



(2003). *British Journal of Psychotherapy*, 20:157-176

## Confidentiality and Professionalism in Psychoanalysis

*Christopher Bollas* ⓘ

The year is 2006 and Welldone Furness, Member of the British Psychoanalytical Society, has been having a bad week. On Monday he received a letter from a patient's solicitor, informing him that his patient now demanded that he kindly fill in the questionnaire he had received a fortnight earlier from the patient's prospective employer, the RUNON Corporation. Furness's patient had ticked a question on the application 'Have you ever received treatment for emotional or psychological problems?' and RUNON had despatched a routine questionnaire asking for a diagnosis, a brief noninvasive description of the course of treatment, and a prognosis. Furness had sent RUNON what he privately called the BCP 'Screw off' document, but what in fact was a well-written detailed description of why none of its members could disclose confidential information to a third party; indeed, as the document made clear, RUNON's receipt of the BCP document was not to be taken as confirmation that the patient named was in fact one of Furness's patients, and that Furness and all members of the BCP were compelled to immediately notify the BCP in writing of any effort to gain information from a psychoanalyst treating any possible patient.

Felicity Dart, the patient's solicitor, demanded that the psychoanalyst nonetheless comply with RUNON, or hand over the clinical records which were the patient's property. Dart claimed that the analyst was in jeopardy of denying the patient the right to work and was liable for damages as the post for which the patient had applied was a senior executive position. Fortunately for Furness the BCP Charter on Confidentiality (COC) made it crystal clear that the analyst's notes were the property of the psychoanalyst and not the patient because there were numerous circumstances in which patients were coerced by circumstances into agreeing to supply the notes. The document pointed out that confidentiality was in fact held in the name and practice of psychoanalysis and was not even eventually the property of the psychoanalyst, but of the profession. Deceased analysts' clinical notes,

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This essay remains largely in its original form, as a talk.

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for example, were by deed of trust transferred to the BCP Deceased Analyst's Committee (DAC) for disposal. Any complaint about the conduct of a psychoanalyst was in the first instance to be reviewed by the Ethics Committee of the Members Society. The COC went on to the fine print and said that among other things, if the psychoanalyst was found to have committed malpractice, then he or she could not seek professional immunity from criminal prosecution or civil litigation under cover of confidentiality and all clinical records of that particular case were to be made available to the authorities or to the litigant, but the Parsons White Paper on psychoanalysis had convinced the Government in 2005 to invest the BCP Review Council with the statutory obligation to be the first court of review so to speak, rather like the Law Society or the General Medical Council.

At a conference that Tuesday on 'Scrotum: Missing Link Between Penis and Phallus' held by a consortium of the British, Italian and French psychoanalytical societies, called 'The Genital Alliance for Evidence-Based Sexuality', Furness had conferred with several colleagues who had been in similar situations.

Lawton English, a historian, now a full Member of the BAP, had been subpoenaed by a court to hand over his notes in the treatment of one of his patients in a divorce suit. The patient had been injured in a car accident when her husband had driven off the road into a ditch and this incident was to the patient the last straw: her husband had unconsciously intended to kill her and she was suffering profound emotional damage. The solicitor representing her in a personal injury suit for emotional damages had a court order demanding that English supply his notes. English sent in the COC, but the solicitor for his patient demanded compliance and English was worried that he would suffer the fate of Morton Fellecrest who was the first psychotherapist to be sentenced to jail in the United Kingdom for contempt of court. To be sure Fellecrest 'only' spent one week in jail, but it was not just the time served that sent

shudders through the analytical community, it was the judge's argument that had created panic in the world of practice.

The mere mention of Oliver Rootweiler still sent chills through the community just two years later, even though Fellcrest's sentence was the galvanizing force for the COC. Sentencing Fellcrest, Rootweiler immediately crushed Fellcrest's defence that his non-compliance was an act of conscience. 'That may be,' said Rootweiler, but reviewing the evidence (provided for him by the Evidence-Based Audit for Mental Health or EBAUMH or 'Bam') Rootweiler found no credible documentary evidence from Fellcrest's society or professional associations to support his act of conscience. He added that Bam had also provided evidence that Fellcrest was only one of three psychoanalysts in the last 20 years who had refused to comply with a subpoena, and that, in comparison, 235 members of his association in numerous and far less serious matters had complied with court

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orders. 'I am afraid, Mr Fellcrest, that your act of conscience is simply not shared by other members of your profession, and with good reason.' With withering gaze Rootweiler added, 'Any ass can accept that psychoanalysis must promote confidentiality, but you have no absolute right to confidentiality under the law and it is for the courts to determine whether the public interest overrides the private claim.'

As if this was not enough, Rootweiler went on to deride the entire notion that analysts could not supply their notes. Fellcrest had no reply to Rootweiler's point that at that very moment there were by his calculation at least 25 mental health workers giving testimony in one court or another throughout the United Kingdom. What had Fellcrest to say, said Rootweiler rhetorically, over the fact that analysts and therapists in the so called forensic area regularly conducted interviews of clients that were then provided to the courts. 'If your profession is so sacrosanct, it if really relies on confidentiality, then what do you think you all have been doing these last 50 years bringing your notes into court on behalf of a prosecution or a defence?' Rootweiler had the terrifying ability to deftly use some of Fellcrest's own arguments against him in this moment, the highlight of which was when he pointed out that Fellcrest's refusal to comply on the grounds that the patient was not really capable of a correct judgement because of the transference, would have to be true in the forensic area as well. 'Do you mean to say', he pealed in redolent voice 'that the individual who agrees to a forensic interview, knowing that such an interview could be used against him as testimony in a court of law, is also not caught up in the transference and, if so, Mr Fellcrest, where do we find in the lofty literature of your profession any publication expressing concern over this use of the so-called transference? Either the transference does not exist in the way you imagine it, or, if it does, then you are part of a profession that invokes it only when it is convenient, and ignores it when it is profitable.'

