

5-1-1993

# The Poet, the Biographer and the Shrink: Psychiatrist-Patient Confidentiality and the Anne Sexton Biography

Sharon Carton

Follow this and additional works at: <http://repository.law.miami.edu/umeslr>



Part of the [Entertainment and Sports Law Commons](#)

---

## Recommended Citation

Sharon Carton, *The Poet, the Biographer and the Shrink: Psychiatrist-Patient Confidentiality and the Anne Sexton Biography*, 10 U. Miami Ent. & Sports L. Rev. 117 (1993)

Available at: <http://repository.law.miami.edu/umeslr/vol10/iss1/7>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Entertainment & Sports Law Review by an authorized administrator of Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# THE POET, THE BIOGRAPHER AND THE SHRINK: PSYCHIATRIST-PATIENT CONFIDENTIALITY AND THE ANNE SEXTON BIOGRAPHY

SHARON CARTON\*

I. INTRODUCTION .....	117
II. HISTORICAL BACKGROUND OF SEXTON'S PSYCHIATRIC TREATMENT .....	118
III. THE CONTROVERSY: REACTION TO THE DISCLOSURE .....	121
IV. NATURE OF THE CAUSES OF ACTION AVAILABLE TO SEXTON'S ESTATE .....	131
V. FIRST AMENDMENT RIGHT TO DISCLOSURE .....	146
VI. THE DEFENSES OF WAIVER AND CONSENT .....	153
VII. CONCLUSION .....	163

## I. INTRODUCTION

"[M]e, I likes confession. . ." Anne Sexton.<sup>1</sup>

One could not hypothesize a tougher case to argue breach of the psychiatrist-patient privilege of confidentiality than one concerning the patient in this instance, the noted "confessional" poet Anne Sexton. Sexton made it her life's *oeuvre* to give the public access to the darkest secrets of her years of devastating mental illness that culminated in her suicide. The psychiatrist who arguably violated the privilege, Dr. Martin Orne, was unquestionably responsible not only for motivating Sexton to begin her literary career, but also for extending Sexton's life by encouraging her to write. Thus, many commentators have argued that Sexton owed Orne both her life and her art.<sup>2</sup>

At first blush, one is hard-pressed to find either a victim or a villain in the purported breach. However, in releasing the tapes of Sexton's therapy sessions to her biographer, Diane Wood Middlebrook, Dr. Orne has generated a storm of controversy. Those who have injected themselves into the fray have raised issues ranging from the First Amendment to the right of privacy to, less pre-

---

\* Professor, Nova University Shepard Broad Law Center; B.A., C.W. Post College, 1976; J.D., Hofstra University School of Law, 1979; L.L.M., George Washington University National Law Center, 1986. The author gives special thanks to research assistant Shelley Zabel for her tireless and invaluable contribution.

1. DIANE MIDDLEBROOK, ANNE SEXTON 215 (1991).

2. See, e.g., L.S. Klepp, *Bedlam Bound*, ENT. WKLY., Sept. 6, 1991, at 76.

dictably, feminism.

A first reading of Anne Sexton's eponymous biography does not inspire any palpable sense of outrage. Middlebrook has not written a sensationalized "tabloid" account, but an account grounded in the sober tone and jargon of literary criticism interspersed with the similarly sedate sensibilities of psychiatric evaluation. The most lurid events and characterizations of Sexton's life are treated with decorum and arid detachment.<sup>3</sup>

Unfortunately, this is not a case susceptible of easy resolution by visceral reaction. The emotions evoked in the reader should not be determinative of whether Dr. Orne breached a tort or contract duty. Nor should this issue be governed by establishing or attempting to establish whether Sexton was aggrieved by Orne's decision. Even if Sexton's views can be ascertained from beyond the grave, and even if those views do not condemn the release of the tapes, it must still be considered whether there are rights belonging to other potential victims of that action, and whether their rights have been violated.

This Article will address several issues raised by Dr. Orne's actions. First, it will examine the background of the controversy, that is, Sexton's treatment by Dr. Orne and the disclosure to Professor Middlebrook. Second, it will review the different theories of recovery upon which liability might be based. Third, it will address the potential defenses to such liability, most notably consent or waiver and the First Amendment.

## II. HISTORICAL BACKGROUND OF SEXTON'S PSYCHIATRIC TREATMENT

Anne Sexton began psychiatric treatment with Dr. Martha Brunner-Orne, the mother of the psychiatrist who would later become Anne's long-term psychiatrist and make the decision, after her death, that gave rise to the present controversy. Anne consulted Dr. Martha Brunner-Orne shortly after Anne's second daughter was born in August of 1955, for what the doctor diagnosed as postpartum depression. Sexton had been experiencing what she called "'terrible spells of depression,'" she was "agitated, disoriented, and subject to fits of feeling 'unreal.'" The therapy relationship lasted one year, during which time Sexton was hospitalized temporarily, where she was diagnosed as suffering "'rather

3. Lance Morrow, *Pains of the Poet-And Miracles*, TIME, Sept. 23, 1991, at 76.

4. MIDDLEBROOK, *supra* note 1 at 31.

prevalent psychoneurotic features, not entirely the picture of true depression.'"<sup>5</sup> Dr. Martin Orne began treating Anne in August of 1956, while his mother was on vacation. It was the start of a relationship that would last for the next eight years.<sup>6</sup> Sexton had met and formed a favorable impression of Dr. Orne during her hospitalization, and liked him so well that he remained her psychiatrist even after his mother returned.<sup>7</sup> Dr. Orne later noted that he often lost his temper with Sexton. "She was a very difficult patient; she pushed the world of reality away."<sup>8</sup> In 1960, Dr. Orne grew frustrated with Anne's tendency to treat the sessions as "self-contained vignettes with a beginning, middle and end."<sup>9</sup> That is, Anne retained no memory of any progress made in any one session, losing any sense of continuity from one session to the next. Indeed, Sexton would often close the sessions by falling into a deep trance, "further distanc[ing] the content of the preceding hour from [her] memory."<sup>10</sup>

It is difficult to describe the profound inability to respond that marked these states of dissociation . . . . Eventually it became clear that she would dissociate when she had not been able to come to the end point of a session . . . . Often she was annoyed, or she was feeling too much to stop just then, but she could not really verbalize much of what was troubling her. This symptom interfered with treatment. To some extent, she was aware of what she was doing. At times I couldn't help becoming angry about her lack of response . . . .<sup>11</sup>

In an attempt to remedy his frustrations over Sexton's loss of memory, Dr. Orne instructed Sexton to capture the sessions by making notes immediately following each meeting. Later, in 1961, Dr. Orne began to tape record the sessions. He then assigned Sexton the task of compiling a written record of each session, requesting her to return a day later to the office to listen and take notes on the previous session.<sup>12</sup> As Dr. Orne put it, he "taped [their] sessions . . . to help her understand what she was doing [in the therapy process]."<sup>13</sup>

---

5. *Id.* at 34.

6. *Id.*

7. *Id.*

8. *Id.* at 41.

9. *Id.* at 37.

10. *Id.*

11. *Id.* at 44 (quoting Dr. Orne).

12. *Id.*

13. *Id.* at 43.

Although Sexton was disturbed by the pain of remembering and thus facing her problems and by the fact that her "assignments" took time away from her writing, taping the sessions proved a success.<sup>14</sup> Sexton's condition was symptomized, if not caused by, her inability to care for her children. Middlebrook theorizes that Sexton's illness lay "in ambiguous diagnostic territory that is only somewhat clearer today than it was in 1956."<sup>15</sup>

[A]necdotal evidence of breakdowns on both sides of her family suggests a genetic predisposition to a biologically based illness, a supposition reinforced by Sexton's extreme physiological symptoms: wildly alternating moods, anorexia, insomnia, waves of suicidal and other impulses, rages, rapid heartbeat. It is possible that biochemical imbalances throughout her life intensified the underlying psychological vulnerabilities that were the primary focus of her psychotherapy.<sup>16</sup>

Particularly problematic for Sexton was her relationship with her daughters, stemming from unresolved feelings about her relationships with the two women who were her maternal figures: her biological mother, Mary Gray, and the great-aunt, "Nana," upon whom Sexton was largely dependent.<sup>17</sup> Also to be factored into diagnosing Sexton's illness, according to Middlebrook, was the sociology of Sexton's time. "The glorification of 'feminine' roles did not offer insight into the rage and guilt aroused by the behavior of small children - women were supposed to be naturally good at mothering."<sup>18</sup> This perspective fed into Sexton's belief that, since she was not "naturally good at mothering," she was good at nothing, save perhaps sex, as she portrayed herself to Dr. Orne.<sup>19</sup> Dr. Orne offered Sexton an avenue for self-validation through self-expression, a medium that would be increasingly seized upon by the cadre of women poets throughout the decades that followed.<sup>20</sup>

Dr. Orne countered Sexton's repeated suicide attempts<sup>21</sup> with the encouragement that her work would help not only herself but her similarly troubled readers. Sexton recalled Dr. Orne's telling her, "You can't kill yourself, you have something to give. Why, if people read your poems (they were all about how sick I was) they

---

14. See *id.* at 138-39.

15. *Id.* at 37.

16. *Id.*

17. *Id.*

18. *Id.* at 40.

19. *Id.* at 41.

20. *Id.* at 40.

21. See *id.* at 34, 42.

would think, "There's somebody else like me!" They wouldn't feel alone.' " As Middlebrook notes, "[t]his was the message Sexton called her turning point: 'I had found something to do with my life.' "22

### III. THE CONTROVERSY: REACTION TO THE DISCLOSURE

It may be surprising to note the widespread attention given to the ethical issue surrounding Dr. Orne's disclosure of the tapes to Sexton's biographer, given that Anne Sexton's poetry was always popular and accessible to the masses. Sexton frequently wrote about her hospitalizations and suicide attempts.

I came back to the scene of the disordered senses,  
came back last night at midnight,  
arriving in the thick June night  
without luggage or defenses,  
giving up my car keys and my cash,  
keeping only a pack of Salem cigarettes  
the way a child holds on to a toy.  
I signed myself in where a stranger  
puts the inked-in X's -  
for this is a mental hospital,  
not a child's game.  
Today an intern knocks my knees,  
testing for reflexes.  
Once I would have winked and begged for dope.  
Today I am terribly patient.<sup>23</sup>

Later she would write in "The Addict:"

Sleepmonger,  
deathmonger,  
with capsules in my palms each  
night  
[. . .]  
Don't they know  
that I promised to die!  
I'm keeping in practice.  
I'm merely staying in shape.  
The pills are a mother, but better,  
every color and as good as sour balls.  
I'm on a diet from death.<sup>24</sup>

---

22. *Id.* at 43. (emphasis in original).

23. *Id.* at 176-77.

24. *Id.* at 260.

In this section, I will explore first the response of the popular media to the controversy, and then the heated scholastic debate waged largely in the pages of *The New York Times* prior to release of the biography.

The *Wall Street Journal* addressed the fact that Professor Middlebrook began writing the biography with no ready access to the tapes. Indeed, when Professor Middlebrook began her research,

Dr. Orne seemed a lost cause as a source. For five years, he had ignored written requests for an interview. Then, in 1985, a Stanford academic, a colleague of Dr. Orne's who heard Ms. Middlebrook deliver a paper on Sexton at a professional meeting, offered to introduce them. By then, Ms. Middlebrook had learned a great deal about the treatment from a lode of Sexton papers assembled at the University of Texas in Austin. The collection included four of the therapy tapes. Only when she met Dr. Orne did Ms. Middlebrook learn that he had made scores more . . . Listening to and transcribing the tapes took another two years, but the time was gold to a biographer.<sup>25</sup>

According to Professor Middlebrook, "[f]ar more than information, [the tapes] provided intimacy."<sup>26</sup> One *Miami Herald* reporter acknowledged that "Sexton believed in letting it all hang out: 'I hold nothing back,' she once said proudly,"<sup>27</sup> but questioned the motives of Sexton's daughter and Dr. Orne:

The daughter has said her duties as literary executor required her to release information that would lead to a better understanding of her mother's poetry. But then Linda Gray Sexton also revealed to the biographer that her mother sexually abused her, so who knows what really motivates her.

The psychiatrist seemed to want a chance to say: I created Sexton as an artist. And to suggest, outrageously, that if he had not moved from Boston, if he had remained her therapist, "Anne Sexton would be alive today[.]" . . .

