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Psychotherapist-Patient Sex: A Proposal for a Mandatory Reporting Law

Studies indicate that approximately five percent of male psychologists and psychiatrists and less than one percent of female psychologists and psychiatrists have engaged in sexual intercourse with their patients during the course of treatment.¹ An alarming eighty percent of those therapists who have engaged in sexual relations with a patient have done so with more than one patient.² The widespread extent of this conduct is evident when one recognizes that in excess of 31,000 psychotherapists are licensed in California.³ Furthermore, projections based upon enrollment figures and immigration from other states indicate that this figure will swell to over 43,000 by 1987.⁴

Psychotherapist-patient sex typically involves middle-aged male therapists and young female patients.⁵ Harmful consequences generally befall these patients who have sexual relations with their therapists.⁶ Common symptoms include a decrease in self-esteem and an increase in guilt, depression, and alcohol and drug abuse.⁷ As a result, an overwhelming majority of these patients returns to therapy at a later time with a different psychotherapist.⁸

Sexual relations between a psychotherapist and patient represent an egregious breach of the fiduciary duty owed by a therapist to the

1. Holroyd & Brodsky, *Psychologists' Attitudes and Practices Regarding Erotic and Nonerotic Physical Contact with Patients*, 32 AM. PSYCHOLOGIST, 843, 847 (1977) (citing a national survey); Kardener, Fuller & Mensch, *A Survey of Physician Attitudes and Practices Regarding Erotic and Nonerotic Contact With Patients*, 130 AM. J. PSYCHIATRY, 1077, 1079 (1973) (reporting data from a California sample); Bouhoutsos, Holroyd, Lerman, Forer & Greenberg, *Sexual Intimacy Between Psychotherapists and Patients*, 14 PROF. PSYCHOLOGY: RESEARCH AND PRACTICE 185, 187 (1983) (reporting figures from a California survey).

2. Holroyd & Brodsky, *supra* note 1, at 847.

3. Manpower Development Branch of the Department of Mental Health, *Mental Health Manpower Production Study of 1983*, reprinted in 19 CAL. STATE PSYCHOLOGIST, Mar. 1984, at 4.

4. *Id.*

5. Dujovne, *Sexual Feelings, Fantasies and Acting Out*, 20 PSYCHOTHERAPY: THEORY, RESEARCH AND PRACTICE 243, (1983) (also notes increase of homosexual contacts). This author will focus only on sexual relations between male psychotherapists and female patients.

6. Davidson, *Psychiatry's Problem With No Name: Therapist-Patient Sex*, 37 AM. J. PSYCHOANALYSIS, 43, 48 (1977); Bouhoutsos, Holroyd, Lerman, Forer & Greenberg, *supra* note 1, at 190.

7. Bouhoutsos, Holroyd, Lerman, Forer & Greenberg, *supra* note 1, at 190.

8. *Id.* at 192.

patient.⁹ Psychotherapist-patient sex involves an exploitation of the imbalance in the therapeutic relationship and a mishandling of the concept of transference.¹⁰ A sexual relationship with a patient is considered to be unethical by the majority of practicing psychotherapists and an extreme departure from acceptable professional standards.¹¹

Incidents of sexual relations between psychotherapists and patients rarely are reported.¹² This phenomena has been attributed, in part, to the fact that patients usually are unaware that this behavior is unethical and illegal.¹³ A more likely reason that patients do not report this behavior is the uniqueness of the intimate psychotherapy relationship and treatment situation, compounded by feelings of guilt, shame, and humiliation.¹⁴

During the course of treatment, psychotherapists often learn that a current patient engaged in sexual relations with a former psychotherapist. Unfortunately, these therapists presently are unable to file a report with the proper authorities due to the confidential nature of the communication.¹⁵ As a result, psychotherapist-patient sex has and will continue to flourish, notwithstanding the existence of professional and legal sanctions.¹⁶ Actions taken by professional mental health organizations have not effectively curtailed this behavior.

The purpose of this comment is to demonstrate the need for a mandatory reporting law. Current professional, administrative, and legal sanctions are ineffective because instances of psychotherapist-patient sex rarely are reported. The problem of psychotherapist-patient sex,

9. See Stone, *Sexual Misconduct by Psychiatrists: The Ethical and Clinical Dilemma of Confidentiality*, 140 AM. J. PSYCHIATRY 195, (1983); Bernstein v. Board of Medical Examiners, 204 Cal. App. 2d 378, 381, 22 Cal. Rptr. 419, 421 (1962). But see Riskin, *Sexual Relations Between Psychotherapists and Their Patients: Toward Research or Restraint*, 67 CAL. L. REV. 1000, 1013-16 (1979) (questioning the viability of utilizing sexual relations as a treatment modality and advocating a research paradigm).

10. Demac, *Masters Blasts Innumerable Patient Rapes*, 9 HOSP. TRIBUNE 1, 1 (1975). Dr. William Masters, admonishing an annual meeting at the American Psychiatric Association, stated: "The sexually dysfunctional person is a pushover for seduction by an authority figure such as the psychotherapist...the innumerable examples of patient seduction, both heterosexual and homosexual, are a disgrace to our profession." *Id.* For an explanation of transference, see *infra* notes 53-59 and accompanying text.

11. See Dresser v. Board of Medical Quality Assurance, 130 Cal. App. 3d 506, 515, 181 Cal. Rptr. 797, 802 (1982).

12. See Bouhoutsos, Holroyd, Lerman, Forer & Greenberg, *supra* note 1, at 192.

13. *Id.*

14. See Stone, *supra* note 9, at 196.

15. *Id.* at 195.

16. Stone, *The Legal Implications of Sexual Activity Between Psychiatrist and Patient*, 133 AM. J. PSYCHIATRY, 1138, 1141 (1976); see also Butler & Zelen, *Sexual Intimacies Between Therapists and Patients*, 14 PSYCHOTHERAPY: THEORY, RESEARCH AND PRACTICE, 139, 142 (1977) (concluding that chances of repetition are quite high in light of the fact that sex with a patient is a self-serving, need fulfilling behavior by the therapist that is coupled with very few, if any, punishing or non-rewarding consequences).

if not reported, remains hidden from legal authorities. This author will demonstrate the need for a mandatory reporting law by analyzing the extent, nature, and effect of sexual relations between psychotherapists and patients.¹⁷

Initially, this author will examine the problem of psychotherapist-patient sex.¹⁸ The nature of this problem and the imbalance inherent in the psychotherapy relationship will be analyzed.¹⁹ Next, existing sanctions against psychotherapists who engage in sexual relations with a patient will be surveyed.²⁰ A proposal that would require psychotherapists to report instances of known sexual relations between a current patient and the previous psychotherapist of that patient then will be offered.²¹

Constitutional interests of right of privacy, impinged upon by the proposal, will be explored.²² A survey of relevant constitutional law and standards will be conducted.²³ A constitutional analysis then will be applied to the legislative proposal. This author will conclude that the compelling interests of the state in protecting the health, welfare, and safety of its citizens clearly outweigh the privacy interests of the individual psychotherapy patient.²⁴ First, however, to understand the problem of psychotherapist-patient sex, the characteristics of the involved psychotherapists and patients must be explored.²⁵

THE PROBLEM OF PSYCHOTHERAPIST-PATIENT SEX

Sexual relations between psychotherapists and their patients cannot be viewed from one dimension if this problem is to be appreciated and understood fully. The following discussion will review characteristics of both therapists and patients who engage in sexual relations. In addition, interactional factors²⁶ that are an outgrowth of the unique nature of the psychotherapy relationship will be examined.

17. See *infra* notes 26-61 and accompanying text.

18. See *infra* notes 26-39 and accompanying text.

19. See *infra* notes 40-67 and accompanying text.

20. See *infra* notes 68-109 and accompanying text.

21. See *infra* notes 110-27 and accompanying text.

22. See *infra* notes 128-67 and accompanying text.

23. See *infra* notes 168-222 and accompanying text.

24. See *infra* notes 224-36 and accompanying text.

25. The scope of this comment is limited to overt acts of sexual relations between competent adult outpatients and state licensed psychotherapists during the course of treatment. Sexual misconduct in institutional settings will not be addressed.

26. Interactional factors are those resulting from the combination of patient, therapist, and environment.

A. Therapist and Patient Characteristics

The overwhelming majority of psychotherapists who engage in sexual relations with patients are middle-aged men.²⁷ The personal life of the therapist often is in transition due to a recent separation or divorce.²⁸ Some therapists, in retrospect, have described themselves as vulnerable, needy, or lonely.²⁹ They have been described by others as depressed, sociopathic, or grandiose.³⁰ Many therapists are thought to be attempting to mask feelings of masculine inadequacy by engaging in sexual relations with their patients.³¹

Patients who become involved in sexual relations with psychotherapists often are young attractive women.³² The attention these women receive from the therapist, coupled with the eventual affection of the therapist, is very gratifying and can produce a transient lift in mood and self-confidence.³³ The patient is made to feel understood, accepted, and appreciated. The resultant bond is particularly strong because many psychotherapy patients rarely have felt understood or accepted. Ultimately, however, the patient feels belittled, betrayed, and exploited.³⁴ These feelings exacerbate rather than remedy the problem that initially prompted the patient to seek therapy. Resulting symptoms commonly reported by patients include an increase in guilt,³⁵ depression, suicidal feelings, and drug or alcohol abuse.³⁶ The most devastating consequence of the experience, from a prognostic standpoint, is that the patient suffers yet another disappointing intimate relationship that may result in recoil from further interpersonal

27. Bouhoutsos, Holroyd, Lerman, Forer & Greenberg, *supra* note 1, at 187-88; see Dahlberg, *Sexual Contact Between Patient and Therapist*, 6 CONTEMPORARY PSYCHOANALYSIS, 107, 118 (1970).