The decision created quite a stir and led to a series of devastating articles by the *Evening Banner* newspaper which lived up to its name. 'Psychoanalyst In Slammer!' As if matters were not bad enough, when the *Banner* found out that Fellcrest was a historian it ran a series of articles on how it could possibly be that so-called qualified psychoanalysts, mental health workers, had come from history or literature. They had heard that someone had even come from cricket, but they could not find him as he had suddenly gone on a tour Down Under for Over 50s. Turning to Bam's recently formed 'Evidence Based Quick Response Unit' (EBQRU) or 'Roo' as it was now fearfully called - composed of three cognitive psychologists, four organic research psychiatrists, and two civil servants seconded by Whitehall - the *Banner* was quick to point out that psychoanalysis was hopelessly infiltrated by people unqualified to train in the first place. 'This Is A Mental Health Profession?' chortled the *Banner*.

So as the audience tucked into a searching discussion of the scrotum and

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what the speaker had called the 'hung future', English and Furness moved to the tea room where they were joined by Anna Praxis. Praxis had been trying to conduct a review of case history in the USA and the UK on court subpoenas and the kinds of issues being faced. She was a remarkably trenchant person and always came immediately to the point. Praxis said that analysts were now regularly being called to court ever since the parliamentary debate on the duty to protect against harm. The 2003 Green Paper on Protection Against Harm (PAH) had heard from child support agencies, victims of domestic violence, mothers against drunk drivers, and 20 other groups all of which claimed that psychotherapists had a duty to report any client to the authorities if the person was likely to harm others. Even the International Airline Passengers Association managed to be heard, but it was generally regarded as an outcome of the

moment the country woke up in the wake of the airliner that crashed because the pilot - who was in therapy - had a drug problem. 'Shrink Shrinks From Saving Lives' ran the *Banner* as it launched a scathing attack on the psychotherapist whose notes (successfully subpoenaed by the insurers and the victims of Flight 007) indicated that the pilot frequently flew while on cocaine. Never mind that English legal history had shied away from mandatory reporting, all this seemed an historic artefact in light of the public outcry over the disaster. Matters were made much worse, however, by continuation of World War III (or the Bush Fires) in the Middle East that had led to a mass exodus of asylum seekers to the UK. The Medical Foundation and other agencies, always on the front line in work with people seeking asylum, had over the years given people from many countries of the world a belief in 'the talking cure', and those even from fundamentalist countries found that by talking they not only gained some material benefit, but also psychological help. But the suicide bombings in the streets of London and attacks on aircraft, water supplies, the underground, and the Chunnel led to the Emergency Powers Act which ordered that any professional person - and psychotherapists were given special mention - had to immediately disclose to the authorities any client who had suspicions of or knew of any terrorist activity. Failure to do so meant that the psychotherapist - or anyone harbouring such a person - was guilty of a conspiracy to commit terror.

Praxis told Furness that his only hope was in the support provided by his profession. Strength in numbers did matter, she added. She pointed out, quite correctly, that FOP - Friends of Psychoanalysis - had played a huge role in the public debate over psychoanalysis. When 500 leading actors, academics, writers, fine artists, musicians, and politicians had signed a declaration on behalf of confidentiality in psychoanalysis, it had enormous impact. And all efforts by the media to brand the 'Fortunate 500' as they called themselves as simply 'shrunk' out of their minds, failed, due to very astute management, not the least of which was the inclusion of several leading Freud-bashers or therapy-haters. It was a real *coup* when Fay

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Weldon and Fred Crews added their names to the list as, even though they thought analysis was idiotic, they believed in free speech and they could see the sense in befriending an old enemy for a higher purpose. But the press soon tired of asking different members of the 'Fortunate 500' if they had been analysed because of the by now quite tedious reply 'Sorry but that would be confidential, wouldn't it'. At the end of the day, added Praxis, the sheer determination and organization of psychoanalysis had actually begun to pay dividends and, although the battle was far from over, that was the way forward.

Well, enough of this future, now back to the present.

## What is Psychoanalysis?

At the heart of our present situation is a seemingly simple matter. What is psychoanalysis? What does it claim to do? For what could it be held accountable, in what way, and by whom?

To give you an idea of why this is crucial let's think of the implications of the Ninth District Court of Appeals of California which held that 'speech' in psychoanalysis was not 'pure speech' and could not be differentiated from any other form of speech. The Ninth Circuit Court of Appeals in the State of California (*National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3rd 1043) in 2000 declined the argument that psychoanalysis operated according to 'pure speech'. The court cited the District Court which held that 'the key component of psychoanalysis is the treatment of emotional suffering and depression, not speech'<sup>1</sup> and although psychoanalysts use speech they do not enjoy a privilege based on the first amendment. Other professions, they point out, use speech - even prostitutes - but that does not entitle these professions to claim a first amendment right to pure speech.

I would like us to take note of the definition of psychoanalysis as the treatment of emotional suffering because later on we will return to the implications for the practice of psychoanalysis of *how* we define ourselves, but for the moment let us think about the Court's finding which sounds reasonable.