But there are hints throughout Middlebrook's book that Sexton did value a certain privacy, that the confessionalism of her poetry was in many ways a persona. And if she had wanted to make the tapes public, it is quite possible that, as a woman who planned her death, she would have included them in her literary

---

25. Helen Dubar, *The Author in the Middle of the Sexton-Tape Debate*, WALL ST. J., Sept. 24, 1991, at A16.

26. *Id.*

27. Debbie Sontag, *Anne Sexton: A Poet's Life Haunted by Nightmares*, MIAMI HERALD, Aug 25, 1991, at 11, 61.

estate.<sup>28</sup>

*Entertainment Weekly* inquired whether Sexton, "for all her exhibitionism, [would] have wanted her secrets spilled in this new biography? Or does it matter what she would have wanted?"<sup>29</sup>

Sexton's friend, poet Maxine Kumin, is quoted as saying, "She's dead, for gosh sakes . . . . In my heart of hearts I know Annie would've welcomed the release of the tapes."<sup>30</sup> Dr. Orne, however, is criticized for his actions, both for the release of the tapes and for the "insert[ion] [of] a flat, clinical foreword to the book that calls as much attention to himself as to his patient."<sup>31</sup>

The *Entertainment Weekly* article goes on to quote Peter Davison, a poet who knew Sexton, as attributing to Dr. Orne "a proprietary interest in Anne Sexton," which the author of the piece considers "the key to the entire question of biographical ethics[:] . . . Everyone has their reasons. Everyone, that is, except the dead, who have only their uses."<sup>32</sup>

In the battle of the academicians, the opening shots seem to have been fired on July 15, 1991, in the pages of *The New York Times*. Columnist Alessandra Stanley quoted Dr. Willard Gaylin, a Columbia University psychiatry professor and expert on medical ethics, as saying, "Doctors have no obligation to history and certainly should not act as a research assistant to a biographer."<sup>33</sup> Gaylin described Dr. Orne's action as a "betrayal of his patient and his profession."<sup>34</sup>

Although Orne was quoted as stating that he had "no question that [Sexton] would have jumped at the opportunity to share what we did,"<sup>35</sup> and that he was "often more concerned about her privacy than she was,"<sup>36</sup> others in his profession disagreed. "A patient's right to confidentiality survives death," said Dr. Jeremy A. Lazarus, the chairman of the ethics committee of the American Psychiatric Association. "Our view is that only the patient can give that release. What the family wants does not matter a whit."<sup>37</sup>

28. *Id.*

29. James Kaplan, *Dead Poets*, ENT. WKLY., Aug. 23, 1991, at 35.

30. *Id.*

31. *Id.*

32. *Id.*

33. Alessandra Stanley, *Poet Told All; Therapist Provides the Record*, N.Y. TIMES, July 15, 1991, at A1.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*



Dr. Robert P. Hopkins, chairman of the Massachusetts Psychiatric Society's ethics committee, disagreed. "The privilege is the patient's, not the doctor's . . . I would have no reason to bring ethics complaints against Dr. Orne. I don't think he did anything wrong."<sup>38</sup>

On July 20, 1991, a *New York Times* editorial entitled *Betrayed: The Poet and the Public*, garnered a defensive reaction from those associated with the disclosure. In that editorial, it was noted that,

Anne Sexton is not the first writer to be betrayed by those who knew her. Sometimes literature is the richer for those infidelities: we would have had less Kafka, for instance, had his friend, Max Brod, not disobeyed his order to destroy some of his works. Sometimes it is infinitely poorer for them: Lord Byron's friends burned his memoirs . . .

It's not surprising, then, that Ms. Middlebrook leaped like a trout to the fly when Dr. Orne offered the tape recordings. But the person who dangled that bait was a physician, and as such, governed by a set of strictures not placed on ordinary friends and enemies.

When literary value is balanced against those strictures, the public's interest in privacy prevails. Anne Sexton likely assumed that the relationship between psychiatrist and patient was as confidential as that between priest and penitent. Anyone who enters therapy does so with that assumption. Confidentiality is at the heart of the process. Betrayal is, or should be, unthinkable.

By taking the tapes, Ms. Middlebrook followed her profession. But by offering them, Dr. Orne dishonored his.<sup>39</sup>

The above editorial raises an interesting point in maintaining that the interest in privacy is not solely the province of the patient, but rather belongs to the public. This was a theme that sounded throughout the flurry of letters to the editor, subsequent editorials, and other responses to *Betrayed*. As another commentator argued, "[E]ven if Anne Sexton wanted the tapes revealed, I still say: Lock them up! Why should Sexton have the right to undermine trust for millions of living patients in a pitch for immortality from the grave?"<sup>40</sup>

---

38. Charles E. Claffey, *When Therapists Give Information to Biographers; A Forthcoming Book on Anne Sexton Sparks Debate over Psychiatric Ethics*, BOSTON GLOBE, July 17, 1991, at 57.

39. *Betrayed: The Poet and the Public*, N.Y. TIMES, July 20, 1991, section 1 at 18.

40. M.G. Lord, *Woman Talk to a Psychiatrist while an Ear on the Wall is Listening*,

Leonore Tiefer, Clinical Associate Professor of Psychiatry at Montefiore Medical Center, asked the seminal question: "Whose information is it, anyway?"<sup>41</sup> Professor Tiefer questioned whether the consent of Sexton's daughter was sufficient, or whether "Sexton's own explicit consent [was] required?"<sup>42</sup> Acknowledging that there may be, under certain circumstances (e.g., public peril) justifications for disclosure, Professor Tiefer still asks,

[W]as there any such justification for Sexton's therapist . . . ? For the life of me, I cannot think of one. I assume he did it for his own greater glory, so everyone would forever associate him with the award-winning poet. I assume it's yet another instance of a man taking control of something belonging to a woman and, of course, saying she would have wanted him to do it.<sup>43</sup>

Dr. Tiefer makes two points: first, that Dr. Orne had his own interests to serve, separate and apart from any altruistic notion of public interest or fealty to Sexton, and second, that the disclosure controversy is, at its heart, a feminist "control" issue.<sup>44</sup> These two points are raised repeatedly in the media flap.

Erica Jong, author and President of the Author's Guild, questioned rhetorically,

Do some people denigrate Anne Sexton's revelations because she was a woman? Women's revelations are invariably thought to be less valuable than men's. Women, after all, reveal themselves all the time and their selfhood is often called selfishness - as if it were presumption for a woman to have a self at all.

If the poet Robert Lowell had left these therapy tapes, would we rejoice or denounce? I suspect we would treat his "literary remains" with greater respect.<sup>45</sup>

Dr. Orne responded to the controversy in an editorial printed in *The New York Times* on July 23rd, in which he took issue with Dr. Jeremy Lazarus' point that "what the family wants does not matter a whit."<sup>46</sup> It was Dr. Orne's position that he was furthering the interests of Anne's family and Anne herself.

In 1964, when I left Massachusetts [terminating the therapy re-

NEWSDAY, July 28, 1991, at 32.

41. Leonore Tiefer, *Personal Perspective; The Neurotic Need of Psychotherapists to Exploit their Patients*, L.A. TIMES, July 21, 1991, at M1.

42. *Id.*

43. *See id.*

44. *See id.*

45. Erica Jong, *Anne Sexton's River of Words*, N.Y. TIMES, Aug. 17, 1991, at 21.

46. Martin Orne, *The Sexton Tapes*, N.Y. TIMES, July 23, 1991, at A21.

lationship with Sexton], I offered to return all the therapy tapes to Anne. She asked that I keep them to use as I saw fit to help others, though she retained a few for herself . . . Anne Sexton chose disclosure of her therapy in keeping with what she stood for as a confessional poet. Indeed, she alluded to my identity as her therapist in her 1960 book . . . Privacy was of no concern to her.<sup>47</sup>

Orne argued that, while a psychiatrist should not "accede to a family's desire to have therapeutic material released" contrary to the express desires of the patient, when the patient's family's wishes are, as Orne perceived them to be, in concert with those of the patient, there is no valid reason for withholding the material.<sup>48</sup>

Further, Orne closes with the point that would be stated again and again - this is an exceptional case: "Ethical rules of confidentiality are intended for what applies to most cases. Anne Sexton's case was unique."<sup>49</sup> Dr. Victor Bloom, Clinical Associate Professor of Psychiatry at Wayne State University's School of Medicine, agrees, "No rule is without exceptions, and the case of Anne Sexton is surely exceptional."<sup>50</sup>

But another school of thought disputes that position. According to Dr. Howard D. Kibel, Associate Professor of Psychiatry at Cornell University Medical College,

Dr. Orne confuses the right of privacy with the obligation for confidentiality. Privacy is a prerogative of citizens to keep personal aspects of their lives from public view. Confidentiality is an ethical tenet of the psychiatric profession that precludes the psychiatrist from allowing what is said in psychotherapy to leave the consultation room.<sup>51</sup>

As for whose information it is, and to whom this duty is owed, Dr. Kibel adds:

Confidentiality is not a privilege of the patient. It is a duty of the psychotherapist. The clinician must not release material from sessions *even if the patient gives consent, because the patient is not fully cognitive of the implications of what he or she said there* . . . The dictum against disclosure also exists for the protection of all other patients, both past and future, so that

---

47. *Id.*

48. *Id.*

49. *Id.*

50. Victor Bloom, M.D., *Sexton's Psychiatrist Violated Ethics; An Exception*, N.Y. TIMES, Aug. 9, 1991, at A6.

51. Howard Kibel, M.D., *Sexton's Psychiatrist Violated Ethics*, N.Y. TIMES, Aug. 9, 1991, at A26.

none will be dissuaded from seeking help and talking openly to therapists. It is these people that Dr. Orne has let down. And for this reason he is guilty of violating the ethics of the profession.(emphasis added)<sup>52</sup>

Another literary biographer, Nancy Milford, argued on the side of the defenders of disclosure stating that Sexton's therapy, "that splendid analysis", was rich with information which "those who outlive Sexton [should] learn from . . ."<sup>53</sup> Joining her, however, was John G. Freund, Sexton's son-in-law, who bills himself as "someone intimately familiar with the process by which Diane Middlebrook wrote her . . . biography . . ."<sup>54</sup> Freund argues that "to Anne Sexton, . . . neither the doctor-patient relationship . . . nor anything else of literary value was in the slightest way confidential."<sup>55</sup>

Orne and Linda Gray Sexton believe they were speaking for Sexton and following her implied wishes. But, according to Josef H. Weissberg, President of the American Academy of Psychoanalysis, "[t]he question is not if Anne Sexton's wishes were correctly perceived, but whether or not a psychiatrist is ever justified in disregarding confidentiality without the patient's explicit, freely given permission."<sup>56</sup> Dr. Weissberg answers that question with a resounding "no".<sup>57</sup>

On July 26th, Diane Middlebrook entered the media fray, with a *New York Times* editorial explaining her method and motive, responding not to the July 20th editorial, but to the July 15th front-page article.

The [Sexton] estate and the psychiatrist granted me access to these medical records because of the many ways treatment promoted Anne Sexton's evolution as a writer; the extensive use she made of psychotherapy as a theme and inspiration, and her own indifference toward privacy. Ethicists consulted for your article had to respond without having seen my book, which has not yet been published, in judging Dr. Orne's culpability for violating confidentiality. Those of us responsible for deciding what should

---

52. *Id.*

53. Nancy Milford, *50 Minutes - Or Forever?*, *Newsday*, July 24, 1991, at 78. This is a minority position.

54. John G. Freund, *The Poet's Art Mined the Patient's Anguish*, *N.Y. Times*, July 26, 1991, at A26.

55. *Id.*

56. Josef H. Weissberg, M.D., *The Poet's Art Mined the Patient's Anguish*, *N.Y. Times*, July 26, 1991, at A26.

57. *Id.*

go into the book — heirs, doctor, publisher, author — were acutely aware of the moral complexities. Yet it seemed to us that the tapes provided a historical record of the processes by which a human being had survived a mental illness by turning her treatment into an education in the service of art.<sup>58</sup>

One issue that the contributors to this controversy fought over was the survivability of the right of privacy or confidentiality. “Beyond the putative transgressions of one psychiatrist, there was a larger question of whether the dead retain any right to privacy.”<sup>59</sup> Dr. Kathleen Mogul, a member of the Ethics Committee of the American Psychiatric Association was quoted in *Newsweek*,

What has become very evident to me is the necessity of this principle [of inviolable privacy without express patient consent] to supersede whatever the public interest in history is . . . The daughter may have approved, but that doesn’t obligate the psychiatrist to release the material. If I had a case like this I would fight the release - I am the patient’s guardian in this.<sup>60</sup>

Dr. Robert Hopkins, head of the Ethics Committee of the Massachusetts Psychiatric Association, quoted in the same article, questioned why Dr. Orne even kept the tapes after Sexton’s death, when “[t]here was no issue of further treatment . . .”<sup>61</sup>

The defenders of disclosure continually claim that Sexton would have consented to the release of the tapes. “If ever there was an author whose right to privacy was voluntarily waived, it’s Anne Sexton.”<sup>62</sup> But that . . . presumes to speak for a master of words whose tragedy is that she is no longer here to speak for herself.”<sup>63</sup> The difficulty in reading the mind of a late patient is that, as Joyce Carol Oates argued, “[w]ith age, Sexton might have lost her desire for self-exhibitionism.”<sup>64</sup> Not all of Sexton’s surviving family members supported the daughter’s decision to disclose the tapes. Blanche Harvey Taylor, Sexton’s sole surviving sister, “feels devastated by printed but unprovable complaints about her parents that

58. Diane Middlebrook, *The Poet’s Art Mined the Patient’s Anguish*, N.Y. TIMES, July 26, 1991, at A3.

59. David Gelman & Farai Chideya, *Secrets of the Couch*, NEWSWEEK, July 29, 1991, at 54.

60. *Id.*

61. *Id.* at 55.

