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TO BEDLAM AND PART WAY BACK: ANNE SEXTON, HER THERAPY TAPES, AND THE MEANING OF PRIVACY

Tamar R. Lehrich*

INTRODUCTION

.....

I have ridden in your cart, driver,
waved my nude arms at villages going by,
learning the last bright routes, survivor
where your flames still bite my thigh
and my ribs crack where your wheels wind.
A woman like that is not ashamed to die.
I have been her kind.¹

The poet Anne Sexton committed suicide in October, 1974, at the age of forty-five. Three months earlier, she had celebrated the 21st birthday of her elder daughter, Linda Gray Sexton, and on that occasion appointed her as Sexton's literary executor.² Anne Sexton

* J.D. candidate, Harvard Law School, 1992; B.A., Yale University, 1987. This Essay was written in Alan A. Stone's seminar, "Psychoanalysis and Legal Assumptions," given at Harvard Law School in the fall of 1991. The seminar provided a rare opportunity to explore theories of law, medical ethics, and artistic expression from an interdisciplinary perspective. In addition to Professor Stone, I am grateful to Martha Minow and Mithra Merryman for their insightful comments and challenging questions and to Carmel Sella and Lisa Hone for their invaluable editorial talents. I am indebted always to Tom Augst for his confidence and belief in the validity of my ideas. I would also like to acknowledge Susan Lehrich Greenburg who taught me to recognize the beauty of language and to respect its power.

1. ANNE SEXTON, *Her Kind*, in ANNE SEXTON: THE COMPLETE POEMS 15, 16 (Linda Gray Sexton ed., 1981) [hereinafter THE COMPLETE POEMS].

2. Anne Sexton had made the decision to appoint Linda Gray Sexton as her literary executor in December, 1973, on the advice of poet J. D. McClatchy who helped Sexton revise her will. Sexton chose her elder daughter for the position after both McClatchy and poet Maxine Kumin refused the dubious honor. DIANE WOOD MIDDLEBROOK, ANNE SEXTON: A BIOGRAPHY 382-83 (1991). Linda Gray Sexton has written that she, too, attempted to decline her mother's "gift"; but Sexton convinced her daughter that by having a family member as executor, the conflicts that often result

provided detailed instructions in her will about the disposition of her papers.³ She made no mention, however, of the four audio tapes of her psychotherapy sessions that were later found. She also did not mention the over 300 therapy tapes that were still in the possession of her principal psychiatrist, Dr. Martin Orne.⁴ After Anne Sexton's death, Linda Gray Sexton created an inventory of her mother's papers and transferred their ownership to an archive at the University of Texas.⁵ She placed the four tapes and the notebooks in which the poet wrote down her thoughts and reflections of the therapy sessions in a restricted part of the archive.⁶

When Linda Gray Sexton asked Diane Wood Middlebrook in 1980 to become her mother's biographer, she agreed to give Middlebrook full access to her mother's estate, including the four tapes and the therapy notebooks.⁷ She also authorized Middlebrook to

between families and literary executors would be avoided. Linda Gray Sexton, *A Daughter's Story: I Knew Her Best*, N.Y. TIMES, Aug. 18, 1991, § 7 (Book Review), at 20.

3. Anne Sexton's "papers" consist of a wide range of self-documentation, including scrapbooks, carbon copies of letters, worksheets of poems, correspondence, photographs, press clippings, and the poet's therapy notebooks. MIDDLEBROOK, *supra* note 2, at xxii. Linda Gray Sexton has written that 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." Sexton, *supra* note 2. Guided by this responsibility, Linda Gray Sexton has on occasion overridden her mother's specific instructions concerning the disposition of her literary materials. For instance, Linda Gray Sexton decided to include early poems that Sexton had instructed were "[n]ever to be published or seen by anybody" in the literary archive of her mother's work. Believing that Sexton would have destroyed the poems if she really had not wanted anyone to see them, Linda Gray Sexton has based the decision on the value of the "raw and unfinished" work to scholars interested in exploring Sexton's first attempts at poetry. Sexton, *supra* note 2.

4. Dr. Orne has stated that when he left his Massachusetts practice in 1964 for Philadelphia, he offered to return the therapy tapes to Sexton. She declined, however, asking that he keep them to use "to help others." Martin T. Orne, *The Sexton Tapes*, N.Y. TIMES, July 23, 1991, at A21.

5. Sexton, *supra* note 2. Sexton's papers are housed at the Harry Ransom Humanities Research Center at the University of Texas at Austin, chosen by Linda Gray Sexton for its status as a "worthy university library." *Id.*

6. Linda Gray Sexton placed her mother's therapy notebooks and tapes under restriction during the lifetime of family members because of the potential for harm if the materials were released to the general public. The restricted portion of the archive is accessible to scholars only for the limited purpose of informing their analyses of Sexton's poetry. MIDDLEBROOK, *supra* note 2, at xxii; Sexton, *supra* note 2.

7. Linda Gray Sexton's decision to make accessible her mother's therapy notebooks and tapes to her mother's biographer may seem inconsistent with the decision to place them within a restricted part of the archive. However, in each instance Linda Gray Sexton proscribed access to the materials by the public at large. She considered the therapy notebooks and tapes only as "deep background" for her mother's biographer, relevant because they reveal the roots of Anne Sexton's poetic style and because they illuminate the relationship between her life and her art. Linda Gray Sexton gave

consult with Dr. Orne.⁸ In 1986, after Dr. Orne told Linda Gray Sexton that he still possessed the remaining therapy tapes, he made them available to Middlebrook. While Dr. Orne did not explicitly request Linda Gray Sexton's permission to disclose the tapes to Middlebrook, he knew that Sexton had veto power over anything in the biography that she found objectionable to the family.⁹ He also had received legal advice to the effect that in most jurisdictions a literary executor could get a court order requiring the release of medical records.¹⁰ In addition, Dr. Orne knew that Middlebrook had already obtained the most sensitive material involving Sexton's life and psychiatric treatment from the therapy notebooks and other biographical sources.¹¹ Before releasing the tapes, Dr. Orne discussed at length with Middlebrook the issues raised in the manuscript of the biography, and was convinced that nothing "new" in terms of salient biographical information would be gleaned from the tapes.¹² As a biographer, Middlebrook felt that the process of listening to the tapes would provide her with insight into Sexton that she could not gain through any other medium.¹³

them to Middlebrook with the proviso that whatever material was used had to be read independently by the literary executor before it could be incorporated into the biography. This proviso also applied to the over 300 therapy tapes that Dr. Orne later made available to Middlebrook. Sexton, *supra* note 2. See also *infra* text accompanying notes 212–232 (discussing the role of families in surrogate decision-making).

8. Sexton, *supra* note 2. For five years, Dr. Orne declined Middlebrook's requests for an interview, fearing that Sexton's life would be depicted in an exploitative manner. He complied only after receiving assurances about Middlebrook's reputation as an academic from a colleague familiar with her work. See Alan A. Stone, 325 *NEW ENG. J. MED.* 1450, 1450 (Nov. 14, 1991) (book review); see also Diane Middlebrook, *The Poet's Art Mined the Patient's Anguish*, *N.Y. TIMES*, July 26, 1991, at A26 (letter to the editor).

9. Stone, *supra* note 8, at 1450; see also Martin T. Orne, *Foreword* to *MIDDLEBROOK*, *supra* note 2, at xvii [hereinafter *Foreword*].

10. The term "medical records" includes any and all materials generated by a doctor or therapist during the treatment of a patient. This may include the audiotapes and detailed notes from psychotherapy sessions, as well as the results from laboratory testing.

11. Stone, *supra* note 8, at 1450; see also Carola Eisenberg, 325 *NEW ENG. J. MED.* 1451 (Nov. 14, 1991) (book review) ("Anne Sexton's poetry is extraordinarily self-revelatory; there is not a great deal in the transcripts [from the therapy tapes] that is not already evident in the poetry . . .").

12. Stone, *supra* note 8, at 1450 ("Orne released the tapes on the assumption that he was doing what his patient would have wanted, and he believed that Middlebrook needed to hear the tapes because, despite all her research, she did not have a convincing sense of the person Anne Sexton. He thought the tapes might give her the empathic connection she still lacked.")

13. Middlebrook, *supra* note 8 ("I could not talk to [Sexton], but on the tapes she spoke for more than 300 hours — as if to me, or so it often felt — about the transition she was making in 1961–64 from housewife and mother into prize-winning poet. The

The psychiatric and the literary communities' response to the publication of Middlebrook's biography in July, 1991, was immediate, impassioned, and well-publicized. Some claimed that by releasing the tapes to the public, Dr. Orne breached "the contract of confidentiality that always exists between psychotherapist and patient"¹⁴ and that his action betrayed the profession.¹⁵ Others, in contrast, felt that the decision to disclose is the patient's — or the executor's — and that the issue is one of "public taste and public opinion."¹⁶ Sexton's close friends and colleagues defended the act of disclosure,¹⁷ while her extended family condemned it.¹⁸

The issues involved in the release of the tapes are highly charged and controversial. The questions raised require examining the intersection of theories of law, medical ethics, and artistic expression. A full analysis implicates not only the legal doctrine of substituted consent and the ethical issue of doctor-patient confidentiality, but also the relevance of Sexton's status as a confessional poet and as a woman. An awareness and understanding of each of these areas is necessary to inform a meaningful discussion of the whole. The psychiatric establishment¹⁹ and the media framed the key issue in the controversy as whether Sexton herself would have wanted the therapy tapes to be made accessible to her biographer and, therefore, made public. Given that it is impossible to be certain what Sexton would have wanted under these specific circum-

tapes made me privy not only to anguish but also to thousands of homely particulars that make up an actual life.").

14. Josef H. Weissberg, *Trust Is at Stake*, N.Y. TIMES, July 26, 1991, at A26 (letter to the editor).

15. *Betrayed: The Poet and the Public*, N.Y. TIMES, July 20, 1991, at A18 (editorial) [hereinafter *Betrayed*].

16. 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.

17. Erica Jong, *Anne Sexton's River of Words*, N. Y. TIMES, Aug. 17, 1991, at A21; James Kaplan, *Dead Poets Society*, ENTERTAINMENT WEEKLY, Aug. 23, 1991, at 34 (statements of Peter Davison, Maxine Kumin, J. D. McClatchy); Alessandra Stanley, *Poet Told All: Therapist Provides the Record*, N.Y. TIMES, July 15, 1991, at A1 (statements of Linda Gray Sexton, Maxine Kumin, J.D. McClatchy).

18. 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 (statements of Anne Sexton's sister, Blanche Harvey Taylor, and her two nieces).

19. I characterize the "psychiatric establishment" as monolithic in various contexts in this Essay primarily because doctors within the community have chosen to present themselves in those terms and because the media in its coverage of the release of the tapes has also portrayed the establishment as a rigid, undifferentiated whole. I do not intend to imply, however, that every therapist shares the views that I attribute to the "establishment." See *infra* text accompanying notes 241–256 (discussing contrasting reactions by psychiatrists to the release of the tapes).

stances, the question instead might be whether to release the tapes at all, in the absence of clear evidence of her preference. It is most productive, however, to view the debate as a challenge to conventional notions of privacy while offering a glimpse of new (but not untroubled) ones.

Contemporary consternation over disclosure of the therapy tapes mirrors early criticism of Sexton's poetry.²⁰ While the object of the censure is different — a psychiatrist's decision rather than a poet's words — the motivation is similar: the desire to maintain the status quo.²¹ Sexton's writing and therapy were interwoven and interdependent. In both contexts she explored topics integral and specific to her identity as a woman, from parenting and bisexuality to domestic violence and incest. In her writing, Sexton often suggested a theme or expressed an emotion that she had not yet explored or acknowledged consciously.²² In this way, her poetry illuminated her inner life just as the process of psychotherapy enabled her to become a poet.²³ In both forums, Sexton inverted the distinction between public and private and challenged gender norms.

This Essay addresses the issues raised by the release of Anne Sexton's therapy tapes. First, it considers the interrelationships among Sexton's poetry, her psychotherapy, and her identity as a woman. Second, this Essay places the tapes within the legal doctrine of surrogate decision-making. Related to this inquiry is a discussion of doctor-patient confidentiality and the psychobiography of artists. Throughout, the Essay explores difficult questions about

20. The critical reaction to Sexton's early poetry was characterized by discomfort both at the structure of her poetry and at the subject matter. Sexton, along with other "confessional" poets of the time such as Robert Lowell and W. D. Snodgrass, broke with formalist notions of poetry in which imagery and emotion were subordinated to sound patterns and rhyme schemes. The confessional mode of contemporary poetry explored in a truthful, explicit manner "unpoetic" themes inspired by one's domestic life, e.g., mental illness, intimate relationships, and politics. MIDDLEBROOK, *supra* note 2, at 76–78, 83.

21. See *infra* text accompanying notes 84–104 (discussing how criticism of Sexton's poetry provides an insight into the negative reaction to disclose her therapy tapes).

22. ANNE SEXTON, *NO EVIL STAR: SELECTED ESSAYS, INTERVIEWS AND PROSE* 85–86 (Steven E. Colburn ed., 1985) [hereinafter *NO EVIL STAR*]. In a 1968 interview, Sexton explained,

Sometimes, my doctors tell me that I understand something in a poem that I haven't integrated into my life. In fact, I may be concealing it from myself, while I was revealing it to the readers. The poetry is often more advanced, in terms of my unconscious, than I am. Poetry, after all, milks the unconscious In therapy, one seeks to hide sometimes.

Id. at 85.

23. See *infra* text accompanying notes 35–48.

the nature of privacy and autonomy and the impact of gender upon these concepts. In addition, a contextualized, fact-specific analysis is emphasized, one that draws upon — rather than minimizes — the paradox, tensions, and ambiguities expressed by the debate itself.

I. THE CASE OF ANNE SEXTON

A. *The Healing Power of Art*

Sexton's early life served as the reference point for much of her poetry as well as for her many years in analysis. The youngest of three girls, Sexton grew up in Wellesley, Massachusetts. She had a lonely childhood, infused with the feeling that she had been "locked in the wrong house."²⁴ Her father, Ralph Churchill Harvey, was a successful and shrewd businessman.²⁵ Her mother, Mary Gray Staples Harvey, came from a well-established family of Maine politicians and journalists. Mary Harvey attended Wellesley College and aspired to a literary career which was forestalled by her marriage at age twenty.²⁶ The Harveys were formal and strict parents who subjected their daughters to dress codes and left them to the supervision of a hired nurse. Anne Sexton, especially, yearned for the attention of her mother and the approval of her father, but felt she continually failed to achieve either.²⁷ She expressed this pain and frustration in the 1965 poem, "Cripples and Other Stories":

....

Disgusted, mother put me

24. *For the Year of the Insane*, in *THE COMPLETE POEMS*, *supra* note 1, at 131, 133. The line reads: "O little mother, / I am in my own mind. / I am locked in the wrong house." During the period of psychotherapy with Dr. Orne, Sexton would occasionally slip into a "state of dissociation" or "trance" at the end of a session. Dr. Orne interpreted these periods as expressions of Sexton's anger or frustration with the conclusion of treatment. *MIDDLEBROOK*, *supra* note 2, at 44. Sexton based the poem, "For the Year of the Insane," upon her inner experience during one of these trance states. *Id.* at 201.

25. *MIDDLEBROOK*, *supra* note 2, at 4.

26. ANNE SEXTON: *A SELF-PORTRAIT IN LETTERS* 3 (Linda Gray Sexton & Lois Ames eds., 1977) [hereinafter *A SELF-PORTRAIT IN LETTERS*]. This annotated collection of Sexton's letters is arranged chronologically and provides a textured account of Sexton's life in her own words. Essays and commentaries on Sexton and her work include: ANNE SEXTON: *THE ARTIST AND HER CRITICS* (J. D. McClatchy ed., 1978); ANNE SEXTON: *TELLING THE TALE* (Steven E. Colburn ed., 1988); *CRITICAL ESSAYS ON ANNE SEXTON* (Linda Wagner-Martin ed., 1989); DIANA HUME GEORGE, *OEDIPUS ANNE: THE POETRY OF ANNE SEXTON* (1986); CAMERON NORTHOUSE & THOMAS P. WALSH, *SYLVIA PLATH AND ANNE SEXTON: A REFERENCE GUIDE* (1974); *ORIGINAL ESSAYS ON THE POETRY OF ANNE SEXTON* (Francis Bixler ed., 1988); *SEXTON: SELECTED CRITICISM* (Diana Hume George ed., 1988).

27. *A SELF-PORTRAIT IN LETTERS*, *supra* note 26, at 3-6.

on the potty. She was good at this.
 My father was fat on scotch.
 It leaked from every orifice.

Oh the enemas of childhood,
 reeking of outhouses and shame!
 Yet you rock me in your arms
 and whisper my nickname.²⁸

.....