Our task is to explain how and in what ways speech in psychoanalysis differs from speech anywhere else and why it is at the very heart of psychoanalysis. However upsetting it might be to hear of some criminal intent on the part of a patient, the function of psychoanalysis is not to preserve the right of the patient to consciously disclose such a secret, although that is an important secondary right of the analytical situation. Free speech in an analysis does not operate according to consciously disclosed problematic thoughts, but to the exact opposite: to unconsciously reported seemingly trivial ideas. Freud's theory of free association is very specific. Those ideas that the analysand deems to be the least relevant facts to report in a session

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are invariably the most valuable. Why? Because when the self represses unwanted ideas they will return to partial consciousness by attaching themselves to seemingly unrelated ideas. The remarkable paradox of an analysis is that speech must be free in order to utter the irrelevant, because, through the chains of ideas revealed in free association, deeply meaningful and often conflicted thoughts will be revealed.

Likening the analyst's listening to any other professional's relation to the client's speech is misleading because the psychoanalyst is not listening to conscious disclosure but making it possible for unconscious thinking to take place. So what is the problem, it might be asked? Given that the State is only looking for speech that discloses the very opposite - intent to harm - why should this deter analysis from taking place if the analyst seeks to encourage its opposite: the apparently irrelevant?

Because as Freud argued, and as I think psychoanalysts discover all the time in their work, the reason that unwanted ideas can attach themselves to seemingly irrelevant ideas is that they are able to bypass that internal censorship that would otherwise prevent such an act of displacement from taking place. Psychoanalysts remain 'neutral' to the moral dimension of their patient's discourse not simply because they think it is wrong to judge the patient in such a way, but because, from a purely pragmatic view, the process will not work if the analysand has evidence that the analyst is on the side of the censor. Indeed, by virtue of moral neutrality the analyst enables the patient to speak more freely and the unconscious then recognizes this relationship to be a very special one indeed, one in which one really can let oneself speak openly without fear of harm.

## The Politics of Definition

How do we define psychoanalysis in the modern world, taking into account the perils of representation? I believe we should be clear and simple and not over-define psychoanalysis as any claim we make may subsequently be held to account. Also as there are many schools of psychoanalysis we need to seek a definition that is inclusive. Something simple like: 'Psychoanalysis is a form of experience constituted through the Freudian method, that elicits unconscious processes of thought and behaviour interpreted by differing psychoanalysts within the parameters of their own school of thought and according to their own inevitably individual means of working.'

You will notice that I have not mentioned the transference or resistance. I have intentionally left the definition as simple as possible yet I hope open to the reality that many analysts now differ in how they work, although I believe all could agree to some version of the above draft statement.

I have not said that psychoanalysis is a special form of therapy for the treatment of mental disorders and personality problems even though I believe this to be true. Nor have I said that psychoanalysis is a relationship

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that deepens the analysand's personal creativity, even though I believe that to be true.

I appreciate those who view psychoanalysis as a religion, or a philosophy, or an expression of physics, and I am usually interested in reading such 'takes' on psychoanalysis.

While I believe in the venture called evidence-based research in psychoanalysis, just as I think linguistic studies of analytical discourse and sonic evaluations of the acoustic properties of analytical talk are valuable, I do not think evidence-based research should for a moment define the political future of psychoanalysis. We need to be acutely aware that our own interest in evidence-based psychoanalysis is a political position whether we like it or not, one that is enormously attractive to legislators and regulators outside psychoanalysis. It would only be a matter of time before this view of psychoanalysis would not only become a predominate expectation of psychoanalysis in competition with other therapies, but a claim that would translate into standardized forms of accountability.

The words we use to define psychoanalysis in the public realm will have precise consequences. If we call psychoanalysis a treatment for mental health disturbances then we automatically invite audit by the government on the grounds of how we treat, to what effect, and through what form of accountability.

In the 19 January 2001 discussion of the Second Reading of the Psychotherapy Bill in the House of Lords, for example, Lord Burlison announced that the government

are taking action to ensure that practice [of psychotherapy] is evidence-based ... We have also

commissioned guidelines on treatment choice decisions in psychological therapies and counselling, which will help commissioners, employers and the public to know more about what works for whom in this complex field. (column 1352)<sup>2</sup>

So we can see that if we advertise ourselves as able to provide evidence of psychoanalysis we will be held to account, and, as I do not think that psychoanalysis can provide adequate evidence of how it works, then I believe we would fate psychoanalysis to a form of representation and evaluation that would distort it beyond recognition.

While the wish that psychoanalysis could produce evidence worthy of its name is understandable and while the lay public's and government's intention to recommend treatments on an evidence-based foundation is also understandable, these are the sorts of approach to the nature of psychoanalysis that are most unfortunate, because in putting forward our 'evidence' we not only misrepresent ourselves and unwittingly put psychoanalysis in the hands of those who would then evaluate it according to such evidence, but, as seriously, we destine psychoanalysts to increased violation of confidentiality as inevitably our evidence would have to rest on the

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production of clinical notes, as has happened in the USA. We would, in effect, create the foundation of our own death by bureaucracy.

For what are we accountable? We claim to be able to set this process in motion and we undertake to preserve its viability. We are accountable for this. We cannot throw a patient out of the room if we find him or her confounding. We do not recommend actions, such as going to a spa or bicycling. We do not act upon the analysand as in setting about to say or do something for strategic effect. We are accountable for being on time, for remaining during the duration of the session, for ending it on time unless there are mitigating circumstances, and for upholding the setting of analysis.

