the presence of particular mental health conditions or a risk to the individual’s health and safety

Table 1 Silver Alert Eligibility Criteria Groups

Senior Citizens Only	Specified Mental Health Condition	Other Cognitive Impairments and Disabilities	
Alabama	Colorado	Arizona	Minnesota
California	Florida	Arkansas	Mississippi
Hawaii	Georgia	Connecticut	Missouri
Louisiana	Kansas	Delaware	New York
Nevada	Maryland	Illinois	North Carolina
New Jersey	Massachusetts	Indiana	Ohio
Pennsylvania	New Hampshire	Kentucky	Oklahoma
Texas	New Mexico	Maine	South Carolina
Virginia	Rhode Island	Michigan	Tennessee
	West Virginia		

based on grave disability. The most commonly applied inclusion criterion is an age restriction of 65 years or older.¹⁴ The second most common criterion is proof of a cognitive impairment provided by either a clinician or a caregiver.¹⁴ Certain states cite particular mental health conditions, most notably dementia, as an explicit criterion for eligibility. Others cite dementia with the inclusion of additional conditions or disabilities, whereas some states refer to a mental or cognitive impairment when describing those younger than 65 who are eligible for the alert. In addition, the proof needed to activate the Silver Alert and the persons permitted to request its activation varies by state.

Table 1 and Figure 1 outline the Silver Alert eligibility criteria groups. Nine states, comprising the senior citizens-only group, limit their alerts to those who are 60 or 65 years of age or older (Alabama, California, Hawaii, Louisiana, Nevada, New Jersey, Pennsylvania, Texas and Virginia).^{11,14–21} In this group, some states require that individuals have an impaired mental condition, cognitive impairment, or irreversible deterioration of intellectual faculties (California, Louisiana, Pennsylvania, Texas, and Virginia); others require that the disappearance pose a credible threat to the person’s health and safety (Alabama, Louisiana, Nevada, Pennsylvania, Texas, and Virginia); and still others have a single criterion based solely on age (Hawaii and New Jersey). In the 10 states (Colorado, Florida, Georgia, Kansas, Maryland, Massachusetts, New Hampshire, New Mexico, Rhode Island, and West Virginia) requiring a specified mental health condition, eligibility includes all individuals 18 years of age or older with a specifically defined mental or cognitive impairment,^{14,22–31} including Alzheimer’s disease, other dementias, irre-

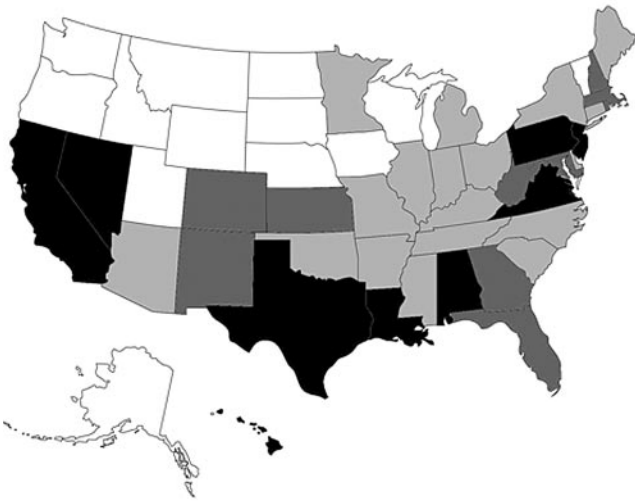


Figure 1. State map according to Silver Alert eligibility criteria. □—no Silver Alerts currently in place; ■—senior citizens only; ■—specified mental health condition; ■—other cognitive impairments and disabilities.

versible deterioration of intellectual faculties, degenerative brain disorders, a deficiency in short- or long-term memory, risk of harm to self, developmental disabilities, disorientation, impaired judgment not related to substance abuse, or a combination of any of these. The 18 states in the third and largest group (Arizona, Arkansas, Connecticut, Delaware, Illinois, Indiana, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Oklahoma, South Carolina and Tennessee) require that eligible persons be at least 18 years of age and have a cognitive impairment or disability, but do not specify conditions that mandate their inclusion.^{11,14,32–46} Some states cite specific illnesses, such as dementia, but also use catch-all phrases, such as other cognitive impairments, other health problems, or other disabilities (Alaska, Delaware, Illinois, Indiana, Kentucky, Maine, Michigan, Mississippi, New York, North Carolina, Oklahoma, South Carolina, and Tennessee). In addition, within this group, five states use terms such as mental impairment, cognitive impairment, or disability without definition or example of the conditions to which the terms would apply (Arizona, Connecticut, Minnesota, Missouri, and Ohio).