Sexton's close friend, poet Maxine Kumin, wrote:

Her parents, she was convinced, had not wanted her to be born.
 Her sisters, she alleged, competed against and won out over her.
 Her teachers, unable to rouse the slumbering intelligence from its
 hiding place, treated her with impatience and anger. Anne's
 counterphobic response to rejection and admonishment was al-
 ways to defy, dare, press, contravene.²⁹

In junior high school, Sexton began to lose her former shyness and emerged as the leader of a clique of girls. In high school she embarked on the goal of finding a fiancé. To temper her "boy-crazy" behavior, Sexton's parents enrolled her in a girls' boarding school where she selected the non-college-preparatory curriculum. After graduating, Sexton spent a year at a finishing school in Boston. By the summer she had eloped with Alfred Muller Sexton II, known as Kayo, breaking an engagement with another boy whom she had met only months earlier. The year was 1948 and Anne Sexton was twenty years old.³⁰

Eight years later, Sexton was plagued by deep depression, anxiety attacks, and severe mood swings erupting in violence. With two small children, she found herself unable to cope with the roles of wife and mother and unable to live up to the 1950s image of the successful white suburban woman. Reflecting upon this period, Sexton said, "I was trying my damndest to lead a conventional life, for that was how I was brought up, and it was what my husband wanted of me. But one can't build little white picket fences to keep nightmares out."³¹ After swallowing an overdose of barbiturates, Sexton was hospitalized for mental illness and treated by Dr. Martin Orne, who had become her therapist three months earlier.³²

28. *Cripples and Other Stories*, in *THE COMPLETE POEMS*, *supra* note 1, at 160, 161.

29. Maxine Kumin, *How It Was*, *THE COMPLETE POEMS*, *supra* note 1, at xxii.

30. *MIDDLEBROOK*, *supra* note 2, at 17-23.

31. *NO EVIL STAR*, *supra* note 22, at 84.

32. *MIDDLEBROOK*, *supra* note 2, at 34. Although psychiatrists at the time favored electroshock therapy for patients with mental illness, Dr. Orne instead scheduled Sexton for psychotherapy sessions five times a week. *Id.*

Since the Sexton family had a history of mental illness,³³ Sexton's parents, sister, and mother-in-law took her breakdown seriously. Recognizing that Sexton could not responsibly care for two young children and that Kayo Sexton, working as a salesman for Sexton's father, was frequently away from home, they arranged for Linda to be sent to Sexton's sister and for Joy to live with Sexton's mother-in-law. Three year old Linda returned home after five months, while Joy, who was still an infant, remained with her grandmother for the next three years. Although Sexton was despondent about the loss of her youngest child, she recognized her inability to care for Joy.³⁴

Sexton and Dr. Orne commenced psychotherapy in 1956, meeting several times weekly for the next eight years. Throughout this process, Dr. Orne worked with Sexton on combatting her feelings of inadequacy, failure, and lack of self-worth. As Sexton later explained, "Until I was twenty-eight I had a kind of buried self who didn't know she could do anything but make white sauce and diaper babies. I didn't know I had any creative depths. I was a victim of the American Dream, the bourgeois, middle-class dream."³⁵ Dr. Orne's first goal was to help Sexton identify and then utilize her

33. There is evidence of mental illness existing throughout Anne Sexton's family. Sexton initially received treatment at Westwood Lodge, a private hospital where her father had been treated several years earlier for alcoholism and where his sister, Frances Harvey, was treated after she had attempted suicide in the 1920s. Sexton's paternal grandfather, Louis Harvey, suffered from two nervous breakdowns and was permanently hospitalized. Her maternal great-aunt "Nana," Anna Ladd Dingley, with whom Sexton had a close bond, was placed in a mental institution when Sexton was a teenager. A year after Sexton's suicide in 1974, Frances Harvey shot herself to death. Sexton's eldest sister, Jane Harvey, also committed suicide. *Id.* at 4-16, 33-34.

34. During this period, Sexton wrote:

I had Joy for the weekend and she has gone back today — I love her, she is adorable and winning — but it seems to take so much patience and energy and I was glad to see her go . . . I guess I don't love anyone — that is a terrible statement and now I am crying. . . . My heart pounds and it's all I can hear — my feeling for my children does not surpass my desire to be free of their demands upon my emotions What have I got? Who would want to live feeling that way?

Id. at 36-37. Eleven years later, Sexton reflected upon the period in an interview:

I had lost a daughter, lost her because I was too sick to keep her. After I read [W. D. Snodgrass'] poem, 'Heart's Needle,' I ran up to my mother-in-law's house and brought my daughter home. That's what a poem should do — move people to action. True, I didn't keep my daughter at the time — I wasn't ready. But I was beginning to be ready. I wrote a disguised poem about it, 'Unknown Girl in the Maternity Ward.' The pain of the loss.

NO EVIL STAR, *supra* note 22, at 89.

35. NO EVIL STAR, *supra* note 22, at 84.

“resources.” When treatment began, she told him that she felt her only talent might be as a “good prostitute and to help men feel sexually powerful.”³⁶ Dr. Orne proposed that she begin writing poetry, something she had done for several months during high school.³⁷ Acting upon his suggestion, Sexton was able to channel the creativity that she had expressed as a girl into a vocation in art as an adult.

Writing poetry fostered Sexton’s sense of herself as an able person. After her second suicide attempt in 1957, Dr. Orne told her, “You can’t kill yourself, you have something to give. Why, if people read your poems . . . they would think, ‘There’s somebody else like me!’ They wouldn’t feel alone.”³⁸ For Sexton this was a turning point: “[Writing poetry] gave me a feeling of purpose, a little cause, something to *do* with my life, no matter how rotten I was.”³⁹ That year, Sexton completed sixty poems.⁴⁰ Dr. Orne encouraged her to take an IQ test to boost her confidence. He also showed Sexton’s poetry to a Harvard literature professor who found her writing to be promising.⁴¹ Sexton then enrolled in her first poetry workshop, a fortuitous event that soon plugged her into a circuit of

36. *Foreword*, *supra* note 9, at xiii.

37. During high school, Sexton’s only exposure to poetry was the work of Sara Teasdale whose lyrical verse she emulated. Sexton stopped writing poetry, however, after her mother suggested that she had plagiarized from Teasdale. Sexton said of the episode, “Something about that statement of [my mother’s] . . . I had been writing a poem a day for three months, but when she said that, I stopped.” When asked, “Didn’t anyone encourage you?” Sexton answered, “It wouldn’t have mattered. My mother was top billing in our house.” NO EVIL STAR, *supra* note 22, at 85.

38. MIDDLEBROOK, *supra* note 2, at 42–43.

39. NO EVIL STAR, *supra* note 22, at 85.

40. MIDDLEBROOK, *supra* note 2, at 45.

41. *Id.* at 49. Dr. Orne’s active involvement in the early development of Sexton’s career may be seen as an attempt to appropriate Sexton’s talent and achievement. Critics of Middlebrook’s biography have attributed this motive to Dr. Orne, citing the foreword that he wrote to the book as proof. *See, e.g.*, Raymond Sokolov, *Shushing the Dead and the Dying*, WALL ST. J., Aug. 21, 1991, at A10 (“Dr. Orne has also written a foreword to the biography, a repulsive little piece in which he asserts that if he had been able to continue as the poet’s therapist, even part-time after he left Boston for Pennsylvania, she would not have killed herself.”); Katha Pollitt, *The Death Is Not the Life*, N.Y. TIMES, Aug. 18, 1991, § 7 (Book Review), at 22 (“[I]n his brief foreword to Ms. Middlebrook’s book [Dr. Orne] comes across as rather oleaginous and self-promoting.”); Stanley, *supra* note 17, at C13 (“J. D. McClatchy . . . said of Dr. Orne, ‘There is something a little sleazy about the way he has put himself forward as her Pygmalion.’”). Sexton, however, consistently spoke admiringly of Dr. Orne and the role he played in her life. *See, e.g.* NO EVIL STAR, *supra* note 22, at 84:

I said to my doctor at the beginning, ‘I’m no good; I can’t do anything; I’m dumb.’ He suggested I try educating myself by listening to Boston’s educational TV station. He said I had a perfectly good mind. As a matter of fact, after he gave me a Rorschach test, he said I had

some of the most talented American poets of the time: Maxine Kumin, Robert Lowell, George Starbuck, and Sylvia Plath.⁴² Sexton's belief in the importance of her poetry to her readers compelled her to lead a weekly poetry workshop for the mentally ill at McLean Hospital in Boston, during which time she said, "Poetry led me by the hand out of madness. I am hoping I can show others that route."⁴³

During Sexton's first few years of psychiatric treatment, the activities of writing poetry and psychotherapy were strongly interlocked. Many of her early poems concerned the process of therapy, and she learned that her talent lay in her ability to make poetry the vehicle of autobiography and self-analysis. In tandem, the success of her therapy depended heavily on her ability to acknowledge in writing past painful traumas such as incest, mental illness, and loss. Sexton found that aspects of her behavior that society and she, herself, considered negative could be made valuable through poetry. Indeed, symptoms of her illness became metaphors, as in "Music Swims Back to Me," one of Sexton's earliest poems:

....

Imagine it. A radio playing
and everyone here was crazy.

creative talent that I wasn't using. I protested, but I followed his suggestion.

42. Maxine Kumin is a Pulitzer Prize-winning poet whose close friendship with Sexton began in the late 1950s when they studied together in a poetry workshop in Boston. Each became a sounding board for the other's poetry. Eventually, a second phone line was installed in each of their homes so that the two could "workshop each other's poems" without interruption. NO EVIL STAR, *supra* note 22, at 158-67. Robert Lowell was one of the most influential American poets in the 1950s. Sexton joined his poetry seminar at Boston University in 1958, and Lowell became a mentor to her, advising her and editing her first manuscript of poems. Sexton said of Lowell, "He didn't teach me what to put into a poem, but what to leave out. What he taught me was taste — perhaps that's the only thing a poet can be taught." *Id.* at 92. George Starbuck, a poet and later director of the creative writing program at Boston University, began a friendship with Sexton during Lowell's seminar. He and Sexton maintained contact for the next sixteen years with Starbuck acting as a principal ally when Sexton sought a teaching appointment at Boston University in the 1970s. *Id.* See also Letter from Anne Sexton to George Starbuck (Jan. 28, 1970), in A SELF-PORTRAIT IN LETTERS, *supra* note 26, at 350; Letter from Anne Sexton to George Starbuck (Mar. 4, 1970), in A SELF-PORTRAIT IN LETTERS, *supra* note 26, at 350, 351. Sylvia Plath, Pulitzer Prize-winning poet and author of *The Bell Jar*, also became a friend of Sexton's through Robert Lowell's writing seminar. She and Sexton met together each week after the seminar in the lounge-bar of the Ritz-Carlton Hotel. Sexton has said that they spoke often of their attempts to commit suicide, of death and poetry. After Plath committed suicide in 1963, Sexton wrote the poem, "Sylvia's Death," which she later developed into a memoir. NO EVIL STAR, *supra* note 22, at 92-93, 6-13.

43. MIDDLEBROOK, *supra* note 2, at 309.

I like it and danced in a circle.
 Music pours over the sense
 and in a funny way
 music sees more than I.
 I mean it remembers better;
 remembers the first night here.
 It was the strangled cold of November;
 even the stars were strapped in the sky
 and that moon too bright
 forking through the bars to stick me
 with a singing in the head.
 I have forgotten all the rest.⁴⁴

.....

The therapy process itself improved Sexton's ability to make agile associations and connections between images which later enhanced her skills as a teacher.⁴⁵ Sexton compared the role of the therapist with that of the creative psyche: "It is the split self, it seems to me, that is the mad woman. . . . It is like lying on the analyst's couch, reenacting a private terror, and the creative mind is the analyst who gives pattern and meaning to what the persona sees as only incoherent experience."⁴⁶ She considered her "madness" essential to her creativity, going off Thorazine⁴⁷ to write and using periods of hospitalization to produce. She told the poet, W. D. Snodgrass, "The 'sealed hotel' helped unblock me [for] writing."⁴⁸

After four years of therapy sessions, Dr. Orne felt that although Sexton was making progress within the parameters of each

44. *Music Swims Back to Me*, in *THE COMPLETE POEMS*, *supra* note 1, at 6, 6-7.

45. Sexton's "image-mongering technique" required students as a group to create a continuous flow of images while associating from a single object. Using this process in a class she taught at Boston University in 1974, "Creative Writing of Poetry: Raising of the Unconscious," Sexton hoped to encourage students to reject the cultural conventions that she felt were thwarting their creativity. She knew that the success of the technique "depend[ed] on the students, each being an individual with different needs and potentials." Letter from Anne Sexton to George Starbuck (Apr. 18, 1974), in *A SELF-PORTRAIT IN LETTERS*, *supra* note 26, at 411, 411; *MIDDLEBROOK*, *supra* note 2, at 388.

46. *MIDDLEBROOK*, *supra* note 2, at 64.

47. The generic name for Thorazine is chlorpromazine, a tranquilizer widely used to treat schizophrenia and to relieve hallucinations and delusions. Sexton was conflicted about the use of Thorazine. While it succeeded in calming down her "mania" and in preventing prolonged episodes of depression, Sexton felt that the drug also muted her creativity, likening its effects to being "lobotomized." *Id.* at 226, 231-32. Thus, on several occasions in spite of her doctor's instructions, Sexton went off the drug in order to write. Sexton wrote in 1965, "I am not going to take anymore thorazine [sic]. I want to write poems!" Letter from Anne Sexton to Anne Clarke (Feb. 15, 1965), in *A SELF-PORTRAIT IN LETTERS*, *supra* note 26, at 258, 259.

48. Letter from Anne Sexton to W.D. Snodgrass (Nov. 26, 1958), in *A SELF-PORTRAIT IN LETTERS*, *supra* note 26, at 43-44.

session, there was little progression from one session to the next. Sexton continued to have difficulty distinguishing between memory and reality. She could not maintain an accurate recollection of what she had discussed or a sense of why or how she had responded the way she did. In order to combat this condition, traditionally known as hysteria,⁴⁹ Dr. Orne suggested that they audiotape the therapy sessions. Sexton took extensive notes after each session before listening to the tape the following day. In this way, she could compare what she chose to remember with what had actually occurred. Years later, Dr. Orne reflected that this technique not only improved the quality of therapy but made the process more collaborative; it gave the poet a shared responsibility for remembering what the patient and therapist were accomplishing together.⁵⁰

As Sexton and Dr. Orne developed a more equal relationship, the balance of power shifted between them. Sexton now had the tools to be able to show Dr. Orne when he was "wrong."⁵¹ While psychiatrists traditionally have taped therapy sessions for their own use in teaching, research, and documentation, that patients might benefit in some way from hearing tapes of their sessions was not considered.⁵² Dr. Orne was innovative in his conception of the relationship between doctor and patient. He considered the patient as a colleague, with the doctor and patient together committed to a common project.⁵³ Dr. Orne recently stated that when he had moved his practice from Boston to Philadelphia in 1964, he offered to return the therapy tapes to Sexton, who declined and asked that

49. The term "hysteria" was used by psychiatrists in the nineteenth and early twentieth centuries to describe women who were suffering from "disturbances of the womb." Feminists today have written that hysteria "epitomized the cult of female inviolism." BARBARA EHRENREICH & DEIRDRE ENGLISH, *FOR HER OWN GOOD* 124 (1978). "It affected middle and upper-class women almost exclusively; it had no discernible organic basis; and it was totally resistant to medical treatment." *Id.* The syndrome of hysteria was used to justify the sedentary, inactive lives led by affluent women while simultaneously providing them with a way to rebel against societally-imposed roles. *Id.* In the contemporary medical context, the term is used to refer to emotional excitability and disturbances of the psychic, sensory, vasomotor, and visceral functions.

50. *Foreword*, *supra* note 9, at xv-xvi.

51. *Id.*

52. Stone, *supra* note 8, at 1450.

53. Dr. Orne's conception of the relationship between doctor and patient is reflected today in the methodology of feminist research which rejects assumptions of neutrality and of reaching objective conclusions. Instead, feminist research is grounded in a recognition of the non-neutrality of participants and researchers, and it emphasizes the relevance of individual perspective while attempting to integrate that perspective into its analysis. See, e.g., Brenda Cossman & Ratna Kapur, *Trespass, Impasse, Collaboration: Doing Research on Women's Rights in India*, 2 J. HUM. JUST. 99, 103 (1991).

he keep them "to help others."⁵⁴ Dr. Orne never destroyed the tapes, contrary to the practices of some in the psychiatric community.⁵⁵ His decision reflected his view that Anne Sexton had little concern for conventional notions of privacy.⁵⁶

It is doubtful whether the majority of psychotherapists today would advocate the use of Dr. Orne's techniques. Would a therapist voluntarily disrupt the traditional balance of power between doctor and patient? Would a therapist utilize a method that would enable the patient to have the bulk of the "control" over the substance of past sessions? Would he or she recommend a process whose success would depend primarily upon the patient's rather than the therapist's ability to make associations and connections? Dr. Orne recognized that taping therapy sessions better enabled Sexton to recall emotional events which then allowed her to explore these emotions more fully in her poetry. He recognized that the tapes were Sexton's work product, that they had meaning to her that was discrete from the role they played in therapy. Most importantly, given the nature of his relationship with the poet, he recognized that it would have been inappropriate to summarily destroy the tapes.

Perhaps as a result of the active analytic role that Sexton assumed in therapy with Dr. Orne, she had a perspective on her work and on her adult relationships that was clearly informed by psychoanalytic concepts. Many of her early poems reveal a consciousness of Freudian theory, particularly the notion of transference — the concept that the patient's relationship with the psychoanalyst re-plays childhood relationships with parents and other significant figures.⁵⁷ Yet, as with everything she touched, Sexton had her own

54. Orne, *supra* note 4.

55. Stone, *supra* note 8, at 1451 ("If I had been Anne Sexton's psychiatrist I would have urged her to allow me to destroy the tapes, but if she had refused I hope I would have used them according to her wishes.").