Lord Hodgson of Astley Abbots in the House of Lords envisioned the problem of accountability. When considering the type of psychotherapist who would put in the hours demanded by the now abandoned Psychotherapy Bill's proposed General Council, he asked

'Will psychotherapists wish to undertake this burden of work? High-quality psychotherapist input will be of critical importance in the early years of this council's existence' [he adds and concludes] 'I am concerned that ... some of the less well regarded members of the profession may take on this particular role.' (column 1345)<sup>3</sup>

Well, perhaps he lived in the State of California during the 1970s when the Board of Behavioural Sciences and other regulatory bodies were being staffed, or perhaps he spent time in the State of Texas perusing the CVs of those who regulate psychology or social work. It is not so much a question of whether or not the regulators are highly qualified as it is a matter of the mentality of the regulator, in contrast to the way the psychoanalyst thinks, a juxtaposition easily illuminated by study of the fraught discussions between psychoanalysts and HMO clerks in the USA over an individual treatment. Even though discussion in the UK at present pays lip service to standards based on separate modalities of psychotherapy, at the same time there is a call for 'universal standards' that are to apply to all of the therapies, modal differences accounted for. Yet the refrain running through all these discussions is evidence based this and evidence based that and it does not take a visionary to see that such a future would have to violate the analysand's right to privacy.

## Record-Taking and Freedom of Thought

If one is to claim that psychoanalysis produces clinical evidence then of course there must be a means of gathering that evidence. Robert Stoller<sup>4</sup> believed passionately that sessions claiming any scientific credibility had to be tape-recorded because one could not trust the analyst's recollection of an hour. In the UK we hold in high regard the process recorded session which for training purposes we usually write up just after an hour in the customary 'I said, he/she said' format.

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I do not think there is any form of note-taking or record-keeping, however, that could even remotely be considered to represent the immaterial psychic reality of a psychoanalysis, not the least of which is because the

greater part of the work of an analysis is *unconscious*. If we are not to cheat when faced with this fact, that means that the heart of a session is actually not available to us, ordinarily, in consciousness except in ephemeral glimpses.

It might well be argued, however, that a court is not interested in a representation of psychoanalysis; indeed, the law might well accept my argument that psychoanalysis cannot be adequately reported, but would maintain that all any court would be interested in was a record of the general disclosures by the patient in order to determine matters of fact, such as guilt or innocence in the commission of a crime. Indeed, in some situations the judge reads the clinical material in his or her chambers before trial and determines what is relevant for disclosure and what is not relevant, so the history of the analysis need not be revealed. Future regulators of mental health in the UK, however, might take the position of some professional bodies in the USA that oblige a clinician to keep notes only when he or she is of the view that what the patient is disclosing might be the subject of court action, which is less extreme than those professional associations in the USA that regard record-keeping as a professional obligation so that failure to keep records is evidence of malpractice.

What objections are there to the psychoanalyst keeping some record for potential review?

If there is a need for free speech in psychoanalysis in order for the unconscious to determine the mental contents of an hour, there is also a need for what Adam Phillips terms 'free listening'.<sup>5</sup> The analyst must to the best of his or her personal ability maintain an open mind when listening to his or her patient and there should be no other mandate in the analyst's mind than the upholding of the analytical situation. I know from many consultations with psychoanalysts and psychotherapists in the USA, who have found themselves listening to material that they think might be actionable, that their ability to listen to their analysands psychoanalytically is less than possible. Such incidents also become common knowledge to the community of clinicians who become aware of a colleague's dilemma and they too find that, however much they might try to block out such invasions of analytical listening, this is not possible.

A dentist can still drill teeth when his patient discusses knowledge of some suspected criminal activity, a lawyer can still advise his client even if the client's likely violation of the law troubles him, and so, with all other professions, it is possible to hear something from the other that might suggest the speaker is suicidal or homicidal or the victim of an abuse or the neighbour of someone committing an abuse or the friend of a major drug dealer or ... and for such a disclosure not to destroy the function of that

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engagement. All the other psychotherapies - cognitive, behavioural, psychodramatic, humanistic - would also be able to function because none of these professions rely upon free association in the speaker and in the listener. Only psychoanalysis is destroyed when the instrument of analysis - what I call the 'Freudian pair'<sup>6</sup> - is disabled.

This is the way we think: through free association and free listening. To be obliged to listen *out* for any mental content that would compel the analyst to report the analysand to any authority other than his own unconscious would be to damage the analytical instrument from the outset. I am sad to say that many fine psychoanalysts and psychotherapists in the USA can no longer use the instrument of psychoanalysis, as suicidal thoughts from an analysand or a depressed state immediately invade the clinician's mind and the analysand is referred for medication, or a patient begins to feel suppressed anger towards a partner and the analyst is now thinking that perhaps he will enter the territory of the duty to protect against harm. What I ask us to recognize here is that, although the danger may be negligible, the damage to analytical listening is destroyed nonetheless, because it is organized around the state's anxieties.