28. See Dahlberg, *supra* note 27, at 118.

29. Butler & Zelen, *supra* note 16, at 142. Some psychotherapists attempt to rationalize their behavior by asserting that healthy consequences may be derived by patients. Marmor, *Some Psychodynamics of the Seduction of Patients in Psychotherapy*, 36 AM. J. PSYCHOANALYSIS, 319, 322 (1976). Kardener, *Sex and the Physician-Patient Relationship*, 131 AM. J. PSYCHIATRY 1134, 1134 (1974). It is curious that only young, attractive female patients are able to benefit from this treatment modality.

30. Dahlberg, *supra* note 27, at 119-20. This author is not aware of data indicating that psychotherapists, as a group, are more emotionally disturbed than are members of any other profession.

31. Marmor, *supra* note 29, at 322. The insecurity is masked by frequent sexual encounters that more closely resemble exploits rather than meaningful relationships. *Id.*

32. See Dahlberg, *supra* note 27, at 118. See also Dujovne, *supra* note 5, at 243 (using the descriptive adjective "attractive" although not specifically defining the term).

33. See Kardener, *supra* note 29, at 1134.

34. See Dahlberg, *supra* note 27, at 121.

35. Davidson, *supra* note 6, at 48, compares the patient's reaction to that of a rape victim since both may feel as though they may have done something to "cause" the incident.

36. Bouhoutsos, Holroyd, Lerman, Forer & Greenberg, *supra* note 1, at 190.

involvement.³⁷ Not surprisingly, ninety percent of female patients who have had sexual relations with their psychotherapist return to therapy with a new therapist.³⁸ In addition to being denied help for the problems that initially brought them to psychotherapy, these female patients have been injured further.³⁹

The unique nature of the psychotherapy relationship must be considered if interactional factors are to be understood. The following section will examine the imbalance inherent in the psychotherapy treatment relationship. The fiduciary duty owed by the psychotherapist to the patient will be noted. Finally, the tremendous power of the psychotherapist and the vulnerability of the psychotherapy patient will be outlined.

B. The Nature of the Psychotherapeutic Relationship

The imbalance inherent in the psychotherapy relationship and the emotional vulnerability of those who seek help combine to render the psychotherapy patient particularly dependent upon the ethical and moral integrity of the psychotherapist. The terms "fiduciary" and "confidential" are used interchangeably to describe any relationship existing between parties in which one is bound by a duty to act in good faith for the benefit of the other party.⁴⁰ An important aspect of a fiduciary relationship is unequal bargaining positions. The parties often do not deal on equal terms because the party in whom trust and confidence is reposed is in a superior position and can exercise unique influence over the dependent party.⁴¹

Psychotherapists hold themselves out to the public as state licensed providers of insight and guidance. They therefore occupy important positions of trust.⁴² These therapists have a fiduciary duty to act in good faith for the benefit of their patients.⁴³ A California appellate court affirmed the revocation of a psychiatrist's license to practice medicine by concluding that this position of trust had been violated when the psychiatrist engaged in sexual relations with a sixteen-year-old patient.⁴⁴ Medical patients in general are more vulnerable and subject to the power and control of the practitioner than are

37. See Kardener, *supra* note 29, at 1136.

38. Bouhoutsos, Holroyd, Lerman, Forer & Greenberg, *supra* note 1, at 192.

39. *Id.* at 194.

40. *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 392, 193 Cal. Rptr. 422, 431 (1983).

41. *Id.* at 383, 193 Cal. Rptr. at 431.

42. See *Bernstein*, 204 Cal. App. 3d at 378, 22 Cal. Rptr. at 419.

43. See *id.*

44. See *id.* at 381, 22 Cal. Rptr. at 421.

consumers of any other professional service.⁴⁵

Sex between a psychotherapist and patient represents the most egregious breach of a fiduciary duty.⁴⁶ A patient has a legitimate expectation that the psychotherapist is acting on behalf of the interests of the patient and that the psychotherapist-patient trust will not be betrayed.⁴⁷ This trust is precisely what encourages patients *not* to employ their ordinary psychological and social defenses when they interact with the psychotherapist.⁴⁸ Patients are urged to speak without inhibitions and to subject themselves to the skill of the psychotherapist.⁴⁹ At the same time, the patient undergoing psychotherapy usually knows little or nothing about the personal life of the psychotherapist. Patients are especially vulnerable and unable to protect themselves under these circumstances. This imbalance, however, is fostered in traditional psychotherapy and is believed to be the vehicle through which change is accomplished.⁵⁰

Psychotherapy is a very complex process that is difficult to describe.⁵¹ An understanding of the concepts of transference and countertransference is necessary in order to understand and comprehend fully the inherent imbalance of the parties in the psychotherapeutic relationship. Since transference and countertransference are important in traditional psychotherapy, the following section will define and clarify these concepts.

1. *Transference and Countertransference*

Transference is a natural phenomenon that is often associated with, but not limited to, the psychotherapy relationship.⁵² Transference is the repetition or reenactment of previous interpersonal relationships, the parent-child relationship being of greatest importance.⁵³ A key aspect of transference is the displacement of feelings, attitudes, or

45. *Fuller v. Board of Medical Examiners*, 14 Cal. App. 2d 734, 741, 59 P.2d 171, 174 (1936).

46. *See Butler & Zelen, supra* note 16, at 144.

47. *See Bernstein*, 204 Cal. App. 3d at 381, 22 Cal. Rptr. at 421.

48. *Marmor, supra* note 29, at 322 (comparing psychotherapist-patient relationship to that of parent and child).

49. *Id.*

50. *See Strupp, A Reformulation of the Dynamics of the Therapist's Contribution*, in A. GURMAN, *THE THERAPIST'S CONTRIBUTION TO EFFECTIVE PSYCHOTHERAPY*, 4 (1977). The imbalance is used to break down the usual defenses of the patient and make the patient more susceptible to the influence of the therapist. *See id.* at 14.

51. DeLeon & Borreliz, *Malpractice: Professional Liability and the Law*, PROF. PSYCHOLOGY, 467, 473 (1978).

52. Each person has an interpersonal style of relating. Relationships with significant persons often are for the purpose of expressing needs in symbolic or disguised ways. *See Strupp, supra* note 50, at 15.

53. *See R. GREENSON, THE TECHNIQUE AND PRACTICE OF PSYCHOANALYSIS*, 153-54 (1967).

impulses from the patient's past onto the therapist.⁵⁴ Transferential emotions that are displaced onto the psychotherapist may be primarily positive or negative.⁵⁵ Therapists often become the object of the hopes, desires, fears, and frustrations of patients.⁵⁶ Who the psychotherapist is as a person may have little bearing on the reaction of the patient as long as the psychotherapist does not interfere with the natural emergence of these transferential feelings. Patients who idealize⁵⁷ their therapist and express strong feelings of affection for their therapist are not in love with the psychotherapist as a person, but as an object of transferred feelings of idealization and love.⁵⁸

Although the reactions of a patient to a psychotherapist sometimes are triggered by an event in reality, the reactions often are exaggerated by displaced feelings of transference.⁵⁹ Thus, reactions to the psychotherapist may be based more upon the history of the patient than who the psychotherapist is as a person. Likewise, the interaction between the therapist and the patient and the events that occur during the course of therapy may be less important than the patient's past. The reactions of the patient thus become distorted and inappropriate to the actual circumstances of the treatment situation through no fault of the psychotherapist.

Countertransference refers to the displaced feelings of the psychotherapist.⁶⁰ Just as patients carry their history into the psychotherapeutic treatment setting, so does the therapist. Although countertransference feelings may be natural, these reactions of the psychotherapist also may be exaggerated and distorted. His reactions

54. I. WEINER, *PRINCIPLES OF PSYCHOTHERAPY*, 203 (1975).

55. See GREENSON, *supra* note 53, at 159.

56. Dujovne, *supra* note 5, at 244.

57. Idealization is used to refer to the process that occurs when an individual places another upon a pedestal. See L. HINSIE & R. CAMPBELL, *PSYCHIATRIC DICTIONARY* 372 (1974).

58. See *id.*

59. WEINER, *supra* note 54, at 205. An illustration not uncommon could involve a patient who is being uncharacteristically sullen and withdrawn during a session that began five minutes late due to the late arrival of the therapist. When prodded, the patient snaps that nothing significant is happening. The realistic event is the fact that the therapist was five minutes late. A patient could understandably feel disappointed and disheartened. The intensity and extent of the patient's reaction, however, may go far beyond the actual event and be determined by similar events that occurred earlier in life, e.g., important people generally not living up to their promises.