62. *Id.* (quoting Peter Davison, editor of ANNE SEXTON).

63. Gelman & Chideya, *supra* note 59, at 55.

64. Joyce C. Oates, *Anne Sexton: A Heart Laid Bare*, WASH. POST, Aug. 11, 1991, Book World (Magazine) at 1, 10.

were meant to be the stuff of therapy.”<sup>65</sup> Taylor had originally cooperated with Middlebrook, but when Middlebrook rewrote the book after two years of transcribing the therapy tapes, Taylor withdrew her support, and “is now looking for other ways to take action, such as filing a complaint against Dr. Martin T. Orne

. . . .”<sup>66</sup>

While much has been made of possible invasion of Sexton’s privacy (and her friends agree that privacy was not something she valued) little attention has been paid to the unwelcomed spotlight shone on much less exhibitionist relatives who were often topics or metaphors in her therapy. (After all, whose complaints behind closed doors to a therapist would not contain angry allegations against spouses and parents?) . . . [D]ead relatives cannot [sue], and so, apparently, are fair game.<sup>67</sup>

In an August issue of *The New York Times*, Linda Gray Sexton responded to the articles and editorials that left her “besieged by the press . . . .”<sup>68</sup> “A literary executor is the future eyes and ears of the artist, and her most important duty is to keep the work both visible and alive after the author dies. Sometimes I was able to obey the instructions left me, other times I had to override them.”<sup>69</sup> Gray Sexton does not specify into which category the release of the tapes fell. In defense of Dr. Orne, she states:

Dr. Orne did not stand alone when he made the records from his therapy available: all but one of the many psychiatric institutions that held my mother’s medical records - including the prestigious McLean Hospital in Belmont, Mass. . . . - released those records at my request . . . for the express purpose of providing information to the biographer. The only institution that did not . . . was Massachusetts General Hospital, which maintained that Anne Sexton’s records could not be found. McLean requested a court ruling before turning over the record; I applied for such a ruling and the court awarded it. Had Dr. Orne revealed he had tapes but refused to make them available, I would have gone to court for them. It is germane to point out that Dr. Orne receives no royalties from the book, nor did he receive any remuneration for writing his introduction.<sup>70</sup>

---

65. Carol Stocker, *The Late Poet’s Sister and Nieces are Battling to Tell their Side of the Family’s Story*, BOSTON GLOBE, Aug. 13, 1991, at 49.

66. *Id.*

67. *Id.*

68. Linda Gray Sexton, *A Daughter’s Story: I Knew Her Best*, N.Y. TIMES, Aug. 18, 1991, § 7, at 20.

69. *Id.*

70. *Id.*

Katha Pollitt, a poet at work on a collection of essays about feminism, has no problem with the release of the tapes, though she finds Orne's foreword reveals him to be "rather oleaginous and self-promoting."<sup>71</sup> Instead, in a prioritization of psychiatric wrongdoing, Pollitt admits, "I have to confess that I can't even work up much indignation over the release of the tapes as an issue of medical ethics. The posthumous revealing of Sexton's confidences seems a peccadillo compared to what some of her therapists did to her while she was alive."<sup>72</sup> One of the most notable incidents involved the pseudonymous "Dr. Zweizung" who had sex with Anne while charging her for the time.

Perhaps the final word in this flurry of attacks and counterattacks should go to Beverly Fields, a critic who has written on Sexton.

Linda [Gray Sexton] has wondered publicly "if Mother is angry with me . . . 'Look, Mom, you wrote about this stuff. You lived it in public.'" But she didn't write about all of it, and although she certainly lived it, she didn't live all of it in public.<sup>73</sup>

As this article evaluates the causes of action that could be raised to attack Dr. Orne's actions, several factors should be considered. First, to whom does the privilege of confidentiality or right of privacy belong? Is it the patient's alone, the patient's as shared with her family, or does it belong to the public, in particular, the segment of the public which may seek psychiatric help? Does it belong, in any way, to the people whose private lives were mentioned in the disclosed information and did not support release of the tapes?

Second, can this privilege or right ever be waived, and if so, by whom? Does the nature of psychiatrist-patient relationship proscribe inferring consent where it is not express, especially where the patient has died without giving that express consent? Does the nature of the relationship even bar accepting consent from a patient who may be incapable of making that objective decision?

Finally, under the rubric of "bad facts make bad law," is the Sexton case so exceptional that the rules do not apply? Perhaps an exception can be carved out for publicity-loving patients who, either probably or certainly would have welcomed the disclosure? Or, on the contrary, are there sufficient other interests at stake

---

71. Katha Pollitt, *The Death Is Not the Life*, N.Y. TIMES, Aug. 18, 1991, § 7, at 1.

72. See *id.*

73. Beverly Fields, *Anne Sexton: Putting the Poet on the Couch*, CHI. TRIB., Aug. 18, 1991, Tribune Books section, at 6.

such that Sexton's likely wishes should not vitiate the obligation of confidentiality? If an exception would be recognized in a unique case, have Middlebrook *et alia* met that standard in this case? These issues will be explored in the sections on the theories of liability for psychiatric disclosure and waiver and consent which follow.

#### IV. NATURE OF THE CAUSES OF ACTION AVAILABLE TO SEXTON'S ESTATE

Courts and academicians that have considered the issue of wrongful disclosure of psychiatric records or information have recognized or encouraged the recognition of various theories of liability. The most prevalent theories include causes of action based on tort liability and breach of contract.<sup>74</sup> This section of the Article will survey the scope of these causes of action and will consider the applicability of each basis for liability to the Sexton case.

##### A. Tort Liability

##### 1. Invasion of Privacy

Tort liability for the invasion of privacy is said to have originated in an article written by Samuel Warren and Louis Brandeis in 1890, in which they defined the right of privacy as the right "to be let alone."<sup>75</sup> The article is said to have inspired a majority of states to adopt a cause of action in tort for the "wrongful public exposure of private information."<sup>76</sup>

The *Restatement (Second) of Torts* recognizes liability in tort for invasion of privacy, which the *Restatement* defines as consisting of four different theories of wrongdoing: "unreasonable intrusion upon the seclusion of another; appropriation of the other's name or likeness; unreasonable publicity given to the other's private life; or publicity that unreasonably places the other in a false

---

74. This article is not meant as an exhaustive survey of every possible cause of action. For example, courts have held that statutes governing physician conduct give rise to liability for wrongful disclosure of confidential information. See generally, Lonette E. Lamb, Comment, *To Tell or Not to Tell: Physician's Liability for Disclosure of Confidential Information about a Patient*, 13 CUMB. L. REV. 617 (1983). The two most relied upon bases for statutory liability are the state statutes recognizing a physician-patient testimonial privilege and those state statutes regulating physician conduct. *Id.* For a discussion on basing a cause of action for disclosure on statutory authority, see *id.* at 631-34.

75. See David L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983).

76. *Id.* at 292.



light before the public.”<sup>77</sup> Section 652D, “Publicity Given To Private Life”, would arguably pertain to the Anne Sexton case, as well as to most cases in which a psychiatrist or other mental health practitioner discloses information about a patient’s treatment.<sup>78</sup>

Section 652D states:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”<sup>79</sup>

In the pre-*Restatement* formulation of the Warren-Brandeis invasion of privacy tort, the “the phrase ‘right to privacy’ referred to a right not to have information about one’s personal life exposed to the general public by the press.”<sup>80</sup> As one commentator noted, this right did not seem to depend on a showing “that the actionable information [was] especially intimate, or particularly offensive by objective standards.”<sup>81</sup>

The elements of the “public disclosure of private facts” tort under section 652D are private information and widespread dissemination.<sup>82</sup> The tort has been defined as “giving publicity to a matter that is private, highly offensive, and not of legitimate concern to the public.”<sup>83</sup> Alternately stated, in view of interpretive case law, the three prerequisites to actionable public disclosure of private facts are: “(1) the fact must be one not voluntarily disclosed; (2) it must not concern governmental authorities or the occurrence of crime; and (3) it must concern a matter that would be embarrassing or demeaning to a reasonable person.”<sup>84</sup>

One of the limitations of this cause of action is the relationship of the elements to the “newsworthiness” defense.<sup>85</sup> That is, the claim will fail if the information is of legitimate public interest.<sup>86</sup> Thus, while the cause of action seemingly “target[s] the mass media for liability”<sup>87</sup> in that dissemination must be sufficiently

77. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

78. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

79. *Id.*

80. Zimmerman, *supra* note 75, at 295.

81. *Id.*

82. *Id.* at 299, 300.

83. Philip E. de la Torre, *Resurrecting a Sunken Ship: An Analysis of Current Judicial Attitudes toward Public Disclosure Claims*, 38 Sw. L.J. 1151 (1985).

84. *Id.* at 1177.

85. See Zimmerman, *supra* note 75, at 300.

86. *Id.*

87. *Id.* at 300, n.35.

widespread, information that is newsworthy is nevertheless protected from liability.<sup>88</sup>

Because courts soon recognized that broad tort liability for truthful speech could pose serious First Amendment problems, they felt constrained to treat disclosures as immunized or privileged if they were newsworthy. All jurisdictions that recognized the private-facts tort have adopted the newsworthiness defense.<sup>89</sup>

The common law invasion of privacy tort, or, more specifically, the "public disclosure of private facts" branch of that tort, has been criticized as both difficult to circumscribe and inconsistent with First Amendment protections for truthful speech.<sup>90</sup> The nexus of the newsworthiness defense to the First Amendment issue has been questioned, however. "Th[e] newsworthiness defense seemingly derived from the nature of the public disclosure tort itself, rather than from the First Amendment."<sup>91</sup> Regardless of the source of the defense, courts have had very little difficulty in using the defense to erode the effectiveness of the tort.

Only rarely have the courts held against the public's interest in the reporting of news. On some of these rare occasions, the courts seem not to have denied the potential public interest in the event disclosed, but instead to have found that other considerations, such as the shame and humiliation suffered by the plaintiff, outweighed the public's interest. *More often, courts have had little trouble in finding newsworthiness even in very sensitive items.*(citations omitted)(emphasis added)<sup>92</sup>

Some commentators feel that the public disclosure tort is moribund, and in fact, was never allowed full fruition by the courts.<sup>93</sup> It has also been suggested, however, that "[t]he solution is not to scuttle the public disclosure tort, but to resurrect it."<sup>94</sup>

The body of case law, either adopting one or all of the Section 652A bases for liability or recognizing one or more theories of liability outside the scope of Section 652A, is extremely limited.<sup>95</sup> *Doe v. Roe*,<sup>96</sup> arguably the first United States case on psychiatrist

---

88. *Id.*

89. *Id.* at 300 n.34.

90. *See id.* at 293 and n.6.

91. de la Torre, *supra* note 83, at 1164.

92. *Id.* at 1167.

93. Zimmerman, *supra* note 75.

94. de la Torre, *supra* note 83, at 1185.

95. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

96. 400 N.Y.S.2d 668 (Sup. Ct. 1977).

liability for breach of confidentiality, was based on four theories of liability.<sup>97</sup> Two were based on New York state statutes<sup>98</sup> which allegedly "establish a public policy whose breach gives rise to a cause of action in tort . . ." <sup>99</sup> A third theory argued that the physician-patient relationship gave rise to a contractual obligation to act consistently with the Hippocratic Oath.<sup>100</sup> The fourth claimed a common law cause of action for violation of privacy, "a separate cause of action . . . for unreasonably publicizing elements of plaintiff's life which ought to have been left in confidence."<sup>101</sup> This last theory appears to track the *Restatement* provision recognizing a cause of action for public disclosure of private facts.<sup>102</sup>

In addition to recognizing a contractual basis for liability,<sup>103</sup> the court also addressed the issue of a privacy cause of action lying in tort.<sup>104</sup> The court considered two bases for privacy liability: statutory (under the New York Civil Rights Law) and the common law.<sup>105</sup> The court recognized that the statutory provision in question did not articulate an applicable theory of liability, and that New York had not adopted a common law right of privacy.<sup>106</sup> The court maintained, however, that "[t]he right of privacy urged here . . . is not a common law right . . ." but rather, one arising from public policy and the implied promise of confidentiality.<sup>107</sup> It was on this basis that the court recognized liability.