I draw our attention to an eloquent defence of the right to privacy in note-taking. Litigants in Canada sought to gain disclosure of a judge's notes on the grounds that such notes might prove that the judge's decision was ill considered. They would be 'revealing' of a 'judge's mental process'. The Court ruled as follows:

Judges must be able to take notes free from any intrusion and, in particular, free from the fear that the notes could thereafter be subject to disclosure for purposes other than that for which they were intended. A judge must have total freedom as to what is noteworthy ... [and] to allow hearing notes to be used for purposes other than that for which they were intended would fundamentally impede the use of a tool that is essential to the judiciary. (3)<sup>7</sup>

When psychoanalysts keep notes they do so usually as a means of assisting them in thinking about a patient. I write down occasional dreams, or free associative threads, or screen memories, as well as impressions of all kinds. Although I sometimes write up a session for presentation, like most analysts I keep notes to help me to think something through and it is solely for my own purposes, just as the judge in the above example takes notes to help

him or her put passing thoughts on paper. To know in advance that a thought process that we call writing could be subpoenaed is to have one's freedom of thought interfered with no matter how slight the incursion.

## Privilege

Most of the states in the United States have established legislative privilege for psychotherapy and psychoanalysis and the Supreme Court's *Jaffee v. Redmond* decision established a federal privilege for psychotherapy. Even though there are exceptions to privilege in both cases that are unfortunate,

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it is important for the future of psychotherapy that we use these important legislative and judicial acts to argue in front of other bodies that a psychoanalyst cannot disclose confidential information to the courts. We do so not only on the grounds that this would violate the patient's right to free speech in the most profoundly private relation yet established in Western culture, but on the grounds that the analytical instrument could not exist without complete freedom of thought and we can draw upon the Canadian Court's ruling to form part of our argument.

We can also look around us and see other professions with similar dilemmas. The most obvious is journalism. We are aware that journalists regularly refuse to comply with a court order to disclose their source even though they will be held in contempt of court. At the contempt hearings those representing the journalist regularly point out that a journalist cannot disclose his or her source because in effect to do so would be to undermine the future of journalism. Sources would not be forthcoming were it common practice for journalists to disclose them to the criminal justice system.

A crucial point to keep in mind when considering the private right versus public peril debate is the distinction between short and long-term solutions. Forced disclosure by a clinician of information that might reveal intended harm could very well assist in the saving of a life, but when considering the defence of confidentiality and privilege for psychoanalysis we cannot take this short view. We have to argue that in preserving confidentiality as privileged we are in fact protecting the public interest against a private right in an important way because we are protecting the public's right to psychotherapy which would be destroyed by limited confidentiality. Indeed, in the context in which the so-called public interest is invoked against the right to privacy I think more often than not the category should be reversed, i.e. the public peril claim is more limited and localized than the long-term public right. In this context I think the public peril argument bears closer resemblance to the private right (in this case the right of a public body to gain information in a specific matter) and the analyst's defence of confidentiality is more of a defence of the public right.

Think of the paedophile. It was argued in the USA in legislature after legislature that therapists, by law, had to report suspicion of sexual abuse. I am sure that in some cases children were protected, but was the public interest served? One outcome of these laws was the disappearance of all the clinics in the USA for the treatment of paedophiles and other sexual deviants. In addition, highly qualified psychotherapists abandoned working with children and families because they found it impossible to work in a mandatory reporting climate. Has the public interest been served by eliminating psychoanalysis from effective treatment of the sexual deviant?

Further, we could more effectively protect the public against criminals if we tortured suspects - if the court held that the public's right to protection superseded the individual right - but we do not do this because the long-term

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cost to our countries' democracies would be jeopardized by the apparently immediate public need.

I believe we have important judicial and legislative support for our refusal to comply with a court order that violates the confidentiality of our patient. It is more than possible, however, that a court might hand over a psychoanalyst for a custodial sentence if the analyst did not comply with the judge, but I think we cannot be intimidated by the vagaries of the judicial mind. Chances are this will not happen, or, if it does, that it will be a nominal symbolic act.

Why? Because I think we can trust that a court will more often than not understand the difference between an act of contempt that is principled from one that is not. That is a crucial difference. Indeed, a judge in sentencing a journalist to a few days' jail may make a point for the upholding of the law, but also implicitly accepts the journalist's

ethical obligation and sanctions this right through *de facto* privilege. Throughout the history of democracy there are eloquent defences of civil disobedience, none more relevant to the present time than the work of John Rawls. In *A Theory of Justice*<sup>8</sup> he argues that civil disobedience is 'conscientious refusal' which he understands as 'non-compliance with a more or less direct legal injunction or administrative order' (323). Civil disobedience, he argues:

expresses disobedience to law within the limits of fidelity to law ... the law is broken, but fidelity to law is expressed by the public and non-violent nature of the act, by the willingness to accept the legal consequences of one's conduct. (322)

There is a great deal that we can do to prepare the way for those of our colleagues who decide in the future that they will not comply with a court order to appear and give evidence either for or against their patient. The more position papers our associations publish the more we can rightly point to a professional position that supports any member before a court. Thus far we have been relatively silent in these matters; indeed, Anne Hayman did not have the support of the British Psychoanalytical Society in the 1960s when she refused to disclose information on her patient. It is important that each and every psychotherapist not only feels that he or she has the support of their professional body, but that it is encoded in the profession's standards.

## Standards

Such documentation, however, must be linked to an upgrading of the professionalism of our individual societies and, by implication, participation in the BCP. For reasons to be discussed shortly, we need to examine our own institutional structures in order both to believe in their efficacy and to promote the necessity and the privilege of self-regulation in the public sphere. I do not think we can engage in such examination and potential reformation through internal audit alone. We need, in my view, independent

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assessment of our institutions (as occurred at the Tavistock Clinic in the late 1970s) and so I think we need both the publication of Green and then White Papers that thoroughly examine each of our institutions.

