

# DUTIES IN CONFLICT: MUST PSYCHOTHERAPISTS REPORT CHILD ABUSE INFLICTED BY CLIENTS AND CONFIDED IN THERAPY?

*This Comment will investigate whether confidential communications between psychotherapist and client regarding child abuse must be divulged, or whether these communications are protected by either the constitutionally based right to privacy or the statutory psychotherapist-client privilege. Also examined in this Comment are the civil and criminal liabilities that may be imposed on a therapist for unreported incidents of child abuse. Finally, assuming that therapists must report child abuse inflicted by clients, this Comment will explore the effect that this compromise of confidentiality may have on the therapeutic process.*

## INTRODUCTION

Child abuse is a long-standing problem. The concept that children are property of their parents is traceable to the earliest days of recorded history.<sup>1</sup> As a result of this presupposition, children have suffered violence, neglect, abandonment, slavery and murder.<sup>2</sup> With the arrival of the twentieth century, however, attitudes changed regarding the rights of children to be protected from such abuse.<sup>3</sup> By the end of the 1930's, a variety of private and public child welfare agencies existed in most states.<sup>4</sup> Despite the creation of these agencies, few incidents of child abuse or neglect were reported to the authorities.<sup>5</sup> Not until 1962, when physician C.H. Kempe published a study which documented physical injuries to children and coined the term "battered child syndrome,"<sup>6</sup> did public concern become widespread.<sup>7</sup>

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1. Schwartz, Hirsch, *Child Abuse and Neglect: A Survey of the Law*, 28 MED. TR. TECH. Q. 293 (1982).

2. *Id.* at 293.

3. Besharov, *Child Protection: Past Progress, Present Problems and Future Directions*, 17 FAM. L.Q. 151, 152 (1983).

4. *Id.* at 152.

5. *Id.* at 153.

6. Kempe, Silverman, Droegmueller & Silver, *The Battered Child Syndrome*, 181 J.A.M.A. 17 (1962). The syndrome should be considered in any child exhibiting evidence of possible trauma or neglect (fracture of any bone, subdural hematoma, multiple soft tissue injuries, poor skin hygiene, or malnutrition) or where there is a marked discrepancy between the clinical findings and the historical data as supplied by the parents. *Id.* at 24.

7. Besharov, *supra* note 3, at 153.

Within four years of Kempe's study, all fifty states enacted legislation requiring physicians to report physical abuse of children.<sup>8</sup> Subsequently, legislatures expanded these reporting statutes to include other professionals as it became clear that physicians were not the only ones to come into contact with child abuse and that the identification of abuse victims was an essential step in protecting children.<sup>9</sup>

In 1963 California enacted a reporting statute requiring certain professionals and non-professionals to report to a designated authority observations of any minor with physical injuries that appeared intentionally inflicted.<sup>10</sup> Between 1963 and 1980 the statute was amended at regular intervals to require additional persons to report such injuries.<sup>11</sup> In 1981, the original statute was repealed and replaced by new legislation<sup>12</sup> that specifically identified those persons who "shall" and who "may" report child abuse.<sup>13</sup> Individuals required to report include child care custodians, medical practitioners, non-medical practitioners, and employees of a child abuse agency.<sup>14</sup> The statute defines each of these four categories. Psychiatrists and psychologists are included in the definition of "medical practitioner."<sup>15</sup> These two professional groups, psychiatrists and psychologists (herein collectively referred to as "psychotherapists"), provide the focus of this Comment.<sup>16</sup>

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8. Besharov, *supra* note 3, at 159.

9. Note, *Civil Liability for Teachers' Negligent Failure to Report Suspected Child Abuse*, 28 WAYNE L. REV. 183, 184 (1981).

10. CAL. PENAL CODE § 11161.5 (repealed 1980).

11. Amendments: 1965 added dentist, resident, intern or religious practitioners; 1966 added school superintendents and principals; 1968 added registered nurses; 1971 added teachers, licensed day care workers and social workers; 1972 added podiatrists and administrators of public or private summer day camps or child care centers; 1977 added marriage counselors, child counselors, and psychologists. See CAL. PENAL CODE § 11161.5 (repealed 1980).

12. CAL. PENAL CODE §§ 11161.5 (West 1982). Section 5 of Stats. 1980 c. 1071 provided: "In reenacting the child abuse reporting law, it is the intent of the Legislature to clarify the duties and responsibilities of those who are required to report child abuse." Historical notes accompanying CAL. PENAL CODE § 11165 (West 1982).

13. CAL. PENAL CODE §§ 11166a, 11166(b), 11166(c) (West 1982).

14. CAL. PENAL CODE § 11166(a) (West 1982).

15. "Medical practitioner" means a physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, licensed nurse, dental hygienist, or any other person who is currently licensed under Division 2 (commencing with Section 500) of the Bus. & Prof. Code. CAL. PENAL CODE § 11165(i) (West 1982).

16. As used in this Comment, "psychotherapist" means:

(a) A person authorized or reasonably believed by the patient to be authorized, to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his time to the practice of psychiatry; or

(b) a person certified as a psychologist under Chapter 6.6 (commencing with Section 2900) of Division 2 of the Bus. & Prof. Code. (Stats. 1965, c. 299, § 1010).

CAL. EVID. CODE § 1010 (West 1966). "Psychotherapist" and "therapist" will be used

The new California legislation also changed the conditions upon which a report is required. Previously, individuals were required to report the appearance of non-accidental injuries that they directly observed on a minor.<sup>17</sup> Under the current statute, it is no longer necessary that the injuries be actually observed.<sup>18</sup> Psychotherapists must now report child abuse when they have facts that could cause a reasonable person in their position, with their training and experience, to suspect child abuse.<sup>19</sup>

It is clear that the reporting statute requires psychotherapists to report child abuse when a child with whom they have contact shows evidence of abuse. It is less certain that the statute requires psychotherapists to report when they know or reasonably suspect that their clients are abusing children.

#### CONSTITUTIONAL RIGHT TO PRIVACY AND COMPELLING STATE INTEREST

Communications between a psychotherapist and client are protected by both the constitutionally based right to privacy and by the California psychotherapist-client privilege. Arguably, these protections extend to communications about child abuse, thus creating an apparent conflict with the reporting statute.

##### *Right to Privacy*

At least one commentator has argued that requiring psychotherapists to report child abuse discovered during therapy conflicts with the constitutional right to privacy of the patient and perhaps also, the privacy right of the psychotherapist.<sup>20</sup> This right generally limits unwarranted governmental intrusion into fundamentally important

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interchangeably in this Comment.

17. CAL. PENAL CODE § 11161.5(a) (Deering 1980).

18. CAL. PENAL CODE § 11166(a) (West 1982).

19. [A]ny child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of child abuse shall report the known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible by telephone and shall prepare and send a written report thereof within 36 hours of receiving the information concerning the incident.

CAL. PENAL CODE § 11166(a) (West 1982).

20. Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 59 (1980).

aspects of an individual's life.<sup>21</sup> In 1965 the Supreme Court recognized a specific constitutional right to privacy in *Griswold v. Connecticut*.<sup>22</sup> In *Griswold*, the Court struck down a Connecticut statute prohibiting married couples from using contraceptive devices. Although the Court found that privacy is a constitutional right in this context, the Court did not tie this right to a specific constitutional provision. Rather, the Court referred to the penumbras of the Bill of Rights,<sup>23</sup> emphasizing the ninth<sup>24</sup> and the fourteenth amendments.<sup>25</sup> In 1973, however, the Court in *Roe v. Wade*<sup>26</sup> cited the fourteenth amendment's concept of personal liberty and its restriction upon state action as the contextual basis for the right to privacy. The Court arrived at this conclusion after reviewing previous decisions leading to the establishment of this right.<sup>27</sup>

Although the constitutional right to privacy has been recognized, its scope is seriously debated.<sup>28</sup> The Court in both *Griswold* and *Roe* held that the right to be free from governmental interference is limited when a compelling state interest exists.<sup>29</sup> In *Roe* the Court stated that, "Where certain 'fundamental rights' are involved, . . . regulation limiting these rights may be justified only by a 'compelling state interest' and that legislative enactment must be narrowly drawn to express only the legitimate state interest at stake."<sup>30</sup>

### *Compelling State Interest*

Laws against child abuse and neglect reflect a recognition that society has a compelling interest in stopping child abuse. Child abuse can result in death or in long-term disabilities such as mental retardation, loss of hearing or sight, lack of motor control, speech defects, growth failure and autistic behavior.<sup>31</sup> Although child abuse does not always result in death or permanent injury, the emotional effects are longstanding. Aggression, destructiveness, fear, withdrawal, poor social relations,<sup>32</sup> and emotional problems<sup>33</sup> are associated with child

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21. *Id.* at 1.

22. 381 U.S. 479 (1965).

23. *Id.* at 484, 485, 496.

24. *Id.* at 491, 484, 496.

25. *Id.* at 500, 502.

26. 410 U.S. 113 (1973). This decision struck down criminal laws which prohibited abortions except when they were necessary to save the life of the mother and based this decision on the mother's right to privacy. *Id.* at 164.

27. *Id.* at 153.

28. Smith, *supra* note 20, at 19.

29. *Griswold v. Connecticut*, 381 U.S. 479, 495-98 (1965).

30. 410 U.S. 113, 155-56 (1973).

31. M. ESKIN & M. KROVITE, CHILD ABUSE AND NEGLECT 25 (1980).

32. J. CHRISTIANSEN, EDUCATIONAL AND PSYCHOLOGICAL PROBLEMS OF ABUSED CHILDREN 58, 59 (1980).

33. *Id.* at 27. See also C. SMITH, D. BERKMAN, & W. FRASER, A PRELIMINARY NATIONAL ASSESSMENT OF CHILD ABUSE AND NEGLECT AND THE JUVENILE JUSTICE

abuse. Victims of sexual abuse experience guilt, anxiety, low self-esteem, hostile/aggressive<sup>34</sup> and delinquent behavior.<sup>35</sup> Moreover, academic achievement for most sexually or physically abused children is below grade level.<sup>36</sup>

Beyond relieving the injury and pain experienced by the individual child, an even stronger state interest in preventing child abuse lies in the recursive nature of the crime. Today's abused child becomes tomorrow's child abuser. Two researchers, Steele and Pallock,<sup>37</sup> found that all the participants in their study group of abusing parents were rearing their children in the same style in which they themselves were reared.<sup>38</sup> These authors report clinical observations of abusive child-rearing styles extending through three successive generations.<sup>39</sup>

Although a compelling state interest in preventing child abuse is obvious, not all authors agree that this interest is furthered by infringing the patient's right to privacy in psychotherapy. Smith argues that the state's interest in preventing a child abuse is not significantly promoted by laws requiring therapists to report all incidents of child abuse discovered in therapy.<sup>40</sup> He believes such a threat to confidentiality might keep some abusers from seeking therapy or cause them to withhold information about child abuse from their therapist. Smith writes: "By requiring therapists to breach the confidences of patients, the state would be discouraging child abusers from seeking effective psychotherapy to deal with the problems that cause them to abuse their children."<sup>41</sup>

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SYSTEM: THE SHADOWS OF DISTRESS (1980). "[E]vidence points in the direction that there is a significant link between abuse, neglect, and juvenile delinquency." *Id.* at 138. Shelters for runaways report that a high percentage of their clients have been abused or neglected. *Id.* at 35.

34. V. DEFRANCIS, PROTECTING THE CHILD VICTIMS OF SEX CRIMES COMMITTED BY ADULTS, 159-62 (1969).

35. *Id.* at 162. See also NATIONAL CENTER IN CHILD ABUSE AND NEGLECT, CHILD SEXUAL ABUSE: INCEST, ASSAULT, AND SEXUAL EXPLOITATION (1978). Reports suggest that many children and adolescents sexually exploited for prostitution or production of pornographic materials were victims of incest or are runaways trying to escape a sexually exploitative situation at home. *Id.* at 19.

36. J. CHRISTIANSON, *supra* note 32, at 72, 73. See also V. DEFRANCIS *Protecting the Child Victims of Sex Crimes Committed by Adults*. High rates of school absenteeism and school dropout are noted among the sexually abused. *Id.* at 163.

37. Steele & Pallock, *A Psychiatric Study of Parents Who Abuse Infants and Small Children*, in THE BATTERED CHILD (Helfer and Kempe 2d ed. 1972).

38. *Id.* at 97.

39. *Id.* at 98.

40. Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1 (1980).

41. *Id.* at 59.

Other scholars, however, assert that reporting the abuse inflicted by clients can have a beneficial effect on therapy.<sup>42</sup> In addition to helping the client, reporting such abuse ensures that the child will be protected while the abuser is receiving therapy. Although a therapist may assist a client in changing abusive behavior, the therapist can offer no protection for the child in the interim. Reporting the child abuse immediately furthers the state interest in protecting the child. This state interest is sufficiently compelling to justify a statute requiring psychotherapists to report child abuse even when they learn of the abuse through confidential communications in therapy.

#### THE PSYCHOTHERAPIST-CLIENT PRIVILEGE AND THE DANGEROUS PATIENT EXCEPTION

Even though a compelling state interest may justify requiring psychotherapists to report when clients are abusing children, the reporting statute may conflict with the psychotherapist-client privilege.<sup>43</sup>

#### *Psychotherapist-Client Privilege in California*

In 1965 the California legislature enacted the psychotherapist-client privilege after carefully weighing several factors involved in protecting such a relationship. The Senate Committee on the Judiciary noted that successful psychoanalysis and psychotherapy depend upon the fullest revelation of the most intimate and embarrassing details of the patient's life, and that the interest of society are served in assuring patients that their confidences are protected.<sup>44</sup>

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42. Summit, *Sexual Child Abuse, the Psychotherapist and the Team Concept*, in *DEALING WITH SEXUAL CHILD ABUSE* 22 (1982).

43. Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist if the privilege is claimed by:

(a) the holder of the privilege;

(b) a person who is authorized to claim the privilege by the holder of the privilege; or

(c) the person who was the psychotherapist at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure. CAL. EVID. CODE § 1014 (West 1966).

44. The legislative intent was further clarified in a later portion of the comment: The law revision commission has received several reliable reports that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community. Accordingly, this article established a new privilege that grants to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society are better served if psychiatrists are able to assure patients that their confidences will be protected.