The National Silver Alert Act of 2011

In an effort to encourage a greater number of states to adopt Silver Alert systems, members of the Senate constructed a national bill entitled the National Sil-

ver Alert Act of 2011.⁴⁷ This bill was introduced in the 112th Congress on January 5, 2011, and reintroduced on June 23, 2011. The Act promotes the creation of programs to aid in locating the missing elderly, which it defines as any individual who “meets the requirements to be designated as a missing senior, as determined by the State in which the individual is reported or identified as a missing person” (Ref. 47, p 2). The bill’s language imposes no specific age requirements by stating that:

The minimum standards shall not include any specific age requirement for an individual to be classified as a missing senior for purposes of the Silver Alert Communication Network. Age requirements for determination of whether an individual is a missing senior shall be determined by each State and may vary from State to State [Ref. 47, pp 9–10].

However, for a missing senior to be considered eligible for the issuance of a Silver Alert, the Act specifies that a state must first determine “whether the mental capacity of a senior who is missing, and the circumstances of his or her disappearance, warrant the issuance of a Silver Alert” (Ref. 47, p 4).

The national bill envisions a communications network unconstrained by state jurisdictions or boundaries. It proposes the establishment of a Coordinator of the Silver Alert Communications Network within the Department of Justice. The coordinator is to create an advisory group tasked with providing

... assistance to regional and local search efforts for missing seniors through the initiation, facilitation, and promotion of local elements of the network (known as Silver Alert plans) in coordination with States, units of local government, law enforcement agencies, and other concerned entities with expertise in providing services to seniors [Ref. 47, p 2].

In regard to the need for greater uniformity in the manner in which states adopt and use Silver Alert Programs, the duties of the coordinator also include the establishment of voluntary guidelines for states to consider when developing their programs (Table 2). The Act stipulates that particular attention be paid to both the criteria for evaluating whether a situation warrants the issuance of a Silver Alert and the protocols that should be followed when executing a Silver Alert search, including the development of a public safety communications protocol.

The national bill recognizes that a Silver Alert notification has the potential to curtail an individual’s right to privacy. It requires that the coordinator provide recommendations to the attorney general “on how to protect the privacy, dignity, independence,

Table 2 Duties of the Coordinator of the Silver Alert Communications Network

Create advisory group
Establish voluntary guidelines for the states
Evaluate when silver alerts are warranted
Develop protocols
Make recommendations to the attorney general
Protect privacy and autonomy
Establish minimum standards
Compose and submit annual reports to Congress

and autonomy of any missing senior who may be the subject of a Silver Alert” (Ref. 47, p 4). It also establishes the need for minimum standards, “that specifically provide for the protection of the civil liberties and sensitive medical information of missing seniors” (Ref. 47, p 10). In addition, the Coordinator of the Silver Alert Communications Network is to compose and submit to the U.S. Congress an annual report on the extent of the states’ adoption of Silver Alert programs, the effectiveness of the programs in locating missing seniors, the process by which Silver Alerts are disseminated, and the costs associated with implementation and operation of the programs. As a further incentive for states to adopt a Silver Alert system, the Act permits Congress to provide financial appropriations through federal grants made available to states that develop and implement programs consistent with federal guidelines.

Although the duties of the Coordinator of the National Silver Alert Program include the establishment of guidelines aimed at creating a more uniform set of standards, the guidelines are merely recommendations and carry no enforcement authority. If approved by Congress and signed into law, the National Silver Alert Act of 2011 will bring widespread attention to this important public health initiative.

Discussion

On its face, the National Silver Alert Act of 2011 serves a legitimate governmental interest, the protection of its citizens. For a state to assert that interest by activating a Silver Alert, the missing person’s safety must be at risk. However, the Act’s reliance on each state to determine eligibility criteria for issuance of a Silver Alert allows states to use criteria that do not account for the individual’s safety, such as age or mental impairment alone. Eligibility criteria that do not incorporate danger to health and safety as a prerequisite for activation do not have the elements nec-

essary to qualify as a governmental interest sufficient to allow the invasion of privacy inherent in the activation of a Silver Alert.

