SOCIAL CONTROL OF SEXUAL ASSAULT
BY PHYSICIANS AND LAWYERS
WITHIN THE PROFESSIONAL
RELATIONSHIP: CRIMINAL AND
DISCIPLINARY SANCTIONS

Susan Jacobs†
University of Nebraska at Omaha

ABSTRACT

Two penal sanctions may be imposed judicially on physicians and lawyers who are alleged to have sexually assaulted their patients and clients. Appellate opinions in each state reporting such a case were examined from 1980 through June, 1993, and generalizations from those opinions are reported here. In each profession, the administrative/disciplinary sanction imposed by the professional association may offer a stronger means of social control than does the criminal sanction. The efficacy of the disciplinary sanction, relative to the criminal, is attributable to the facts that the burden of proof is easier to meet and defenses commonly raised in sexual assault cases are not available in disciplinary proceedings. The significance of this pattern is discussed in relation to Black's theory of the behavior of law, specifically with respect to the manner in which the style of social control is influenced by stratification, the relational distance between the parties, and organization.

INTRODUCTION

Sexual assault by professionals upon their clients takes a variety of forms. Common patterns are those in which the professional engages in sexual touching, or suggests sexual favors in exchange for professional services, or allows the relationship to develop into one in which the parties are active sexually. In some of these instances, though not in all, a crime of sexual assault may have occurred. In each of these instances, there are grounds for professional sanctions, not withstanding the ability to prove that a crime occurred.

Each state is empowered typically to address these complaints criminally or, alternatively, as matters of discipline for those licensed by

† An earlier version of this article was presented at the National Conference on Ethics and the Professions, Gainesville, Florida, January 31, 1992. The author extends thanks to colleagues and the anonymous reviewers for their comments on an earlier draft.
the state to practice their professions. Either kind of sanction may be imposed judicially, and both constitute legal sanctions insofar as both are forms of "governmental social control," (Black, 1976). This article was not designed as a test of Black's theoretical principles, but his work nonetheless provides an instructive context for understanding the patterns of sanctions examined in the sections that follow.

This article examines two forms of social control (criminal and disciplinary/administrative) that can be imposed on physicians and lawyers in cases in which they are alleged to have engaged in improper sexual intimacies with their patients and clients. Limiting the discussion to the medical and legal professions does not imply that their members are the most likely or even the most notorious offenders. Instead, physicians and lawyers are the focus of this study because they represent the traditional professions and, more important, because each is subject to control by the state as it enforces criminal laws and regulates professional licensure. When criminal and administrative forms of social control are compared within and between these professions, important differences emerge that allow us to contrast these control mechanisms and understand better why administrative control appears more effective than criminal sanctions in this context.

**Generalizations Across Professions:**

Three basic tenets of professionalism are important to exploration of incidents of sexual assault allegedly committed by physicians and lawyers. First, members of both of these professions owe a duty to place the needs of their patients and clients above their own personal interests. That is, they have a duty, created by the professional relationship, to act primarily for the benefit of the patient or client in matters connected with the professional undertaking.

Second, each of these professions has standards of conduct established for its members and a sanctioning process when those standards are breached. The standards are not necessarily the same across the professional lines nor across state lines. Those differences are largely of form, at least as they relate to the impropriety of sexual intimacy between physician and patient and lawyer and client, and thus do not concern us here. There is no reported case in which we find either a disciplinary body or a court seriously questioning whether the sexual assault of a client by a professional violates a given code of conduct.

Third, these associations between professionals and clients are theoretically relationships of trust, but, in practice, are relationships in which power is not equally shared. One party has expertise upon which the other relies; the party with expertise is able to withdraw or withhold