56. Orne, *supra* note 4 ("What others would see as exposure, she saw as honesty. Sharing her most intimate thoughts and feelings for the benefit of others was not only her expressed and enacted desire, but the purpose for which she lived. Privacy was of no concern to her."). Dr. Orne considers Sexton's lack of concern for her own privacy as a basis for inferring consent to release the tapes. *Id.* It is possible also to view Sexton's attitude toward privacy as evidence of her mental illness. The difficult question is how a psychiatrist should view such evidence, and how others should view *his* view.

57. MIDDLEBROOK, *supra* note 2, at 53. In a 1957 poem found in the files of Dr. Orne, Sexton explicitly acknowledged the transference process:

Well Doctor — all my loving poems
write themselves to you.
If I could channel love,
by gum, that's what I'd do.

distinctive view of the impact of early family traumas upon her adult psyche. Her poetry has been a valuable contribution to the literature of feminine psychology, a genre that recognizes the centrality of the mother-daughter relationship.⁵⁸ "The Double Image," for instance, is both a compelling example of a confessional poem and an analysis of the psychological resemblance between Sexton and her mother:

....

In north light, my smile is held in place,
the shadow marks my bone.
What could I have been dreaming as I sat there,
all of me waiting in the eyes, the zone
of the smile, the young face,
the foxes' snare.

In south light, her smile is held in place,
her cheeks wilting like a dry
orchid; my mocking mirror, my overthrown
love, my first image. She eyes me from that face,
that stony head of death
I had outgrown.⁵⁹

....

As she once said before reading the poem aloud, "The mother-daughter relationship is more poignant than Romeo and Juliet. . . . Just as Oedipus is more interesting."⁶⁰ Thus, the impact that Sexton's psychotherapy had upon her writing was neither predictable nor pedestrian. Through her poetry, Sexton consistently brought

And never pen another
foolish Freudian line
that bleeds across the page
in half assed metered rhyme.
If all this bother and devotion
is not, in truth, for you —
(since you're the expert on emotion)
tell me Doctor — who?

Anne Sexton, *Real Love in Imaginary Wagon*, reprinted in N.Y. TIMES, July 15, 1991, at C13.

58. For both a feminist and Jungian study of Sexton's poetry, see Stephanie Demetrakopoulos, *Goddess Manifestations as Stages in Feminine Metaphysics in the Poetry and Life of Anne Sexton*, in SEXTON: SELECTED CRITICISM, *supra* note 26, at 117-44; Margaret Honton, *The Double Image and the Division of Parts: A Study of Mother-Daughter Relationships in the Poetry of Anne Sexton*, in SEXTON: SELECTED CRITICISM, *supra* note 26, at 99-116; Estella Lauter, *Anne Sexton's Radical Discontent with the Awful Order of Things*, in SEXTON: SELECTED CRITICISM, *supra* note 26, at 145-61. For a leading work on the value that psychoanalysis and Freudian theory have for feminism, see JULIET MITCHELL, *PSYCHOANALYSIS AND FEMINISM* (1974).

59. *The Double Image*, in THE COMPLETE POEMS, *supra* note 1, at 35, 40.

60. MIDDLEBROOK, *supra* note 2, at 87.

her own unique imprint to basic psychoanalytic concepts, leaving a body of work valuable not only for its literary quality but for its commitment to the "task of defining the significance of the feminine self."⁶¹

B. *Poetry as Resistance*

Poetry came to represent a form of resistance for Sexton, a challenge both to the traditional literary canon and to traditional gender norms and values. The story of Sexton's rise as a poet reflects and symbolizes the expansion of women's consciousness and the growth of the women's movement. Like Sexton, most white, middle-class women of the 1950s grew up inundated by the glorification of "feminine" roles.⁶² As Sexton told an interviewer, "I wanted to get married from the age of thirteen on. I wanted nothing else. I thought that having children was some kind of answer, then."⁶³ Emotionally unable to accept the traditional conceptions of wife and mother, Sexton found little validation for her dramatic departure from the norm. She, along with such women as Maxine Kumin, Sylvia Plath, and Adrienne Rich,⁶⁴ turned to writing as a forum for free expression. Reflecting upon the significance of her first poetry class, Sexton said, "The most important aspect of that class was that I felt I belonged somewhere. . . . I found I belonged to the poets, that I was *real* there, and I had [the feeling], 'These are my people.'"⁶⁵ Sexton had been writing poetry for over a year, regularly submitting her work for publication, before she changed her signature from "Mrs. A.M. Sexton" to "Anne Sexton."⁶⁶ The shift symbolized the transformation of her identity. Sexton was reclaiming herself, and in so doing she widened her own possibilities. Later she told Dr. Orne, "By God, I don't think I'm the one who writes the poems! They don't center in my house — I can't write

61. Demetrakopoulos, *supra* note 58, at 118.

62. Referring specifically to white, middle-class women is not meant to suggest that Black or Latina women or lower-class white women did not also face pressures to conform to a given ideal. As this Essay seeks to place Anne Sexton in the context of her own milieu, a discussion of the gender role conditioning confronted by other groups of women confronted is beyond the scope of this Essay.

63. MIDDLEBROOK, *supra* note 2, at 40.

64. Adrienne Rich is a feminist poet and writer who met Sexton in the late 1950s at a party thrown by Robert Lowell in Boston. *Id.* at 110. Rich has spoken of the strong impression that Sexton's poetry made upon her during the 1960s. Sexton's more explicitly political poetry, particularly "The Firebombers," suggests the influence of Rich's work upon her own. *Id.* at 296.

65. NO EVIL STAR, *supra* note 22, at 87.

66. MIDDLEBROOK, *supra* note 2, at 65.

about Kayo, nothing — I was very careful about the picture on my book: didn't want it to look suburban, wanted just to be a face, a person whose life you couldn't define."⁶⁷

Although Sexton did not affiliate herself with the politics of the women's movement, she was well-aware of the negative impact that economic and social forces have upon women's lives.⁶⁸ She believed that in order for women to commit themselves to lives of creative expression, they needed the freedom and opportunity that only money could provide: "It's the only thing — in the society I live in."⁶⁹ Therefore, when Sexton was chosen in 1961 for one of Radcliffe College's first fellowships to "harness the talents of 'intellectually displaced women,'"⁷⁰ she considered the award a significant step in her evolution from housewife to poet. When asked whether she found it difficult to be both a woman and an artist, Sexton explained, "I think they are really very closely allied. I don't think it's that difficult at all. It's within a woman to create, to make order, to be an emotional, full human being."⁷¹ The Radcliffe fellowship allowed Sexton to feel that her vocation had been vindicated, that she was contributing to the family, and that she now had a valid response when her mother-in-law asked, "Why don't you make [writing] a hobby?"⁷²

The critical reaction to Sexton's writing reflected the establishment's discomfort at the themes her poetry explored: the cult of domesticity, the celebration of women's sexuality, and the exposure of mental illness. Many writers and critics considered the revelations of Sexton's genre of poetry damaging to the author and inappropriate subject matter for publication. In her first collection of poems, *To Bedlam and Part Way Back*, Sexton explored her institutionalization and attempted suicide, the distinction between the maternal bond and the maternal role, and the universality of suffering. John Holmes, Sexton's first mentor and writing professor, advised her not to publish *To Bedlam and Part Way Back* because of the

67. *Id.* at 65, 412.

68. *Id.* at 151.

69. *Id.*

70. *Id.* at 144. The fellowship, sponsored by the Radcliffe Institute, was intended to provide women whose careers had been interrupted by raising families with an opportunity to integrate their professional work into their daily lives.

71. NO EVIL STAR, *supra* note 22, at 76. In the same interview, Sexton rejected any suggestion that women are fundamentally emotional while men are innately rational. She pointed to "marvelous women poets" such as Marianne Moore, Elizabeth Bishop, and May Swenson, whom she considered "very rational," and to "emotional" male poets, saying, "Great poets know both." *Id.* at 77.

72. MIDDLEBROOK, *supra* note 2, at 152.

book's focus on her experiences in a mental hospital. He wrote, "You'll certainly outgrow it, and become another person, then this record will haunt and hurt you. It will even haunt and hurt your children, years from now."⁷³ Sexton, in her own inimitable way, responded to Holmes not with a letter, but with a poem:

.....

I tapped my own head;
 it was glass, an inverted bowl.
 At first it was private.
 Then it was more than myself;
 it was you, or your house
 or your kitchen.
 And if you turn away
 because there is no lesson here
 I will hold my awkward bowl,
 with all its cracked stars shining
 like a complicated lie,
 and fasten a new skin around it
 as if I were dressing an orange
 or a strange sun.
 Not that it was beautiful,
 but that I found some order there.⁷⁴

.....

Criticism of Sexton's poetry was also directed at her other choices of subject matter: menstruation, masturbation, abortion, adultery, and women's sexuality in general. The poet and writer Louis Simpson wrote, "A poem titled 'Menstruation at Forty' was

73. *Id.* at 98. Holmes' justification for not publishing *To Bedlam and Part Way Back* is echoed by Ted Hughes, the poet and husband of Sylvia Plath, who destroyed the journal that Plath kept during the last months of her life. Hughes wrote in the foreword to Plath's published journals, "I destroyed it because I did not want her children to have to read it. . . ." Ted Hughes, *Foreword to THE JOURNALS OF SYLVIA PLATH* xiii, xv (Frances McCullough ed., 1982). Such statements reveal a desire to thwart and silence women's creative expression based on the notion that it is "anti-family." In each instance, the paternalistic message is that a choice must be made between the children's welfare and the woman's art. Significantly, Hughes claimed that his destructive act had been intended to protect *her* children, not theirs or his own. Erica Jong, among others, has asserted that "Hughes destroyed [the journals] to conceal his involvement with another woman." Kaplan, *supra* note 17, at 35. Hughes has always denied this. *Id.* For an excellent biography of Sylvia Plath, see ANNE STEVENSON, *BITTER FAME: A LIFE OF SYLVIA PLATH* (1989).

74. *For John, Who Begs Me Not to Enquire Further*, in *THE COMPLETE POEMS*, *supra* note 1, at 34, 34-35. This poem conveys the message that in Sexton's poetry there is no "lesson" or universal truth. What she presents is a poem of herself, one that may not be "beautiful," but that has "some order" and with it a shared sense of hope. Yet, a poem is not literally herself, but is a poem, and thus the "self" may turn from a bowl into an orange and then a sun.

the straw that broke this camel's back."⁷⁵ The writer James Dickey stated in a review of Sexton's poetry: "It would be hard to find a writer who dwells more insistently on the pathetic and disgusting aspects of bodily experience"⁷⁶ In light of the revelations of Dickey's own obsessions in his 1970 novel *Deliverance*, Dickey's comment is both ironic and sexist.⁷⁷

While Sexton gradually became more confident about her status as a poet, she was not immune to the hard line drawn by the establishment between "lady poets" and the "greats."⁷⁸ Expected to conform to standards set by men, many prominent women writers in the 1950s and 1960s felt they were tokens, accepted within literary circles only as representatives of "their kind." In 1969 Sexton wrote, "As long as it can be said about a woman writer, 'She writes like a man' and that woman takes it as a compliment, we are in trouble."⁷⁹ In speaking of her first introduction to Sexton, the "new woman" on the Boston literary circuit, Adrienne Rich said: "I felt threatened, very competitive with her. There was little support for the idea that another woman poet could be a source of strength or mutual engagement. I think I suspected . . . that if she was going to take up space, then I was not going to have that space."⁸⁰ Rich today considers her old fears as "tied up with my problems with being a woman, too. Competing in the literary establishment felt to me defeminizing."⁸¹ Maxine Kumin echoed this sentiment in a 1974 interview:

I see such immense changes in women's perceptions. I grew up in an era when you went to a cocktail party and measured your success by how many men spoke to you. I really identified much more with the male side, but now I have such a feeling of sisterhood. I find that wherever I go, I meet splendid women, and I'd a hell of a lot rather be with them.⁸²

With her poetry as well as with her persona, Sexton struggled between embracing the role of iconoclast and yearning for public

75. MIDDLEBROOK, *supra* note 2, at 264.

76. *Id.* at 173.

77. In *Deliverance*, Dickey depicts in graphic detail the rape of two men and the murder of another during the course of a canoe trip. JAMES DICKEY, *DELIVERANCE* (1970). To compound the irony of Dickey's criticism, he asked Sexton, upon meeting her in 1966, if she "slept around," and two months later phoned her in the middle of the night, drunk and insistent that she tell him she loved him. MIDDLEBROOK, *supra* note 2, at 250-51.

78. *Id.* at 173.

79. *Id.*

80. *Id.* at 111.

81. *Id.*

82. NO EVIL STAR, *supra* note 22, at 176.

acceptance. As Kumin writes, "Anne basked in the attention she attracted, partly because it was antithetical to an earlier generation's view of the woman writer as 'poetess,' and partly because she was flattered by and enjoyed the adoration of her public."⁸³ Sexton wrote openly about taboo issues that were considered inappropriate subjects for art and were dismissed as "women's experience." She broke all the rules of poetic formalism and established her own. Yet, at the same time, Sexton wanted to be accepted on equal terms and judged by the same standards as the "greats." She thrived in her status as outsider, but expected the tolerance and indulgence that the insiders only gave to each other.

The condemnation by both the psychiatric and literary worlds of the use of Sexton's therapy tapes seems rooted in much the same sentiment that met her poetry: fear that the balance of power is being upset, that the veil of secrecy will be lifted only to reveal that its purpose was to protect the status quo at the expense of the individual. The response both today and thirty years ago seems fuelled by the same fire, that women's revelations, experiences, and language are worth less than men's. There is a tension, however, in the critics' strategy: although they attempt to devalue women's experience, they refuse to acknowledge the significance of gender. In 1979, a critic wrote, "[Sexton] indulges in self-revelation without stint, telling all in an *exposé* of her innermost workings that amounts to literary *seppuku*."⁸⁴ The critic wondered whether, "such messy preoccupations will remain to stain the linen of the culture for long or whether good taste bleaches out even the most stubborn stain eventually." Poet and writer Erica Jong recently asked:

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.⁸⁵

83. Kumin, *supra* note 29, at xxi.

84. Rosemary Johnson, *The Woman of Private (but Published) Hungers*, PARNASUS 92 (Fall/Winter 1979), cited in Alice Ostriker, *That Story: Anne Sexton and Her Transformations*, in SEXTON: SELECTED CRITICISM, *supra* note 26, at 251, 251.

85. Jong, *supra* note 17. This observation echoes a theme explored by feminist legal scholars such as Professor Elizabeth Schneider, who has written of the way in which the law devalues women by failing to protect them in the "private" sphere; the resulting implication is that women are not as important as men to merit adequate legal regulation. See, e.g., Elizabeth Schneider, *The Violence of Privacy*, 23 U. CONN. L. REV. 973 (1991). See also *infra* text accompanying notes 140–152 (discussing privacy doctrine and the public/private distinction).

The psychiatric establishment's discomfort with the tapes' release is implicitly directed not only at the act of revealing, but at the revelations themselves — that which is revealed both in the tapes and in the biography as a whole. While the debate has explicitly been about the doctrine of confidentiality, the subtext is about privileging abstract ethical norms over systemic societal problems such as incest and sex between therapist and patient.⁸⁶ Middlebrook's account of the alleged sexual abuse of Sexton by her father, Sexton's sexual abuse of her daughter, Linda, and Sexton's sexual exploitation by Dr. Frederick J. Duhl, her second psychiatrist,⁸⁷ has been obscured by the obsessive focus on the release of the tapes. Instead, the biography should be used as a vehicle to address issues of particular importance to women. Those who criticize the release of the therapy tapes are motivated not only by a judgment that disclosure violates the rule of doctor-patient confidentiality,⁸⁸ but by a conviction that Sexton's story should not be told. Because a full chronicle of Sexton's life is perceived to threaten the fabric of American culture, the response has been particularly impassioned.

The parallels between the language used by critics spanning a thirty year expanse are striking. In 1960, the poet Elizabeth Bishop found Sexton's first book to be "egocentric[]" and wrote, "I feel I know too much about her"⁸⁹ In 1991, the powerful literary critic, Michiko Kakutani, found it "impossible to condone" the decision to release the tapes. Kakutani wrote of Middlebrook's biography: "In the end we are left not with a portrait of a poet and her work, but with a portrait of a deeply disturbed, highly unstable, selfish and self-absorbed woman, who happened to possess the talent to channel her neuroses into the therapeutic channels of art."⁹⁰ These comments convey the message that women poets should not be self-revelatory to the extent that they make the reader uncomfortable. They imply that "selfish and self-absorbed women" cannot also be great artists. They perpetuate the notion that the natural province of men is the public realm of the workplace, poli-

86. Prominent members of the psychiatric establishment have countered this assertion by claiming that their emphasis on the rules of confidentiality is grounded in a desire to protect the patient, not the doctor. See *infra* text accompanying notes 153–170 (discussing this aspect of the debate).

87. See *infra* text accompanying notes 128–146 (discussing the ramifications of Sexton's relationship with Dr. Duhl).

88. See *infra* text accompanying notes 233–264 (discussing doctor-patient confidentiality and psychobiography).

89. MIDDLEBROOK, *supra* note 2, at 125.

90. Michiko Kakutani, *A Poet's Life Through a Sexual Lens*, N.Y. TIMES, Aug. 13, 1991, at C16.

tics, and intellectual and cultural life, while women belong in the private world of the home, hearth, and family.⁹¹

Erica Jong has posed the question of whether the same response would be expressed if the therapy tapes of a male artist such as Robert Lowell were disclosed.⁹² Would the *New York Times* place a critical account of the controversy on its front page and write a paternalistic editorial on the topic, speaking in terms of obsession, betrayal, and infidelity?⁹³ Would the media tirelessly question the motives of the therapist and suggest that the poet's daughter authorized the tapes' release out of a desire to "sett[e] a score"?⁹⁴ The release of the tapes of a male poet, particularly one not known for his confessional style, would more likely be seen as a coup — a rare look inside the psyche of one of the "greats" — rather than as a dishonorable act.