Why do we need to do this? In other essays and in *The New Informants*<sup>9</sup> I have examined reasons why the psychoanalytical world has been slow to defend confidentiality and I have concentrated in particular on attachment to disciplines of origin (psychology, psychiatry, social work) that enabled analysts to be passive and to misguidedly put their future into the hands of other disciplines that are no longer meaningful guardians of psychoanalysis (if they ever were).

Taking that into account, there is a certain lassitude within the analytical movement that remains puzzling, a certain casualness or studied amateurism in professional matters that in some respects borders on a kind of professional depression, a thinly disguised lowered self-esteem, not in the practice of psychoanalysis, but in the profession of psychoanalysis. The historical disinclination to separate from the original disciplines and the disappearance back into them when matters of professional definition arise may only be symptomatic of this underlying professional depression.

Certain topics in psychoanalysis are quite difficult to discuss and I am aware that I am about to embark on one such difficult topic. To discuss our right to confidentiality I must, nonetheless, discuss impediments to the exercise of that right and, if one such obstacle is deriving from within psychoanalysis itself, then this must be examined especially in a meeting of our profession such as today. It is not only a matter of upgrading standards to put psychoanalysis on a parity with other professions, but, as importantly, it is a question of improving our standards so that psychoanalysts themselves can work through a certain transgenerational malignant depression involving the profession of psychoanalysis. If we do not believe in ourselves as a profession then we cannot expect others to do so in our place; indeed, it is highly likely that we will projectively identify our doubt into others who will also fail to take our professionalism seriously.

A psychoanalytical society is a more complicated group than, say, an academic department or a small business in that the members are almost always children of one or another of the training analysts who form a kind of elected oligarchy. Each training analyst and his or her children form a family that is part of a larger kinship system usually based on the training analyst's friendships and ideological positions. Clans can form within a society usually through small wars over ideas that serve as unifying and binding elements in sustaining the viability of the clan. It is a tribute to the efficacy of the practice of psychoanalysis and to the talent and integrity of individuals in societies that psychoanalysis survives and in some cases thrives in spite of the group process of some societies.

There are specific ways, however, in which psychoanalysts do not treat each other very well and there are things



we can do about it. Some argue

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that we are no different than others in the comparative sociology of bad mouthing one another. The problem is more subtle and acute than that possibility (i.e. that we are no different from others) because there is one common way in which we pass on destructive gossip or make defamatory allegations that undermines belief in ourselves as a professional group. We use confidentiality to this end. Or, I should say, we abuse confidentiality to this end. This takes place when one psychoanalyst says to another, 'Look this is strictly confidential but I have something to tell you'. Under guise of confidentiality one party to this discussion proceeds then to pass on destructive gossip about another member of the profession, and the word confidentiality has been invoked as a kind of parliamentary privilege that allows the subject to damage a colleague with impunity.

Now, of course, some listeners in such situations decline and say, 'Look, I don't want to know' or they may be the sort of person whom the speaker is disinclined to approach because they know the listener is not inclined to use confidentiality in this way.

Another feature of group relations in psychoanalysis is what we might call the 'Mafia moment'. Induction into the Mafia involves participation in a crime by the novice as it is only through the commission of a crime that the group can assure itself that it has a member it can trust. Induction into some of the committees of psychoanalytical institutions too often follows a similar procedure. A new member joins a committee and one or another of the committee members, when talking about another member of the society, discusses that member in destructive terms and too often there is no objection to this act. These character assassinations partly test the loyalty of a new member to the group, and new generations of psychoanalysts witness to this for the first time inherit a destructive feature of psychoanalytical group relations, a collusion that degrades the profession.

There is no more important body within any psychoanalytical organization than its Ethics Committee. These committees have not only an important function now, but for the future of psychoanalysis, because it is here that psychoanalysts establish their standards and it is here where they demonstrate their ability to be self regulating.

Given the size and nature of psychoanalytical societies we must be sure when any Ethics Committee is hearing a matter before it that there is no conflict of interest between those listening to the issue before them. Cronyism is a disease of any small organization and psychoanalytical societies are no different from other small groups more inclined to cover up matters that involve unprofessional conduct of one of its members than to prosecute said member. I would like to refer us to leadership taken by the IPA on conflicts of interest. The 'Implementing Procedures of the IPA Ethics Code' state very clearly:

3(e) *Conflicts of interest.* Any IPA officer or committee member with a material conflict of interest - family, professional, or economic - *vis-à-vis* an

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ethics Inquiry or Complaint shall (i) promptly disclose the conflict [in writing] to the IPA President and Ethics Committee Chair and (ii) not participate in the IPA's review of or action on the matter.

It may well be that the IPA has been very specific about conflict of interest - to the point of investing disclosure of a conflict of interest to the person who knows or suspects such a conflict to exist and to the point of putting it in writing - because the very size of societies can develop cultures of cronyism where conflicts of interest are a regular occurrence.

It is well past time for us to publish the names and the offences of any psychoanalyst found to have been in breach of the Ethics Code of his or her society. And as long as an analyst's sexual conduct with a patient is clearly a sexier issue for analysts to discuss these days - rather than the more endemic ordinary bad behaviour towards one another - such sensational issues will continue to serve as ironic points of repression, as the sexually acting out psychoanalyst serves as a convenient spectacle for an institution's distraction from more widespread and common unethical action. Until we examine our professionalism, we cannot in my view hope to overcome unconscious reasons why we fail to develop our own profession. We will not be robust enough in defence and advocacy of psychoanalysis in the public domain if we do not believe in ourselves because of the degradation of our own behaviour as a group invested with the guardianship of psychoanalysis.