A significant problem is that several states already have as the only defining criterion for the issuance of an alert that an individual be of a certain age, irrespective of any other factors. Yet, the Age Discrimination Act of 1975 was enacted to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance.⁴⁸ The Act recognizes that certain classes of individuals may receive disparate treatment, as long as the differentiation made by such action is based on reasonable factors other than age. States with Silver Alert notification eligibility based solely on age may arguably run afoul of the Age Discrimination Act. They may also violate the established common law presumption of competence that applies for all adults in the United States. The additional reasonable factors must directly relate to an identified governmental interest, or they may be challenged as a violation of substantive due process or equal protection under the 14th Amendment,⁴⁹ due to the unjustified deprivation of an individual’s privacy.

The National Silver Alert Act recognizes that the public dissemination of a person’s private information, including a diagnosis of mental impairment, may constitute a violation of privacy. It seeks to balance this right against the need to locate promptly those missing persons who may be at risk. Although the currently proposed national bill does not include language that specifically addresses the appropriateness of public notification through media and other mechanisms, numerous state Silver Alert systems include this provision and have used it to aid in locating missing persons. In its current inchoate form, the bill acknowledges the need to create minimum standards to protect the liberty interests and privacy rights of the missing senior, including the protection of sensitive medical information, but provides no clear guidelines as to how this protection is to be achieved. The Act also provides “that appropriate information relating to the special needs of a missing senior (including health care needs) are disseminated to the appropriate law enforcement, public health, and other public officials” (Ref. 47, p 9). This stipulation may prove to be pragmatically difficult to implement in those states that do not include some form of mental incapacity in their eligibility criteria, as there

would be no basis on which to release private health information.

The Health Insurance Portability and Accountability Act (HIPAA) outlines the conditions under which the disclosure of sensitive health information is legally permissible in the United States. Under HIPAA, disclosure of protected health information is permitted without an individual's authorization in particular situations. Disclosure of this information to law enforcement agencies is permitted for the purposes of identifying or locating a suspect, fugitive, material witness, or missing person.⁵⁰ Thus, the mere act of informing law enforcement personnel of a person's disappearance as outlined in the Act does not constitute a HIPAA violation. However, the subsequent ramifications, most notably the dissemination of this information to the general public, may be of concern. A central aspect of the Privacy Rule described within HIPAA is the principle of minimum necessary use and disclosure, which instructs that reasonable efforts must be made to use, disclose, and request only the minimum amount of protected health information necessary to accomplish the intended task.⁵¹ Disclosing this protected health information to the general public raises questions as to whether the extent of the disclosure is more expansive than is necessary and thus may run contradictory to HIPAA's permissible-disclosure conditions.

Another complication that may arise from the Act's reliance on individual states to determine eligibility criteria is the potential for missing persons to cross boundaries between states that have discrepant Silver Alert criteria. In such a case, it is unclear which state would have jurisdiction and be responsible for activating a Silver Alert. In addition, if the individual meets criteria for activation in one state but not the other, which state's criteria take precedence? The Act does not provide guidance regarding how to address such jurisdictional questions.

The federal Act has the potential to serve as a unifying piece of legislation that would help to correct many of the inadequacies of individual state programs by providing uniform national standards. The bill could specify that Silver Alerts apply to all individuals greater than 18 years of age, for whom disappearance poses a credible threat to health and safety. Such a requirement would eliminate the shortcomings of and discrepancies between many of the current state bills and provide a guiding foundation for

future states in creating such programs. Yet the proposed legislation fails to do so, as it relies on individual states to maintain or create their own definitions.

Individual Rights Versus Governmental Interests

Silver Alerts are intended to address a clear societal interest by helping to locate missing individuals who may be at risk. Although many jurisdictions have historically issued teletypes through law enforcement and other public safety agencies to locate a missing person, Silver Alerts represent a significant broadening of the notification to include members of the general public. In evaluating the constitutionality of such a disclosure, an analysis of the competing interests should balance the government's interests, the individual's interests, the risk of erroneous deprivation of privacy, and the probable value of additional procedural safeguards.⁵²

Given the potential for substantial societal benefits from Silver Alerts and their ability to help protect a vulnerable population, the government's interest in protecting its citizens may outweigh the individual's interests if sufficient procedural safeguards are enacted to protect the individual's right to privacy. Thus, the inclusion criteria for Silver Alerts should not be determined merely by standards of age or the presence of mental illness. These broad categories cast too wide a net and contribute to the pragmatic complications outlined herein. The eligibility criteria should be further specified to include only those missing adults with a mental impairment whose disappearance poses a significant risk to their health and safety. Silver Alert schemes that propose the public dissemination of information clearly favor the government's interests over the individual's privacy. Although a person for whom a Silver Alert is issued may be too impaired to appreciate that a disclosure of personal information, including health information, has occurred, these individuals are entitled to at least the same protections as other adults.