60. See *Anclote Manor Foundation v. Wilkinson*, 263 So.2d 256 (Fla. Ct. App., 1972). A psychiatrist told his patient that he was going to divorce his wife so that he would be free to marry her. *Id.* at 257. The husband of the patient was entitled to recoup all payments made under the professional contract on a breach of contract theory. *Id.* at 257. The appellate court ruled that the determination of the trial judge that the psychiatrist was guilty of malpractice as a matter of law was not in error. *Id.* at 258. This holding was based upon the testimony of each expert witness that the conduct of the defendant psychiatrist was below professional standards and was an "acting out" of the countertransference. *Id.* at 257. See *infra* notes 62-66 and accompanying text.

may have more to do with his history and internal needs rather than the uniqueness of the patient. Similarly, the therapist-patient interaction and the events that occur during the course of treatment may be less important than the history of the therapist.

Illustrative of countertransference problems is the generally inadequate male therapist who is threatened easily but can be reassured by receiving praise from women. The need of the therapist to be idealized and praised may affect how the therapist perceives the patient and how he responds to the patient under certain circumstances.⁶¹ The idealizing female patient and the insecure male psychotherapist form a pair that is vulnerable to acting upon their distorted feelings. This type of a relationship is not based upon mature and realistic needs but, rather, is in fact the reenactment of past relationships that were not completed satisfactorily. Restrictions and demands upon the therapist play an integral role in the psychotherapeutic process because transference and countertransference, if improperly used, can cause the patient further difficulties. The manner in which the psychotherapist manages transference and countertransference often is critical to a positive outcome of psychotherapy.

2. Management of the Psychotherapy Relationship

An arousal of anxiety, anger, sadness or sexuality in a therapist by a patient is common and, in fact, is expected to occur.⁶² The therapist, although a participant in the psychotherapeutic relationship, must retain objectivity and not lose the capacity to ascertain which of his reactions are based on countertransference.⁶³ The feelings of the therapist are always to be understood rather than acted upon.⁶⁴ The critical issue concerning a positive therapeutic result then becomes the manner in which the therapist utilizes these feelings. The overriding principle for successful therapy is that the experience of the therapist is employed in the service of the patient's treatment.⁶⁵ The overwhelming opinion of professional therapists is that a psychotherapist is no longer acting as a therapist when he engages in sexual relations with a patient.⁶⁶

This author has demonstrated that therapists breach their fiduciary and professional obligations by engaging in sexual relations with their

61. See Greenson, *supra* note 53, at 221.

62. Dujovne, *supra* note 5, at 248.

63. See Strupp, *supra* note 50, at 11.

64. Dujovne, *supra* note 5, at 244.

65. See Strupp, *supra* note 50, at 11.

66. Butler & Zelen, *supra* note 16, at 142.

patients.⁶⁷ Nevertheless, this abusive conduct is reported only rarely by the injured patient. State licensing boards and state legislatures have recognized this potential abuse that psychotherapy patients face and have attempted to remedy the problem. The following examination of these actions will demonstrate that additional measures are required if the safety of unsuspecting future patients is to be ensured.

SANCTIONS

The conduct of psychotherapists is governed by several separate interests. The state provides civil and criminal remedies.⁶⁸ The state also regulates the practice of psychotherapists through administrative agencies.⁶⁹ Furthermore, psychotherapists endeavor to monitor themselves through professional organizations.⁷⁰

A. Professional Organizations and Licensing Boards

Sexual relations between therapists and patients are proscribed in professional ethical codes.⁷¹ Therapists who engage in sexual relations with their patients jeopardize their professional standing and affiliations.⁷² These therapists also subject themselves to license suspension or revocation by their administrative licensing body.⁷³

*Dresser v. Board of Medical Quality Assurance*⁷⁴ provides an

67. See *supra* notes 40-66 and accompanying text.

68. See *infra* notes 82-99 and accompanying text.

69. See *infra* notes 74-79 and accompanying text.

70. See *infra* notes 71-72 and accompanying text.

71. See, e.g., National Association of Social Workers Code of Ethics §11, #5. "The social worker should under no circumstances engage in sexual activities with clients"; Ethical Principle 6, Welfare of the Consumer: "Sexual intimacies with clients are unethical." The American Psychiatric Association states "Sexual activity with a patient is unethical." *The Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry*, 130 AM. J. PSYCHIATRY, 1058, 1061 §1 (1973). See *Dresser*, 130 Cal. App. 3d at 512, 181 Cal. Rptr. at 800. See also Hare-Mustin, *Ethical Considerations in the Use of Sexual Contact in Psychotherapy*, 11 PSYCHOTHERAPY: THEORY, RESEARCH AND PRACTICE, 308, 310 (1974) (concluding that genital contact is ethically unacceptable after observing that no reputable school or psychotherapy course offers a body of theory and techniques on how to provide sexual contact for patients); Stone, *supra* note 9, at 195. "The sexual abuse of patients is an egregious manifestation of deficiencies in character and competence." *Id.* But see McCartney, *Overt Transference*, J. SEX. RESEARCH, 227, 227 (1966) (extreme minority position).

72. See Sinnott & Linford, *Processing of Formal Complaints Against Psychologists*, 50 PSYCHOLOGICAL REPORTS, 535, 538 (1982) (review of various intraprofessional administrative options). *Id.*

73. CAL. BUS. & PROF. CODE §2960(n) provides disciplinary action for "[t]he commission of any dishonest, corrupt, or fraudulent act or any act of sexual abuse, or sexual relations with a patient, or sexual misconduct which is substantially related to the qualifications, functions or duties of a psychologist or psychological assistant." See also CAL. BUS. & PROF. CODE §1846(f) (providing for the license suspension or revocation of a marriage, family and child counselor who "has sexual relations with client, or who solicits sexual relations with a client...").

74. 130 Cal. App. 3d 506, 181 Cal. Rptr. 797 (1982).

example of enforcement of mental health treatment standards by a licensing board. In *Dresser*, the license of a psychologist was revoked due to a finding that the psychologist was guilty of gross negligence and was in violation of former Business and Professions Code section 2960(i)⁷⁵ for engaging in sexual relations with two patients.⁷⁶ The psychologist petitioned the court for a writ of mandate to compel the Board of Medical Quality Assurance to set aside its decision to revoke his license.⁷⁷ The trial court denied the requested relief and the appellate court affirmed.⁷⁸ The appellate court noted that the license revocation was proper because of the psychological harm suffered by the patients as a result of the extreme departure from standard psychotherapy.⁷⁹ In addition to jeopardizing their professional licenses and affiliations,⁸⁰ therapists subject themselves to criminal and civil liability by engaging in sexual relations with their patients.⁸¹ Criminal penalties and civil remedies that are encountered most frequently in these situations now may be explored.

B. Criminal Penalties and Civil Remedies⁸²

Some psychotherapists have argued that a fellow psychotherapist who engages in sexual relations with a patient should be prosecuted for rape.⁸³ Criminal charges of rape or related sexual offenses against psychotherapists who sexually exploit patients, however, are very rare.⁸⁴ A major difficulty associated with criminal prosecution involves the issue of consent. Many patients who engage in sexual relations with their therapist impliedly or expressly consent to this conduct. Non-consensual sex however, is a required element of rape.⁸⁵ The modern

75. Former CAL. BUS. & PROF. CODE §2960(i) is now CAL. BUS. & PROF. CODE §2960(j) (being grossly negligent in the practice of his profession).

76. 130 Cal. App. 3d at 510, 181 Cal. Rptr. at 799 (1982).

77. *Id.*

78. *Id.* at 506, 181 Cal. Rptr. at 797.

79. *Id.* at 515, 181 Cal. Rptr. at 802.

80. See *supra* notes 70-79 and accompanying text.

81. See *infra* notes 82-99 and accompanying text.

82. A thorough review of this area is beyond the ambit of this comment. For more comprehensive coverage see Stone, *supra* note 16, at 1138-39; Hays, *Sexual Contact Between Psychotherapist and Patient: Legal Remedies*, 47 PSYCHOLOGICAL REPORTS, 1247, 1252 (1980); DeLeon & Borreliz, *supra* note 51, at 471-73.

83. Masters & Johnson, *Principles of the New Sex Therapy*, 133 AM. J. PSYCHIATRY, 548, 553 (1976).

84. See *People v. Bernstein*, 171 Cal. App. 2d 279, 340 P.2d 299 (1959) for an exception. In *Bernstein*, a psychiatrist was convicted of statutory rape for engaging in sexual relations with a sixteen-year-old patient. *Id.* at 286, 340 P.2d at 303.