A subsequent New York case, *MacDonald v. Clinger*,<sup>108</sup> considered three potential grounds for liability when a psychiatrist disclosed confidential information about a patient to the patient's spouse. Among these was protection against the invasion of privacy, which is guaranteed by New York's Civil Rights Law.<sup>109</sup> This case stands as exemplifying the difficulty courts have encountered in pigeon-holing a cause of action under which they have grounded

97. *Id.* at 671.

98. The first is an evidentiary privilege and the second is the Education Law and implementing regulations.

99. *Doe*, 400 N.Y.S.2d at 671.

100. *Id.*

101. *Id.*

102. de la Torre, *supra* note 83, at 1151.

103. The court found an implied covenant of confidentiality on the part of physicians that was "particularly and necessarily true of the psychiatric relationship . . ." *Doe*, 400 N.Y.S.2d at 674; see discussion *infra* on "Breach of Confidentiality."

104. *Doe*, 400 N.Y.S.2d at 675.

105. *Id.*

106. *Id.*

107. *Id.* at 676.

108. 446 N.Y.S.2d 801 (Sup. Ct. 1982).

109. *Id.* at 802.

liability in this type of case.

The *MacDonald* court declined to recognize either the *Doe v. Roe* public policy based theory of liability, or its right of privacy basis, while instead acknowledging a basis for liability for breach of an implied covenant of confidentiality.<sup>110</sup> The court based liability on a tort duty arising from the contractual relationship between psychiatrist and patient.<sup>111</sup>

A Kansas court in *Werner v. Kliever*<sup>112</sup> refused to hold a doctor liable in an invasion of privacy cause of action.<sup>113</sup> In that case the patient sued for, *inter alia*, invasion of privacy when her doctor disclosed medical information regarding a suicide attempt and suicidal thoughts without her consent to the court officers and the patient's husband.<sup>114</sup>

The plaintiff's claim rested in part on *Restatement* Section 652D's unreasonable "publicity of her private life" language and on an implied right of privacy under Kansas law.<sup>115</sup> The court, stressing Kansas public policy, found that the plaintiff waived the statutory privilege of confidentiality based on the Kansas statutory exemption to that privilege. Specifically, the plaintiff waived confidentiality when she placed the matter in issue in her efforts to secure custody of her children in a divorce proceeding.<sup>116</sup>

The court also rejected the *Restatement* Section 652D argument for two reasons.<sup>117</sup> First, the plaintiff did not demonstrate the element of publicity because the information was disclosed only to the court.<sup>118</sup> Second, in rather circuitous reasoning, the court determined the contents of the letter to be "of legitimate concern to the public" in determining custody of the child.<sup>119</sup> In sum, the court declined to adopt a privacy cause of action outside the scope of Section 652A.<sup>120</sup>

In a case not involving psychiatric confidentiality, the Supreme Court of North Carolina recently refused to adopt a cause of action based on the Section 652D theory of "publication of private facts," noting that such a cause of action is adequately redressed

110. *Id.* at 803.

111. *See id.* at 804; *see discussion infra* on "Contracts."

112. 710 P.2d 1250 (Kan. 1985).

113. *See id.* at 1252, 1258.

114. *Id.* at 1252-53.

115. *Id.* at 1254.

116. *Id.* at 1255.

117. *Id.* at 1256.

118. *Id.*

119. *Id.* at 1256-7.

120. *Id.* at 1257; *See* RESTATEMENT (SECOND) OF TORTS § 652A(2)(1977).

through the tort of intentional infliction of emotional distress.<sup>121</sup> The only branch of the privacy tort recognized in North Carolina is commercial appropriation.<sup>122</sup> The court held that, just as with the "false light" prong, the "private facts" branch of privacy claims "often would duplicate or overlap existing claims for relief."<sup>123</sup> The court noted that these two types of privacy claims would "most directly affect First Amendment speech and press rights."<sup>124</sup>

Commentators have questioned, however, whether the cause of action for violation of privacy is, in fact, duplicative of other causes of action. One justification for the additional privacy cause of action is the need for a patient to be able to enjoin publication or disclosure by a noncontracting party.<sup>125</sup> The common law right of privacy propounded by Warren and Brandeis envisioned a cause of action separate and apart from a breach of an implied or an express contract.<sup>126</sup> The Supreme Court has used the constitutional right of privacy to invalidate state statutes that regulate areas of private choice, but has left to the states, under the Ninth and Tenth Amendments, the protection of the private personality from individual tortious action. A Florida court has held that even the legitimate public interest in the life of an author could not justify invasion of the privacy of a person portrayed in the author's autobiography.<sup>127</sup> As discussed *infra*, some of the weaknesses in this cause of action stem from the "newsworthiness" defense aimed at nullifying First Amendment considerations, and have generated proponents of some of the other bases for liability addressed below.

Using the *Restatement* formulation rather than the interpretive case law, one can make a strong argument that Dr. Orne's release of the tapes satisfies the elements for the public disclosure tort. Only a brief glimpse at the media's interest in the biography is needed to determine that the publicity elements are present. Further, although the courts have been ready to find even the most private matter "of legitimate concern to the public,"<sup>128</sup> it is highly

121. Hall v. Post, 372 S.E.2d 711, 717 (N.C. 1988).

122. *Id.* at 714.

123. *Id.*

124. *Id.* See discussion *infra* on the First Amendment.

125. Note, *Roe v. Doe: A Remedy for Disclosure of Psychiatric Confidences*, 29 RUTGERS L. REV. 190 (1975).

126. Zimmerman, *supra* note 75, at 193.

127. Cason v. Baskin, 30 So.2d 635, 640 (Fla. 1947).

128. See *id.* at 638; see also de la Torre, *supra* note 83 at 1164; RESTATEMENT (SECOND) OF TORTS §652D, *supra* note 77.

unlikely that the question of whether Sexton was herself sexually molested or, in turn, sexually molested her daughter, could be deemed newsworthy.<sup>129</sup>

Finally, one commentator has called the "highly offensive" requirement "probably the most elusive element of the tort and . . . made more difficult to delineate by the infrequency with which courts have directly dealt with it."<sup>130</sup> One of the reasons for the problematic nature of this prong is that courts have avoided the issue by focusing on the other elements.

If the disclosed matter is of legitimate public concern, no liability results, even if the matter is otherwise highly offensive. Because so many cases have come out for the defendant based on public interest, obviating the need to consider the meaning of "highly offensive," very little data are available from which to derive a definition.<sup>131</sup>

Still, it seems beyond belief that a court would find Sexton's discussion in therapy about the sexual dynamics in her family was not "highly offensive." According to the *Restatement*, the test is what "would be highly offensive to a reasonable person . . ." <sup>132</sup> The parameters of this element would vary depending on time and community. "The protection. . . must be relative to the customs of the time and place . . ." <sup>133</sup>

Notwithstanding the arguably liberal times in which we live, it is highly likely that a court would find information of the type disclosed in Dr. Orne's tapes to be so intimate and embarrassing to a reasonable person, that an actionable tort was committed by the disclosure. The test is not whether Sexton, Sexton's daughter, or Sexton's psychiatrist would be offended, but rather is controlled by the sensibilities of the ordinary public. If publishing a picture of a mother nursing a child is postulated by the *Restatement*<sup>134</sup> as an invasion of privacy, then surely a verbal depiction of sexual molestation would also be actionable.

## 2. Breach of Confidentiality

One tort that has been considered as potentially applicable in cases of this type is the relatively new "breach of confidence" or

129. *Cason*, 30 So.2d at 638.

130. *de la Torre*, *supra* note 83, at 1180.

131. *Id.*

132. *RESTATEMENT (SECOND) OF TORTS* § 652D(a) (1977).

133. *Id.* at Comment "c".

134. *Id.* at § 652D, illus. 10.

"breach of confidential relationship." This tort has already been utilized in fields other than psychiatry,<sup>135</sup> as well as within the psychiatric field.<sup>136</sup> The elements of this cause of action are "evidence of . . . [a] professional relationship, the disclosure of confidential information and damages."<sup>137</sup> In *Doe v. Roe*, the court quoted an Ohio opinion for support that "wrongful disclosure by physicians of patients' secrets" gives rise to tortious liability.<sup>138</sup>

[T]he preservation of the patient's privacy is no mere ethical duty upon the part of the doctor; there is a legal duty as well. The unauthorized revelation of medical secrets, or *any* confidential communication given in the course of treatment, is tortious conduct which may be the basis for an action in damages.<sup>139</sup>

One commentator defined the tort as "the unconsented, unprivileged disclosure to a third party of nonpublic information that the defendant has learned within a confidential relationship" thus requiring the following elements: lack of consent,<sup>140</sup> a confidential relationship, and an unprivileged disclosure.<sup>141</sup>

A confidential relationship originates in two elements: "the assurance of secrecy and the reliance it evokes."<sup>142</sup>

The giver of information places himself in a vulnerable position in reliance on the assurance of secrecy and thus has a legitimate expectation of confidentiality. The receiver of the information, by implicitly holding out the assurance associated with his occupation, invites the reliance and thus has an obligation not to disappoint the giver's expectation. Most would agree that revealing to a third party any private information learned within the relationship constitutes a moral wrong. In certain contexts, courts have increasingly shown a willingness to attach legal consequences to such breaches of confidence.<sup>143</sup>

135. Alan B. Vickery, Note, *Breach of Confidence: An Emergency Tort*, 82 COLUM. L. REV. 1426 n.1 (1982) (see cases cited: *Peterson v. Idaho First Nat'l Bank*, 367 P.2d 284 (Idaho 1961); *Blair v. Union Free School Dist. No. 6, Hauppauge*, 324 N.Y.S.2d 222 (Dist. Ct. 1971)).

136. *Id.* at 1426 n.1. (see cited case; *Doe v. Roe*, 400 N.Y.S.2d 668 (N.Y. Sup. Ct. 1977)).

137. *MacDonald v. Clinger*, 446 N.Y.S.2d 805 (N.Y. App. Div. 1982).

138. *Doe*, 400 N.Y.S.2d at 673. (citing *Hammonds v. Aetna Casualty & Sur. Co.*, 243 F.Supp. 793 (N.D. Ohio 1965)).

139. *Id.* at 674 (quoting *Hammonds*, 243 F.Supp. at 801-02.).

140. Defined as "the absence of explicit or implicit permission to disclose the specific information to a particular audience"; Vickery, *supra* note 135, at 1455.

141. Vickery, *supra* note 135, at 1455.

142. *Id.* at 1428.

143. *Id.*

Disclosure by a "receiver" of information, the psychiatrist in the instant case, is said to violate both personal and societal interests. The personal interests of the "giver" of information include "his general interest in the security of the confidential relationship and his corresponding expectation of secrecy . . ."<sup>144</sup> An additional personal interest exists in "his specific interest in avoiding whatever injuries will result from circulation of the information."<sup>145</sup>

The nature of the invasion in the first instance is that the person confides in the "receiver" specifically because of the expectation of privacy.<sup>146</sup> In the specific case of a psychiatrist-patient relationship, disclosure by the patient is perforce of personal, potentially embarrassing information. A failure to protect that expectation would vitiate or chill the free flow of secrets that facilitates psychiatric treatment and thereby "deter future candor."<sup>147</sup>

"[T]he content of the disclosure and the nature of the audience" will determine the extent to which the second interest is violated.<sup>148</sup> That is, a court would need to evaluate how embarrassing the information is and the sensibilities and sensitivities of the audience. In our case, the information is highly personal - Sexton's sexual aberrations and those of her family - and the audience is virtually unlimited, save for the price of the biography.

The social interest at risk is that of the general public. Specifically, this includes those people who benefit from the confidential relationship now or in the future. "[T]he physical and mental health of individuals is a fundamental social concern. Because confidentiality promotes the full disclosure necessary to effective medical treatment, society has an interest in fostering doctor-patient confidences."<sup>149</sup>

One commentator has opined that the cause of action for breach of a confidential relationship has emerged due to the inadequacy of alternate theories of liability in tort (e.g., invasion of privacy) and in contract (e.g., implied promise of confidentiality).<sup>150</sup>

Courts focusing on the nature of the injury - damage to reputation, embarrassment, and related harm caused by communication of personal information to third persons - have tended to

---

144. *Id.* at 1434.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 1435.