The BCP can play an important role in psychoanalytic self-regulation if it is prepared to function as an important appellate body for matters appealed by individual societies' ethics committees, but in the long term I think it will be important that it function as *the* Ethics Committee for all the constituent organizations as only then do I think we can safely assure ourselves that the small size of our societies which can interfere with independent and fair judgement is offset by using the members from other societies on the BCP Ethics Committee to constitute a more independent body.

## Confidentiality and Professionalism

Psychoanalysis has been shy for historical reasons to become a profession, preferring especially in the USA to see itself for decades as a branch of psychiatry or a branch of psychology. In many countries one must first be a qualified psychologist or psychiatrist before one can train to be a psychoanalyst. In the UK there is a mixed picture, as some societies do require a qualification in psychiatry or psychology, while the British Psychoanalytical Society has a long-standing tradition of lay analysis.

Indeed, one of the great strengths of psychoanalysis in the UK is the inclusion in training of people from the humanities, the world of finance, social sciences, and fine art. Whom we choose to accept for training says something about our profession. If we accept only psychologists,

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psychiatrists, or social workers, then we remain married to so-called disciplines of origin that is not only a serious misinterpretation of psychoanalysis, but a fateful misdirection of its future. One of the reasons why there has been a world-wide decline in the popularity of psychoanalysis is that psychoanalysis has excluded itself from the humanities, sciences, and fine arts. There is very little access to psychoanalysis at the undergraduate level even though there is continued evidence that young adults have a very high degree of interest in psychoanalysis. Indeed, I think it is a tribute to the remarkable strength of psychoanalytical ideas and the efficacy of its practice that it has survived as well as it has, and I think that if we were less exclusive in our admissions policies and more open to younger people from a wider undergraduate or graduate backgrounds it would be not only more fruitful for our intellectual future, but also strengthen our position as an independent profession.

## Clinical Judgement

It is heartening when reading deliberations on the Mental Health Act in the UK to see a consistent pattern of appreciating either a clinician's independent judgement or the views of a team of practitioners as they work with their patients. When thinking of how to deal with the patient who might be of harm to others there is a striking concern for the care of the disturbed person as well as those who might come to harm from this person, in stark contrast to the trend in the USA that immediately refers any such person to the criminal justice system.

If we do decide to take an action in relation to a patient it will have arisen only out of the clinical situation itself, not compelled by an act of law that cannot make differential clinical decisions. Unwittingly, California legislators and jurists by mandating disclosure effectively practised psychotherapy without a licence. For better and for worse, it must be left to the individual psychoanalyst to determine how he or she will protect the patient and the public, and that clinician should in the very first instance be accountable to the Ethics Committees of his or her own professional association. Those Ethics Committees, in turn, must demonstrate to this body (the BCP) and the BCP must demonstrate to other interested professional associations that it is maintaining a very high level of professional accountability.

If we do the best we can in this direction, then I believe we will preserve the implicit licence that historically we know as clinical judgement. Indeed, we can issue our own guidelines about the standards of such judgement, but in so doing we would amongst other things stress the priority any psychoanalyst must have on presenting the analysand with the right to psychoanalysis. If something disturbs this object relation such that the psychoanalyst feels that he or she can no longer preserve the psychoanalytical object - for example, if the analysand is suicidal or dangerous - then that

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determination will have been that clinician's decision, derived from work with that particular patient.

There is a culture of true care in the UK that has not led to a criminalization of mental disturbance and that allows us to cooperate with colleagues to ensure our patient's rights (to confidentiality amongst others) while in the USA it takes only one person in the chain of collegial cooperation to destroy the pool of clinical judgement. Clinical judgement can and does function here still because confidentiality is implicitly held by the profession as psychoanalysts confer with colleagues in other settings to discuss their work with a particular patient.

## Conclusion

In conclusion, to preserve confidentiality we must become an independent profession and we must both defend and articulate what is meant by the clinical judgement of a psychoanalyst. We must argue that confidentiality is held by our profession - not by our patients - so that we may discuss our patients with colleagues, clear in our minds that in so doing we are not referring our patients to the criminal justice system.

We must continue to find legal council that will argue our beliefs rather than the other way round. It is very easy to find a lawyer who will argue that we must comply with court orders and thus unwittingly hand over our destiny to another profession, but it is possible to find lawyers who understand our position against such compliance and who are prepared to argue it before a court.

We must deter any form of mandatory reporting as it destroys clinical judgement and inter-professional cooperation. In particular we must point out why this is so.

If we strengthen clinical judgement and ensure the confidential right of collaboration with colleagues in clinics and hospitals then we can be more effective than any mandated reporting. To do so, however, psychoanalysts must upgrade their Ethics Committees, and the standards by which they regulate their members and hold themselves to effective public accountability. Publication of a White Paper on our component societies conducted by an independent body would lay the foundation for a council convened by the BCP that would then set new standards and methods of self-regulation that could assure our members and the public that we had brought psychoanalysis into the world of modern professions.