The California judiciary approved of the psychotherapist-client privilege and recognized its constitutional basis in the case of *In Re Lifschutz*.<sup>45</sup> *Lifschutz* involved a psychiatrist's petition for a writ of habeas corpus. He had been imprisoned on grounds of contempt for refusing to obey a trial court order that he answer deposition questions and produce records involving communications with a former client.<sup>46</sup> In addressing the issue of confidentiality in psychotherapy, the supreme court stated, "We believe that a patient's interest in keeping such confidential revelations from a public purview, in retaining this substantial privacy, has deeper roots than the California statute and draws sustenance from our constitutional heritage."<sup>47</sup>

The supreme court, however, affirmed the trial court's ruling that the psychotherapist-client privilege was not applicable in the *Lifschutz* case because the former patient had made his mental and emotional stress an issue in his legal action against an alleged assailant.<sup>48</sup> According to the trial court, this activated the patient-litigant exception<sup>49</sup> to the psychotherapist-client privilege.<sup>50</sup> The supreme court noted that the psychotherapist-client privilege was not absolute,<sup>51</sup> even though it rested on constitutional underpinnings. Hence, state interference with such a confidentiality is sometimes permitted.<sup>52</sup> The enumerated exceptions to the psychotherapist-client privilege reflect the intent of the legislature to limit this privilege in certain situations.

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CAL. PENAL CODE § 1014 (Senate Committee Comment) (West 1966).

45. 2 Cal. 3d 415, 85 Cal. Rptr. 829 (1970).

46. *Id.* at 415, 85 Cal. Rptr. at 829.

47. *Id.* at 431, 85 Cal. Rptr. at 839.

48. *Id.* at 436, 85 Cal. Rptr. at 843.

49. There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by:

(a) the patient;

(b) any party claiming through or under the patient;

(c) any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or

(d) the plaintiff in an action brought under Section 376 or 377 of the Code of Civil Procedure for damages for the injury or death of the patient.

CAL. EVID. CODE § 1016 (West 1966).

50. 2 Cal. 3d at 421, 85 Cal. Rptr. at 831.

51. "We do not believe the patient-psychotherapist privilege should be frozen into the rigidity of absolutism." *Id.* at 438.

52. *Id.* at 432, 85 Cal. Rptr. at 840.

## *Dangerous Patient Exception to the Psychotherapist-Client Privilege*

In *Lifschutz*, the supreme court recognized that a statutory exception to the psychotherapist-client privilege can render the privilege inapplicable. Just as the patient-litigant exception was held to apply in *Lifschutz*, the dangerous patient exception<sup>53</sup> may apply when a client confides to his or her therapist that he or she is currently abusing a child. No privilege exists when a psychotherapist has reasonable cause to believe that his or her patient is "dangerous"<sup>54</sup> to himself or to the person or property of another and when the disclosure of the communication is necessary to prevent the threatened danger.<sup>55</sup> Arguably, a client who is abusing children is "dangerous to others," and the therapist may therefore be required to disclose the pertinent therapy communications to the authorities. Circumstances such as these may activate the dangerous-patient exception and nullify the psychotherapist-client privilege.

Applying the dangerous patient exception when a client admits having abused children in the past is more complicated. In some situations, for example, the client may no longer be dangerous, rendering the exception inapplicable. However, research indicates that child abuse is frequently linked to a certain style of child rearing and is generally repetitive in nature.<sup>56</sup> In some cases, therefore, it may be reasonable for the therapist to conclude that the child abuse is ongoing even though the client speaks of it as a past occurrence. The dangerous-patient exception might therefore apply when a client communicates only that he or she has previously abused children.

## *The Psychotherapist-Client Privilege in Criminal Proceedings*

As noted above, the psychotherapist-client privilege does not apply when the client is dangerous, or when the state has a compelling interest in obtaining the confidential information revealed by the client. The privilege does apply, however, in criminal proceedings

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53. There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such a mental or emotional condition as to be dangerous to himself or to persons or property of another, and that disclosure of the communication is necessary to prevent the threatened danger. CAL. EVID. CODE § 1024 (West 1966).

54. See generally Note, *The Scope of a Psychiatrist's Duty to Third Persons: The Protective Privilege Ends Where the Public Peril Begins*, 59 NOTE DAME L. R. 770-78 (1984) (analysis of the difficulty in determining "dangerousness" of a patient). See also *Tarasoff v. Regents of University of California* 17 Cal. 3d 425, 437-38, 451-52; 131 Cal. Rptr. 14, 24-25, 33-34 (1976) (regarding predictability of "dangerousness").

55. CAL. EVID. CODE § 1024 (West 1966).

56. McCord, *The Battered Child and Other Assaults Upon the Family*, 50 MINN. L. REV. 1, 8, 18 (1965).



against the client<sup>57</sup> unless the client makes his or her mental or emotional condition an issue in the proceeding.<sup>58</sup> The comment of the Senate Committee on the Judiciary indicates that the legislature intended that the privilege apply in criminal proceedings so that a patient may talk freely to a psychotherapist without fear that the latter will be compelled in such a proceeding to reveal what he or she has been told.<sup>59</sup> If a psychotherapist reports child abuse to the authorities and the abuse is of such a nature as to lead to the prosecution of the abuser, the psychotherapist-client privilege would appear to protect communications between the therapist and the client from being divulged in a criminal proceeding.<sup>60</sup>

Additionally, the privilege may even protect the identity of the abuser. The child abuse reporting statute requires the psychotherapist to give the name of the child to the authorities, but not the name of the abuser.<sup>61</sup> Consequently, the psychotherapist-client privilege and the reporting statute might interact negatively in certain situations. For example, a patient might confide that he or she is currently abusing neighborhood children. If the therapist reports as mandated, the patient may stop therapy, perceiving a violation of trust, and continue to abuse children. The privilege would prevent the therapist from assisting the police in the ensuing criminal investigation.

Similar dilemmas have recently plagued the clergy. In September,

57. CAL. EVID. CODE § 1014 (West 1965).

58. See *supra* note 49 and accompanying text.

59. The psychotherapist-patient privilege applies in all proceedings. The physician-patient privilege does not apply in criminal proceedings. This difference in the scope of the two privileges is based on the fact that the Law Revision Commission has been advised that proper psychotherapy often is denied a patient solely because he will not talk freely to a psychotherapist for fear that the latter may be compelled in a criminal proceeding to reveal what he has been told. The commission has also been advised that research in this field will be unduly hampered unless the privilege is available in criminal proceedings.

Senate Committee on Judiciary Comment CAL. EVID. CODE § 1014 (West 1980).

60. CAL. EVID. CODE § 1014 (West 1965).

61. (a) A telephone report of a known or suspected instance of child abuse shall include the name of the person making the report, the name of the child, the present location of the child, the nature and extent of the injury, and any other information, including information that led such person to suspect child abuse, requested by the child protective agency. CAL. PENAL CODE § 11167 (West 1982).

[T]he therapist's obligation to his patient requires that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would presume the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger. *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 441, 131 Cal. Rptr. 14, 27 (1976).