149. *Id.*

150. *Id.* at 1437.



base liability on the common law tort of invasion of privacy by publicity, especially when the content of the disclosure is embarrassing or sensational. Courts focusing on the conduct involved - breach of an obligation of confidence - have tended to analyze the facts in contract terms or to search for a statute prohibiting such conduct; they typically have sought out sources of public policy from which to justify implying a term of contract or a private statutory cause of action.<sup>151</sup>

Many courts have mixed and matched different theories of liability.<sup>152</sup> In particular, one court stated that the label placed on the action is not determinative of liability.<sup>153</sup> In *Berry v. Moench*, a libel action against a disclosing doctor, the court recognized a duty to preserve confidentiality, while allowing for the existence of a "conditional privilege" to breach that duty and disclose.<sup>154</sup> In that case, a doctor revealed information regarding a young man's psychiatric treatment to a friend of the parents of a girl that the former patient intended to (and ultimately did) marry.<sup>155</sup> In describing the need for confidentiality in the doctor-patient relationship, the court noted:

That relationship is among those with respect to which it is the policy of the law to encourage confidence . . . . It is grounded upon the advantage to all concerned in encouraging the full disclosure of all facts which may have a bearing upon diagnosis and treatment of the patient.<sup>156</sup>

The court went further in recognizing that "if the doctor violates that confidence and publishes derogatory matter concerning his patient, an action would lie for any injury suffered."<sup>157</sup>

In *Horne v. Patton*<sup>158</sup>, the Supreme Court of Alabama recognized "at least a qualified duty on the part of a [medical] doctor not to reveal confidences obtained through the doctor-patient relationship."<sup>159</sup> The court surveyed the line of cases that have supported a finding of a duty not to disclose, the breach of which gives

---

151. *Id.* at 1437-38.

152. *Id.* at 1438.

153. *Doe v. Roe*, 400 N.Y.S.2d 668, 676-7 (N.Y. Sup. Ct. 1977).

154. 331 P.2d 814 (Utah 1958).

155. *Id.* at 816.

156. *Id.* at 817.

157. *Id.*; see also *Felis v. Greenberg*, 273 N.Y.S.2d 288, 290 (N.Y. Sup. Ct. 1966) (doctor's furnishing medical information to an insurance company was in violation of privileged and confidential relationship of physician and patient, the breach of which gives rise to action for damages).

158. 287 So.2d 824 (Ala. 1973).

159. *Id.* at 827.

rise to tortious liability. The court noted that the vast majority of jurisdictions that had considered the issue found a duty not to disclose.<sup>160</sup>

Subsequent to *Doe*, another New York court struggled with the nature of liability for breach of an implied covenant of confidentiality.<sup>161</sup> This court seemed to suggest that the cause of action, which it described as breach of a "fiduciary obligation that confidences communicated by a patient should be held as a trust,"<sup>162</sup> lay somewhere between the laws of tort and contract.

It is obvious then that this relationship gives rise to an implied covenant which, when breached, is actionable. If plaintiff's recovery were limited to an action for breach of contract, however, he would generally be limited to economic loss flowing directly from the breach . . . . We believe that the relationship contemplates an additional duty springing from but extraneous to the contract and that the breach of such duty is actionable as a tort.<sup>163</sup>

Citing an earlier New York case<sup>164</sup> that the court in *MacDonald* maintained had already recognized a cause of action in tort for breach of confidentiality, the *MacDonald* court attempted to explain the difference between the two theories of liability:

Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, . . . the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract . . .<sup>165</sup>

In addition to the damage limitations inherent in labeling the action as one lying in contract, the *MacDonald* court<sup>166</sup> outlined other doctrinal limitations in the alternate theories of liability that

160. *Id.* at 832; see also *Hague v. Williams*, 181 A.2d 345 (N.J. Sup. Ct. 1962); *Simonsen v. Swenson*, 104 Neb. 224, 177 N.W. 831 (1920). Those that go to a physician of any nature are entitled to be free from any possibility that the physician will disclose facts that were given to the physician, and the physician alone. Patients should be able to go to their physician and receive the proper treatment, without fear of any disclosure being revealed by their physician.

161. *MacDonald v. Clinger, M.D.*, 446 N.Y.S.2d 801 (N.Y. App. Div. 1982).

162. *Id.* at 803 (citing *Hammonds v. Aetna Casualty & Sur. Co.*, 243 F.Supp. 793 (N.D. Ohio 1965)).

163. *MacDonald*, 446 N.Y.S.2d at 804.

164. *Doe v. Roe*, 400 N.Y.S.2d 668 (N.Y. Sup. Ct. 1977).

165. *MacDonald*, 446 N.Y.S.2d at 804 (quoting *Rich v. N.Y.C. & H.R. R.R. Co.*, 87 N.Y. 252 at 390 (1882)).

166. *MacDonald*, 446 N.Y.S.2d at 804.

establish the need for the additional tort of breach of confidence.<sup>167</sup> In fact, even the other tort actions for liability have been asserted to be inadequate to redress the rights violated by psychiatrist or physician disclosure.

It has been argued that tort liability for invasion of privacy, specifically the *Restatement's* Section 652D (unwanted publicity), seems insufficient to supplant a cause of action for breach of confidence because of the different interests at issue in the two torts, and because of the inherent limitations in the doctrine of invasion of privacy.<sup>168</sup> Prosser identified the interest implicated in publicity cases as

"reputation, with the same overtones of mental distress that are present in libel and slander." The interests present in confidentiality cases are (1) the expectation of confidentiality arising from the assurance of secrecy and the reliance thereon; and (2) freedom from circulation of damaging information. The first of the confidentiality interests is not protected at all by the privacy action, and the second interest is protected only partially . . .<sup>169</sup>

Further doctrinal dissimilarities suggest that the two causes of action are not duplicative. Disclosing information to a small group would not violate a right of privacy, while the size of the group is not dispositive to a breach of confidence case. Liability under a right of privacy theory "strike[s] a balance between . . . the individual's privacy interest" and the public's right to know.<sup>170</sup> While "[p]rivacy is a right against the public at large," a breach of confidence is perpetrated by one individual who, by virtue of a confidential relationship, has access to secret or private information and therefore, "has notice of the duty to preserve the secrecy of clearly identifiable information."<sup>171</sup>

Two additional limitations in the right of privacy basis for liability create the need for a distinct cause of action for breach of confidence. One is the requirement under the *Restatement* for the disclosure to be of a "highly offensive" nature.<sup>172</sup> Under the breach of confidential relationship tort, "even hypersensitive people should have a right to be secure in their confidential

167. *Id.*

168. Vickery, *supra* note 135 at 1439.

169. Vickery, *supra* note 135, at 1439 (quoting Prosser, *Privacy*, 48 CALIF. L. REV. 383, 398 (1960)).

170. *Id.* at 1440.

171. *Id.*

172. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

relationships.”<sup>173</sup> The fact that the information disclosed is neither objectively nor highly offensive would not be determinative in a breach of confidence claim, as compared with a right to privacy action. Lastly and significantly are the “public figure” and “legitimate public interest” aspects of the privacy tort.

The right of privacy has certain constitutional limitations when the public’s right to know is factored into the equation. While the public’s right to know, when balanced against privacy interests, is often held to be superior, the balance shifts when considering the right to safeguard information revealed in a confidential relationship.<sup>174</sup>

[P]rivate figures should not lose their right of secrecy when the content of their confidential revelations is also of legitimate public interest. Public figures, because of their relative lack of privacy, have at least as great, if not greater, need to be secure in their confidential relationships as private individuals.(footnotes omitted)<sup>175</sup>

This is not to suggest that the tort of breach of confidence is without constitutional limitations. If the duty of confidentiality were to apply to every “secret” shared in conversation, “First Amendment rights to speak freely would be chilled because of the possibility that one might accidentally convey to others something previously learned in confidence.”<sup>176</sup> Perhaps for that reason, some courts which have recognized liability in this area have limited the cause of action to those cases that violate a fiduciary relationship.<sup>177</sup>

The other notable alternate basis for liability, similar to but not replacing breach of confidence, is breach of an implied term of a contract.<sup>178</sup> The doctrinal limitations in the contract cause of action are twofold. They include the need for a contract from which to infer both a promise of confidentiality and a measure of damages. With regard to the latter, tort damages are designed to compensate for all damages directly and proximately caused by the wrong. Contract damages, on the other hand, are aimed at remedying only those damages that “could have [been] reasonably antici-

---

173. Vickery, *supra* note 135, at 1441.

174. *Id.* at 1442-1443.

175. *Id.* at 1443-44.

176. *Id.* at 1458; *see* discussion *infra* on the First Amendment.

177. *See, e.g.,* MacDonald v. Clinger, 446 N.Y.S.2d 801, 805; Hammond v. Aetna Casualty & Sur. Co., 243 F. Supp. 793 (N.D. Ohio 1965); Doe v. Roe, 400 N.Y.S. 2d 668 (N.Y. Sup. Ct. 1977).

178. Vickery, *supra* note 135, at 1444.

pated . . . had the [breaching] party performed in full" the contract terms.<sup>179</sup> In addition, punitive damages, while recoverable in a tort claim, are not available when seeking relief on a contract theory.<sup>180</sup> Finally, "a contract action may also be subject to various contract defenses not assertable against a tort victim, such as the statute of frauds, the parol evidence rule, incapacity, bankruptcy, uncertainty, and lack of consideration."<sup>181</sup>

It may again be argued that Dr. Orne committed an actionable tortious breach of the duty of confidentiality in his disclosure of the tapes. The psychiatrist-patient relationship is by definition one of confidentiality. This relationship gave rise to Sexton's disclosures about sexual molestation. This information was not revealed in her letters, her poetry or her lectures. The damage may be evidenced both by the harm done to Sexton and her family's reputation, and by the chilling effect the disclosure may have on future patients. Lack of consent, as an element of this tort, is discussed below.<sup>182</sup>

The question arises as to whether any duty of confidentiality owed by Dr. Orne to Sexton terminated upon the latter's death. While most academicians and medical practitioners opine that it would not,<sup>183</sup> one commentator, Dr. Jonas Robitscher, questioned this practice, arguing that if everyone else can write about the dead, why not a physician?<sup>184</sup>

Dr. Robitscher's article is limited to the physicians' right to write about dead celebrities. Dr. Robitscher cites the case of Lord Moran, Churchill's personal physician and constant companion, who published a biography.<sup>185</sup> *The Lancet*, (a British medical journal) claimed that "if this confidentiality is owed to the living, it is doubly owed to the dead."<sup>186</sup> The Representative Body of the British Medical Association resolved that the "death of a patient *does not* absolve the doctor from his obligation of secrecy."<sup>187</sup>

However, Dr. Robitscher stresses that "[i]t is a staggering proposition to insist that all others in society can write about public

179. *Id.* at 1445.

180. *Id.* at 1446.

181. *Id.*

182. See discussion *infra* part VI regarding lack of consent.

183. See discussion *infra* part V regarding media.

184. Jonas B. Robitscher, *Doctors' Privileged Communications, Public Life, and History's Rights*, 17 CLEV-MAR. L. REV. (2) 199, 203 (1968).

185. *Id.* at 201.

186. *Id.*

187. *Id.* at 202.

figures, and the doctor alone cannot."<sup>188</sup> Yet, what Robitscher does not contemplate is that the information disclosed by the psychiatrist would not have been revealed without the privilege or duty of confidentiality. This fiduciary relationship gives rise to the duty of confidentiality, to protect the secrets of a patient who would not have spoken but for the promise of secrecy.<sup>189</sup> What Professor Middlebrook would have written on Sexton without the psychiatrist's release of the tapes was so strikingly different from what she learned of Sexton in the tapes, that she admitted to rewriting her entire manuscript upon gaining access to Dr. Orne's tapes.<sup>190</sup> Thus, Middlebrook was made privy to information, whether substantive or merely peripheral, that neither she nor the public would have had but for the release of the tapes. It is with the expectation of confidentiality that patients customarily confide in their doctors. Further, this understanding of confidentiality gives rise to a duty that is not merely medical, but legal in nature.<sup>191</sup>

### B. Contract

The most prevalent use of contract theory to support liability in cases of this ilk is to recognize a cause of action for breach of an implied covenant of confidentiality.<sup>192</sup> Yet, one of the inherent limitations in this basis for liability is the requirement of a contractual relationship and an expressly articulated contract from which to infer the covenant of confidentiality.<sup>193</sup>

While Dr. Orne and Sexton were in a confidential relationship that might have given Sexton a cause of action for breach of an implied in fact contract, a third party such as one of Sexton's family members could not attain the required state of privity with the psychiatrist to protest against the revealing of family secrets.<sup>194</sup>

The trial court in *Doe v. Roe* rested its finding of liability on a theory of implied contract.<sup>195</sup> This finding was based on the recognition of a physician's duty to maintain the confidentiality of disclosures made under a contract, that is, an implied in fact promise

188. *Id.* at 203.