85. For this reason, criminal prosecution is extremely difficult. License revocation actions that do not focus on consent when the charge is unethical professional conduct are far easier to maintain. See *supra* notes 74-79 and accompanying text.

trend is to enact legislation that attaches criminal penalties specifically to this conduct, in part to circumvent the problem of consent.⁸⁶

An injured patient also may seek civil redress under a variety of legal theories.⁸⁷ Professional negligence is by far the most common cause of action employed by plaintiffs. The Missouri Supreme Court case of *Zipkin v. Freeman*⁸⁸ is illustrative. This case involved an aggravated abuse of transference by a psychiatrist who engaged in sexual relations with his patient.⁸⁹ The patient initially sought help for psychosomatic diarrhea and headaches.⁹⁰ The plaintiff charged that the psychiatrist, through his treatment, aroused her emotions to the point where she actually fell in love with him.⁹¹ She claimed that the psychiatrist was able to accomplish this through manipulation of the transference relationship.⁹² The court noted that the psychiatrist maneuvered the feelings of the patient beyond the phenomenon of transference to direct feelings of love for him as a person rather than a transference object.⁹³ The psychiatrist in *Zipkin*, after convincing the patient that she could not survive emotionally without him, coaxed the patient into investing her money in the business enterprises of the psychiatrist.⁹⁴

The insurance carrier in *Zipkin* claimed that the activities and conduct of its insured psychiatrist did not constitute professional services rendered in the course of his practice, and, therefore, fell under a policy exclusion.⁹⁵ The court rejected this contention and held that what a treating psychotherapist does with a patient both in and out of the office is based in part upon the transference relationship.⁹⁶

The *Zipkin* rationale has been employed to defeat other attempts to limit malpractice liability through policy coverage exclusions for sexual misconduct.⁹⁷ Courts have recognized that a sexual act between

86. See Stone, *supra* note 16, at 1139.

87. Included among these theories is malpractice, assault and battery, fraud, intentional infliction of mental distress, and gross negligence. See *supra* note 82.

88. 436 S.W.2d 753 (Mo. 1969).

89. *Id.*

90. *Id.* at 755.

91. *Id.*

92. *Id.* at 761.

93. *Id.*

94. *Id.* at 755.

95. The insurance agreement stated in part that Dr. Freeman would be defended in "any claim or suit for damages, at any time filed, based on professional services rendered or which should have been rendered...." *Id.* at 754. Thus, Dr. Freeman's insurance carrier claimed that it was not obligated to defend Dr. Freeman under his malpractice policy. *Id.* at 761.

96. *Id.*

97. See, e.g., *St. Paul Fire and Marine Insurance Co. v. Mitchell*, 296 S.E.2d 126 (Ga. Ct. App., 1982) (declaratory judgment for malpractice carrier denied in a suit based upon mishandling of transference resulting in sexual relations between psychiatrist and patient).

a psychotherapist and patient, distinguished from that between an orthopedic surgeon and a patient, or between an attorney and client, is an abuse of the professional service itself.⁹⁸ Sexual relations are a manifestation of the failure to treat the patient within acceptable professional standards. Damages flow from both the failure to treat the patient properly for her initial difficulties and the mistreatment manifested by the act of engaging in sexual relations.⁹⁹ The effectiveness of existing sanctions now may be reviewed in order to demonstrate the need for the proposed reporting law.

C. Effectiveness of Current Sanctions

Neither professional organizations, licensing boards, criminal penalties, nor civil remedies currently provide an effective system of control over psychotherapists who engage in sexual relations with their patients.¹⁰⁰ As previously noted, many patients are unaware that engaging in sexual relations with a patient is unethical and illegal for psychotherapists.¹⁰¹ Even when aware of the impropriety of this conduct, however, most patients do not report the behavior to authorities or seek legal redress.¹⁰² This inaction is in part attributable to feelings of confusion and guilt that are similar to those of rape victims.¹⁰³

Despite the prevalence of psychotherapist-patient sex, professional organizations have not adopted additional measures to confront this problem realistically. Professional journals have been reluctant to publish articles on this topic.¹⁰⁴ Attempts to obtain funding for research efforts focusing on this problem have been frustrated.¹⁰⁵ These occurrences have led some professionals to speculate upon the lack of concern by the mental health professions.¹⁰⁶ Psychotherapist commentators have asserted that indifference is in part motivated by

98. See *id.* See *supra* notes 86-97 and accompanying text.

99. See *Cotton v. Kambly*, 300 N.W.2d 627, 629 (Mich. Ct. App., 1 1981); see also Siassi & Thomas, *Physicians and the New Sexual Freedom*, 130 AM. J. PSYCHIATRY, 1256, 1257 (1973) (noting that as a practical matter, objectivity that is essential to effective treatment necessarily must be compromised when the doctor is in bed with his patient).

100. Stone, *supra* note 16, at 1141.

101. Bouhoutsos, Holroyd, Lerman, Forer & Greenberg, *supra* note 1, at 192. Only 52% of the patients in the California study were aware that it is unethical for a psychotherapist to have sex with his patient. *Id.*

102. *Id.* Only 4% of the 52% who were aware that this conduct is unethical initiated legal action. *Id.*

103. Davidson, *supra* note 6, at 48; see also Stone, *supra* note 9, at 196 (stating that the feelings of patients who have been sexually active with their psychotherapist are not dissimilar from those of a woman who had been subjected to an incestuous relationship with her father).

104. Dahlberg, *supra* note 27, at 107.

105. Sinnott & Linford, *supra* note 72, at 537.

106. See Stone, *Management of Unethical Behavior in a Psychiatric Hospital Staff*, 29 AM. J. PSYCHOTHERAPY 391, 397 (1975) (noting the dilatory manner in which senior psychiatrists administratively responded to unethical behavior, including sexual relations, among residents).

sexism.¹⁰⁷ Furthermore, the protectionist interests of the mental health professions as a whole have not escaped notice.¹⁰⁸

The inefficacy of currently available professional and legal sanctions against psychotherapists who engage in sexual relations with patients has necessitated the recent involvement of the California Legislature.¹⁰⁹ In the following section, legislative efforts to curtail psychotherapist-patient sex in California will be reviewed. The discussion will focus on the adequacy of past and present proposals in light of the special problems which are unique to the psychotherapy relationship. Finally, this author will propose an amendment to existing law that will address the specific problems of psychotherapist-patient sex.

LEGISLATIVE SOLUTIONS

A mandatory reporting law is necessary in California because injured patients do not voluntarily report to proper authorities incidents of wrongdoing by psychotherapists. Current laws that attach criminal penalties to this behavior by psychotherapists are too narrow. The primary problem with these laws is that they focus on only one side of the problem.

A. Past and Current Legislative Action

The problem of psychotherapist-patient sex has been recognized by the California Legislature. In 1983, Senate Bill 861 (hereinafter referred to as SB 861) was introduced by Senator Diane Watson. The bill proposed to amend Penal Code section 261 by providing misdemeanor or felony punishment for persons who engage in intercourse during medical or psychological treatment or examination of the patient in abuse of the position of trust established in a professional-patient relationship.¹¹⁰ The bill apparently was designed to provide statutory authority for the punishment of medical and psychological professionals who abuse their fiduciary responsibilities by engaging in sexual relations with patients during the course of treatment.¹¹¹ The scope of SB 861 prohibitions extended beyond psychotherapists, to include all professionals licensed pursuant to Division 2 of the Business and

107. Davidson, *supra* note 6, at 48.

108. Davidson, *supra* note 6, at 46, 48-49; *see also* Stone, *supra* note 9, at 195. "Whatever the reasons for this collective failure to act, in retrospect it creates an appearance of a 'conspiracy of silence.'" *Id.*

109. *See infra* notes 110-17 and accompanying text.

110. Senate Bill 861 at 1.

111. *Id.*

Professions Code.¹¹² Thus, among those falling within the reach of SB 861 would have been dentists, speech pathologists, pharmacists, chiropractors, physical therapists, and clinical laboratory technologists.¹¹³ SB 861, then, would have applied to many different specialists involving varied types of relationships with consumers.¹¹⁴

Another bill involving the same subject matter was introduced by Senator Watson in 1984.¹¹⁵ Senate Bill 2307 (hereinafter SB 2307) would have provided that misdemeanor charges could be brought against a psychotherapist who had "sexual intercourse or sexual contact, as defined, with a client or patient during any treatment, consultation, interview, or examination session."¹¹⁶ The purpose of SB 2307 was to deter sexual contact between psychotherapists and their patients by attaching criminal penalties to this conduct.¹¹⁷

This author asserts that a proposal for a mandatory reporting law is necessary, because proposals like SB 2307, if ever passed, will not curb in any effective manner the frequency with which psychotherapists have sexual relations with their patients. The reason these proposals will fail is that the conduct will remain unreported.¹¹⁸ Psychotherapist-patient sex, absent a mandatory reporting law, will continue undisturbed because of the unique nature of the psychotherapy relationship.¹¹⁹

B. A Proposed Statute

As previously discussed, a majority of patients who are sexually victimized by their psychotherapists return to treatment with a different therapist.¹²⁰ The subsequent psychotherapist usually becomes aware during the course of treatment that the patient engaged in sexual

112. CAL. BUS. & PROF. CODE, §§500-4905.

113. *Id.*

114. Senate Bill 861 was withdrawn because the author did not believe SB 861 would pass. Personal communication, John Miller, Consultant to Senate Committee on Health and Human Services, September 5, 1984 (notes on file at *Pacific Law Journal*).

115. Senate Bill 2307.

116. Senate Bill 2307 at 1.

117. Senate Bill 2307 was withdrawn because the sponsors felt that SB 2307 would not pass. An unspoken feeling was that members of the Criminal Law and Public Safety Committee in the Assembly remained unconvinced that attaching criminal penalties to psychotherapist-patient sex would serve as an effective deterrent. Personal communication, John Miller, Consultant to Senate Committee on Health and Human Services, September 5, 1984 (notes on file at *Pacific Law Journal*).