Gender is a central factor in explaining the critical reaction to Sexton's revelatory mode in her poetry, in Middlebrook's biography, and in the therapy tapes. For Sexton, the act of writing represented an affirmation of her identity that by itself was an important act of resistance.⁹⁵ Writing allowed her to redefine herself as "Anne Sexton, the Poet" and to resist the traditional roles of wife and mother that she felt were being imposed upon her by her husband Kayo, her family, and society.⁹⁶ Feminist theorists have written extensively about the power of naming, defining and redefining one's experience and giving it shape through words.⁹⁷ Language

91. See *infra* text accompanying notes 147–152 (discussing the public/private dichotomy based on gender).

92. Jong, *supra* note 17.

93. *Betrayed*, *supra* note 15, at A21.

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

95. bell hooks writes that "for many exploited and oppressed peoples the struggle to create an identity, to name one's reality is an act of resistance . . ." BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 109 (1989), *quoted in* Cossman & Kapur, *supra* note 53, at 109.

96. At the end of 1957, Sexton presented a manuscript of her first collection of poems to her mother, writing in the accompanying letter, "Here are some forty-odd pages of the first year of Anne Sexton, Poet." MIDDLEBROOK, *supra* note 2, at 65. In 1960, Sexton wrote "poet" under the occupation column on her portion of the Sextons' joint income tax statement, and her daughters described their mother as "someone who types all day." A SELF-PORTRAIT IN LETTERS, *supra* note 26, at 31.

97. See, e.g., KAYA SILVERMAN, *THE SUBJECT OF SEMIOTICS* 178–93 (1983); Karen Davis, *I Love Myself When I am Laughing: A New Paradigm for Sex*, in 21 J. SOC. PHIL. (forthcoming); Liz Kelly, *How Women Define Their Experiences of Violence*, in *FEMINIST PERSPECTIVES ON WIFE ABUSE* 114 (Kersti Yllo & Michele Bograd eds., 1988); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculation on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

historically has been used to control women, both by sexualizing and by "maternalizing" them; the absence of words to describe women's experience has rendered it invisible.⁹⁸

The literary establishment had an interest in preventing Sexton from redefining the "proper form" of verse and from challenging existing notions of what subjects poetry could appropriately address.⁹⁹ Sexton took control of the word and used it in ways that threatened those around her. She wrote of women's biology, of breasts — her own, her mother's and her daughter's — of her uterus, her abortion, and her vagina. In *Transformations*,¹⁰⁰ Sexton retold seventeen fairy tales from Brothers Grimm, subverting the meaning of traditional social values associated with women's existence: love, marriage, beauty, and family.¹⁰¹ In "The Jesus Papers," she presented a radical reinterpretation of Christian beliefs. Sexton expressed anger and resentment in her poetry, challenging cultural injunctions against anger in women. She understood the importance of rebellion and how it could stave off feelings of complicity in her own unhappiness. Today it is considered a prevent-

98. For instance, only after feminists named and defined the concepts of "sexual harassment" and "domestic violence" were these age-old phenomena recognized as valid causes of action. Only after feminists redefined the legal concept of "rape" to encompass acts of sexual aggression between husband and wife was statutory law interpreted (in some jurisdictions) to recognize "spousal rape" as a criminal act. Kelly, *supra* note 97, at 115. See also Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992) (discussing the way in which legal rules permit and sometimes mandate both the sexualization and the maternalization of the female body).

99. Those in power have an interest in silencing women to ensure that the boundaries of acceptable expression are circumscribed. See, e.g., ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 13-47 (1981); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 127-213 (1987); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 3-51 (1991); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

100. ANNE SEXTON, *TRANSFORMATIONS* (1971).

101. For instance, Sexton concludes the poem, "Cinderella," with this stanza:

....

Cinderella and the prince
lived, they say, happily ever after,
like two dolls in a museum case
never bothered by diapers or dust,
never arguing over the timing of an egg,
never telling the same story twice,
never getting a middle-aged spread,
their darling smiles pasted on for eternity.
Regular Bobbsey Twins.
That story.

Cinderella, in *THE COMPLETE POEMS*, *supra* note 1, at 255, 258.

ative measure to give children the vocabulary to describe and to name acts of physical or psychological abuse. Not having access to such words as a child, Sexton respected the power of language as an adult; she recognized its ability to transform and to shape one's perspective. The creative and the therapeutic processes are analogous; both rely on the act of naming, on the act of coming into a voice.

The fact that Sexton challenged both artistic and gender norms is integral to the question of whether to disclose the tapes of her therapy sessions. In her poetry, Sexton addressed an audience that was only beginning to take shape, readers drawn by the visceral nature of her work and moved by the exploration of women's experience in a woman's voice.¹⁰² Perhaps the bold move to make Sexton's therapy experience public and accessible is also ahead of its time: trivial and embarrassing to some, an overt threat to others. Yet, the decision to disclose is completely consistent with every other decision the poet made about her life, both as a person and a persona. It seems likely that if Sexton were alive today, she would echo a message of radical feminists: problematize the distinction between public and private, the hierarchy of objective over subjective, and reject the notion that any discipline can be objective, rational, and principled.¹⁰³ If Sexton were alive today, she might well have repeated her incantation, "I hold back nothing."¹⁰⁴

C. *Blurring the Line Between Art and Life*

To critic Hayden Carruth, Sexton's poems "raise the never-solved problem of what literature really is, where you draw the line between art and documentary."¹⁰⁵ In 1965, when asked, "Do you find that you are more truthful in your poetry than you are to yourself?" Sexton responded:

Yes, I think so. That's what I'm hunting for when I'm working away there in the poem. I'm hunting for the truth. It might be a kind of poetic truth, and not just a factual one, because behind everything that happens to you, every act, there is another truth, a secret life.¹⁰⁶

102. MIDDLEBROOK, *supra* note 2, at 151.

103. See, e.g., MACKINNON, *supra* note 99, at 70-77; Jane Flax, *Postmodernism and Gender Relations in Feminist Theory*, in FEMINISM/POSTMODERNISM 39 (Linda J. Nicholson ed., 1990); Frances Olsen, *The Sex of Law*, in THE POLITICS OF LAW 453 (David Kairys ed., 1990).

104. Stanley, *supra* note 17.

105. Kumin, *supra* note 29, at xxi.

106. NO EVIL STAR, *supra* note 22, at 74.

This section of the Essay explores the way that Sexton's status as a confessional poet, an artist whose success depended upon blurring all lines, affects the question of whether the therapy tapes should have been disclosed.¹⁰⁷ Is this situation unique, or must we always require explicit consent regardless of the context and the personal philosophy of the subject?

Sexton's self-revelatory attitude, her commitment to challenging the distinction between public and private, sets her apart in this inquiry.¹⁰⁸ Accordingly, the standard applied to her should be radically different. Clear distinctions between art and life rarely may be made when the subject is a writer, poet, or artist. As Middlebrook's biography illustrates, Sexton often could not distinguish between memory and fantasy. Indeed, the struggle to differentiate the two occupied her energies both in therapy and in writing. Did Sexton experience sexual abuse by her father? Was her great aunt, Nana, a witness to the incest? Did this knowledge trigger Nana's own descent into madness and eventual death? These questions have no definitive answer, although there is evidence that Sexton fit the clinical picture of a victim of sexual trauma.¹⁰⁹ Yet, what is relevant is that in each area of her life, Sexton was engaged in the search for self:

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 acting the part of a nice case history.¹¹⁰

When told to be herself, Sexton asked, "which self?" and would try to "tone down the mask" that had become her professional persona.¹¹¹ Sexton relied upon the ambiguity suggested by the term confessional poet. "It's a difficult label, 'confessional,'" Sexton said, "because I'll often confess to things that never happened. . . .

107. The term "confessional poet" as applied to Sexton, Robert Lowell, Sylvia Plath, W.D. Snodgrass, among others, was something of a misnomer, for the openness of their writing derived from self-knowledge not from shame. *THE AMERICAN HERITAGE DICTIONARY* 308 (2d college ed. 1985) ("Confess 1. To disclose or acknowledge (something damaging or inconvenient to oneself); admit. 2. To acknowledge belief or faith in . . ."). Sexton, Lowell, and other confessional poets would characterize the essence of their work using the latter rather than the former definition.

108. Jong, *supra* note 17; Carl Sherman, *Biography Sparks Confidentiality Dispute*, *CLINICAL PSYCHIATRY NEWS*, Sept. 1991, at 1, 16 (statements of Dr. Martin T. Orne and Dr. Peter F. Ostwald). See also *infra* text accompanying notes 247-256 (discussing the relevance of Sexton's status as an artist to the discussion of the tapes' release).

109. Pollitt, *supra* note 41, at 21; MIDDLEBROOK, *supra* note 2, at 57.

110. MIDDLEBROOK, *supra* note 2, at 62.

111. *Id.* at 96.

So, you know . . . I'll often assume the first person and it's someone else's story. It's just very amenable to me to kind of climb into that persona and tell their story."¹¹² Sexton knew that the power of writing was in the power of language to have meaning beyond the author's conscious intention: "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."¹¹³ In a discussion of the life and work of Anne Sexton, an attempt to delineate between the personal and the political or the private and the public misses the essence of her message.

Throughout her career, Sexton wanted to demystify the creative process and share it with others to equalize the relationship between artist and reader,¹¹⁴ just as Dr. Orne had made his own relationship with the poet more collaborative by introducing the process of taping their sessions. Sexton spoke often about the need to reach the individual, not to write for an "audience," but for another person.¹¹⁵ This commitment to making her work accessible to a wide spectrum of people, combined with her desire for fame and celebrity, led her to diversify her art. She wrote a play produced off-Broadway; she founded a chamber rock group, "Anne Sexton and Her Kind," that set her poetry to music; and, as she became more committed to popular culture and less to the art of poetic formalism, Sexton published her work in the mass media, from *Ms.* and *The New Yorker* to *Playboy* and *Cosmopolitan*. In speaking with envy of the growing reputation of J.D. Salinger after the publication of his novel *Catcher in the Rye*, Sexton said, "And I [too] have a best-seller mind, I'm really rather ordinary. I am popular with the masses: I have the common touch, I write about the middle-class!"¹¹⁶

Since the publication of the Middlebrook biography, the claim that Sexton presents a unique case has been countered with the assertion that clear distinctions must always be made between an indi-

112. NO EVIL STAR, *supra* note 22, at 133–34.

113. MIDDLEBROOK, *supra* note 2, at 82.

114. Sexton gave dozens of interviews during which she explained at length her process of writing poetry — her techniques, inspirations, and judgments. *See, e.g.*, NO EVIL STAR, *supra* note 22, at 41–206. Sexton also gave great care to answering letters from her readers, letters often from aspiring poets who wrote to Sexton about their own psychiatric treatment. A SELF-PORTRAIT IN LETTERS, *supra* note 26, at 313; Letter from Anne Sexton to Jonathan Korso (Aug. 12, 1965), in A SELF-PORTRAIT IN LETTERS, *supra* note 26, at 266, 266–68.

115. MIDDLEBROOK, *supra* note 2, at 382: "[Sexton believed that] a poem addresses just one person, not a group, not an era."

116. *Id.* at 160–61.

vidual's own declaratory statements and decisions made by a surrogate.¹¹⁷ As such, differentiations should be made between expressions of art intended for public circulation and those expressions — whether in the form of tapes, journals, or correspondence — not explicitly intended for dissemination.¹¹⁸ This attitude is held by leaders within the psychiatric community and by members of Sexton's extended family,¹¹⁹ and it is shared by those on the *New York Times* editorial board¹²⁰ as well as others who have scant knowledge of Sexton¹²¹ and a limited sense of the relationship between the artist and her psychotherapy.¹²²

However, as one explores the facts of the poet's life and art, it becomes clear that the very spirit of Sexton would be betrayed if the tapes were not disclosed for the purpose of illuminating her writing. As Linda Gray Sexton explained, the "tapes and notebooks of her early 1960's (sic) therapy sessions . . . would have been mere objects of prurience had they not revealed the roots of her poetic style —

117. Weissberg, *supra* note 14 ("The 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."); Eisenberg, *supra* note 11.

118. Eisenberg, *supra* note 11 ("[Dr. Orne] infers Sexton's acquiescence in the release of the tapes from her willingness to have him use them in therapeutic and didactic settings. I disagree; the two situations are not comparable.").

119. Stocker, *supra* note 18, at 54 (statements of Sexton's sister, Blanche Harvey Taylor, and her nieces, Mary Taylor Ford and Elizabeth Harvey Tompson).

120. *Betrayed*, *supra* note 15 ("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.").

121. See, e.g., Stanley, *supra* note 17, at C13 (Professor Peter Gay, who underwent psychoanalytic training to write a biography of Sigmund Freud, stated: "As a biographer, I was voracious and angry at anyone who withheld things, but I would despise any analyst willing to [disclose the tapes]."). *Id.* See also M.G. Lord, *Woman Talk to a Psychiatrist While an Ear on the Wall is Listening*, *NEWSDAY*, July 28, 1991, at 32 ("And even 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?").

122. See, e.g., Leonore Tiefer, *Personal Perspective: The Neurotic Need of Psychotherapists to Exploit Their Patients*, *L.A. TIMES*, July 21, 1991, at M1. Professor Tiefer writes:

Why, in the first place, would someone tape their psychotherapy sessions? I've had clients who wanted to do that. Maybe it's because I talk too fast. Maybe it's their perfectionism in wanting to get as much from every session as possible. Maybe the tape is, in effect, a bit of me they can take home with them and listen to when they're frightened or lonely. Or maybe it's for complicated or screwy reasons I never even learn about. Whatever the case, I cannot even imagine giving such tapes to a client's biographer.

Id.

the unconscious associative process employed in analysis, which was to become the trademark of her poetry."¹²³

D. *A Betrayal of the Profession*

Sexton benefitted in myriad ways from the psychiatric counseling she received. At the very least, therapy enabled her to discover her voice and to recognize her talents. At the most, it kept her alive. Yet, Sexton also was damaged by it in ways that are representative of the profession's historic mistreatment of women. While the media has focused on Dr. Orne's decision to release the therapy tapes, of her three principal psychiatrists, Dr. Orne stands alone in having had an undeniably positive impact upon Sexton.¹²⁴ Maxine Kumin described Dr. Orne's decision as "gutsy" and dismissed the objections of his colleagues as "pietistic."¹²⁵ Kumin also said, "Those same doctors [who objected to Dr. Orne's decision] would never have taken on a patient as demanding as Anne. They just want nice, mannerly depressives."¹²⁶ The press has set up Dr. Orne as a scapegoat, a tactic intended, some have suggested, to hide the psychiatric profession's own misconduct.¹²⁷

The primary behavior that the establishment would want concealed is Sexton's alleged sexual relationship with principal psychia-

123. Sexton, *supra* note 2.

124. Sexton worked with three principal psychiatrists during the course of 18 years as a result of logistics (Dr. Orne relocated to another city), mutual termination (after five years of therapy, Dr. Frederick Duhl and Sexton decided that the relationship had become untenable), and unilateral termination (after four years, Dr. Constance Chase abruptly terminated therapy with Sexton). "Constance Chase" is a pseudonym used by Middlebrook. See *infra* text accompanying notes 124–139, 153–170 (discussing Sexton's treatment by these three psychiatrists).

125. Stanley, *supra* note 17, at C13.

126. *Id.*

127. See, e.g., Kaplan, *supra* note 17, at 35 ("The psychiatric community, Kumin thinks, has its motives for censuring Orne. 'I have read that in a family where there has been an incestuous relationship, they all focus on something else. . . .' says Kumin. 'That's what this reminds me of. In this case, what the psychiatric establishment wants to hide is its own misconduct.'"); Christina Robb, *Sexton Biographer Says Controversy Misses the Point*, BOSTON GLOBE, Nov. 26, 1991, at 28:

Joyce Ladd Sexton, Sexton's daughter, thinks the psychotherapists' choice of the release of the tapes as the main issue for controversy in the book is a 'smoke screen' that is 'purely intentional' [Ladd explained,] 'My theory is that the release of the tapes is an easier thing for them to deal with than it is for them to admit that one of their fellow psychiatrists, who is still practicing, would do such a thing' as have an affair with a patient.

trist, Dr. Frederick J. Duhl, who still practices in Boston.¹²⁸ He and Sexton wrote poems for each other; she called him her "doctor-daddy"; and he continued to charge her for their twice-weekly sessions.¹²⁹ The affair, which began in June, 1966, lasted almost three years. Sexton spoke frankly about the relationship with her intimate friends as well as with a few acquaintances.¹³⁰ While all who knew about it were disturbed by the doctor's behavior, none did more than attempt to convince the poet either to end their therapy or end their sexual relationship.¹³¹

The failure of those within the medical community who were close to Sexton to report the sexual relationship deserves censure.¹³² The 1973 code of medical ethics for psychiatrists clearly states that "sexual activity with a patient is unethical."¹³³ The code requires each member of the medical profession to "expose, without hesita-

128. Stanley, *supra* note 17, at C13. In her biography of Anne Sexton, Diane Middlebrook does not mention Dr. Duhl by name; instead she uses the pseudonym, *Zweigung*, a German word that translates as "forked tongue."

129. MIDDLEBROOK, *supra* note 2, at 258.

130. *Id.* at 313-14.