189. *See generally*, *supra* note 179.

190. *See generally*, D. MIDDLEBROOK, ANNE SEXTON (1991).

191. *See*, Comment, *To Tell or Not to Tell*, *supra* note 74, at 631, 632.

192. *Id.* at 637.

193. *Id.* at 634.

194. *Id.*

195. *See Doe*, 400 N.Y.S.2d at 674; Note, *Roe v. Doe: A Remedy for Disclosure of Psychiatric Confidences*, 29 RUTGERS L. REV. 190, 192 (1975).

that medical confidences will not be disclosed.<sup>196</sup> This implied promise rests on public expectation as well as being supported by the Hippocratic oath and statute. The last of these includes the testimonial privilege, which protects disclosures to physicians generally, and special statutes which protect disclosures to psychiatrists specifically.<sup>197</sup>

The court in *Doe* was not alone in recognizing an implied covenant of confidentiality. In what have been recognized as "three cases of first impression" on physician or psychiatrist liability for disclosure of patient information, courts in Ohio, Alabama and the New York court in *Doe*, have not imposed liability based on either the common law physician-patient privilege of confidentiality or "statutory regulation of the physician-patient testimonial privilege."<sup>198</sup> Rather, the courts have relied on "a new-found implied covenant of confidentiality."<sup>199</sup>

The privity between Sexton and her psychiatrist is evident. In providing Sexton's treatment, Dr. Orne impliedly contracted to keep her secrets confidential. The doctor breached that covenant by disclosing the information to a third party without Sexton's explicit consent.<sup>200</sup>

## V. FIRST AMENDMENT RIGHT TO DISCLOSURE

The strongest argument undercutting any cause of action stemming from the release of the tapes is that Middlebrook is protected by the First Amendment's freedom of speech. Courts that have considered the balance of psychiatrist-patient duty of confidentiality against the First Amendment right to disclosure have focused primarily upon the nature of prior restraint as an applicable remedy.<sup>201</sup>

In *Commonwealth v. Wiseman*, Wiseman received permission

196. *Doe*, 400 N.Y.S.2d at 675; Note, *supra* note 136, at 1444.

197. See *supra* note 74, at 631-2.

198. Frank C. Woodside, III & Naomi C. Dallob, *Professional Liability Of Health Care Providers*, 45 ALB. L. REV. 643, 652 (1981)(citing *Doe v. Roe*, 400 N.Y.S.2d 668 (1977); *Hammonds v. Aetna Casualty & Sur. Co.*, 243 F. Supp. 793 (N.D. Ohio 1965); *Horne v. Patton*, 287 So. 2d 824 (Ala. 1973).

199. Note, *Roe v. Doe: A Remedy for Disclosure of Psychiatric Confidences*, 29 RUTGERS L. REV. 190, 192 (1975); see also *Horne*, 287 So.2d 824. But see *Werner v. Kliever*, 710 P.2d 1250, 1257 (Kan. 1985)(declining to find liability under a contract theory).

200. Whether Sexton impliedly consented, and whether implied consent is ever sufficient, much less in a psychiatric context, is discussed below. See discussion *infra* part VI on consent.

201. Vickery, *supra* note 135 at 1466-47; see *Commonwealth v. Wiseman*, 249 N.E.2d 610 (Mass. 1970).

from a state hospital to make a film about the facilities and patients, provided that he abide by certain express conditions.<sup>202</sup> He did not comply with the conditions, and the State sued on behalf of the inmates to enjoin exhibition of the film, claiming a violation of the patients' right to privacy.<sup>203</sup> The court sustained a lower court's granting of injunctive relief restraining commercial distribution based on contractual breach, but found that the First Amendment interests of the public in having specialized persons view the film outweighed the privacy interests of the patients.<sup>204</sup> The court therefore modified the injunction to permit specialists in the fields of psychiatry and public health to view the film.<sup>205</sup>

This may be contrasted with *Doe*, where there was a contractual obligation to respect privacy, which the *Wiseman* court recognized but limited to accommodate the countervailing public interest in exhibition.<sup>206</sup> Perhaps *Wiseman* can be explained by the fact that it was a "public" contract, a documentary made for the public benefit.

The authors of the *Restatement of Torts* considered the defenses of the First Amendment's freedom of speech and of the press in an action for privacy in a "Special Note on Relation of Section 652D to the First Amendment to the Constitution."<sup>207</sup> The note reads, in pertinent part:

It has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment to the Constitution. Since 1964, with the decision of *New York Times Co. v. Sullivan* . . . , the Supreme Court has held that the First Amendment has placed a number of substantial restrictions on tort actions involving false and defamatory publications . . . The Supreme Court has rendered several decisions on invasion of the right of privacy involving this section . . . The case of *Cox Broadcasting Co. v. Cohn* . . . holds that under the First Amendment there can be no recovery for disclosure of and publicity to facts that are a matter of public record. The case leaves open the question of whether liability can constitutionally be imposed for other private facts that would be highly offensive to a reasonable person and that are not of legitimate concern.

---

202. 249 N.E.2d 610 (Mass. 1969).

203. *Id.* at 612.

204. *Id.* at 618.

205. *Id.*

206. *Id.*

207. RESTATEMENT (SECOND) OF TORTS § 652D.



Pending further elucidation by the Supreme Court, this Section has been drafted in accordance with the current law of privacy and the constitutional restrictions on that law that have been recognized as applying.<sup>208</sup>

In this Special Note, the drafters recognized that, at least facially, the nature of the cause of action for public disclosure of private facts may run counter to the developing body of law on constitutional defamation. In a Comment to clause "b" of Section 652D, which elaborates on the provision regarding "private life," the drafters noted that, pursuant to *Cox Broadcasting*, it is now constitutionally mandated that "[w]hen the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy."<sup>209</sup>

The drafters also noted that, under *Cox*, "[s]tates may not impose sanctions for the publication of truthful information contained in official court records open to public inspections," and that *dicta* seems to suggest that "this position applies to public records in general."<sup>210</sup> The drafters concluded:

It seems clear that the common law restrictions on recovery for publicity given to a matter of proper public interest will now become a part of the constitutional law of freedom of the press and freedom of speech. To the extent that the constitutional definition of a matter that is of legitimate concern to the public is broader than the definition given in any State, the constitutional definition will of course control.<sup>211</sup>

Because the constitutional defamation cases have not wholly proscribed the development of a tort cause of action for invasion of privacy, the question becomes one of delineating the scope of the common law tort. Since Anne Sexton was clearly a public figure, and even further, like an actress or a sports figure or a politician, she voluntarily placed herself in the public eye, the issue is narrowed to what facts may be deemed as so private that they must be protected.

In Comment "h", the drafters noted that public "interest, once aroused . . . may legitimately extend, to some reasonable degree, to further information concerning the individual and to facts about him, which are not public and which, in the case of one who

---

208. *Id.*

209. *Id.* at Comment on clause "b" (citing *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975)).

210. *Id.*

211. *Id.* at Comment on clause "b".

had not become a public figure, would be regarded as an invasion of his purely private life.”<sup>212</sup> Even so, the drafters did not envision this scope as being unlimited.

There may be some intimate details of her life, such as sexual relations, which even the actress is entitled to keep to herself. In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores.<sup>213</sup>

Thus, if we are asking whether Anne’s psychiatric dialogues concerning her accusations of incest toward her family and admissions of sexual molestation toward her elder daughter constitute sufficiently private facts about a public figure, we must look to whether the community mores would consider such information sufficiently intimate. It seems that the question is beyond cavil, even for a woman whose psychiatric history became, to a certain extent, the fodder of her literary work. As discussed in the section on waiver and consent, there remained privacy concerns that even Anne Sexton cherished. As the *Restatement* drafters noted,

The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.<sup>214</sup>

While it is arguable that the late Sexton is beyond the point at which she can be harmed by revelation of such private facts it is the position of this Article that Sexton carefully chiseled out a public persona to survive her death, and the information disclosed by Dr. Orne violated her right to do so. This is especially true, given that the intimate disclosures were in no way a matter in which the public had a legitimate interest. Section 652H(a)<sup>215</sup>, with regard to damages, notes that “[o]ne who has established a cause of action for invasion of his privacy is entitled to recover damages

---

212. *Id.* at Comment “h”.

213. *Id.*

214. *Id.*

215. RESTATEMENT (SECOND) OF TORTS § 652H(a).

for. . . the harm to his interest in privacy resulting from the invasion."<sup>216</sup> Under Comment "a", recovery may be had "for the harm resulting to . . . reputation from the publicity," and under Comment "c" the "proof of actual harm need not be of pecuniary loss."<sup>217</sup> Thus, even if Sexton's books of poetry were still to sell many copies, with no pecuniary loss to her estate, the fact that her reputation or image has been damaged constitutes a loss that is compensable under 652D.<sup>218</sup>

In sum, while the First Amendment will be considered as a limitation on liability and recovery for invasion of privacy, the constitutional free-speech and free-press guarantees do not completely vitiate the cause of action. The issue will finally be decided on a case by case basis, determining the nature of the private facts disclosed in each instance as being worthy of constitutional protection as a matter of legitimate public concern.<sup>219</sup>

It has been argued that the doctrinal conflict between free speech and the right to privacy might be fatal to the latter cause of action. Professor Diane L. Zimmerman takes a position that attempts to reconcile the two rights.<sup>220</sup> Unfortunately, her attempt may be overly sanguine.

The challenge of harmonizing privacy with free speech has attracted many outstanding scholars of tort and constitutional law. The moral force of the privacy argument has compelled most commentators to attempt to entrench the private-facts tort firmly in modern law . . . . In their attempt to justify the tort, however, [these scholars] have often underplayed its serious constitutional problems and have overlooked the fact that genuine social values are served by encouraging a free exchange of personal information. (footnotes omitted)<sup>221</sup>

Professor Zimmerman notes that courts have attempted to reconcile the two doctrines by carving out a standard exception to the right to privacy for newsworthy facts.<sup>222</sup> "All jurisdictions that recognize the private-facts tort have adopted the newsworthiness defense."<sup>223</sup>

216. *Id.*

217. *Id.* at Comment "a" and Comment "c".

218. *Id.* at § 652D.

219. *But see* Hall v. Post, 372 S.E.2d 711, 717 (N.C. 1988) (declining to recognize a § 652D cause of action because of tension between the section and the First Amendment).

220. *See generally* Zimmerman, *supra* note 75.

221. *Id.* at 294.

222. *Id.* at 301 n.39.

223. *Id.* at 300 n.34.

One chief flaw in this accommodation is the lack of a clear, workable standard for newsworthiness. "[B]oth the elements of the tort and the newsworthiness defense have remained so conceptually vague that they offer little guidance to the judges and jurors who must decide private-facts cases. What sorts of information should be deemed personal or private?"<sup>224</sup> Given these difficulties, Professor Zimmerman predicts that the right to privacy is doomed: "Although the [United States Supreme] Court has yet to rule on the validity of the private-facts tort, there is much evidence to suggest that it will ultimately find that body of law an unconstitutional restraint on speech."<sup>225</sup>

It has also been suggested that such doctrinal limitations on the cause of action for invasion of privacy demonstrate the need for recognition of causes of action for breach of implied contract and breach of confidence. "Many things disclosed to a doctor, lawyer, accountant, or bank are legitimately newsworthy, but should this strip the individual of his expectation of confidentiality?"<sup>226</sup> However, this does not imply that the First Amendment is not considered in cases that invoke the tort of breach of confidence. In addition to the situations in which sound public policy calls for a privilege, there may be other situations in which First Amendment considerations prohibit the imposition of civil liability for the breach of confidence.<sup>227</sup>

"Thus First Amendment values not only play a role in determining which relationships should carry an actionable duty of confidentiality in the first place, but also influence the determination of which communications from persons otherwise subject to an obligation of confidence will be privileged because of the high public interest in knowing the information contained in such a communication."<sup>228</sup> It should be noted that the author of the preceding specifically addressed the hypothetical situation of a public figure's biographer.

Essentially, First Amendment considerations here create a public-right-to-know privilege. The privilege reflects society's interest in public knowledge of the lives and careers of important people and the workings of private corporations, organizations, and institutions as well as of political figures and governmental

---

224. *Id.* at 301.