118. See *supra* notes 12-14, 101-03, and accompanying text.

119. See *id.*

120. See Bouhoutsos, Holroyd, Lerman, Forer & Greenberg, *supra* note 1, at 190.

relations with a previous psychotherapist.¹²¹ Accordingly, the subsequent psychotherapist could serve as an effective source of identification of this behavior.¹²² The subsequent therapists, however, absent the consent of the patient, cannot report their discoveries due to the psychotherapist-patient privilege.¹²³ Mental health professions¹²⁴ have taken no action to alleviate the ethical dilemma that a subsequent psychotherapist finds himself in after discovering that a current patient has been sexually abused by a previous psychotherapist.¹²⁵ The following proposal is advanced to resolve that dilemma and to ensure that instances of psychotherapist-patient sex discovered during the subsequent treatment of the abused patient, do not continue to remain unreported.

The enactment of a statutory amendment to the Penal Code would be the most effective means of deterring psychotherapists from engaging in sex with their patients. This author submits the following statutory proposal as the means for achieving this result:

A psychotherapist who becomes aware through a patient that the patient had sexual intercourse or sexual contact with a previous psychotherapist during the course of a prior treatment must notify, immediately, or as soon as is reasonably possible, the Department of Consumer Affairs and file a written report within thirty-six hours.

(a) A "psychotherapist" is defined as a physician specializing in the practice of psychiatry or practicing psychotherapy, a psychologist, a clinical social worker, a marriage, family, and child counselor, a psychological assistant, or a psychiatric technician.

(b) "Sexual contact" as used in this section means the touching of an intimate part of another person.

(c) "Intimate part" and "touching," as used in this section, have the same meaning as defined in Penal Code section 243.4.¹²⁶

(d) The report required by this proposal must include the name of the psychotherapist making the report, the name of the patient, the name of the previous licensed psychotherapist, and the nature and extent of the sexual contact.

(e) The written report will be submitted on forms provided by the Department of Consumer Affairs. These forms will be adopted

121. Stone, *supra* note 9, at 195.

122. *See id.* at 197.

123. *Id.* at 195. For a review of the psychotherapist-patient privilege, see *infra* notes 131-66 and accompanying text.

124. "Mental health professions" refer to the professional organizations representing psychologists, psychiatrists, social workers, and marriage, child, and family counselors.

125. *See* Stone, *supra* note 9, at 195-97.

126. "As used in this section, 'intimate part' means the sexual organ, anus, groin, or buttocks of any person, and the breast of a female... 'touches' means physical contact with the skin of another person." CAL. PENAL CODE §243.4.

after consultation with representatives of the various professional associations.

(f) Subsequent psychotherapists may withhold names of the patient and the abusing psychotherapist if, in their professional judgment, disclosure would be unusually injurious to the patient.

(g) Unusual injury is defined as risk of suicide, psychosis or extreme hardship to the patient that, in all likelihood, would result in the patient terminating the present course of therapy.

By requiring psychotherapists to report known instances of psychotherapist-patient sex, the foregoing proposal ensures that existing professional and legal sanctions would serve as effective deterrents to this conduct. The existing professional and legal deterrents are not ineffective *per se*, but they become operative only rarely because the proscribed conduct largely remains unreported.¹²⁷ Due to the fact that a mandatory reporting law may impinge upon constitutionally protected areas, constitutional considerations now must be examined.

CONSTITUTIONALITY OF MANDATORY REPORTING

Constitutional doctrine long has held that a statute that implicates fundamental rights will receive strict scrutiny from the courts.¹²⁸ Fundamental rights are deemed to have values essential to individual liberty in our society.¹²⁹ A strict scrutiny standard provides that statutes will be upheld only if they are narrowly tailored to advance a compelling state interest.¹³⁰ The psychotherapist-patient privilege and applicable exceptions must be analyzed to ascertain whether the state interests are sufficient to overcome the privilege. Once the fundamental rights of patients are established, the compelling state interests involved in the problem of psychotherapist-patient sex may be explored.

A. Psychotherapist-Patient Privilege

The importance of mental health treatment in our modern, complex society frequently has been commented upon by the courts.¹³¹ Since psychotherapy offers the potential for relief from the tensions

127. See *supra* notes 101-03 and accompanying text.

128. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW, 457 (2d ed. 1983).

129. *Id.*

130. *Id.* at 448.

131. *Tarasoff v. Regents of University of California*, 17 Cal. 3d 426, 440-41, 551 P.2d 334, 346-47, 131 Cal. Rptr. 14, 26-27 (1976); see *In re Lifschutz*, 2 Cal. 3d 415, 421-22, 467 P.2d 557, 560-61, 85 Cal. Rptr. 829, 832-33 (1970).

that are attendant to life in contemporary society, mental health professions are essential to the maintenance of societal health and well-being.¹³² An environment of confidentiality is vitally important to the psychotherapeutic relationship.¹³³

The importance of confidentiality to the psychotherapist-patient relationship has been recognized by both the California Legislature and judiciary.¹³⁴ The Legislature originally enacted the psychotherapist-patient privilege in 1965.¹³⁵ The California Evidence Code defines "psychotherapist"¹³⁶ and "patient"¹³⁷ and details the nature of communications between these two groups entitled to protections.¹³⁸ Under existing California law, a psychotherapy patient may refuse to disclose and may prevent others from disclosing confidential communications between the patient and a psychotherapist.¹³⁹ Although a psychotherapist may claim the privilege for the patient when confidential information is sought, the patient is the holder of the psychotherapist-patient privilege.¹⁴⁰ The psychotherapist-patient privilege is to be construed liberally in favor of the patient.¹⁴¹ Legislatively created exceptions to this privilege are set forth in the Evidence Code.¹⁴²

The California Legislature has recognized the uniqueness¹⁴³ of the psychotherapist-patient relationship by providing a greater degree of protection for the psychotherapist-patient privilege than is afforded the physician-patient privilege.¹⁴⁴ For example, no statutory exception to the psychotherapist-patient privilege exists comparable to the

132. *Lifschutz*, 2 Cal. 3d at 421-22, 467 P.2d at 560-61, 85 Cal. Rptr. at 832-33.

133. *See id.*

134. *See* CAL. EVID. CODE §§1010-1028; *see supra* note 132. *See also* FED. R. EVID. 501. FED. R. EVID. 501 is a general rule of privilege that was passed in lieu of specific rules dealing with privilege. *See In re Zuniga*, 714 F.2d 632, 636 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 426 (1983). Proposed Fed. R. Evid. 504 dealt with the psychotherapist-patient privilege and was approved by the Supreme Court although it was ultimately superseded. *Id.* at 637. The Senate Report to Fed. R. Evid. 501 states that the approval of the general rule should not be construed as disapproving of the psychotherapist-patient privilege. *Id.* Federal law allows for the recognition of the psychotherapist-patient privilege although privileges were not included in the final draft of the Federal Rules of Evidence. *Id.*

135. WEINSTEIN, MANSFIELD, ABRAMS & BERGER, EVIDENCE, RULES AND STATUTE SUPPLEMENT, 201 (1981).

136. CAL. EVID. CODE §1010.

137. *Id.* §1011.

138. *See id.* §1012.

139. *Id.* §1014.

140. *Id.* §§1013-1015.

141. *Lifschutz*, 2 Cal. 3d at 437, 467 P.2d at 572, 85 Cal. Rptr. at 844.

142. CAL. EVID. CODE §§1016-1026. *See infra* notes 182-91 and accompanying text.

143. *See infra* notes 144-46 and accompanying text.

144. The 1964 Senate Committee on Judiciary Comment to California Evidence Code section 1014 states in part that art. 7 establishes a new privilege that grants to psychotherapy patients "a privilege much broader in scope than the ordinary physician-patient privilege." *Id.*

physician-patient exception in California Evidence Code section 999.¹⁴⁵ Further, a California court of appeal has held that an answer to an interrogatory revealing the names of psychotherapy patients would constitute a disclosure of privileged information because the very fact that a person consults a psychotherapist constitutes a privileged communication.¹⁴⁶

The psychotherapist-patient privilege is more than a mere rule of evidence.¹⁴⁷ The privilege is arguably a guaranteed right of privacy protected by both the United States and California Constitutions.¹⁴⁸ The United States Supreme Court expanded the right of privacy concept in *Griswold v. Connecticut*.¹⁴⁹ *Griswold* held that certain guarantees of the Bill of Rights establish zones of privacy and therefore must receive strict judicial scrutiny.¹⁵⁰

The California Supreme Court in *In re Lifschutz*¹⁵¹ concluded that the confidentiality attendant to psychotherapy fell within the penumbra of *Griswold*.¹⁵² *Lifschutz* involved a psychiatrist who, pursuant to Evidence Code section 1016, was ordered to produce records relating to communications with a former patient and answer deposition questions concerning the treatment of the patient.¹⁵³ The psychiatrist contended that the court order compelling this type of discovery unconstitutionally infringed upon his personal right of privacy, his right to practice his profession effectively, and the privacy interests of his patients.¹⁵⁴ Although the California Supreme Court rejected the claim of the psychiatrist, the court commented that the preservation of a degree of privacy in interpersonal relationships and communications lies at the heart of the sweeping rationale of *Griswold*.¹⁵⁵

The California State Constitution was amended subsequent to *Lifschutz* to include the right to pursue and obtain privacy as one of the inalienable rights of all people in California.¹⁵⁶ This amend-

145. See *City of Alhambra v. Superior Court of Los Angeles County*, 110 Cal. App. 3d 513, 519, 168 Cal. Rptr. 49, 52 (1980). CAL. EVID. CODE §999 provides: "there is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient in a proceeding to recover damages on account of the conduct of the patient if good cause for disclosures of the communication is shown."