The criteria for activation of an alert must be more strictly defined so that any intrusion of the individual's privacy is limited to those situations in which public disclosure is absolutely necessary for the preservation of life. Unfortunately, as of now, many states with Silver Alert programs include a mental or cognitive impairment requirement that is vaguely defined and lacks guidance as to which conditions or examples would satisfy this criterion, leading to po-

tential abuses or to the inappropriate activation of a Silver Alert far beyond the system's intended scope. For example, such a criterion could allow for the activation of a Silver Alert when a competent adult leaves a substance abuse rehabilitation facility against medical advice or a young adult with a history of depression intentionally absconds from his parents' home. Explicit, narrowly defined criteria are necessary to avoid such improper activations of the Silver Alert system.

The right to privacy is deeply rooted in American jurisprudence through common law and, to an extent, the United States Constitution. The Constitution recognizes certain privacy interests, but does not establish a general right to privacy. Advancement of the notion of a right to privacy gained greater attention and acceptance in the latter part of the 19th century, with the publication of an article entitled, "The Right to Privacy" by Louis D. Brandeis and Samuel D. Warren.⁵³ In their publication, the authors expressed the need for safeguards to prevent newspapers from exposing the private lives of citizens to the general public. Later appointed as a justice to the United States Supreme Court, Brandeis interpreted the Constitution as protecting a general right to privacy in his dissenting opinion in *Olmstead v. United States*, in which he wrote, "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, against the government, the right to be let alone—the most comprehensive of the rights of man and the right most valued by civilized men."⁵⁴ Later United States Supreme Court cases, such as *Griswold v. Connecticut*⁵⁵ and *Roe v. Wade*,⁵⁶ further advanced the notion of a citizen's right to privacy.

Public notification of an individual's disappearance predicated on the presence of a mental or cognitive impairment is an explicit infringement on an individual's privacy. There are certain instances in which an individual's privacy must give way to other interests, such as the well-being of its citizenry (*e.g.*, *Tarasoff*).⁵⁷ Therefore, the risk of harm must be sufficiently substantial to create a compelling governmental interest that outweighs the individual's privacy. The government's interests and the individual's privacy are not mutually exclusive. Only a compelling governmental interest for the purpose of the preservation of life should override any right to privacy, not merely the presence of a mental impair-

ment or satisfaction of an age requisite. For states that specify mental impairment as an element of eligibility, public disclosure of a person's disappearance through activation of the Silver Alert implies that the individual in question has been found to have a mental impairment. Activation of a Silver Alert merely on the basis of a person's age or the presence of a mental impairment could be argued on equal-protection grounds, as neither directly creates sufficient governmental concerns to warrant disclosure of information that would otherwise be considered private. In addition, for individuals for whom the alert is activated to be protected and the intrusion into their privacy minimized, the scope of the disclosure must be geographically limited to those areas in which those alerted would be considered reasonably able to aid in locating the missing persons.

A further consideration is the potential undue burden the use of poorly defined terms such as mental impairment may place on law enforcement personnel who must determine what condition meets the criterion, particularly in states that do not require these conditions to be documented by a mental health professional. Law enforcement personnel are not likely to be qualified to determine what constitutes a mental impairment. Such vague terminology may lead to great variability in how the alert system is used within a single state, and fear of the repercussions from a failure to activate a Silver Alert may lead to its overuse. Without more narrowly defined eligibility criteria, the responsibility placed on law enforcement personnel may be unreasonable and inappropriate.