1984, Earl Sands, a Florida man accused of sexually abusing a six-year old girl, surrendered to his pastor, John Mellish. Mellish accompanied Sands to the police station but refused to reveal what Sands had told him. Although such claims of confidentiality are normally honored by judges, Mellish was sentenced to sixty days of confinement for contempt of court.<sup>62</sup> The Florida trial court was willing to ignore a long-standing clergy-penitent privilege in this criminal proceeding involving child abuse.<sup>63</sup>

In California, the psychotherapist-client privilege may protect a psychotherapist in a situation similar to Mellish's from having to divulge client confidences in a criminal proceeding. Even though the privilege will shield a therapist from the duty to *testify* regarding child abuse revealed in therapy, it is unlikely that the privilege will free a therapist from the obligation to *report* such child abuse disclosed in therapy. The reporting statute specifies that psychotherapists must report when they know of or suspect abuse.<sup>64</sup> In addition to this mandate, the existence of the dangerous patient exception<sup>65</sup> to the psychotherapist-client privilege offers strong evidence that the legislature did not intend to protect communication between therapist and client if divulging the communication was necessary to prevent harm to another, in this case, to a child.

#### LIABILITY FOR NOT REPORTING CHILD ABUSE

The California child abuse reporting statute requires psychotherapists to report when they know of or reasonably suspect child abuse.<sup>66</sup> As discussed earlier, it is unlikely that a therapist could successfully challenge this mandate on constitutional grounds or by claiming the psychotherapist-client privilege. California has granted, by statute, immunity from civil and criminal action that might be taken against a psychotherapist who reports in conformity with the law.<sup>67</sup> This immunity relieves a psychotherapist from the risk of civil or criminal responsibility for defamation, invasion of privacy, or

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62. An appellate review of the case is pending. *TIME* Oct. 1, 1984, at 66. In at least 20 states, toughened child abuse laws have eliminated the clergy-penitent privilege in this context. *Id.*

63. *Id.*

64. CAL. PENAL CODE § 11166 (West 1982).

65. CAL. PENAL CODE § 1024 (West 1966).

66. CAL. PENAL CODE § 11166 (West 1982).

67. No child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this article. Any other person reporting a known or suspected instance of child abuse shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew the report was false.

CAL. PENAL CODE § 11172 (West 1982).

breach of confidence.<sup>68</sup> Although a therapist is released from liability for reporting child abuse, he or she risk both criminal and civil liability for not reporting child abuse as mandated.

### *Criminal Liability*

In California, persons violating the reporting statute are guilty of a misdemeanor<sup>69</sup> punishable by imprisonment in the county jail for a period not to exceed six months, or by imposition of a fine not to exceed one thousand dollars, or both.<sup>70</sup> Most authors believe that statutory reporting requirements have little value unless the law provides a means of enforcement.<sup>71</sup> Although criminal prosecution for failing to report child abuse is rare,<sup>72</sup> these sanctions may still promote reporting by serving as a prod to the professional who has scruples about acting as an "informer."<sup>73</sup>

### *Civil Liability*

Psychotherapists may be more vulnerable to civil suits than to criminal prosecution,<sup>74</sup> especially if the abuse continues after the psychotherapist knows or suspects it and fails to report. Non-reporting physicians have been subject to civil suits in at least two instances. In 1970, in a case which eventually settled, five-month old Thomas Robison was admitted to Sierra Vista Hospital in San Luis Obispo where X-rays showed a skull fracture. The child was returned to his seventeen-year old mother three days later. Twice within the next month he required further hospital treatment for whip welts, puncture wounds and burned fingertips. The last time the child was admitted he had strangulation marks and had stopped breathing. Permanent injury resulted. The mother's boyfriend was convicted of child beating and was imprisoned. The child's natural

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68. McCord, *supra* note 56, at 37-38.

69. CAL. PENAL CODE § 11162 (West 1982).

70. CAL. PENAL CODE § 19 (West 1984).

71. Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 FAM. L.Q. 245, 295-96 (1974) McCord, *supra* note 56, at 43.

72. Kohlman, *Malpractice liability for failing to report child abuse*, 49 CAL. ST. B.J. 118, 121.

73. "There is indeed, little reason for placing a criminal punishment in the law except that its presence may strengthen the point that parents will find a physician's actions in reporting more palatable if it is required by law." Paulson, *The Law and the Abused Child*, in *THE BATTERED CHILD* 163 (Helfer and Kempe, 2d ed. 1972). See also McCord, *supra* note 56, at 41-43.

74. Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 FAM. L.Q. 245, 297 (1974).

father brought a \$5,000,000 civil suit against four doctors at the hospital for failing to report the attacks and against the police chief for not investigating properly when another doctor did report the abuse. The case was settled for \$600,000 and a trust account for the child was established.<sup>75</sup>

Subsequently, the California Supreme Court in 1976 recognized a cause of action for failure to report child abuse in *Landeros v. Flood*.<sup>76</sup> In that case, the eleven-month old plaintiff was brought to San Jose Hospital by her mother. The attending physician, defendant Flood, released the child after treating several injuries which, according to the allegation of the plaintiff, appeared to be intentionally inflicted. The child suffered permanent injury from beatings inflicted after her release. The plaintiff's guardian ad litem brought the civil suit against Flood and the hospital.<sup>77</sup> The court held that the "battered child syndrome" was an accepted medical diagnosis,<sup>78</sup> and that the plaintiff was entitled to prove that a reasonable and prudent physician would have followed the appropriate treatment procedures, which included reporting to the authorities.<sup>79</sup> The court also held that the plaintiff was entitled to prove that the physician's negligence was the proximate cause of the injury suffered on the theory that the defendants should reasonably have foreseen that the plaintiff's caretakers were likely to resume their physical abuse.<sup>80</sup>

The *Landeros* court also considered the plaintiff's allegations that the defendants violated the child abuse reporting statute thereby raising a presumption that the defendants failed to exercise due care.<sup>81</sup> The court ruled that if the plaintiff wished to invoke this presumption predicated on the fact that the defendant violated a statute, it would be necessary for her to persuade the trier of fact that defendant Flood actually observed her injuries and formed the opinion that they were intentionally inflicted on her.<sup>82</sup> It was also held that this burden could be met through the introduction of circumstantial evidence and did not necessitate the acquisition of damaging admissions from defendant Flood.<sup>83</sup>

*Landeros* establishes that professionals who fail to report child abuse may be vulnerable to civil action. The likelihood of such a civil action is increased by the fact that a child, under California law, is

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75. TIME Nov. 20, 1972, at 74.

76. 17 Cal. 3d 399, 131 Cal. Rptr. 69 (1976).

77. *Id.* at 405, 131 Cal. Rptr. at 70.

78. *Id.* at 409, 131 Cal. Rptr. at 73 (quoting *People v. Jackson*, 18 Cal. App 3d. 504, 516, 95 Cal. Rptr. 919 (1971)).

79. *Id.* at 410, 131 Cal. Rptr. at 74.

80. *Id.* at 412, 131 Cal. Rptr. at 76.

81. *Id.* at 413, 131 Cal. Rptr. at 76.

82. *Id.* at 415, 131 Cal. Rptr. at 77.

83. *Id.* at 415 n.13, 131 Cal. Rptr. at 78.

provided with separate counsel in proceedings to terminate parental custody because of abuse.<sup>84</sup> One of the explicitly enumerated duties of such counsel is to investigate the possibility of bringing a civil action on behalf of the child against persons who violated the child abuse reporting statute.<sup>85</sup>

### *Elements for a Negligence Cause of Action in Civil Courts*

A child plaintiff wishing to bring a civil action for negligence against a non-reporting psychotherapist must prove the usual four elements of a negligence cause of action: a duty recognized by law; breach of the duty; a reasonably close causal connection between the breaching conduct and the resulting injury; and actual loss or damage.<sup>86</sup> A plaintiff in such a case will have the greatest difficulty proving the first element of negligence, a duty owed by the defendant to the plaintiff.