131. The prohibition against therapist-patient sexual intimacy has its origins in the earliest documentation of medical ethics. As the Hippocratic Oath clearly states: "In every house where I come, I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction, and especially from the pleasures of love with women and men." KENNETH S. POPE & JACQUELINE C. BOUHOUTSOS, *SEXUAL INTIMACY BETWEEN THERAPISTS AND PATIENTS* 22 (1986). Many reasons exist for this prohibition, the most common being a recognition of the extreme vulnerability of the patient, the responsibilities of the therapist, and the harm that such intimacy inflicts upon the patient. As Freud recognized, to engage in therapist-patient sex means the destruction of therapy: "If her advances were returned, it would be a great triumph for the patient, but a complete overthrow for the cure The love-relationship actually destroys the influence of the analytic treatment on the patient: a combination of the two would be an inconceivable thing." SIGMUND FREUD, *Further Recommendations in the Technique of Psychoanalysis: Observations on Transference-love*, in *FREUD: THERAPY AND TECHNIQUE* 174 (Philip Rieff ed., 1963) (1915).

132. The reasons for the failure of therapists to expose colleagues who have sexually exploited patients are complex. The situations are "filled with ambivalence for everyone involved, including the victims, the victimizers, and those who sit in judgment." ALAN A. STONE, *Sexual Exploitation of Patients in Psychotherapy*, in *LAW, PSYCHIATRY, AND MORALITY: ESSAYS AND ANALYSIS* 191, 193 (1984) [hereinafter *Sexual Exploitation*]. Many therapists interpret a colleague's sexual involvement with patients as a sign that the doctor needs treatment and help, not punishment or censure. Others acknowledge their duty to expose the colleague but do nothing out of feelings of helplessness. This failure to act thus becomes the accepted norm of professional behavior, while action is seen as a deviation from the norm. *Id.* at 204-07. "Whatever the reasons for this collective failure to act, in retrospect it creates the appearance of a 'conspiracy of silence.'" *Id.* at 207.

133. AMERICAN PSYCHIATRIC ASSOCIATION, *THE PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY* § 1(2) (1978) (This annotation was adopted in 1973.).

tion, illegal or unethical conduct of fellow members of the profession."¹³⁴ Yet, Lois Ames, a psychiatric social worker who was a close friend of Sexton's, failed to expose Dr. Duhl.¹³⁵ Dr. Anne Wilder, a psychiatrist and confidante of Sexton's, also failed to expose him, a failure that has been attributed to her knowledge that Dr. Duhl was critical of aspects of Wilder's own relationship with Sexton.¹³⁶ While Dr. Orne chastised Dr. Duhl on two separate occasions, Dr. Orne also failed to expose his colleague.¹³⁷ And, after the relationship between Sexton and Dr. Duhl had finally ended, Barbara Schwartz, a psychiatric social worker, refused even to accompany Sexton to a conference where Dr. Duhl was to speak. "[Anne] wanted to stand up there and say, 'J'accuse!'" Schwartz explained. "I felt I could not go to that meeting and let her expose herself that way."¹³⁸ It is ironic that the very same establishment that is today decrying the "exposure" of the "innocent" Anne Sexton sat by impassively while one of its own betrayed his profession. Or perhaps the behavior of the members of the establishment is consistent. Perhaps the discomfort the establishment feels when a pa-

134. *Id.* § 4.

135. MIDDLEBROOK, *supra* note 2, at 259-60.

136. *Id.* at 314. For over a year, Wilder and Sexton had nurtured a close, intimate friendship. Eventually, their relationship became sexual when Wilder accompanied Sexton on a reading tour. Sexton wrote a poem, "Your Face on the Dog's Neck," inspired by the experience. While the two women did not sleep together again, they maintained an active correspondence. *Id.* at 233-40. Both Dr. Orne and Dr. Duhl discouraged Sexton's relationship with Wilder primarily because of its sexual, erotic component, not because of Wilder's status as a psychiatrist. *Id.* at 232.

137. *Id.* at 314-17. Dr. Orne's reaction to Sexton's relationship with Dr. Duhl illustrates the limited nature of Dr. Orne's commitment to reconceptualizing the doctor-patient dynamic. While Dr. Orne was willing to give Sexton the tools to understand her own behavior and feelings, he did not act to terminate therapy between Sexton and a doctor about whom Dr. Orne recently wrote, "Although Anne initially did extremely well with [Dr. Duhl], the therapeutic contract became untenable because of a change in their relationship. Unfortunately, this change also undermined her crucial relationship with her husband, thereby depriving Anne of what had been a vital interpersonal support." *Foreword*, *supra* note 9, at xviii.

138. Stanley, *supra* note 17, at C13. It is revealing that Schwartz chose to characterize the act as the exposure of Sexton, rather than the exposure of Dr. Duhl. Schwartz also did not provide Middlebrook with the notebooks and medical records that Schwartz kept during Sexton's treatment, because they were "a private piece of therapy." *Id.* A growing number of psychiatrists and psychoanalysts believe that it is therapeutically important for sexually abused women to take action against the men who have harmed them: "The real world confrontation is considered a crucial therapeutic parameter for such a woman to work through in order to master the trauma of this sort of experience." *Sexual Exploitation*, *supra* note 132, at 210. See *infra* text accompanying notes 143-150.

tient "tells all" is the same discomfort it feels when telling all ruins a professional reputation.¹³⁹

In commentary on the tapes' release, members of the medical community have ignored the possibility of psychiatric malpractice by Dr. Duhl and have focused solely upon the personal privacy rights of the patient.¹⁴⁰ This approach fails to acknowledge, however, that conventional notions of privacy are problematic for women — in general as well as in the particular contexts of poetry, psychiatry, and psychobiography. Dr. Anita Allen has written extensively of the uneasy relationship between women and privacy.¹⁴¹ According to Dr. Allen, "women's privacy" historically has meant restricted access to women and the protection of women's chastity, virtue, and modesty. Restricted access in the contemporary context implies anonymity, solitude, and freedom from harassment on the street, at work, and in the home. The meaning of "women's privacy" has evolved to include decisional privacy in the sense of freedom from coercive interference, particularly women's freedom of choice in the context of reproductive rights. While women desire opportunities for personal privacy and private choice, they also seek to reject forms of privacy that confine and oppress them, such as the traditional role of family caretaker or the societal proscription against casual sex. The challenge is to demonstrate that it is not paradoxical for women to want and need certain forms of privacy while rejecting others, for "the privacy given up is not the privacy sought."¹⁴²

To suggest that certain subjects are appropriate to write about, to talk about, or to disclose in a biography, while others are not, reinforces an understanding of women's privacy in its traditional, normative sense. It confirms the idea that the personal is separate

139. Martha Minow pointed out to me that the debate over the tapes' release raises the question of who is hurt by the revelatory act — the patient, the doctor, or the public? Ethical standards are interpreted very differently when the potential "victim" of the telling is a professional rather than the patient or her family. Written comments from Professor Martha Minow of Harvard Law School to Tamar Lechich (Mar. 2, 1992). The difficulty arises in making an ethical and moral judgment about the situation and in determining what responsibilities each party has to the others. An added complicating factor is an assessment of the patient's competence.

140. Howard D. Kibel, *Sexton's Psychiatrist Violated Ethics*, N.Y. TIMES, Aug. 9, 1991, at A26 (editorial) ("Privacy is a prerogative of citizens to keep personal aspects of their lives from public view."); Sherman, *supra* note 108, at 16 (statement of Dr. Jeremy Lazarus) ("The right to confidentiality survives death. . . . What is said in the psychiatrist's office should stay there.'").

141. ANITA ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 1-34 (1988).

142. *Id.* at 181.

from the political, that private things should be kept secret.¹⁴³ Privacy thus becomes a passive right rather than an affirmative one. It is understood only as the right to be let alone or the right to protection against familial intrusion, rather than as an aspect of liberty and self-expression. Women's privacy, however, represents more than just a boundary between the known and the unknown; it incorporates a woman's right to control personal information — revelations in diaries and therapy tapes as well as disclosures about marriage and sexuality. In this sense, privacy becomes an aspect of autonomy and is rightly situated in the actor, rather than in society which may choose to impose silence as a control mechanism.¹⁴⁴

The classic understanding of the right to privacy obscures the fact that women can be empowered by making the private public — by bringing lawsuits against psychiatrists with whom they have had sexual relations, by seeking legal protection against domestic battering, and by writing poetry about "women's experience." Making the private public holds men accountable for their acts in a public setting. It can further help women overcome a sense of alienation and private blame, and encourage a feeling of group identity and public pride. As Professor Elizabeth Schneider has written, privacy would better serve women's needs if based on the notion of women as independent agents protected against subordination no matter where such subordination occurs, rather than on the notion of women as agents whom the state will protect in the public sphere but will "let alone" in the private.¹⁴⁵ Anne Sexton challenged conventional notions of privacy in her poetry. As Erica Jong has written:

I think [Anne's] indifference to traditional concepts of privacy was part of what made it possible for her to write the way she did, to track the night mare down into its lair, to ride her witch's broom into pure metaphor. As she once said to me, "Yes, the poems are excessive but I'm an excessive person."¹⁴⁶

Privacy additionally has been construed as synonymous with norms of seclusion separating the family home from society at large.¹⁴⁷ This understanding of privacy laid the groundwork for the public/private dichotomy, a theory that divides the world into the

143. While the controversy has explicitly focused upon the act of disclosing the tapes, I am proposing that it is implicitly catalyzed by the nature of the subject matter addressed both in the tapes and in the biography itself. See *supra* text accompanying notes 86–104.

144. See *infra* text accompanying notes 263–273 (discussing autonomy in the context of Sexton's beliefs and the release of the therapy tapes).

145. Schneider, *supra* note 85, at 999.

146. Jong, *supra* note 17.

147. ALLEN, *supra* note 141, at 63.

public realm of work, politics, and the law, which men inhabit, and the private sphere of the home and children, which is considered the women's domain.¹⁴⁸ This distinction has a normative as well as descriptive component: the public, male sphere is accorded more value and significance than the private, female one. Precisely because the subordination of women frequently occurs in the private sphere, women experience it as an individual problem, not a systemic one.¹⁴⁹ Traditional privacy doctrine then prevents the state from intervening in this realm, regardless of whether women are abused at the hands of their fathers, husbands, or therapists. In this way, both the public/private dichotomy and conventional understandings of privacy have functioned to mask inequality, to validate the division of labor, and to perpetuate male violence against women.¹⁵⁰

Sexton challenged the public/private distinction in her rejection of the traditional conceptions of wife and mother. Although she did most of her writing from a study in her home, Sexton travelled often for her career — to writers' conferences and colonies, to readings across the U.S., and to Europe on a three-month fellowship. Her husband Kayo assumed most of the domestic duties, including shopping and cooking, and Sexton's mother-in-law continued to share much of the responsibility for Linda and Joy.¹⁵¹ Not surprisingly, Sexton also challenged the public/private dichotomy in her poetry, mocking the ideal of the home as the "natural" locus for women and recognizing that to be feminine is to be either powerless or punished. In the poem, "Mother and Daughter," Sexton conveyed her vision of the meaning of womanhood:

. . . .

Now that you are eighteen
I give you my booty, my spoils,
my Mother & Co. and my ailments.

148. See Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281 (S. I. Benn & G. F. Gaus eds., 1983).

149. Riane Eisler, *Human Rights: Toward an Integrated Theory for Action*, 9 HUM. RTS. Q. 287 (1987); Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REF. 933, 948-50 (1985); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 862 n.80 (1985).

150. Schneider, *supra* note 85, 984-85. See also Elizabeth Schneider, *The Dialectics of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

151. MIDDLEBROOK, *supra* note 2, at 138, 153. When Sexton was home, Kayo was allegedly physically abusive to his wife on a regular basis. *Id.* at 154-55.

Question you about this
 and you'll not know the answer —
 the muzzle at the mouth,
 the hopeful tent of oxygen,
 the tubes, the pathways,
 the war and the war's vomit.
 Keep on, keep on, keep on,
 carrying keepsakes to the boys,
 carrying powders to the boys,
 carrying, my Linda, blood to
 the bloodletter.¹⁵²

. . . .

The psychiatric profession's fixation upon Dr. Orne's "public" actions obscures the "private" treatment of Sexton that deserves close examination.¹⁵³ This treatment includes the breach of medical ethics by Dr. Duhl; the incessant over-prescription of drugs by her doctors that allowed Sexton to sedate herself each night and to overdose on several occasions;¹⁵⁴ the decision to allow Sexton to discontinue Thorazine;¹⁵⁵ the jarring termination of therapy by Dr. Constance Chase which preceded Sexton's suicide by less than a year; and the early advice and diagnosis of Sexton's first psychiatrist, Dr. Martha Brunner-Orne,¹⁵⁶ who found the poet's troubles grounded in her "difficulty controlling her desire for romance and adventure."¹⁵⁷ While this treatment was tolerated silently two decades ago, today these issues — sex between doctor and patient, the move from psychotherapy to drugs, and patronizing explanations

152. *Mother and Daughter*, in *THE COMPLETE POEMS*, *supra* note 1, at 305, 306.

153. The argument is not that disclosure of the tapes is justified because of the concurrent exposure of Sexton's mistreatment by her doctors, but that the accusations of a breach of medical ethics have been directed exclusively at Dr. Orne. In the guise of protecting the patient, the psychiatric community has chosen to launch a selective prosecution against one doctor, while ignoring the actions of others.

154. Stone, *supra* note 8, at 1451; *MIDDLEBROOK*, *supra* note 2, at 210–11, 238, 252, 341 (overdose 1970), 378 (overdose 1973).

155. While Sexton felt that taking Thorazine hindered her ability to write, she also recognized that it staved off her periods of deep depression. She told Anne Wilder in 1971, "Thorazine isn't an anti-depressant and yet it keeps me sane." *MIDDLEBROOK*, *supra* note 2, at 345–46. Maxine Kumin thought it had been a mistake for Sexton to stop taking Thorazine and was worried about how agitated Sexton seemed as a result. *Id.* at 367. In February 1974, Sexton took an overdose of Thorazine and other pills and was not discovered until more than a day later. When she regained consciousness she said, "You won't get another chance to save me." *Id.* at 392.

156. Dr. Martha Brunner-Orne, who had treated Sexton's father for alcoholism, was Dr. Martin Orne's mother. In 1956, while Dr. Brunner-Orne was on vacation, Sexton was treated by her son whom she liked so much that she continued to see him after Dr. Brunner-Orne returned. *Id.* at 34.

157. *Id.* at 26.

for depression in women — are slowly being acknowledged and addressed.

For instance, although the prohibition against sexual intimacy between therapist and patient has been definitively stated by Hippocrates and Freud, the psychiatric profession and the public failed to give it adequate attention before the last decade. A major article on the issue written in 1977 characterized the phenomenon as the "problem with no name."¹⁵⁸ Denial, resistance, and "selective inattention" are among the reasons given for the failure to act.¹⁵⁹ Most therapists refused to acknowledge that the issue was even a valid subject for formal study.¹⁶⁰ It was not until several therapists made public assertions of the *legitimacy* of sexual relations between therapist and patient that the profession began to respond.¹⁶¹ During the 1970s and early 1980s, studies were released confirming that the sexual exploitation of women in psychotherapy was quite prevalent.¹⁶² This public exposure of "private" behavior was the catalyst for explicitly reaffirming the prohibition in ethical codes and textbooks.¹⁶³ It also encouraged some patients to bring charges against therapists who violated the prohibition, although these cases have rarely reached the courtroom.¹⁶⁴

Sexton's questionable treatment by her various doctors reflects the systemic mistreatment of women by therapists. Insurance industry data suggest that 20% of all therapists will, at some time during their careers, become sexually intimate with at least one of their patients.¹⁶⁵ These therapists tend to be men who are from 12 to 16 years older than their female patients. They tend to be well established, often leaders in their field. One study revealed that

158. POPE & BOUHOUTSOS, *supra* note 131, at 26.

159. *Id.*

160. *Id.* at 26-27.

161. *Id.* at 27.

162. See, e.g., JERRY EDELWEICH & ARCHIE BRODSKY, *Sexual Dilemmas for the Helping Professional* (1982); *Ethics and the Sensual Psychologist*, 112 SCIENCE NEWS 293, Nov. 5, 1977; Sheldon H. Kardener, *Sex and the Physician/Patient Relationship*, 131 AM. J. PSYCHIATRY 1134 (1974).

163. *Sexual Exploitation*, *supra* note 132, at 191-92; Denise LeBoeuf, *Psychiatric Malpractice: Exploitations of Women Patients*, 11 HARV. WOMEN'S L.J. 83, 90-95 (1988); See also AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 133.

164. POPE & BOUHOUTSOS, *supra* note 131, at 26-28. Sexual intimacy has been recognized as a cause of action in tort and malpractice suits. Insurance companies, however, often opt to settle out-of-court and frequently require patients to forego filing a licensing complaint or making public statements about the case which might lead other patients to file suits against the same therapist. *But see* Zipkin v. Freeman, 436 S.W.2d 753 (Mo. 1968).