To Call or Not to Call: The Role of Mental Health Providers

Several questions arise with respect to the Silver Alert system and health care providers. For instance, what role should mental health providers play in the Silver Alert system? If a mental health provider is aware of a missing gravely disabled patient with mental illness whose disappearance poses a risk because of the person's disability, how should the clinician proceed? Should the provider make an exception to the confidential nature of the treatment relationship by reporting the disappearance to the police and request that a Silver Alert be activated? If so, would mental health providers be considered mandated or permissible reporters, and what is their liability if they fail to report? Should they be activators of the system or

instead have the responsibility to inform the family of the disappearance and thus place the onus on relatives for asking law enforcement to issue a Silver Alert? What if there are no family members, friends, or other identified individuals to contact? To date, Silver Alert systems do not directly address these ethics-related and legal concerns, which are already arising for mental health workers.⁵⁸

In the United States, doctor-patient confidentiality is a time-honored and respected principle that has been supported by state and federal legislation. There are certain instances in which physicians may be mandated to disclose to third parties information obtained in the course of treatment. Examples of this include risk of harm to self, risk of harm to an identifiable third party, and reasonable suspicion of child or elder abuse. In each of these instances, confidentiality is superseded by a need to protect the patient or others from foreseeable harm. In the case of suspected child or elder abuse, many jurisdictions mandate timely disclosure to other government authorities, such as child or elderly protective services. For instances in which persons are mandated to report suspicions of abuse, most jurisdictions include provisions to limit the disclosure to the necessary authorities and require that the information disseminated be only that which is necessary for the government authority to fulfill its duty to investigate the allegations. By contrast, public broadcast of the mental condition of a missing adult through activation of a Silver Alert is antithetical to the notion of privacy and confidentiality. Even with the best available protections in place and geographic limitations established to minimize the extent to which the information is broadcast, the missing person's private health information is being transmitted via television, radio, and highway billboards¹⁴ to their local and possibly city- or state-wide community. In the process of carrying out a Silver Alert, the actions taken to achieve its goal do not allow the opportunity to limit the dissemination of information to nearly the same degree.

In cases of suspected child or elder abuse, clinicians are mandated reporters because of the concern that the clinician may be the only person with knowledge of the illegal and dangerous behavior. Thus, if they do not report the information obtained, it may go unreported and result in further harmful consequences. Thus, situations in which a health care pro-

vider is mandated to report are distinguished from Silver Alert notifications. The missing person may have family or other close contacts whom the clinician can contact and inform of the patient's disappearance. If the missing person is in a facility at the time, the procedure could require that the facility notify the next of kin of the event and the availability of Silver Alert notifications and provide information to aid the family in requesting activation, without the facility staff's making the direct disclosure. This method would diminish the ethics-related complications involved with requiring mental health providers to be activators of a system that disseminates private and protected health information about their patients. Although the broadcast would still occur, the information would come from someone without the duty of preserving a privileged relationship with the missing person. Mental health providers could still enact the existing teletype system used when patients go missing from the inpatient setting, but there would be no need for them to play a part in the Silver Alert activation.

What if a clinician has no information or ability to inform a close relative or friend of a missing person who meets the criteria for activation of a Silver Alert? In such a case, the clinician must weigh the risk that the disappearance poses to the patient's health and safety against the potential risk resulting from such a disclosure. If no alternative reporters are available, the situation becomes somewhat analogous to that of suspected child or elder abuse. This scenario could constitute an exception in which the clinician is compelled to report to the police in an effort to activate the alert system, as failure to do so would constitute a harmful omission. There are similar situations in other fields of medicine. For example, with an unconscious patient, the physician must make emergent medical decisions that he believes are in the best interest of the patient. Similarly, the mental health provider in this case must act in the best interest of the patient. When a patient's disappearance raises significant concern for potential harm due to the person's mental illness, the clinician may assume the necessity of substituted judgment to release private information to law enforcement personnel in an effort to activate a Silver Alert. If instead the clinician is bound not to take part in the activation of a Silver Alert, the patient would be at greater risk of not being found and of subsequent harm.

Conclusion

An alert system designed for quickly locating missing adults at risk is laudable and addresses on its face a legitimate governmental interest: the protection of those who cannot protect themselves. However, with the broadening of Silver Alert eligibility criteria to include individuals with poorly defined cognitive deficits, several practical, ethics-related, and legal concerns have come to light. Procedural safeguards must be maximized to protect the privacy of these individuals. In particular, the eligibility parameters for Silver Alert activation in all states must be more specifically and narrowly defined. In addition, the role of mental health providers in the activation of Silver Alerts should be more thoroughly explored and defined, with particular attention paid to ethics-related concerns and to legal and professional considerations.

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