In *Landeros*, proving that the defendant physician owed a duty to the child plaintiff was relatively easy because the child was the physician's patient.<sup>87</sup> On the other hand, attempting to prove that a psychotherapist owes a duty to a child whom he or she is not treating and perhaps does not even know, is considerably more challenging. Historically, there is no legal duty to come to the aid of another human being in danger.<sup>88</sup> In cases where a special relationship exists between the parties, however, courts tend to depart from this historical stance.<sup>89</sup> For example, duty has been found between employer-employee, shopkeeper-visitor, host-guest, and in numerous other relationships.<sup>90</sup>

84. CAL. WELF. & INST. CODE § 318 (West 1984).

85. [C]ounsel shall investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child that may be protected by other administrative or judicial proceedings, including but not limited to a civil action pursuant to subdivision (6) of Section 11172 of the Penal Code.

CAL. WELF. & INST. CODE § 318 (West 1984).

Any person who fails to report an instance of child abuse which he or she knows to exist or reasonably should know to exist, as required by this article, is guilty of a misdemeanor and is punishable by confinement in the county jail for a term not to exceed six months or by a fine. . . .

CAL. PENAL CODE § 11172(b) (West 1982).

86. W. PROSSER, LAW OF TORTS 143 (4th ed. 1971).

87. 17 Cal. 3d at 408-10, 131 Cal. Rptr. at 72-74.

88. W. PROSSER, *supra* note 86, at 240.

89. *Id.* at 341-42.

90. *Id.* at 342. See *Anderson v. Atchison, T & SFR Co.*, 333 U.S. 821 (1948); *Connelly v. Kautman & Bact. Co.* 349 Pa. 261 (1949); *Hutchinson v. Nickie*, 162 F.2d 103 (1947).

The duty arising from a special relationship is recognized in the Restatement of Torts,<sup>91</sup> and was applied by the California Supreme Court in *Tarasoff v. Regents of the University of California*,<sup>92</sup> a case involving a psychiatrist. In *Tarasoff*, a psychiatrist was held liable to the parents of a woman murdered by his patient.<sup>93</sup> The patient, Prosenji Poddar, confided his intentions to kill the woman to his psychiatrist, Dr. Moore.<sup>94</sup> At Dr. Moore's request, the campus police detained Poddar, but then released him. After his release, Poddar killed Tatiana Tarasoff.<sup>95</sup> Her parents brought a wrongful death action against the Regents of the University of California, the psychotherapist, and the campus police.<sup>96</sup>

The *Tarasoff* court applied an exception to the no-duty rule in holding that the relationship between the defendant therapist and either the victim or the assailant/client would suffice to support the imposition of a duty,<sup>97</sup> and that such a relationship may also support a duty for the benefit of third parties.<sup>98</sup> The court explained that in previous decisions, a duty was recognized when the defendant stood in a special relationship to both the victim and the person whose conduct created the danger.<sup>99</sup> The *Tarasoff* court, however, was willing to impose a duty when only a single relationship existed between the therapist and the client and there was no special relationship between the therapist and the victim.<sup>100</sup> The court held, "[O]nce a therapist does in fact determine, or under applicable professional standards, reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger."<sup>101</sup> The court also noted that, when the identity of the victim is unknown but might be revealed by a "moment's reflection," there may be a duty to warn the foreseeable victim.<sup>102</sup>

The *Tarasoff* holding is applicable to a child plaintiff attempting to establish duty in a legal action against a psychotherapist for not reporting ongoing abuse. The California Supreme Court, in *Tarasoff*, was willing to extend the duty a therapist owes to a client to persons the client *may* injure.<sup>103</sup> Foreseeability was cited by the

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91. RESTATEMENT (SECOND) OF TORTS § 315 (1965).

92. 17 Cal. 3d 425, 131 Cal. Rptr. 14 (1976).

93. *Id.* at 450, 131 Cal. Rptr. at 33.

94. *Id.* at 430, 131 Cal. Rptr. at 19.

95. *Id.* at 429, 131 Cal. Rptr. at 19-20.

96. *Id.*, 131 Cal. Rptr. at 20.

97. *Id.* at 435, 131 Cal. Rptr. at 23.

98. *Id.* at 436, 131 Cal. Rptr. at 23.

99. *Id.*, 131 Cal. Rptr. at 24.

100. *Id.*

101. *Id.* at 439, 131 Cal. Rptr. at 25.

102. *Id.* n.11.

103. *Id.* at 439, 131 Cal. Rptr. at 25-26.

court as the most important consideration in establishing duty.<sup>104</sup> If a client confides to his or her therapist that he or she is abusing a child, this child is a foreseeable victim under *Tarasoff* analysis. This foreseeability may be augmented if the child lives with the client or has an ongoing relationship with the client. Neither of these factors was present in the *Tarasoff* case, yet the violence to the victim was still considered to be foreseeable. The *Tarasoff* court's determination that the therapist owes a duty to foreseeable victims is not an isolated holding. This duty has been restated in the 1980 case of *Mavroudis v. Superior Court*.<sup>105</sup>

The defendants in *Tarasoff* argued that violence is difficult to predict.<sup>106</sup> This contention was well supported in the amicus brief submitted by the American Psychiatric Association and other professional societies.<sup>107</sup> The court concluded, however, that the difficulty encountered by the professional in accurately predicting violence cannot negate that professional's duty to protect the threatened victim.<sup>108</sup> Arguably, the violence involved in child abuse is more predictable than certain other types of violence because of the repetitive nature of the crime.<sup>109</sup>

In addition to foreseeability, the *Tarasoff* court held that considerations of public policy enter into a decision regarding whether a particular plaintiff is entitled to protection.<sup>110</sup> There are strong policy reasons for extending the duty a therapist owes to his or her client to the children whom the client admits abusing. Children are often physically, emotionally, and financially dependent on their abuser and find it impossible to leave an abusive situation. Additionally, children are usually physically weaker than their abuser and are un-

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104. *Id.* at 434, 131 Cal. Rptr. at 22. See also *Weirum v. R.K.O.*, 15 Cal. 3d 40 (1975) which establishes that while duty is a question of law, foreseeability is a question of fact for the jury.

105. 102 Cal. App. 3d 594, 162 Cal. Rptr. 724 (1980). Therein plaintiff parent sued a therapist and hospital after being attacked with a hammer by their son. Allegedly, the son's therapist knew or should have known of the danger and warned the parents. The court held that the defendants did not know of the danger, but had they known, a cause of action would have existed. *Id.* at 594. The court re-stated the therapist's duty to protect third parties. *Id.* at 601.

106. 17 Cal. 3d at 437, 131 Cal. Rptr. at 24.

107. *Id.* at 437, 131 Cal. Rptr. at 24.

108. *Id.* at 439, 131 Cal. Rptr. at 26.