146. See *Smith v. Superior Court*, 118 Cal. App. 3d 136, 140-41, 173 Cal. Rptr. 145, 147-48 (1981).

147. See *infra* notes 149-66 and accompanying text.

148. *Id.*

149. 381 U.S. 479 (1965).

150. See *id.* at 484.

151. 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

152. *Id.* at 431-32, 467 P.2d at 568, 85 Cal. Rptr. at 840.

153. *Id.* at 420, 467 P.2d at 559, 85 Cal. Rptr. at 831.

154. *Id.*

155. *Id.* at 432, 467 P.2d at 568, 85 Cal. Rptr. at 840.

156. CAL. CONST. art. I, §1.

ment has cemented judicial recognition in California of the constitutional underpinnings of the psychotherapist-patient privilege. This fundamental interest, therefore, must be protected zealously.¹⁵⁷ For example, in *Caesar v. Mountanos*,¹⁵⁸ a psychiatrist challenged the patient-litigant exception to the psychotherapist-patient privilege provided by Evidence Code section 1016.¹⁵⁹ The challenge in part was based upon the contention that the constitutional right of privacy afforded absolute protection for communications between patients and their psychotherapists.¹⁶⁰ As in *Lifschutz*, the patient voluntarily placed her emotional condition in issue.¹⁶¹ The court in *Caesar* noted that the case posed the same issue as in *Lifschutz* and cited the latter with approval for the proposition that the psychotherapist-patient privilege was based upon the constitutional right of privacy.¹⁶² Furthermore, in *People v. Stritzinger*¹⁶³ the California Supreme Court reversed the conviction of a child molester based upon the decision of the trial court to allow into evidence statements made by a stepfather to a psychotherapist.¹⁶⁴ The court ruled that the psychotherapist had satisfied his statutory duty the previous day when he filed a report based upon the privileged communications of the stepdaughter of the accused.¹⁶⁵ The *Stritzinger* court held that the psychotherapist-patient privilege was a constitutional right and cited approvingly both the *Lifschutz* and *Caesar* decisions in addition to Article I, Section I of the California Constitution.¹⁶⁶

The right to privacy under the Federal and State Constitutions extends beyond confidential communications protected by statute.¹⁶⁷ The proposed statute also implicates the right to privacy in sexual matters. The right to privacy in sexual matters, and limitations placed upon that right, now may be addressed.

157. See *Jones v. Superior Court*, 119 Cal. App. 3d 534, 550, 174 Cal. Rptr. 148, 157 (1981); *Caesar v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976).

158. 542 F.2d 1064 (9th Cir. 1976).

159. *Id.* at 1065.

160. *Id.* at 1066.

161. *Id.* at 1070.

162. *Id.* at 1069-70.

163. 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983).

164. *Id.* at 514, 668 P.2d at 744, 194 Cal. Rptr. at 437.

165. *Id.* The statutory duty was imposed by Cal. Penal Code §11171.

166. See *id.* at 511, 668 P.2d at 748, 194 Cal. Rptr. at 435.

167. See *Jones*, 119 Cal. App. 3d at 549-50, 174 Cal. Rptr. at 157.

B. The Right to Privacy in Sexual Matters

Decisions of the United States and California Supreme Courts have made clear that the constitutional right to privacy extends to matters relating to marriage, family and sex.¹⁶⁸ The right of privacy in sexual matters, however, is not absolute and may be outweighed by the fundamental right of the state to protect the health, welfare, and safety of its citizens.¹⁶⁹ Distinctions have been made by courts between protected and unprotected sexual conduct.¹⁷⁰

Governmental intrusion into matters implicating the right of an individual to privacy in sexual matters has been authorized in both criminal and civil law.¹⁷¹ The case of *Barbara A. v. John G.*¹⁷² states that the right of privacy in sexual relations will not prevent judicial inquiry if the right of privacy is employed as a shield from liability at the expense of an injured party.¹⁷³ *Barbara A.* involved the claim of a client who had sexual intercourse with her attorney allegedly on his assurance that he was sterile.¹⁷⁴ The client suffered an ectopic pregnancy¹⁷⁵ and was forced to undergo surgery.¹⁷⁶ The court in *Barbara A.* upheld the cause of action notwithstanding the consent of the plaintiff. As examples of the right of privacy in sexual matters being subordinated to the interest in maintaining public health, welfare, and safety, the court cited penal statutes pertaining to the following: (1) both forcible and consensual sexual acts; (2) mandatory registration of convicted sex offenders; (3) Penal Code section 262 prohibiting spousal rape; and (4) laws relating to the paternity of children.¹⁷⁷ Similarly, in *Kathleen K. v. Robert B.*,¹⁷⁸ the court held that the constitutional right of privacy in sexual matters did not protect a defendant from liability for transmitting genital herpes by way of sexual intercourse.¹⁷⁹

Although the psychotherapist-patient privilege is deemed to be a constitutional right, this privilege is not absolute and must yield in

168. See *Griswold*, 381 U.S. at 485; *People v. Belous*, 71 Cal.2d 954, 963, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1967).

169. See *infra* notes 171-79 and accompanying text.

170. See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 128, at 735.

171. See *Barbara A.*, 145 Cal. App. 3d at 380, 193 Cal. Rptr. at 430.

172. 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

173. *Id.* at 385, 193 Cal. Rptr. at 433.

174. *Id.* at 374, 193 Cal. Rptr. at 426.

175. An ectopic pregnancy is a tubal pregnancy. See *id.* at 375, 193 Cal. Rptr. at 426.

176. *Id.*

177. See *id.* at 380-81, 193 Cal. Rptr. at 430.

178. 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).

179. *Id.* at 996-97, 198 Cal. Rptr. at 276.

the presence of a compelling state interest embodied in a narrowly drawn statute.¹⁸⁰ Several cases have sustained the subordination of the psychotherapist-patient privilege to a compelling state interest. These cases must be reviewed prior to examining the compelling state interests that justify the proposed statute.¹⁸¹

C. The Psychotherapist-Patient Privilege Must Yield to a Compelling State Interest

Evidence Code section 1016 provides an exception to the psychotherapist-patient privilege. This exception applies to communications related to the emotional condition of a patient if that condition was placed in issue by the patient.¹⁸² Section 1016 has been upheld against constitutional challenge due to the compelling state need to insure ascertainment of the truth.¹⁸³ Thus, in *Lifschutz*, the court rejected the notion of an absolute privilege of confidentiality and asserted that compelled disclosure did not violate any constitutional privacy interests of the psychotherapist or the patient.¹⁸⁴ The patient-litigant exception, however, arguably is easier to justify because patients, by initiating litigation, have placed their emotional condition in issue and therefore should not be permitted to shield themselves behind the privilege.¹⁸⁵

Section 1024 of the Evidence Code provides an additional exception to the psychotherapist-patient privilege. This exception allows a therapist to initiate commitment proceedings and to testify in court when a determination is made that the patient poses a danger to himself or to others.¹⁸⁶ This exception was upheld in *Mavroudis v. Superior Court*¹⁸⁷ and is representative of the judgement that the public interest in the psychotherapist-patient privilege must yield to the public interest in safety from violent assault.¹⁸⁸

The psychotherapist-patient privilege also has been held inapplicable to statements made by a child during a counseling session that she had been molested by her mother's boyfriend.¹⁸⁹ Thus, the court, in

180. *Caesar*, 542 F.2d at 1069; see *Stritzinger*, 34 Cal. 3d at 511, 668 P.2d at 742, 194 Cal. Rptr. at 435.

181. See *infra* notes 182-215 and accompanying text.

182. CAL. EVID. CODE §1016.

183. See *Lifschutz*, 2 Cal. 3d at 423, 467 P.2d at 561, 85 Cal. Rptr. at 833. See *infra* notes 184-85 and accompanying text. See *Caesar*, 542 F.2d at 1069.

184. 2 Cal. 3d at 433, 467 P.2d at 568, 85 Cal. Rptr. at 840.

185. *Caesar*, 542 F.2d at 1070.

186. CAL. EVID. CODE §1024.

187. 102 Cal. App. 3d 594, 162 Cal. Rptr. 724 (1980).