165. POPE & BOUHOUTSOS, *supra* note 131, at 28 (citations omitted).

45% rationalized their behavior as resulting from the expressed need of their patients, 60% saw themselves as father figures, and only 40% sought help from a friend or colleague.¹⁶⁶ The study suggested that because psychotherapists receive little training in sexual countertransference,¹⁶⁷ these feelings are repressed and denied instead of acknowledged and analyzed. When patients are sexually exploited, disserved by stereotyped notions of gender, or over-medicated, the great majority of cases will involve a male therapist and a female patient.¹⁶⁸ Similarly, the overwhelming number of lawsuits alleging psychiatric malpractice because of sexual involvement are brought by women.¹⁶⁹ In this light, it is regrettable that the case of Anne Sexton has been seen only in terms of Dr. Orne's betrayal of the profession — and of Sexton herself — rather than as the profession's betrayal of its women patients.¹⁷⁰

Similarly, the focus by the media upon Dr. Orne's disclosure of the tapes reflects both paternalism and sexism.¹⁷¹ Regardless of whether Dr. Orne voluntarily disclosed the tapes, it was ultimately the literary executor's decision to allow them to be used by the biographer.¹⁷² Linda Gray Sexton had already obtained medical

166. POPE & BOUHOUTSOS, *supra* note 131, at 34 (citing S. Butler, *Sexual Contact Between Therapists and Patients*, unpublished Ph.D dissertation, California School of Professional Psychology, Los Angeles).

167. Sexual countertransference is the phenomenon in which a therapist redirects his own erotic desires toward his patient.

168. *Sexual Exploitation*, *supra* note 132; Nanette Gartrell et al., *Psychiatrist-Patient Sexual Contact: Results of a National Survey, I: Prevalence*, 143 AM. J. PSYCHIATRY 1126, 1128–1130 (1986). Professor Stone discusses the fact that “[m]ost, though not all, of the legal and ethical complaints [reported in questionnaire surveys] involved male therapists sexually exploiting female patients.” *Sexual Exploitation*, *supra* note 132, at 192. He also states that twenty years ago, reports by women claiming they had been sexually exploited by their psychotherapists were considered “hysterical wish-fulfilling fantasies,” a specious claim also applied to victims of rape and incest. *Id.* at 191. Thirty million U.S. women regularly take stimulant and depressant drugs prescribed by their doctors; in 1975, 80% of amphetamines, 67% of tranquilizers, and 60% of barbiturates were prescribed for women. SISTERHOOD IS GLOBAL 704 (Robin Morgan ed., 1984). Similarly, in Canada, tranquilizers are prescribed to twice as many women as men, increasing with age. *Id.* at 103. In Britain, tranquilizers are also gratuitously overprescribed for women. *Id.* at 92.

169. LeBoeuf, *supra* note 163, at 83–94.

170. See *supra* note 153.

171. *Betrayed*, *supra* note 15 (“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.”).

172. It is debatable whether Dr. Orne's role was only marginal to the ultimate question. While the choice of whether to release the tapes did lie with the literary executor, this issue would never have arisen had Dr. Orne chosen to destroy them. Yet, the

records from six different psychiatric hospitals. If Dr. Orne had refused access, Sexton would have petitioned for a court order and made the tapes available to Diane Middlebrook, whom she specifically chose to be her mother's official biographer.¹⁷³ Sexton herself made the decision to appoint her daughter as literary executor, evincing her trust in Linda's judgment. Thus, the decision to disclose the therapy tapes really lay in the hands of three women: Anne Sexton, Linda Gray Sexton, and Diane Middlebrook — not in those of one man. The focus upon Dr. Orne's actions implies that women may be expected to be impulsive and to lack perspective. It suggests that the ultimate responsibility to behave ethically lay with Dr. Orne. The commentary consistently has been grounded in generalizations and stereotypes rather than in the factual context and specifics. Once the background of Sexton informs the debate, it becomes clear that the focus on the tapes' release is a "vastly overplayed bull's-eye for [the publisher's] publicity department,"¹⁷⁴ while the relevant issues — the prevalence of sex between doctor and patient and the psychiatric profession's treatment of women in general — are ignored and thus denied.

II. THE DEVELOPMENT OF THE LEGAL APPROACH TO SURROGATE DECISION-MAKING

A. *The Proper Standard to Apply*

In exploring whether the chronicle of Sexton's psychotherapy should be made accessible to her biographer and therefore public, the questions arise: who decides and what considerations should enter into the decision-making process? Case law addressing the right to refuse medical treatment on behalf of another provides a doctrinal framework for examining the propriety of the therapy tapes' release. The decision-making occurs in factually different contexts. One involves medical decisions made for a person who is still living, while the other involves the dissemination of information about the life of someone who is deceased. Yet, both situations require that subjective judgments be made for persons no longer able to decide for themselves. Furthermore, each instance implicates the validity of giving someone the legal right to speak for an-

media failed even to acknowledge that given the circumstances, Linda Gray Sexton alone had final responsibility for the decision.

173. Sexton, *supra* note 2 ("Had Dr. Orne revealed he had tapes but refused to make them available, I would have gone to court for them.").

174. Carlin Romano, *The Fuel that Ignited Sexton's Poetry*, PHILADELPHIA INQUIRER, Aug. 18, 1991, at 1-J.

other. As a result, case law on the right to refuse treatment offers a model for approaching the problem of the proper method of surrogate decision-making.

The case of *In re Quinlan*¹⁷⁵ involved the legality of allowing a parent of a comatose twenty-two year old woman, Karen Ann Quinlan, to authorize the termination of her life-support system. *Quinlan* recognized that a patient's right to refuse medical treatment is guaranteed by her constitutional right of privacy which may not be disregarded solely because her condition prevents her conscious exercise of the choice:

The court in *Griswold* found the unwritten constitutional right of privacy to exist in the penumbra of specific guarantees of the Bill of Rights Presumably this right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions.

. . . .

. . . Karen's right of privacy may be asserted on her behalf by her guardian under the peculiar circumstances here present.¹⁷⁶

In *Quinlan*, the court balanced the state's interest in the preservation of life against the patient's privacy right; as the degree of medical invasion of the body increases and the prognosis worsens, ultimately "there comes a point" at which the individual's right of privacy overshadows the state's interest in the sanctity of life.¹⁷⁷ The court stated that "[i]t is for that reason that we believe Karen's choice, if she were competent to make it, would be vindicated by the law."¹⁷⁸

The *Quinlan* court also confronted the question of who should make the decision on Quinlan's behalf. The court acknowledged "the sad truth" that Quinlan was grossly incompetent and that "her supposed choice" could not be discerned solely from testimony of her previous conversations.¹⁷⁹ Nevertheless, once a decision is regarded as a valuable incident of a person's right of privacy, "it should not be discarded solely on the basis that her condition prevents her conscious exercise of the choice."¹⁸⁰ The court emphasized the importance of including the wishes of the family and

175. 70 N.J. 10, 355 A.2d 647 (1976).

176. *Id.* at 40, 355 A.2d at 663-64 (citations omitted).

177. *Id.* at 41, 355 A.2d at 664.

178. *Id.*

179. *Id.*

180. *Id.*

stressed that the decision should be controlled primarily within the patient- doctor-family relationship.¹⁸¹ Therefore, the court determined that a guardian may assert Quinlan's right of privacy on her behalf.

The *Quinlan* court reasoned that the only practical way to protect Quinlan's right of privacy was to have her guardian and family use "their best judgment" in determining whether she would exercise the right in this circumstance.¹⁸² While appearing to give wide license to families and guardians in making medical decisions for patients, the court qualified its standard when it defined "best judgment": "If [the family decides to terminate life support] this decision should be accepted by a society the overwhelming majority of whose members would, we think, in similar circumstances, exercise such a choice in the same way for themselves or for those closest to them."¹⁸³ The court's meaning is ambiguous. Is it merely cushioning its bold determination that the family "knows best" with dictum or is it asserting that as long as the family's "best judgment" concurs with societal norms, the decision should not be questioned? The case leaves little hint of the appropriate result in differing factual circumstances. What result, for instance, if "the overwhelming majority" of society would allow the termination of life support, while the idiosyncratic patient would have been strongly against it?¹⁸⁴

The *Quinlan* court required the guardian, family, attending physician, and hospital ethics committee to agree with the decision to terminate life support.¹⁸⁵ The court acknowledged that the requirement of the assent of a hospital ethics committee would diffuse "professional responsibility for decision" and be "protective to the hospital as well as the doctor."¹⁸⁶ The opinion focused on the value of providing physicians with immunity and freeing them from "possible contamination by self-interest or self-protection concerns."¹⁸⁷ The court sought to prevent situations where physicians who made

181. *Id.* at 50, 355 A.2d at 669. The opinion explicitly states that turning to courts to confirm such decisions would generally be "inappropriate, not only because that would be a gratuitous encroachment upon the medical profession's field of competence, but because it would be impossibly cumbersome." *Id.* This assertion has been challenged in later opinions. See *infra* text accompanying notes 197-202.

182. 70 N.J. at 41, 355 A.2d at 664.

183. *Id.*

184. See *infra* text accompanying notes 189-202 (discussing Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977)).

185. 70 N.J. at 49-50, 355 A.2d at 668-69.

186. *Id.*

187. *Id.* at 49, 355 A.2d at 668.

decisions in good faith would be forced to assume the resultant responsibility and risk alone.¹⁸⁸ It considered the involvement of a hospital ethics committee the best means of ensuring that the responsibility for difficult judgments would be shared.

A year later, in another prominent case addressing the issue of surrogate decision-making, *Superintendent of Belchertown State School v. Saikewicz*, the court applied "substituted judgment" because of the standard's "straightforward respect for the integrity and autonomy of the individual."¹⁸⁹ The *Saikewicz* court addressed the issue of whether chemotherapy should be administered to a severely retarded sixty-seven year old man with leukemia who had been institutionalized all his life. Because Joseph Saikewicz was not competent to make this decision, it was made by the judge and the guardian *ad litem*.¹⁹⁰ The *Saikewicz* court applied a very different standard than *Quinlan* which requires that the guardian render "his best judgment" concerning the patient's choice to exercise her privacy right. Under the "substituted judgment" standard articulated in *Saikewicz*, the court considered what Saikewicz would have decided if he were competent and could "tak[e] into account [his] present and future incompetency."¹⁹¹ In other words, would a person choose chemotherapy if he knew he would experience the procedure as someone with the mental age of a three year old child? The court did not ask what decision Saikewicz would have made if he were "miraculously lucid" and "perceptive of his irreversible condition," for the court knew that the overwhelming majority of competent people choose chemotherapy despite its side effects and risks. To use this approach, the court explained, would be to as-

188. The *Quinlan* court equates the need for such an ethics committee with the need for multi-judge appellate courts that are responsible for determining difficult questions of law. *Id.* at 50, 355 A.2d at 669.

189. *Saikewicz*, 373 Mass. at 751, 370 N.E.2d at 431. The "substituted judgment" standard has its origins in an 1816 case, *Ex parte Whitbread in re Hinde, a Lunatic*, 35 Eng. Rep. 878 (1816), in which the court authorized a gift from an incompetent to an individual to whom the incompetent owed no duty of support. The English court substituted itself for the incompetent, guided by what it determined were the motives and considerations that would have moved the man himself. The original conception of the doctrine required the court to "don the mental mantle of the incompetent." *In re Carson*, 39 Misc. 2d 544, 545, 241 N.Y.S.2d 288, 289 (Sup. Ct. 1962).

190. A guardian *ad litem* is a special guardian appointed by the court in behalf of an infant or incompetent, and such guardian is considered an officer of the court to represent the interests of the infant or incompetent in the litigation. BLACK'S LAW DICTIONARY 706 (6th ed. 1990). In addition to the report of the guardian *ad litem*, the probate judge in *Saikewicz* had the clinical team reports of a physician, a psychologist, and a social worker. *Saikewicz*, 373 Mass. at 730 n.1, 370 N.E.2d at 419 n.1.

191. *Saikewicz*, 373 Mass. at 751, 370 N.E.2d at 431.

sume "an objective viewpoint not far removed from a 'reasonable person' inquiry."¹⁹²

The *Saikewicz* court recognized that while most competent people choose chemotherapy,

[t]he significant decisions of life are more complex than statistical determinations. . . . To presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent person by placing a lesser value on his intrinsic human worth and vitality.¹⁹³

With this in mind, the court determined that the probable side effects of the treatment, the need for physical restraints, as well as the pain and fear of the patient, outweighed the slim chance of remission and an extended life.¹⁹⁴

While the doctrine of substituted judgment can be useful in the context of surrogate decision-making, the court failed to provide a compelling or clear model for lower courts to follow. When someone such as *Saikewicz* cannot decide for himself, courts cannot in good faith give this right to another and then equate substituted consent with informed consent.¹⁹⁵ Because one can never know what *Saikewicz* would decide, the concept that someone else's consent may be substituted for his own is mythical. Although the court insisted that "a choice exists" for incompetent as well as competent people, its ultimate determination sheds little light on how and by whom this choice should be made. Rather than try to manipulate the substituted consent model to fit each situation, the court should have rejected the standard and relied instead upon the state interest

192. *Id.* at 750, 370 N.E.2d at 430. Applying the reasonable person standard requires the fact-finder to measure a party's actions against those of the "reasonable man" faced with the circumstances at hand. BLACK'S LAW DICTIONARY, *supra* note 190, at 1266. By definition, the doctrine is intended to be an objective one, yet in practice it is subjective, determined by the fact-finder's own judgment about the meaning of the term "reasonable."

193. *Saikewicz*, 373 Mass. at 748, 370 N.E.2d at 428.

194. *Id.* at 753-55, 370 N.E.2d at 431-32.

195. Informed consent is defined as:

[T]he . . . general principle of law that a physician has a duty to disclose what a reasonably prudent physician in the medical community . . . would disclose to his patient as to whatever grave risks might be incurred from a proposed course of treatment, so that a patient, faced . . . with a choice of undergoing the proposed treatment, or alternative treatment, or none at all, may intelligently exercise his judgment by reasonably balancing the probable risks against the probable benefits.

BLACK'S LAW DICTIONARY, *supra* note 190, at 779.

in preventing nonconsensual invasion of bodily integrity when holding that chemotherapy will not be performed.¹⁹⁶

The *Saikewicz* court explicitly rejected *Quinlan's* emphasis on maintaining decision-making within the patient- doctor-family relationship.¹⁹⁷ The court instead "[took] a dim view" of any attempt to move the ultimate decision-making responsibility away from courts of proper jurisdiction: "[S]uch questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created."¹⁹⁸ The court stated that the achievement of this "ideal . . . is not to be entrusted to any other group purporting to represent the 'morality and conscience of our society,' no matter how highly motivated or impressively constituted."¹⁹⁹

Confusion resulted from the conflicting messages of *Quinlan* and *Saikewicz*. While *Quinlan* considered judicial overview inappropriate, *Saikewicz* held that it should be required. Commentators have suggested that the cases may be reconciled by an analysis of the specific facts at hand.²⁰⁰ In the case of *In re Bertha Coyler*,²⁰¹ the court relied on such a fact-based analysis and determined that Bertha Coyler's situation was more analogous to Karen Quinlan than to Joseph Saikewicz. The court held that judicial intervention is not necessary in the case of a terminally ill, comatose patient, when the family, physicians, and a court-appointed guardian agree upon termination of life sustaining treatment.²⁰²

The Supreme Court's decision in *Cruzan v. Director, Missouri Department of Health*²⁰³ is the most recent judicial attempt to

196. See, e.g., *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64 (1981) (unrealistic to attempt substituted judgment where person has been incompetent since birth).

197. *Saikewicz*, 373 Mass. at 759, 370 N.E.2d at 434.

198. *Id.* at 760, 370 N.E.2d at 435.

199. *Id.*

200. See, e.g., George J. Annas, *Reconciling Quinlan and Saikewicz: Decision Making for the Terminally Ill Incompetent*, 4 AM. J.L. & MED. 367, 387-94 (1979).

201. 99 Wash. 2d 114, 660 P.2d 738 (1983).

202. *Id.* at 126, 660 P.2d at 745-46. The court in *JFK Hospital v. Bludworth*, 452 So. 2d 921 (Fla. 1984), followed *Coyler* and broadly stated that for terminally ill, comatose patients, prior court approval for termination of treatment would be burdensome and would threaten the privacy rights of the incompetent patient. *Id.* at 924-25. In these cases the concurrence of neither a hospital ethics committee nor a guardian should be required. This version of the substituted consent standard requires that those within the patient-doctor-family relationship attempt to substitute their judgment for what they believe the incompetent person would have chosen; as long as the decision is made in good faith no judicial intervention is necessary.

203. 110 S. Ct. 2841 (1990).

achieve a proper standard. *Cruzan* involved a young woman in a persistent vegetative state as a result of severe injuries sustained in a car accident. Nancy Cruzan's parents sought a court order authorizing the withdrawal of their daughter's artificial feeding and hydration tube. The Rehnquist majority opinion gives the state wide discretion by holding that the substituted consent standard is not constitutionally required. Because "there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been,"²⁰⁴ the state may require clear and convincing evidence of the incompetent's wishes and thereby refuse to defer to the "best judgment" of the family. It is unclear whether this result relies upon concepts of federalism or upon a rejection of the very theory of surrogate decision making, the idea that allowing one person the right to choose for another can be equated with informed consent.²⁰⁵ More likely it rests upon the belief that deference to the state trumps deference to the family.²⁰⁶ Justice O'Connor's concurrence suggests, however, that in certain circumstances the doctrine of substituted consent may be constitutionally required, and she encourages states to develop other approaches to protect the right of the incompetent to refuse medical treatment.²⁰⁷

Cruzan has been widely criticized for imposing procedural obstacles upon the right to be free from unwanted medical treatment, and for establishing a narrow conception of what evidence is relevant in determining the patient's wishes. The Missouri court gave little value to the few signs left signifying that Nancy Cruzan was once a human being with close relationships, strong values, and self-respect; the state court stood by a rule of law that flies in the face of Cruzan's conversations with others, the opinions of her close family

204. *Id.* at 2856.