225. Zimmerman, *supra* note 75, at 306.

226. Vickery, *supra* note 135, at 1443.

227. *Id.* at 1466.

228. *Id.* at 1466-67.

affairs. *We do not want to ensnare potential autobiographers and commentators in a web of confidential obligations. The loss to society would be too great.* On the other hand, the privilege is much more restrictive than the broad public-interest exemption to common law invasion of privacy . . . [O]ne is not released from an obligation of confidence whenever the information learned would be of legitimate public interest. Much more is required.(emphasis added)<sup>229</sup>

While the quotation above expresses concern for "potential autobiographers" as a means of limiting the tort of breach of confidence, it does not suggest that public interest is sufficient to negate liability in all cases.<sup>230</sup> Again, to some immeasurable degree, the defendant would need to establish an adequate level of legitimate public interest to outweigh the privilege of confidentiality.<sup>231</sup>

The First Amendment does not necessarily bar a cause of action for breach of contract under facts analogous to those of the instant case. In *Doe v. Roe*, the court declined to find a First Amendment interest on the part of the disclosing psychiatrist sufficient to bar liability under a breach of contract theory.<sup>232</sup>

The cases cited by the defendants in support of their theory that First Amendment rights are somehow involved do not support their contention. *Time Inc. v. Hill* . . . involves a right to publicize a matter of general public interest. *New York Times Company v. Sullivan* . . . involved the right to publicize matters critical of, or even offensive to, public officials. Reliance on the defamation cases . . . would appear to be misplaced. In none of them is a contractual duty to maintain a confidence involved.(citations omitted)(emphasis added)<sup>233</sup>

Thus, while cases and commentary on the torts of breach of confidence and invasion of privacy suggest that there is tension between them and the free-speech and free-press protection of the First Amendment, it is widely accepted that the doctrines can constitutionally coexist.<sup>234</sup> The newsworthiness defense, while admittedly vague in scope, is universally accepted as a limitation on the right of privacy; it is sufficient to save the privacy tort from unconstitutionally impinging on First Amendment guarantees.<sup>235</sup> Fur-

---

229. *Id.* at 1468.

230. *Id.*

231. *Id.* at 1339-40.

232. *Doe*, 400 N.Y.S.2d at 675.

233. *Id.* at 675.

234. *Id.*

235. See Zimmerman, *supra* note 75, at 350.

thermore, action for breach of implied contract in the psychiatric disclosure realm has, at least in the seminal *Doe* case, been recognized as precluding a First Amendment privilege of disclosure.<sup>236</sup> In fact, unlike right to privacy and breach of confidence, the contractual covenant of confidentiality does not admit any constitutional limitations for newsworthiness.

Under the latter two theories, the issue for the Anne Sexton case would seem to revolve around the nature of the information concerned.<sup>237</sup> In both cases, the inquiry would focus on whether the facts disclosed in the psychiatric tapes were of sufficient legitimate public interest.<sup>238</sup> It has been stated that "[t]here is no First Amendment interest in material which the patient would never have disclosed except for the trust implicit in the psychiatric relationship."<sup>239</sup> In Sexton's case, there is no constitutional dimension to the disclosure of tapes containing information which would not have been shared but for the therapy relationship.

While Sexton's celebrity status is certainly relevant, it should not obviate the considerations competing with the First Amendment issue. "With a patient who is a public figure, it would be appropriate to ask whether the publication of his psychiatric file, or indeed of any intimate details of his life, has any valid bearing on the public's right to a free flow of information on matters of general concern."<sup>240</sup>

## VI. THE DEFENSES OF WAIVER AND CONSENT

Many academicians, legal scholars, literary critics, authors, and poets, as well as others who have injected themselves into this controversy in support of Dr. Orne's actions, have done so on the theory that Anne Sexton, by some definitions a "confessional" poet, was an artist who would have wanted the therapy tapes released to the public. These partisans base their position on one or both of two arguments: (1) Sexton's actions with specific regard to the tapes suggest this intention; or (2) Sexton's general conduct, unrelated to the tapes, implied that she would have supported release had she considered the issue.<sup>241</sup>

The specific materials used by Middlebrook are identified in

---

236. *Doe*, 400 N.Y.S. 2d at 675.

237. See Vickery, *supra* note 135, at 1428.

238. *Id.* at 1442.

239. Note, *supra* note 125, at 207.

240. *Id.* at 208 n.111.

241. MIDDLEBROOK, *supra* note 1, at 404.

the "Source and Notes" section following the text of the biography. They include hospital records,<sup>242</sup> notes made by Dr. Orne during a thirteen month treatment period,<sup>243</sup> audiotapes of therapy sessions during a three year period,<sup>244</sup> Sexton's own notes on the therapy process (as per her assignment by Dr. Orne),<sup>245</sup> letters Sexton sent to therapists, "especially to Dr. Orne, dealing with issues in treatment,"<sup>246</sup> and unpublished poems which Sexton had brought to therapy. In his Foreword to *Anne Sexton: A Biography*, Dr. Martin T. Orne, M.D., Ph.D., of the Institute of Pennsylvania Hospital and University of Pennsylvania, addressed his internal debate on releasing the tapes:

When Professor Diane Middlebrook requested an interview to discuss my work with Anne, it was uppermost in my mind how important it had been to Anne always to try to help others, especially in their writing. Although I had many misgivings about discussing any aspects of the therapy, which extended over eight years, I also realized that Anne herself would have wanted to share this process - much as she did in her poetry - so that other patients and therapists might learn from it. After much soul-searching, and after being assured that Anne's family had given their encouragement and approval, I allowed Professor Middlebrook to have access to the audiotapes and my therapy file, including the early unpublished poems Anne brought to therapy. It is in the spirit of helping others that I also offer here a view of what I believe contributed to Anne's untimely death.<sup>247</sup>

Professor Middlebrook herself offers the following justification, in the preface to her book:

Since the years of taping coincided with Sexton's maturation as an artist, Linda Sexton [Anne's older daughter] decided to place her mother's therapy notebooks at HRHRC [Harry Ransom Humanities Research Center at the University of Texas at Austin], under restriction during the lifetime of family members. I was allowed to use them. After I had written about the period covered by the notebooks, Dr. Orne granted me an interview, and then, with the executor's permission, sent me the incomplete but large collection of tapes that had survived his move from Boston

242. *Id.* at 408.

243. *Id.* at 409-411.

244. *Id.* at 422-3.

245. These were placed under restriction at HRHRC [Harry Ransom Humanities Research Center at the University of Texas at Austin].

246. MIDDLEBROOK at 422-3.

247. *Id.* at xvii.

in 1964. I spent the next two years transcribing these tapes; a part of one transcript is included here as an appendix. Though I eventually quoted them sparingly, listening to them changed my view of Anne Sexton very much. I abandoned the book I had been writing and started over.<sup>248</sup>

Professor Middlebrook then discusses how Sexton, whom she calls "a self-documenting person,"<sup>249</sup> would have regarded the release and publication of the taped material.

She [Sexton] made no reference to the tapes when writing her will, which dealt very professionally with the disposition of her literary estate. Four tapes were jumbled among her papers at the time of her death, however, and these have become part of the restricted collection of materials at HRHRC. Everything I have learned about her suggests that she would not have held back from the archive of her manuscripts and private papers the full collection of tapes. Sexton was not a person with a strong sense of privacy. She was open and impulsive: many people found her exhibitionistic, and some of the people who lived with her found her outrageously, immorally invasive. But her lack of reserve had a generous side as well, which was, I think, connected to her spirituality. If suffering like hers had any use, she reasoned, it was not to the sufferer. The only way that an individual's pain gained meaning was through its communication to others. I have tried to honor that attitude of Sexton's in writing about her life.<sup>250</sup>

The arguments in favor of release come in two closely-related varieties: either Sexton had a personal, emotional need to share the story of her mental illness and resulting treatment with the public, as she had been doing with her poetry,<sup>251</sup> or she felt the public would benefit if she shared this history with those similarly afflicted.<sup>252</sup> These are essentially two sides of the same coin.

Whether Sexton's intention to share with her public the most intimate details of her life was a result of selfishness or selflessness, the result during her lifetime was the same. However, after Sexton's death, her motivation becomes highly significant because she can no longer benefit from the disclosure of information. Moreover, her reputation is still subject to posthumous reevaluation, and that revelation, such as those contained in the therapy tapes might, al-

---

248. *Id.* at xxii.

249. *Id.*

250. *Id.* at xvii-xviii.

251. *Id.* at xvii.

252. *Id.*



though unlikely, enhance her reputation.

If Sexton was motivated, in whole or in part, by a desire to give support to others suffering from mental illness, that goal might still be effectuated or furthered by the release of the information on the tapes. "People who were in treatments themselves, or who had been, or who were close to others in treatment, drew encouragement from her candid representations of their very common condition. Her talent as a storyteller and her courage in acknowledging what could happen to ordinary people had drawn such readers . . . ."<sup>253</sup> It is arguable that whatever benefit these readers had derived from Sexton's poetry would be obviated by the knowledge that their psychiatrists might violate their confidentiality.

#### A. Sexton's Wishes

The first issue is whether Sexton expressly or implicitly made known an intention that the tapes be made public. Similarly, if Sexton did not communicate her intention for the tapes to be made public, it must be considered whether there was anything in Sexton's past practices relating to confidentiality which would suggest her approval, if not her intention, regarding release.

Sexton clearly made no provision for the release of the tapes. Thus, instead of looking for testamentary intent, one should examine her life for indications of what she *probably* would have intended had she given the matter sufficient consideration. It should be noted that throughout her later years Sexton made extravagant provisions for what should be made public and what should not. It is not enough, therefore, to identify Sexton as a poet who lived a confessional life, reflected transparently in her poetry, consistent with the information to which the readers of her biography would be privy. One is compelled to consider the relevance of this lack of a decision on Sexton's part regarding the disposition of these tapes. Since Sexton made detailed plans regarding much of her private collection, why did she not adequately inform her executor of her intentions regarding the tapes? It is this author's suggestion that Sexton had no intention of making the tapes public in such a wholesale manner as Dr. Orne did.

This is consistent with what her biography makes clear - a carefully, if not flawlessly, cultivated public persona. For someone whose fame was derived from the simulation of complete and utter

---

253. *Id.* at 273.

openness, Sexton was meticulous in deciding which aspects of her life she wanted the public to know. In some regards, the flamboyantly, almost embarrassingly confessional nature of her work, her personality and her publicity, were themselves a facade. Rather than open her life unreservedly to spectators, she selected the parts of her nature to which she would reveal to the general public.

Middlebrook's biography is replete with incidents in which Sexton gave careful consideration as to the way she wanted the public to identify her. Early in the therapy with Dr. Orne, Sexton compiled a manuscript of poetry directly relating to her therapy. About this book she said, "Such a book might have to be published anonymously."<sup>254</sup> This suggests, as do many other examples referenced in the biography, that Sexton was often struggling with the issue of what she wanted the public to know about her.<sup>255</sup>

Other examples abound depicting her concern regarding the writings she wanted made public and those she did not, as well as those writings which should be released posthumously. One might question why she considered postponing certain revelations until her death. Did she no longer care whom she hurt when she was dead? Did she care more about releasing her work, *Confessing*, when she would no longer be vulnerable? The answers to these questions are not easily forthcoming, despite the prevalence of examples of this desire to posthumously "confess" to certain abilities and predilections. These examples include a book of poetry that "had gone silently into a file . . . which was to remain unpublished until after her death."<sup>256</sup> Further, Sexton wrote poems on child abuse including *The Children's Crusade*, which she planned to save for posthumous release (although she later changed her mind and sold them to raise money).<sup>257</sup> These examples suggest that she released these works, not simply to generate cash, but because she planned to save the "risky" works for publication after her death. While Sexton obviously cared about the type of literary legacy she would leave,<sup>258</sup> she seemed more willing to take literary risks when she was no longer alive and vulnerable.<sup>259</sup> Additionally, Anne worked on a novel which she considered turning into "a forthright

---

254. *Id.* at 52.

255. This one example should not stand alone, however, as it predated publication of any of her works, and thus, precedes her great love affair, or at least infatuation, with publicity and confession.

256. MIDDLEBROOK, *supra* note 1, at 331.

257. *Id.* at 361.

258. *Id.* at 359.