109. McCord, *supra* note 56, at 18.

110. 17 Cal. 3d at 434, 131 Cal. Rptr. at 22. "[D]uty is not sacrosanct in itself, but only a sum total of those considerations of policy which led the law to say that a particular plaintiff is entitled to protection." (quoting W. PROSSER, LAW OF TORTS 332-33 (3d ed. 1964)).

able to defend themselves. Moreover, children frequently have been taught both to respect and obey the person who is abusing them, and sometimes do not question or even reveal the abuse. In some cases, the therapist may be the only person other than the abuser, who knows what is happening to the child.<sup>111</sup>

Once a child plaintiff proves this first element in an action for negligence, the remaining three elements are somewhat easier to prove. The second element is shown if the plaintiff proves that the defendant breached the duty owed. If a psychotherapist *knew* the plaintiff was being abused and did not report it, the duty has been breached. It is somewhat more complex to prove that a therapist *reasonably suspected*, or should have reasonably suspected, abuse and failed to report it. Here the plaintiff must prove that a reasonable psychotherapist in similar circumstances, with similar training and information, would have suspected and reported abuse.<sup>112</sup>

To prove the third element, the plaintiff must show a reasonably close connection between the breach of duty and the injury suffered. In California, a simple phone call to a child protective agency activates an entire system mandated by statute.<sup>113</sup> The main purpose of this system is to protect the reported child from injury. Proving that a psychotherapist failed to use this well-established procedure to protect a foreseeable victim of abuse would most likely meet the requirement for a causal connection between the breach of duty to report and the subsequent injury to the child. The fourth element, injury to the victim, can usually be established without difficulty.<sup>114</sup>

### *Violation of a Statute and Presumption of Negligence*

Without separately proving all four elements of negligence, it may still be possible to impose liability on a non-reporting psychotherapist by proving he or she has violated a statute. When a statute is enacted by the legislature, the law can be interpreted as fixing a standard of care from which it is considered negligent *per se* to deviate.<sup>115</sup> A psychotherapist who knows or reasonably suspects child abuse and does not report the abuse violates California Penal Code § 11166.<sup>116</sup> Under specified conditions, failure to exercise due care is presumed when a statute is violated, although the presumption may

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111. See Note, *Reporting Child Abuse: When Moral Obligations Fail*, 15 PAC. L.J. 189, 196-200 (1983).

112. CAL. PENAL CODE § 11166a (West 1982). Reasonable suspicion in the 1981 statute is an objective standard. *Id.*

113. CAL. PENAL CODE § 11166 (West 1982).

114. See Timnick & Rae-Dupree, *New Scope Helps Confirm Sexual Abuse* L.A. Times, Jan. 17, 1985, at 3. See also NEWSWEEK Aug. 20, 1984, at 44.

115. W. PROSSER, *supra* note 86, at 190.

116. CAL. PENAL CODE § 11166 (West 1982).



be rebutted.<sup>117</sup>

The presumption of negligence was applied to the battered child question in *Landeros v. Flood*.<sup>118</sup> Although the *Landeros* court found a cause of action under common law negligence theory, it also held that the plaintiff could rely on the reporting statute and was entitled an opportunity to prove both the violation of the statute and the existence of the statutory conditions for invoking the presumption of lack of due care.<sup>119</sup> Under *Landeros*, the plaintiff must prove that he or she is a member of the class of persons whom the statute is intended to protect, and that the harm suffered is of a type that the statute was designed to prevent.<sup>120</sup> Additionally, the plaintiff must prove that the defendant's violation of the statute proximately caused the injury to the plaintiff.<sup>121</sup>

The existence of a child abuse reporting statute increases the likelihood that civil liability will be imposed for not reporting abuse as mandated. In a legal action against a non-reporting therapist, the statute gives the child plaintiff the option of proving the presumption of negligence as an alternative to proving all four common law elements of negligence. Court-appointed counsel for an abused child, as provided for in California Welfare and Institutions Code Section

117. Failure to exercise due care:

(a) the failure of a person to exercise due care is presumed if:

- (1) he violated a statute, ordinance, or regulation of a public entity;
- (2) the violation proximately caused death or injury to person or property;
- (3) the death or injury resulted from an occurrence of the nature which the statute, ordinance or regulation was designed to prevent; and
- (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

(b) This presumption may be rebutted by proof that:

- (1) the person violating the statute, ordinance or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances who desired to comply with the law; or
- (2) the person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualification.

CAL EVID. CODE § 669 (West Supp. 1985).

118. 17 Cal. 3d 399, 414, 131 Cal. Rptr. 69, 77 (1976).

119. *Id.* See also Note, *supra* note 111, at 211-12.

120. 17 Cal. 3d at 413 n.11, 131 Cal. Rptr. 76 n.11.

121. *Id.* See CAL. EVID. CODE § 669 (West 1966). See also Note, *supra* note 9, at 211-12.

318, may act on behalf of the child in bringing this type of action, as was the case in *Landeros*.<sup>122</sup>

## REASONS FOR NOT REPORTING CHILD ABUSE

### *Possible Effects on the Therapeutic Process*

Faced with possible civil liability for not reporting, and the potential benefits to a child when reports are made, why would a therapist choose not to report known or suspected abuse?<sup>123</sup> A primary reason a psychotherapist might not report is his or her concern that reporting would have a detrimental effect on the therapeutic process. The importance of confidentiality in therapy has been noted by several experts.<sup>124</sup> Without the assurance of confidentiality some persons needing help may not enter into therapy.<sup>125</sup> Others may be less open in therapy, giving the therapist minimal information with which to assist the patient.<sup>126</sup> In addition to restricting the degree of openness, the absence of assured confidentiality may reduce the trust between the patient and the therapist that is essential to successful treatment.<sup>127</sup>

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122. See *supra* note 85.

123. Cf. Brown & Truitt, *Civil Liability in Child Abuse Cases*, 54 CHI-KENT L. REV. 753, 761 (1978). The survey therein indicated that only 1.6% of the child abuse reports filed in the U.S. came from private physicians. The authors give some reasons why physicians are reluctant to report child abuse:

1. Misconstruction of doctor and patient relationship, not understanding whether his responsibility is to child or his/her parent;
2. Fear of civil actions (e.g. libel, slander, breach of confidential relationship);
3. Desire to avoid involvement in criminal or civil prosecution of the parent (testifying at trial, etc.);
4. Refusal to believe or recognize a case involves child abuse, therefore, failure to diagnose battered child syndrome;
5. Feeling threatened by the requirement that they report suspected abuse or neglect, particularly if their livelihood depends upon a positive image in their community and referrals from other neighboring health professionals; and
6. Fear of testifying in court, part of which is justified because of their lack of training to assume this role.

*Id.* at 761. (quoting Helfer, *Why Most Physicians Don't Get Involved in Child Abuse Cases and What to Do About It*, 4 CHILDREN TODAY 30 (1975)). See also McCord, *supra* note 56, at 36-43.

124. See Smith, *supra* note 20, at 24-47. See also Merton, *Confidentiality and the "Dangerous" Patient: Implications of Tarasoff For Psychiatrists and Lawyers*, 31 EMORY L.J. 263, 306-8 (1982); Note, *Where the Peril Begins: A Survey of Psychotherapists to determine the effects of Tarasoff*, 31 STAN. L. REV., 165, 168, 184 (1978).