188. See *id.* at 603, 162 Cal. Rptr. at 731.

189. See *infra* notes 190-91 and accompanying text.

In re Courtney S.,¹⁹⁰ upheld Evidence Code section 1027 which provides that the privilege is nonexistent when the following circumstances exist: (1) the patient is a child under sixteen years of age; (2) the psychotherapist has reason to believe that the patient has been a victim of a crime; and (3) the disclosure of the communication is in the best interest of the child.¹⁹¹

The psychotherapist-patient privilege has been overcome in situations other than those exceptions expressly contained in the Evidence Code.¹⁹² The primary example is in the area of child abuse. Child abuse has received dramatically increased attention over the past decade.¹⁹³ Penal Code section 1171(b) requires certain persons, including psychotherapists, to report instances of child abuse, notwithstanding the privileged nature of a communication that might be the source of the knowledge.¹⁹⁴ The California Supreme Court in *People v. Stritzinger*¹⁹⁵ held that the Child Abuse Reporting Act¹⁹⁶ takes precedence over the psychotherapist-patient privilege due to the interest of the state in detection and prevention of child abuse.¹⁹⁷ Further, this compelling state interest was held to be sufficient to outweigh the right of privacy in family matters.¹⁹⁸ The Legislature recently has expanded this policy of protecting vulnerable citizens by mandating reporting of instances of abuse of elders.¹⁹⁹

The interest of the state in detecting and prosecuting suspected fraud is another example of an interest that has been held to outweigh the privacy interest of the individual psychotherapy patient.²⁰⁰ *McKirdy v. Superior Court for the City and County of San Francisco*²⁰¹ involved a seizure by Medi-Cal Fraud Unit investigators of forty-nine patient files in the custody of a psychiatrist.²⁰² The files were seized in order to provide information on services actually rendered by the defendant psychiatrist and to provide leads for further interviews with other patients.²⁰³ The psychiatrist unsuccessfully argued that the statutory

190. 130 Cal. App. 567, 181 Cal. Rptr. 843 (1982).

191. *Id.* at 574, 181 Cal. Rptr. at 847.

192. See *infra* notes 193-215 and accompanying text.

193. See Comment, *Vanishing Exception to the Psychotherapist-Patient Privilege: The Child Abuse Reporting Act*, 16 PAC. L.J. 335 (1984).

194. CAL. PENAL CODE §1171(b).

195. 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983).

196. CAL. PENAL CODE §§11165-11174.

197. *Stritzinger*, 34 Cal. 3d at 512, 668 P.2d at 743, 194 Cal. Rptr. at 436.

198. See *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (discussion of right to privacy in family matters).

199. Elder Abuse Reporting Act, CAL. WELF. & INST. CODE §§9380-9386.

200. See *McKirdy v. Superior Court*, 138 Cal. App. 3d 12, 24, 188 Cal. Rptr. 143, 151 (1982).

201. *Id.*

202. *Id.* at 16, 188 Cal. Rptr. at 145.

203. *Id.* at 17, 188 Cal. Rptr. at 146.

exception²⁰⁴ allowing a search warrant to be granted for evidence in the possession or control of a psychotherapist who is reasonably suspected of engaging in criminal activity violated the constitutional right of privacy of his patients.²⁰⁵ The court concluded that the privacy interests of patients were outweighed by the need for the state to investigate and prosecute a suspected fraud of which patients, as members of the public and as short-changed recipients of health care services, were victims.²⁰⁶

In the landmark case of *Tarasoff v. Regents of University of California*²⁰⁷ the California Supreme Court identified a compelling state interest, not stated expressly in the Evidence Code, that superseded the psychotherapist-patient privilege.²⁰⁸ *Tarasoff* involved a claim by parents that a defendant psychologist failed to exercise reasonable care to protect their decedent daughter from danger posed by a patient of the psychologist.²⁰⁹ The *Tarasoff* Court did not base the decision upon Evidence Code section 1024.²¹⁰ Instead, the Court noted an exception to the general common law rule that a person has no duty to either control the conduct of another or warn anyone who might foreseeably be endangered by the conduct.²¹¹ The exception was triggered in factual settings in which the defendant stood in a special relationship with either the person whose conduct warranted the exercise of control or the person who might foreseeably be a victim of that conduct.²¹² The *Tarasoff* court held that a special relationship exists between any psychotherapist and patient.²¹³ The special relationship that exists between a psychotherapist and patient, combined with the knowledge of the therapist that his patient posed a serious threat of violence to another, gave rise to a duty to exercise reasonable care to protect foreseeable victims of the potential violence.²¹⁴ Notwithstanding the value of psychotherapy in modern society, the *Tarasoff* Court concluded that the public policy favoring protection of the psychotherapist-patient privilege must yield to the extent disclosure is necessary to avert danger to others.²¹⁵

204. CAL. PENAL CODE §1524(c).

205. See *McKirdy*, 138 Cal. App. 3d at 19, 188 Cal. Rptr. at 147-48.

206. *Id.* at 23, 188 Cal. Rptr. at 151.

207. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

208. See *id.* at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.

209. *Id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

210. *Id.* at 441 n.13, 551 P.2d at 347 n.13, 131 Cal. Rptr. at 27 n.13.

211. *Id.* at 434, 551 P.2d at 343, 131 Cal. Rptr. at 22.

212. *Id.* at 435, 551 P.2d at 343, 131 Cal. Rptr. at 23.

213. *Id.*

214. *Id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

215. "The protective privilege ends where public peril begins." *Id.* at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.

The cases discussed above illustrate that the privacy interests of patients in the psychotherapist-patient privilege must yield to the presence of a compelling state interest.²¹⁶ The psychotherapist-patient privilege is not absolute.²¹⁷ State interests held sufficient to overcome the psychotherapist-patient privilege include the following: (1) the ascertainment of the truth when patients have placed their emotional state in issue during litigation;²¹⁸ (2) commitment proceedings;²¹⁹ (3) protection of children;²²⁰ (4) detection of Medi-Cal fraud;²²¹ and (5) avoidance of danger to innocent citizens.²²² Since the statute proposed by this author impinges upon the constitutional rights described, the proposal necessarily must overcome the heavy burden of demonstrating that the statute is necessary to further a compelling state interest. This author contends that the health, welfare, and safety of the citizens of the state is compelling and, therefore, is sufficient to subordinate the right of privacy of the patient in the psychotherapist-patient privilege.

D. An Examination of the Proposed Statute

The fundamental right of privacy inherent in every individual sometimes must yield to a compelling state interest. The compelling interest of the state involved in the proposed reporting law, therefore, must be examined to ascertain whether the proposed statute would impermissibly violate the right to privacy of the patient. An intrusion into a constitutionally protected area only can "be compelled after the requisite balancing of the juxtaposed rights, and the finding of a compelling state interest..."²²³ In order to determine the constitutional validity of the proposed statute, possible state justification must be explored.

1. The Compelling Interest of the State

The value of mental health treatment and the important role mental health assumes in modern society has been recognized with approval by the legislature and judiciary.²²⁴ The state has the police power to

216. See *supra* notes 182-215 and accompanying text.

217. See *supra* notes 180-215 and accompanying text.

218. See *supra* notes 182-85 and accompanying text.

219. See *supra* notes 186-88 and accompanying text.

220. See *supra* notes 189-98 and accompanying text.

221. See *supra* notes 200-06 and accompanying text.

222. See *supra* notes 207-15 and accompanying text.

223. Board of Medical Quality Assurance v. Gherardini, 93 Cal. App. 3d 669, 681, 156 Cal. Rptr. 55, 62 (1979).

224. See *supra* notes 131-66 and accompanying text.

protect citizens and generally has broad discretion in the exercise of this power.²²⁵ The legislature has the authority to enact laws to protect the health, safety, and general welfare of its citizens provided that the laws are within constitutional limitations.²²⁶ Safeguards against the unethical conduct of persons charged with a fiduciary duty are properly within the province of the legislature.²²⁷ The obligation of the state to protect citizens by regulating conduct of professional health care providers consistently has been approved.²²⁸ The state has a great interest in protecting the health of citizens and in maintaining medical standards.²²⁹

Professional organizations have not acted to control psychotherapist-patient sex. Existing professional and legal deterrents are ineffective.²³⁰ Thus, a more active role by the state is required to police the conduct of state licensed health care providers. The psychotherapist who has sexual relations with patients poses a great risk of harm to unsuspecting members of the public who may seek his assistance at some future time. The California Supreme Court in *Tarasoff* concluded as follows: "[T]he public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent disclosure is essential to avert danger to others."²³¹ The *Tarasoff* Court based its conclusion on the interdependence of citizens that is an outgrowth of our modern, crowded, technological society.²³²

The proposed statute advances compelling state interests in several distinct manners. By requiring subsequent therapists to file a report, previously unreported instances of psychotherapist-patient sex will come to the attention of authorities. Licensing boards then may proceed to uphold medical standards by suspending and revoking licenses of substandard psychotherapists.²³³ Furthermore, the district attorney may bring criminal charges against wrongdoing therapists.²³⁴ The risk of harm to unsuspecting citizens who may require mental health services in the future would be reduced. The state would fulfill this duty to

225. *In re Quinn*, 135 Cal. App. 3d 473, 486, 110 Cal. Rptr. 881, 890 (1973).

226. *Shea v. Board of Medical Examiners*, 81 Cal. App. 3d 564, 577, 146 Cal. Rptr. 653, 662 (1978).

227. *Escrow Institute of California v. Pierno*, 24 Cal. App. 3d 361, 368, 100 Cal. Rptr. 880, 884 (1972).