205. In certain ways, the reasoning in *Cruzan* resembles that found in *Saikewicz* — both cases challenged the substituted consent doctrine (although the *Saikewicz* court did so through explication). More importantly, both cases refuse to leave the decision to the confines of the patient-doctor-family relationship. In each decision, prior judicial approval was required before a guardian may consent to the withholding of life-sustaining treatment.

206. Martha Minow, *The Role of Families in Medical Decisions*, 1991 UTAH L. REV. 1, 21. Professor Minow discusses a case decided at the same time as *Cruzan* in which the Illinois Supreme Court found that a patient's statements to family and friends were "clear and convincing evidence" justifying the removal of a feeding tube. This supports the theory that *Cruzan* was motivated by a judgment about the importance of the state's imprimatur and not one about the withdrawal of treatment. *Id.* at 19 (discussing *In re Greenspan*, 137 Ill. 2d. 1, 558 N.E.2d 1194 (1990)).

207. States are clarifying rules concerning living wills, the designation of a surrogate through a durable power of attorney, and medical directives, along with other methods of protecting the incompetent's right to refuse treatment. See *id.* at 20-21.

and friends, and even the opinion of a court-appointed guardian and a trial court judge. *Cruzan* evinces a disdain for the patient's very right to choose²⁰⁸ and reflects the Supreme Court's attempt to narrow the definition and scope of the right of privacy. As the dissent stated, the *Cruzan* majority allows the state's abstract interest in the preservation of life to trump Nancy Cruzan's interest in allowing her guardians to exercise her constitutional right to discontinue medical treatment.²⁰⁹

The parallels between *Cruzan* and the Sexton debate are striking. Both situations involved women who did not leave "clear and convincing" evidence of desire or intent regarding the pending decision. Yet, each woman left behind a strong impression of her personality, values, and general beliefs that allowed family members and friends to state with some reliability what she would have wanted. In both contexts, deep public divisions exist about the individual's best interests. And in each case, those in the position to judge — whether the Supreme Court majority or the Chairman of the American Psychiatric Association's ethics committee — ignored all the factual evidence about the individual and instead advocated for a bright-line rule. In Sexton's case, her selection of a literary executor could be viewed as analogous to the selection of a health care proxy decision-maker, meeting Justice O'Connor's recommended position in *Cruzan*. This selection also could be used to clarify any ambiguity about who should be considered Sexton's "family" when making the decision about disclosure.²¹⁰

Case law concerning the right to refuse medical treatment offers several standards to apply when determining whether Sexton's therapy tapes should be released to her biographer: the "best judgment" of the family; the "substituted judgment" approach; or a decision based on an independent state interest, such as doctor-patient confidentiality to prevent disclosure or deference to family decision-making to support disclosure. If Dr. Orne had refused to release the tapes, Linda Gray Sexton would have applied for a court order as she did when McLean Hospital initially declined to make Sexton's psychiatric records available.²¹¹ In such a hearing, the court could apply some variation on the standards presented. A contextualized approach that considers all the available evidence, includ-

208. See, e.g., *id.* at 16.

209. *Cruzan*, 110 S. Ct. at 2879 (Stevens, J., dissenting).

210. See *infra* text accompanying notes 212–232 (discussing the proper role of families in surrogate decision-making).

211. Sexton, *supra* note 2.

ing testimony from Sexton's literary executor, psychiatrist, family, and closest friends as well as testimony that addresses the relevance to the decision of her poetry, identity as a woman, and therapy, would well serve the competing interests at stake. While the theory of substituted consent is mythical, it might also be wise to designate a single decision-maker based on the evidence presented. In any case, a court should not treat the issue of disclosure abstractly or reduce it to the value of doctor-patient confidentiality and the state's power to allow that interest to overcome the recommendations of those closest to the individual. A court should not follow the reasoning of the *Cruzan* majority and ignore the factual findings about an individual's values and beliefs and the loyalty of her family and friends to those interests.

B. *The Role of Families*

While the importance of including the family in decision-making is clear to some, it is refuted by others.²¹² In the *The New York Times* front-page article that broke the story of the disclosure of Anne Sexton's therapy tapes, Jeremy A. Lazarus, M.D., Chairman of the American Psychiatric Association's ethics committee, stated: "Our view is that only the patient can give that release. What the family wants does not matter a whit."²¹³ Dr. Carola Eisenberg asserted in *The New England Journal of Medicine* that only the patient can speak for herself, not her family, her doctors, or a court of law.²¹⁴ "Can a patient's family be trusted to speak for the patient?" Eisenberg asked. "It may have the legal right to do so, but how confident can we be that its decision is the one the patient would have made?"²¹⁵ Not surprisingly, doctors such as Lazarus and Eisenberg believe that Sexton's silence should be respected, and the tapes should not be disclosed.²¹⁶ This view echoes that of the majority opinion in *Cruzan*:²¹⁷ if clear and convincing evidence of the patient's wishes is lacking, the family's best judgment will not receive deference.

According to Professor Martha Minow, the Supreme Court has been inconsistent about the role of families in medical deci-

212. Eisenberg, *supra* note 11; Stanley, *supra* note 17, at C13 (statements of Dr. Jeremy Lazarus).

213. Stanley, *supra* note 17, at C13.

214. Eisenberg, *supra* note 11.

215. *Id.*

216. *Id.*; Stanley, *supra* note 17, at C13.

217. See *supra* text accompanying notes 203-210 (discussing *Cruzan*).

sions.²¹⁸ While in *Cruzan*, the Court refused to grant deference to the parents of an incompetent comatose patient, in *Ohio v. Akron Center for Reproductive Health*,²¹⁹ the majority approved a state requirement that a minor's parent be notified before an abortion may be performed. With these two opinions, the Court offered conflicting messages about the role of the family and about the meaning of "family." In *Cruzan*, the Court dismissed evidence that Nancy Cruzan's parents were "loving and caring," while stressing that family members may not always act in the patient's best interest. Yet, in *Akron Center* the Court relied on stereotyped notions of the "compassionate and mature" family, while dismissing those "exceptional cases" when minors receive neither parental guidance nor understanding. Interestingly, the dissents in both cases also offer inconsistent characterizations of the family: in *Cruzan* the family has "unique knowledge" of the patient, while in *Akron Center* the family may emotionally or physically abuse the minor when discovering her pregnancy.

Professor Minow reconciles the inconsistency by acknowledging the ambivalence we all feel about families: parents can be both compassionate and nurturing as well as irrational and abusive. It makes sense, therefore, that seemingly contradictory notions of the family will be reflected in legal opinions as well as in other forms of social commentary. Courts, however, have only recently been faced with issues involving the rights of individual family members as against other members. Often the judicial response is to recognize, on the one hand, that potential for conflict is greater within families than without, but then to emphasize, on the other hand, that such conflicts would be better resolved outside the judicial arena. Clear legal rules about family conflicts must be drafted, ones that will acknowledge the ambivalence, ones that will encourage courts to address the specific facts at hand and to reject stereotyped notions of family.²²⁰

218. Minow, *supra* note 206.

219. 110 S. Ct. 2972 (1990). The statute included the option of judicial bypass of the requirement if the minor demonstrates by clear and convincing evidence that she is mature enough to give consent or that bypassing the requirement would be in her best interests. On the same day the Court decided *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), in which it found a state statute requiring notification of both parents unconstitutional.

220. Minow, *supra* note 206, at 12-16. Ruth Heller raised the compelling question to me of why, when the discussion involves decisions made on behalf of women but not men, does the focus inevitably shift onto the role of the family. Letter from Ruth Heller, feminist and J.D. candidate, Boston University School of Law, 1992, to Tamar Lechrich (Mar. 31, 1992). Part of the answer may lie in the history of the public/private

The question of the proper definition of "family" arises in the Sexton case. Dr. Orne wrote that just as the patient's right to confidentiality survives death, so does the patient's right to disclosure.²²¹ The right to disclosure, however, is not unlimited. Rather, the patient's desire for posthumous disclosure must be weighed against the right of the family executor not to release the information if she believes that such disclosure would violate the privacy of family members still living.²²² Dr. Orne stated that even after a patient consents to disclosure, it is incumbent upon the therapist to obtain the consent of the family or the family executor. In other words, if Linda Gray Sexton did not have the power to remove from the biography anything that she felt was objectionable to the family, Dr. Orne presumably would not have disclosed the tapes to Middlebrook.²²³ Dr. Orne depended upon the judgment of Linda Gray Sexton — both as Sexton's daughter and as her literary executor — that release of the tapes would not harm Sexton's surviving family members.²²⁴

Dr. Orne emphasized the importance of protecting the privacy rights of surviving family members, not those of the deceased. This emphasis reflects the feelings of Sexton, herself, who said in 1968: "I don't reveal skeletons that would hurt anyone. They may hurt the dead, but the dead belong to me."²²⁵ Yet, several of Sexton's extended family members disagree with this conception. In the Middlebrook biography, the author quoted from one of the therapy tapes in which Sexton told Dr. Orne of her late father sexually fondling her.²²⁶ After the book's publication, Blanche Harvey Taylor, Sexton's sole surviving sister, expressed anger and frustration with

distinction and the cult of domesticity. See *supra* text accompanying notes 135-144. See also NANCY F. COTT, *THE BONDS OF WOMANHOOD: WOMAN'S SPHERE IN NEW ENGLAND, 1780-1835* (1977); KATHRYN KISH SKLAR, *CATHERINE BEECHER: A STUDY IN DOMESTICITY* (1973).

221. Orne, *supra* note 4.

222. Dr. Orne has written, "[I]n my view it is still incumbent on the therapist to insure that the family executor give consent to the release of the confidential material that will now affect the privacy of the family." *Id.*

223. See Stone, *supra* note 8, at 1450; Sexton, *supra* note 2. Dr. Orne's argument does not depend on the fact that the executor also be a surviving member of the family. Yet, in deciding who counts as "family," the fact that Sexton specifically appointed someone to make decisions regarding her literary effects supports the conclusion that Linda Gray Sexton was given the authority to disclose the tapes.

224. However, members of Sexton's extended family, including her sister and nieces, have publicly denounced the decision by Linda Gray Sexton to make the tapes accessible to Middlebrook. See *infra* text accompanying notes 225-229.

225. NO EVIL STAR, *supra* note 22, at 88.

226. MIDDLEBROOK, *supra* note 2, at 56.

the author for publishing the unprovable charges of incest.²²⁷ Ms. Taylor challenged the accuracy of the poet's version of the truth²²⁸ and believed it to be her duty to protect the reputation of her deceased parents. Mary Gray Ford, one of Sexton's nieces, countered Dr. Orne's claim that he acquired family consent with the statement, "It depends on what you define as family."²²⁹

Thus, the definition of family seems to shift depending on the context. Even if a single definition may be agreed upon, what result when people within the "family" disagree about the resolution of the issue? Dr. Orne's reliance on the family executor for consent may make the doctor's decision easier, but it does not always ensure that the "family's rights" are being recognized. Yet, if we rely on an extended notion of family for acquiring consent, will this prevent the legitimate wishes of the patient from being fulfilled?

Once again, the most reliable route seems to be one in which the judgment is contextualized: those with the power to decide — whether doctors, family members, courts, or the state — should not frame the issues (i.e. the right to privacy) abstractly. Instead, the facts of each case should be considered thoughtfully within their proper context, and the alternatives should be clearly examined. Those who knew, worked with, lived with, and loved Anne Sexton provide the best testimony supporting the decision to allow her confessions to be heard. Dr. Martin Orne says that he offered to return the tapes to Sexton in 1964 when he moved to Philadelphia, but that she insisted he take them to use in helping others.²³⁰ Maxine Kumin has said, "In my heart of hearts I know Annie would've welcomed the release of the tapes."²³¹ Linda Gray Sexton seized upon her mother's keen business sense when responding to the accusations of betrayal:

My mother would have been delighted by this furor: she was a dramatic woman, an actress, a publicity hound She would

227. Stocker, *supra* note 18. Incidentally, Diane Middlebrook welcomed the participation of Blanche Taylor and her daughters in the writing of the book, but Ms. Taylor rescinded the offer after reading the version of her sister's childhood that appeared once the biographer gained access to the tapes. Sexton, *supra* note 2; Stocker, *supra* note 18.

228. Stocker, *supra* note 18, at 54. Ms. Taylor says:

Anne Sexton had a wonderful childhood. Her parents indulged these children because they could afford to. But in Anne's poems she was locked in a room with blood clots and ropes on the wall, when in fact she was behind a toddler gate in a fabulous room wallpapered with roses and vines.

229. *Id.*

230. Orne, *supra* note 4.

231. Kaplan, *supra* note 17, at 35.

have pointed to the biography's first printing, already sold out, gleefully nagging Houghton Mifflin to increase the figures for the second printing, all the while dancing and shouting, "Live to the hilt!"²³²

If one is guided by this testimony while taking into account the various factors and conflicting interests at stake, that is the most even Sexton, herself, could have expected.

III. THE TRIAD OF LAW, MEDICINE, AND ART

Over 2000 years ago, Hippocrates stated the basis of the ethical rule that physicians may not reveal the confidences entrusted to them in the course of medical attendance: "Whatsoever things I shall see or hear concerning the life of men, in my attendance on the sick or even apart therefrom, which ought not to be noised abroad, I will keep silence thereon, counting such things to be as holy secrets."²³³ It has been suggested that Hippocrates' use of the word "ought" provides a doctor with discretion, that the ban on "noising about" is not absolute.²³⁴ Only in recent times, however, have exceptions to the rule of doctor-patient confidentiality been recognized; the most common include voluntary waiver by the patient and the doctor's legal duty to disclose patient communications when it serves the public interest.²³⁵

Confidentiality is one of the basic tenets of the doctor's obligations to her patients. There is an ethical presumption in favor of confidentiality over disclosure,²³⁶ and this obligation does not end

232. Sexton, *supra* note 2.

233. James C. Beck, *The Basic Issues, in CONFIDENTIALITY VERSUS THE DUTY TO PROTECT* 1, 1 (James C. Beck ed., 1990).

234. *Id.*

235. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 133, § 9:

A physician may not reveal the confidences entrusted to him in the course of medical attendance . . . unless he is required to do so by law or unless it becomes necessary in order to protect the welfare of the individual or of the community

. . . .

A psychiatrist may release confidential information only with the authorization of the patient. . . . The continuing duty of the psychiatrist to protect the patient includes fully apprising him/her of the connotations of waiving the privilege of privacy.

236. This presumption has been intensified in some instances as a result of the relatively recent development in case law permitting patients to sue their physicians for damages for a breach of confidentiality. This development has resulted in psychiatrists becoming much more cautious when revealing confidences and much more likely to seek legal advice. Perhaps because of this increased caution, suits for disclosure of confidential information are relatively rare. In a study of claims made against psychiatrists covered by APA-sponsored professional liability insurance, only three percent were

with the patient's death.²³⁷ At one time it was thought that a doctor's duty to protect the patient extended even to the point of denying a patient access to her own records.²³⁸ However, recent developments in the area of medical ethics have emphasized the importance of patient autonomy and self-determination over professional paternalism. Privilege, the legal right to release or withhold information, lies with the patient, not the psychiatrist.²³⁹ As a result, a psychiatrist may not release information without a patient's consent, and a patient may release the psychiatrist from the obligation of confidentiality if she so chooses.²⁴⁰

The media portrayed the initial reaction of the psychiatric establishment to the actions of Dr. Orne as uniformly negative.²⁴¹ Yet, articles and commentary reveal that psychiatric ethicists see the issues as complex, textured, and "incontrovertibly controversial."²⁴² There appear to be two main camps: the absolutists viewing confidentiality as trumping all other values, and the utilitarians weighing the positive and negative results of disclosure. Other doctors, however, agree that the decision should depend upon the facts and details of the given case.²⁴³ Under this view, Sexton's status as a confessional poet and the interdependence of her psychotherapy and poetry therefore are not only relevant but essential to the case's disposition.

An additional exception to the principle of confidentiality allows the physician to breach his duty to the patient when necessary

based on breach of confidentiality. See JOEL I. KLEIN ET AL., *LEGAL ISSUES IN THE PRIVATE PRACTICE OF PSYCHIATRY* 32-33 (1984).

237. Several states have specific statutory instructions for control of the privilege after the death of the patient (e.g., Massachusetts, Maryland, Michigan, District of Columbia). States lacking statutory direction generally follow the common law interpretation that a legal representative of the deceased may assert the privilege on the patient's behalf. See SAMUEL KNAPP & LEON VANDECREEK, *PRIVILEGED COMMUNICATIONS IN THE MENTAL HEALTH PROFESSIONS* 75-76 (1987).

238. *Id.* at 143-44.

239. Whereas confidentiality concerns issues of ethics relating to the disclosure of information outside the courtroom, privilege refers to the legal protection of clients from disclosure in judicial proceedings. See RONALD J. COHEN & WILLIAM E. MARIANO, *LEGAL GUIDEBOOK IN MENTAL HEALTH* 259-61 (1982).

240. *Id.*

241. See, e.g., Stanley, *supra* note 17 (the *New York Times* emphasized the "shock" among psychiatrists at Dr. Orne's decision which was seen to be "an unconscionable breach of medical ethics."). See also *Betrayed*, *supra* note 15 (calling Dr. Orne's act an "unthinkable betrayal" of his profession).