125. Cf. *People v. Bullard*, 75 Cal. App. 3d 764, 142 Cal. Rptr. 473 (1977). (parent did not seek medical attention for battered child for fear of prosecution).

126. Smith, *supra* note 20, at 24-25.

127. Smith, *supra* note 20, at 26.

[E]ven if the patient fully discloses his thoughts, assurances that the confidential relationship will not be breached is necessary to maintain his trust in his psychiatrist — the very means by which treatment is affected. [T]he essence of much psychotherapy is the contribution of trust in the internal world and ultimately in

These views regarding the importance of confidentiality were reiterated by Justice Clark, dissenting in *Tarasoff*: "Many people, potentially violent — yet susceptible to treatment — will be deterred from seeking it; those needing it, will be inhibited from making revelations necessary to effective treatment; and, forcing the psychiatrist to violate the patient's trust will destroy the interpersonal relationship by which treatment is affected."<sup>128</sup> This belief lies behind the enactment of the psychotherapist-client privilege in California.<sup>129</sup>

There is some empirical evidence that supports the importance of confidentiality in therapy. A Stanford study<sup>130</sup> conducted to determine the effects of *Tarasoff* found that one-fourth of the responding therapists observed that their patients were reluctant to discuss violent tendencies when the patient learned that the therapist might, in some circumstances, breach confidentiality.<sup>131</sup> Sherman and Weiner,<sup>132</sup> in a study of the effect of the psychotherapist-client privilege, asked a group of lay persons not in therapy what they would disclose to a therapist without a privilege in force. The study showed that those interviewed would most likely withhold information that had legal consequences — physical violence, speeding violations, income tax evasion, and theft.<sup>133</sup>

However, Sherman and Weiner also interviewed individuals who were in therapy. They found that the most prominent reason for a patient's withholding information in therapy was the fear of the therapist's personal judgments about their thoughts and behavior, rather than a concern that their actions were legally punishable if the therapist breached their confidence.<sup>134</sup> Forty percent of the interviewees receiving psychotherapy admitted withholding information from the therapists.<sup>135</sup> Seventy percent of this information had to do with sexual acts and thoughts, nine percent of the withheld informa-

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the self, modeled upon the trusting relationship established during therapy.

17 Cal. 3d at 459-60 (Clark J. dissenting) (quoting Davidoff, *The Malpractice of Psychiatrists*, DUKE L.J. 696, 704 (1966)).

128. 17 Cal. 3d at 460, 131 Cal. Rptr. at 40. (Clark, J. dissenting).

129. CAL. EVID. CODE § 1014 (West 1966) Senate Committee on Judiciary Comment.

130. Note, *supra* note 124. This study involved 179 Psychologists and 1,093 psychiatrists who responded to a mail questionnaire.

131. *Id.* at 177, 183.

132. Sherman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist — Patient Privilege*, 60 N.C.L. REV. 893 (1982).

133. *Id.* at 920. Ninety-three percent of this group indicated that they would seek help from a psychiatrist or a psychologist for a serious emotional problem. *Id.*

134. *Id.* at 920, 926.

135. *Id.* at 925.

tion concerned thoughts of violence, and an additional nine percent concerned financial issues.<sup>136</sup> This study suggests that confidentiality is not the most significant factor considered by a client before revealing sensitive information.<sup>137</sup>

The foregoing inquiry into the importance of confidentiality prompts the question whether therapists discuss, or should discuss, limits of confidentiality with their clients. Of the psychotherapists in the Stanford study, eleven percent indicated that they always discussed confidentiality; the majority stated that they did so "sometimes."<sup>138</sup> Sherman and Weiner report that fourteen percent of the therapists surveyed routinely raised the question of confidentiality with their patients.<sup>139</sup> Some authors have proposed that therapists, at the commencement of therapy, couple the assurance of confidentiality with a "quasi-Miranda"<sup>140</sup> warning as to the limits of confidentiality.<sup>141</sup>

Although confidentiality may be important, it is not the only factor affecting openness and progress in therapy. When a client is abusing children, it may be more advantageous to the therapeutic process to set aside confidentiality and report the abuse to the authorities. Some experts in the field of abuse believe that a single therapist cannot handle the complexities and multiple needs of an abusive family and that it is to the advantage of both the client and the therapist to seek the participation of protective agencies.<sup>142</sup> Proponents of a team approach argue that each family member needs evaluation and counseling while the child needs protection. When a therapist operates alone and solely upon information received from the abusing client, it is difficult to measure accurately the extent of the problem and the progress made in therapy. Investigators have found that several professionals working together, sharing a common interest in the family, are less likely to be misled into a superficial resolution than is a single therapist working alone.<sup>143</sup> Also, professionals working together draw guidance and support from one

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136. *Id.* at 926.

137. *Id.*

138. Note, *supra* note 130, at 176.

139. Sherman & Weiner, *supra* note 132, at 921. This information is based on 84 therapists responding to a questionnaire. When asked by patients if communications were held in strict confidence, forty-seven percent of the therapists in the Sherman and Weiner study told their clients that confidentiality would be maintained unless the patient was dangerous to himself. Twenty-two percent said that confidentiality would be maintained unless a court ordered disclosure, and twelve percent said that confidentiality was absolute. *Id.*

140. Merton, *supra* note 124, at 306.

141. A discussion of the responsibility a therapist has to his or her client to explain confidentiality and its limits is beyond the scope of this Comment.

142. Summit, *supra* note 42.

143. *Id.*

another and assist in building interagency bridges.<sup>144</sup> The client, too, receives support from the involvement of additional professionals and from the opportunity to interact with parent groups.<sup>145</sup>

### *Legal Action Against the Client*

A second reason a therapist may hesitate to report child abuse is the possibility of negative repercussions on the client. Although the California reporting statute does not require the reporter to give the identity of the abuser, the enacting legislature intended that a thorough assessment be made of each incident of abuse reports, including a "determination of the person or persons apparently responsible for the abuse."<sup>146</sup> The therapist may wonder whether his or her client will be prosecuted or lose custody of the child.

Nationally, reports indicate that only five percent of the substantiated cases of child abuse result in criminal prosecution of the abuser, and less than twenty percent of substantiated cases result in the child being removed from the home.<sup>147</sup> Sexual abuse is more frequently the subject of criminal prosecution than any other type of child abuse or neglect.<sup>148</sup> In California, the child protective agency forwards a preliminary written report of disclosed abuse<sup>149</sup> to the Justice Department.<sup>150</sup> This information is, in turn, made available to the district attorney.<sup>151</sup> The filing of a dependency petition<sup>152</sup> on behalf of abused children is left to the discretion of the Juvenile Probation Department. The filing of criminal complaints, most likely to occur against molesters, is entirely within the discretion of the district attorney.<sup>153</sup>

144. *Id.*

145. *Id.* at 26.

146. CAL. PENAL CODE § 11165 (West 1982) (Historical Notes),

147. Besharov, *supra* note 3, at 159-60.

148. Bulkley, *The Law and Child Abuse*, in DEALING WITH SEXUAL CHILD ABUSE 3 (1982).

149. CAL. PENAL CODE, § 11169 (West 1982). All cases except "general neglect" are forwarded to the Justice Department. "General neglect" means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, or supervision where no physical injury to the child has occurred." CAL. PENAL CODE § 11165 (West 1982).