228. See *Shea*, 150 Cal. App. 3d at 577, 146 Cal. Rptr. at 662.

229. *People v. Privitera*, 23 Cal. 3d 697, 730, 591 P.2d 919, 939, 153 Cal. Rptr. 431, 451 (1977).

230. See *Stone*, *supra* note 16, at 1131.

231. *Tarasoff*, 17 Cal. 3d at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.

232. See *id.*

233. See Hare-Mustin & Hall, *Procedures for Responding to Ethics Complaints Against Psychologists*, 36 AM. PSYCHOLOGIST, 1494, 1495 (1981).

234. See *Stone*, *supra* note 16, at 1138-39.

protect citizens from known dangers and to promote the health and welfare of future patients. Future patients are at risk of harm not because they are mentally infirm or *per se* vulnerable; rather, they may be perfectly capable, competent adults who are responsible for their actions.²³⁵ Their vulnerability stems from the uniqueness of the psychotherapy relationship and the childlike, dependent position that they assume upon subjecting themselves to mental health treatment.²³⁶

The compelling state interests outlined above, however, must be balanced against countervailing considerations. These countervailing arguments include several separate considerations. Among them are the following: (1) rights of the sexually abused patient; (2) the governmental intrusion into the professional practice; and (3) the practical problems raised by the statute.

2. Countervailing Interests

Additional harm to the psychotherapy patient who engaged in sexual relations with her therapist is a serious concern raised by the proposed statute. The patient, arguably, is victimized a second time when the subsequent psychotherapist is required to file a report. The patient can have her name reported against her will, with the potential for increased shame and ridicule. The possibility exists that the patient initiated and enjoyed the sexual contact with the previous psychotherapist and felt benefitted from the experience. Reporting the name of the patient to the Department of Consumer Affairs could complicate her ongoing relationships.

The proposed statute permits the reporting psychotherapist to withhold the names of the parties if reporting would result in "unusual injury" to the patient.²³⁷ Unusual injury is defined in subdivision (g) of the proposal as risk of suicide, psychosis or extreme hardship to the patient that in all likelihood would result in the patient terminating

235. Psychotherapy patients require special protection not because they are vulnerable *per se*, but because when they enter therapy, they are placed in a vulnerable, dependent situation. See Kardener, *supra* note 29, at 1135.

This thesis does not mean to imply that adults are children, but rather that when one seeks professional help for a hurt, one is placed emotionally in a childlike posture of dependency characterized by varying degrees of vulnerability, with a concomitant necessity that trust be placed in the wiser, more experienced ('parentoid') healer.

Id.

236. See Minn. Stat. Ann. §626.557 (West 1980) for an example of a statute which does require reporting of sexual relations between psychotherapists and patients. The legislature states that it is the public policy of Minnesota to protect adults who are particularly vulnerable to abuse or neglect because of physical or mental disability or dependency on institutional services. Minnesota, therefore, requires the reporting of suspected abuse or neglect of vulnerable adults.

237. See subdivision (g) of this proposal, *supra* p. 446.

the present course of therapy.²³⁸ This exception compels the exercise of professional judgment by the reporting therapist in rare instances if the reporting of names could cause serious injury to the patient. The basis for this exception is that, in balancing the interests of the individual against the interests of the state, the balance shifts in favor of the patient if serious risk of injury is increased because the interest of the patient then outweighs the compelling interest of the state.

Absent serious injury, however, this author contends that the damage that would inure to the patient and the psychotherapy relationship is outweighed by the greater benefit gained by society as a whole. Members of the public are at risk when even small numbers of unethical psychotherapists are permitted to continue to prey upon vulnerable patients. As seen in *Tarasoff*, the psychotherapist-patient privilege must yield to the extent disclosure is necessary to avert danger to others.²³⁹ Furthermore, by refusing to report the unethical conduct of the psychotherapist, the patient is aiding indirectly the dangerous psychotherapist. This type of indirect assistance was recognized in *In re Courtney S.*²⁴⁰ in which the court upheld Evidence Code section 1024²⁴¹ in a non-commitment context.²⁴² The court allowed into evidence statements of a mother to a therapist that her child had been molested by the man with whom the mother was living.²⁴³ The statements of the mother were admitted on the theory that the mother posed a danger to the daughter by way of the boyfriend, because she might offer the daughter as a sexual substitute.²⁴⁴ The court stated that nothing in the language of or policy behind section 1024 prevents application to situations in which the threat of danger implicates a third party rather than the patient alone.²⁴⁵ The nexus between a patient and former psychotherapist who engaged in sexual relations is not as strong as that between the mother and boyfriend in *Courtney S.* The rationale behind the application of section 1024 to those who indirectly assist a wrongdoer, however, appears applicable to patients who refuse to report their former psychotherapist with whom they had sexual relations.

Professional organizations likely would oppose this mandatory reporting proposal as an intrusion into professional practices.²⁴⁶ No

238. *Id.*

239. *Tarasoff*, 17 Cal. 3d at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.

240. 130 Cal. App. 3d 567, 181 Cal. Rptr. 843 (1982).

241. This section allows for disclosure of communication, if necessary, in situations when a patient represents a danger to himself or others.

242. *Id.* at 575, 181 Cal. Rptr. at 847.

243. *Id.* at 574-75, 181 Cal. Rptr. at 847.

244. *Id.* at 575, 181 Cal. Rptr. at 847.

245. *Id.*

246. Bouhoutsos, J., *Therapist-Patient Sex: Effects and Issues*, presented at the American

profession is desirous of legislative regulation.²⁴⁷ The fact that professional organizations have been aware of the extent of psychotherapist-patient sexual relations and have failed to take affirmative action in an attempt to eradicate this behavior, however, compels external regulation. The intrusion into the professional practice has been demonstrated to be justified in light of the compelling interests of the state.²⁴⁸

As a practical matter, the proposed reporting law places subsequent psychotherapists in a position that may trigger the surprise, disappointment, and wrath of the patient when they file a report. The proposed legislative intrusion into the psychotherapeutic relationship may create a disruption of psychotherapy. This disruption is akin to that caused by the Child Abuse Reporting Act.²⁴⁹ All disruptions, however, are not necessarily catastrophic for the successful operation of psychotherapy. As in the child abuse area, the manner in which the reporting is introduced to the patient and subsequently managed by the therapist is of critical importance. The expertise and experience of the psychotherapist ultimately may be determinative of the extent of disruption to therapy. A mandatory reporting law does not automatically undermine the psychotherapeutic relationship and psychotherapy. In fact, this law may strengthen the therapy relationship in some cases and provide the impetus for increased involvement in and benefit from psychotherapy.

The proposed statute advances a compelling state interest and is narrowly drawn to achieve its aim.²⁵⁰ Express definitions of the operative terms of the statute were provided.²⁵¹ Finally, the statute is not overly broad because the provisions of the proposal are limited to mental health providers and only to instances discovered through the treatment of a current patient.²⁵²

CONCLUSION

This author has focused on the problem of sexual relations between psychotherapists and their patients. A sizeable number of psychotherapists abuse their position of trust by engaging in sexual

Psychiatric Association Convention, Los Angeles, Ca., May, 1984 (noting that considerable concern exists within the mental health professions in California over what is perceived as an erosion of confidentiality).

247. See Hays, *supra* note 82 at 1252-53.

248. See *supra* notes 224-36 and accompanying text.

249. CAL. PENAL CODE §§11165-11174.

250. See *supra* notes 224-36 and accompanying text.

251. See proposed statute, *supra* p. 445-46.

252. See proposed statute, *supra* p. 445.

relations with patients. The power of a psychotherapist and the ease with which a psychotherapist can engage in sexual relations with a patient has been discussed. The vulnerability of patients who undergo psychotherapy was demonstrated. Sexual relations with patients are proscribed by all mental health professional organizations. This conduct constitutes grounds for license suspension and revocation. A psychotherapist who engages in this practice subjects himself to criminal penalties and civil action.

Psychotherapist-patient sex continues to be widespread despite professional and legal sanctions. The primary reason for this widespread behavior is not that current sanctions are ineffective *per se*. Rather, the sanctions do not become operative until a patient initiates an administrative or legal claim. Very few patients file a complaint. A combination of situational and personality factors were considered to be the reasons for patient inaction.

This author has asserted that laws subjecting the psychotherapist to criminal penalties do not provide effective patient protection because criminal penalties cannot serve as a deterrent unless the wrongful behavior is reported. Subsequent psychotherapists who become aware through the treatment of a patient that the patient had engaged in sexual relations with a previous psychotherapist currently cannot report their findings. These therapists are caught between the privileged nature of the communication and their ethical and moral duty to report the wrongdoing psychotherapist and thereby protect members of the public who are at risk of harm.

A proposal for a mandatory reporting law that would require a subsequent psychotherapist to file a report when he becomes aware through the treatment of a patient that the patient had engaged in sexual relations with a previous psychotherapist was offered. Cases that subordinated the psychotherapist-patient privilege to compelling state interests were reviewed. This author contends that the compelling state interest in protecting the health, welfare, and safety of its citizens, embodied in the proposed narrowly drawn reporting statute, is sufficient to overcome the privacy interest of the patient. The proposed statute is necessary in order to protect vulnerable, unsuspecting citizens who at some time in their life may seek mental health assistance from harmful, state licensed psychotherapists.

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