242. Sherman, *supra* note 108 (statements of Dr. Paul Chodoff).

243. *Id.* at 1, 16 (statements of Dr. Paul Chodoff, Dr. Alan A. Stone, Dr. Jeremy Lazarus, and Dr. Peter F. Ostwald).

to protect the doctor's self-interest.²⁴⁴ In defending himself against a malpractice suit or in a fee dispute, a psychiatrist inevitably will reveal confidences — without his patient's consent — that become part of the public record.²⁴⁵ This exception hints at the transparent, malleable nature of the doctrine; it suggests that the meaning of confidentiality for the medical community depends not on the needs of the specific patient, but on the needs of the doctor.²⁴⁶ The focus on the release of Sexton's tapes, rather than on her treatment by her therapists, reveals the way in which psychiatrists, in the name of confidentiality, have chosen to protect the profession's reputation in the name of protecting the patient, but at the expense of its responsibility to the public. The result is to deny the arguably negligent behavior of Sexton's doctors and the systemic mistreatment of women by the establishment at large.

The question of the relationship between the doctrine of confidentiality and the psychobiography of artists is not unique to Middlebrook's biography of Sexton. During the last two years, several biographers have relied heavily on material supplied by their subjects' psychiatrists, apparently without the degree of public outcry that has met the Sexton case. A psychiatrist who had treated Sylvia Plath recently allowed one of Plath's biographers to interview her

244. *Id.* at 16 (statements of Dr. Alan A. Stone); AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 133, § 9(9) (1978). This exception to the confidentiality rule applies equally to lawyers. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983).

245. Sherman, *supra* note 108, at 16 (statements of Dr. Alan A. Stone). Courts have held, either through statutory interpretation or common law, that patients automatically waive the privilege when they enter their mental health as an issue in litigation, a common occurrence in malpractice suits, suits involving emotional pain or suffering, and civil commitments. See KNAPP & VANDECREEK, *supra* note 237, at 66. There is a difference between a patient choosing to sue a doctor and thereby waiving the privilege, and a situation in which a doctor refuses to release information because he lacks the explicit, written consent of the patient. However, my emphasis is upon the fact that professionals have formulated ethical canons that provide a clear exception to the rule of confidentiality only when the professional himself is under scrutiny; there is no room for exception when substantive evidence exists that a patient or client would want the privilege waived but has neglected to leave written consent. Also, there is the question of whether "free choice" actually exists for an individual whose doctor or attorney has acted negligently; it is a "choice" between taking the professional to court or doing nothing. A similar claim that "accusers" should be prepared to have their personal lives exposed to the public is used against women who have been raped and who wish their identity to remain undisclosed.

246. *Sexual Exploitation*, *supra* note 132, at 207:

Critics charge that the ethical duty of confidentiality to the patient is used hypocritically to cloak the offending therapist, that psychiatrists are more responsive to the requirements of professional etiquette and to each other than to their professional responsibility to patients, and that the Canons of Ethics protect the profession, not the patient.

about the poet's psychotherapy.²⁴⁷ Several of artist Jackson Pollock's psychiatrists spoke openly to his biographers, and one psychoanalyst supplied them with various material on Pollock.²⁴⁸ Biographies have been written of composer Robert Schumann and dancer Vaslav Nijinsky using primary psychiatric materials.²⁴⁹ The family of writer John Cheever has decided to publish his intimate and revealing journals in which he discusses his experiences in psychotherapy.²⁵⁰

Most psychiatrists agree that if a patient explicitly refuses permission to disclose, the interest in biography, no matter how great, does not outweigh the posthumous right to privacy.²⁵¹ The issue becomes less clear, however, when no conclusive evidence of the subject's views exists. Some contend that the need to preserve doctor-patient confidentiality, for several generations if necessary, trumps all other interests,²⁵² while others believe that each biographical research project must be judged on its own merits.²⁵³ Thus, central to this discussion is the question of who should have the burden of proof in regard to disclosure? Should clarity be required for nondisclosure and ambiguity justify disclosure, or visa versa?

According to Dr. Peter F. Ostwald, a biographer and professor of psychiatry, no blanket rule should be imposed. Rather, Dr. Ostwald has expressed that if the family is properly consulted, psychobiographies of artists such as Sexton do not threaten confidentiality because of the unique status of the subject.²⁵⁴ He has stated that the crucial fact that the biographical subject is an artist determines the standard: "[When dealing with] people whose lives depend on being in public we have to look at the issue of disclosure from a different perspective."²⁵⁵ Dr. Ostwald directs a program in

247. Elizabeth Frank, *A Long Romance with Death*, N.Y. TIMES, Oct. 6, 1991, § 7 (Book Review), at 15.

248. Stanley, *supra* note 17, at C13; Sherman, *supra* note 108, at 16.

249. Sherman, *supra* note 108, at 16.

250. Stanley, *supra* note 17, at C13; Lord, *supra* note 121.

251. See, e.g., *Psychiatrist Defends Public Disclosure of Sexton Therapy Tapes*, CLINICAL PSYCHIATRY NEWS, Sept. 1991, at 16 (statement of Dr. Martin T. Orne); Gelman & Chideya, *supra* note 94, at 54 (statement of Dr. Kathleen Mogul); Sherman, *supra* note 108, at 16 (statement of Dr. Jeremy Lazarus); Stanley, *supra* note 17 (statement of Dr. William Gaylin); Stone, *supra* note 8, at 1451; Weissberg, *supra* note 14.

252. Frank, *supra* note 247.

253. Sherman, *supra* note 108 (statements of Dr. Alan A. Stone and Dr. Peter F. Ostwald).

254. See *supra* text accompanying notes 212-232 (discussing the problems inherent in defining "family").

255. Sherman, *supra* note 108, at 16.

mental health for performing artists and believes such therapy greatly benefits creative patients. He has called Dr. Orne's treatment of Sexton and its resultant impact upon her poetry "a magnificent example of a positive therapeutic experience She might have committed suicide 10 years earlier had he not been able to establish an avenue of self-expression for her."²⁵⁶

Therefore, the doctrine of confidentiality can actually be used to support the release of Sexton's therapy tapes to her biographer. In particular, the release of the tapes invokes two of the most common exceptions to the confidentiality rule, voluntary waiver and disclosure in the service of the public interest. There is clear evidence that the poet voluntarily waived her right to privacy²⁵⁷ as well as evidence that the psychiatric treatment of Sexton raises issues of significant public interest.²⁵⁸ Moreover, no new information was contained in the therapy tapes themselves.²⁵⁹ Middlebrook had been researching the book for five years, from 1980-85, before Dr. Orne granted her requests for an interview. By that time, Middlebrook already had access to Sexton's therapy notebooks and the four tapes in her possession. It was not until October, 1986, that Dr. Orne placed them in Middlebrook's possession. The biographer then used the tapes only in order to illuminate the role of Sexton's treatment in her artistic development.

With all this in mind, it becomes clear that Dr. Orne did not "betray his profession" when he determined to make Sexton's ther-

256. *Id.*

257. Dr. Orne has written in more than one context that Anne Sexton orally waived her right to keep the therapy tapes confidential. See *Foreword, supra* note 9, at xvii; Orne, *supra* note 4. Courts have also recognized implied waivers. See KLEIN ET AL., *supra* note 236, at 34-35. It can plausibly be argued that when Sexton included the therapy notebooks and the four tapes in her possession with her literary effects, she was including by implication the 300 tapes in Dr. Orne's possession. Thus, just as Sexton's guardian — the literary executor — had the legal power to include the notebooks and four tapes in the literary archive at the University of Texas, Linda Sexton also had the power to make the remaining tapes accessible to her mother's biographer. This line of reasoning may be analogized to the holding that when a patient testifies about privileged communications, she opens the door on the issue and may not prevent a physician from doing so. See, e.g., *Giamanco v. Giamanco*, 393 N.Y.S.2d 453, 57 A.D.2d 564 (1977).

258. Stone, *supra* note 8, at 1451:

[W]hen a patient is sexually exploited by her psychiatrist, when she readily obtains prescriptions for drugs she is known to abuse, and when she commits suicide after a psychiatrist is unwilling to continue treatment, then issues of substantial public interest have been raised. Under such circumstances, psychiatrists have a responsibility not to bury their mistakes or those of their colleagues and perhaps not to cover them up in the name of confidentiality.

259. See *supra* notes 11-12 and accompanying text.

apy tapes available to her biographer. Dr. Orne chose not to destroy the tapes after therapy with the poet ended. Regrettably, he also failed to procure his patient's written consent.²⁶⁰ If consent agreements between doctors and patients were to become matters of procedure, however, might not this result in an "erosion of trust" in the profession?²⁶¹ It might also raise the difficulty (and perhaps impossibility) of obtaining true, voluntary "consent" from a patient, especially if she has an "intense positive transference" to her therapist.²⁶² Dr. Orne's actions, however, were true to the spirit of his former patient, a woman who strongly believed in sharing her experiences with others in order to help them grapple with their own mental illness.

Perhaps most important to a determination of this issue, Sexton placed the importance of individual autonomy over that of conventional wisdom. This is not to say that Sexton's relationship to privacy was uncomplicated. There were strict boundaries placed around the Sextons' home life. Kayo and Anne Sexton rarely entertained neighbors, and they discouraged their daughters from inviting over other children.²⁶³ Sexton had left instructions that her early, unpublished writing was never to be seen by anyone.²⁶⁴ Yet, while Sexton zealously protected certain forms of privacy, she simultaneously rejected others. It is not paradoxical, therefore, to assert that she would have wanted her therapy tapes to be accessible to a biographer chosen by her daughter. All accounts suggest that she would not have held this material back from the readers of her biography, those already familiar with her poetry as well as those introduced to her art for the first time. The publication of this biography provides yet another medium in which Sexton's work — through an analysis of her life — is made accessible to a wider audience. Therefore, the issues of privacy, confidentiality, and disclosure should be as relevant to the decisions made after Sexton's death as she felt they were while she was living.

260. The American Psychiatric Association did not address the issue of requiring a patient's written consent to disclosure until 1978, four years after Anne Sexton's death. See AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 133, § 9(10) ("It is ethical to present a patient or former patient to a public gathering or to the news media only if that patient is fully informed of enduring loss of confidentiality, is competent, and consents in writing without coercion.").

261. Eisenberg, *supra* note 11. In contrast to the context in which I use the term, Dr. Eisenberg states that an irreversible "erosion of trust" in the profession could occur as a result of Dr. Orne's *failure* to obtain Sexton's written consent.

262. Stone, *supra* note 8, at 1451.

263. MIDDLEBROOK, *supra* note 2, at 335.

264. See *supra* note 3.

CONCLUSION

Concerning your letter in which you ask
me to call a priest and in which you ask
me to wear The Cross that you enclose;
your own cross,
your dog-bitten cross,
no larger than a thumb,
small and wooden, no thorns, this rose

. . . .

My friend, my friend, I was born
doing reference work in sin, and born
confessing it. This is what poems are:
with mercy
for the greedy,
they are the tongue's wrangle,
the world's pottage, the rat's star.²⁶⁵

Anne Sexton had a love and appreciation for the palindrome, a word, verse, or sentence that reads the same backward as forward. She delighted in the surprise of the inversion, in the recognition that the flip side of the word or image often contained an element of truth. The palindrome represented to Sexton the potential for words — her written words — to have meaning beyond the author's conscious intention. "Of course I KNOW that words are just a counting game," Sexton wrote, "I know this until the words start to arrange themselves and write something better than *I* could ever know."²⁶⁶ Her favorite palindrome was "rats live on no evil star," which she wanted to be her epitaph. Sexton used "rat" as a metaphor for an element of the self. The "rat" was not the obedient housewife and mother, but the "evilest of creatures/with its bellyful of dirt/and its hair seven inches long."²⁶⁷ In Sexton's poem, "With Mercy for the Greedy," she broadened this insight by suggesting that meaning is created not in a vacuum, but through a communal process, a dialectic. In exchange for your "dog- bitten cross," the poet will give you her "rat's star." With these words, Sexton offered her readers the gift of language which she called "the world's pottage."²⁶⁸

265. THE COMPLETE POEMS, *supra* note 1, at 62–63.

266. MIDDLEBROOK, *supra* note 2, at 82.

267. *Rats Live on No Evil Star*, in THE COMPLETE POEMS, *supra* note 1, at 359–60. The relevance of Sexton's appreciation for the palindrome is insightfully explored in Kim Krynock, *Not That It Was Beautiful*, in SEXTON: SELECTED CRITICISM, *supra* note 26, at 312–15.

268. "Pottage: a thick soup of vegetables or vegetables and meat." AMERICAN HERITAGE DICTIONARY, *supra* note 107, at 970.

Sexton's life and work depended always upon the suggestion of the mirror image, the flip side. Determined to write for the person and not the group, Sexton wrote poetry that was bold, experimental, and challenged convention. She wrote of "rats" and implied the transcendent "star." She referred to "evil" and suggested "live." She spoke of "God" and hoped readers would hear the "dog" of creativity and need. She described the fetus as the symbol of life as well as the embodiment of death. In her early work, Sexton made private topics public because her poetic objective was to reveal, not conceal, one's personal nightmares. In her later work, though still a poet of the subjective self, she reinterpreted shared cultural traditions. In *Transformations* she fused the public with the personal, using Grimm's tales to maintain, not reduce, their psychic impact. Throughout, she questioned what it means to be feminine and what it means to be a woman.

Sexton's delight in the palindrome reflects the value she placed on challenging cultural assumptions. She recognized that it was fear alone that "begs us not to enquire further." In her life and in her work, Sexton defied categories. She blurred the line between the public and the private and between the personal and the political. She believed strongly in the artist's right to public confession and to self-exposure: "I can invade my own [privacy]. That's my right. It's very embarrassing for someone to expose their body to you. You don't learn anything from it. But if they expose their soul, you learn something. That's true of great writers."²⁶⁹ Part of the paradox of the debate is the way in which the release of the tapes is both an act of self-exposure and exposure by others. On the tapes, Sexton shaped in her own words a history and narrative of herself that Middlebrook has incorporated into the only published account of Sexton's life. As a result, details of madness and abuse have been chronicled in the media without controls on the way they are used or understood. These results are consistent, however, with Sexton's commitment to making her work accessible to the widest of audiences and to her desire for fame and for "bring[ing] the stars all down"²⁷⁰ — even at the risk of sullyng her own name in the process.

There is much to applaud about the debate over the release of Sexton's therapy tapes. Sexton, herself, may well have appreciated that it has been the catalyst for so much healthy discussion and

269. MIDDLEBROOK, *supra* note 2, at 329.

270. Letter from Anne Sexton to Claire S. Degener (Apr. 14, 1966), in *A SELF-PORTRAIT IN LETTERS*, *supra* note 26, at 288.

criticism of issues ranging from the treatment of women by the psychiatric profession to the relationship between psychobiography and art. She would probably have objected to the role that gender has played and recognized that there would have been a different response to the revelation of the therapy tapes of "Adam Sexton"²⁷¹ and to the case of "Norris Cruzan."²⁷² Yet, the primary question is not whether Sexton, herself, would have wanted the tapes' release nor whether the tapes should have been released at all. Instead, the inquiry should focus on the way that Sexton's revelatory mode, as reflected in her poetry, in Middlebrook's biography, and in the therapy tapes, provides a rich challenge to conventional notions of privacy that have oppressed women. A discussion of Sexton's attitude toward language and her personal life reveals new ways of talking about privacy and autonomy that reflect the complexity of women's lives and the importance of women defining their own boundaries.

Just as Sexton defied all categories, so must an analysis of the episode. This Essay assumed an interdisciplinary perspective, one that addressed not only legal doctrine and medical ethics, but theories of feminism, art, and psychology. Just as the power of the palindrome is found in the meaning of its inversion, conventions and norms must be flipped and their underside examined. The debate as covered by the press need not be an empty exercise. The press debate, the legal debate, and the ethical debate all express paradox and ambiguity. Emptiness arises when we think we can reconcile those tensions using only abstract terms. This is a trap into which lawyers, medical ethicists, and academics often fall. Principles of law and medicine have the potential to obscure central issues — the power of naming and setting boundaries, the reconceptualization of women's privacy, and the problematic nature of the public/private

271. See VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 80-99 (1929), for Woolf's fictional account of Shakespeare's sister, "Judith Shakespeare." Woolf proposes that regardless of the innate talents of women during the Elizabethan Age, they would not have had the opportunity or cultural support necessary to achieve literary success:

The indifference of the world which Keats and Flaubert and other men of genius have found so hard to bear was in [Judith's] case not indifference but hostility. The world did not say to her as it said to them, Write if you choose; it makes no difference to me. The world said with a guffaw, Write? What's the good of your writing?

Id. at 91.

272. See Steven Miles & Allison August, *Courts, Gender and 'the Right To Die'*, 18 *L. MED. & HEALTH CARE* 85 (1990), for a discussion of the way Nancy Cruzan's gender contributed to the Supreme Court's unwillingness to give significant weight to the statements of her family and friends as well as to the state's willingness to allow intrusive medical procedures.

distinction — only when removed from context. The meaning of the debate need not be determined by the powers that be. It may be appropriated and inverted. It may be used to address the prevalence of sexual exploitation and to celebrate the strength of women's bodies. It is vital for those of us who appreciate Sexton's work — poems written about women's experience in a woman's voice — to use the debate to gain a deeper appreciation for her poetry. Just as Sexton's death may not be separated from her life, neither may this discussion, for each is central to understanding her poetic vision.²⁷³

273. The discourse over Sexton's therapy tapes *is* larger than a thumb. It is the tongue's wrangle. It is the rat's star.