259. *Id.* at 361 (she released them when she decided she liked the poems).

pornographic novel . . . that I could bring out under a pseudonym . . . True confession style only a bit better and of course really vulgar."<sup>260</sup>

Acting and deception played a large role in Sexton's attempt to recreate herself in an image of her own design. One prevalent criticism of Sexton and of the publicity generated by the biography (and, more specifically, the publicity generated by the material released through the tapes), is that Sexton invented the sexual abuse allegations made against her father and great-aunt. Professor Middlebrook raised the question: "Was Sexton's report [of erotic fondling by her father] a memory or a fantasy? This question was of great importance in her therapy, and in her art, but it cannot be answered with certainty."<sup>261</sup> Sexton herself commented on her flirting with embellishment in her sessions with Dr. Orne:

I am nothing, if not an actress off the stage. In fact, it comes down to the terrible truth that there is no true part of me . . . . It is as if I will permit my therapy and think it all very interesting as long as it doesn't touch me. I am a story-maker, a - doesn't it strike him as odd that this "story" is too pat? I know that often people in analysis will tell these great stories about having intercourse with their father, etc. and that they are fictitious but are a childhood fantasy. I have read about this -and also know that they still have some validity - but - . . . . My reaction was to laugh - when I realized this ridiculous lie that I had told - I mean it was funny to have thought up this nice theory for my symptoms - I am acting the part of a nice case history.<sup>262</sup>

As Professor Middlebrook reports, "[t]he interviews Sexton gave . . . provide an index to the life narrative she was evolving for public consumption, which included not mere information but consciousness about the significance of her transformation from housewife into poet."<sup>263</sup>

In 1962, "[c]ultivation of her recently discovered talent had literally remade Anne Sexton as a person, turning her into someone self-created in the first-person voice of her poetry."<sup>264</sup> Anne herself wrote to Dr. Orne that she "[had] made up a whole person, a poet, Anne Sexton, who would be worth something to you . . . . All those people who write to me and believe in me. God! I don't

260. *Id.* at 265.

261. *Id.* at 57.

262. *Id.* at 62.

263. *Id.* at 151.

264. *Id.* at 166.

even exist.”<sup>265</sup>

Despite Anne’s remark that “[M]e, I likes confession . . . ” [sic]<sup>266</sup>, it would be a miscalculation for a reader to assume that her literary style reflects Sexton’s candor and openness. Anne “saw sincerity as a *technique*, the style that happened to fit what she wanted to say.”<sup>267</sup> Sexton recognized a dichotomy between her desire to cherish privacy in certain aspects of her life and her literary confessionalism. Sexton wrote in 1966, “I try to keep my illness ways a secret (except for printing it for the world to read) still I don’t want the world to see.”<sup>268</sup>

The nature of her writing style did not signify Sexton’s utter and unmitigated openness. Anne was asked in an interview whether she was “in fact a confessional writer.” “Not everything I document is factual,” she replied.<sup>269</sup> This was inconsistent with the public perception of her as having no secrets, as speaking - as she supposedly wrote - in an untrammelled stream of consciousness. When Sexton began giving readings of her work, she injected “little introductory notes,”<sup>270</sup> which she apologized to one literary admirer were “not in the least spontaneous with the exception of one or two sentences . . . I hate to admit I am so studied, but there it is.”<sup>271</sup>

Anne started keeping a journal in 1967, about which she remarked, “I don’t like the idea of a journal. I’m afraid it will show all my weakness. It is not disciplined enough. A poem has more rules . . . I, who reportedly write so truthfully about myself, so openly, am not that open.”<sup>272</sup> Anne recorded an interview with MacBeth for the BBC.<sup>273</sup>

On the air, she rewrote history a bit in accounting for her development as an artist . . . . Strategic untruthfulness was, of course, an element of her poetry, so perhaps she regarded it as a legitimate characteristic of her self-representation before an audience interested in poems. (Reading a transcript of the interview later, Sexton commented to D.M. Thomas, “It’s fascinating to read though in places highly inaccurate. I am known to lie,

265. *Id.* at 201.

266. *Id.* at 215.

267. *Id.* at 261-2 (quoting George MacBeth, who produced poetry programming for the BBC and visited Sexton at home to gain insight into her writings).

268. *Id.* at 252.

269. *Id.* at 365.

270. *Id.* at 319.

271. *Id.* at 319-20.

272. *Id.* at 276.

273. *Id.* at 279.

and I never let myself down.”) “Facts,” she said to MacBeth, “are very unimportant things, there to make you believe in the emotional content in a poem . . . I can feel my feeling,” she added sensibly, “and write about it. I don’t have to be autobiographical.”<sup>274</sup>

What exactly is meant by the label “confessional poet?” According to Professor Middlebrook,

The autobiographical or ‘confessional’ mode, no less literary for *seeming* less literary, invited the reader to equate word with person. Sexton’s letter<sup>275</sup> zeros in on the gap. The feel of reality is only one of the tricky effects words achieve just by being arranged in certain ways, she observes. Readers are taken in by this. Praising the poem, they create a poet by projection.<sup>276</sup>

Moreover, Middlebrook adds, “Many people confuse the personal voice of a poem with the poet who wrote it; however, Sexton pointed out, ‘I can be deeply personal, but often I’m not being personal about myself.’”<sup>277</sup> Indeed, Sexton felt she could be “confessional” about her psychiatric history because therapy “wasn’t a very intimate subject to her.”<sup>278</sup> Does this suggest that Anne was not confessional, and thus, with a privacy interest to maintain and protect, or does it conversely suggest that the tapes would not be of high priority for her in protecting after her death? There is a societal interest to protect, even after the death of the patient, and even where the late patient is deemed to have “impliedly consented” to disclosure.

### *B. Legal analysis of the defenses of waiver and consent*

After Dr. Orne relocated his practice, Anne began seeing another psychiatrist, the pseudonymous Dr. Zweizung, with whom, to the grossest outrage of her friends and her former psychiatrist Dr.

274. *Id.*

275. In a letter to Dr. Orne, Sexton wrote:

If I write RATS and discover that rats reads STAR backwards, and amazingly STAR is wonderful and good because I found it in rats, then is star untrue? . . . Of course I KNOW that words are just a counting game, I know this until the words start to arrange themselves and write something better than I would ever know . . . I don’t really believe the poem, but the name is surely mine so I must belong to the poem. So I must be real . . . When you say “words mean nothing” then it means that the real me is nothing. All I am is the trick of words writing themselves.

276. MIDDLEBROOK, *supra* note 1, at 83.

277. *Id.* at 158.

278. *Id.* at 307 (quoting a friend, C.K. Williams).

Orne, she had an affair while continuing to pay him.<sup>279</sup> One of Sexton's friends, Lois Ames, a psychiatric social worker, told Sexton:

In this particular setup the structures of orthodoxy make sense . . . . The rules are a safeguard, not that violation is not often therapeutic or desirable for a number of excellent reasons, but orthodoxy protects the potential victim and the potential perpetrator, however innocent his intentions, however deep the swamp in which he unintentionally mires himself . . .<sup>280</sup>

I submit that the same could be said of Dr. Orne's actions, arguably justifiable in this "exceptional" case - Anne's confessional nature, the symbiosis between her therapy and her work - but nonetheless an inexcusable violation of the rules in place to protect psychiatrist and patient.

The very nature of the patient-psychiatrist relationship is vital to any consideration of the waiver or consent issue with regard to psychiatric records. Arguably, the patient is not in a position in which she is capable of objectivity. Further, the nature of the information found in psychiatric records is so intensely private, that a higher standard for proving consent is called for.

The contractual obligation not to disclose can be waived by the patient.<sup>281</sup> One way to waive is by giving consent, but "such consent must be given *explicitly, voluntarily and intelligently* (with knowledge of the material to be disclosed)." (emphasis added)<sup>282</sup>

Moreover, special notice must be drawn to the unique nature of the psychiatrist-patient relationship. "[T]he requirements of voluntary and knowing consent have special meaning in regard to the disclosure of psychiatric confidences."<sup>283</sup> First, because there is no information "more intimate and potentially embarrassing than a patient's confidences to his psychiatrist,"<sup>284</sup> and second, because transference involves the patient's desire to please the psychiatrist.<sup>285</sup> "[T]he psychiatrist exercises an emotional hold upon his patient which would preclude that patient from consenting freely to release of the psychiatrist's duty not to disclose . . . . Unless a patient is himself trained in therapeutic technique, he is unlikely

---

279. *Id.* at 258. Dr. Zweizung, about whom Professor Middlebrook writes, "in plain language, his behavior toward her was a breach of professional ethics." *Id.*

280. *Id.* at 259.

281. Note, *supra* note 161, at 193.

282. *Id.* at 194.

283. *Id.*

284. *Id.*

285. See generally, Note, *supra* note 125.

to understand the extent of his consent."<sup>286</sup>

In a case before the New York State Supreme Court, *Doe v. Roe*,<sup>287</sup> a psychiatrist who published a book reporting her patient's thoughts and sentiments was held to have breached the implied covenant of confidentiality, violating the patient's right of privacy. *Roe v. Doe* was acknowledged by the court as constituting a "matter of first impression in this State, and . . . a matter of first impression in the United States."<sup>288</sup>

In the *Doe* case, the alleged oral consent of the patient was held insufficient as a matter of law to establish consent.<sup>289</sup> "Consent was sought while the plaintiff was in therapy [and] . . . never obtained in writing."<sup>290</sup> While the court declined to address whether an oral waiver of confidentiality was valid, the court found no such consent had been obtained.<sup>291</sup> "A doctor who wishes to publish confidential material about his patient and relies on the patient's consent should take care to get that consent in clear, unambiguous written form."<sup>292</sup>

The court noted the special nature of psychiatry in finding that there is no information "more intimate and potentially embarrassing than a patient's confidences to his psychiatrist."<sup>293</sup> The court quoted an oft-cited portion of a law review article written by Dr. Melvin S. Heller, *Some Comments to Lawyers on the Practice of Psychiatry*,<sup>294</sup>

The patient is called upon to discuss in a candid and frank manner personal material of the most intimate and disturbing nature . . . He is expected to bring up all manner of socially unacceptable instincts and urges, immature wishes, perverse sexual thoughts - in short the unspeakable, the unthinkable, the repressed. To speak of such things to another human being requires an atmosphere of unusual trust, confidence and tolerance . . . Patients will be helped only if they can form a trusting relationship with the psychiatrist.<sup>295</sup>

Further, the phenomenon of transference suggests a patient might

286. *Id.* at 195. See also *Doe*, 400 N.Y.S.2d at 674-75.

287. 400 N.Y.S.2d at 668.

288. *Id.* at 670.

289. *Id.* at 671.

290. *Id.*

291. *Id.*

292. Note, *supra* note 125, at 191 n.6.

293. *Id.* at 194 n.25.

294. 30 TEMPLE L. REV. 401 (1957).

295. *Doe*, 400 N.Y.S.2d at 674-75.

be acting out of a desire to please a psychiatrist.<sup>296</sup> As quoted earlier, "[t]he psychiatrist exercises an emotional hold upon his patient which would preclude that patient from consenting freely to release of the psychiatrist's duty not to disclose."<sup>297</sup> Yet, "[u]nless a patient is himself trained in therapeutic technique, he is unlikely to understand the extent of his consent."<sup>298</sup>

In summary, Dr. Orne and his supporters defend his actions by claiming Sexton *would have* consented to the disclosure. In cases involving psychiatrist-patient confidentiality, however, the consent must be explicit, and even then the nature of the fiduciary relationship must be considered as impairing patients' ability to intelligently consent or waive. Sexton's appellation as a "confessional" writer does not control the issue. There is evidence that Sexton did maintain a public persona, and that she did care about her public perception, even posthumously. Therefore, the defenses of waiver and consent would not vitiate claims of invasion of privacy, tortious breach of confidentiality, and breach of implied covenant of confidentiality sounding in contract.

## VII. CONCLUSION

It is not the intention of this Note to impugn the motives of Dr. Orne or Professor Middlebrook. Professor Middlebrook, especially, should not be faulted for using whatever material came her way. Additionally, Dr. Orne, who demonstrated great compassion, patience and loyalty to Anne Sexton while she was alive, meant to do her no harm after she was dead.

However, motives alone are not determinative of this issue, just as the fact that the biography does not turn out to be lurid tabloid journalism is incapable of rendering the problematic disclosure innocuous. Neither society nor the poet was served in this case. Harm was done, not just to Sexton and certain members of her family, but to the legions of mental health patients who rely on psychiatrist-patient confidentiality.

Even in a jurisdiction in which no statutory protection of confidentiality exists, the three common law causes of action discussed in this article should be recognized and utilized to redress this type of wrongdoing. While it is unlikely a claim will be brought in the instant case, it is a noteworthy instance of privacy and confidentiality violations which should not be tolerated and perpetrated. It is

---

296. Note, *supra* note 125, at 194.

297. *Id.* at 195.

298. *Id.*



hoped that the outpouring of community and media outrage in the Sexton case will inhibit, if not prevent, reoccurrence of such a disclosure.