150. CAL. PENAL CODE § 11169 (West 1982).

151. CAL. PENAL CODE § 11170 (West 1982).

152. A minor can be adjudged a dependent of the court and taken from the physical custody of his parents or guardians if, upon a hearing, the juvenile court finds clear and convincing evidence that the child's physical or emotional health is in danger. CAL. WELF. & INST. CODE § 361 (West 1984).

153. National Legal Resource Center of Child Advocacy and Protection INNOVATIONS IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES 26 (November 1982) [here-

Realizing that a client may be prosecuted for sexual assault,<sup>154</sup> some therapists undoubtedly feel they are acting as "informers"<sup>155</sup> if they report, and are legitimately concerned that in response to the report, their client will be treated as the "sludge of the earth"<sup>156</sup> by the justice system and by the community. At one time the prevailing course of action regarding intrafamily child sexual abuse was to remove the child from the home, incarcerate the offender and consider the problem "solved."<sup>157</sup> Fortunately, this is no longer the trend in California. In 1976, the State of California Child Sexual Abuse Training and Demonstration Center was established in Santa Clara County to train professionals and to establish similar programs throughout the state.<sup>158</sup>

To use the Santa Clara County program as an example, approximately ninety-five percent of all intrafamily child sex offense cases arising in the county are referred to the program.<sup>159</sup> The program includes individual counseling, family counseling, group counseling, and follow-up service. The self-help components of Parents United, and Daughters and Sons United, lend support.<sup>160</sup> Over eighty percent of the referred offenders successfully complete the program.<sup>161</sup>

The Santa Clara program determined that for treatment in the program to be effective, participation must be mandated by both criminal and juvenile courts.<sup>162</sup> When fathers were the abusers, they found that without a juvenile court mandate, mothers of victims repeatedly failed to involve themselves and their children in the therapy/self-help process.<sup>163</sup> In addition, program therapists believe that the changes the parent must make are often too painful and frightening to be undergone voluntarily.<sup>164</sup> In fact, treatment program professionals who handle all types of sex offenders share the belief that

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inafter cited as National Legal Resource Center].

154. See CAL. PENAL CODE § 11165(b) (West 1982). "Sexual assault" means conduct and violation of the following sections of the Penal Code: § 261 (rape); § 264.1 (rape in consent); § 285 (incest); § 286 (sodomy); § 288(a),(b) (lewd or lascivious acts upon a child under age 14 years); § 288(a) (oral copulation); § 289 (penetration of a genital or anal opening by a foreign object), § 697(a) (child molestation).

155. McCord, *supra* note 56, at 43.

156. National Legal Resource Center, *supra* note 153, at 24.

157. *Id.*

158. *Id.* at 25. See CAL. WELF. & INST. CODE §§ 18275-18281 (West 1980).

159. National Legal Resource Center, *supra* note 153, at 32.

160. *Id.* at 30.

161. *Id.* at 32. When the court terminates probation because the offender has successfully completed the program as a stated condition, it will also change his plea from guilty (or in a few cases, no contest) to not guilty and dismiss the case pursuant to CAL. PEN. CODE § 1213.4 (West Supp. 1980). This entitles the offender to state he has never been convicted of a felony or misdemeanor. Additionally, he is no longer required to be registered as a sex offender. *Id.*

162. National Legal Resource Center, *supra* note 153, at 32.

163. *Id.* at 29.

164. *Id.* at 28.

the offender will be unmotivated in therapy unless some undesirable consequence, such as a prison term, is imposed for failure to participate.<sup>165</sup> Additionally, some authors believe that the involvement of the justice system satisfies an "expiatory factor" necessary in treatment.<sup>166</sup> The common belief among experts that the criminal justice system plays an important, positive role in the treatment of the sex offender may counteract some of the hesitancy a therapist may experience in reporting child abuse to the authorities.

### *Confusion Regarding Compliance*

Even after reading the statute a psychotherapist may have many questions regarding compliance and may fail to report child abuse as a result of these uncertainties. Therapists may not report abuse because they are unsure about how certain they must be that abuse is occurring before they are required to report it.<sup>167</sup> The term "reasonably suspect"<sup>168</sup> implies both an objective and subjective standard. "Reasonably," in the legal sense, means what a reasonable person in similar circumstances would suspect in a particular case.<sup>169</sup> The term "suspect" has more subjective connotations and suggests a standard under which the reporter alone must hold the requisite belief.<sup>170</sup> Fortunately, the California statute explicitly states that "reasonably suspect" is an objective standard which asks whether a reasonable professional in similar circumstances would suspect and report child abuse.<sup>171</sup>

When the client is not abusing his or her own children, the identity of the victim may be in question. Therapists may wonder if they are under any obligation to learn the child's name. If serious abuse is ongoing, a therapist could conceivably be required to inquire into the identity of the child. A therapist might also be required to report abused children whose identity could be ascertained through

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165. Wenck, *Sexual Child Abuse: An American Shame that Can Be Changed*, 12 CAP. U. L. REV. 355, 364 (1983).

166. Henry Siarreto, the psychologist who founded the Santa Clara County Program, concludes: "In all cases the authority of the criminal justice systems and the court process, seems necessary in order to satisfy what might be termed an expiatory factor in the treatment of the offender and his family." E. BREACHER, TREATMENT PROGRAMS FOR SEX OFFENDERS 30 (1978).

167. Sussman, *supra* note 74, at 276.

168. CAL. PENAL CODE § 11166 (West 1982).

169. Sussman, *supra* note 74, at 277.

170. *Id.*

171. CAL. PENAL CODE, § 11166(a) (West 1982). See also Sussman, *supra* note 74, at 277.

a "moment's reflection," a standard mentioned by the *Tarasoff* court.<sup>172</sup>

Yet another concern is whether a therapist must report past abuse that is no longer being inflicted. If the statute is read literally, past abuse must be reported.<sup>173</sup> The decision whether or not to investigate is left to child protective services. This agency makes a determination whether to investigate based on such factors as how long ago the abuse occurred, the type of abuse, whether the abuser still has contact with the child, and whether the child is still a minor.

#### CONCLUSION

In the last 25 years there has been a significant increase in the amount of legislation aimed at protecting children. The legislature has imposed criminal sanctions on those who inflict serious harm on children, has allowed juvenile courts to institute protective supervision or order that a child be removed from his or her home, and has authorized the creation of child protective services. Society can intervene and offer remedies, however, only when it knows about the abuse. The reporting statutes are a key component to stopping child abuse. For this reason it is reasonable to impose criminal or civil liability on individuals who breach their legal duty to report child abuse.

The recent trend to bring legal action against persons who have a duty to protect children and fail to do so has its drawbacks. Dedicated and caring professionals who are attempting to deal with difficult social problems may be the most vulnerable to these types of lawsuits. Psychotherapists are among the groups of professionals who run the risk of civil liability when they fail to report abuse, and the risk remains even when they learn of the abuse from their clients in the confidential setting of therapy. Although it may be difficult for a therapist to report child abuse discovered in this context, the advantages of requiring therapists to do so outweigh the unpleasant complications that may arise when a therapist complies with the reporting statute.

MARY M. HURLEY

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172. 17 Cal. 3d at 439 n.11, 131 Cal. Rptr. at 25 n.11 (1976).

173. CAL. PENAL CODE § 11166 (West 1982).