At the same time, we must give further thought to the politics of placement. As we cannot provide the sort of *in situ* evidence of our work that would be called for by a truly scientific demand for accountability, but as we do want to preserve the public's right of access to qualified psychoanalysts, we shall have to cogently argue for our own standards, regulations, and accountability. We must offer very different practice guidelines to those set

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up by the Department of Health<sup>10</sup> which uses DSM 4 as its criteria and which recommends forms of treatment for the differing diagnoses, something which is now widespread throughout the world. This means establishing a clear differentiation between a psychoanalytical diagnosis and a psychological or psychiatric one.

In identifying ourselves as a separation profession we are not automatically standardized within the DSM 4 structure of accountability and funding that is true for psychiatry and psychology. Even though the EU has yet to my knowledge to pass legislation on psychotherapy it does provide funding for psychiatric hospitals in different countries, and it may be of interest to know that in Finland, for example, funding follows 'evidence-based criteria'. Indeed one hospital there must, amongst other things, collect 'impact points' through which funding is assured and through which EU regulators also dictate the future criteria for psychotherapy itself. Publication of an article in *The Lancet*, for example, earns the staff member (and therefore the hospital) 7 impact points, while publication in the *International Journal of Psychoanalysis* earns no impact points. As in the USA, we can expect that funding will lead to regulation through the back door and in my view the only hope we have of avoiding the catastrophe of regulation by Brussels is to sharpen our own professional identity and make our own standards very clear.

We shall have to convince those who are considering this matter in the near future that we are no more able to describe what goes on in psychoanalysis than we can describe what goes on in a reader's reading of a text. We would do well to read the 'Practice Bulletin 2: Charting Psychoanalysis' of the American Psychoanalytic Association (1997)<sup>11</sup> that firmly states that psychoanalysis cannot be accurately recorded; further, they conclude that psychoanalysts should not keep notes because they 'believe that documenting the content of a psychoanalysis seriously alters that treatment process and conflicts with fundamental clinical psychoanalytic skills' (656).

We have always been curious about what goes on in any one person's mind and I think psychoanalysis gets us closer than any other profession, but not close enough - not close enough by far - to claim that it can both give that sort of evidence of its findings that could be standardized, regularized, by education programmatic and by review accountable.

We *must not* rush into hastily mandated professional requirements of our own making - such as peer clinical discussion groups or CPD - without thinking through the implications of these proposals. A recommendation that, for example, analysts meet regularly in a group to present clinical work can easily lead to a politically driven consensus of 'correct technique'. Indeed, when psychoanalysts-in-group seek consensus on clinical technique the politics of society can create an extra analytical dynamic that distorts the actual nature of the solitary work of an analysis. There is no more disturbing evidence of this kind of distortion than consensus amongst the three

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groups within the British Psychoanalytical Society, for example, around the 'practice' of here and now transference interpretation. Even if this practice does not in my view typify the way analysts actually work, it dominates the educational and clinical discussion groups within the British Society because it is the political point that has cemented this society's group relations. The here and now interpretation, in which the analyst presumes that the analysand's narrative is a reference to the psychoanalyst, is in fact an idea of reference in the countertransference, and in moments such as this psychoanalysis does indeed propose itself as the disease that it is meant to cure.

Finally, we must carefully define what we mean by psychoanalysis. Whatever our own private passions we must find a common language and form a very simple definition of what it is so that we do not over-extend our reach and subject ourselves to false standards and misplaced regulatory requirements. The simpler our definition the less complex our future in the market-place. Psychoanalysis may not, after all, be safely defined as a mental health profession or even as psychotherapy. It may 'simply' be a unique form of experience. It may be closer to a type of amusement or entertainment, closer to the metamorphic value of theatre that transfigures a self through suffering and insight and opens up new understandings of self and other. It may or may not change our actual behaviour. It will be meaningful, but it is not necessarily going to make us feel life is more meaningful. As a form of experience it can claim unique properties for which it has responsibilities. The Freudian pair - free associating patient, evenly suspended psychoanalyst - is unlike any other form of object relation and the psychoanalyst is responsible for maintaining the terms of this relationship. Psychoanalysis is open to virtually anyone - the neurotic, the psychotic, the character disorder - and it will have affected anyone who takes part, but the measure of that effect is ultimately indeterminate. Many a psychoanalyst would argue that the effect of psychoanalysis does not take hold until long after the experience ends, in what we might think of as the *other* side of an *après coup* or *Nachträglichkeit*. The effect of an analysis may well be deferred until a later moment in time when through chance encounters in the real the former analysand receives the full effect of the analysis: a generative after-effect, or the arriving of the transfigurational structures of the psychoanalysis.

I think that for better and for worse we just have to live with the fact that psychoanalysis, whatever it is, is simply different from anything else. It truly is incomparable. That makes defending it in today's world - of the commoditization, capitalization, and globalization of human relations very hazardous indeed. But no one ever said this was going to be easy.

Before ending I have been asked to read the following announcement.

There will be a short talk and reception held by the Evidence Based Research Unit for Psychoanalysis from the Department of Therapeutic Accountability of the University of East Crouch End. This Department's aggressive proposals for comprehensive evaluation and auditing standards have won it substantial grants

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from the Government, from the European Union Policy Committee on Psychotherapy, the Eli Lilly Company, Glaxo, and the Department of Defence. This afternoon's talk will be a short announcement of exciting work on combined cross-referential data collection based on the precedent-breaking Exit Flow Questionnaires<sup>©</sup> given to all analysands leaving their sessions plus the Skin Sensor Affect Bracelet<sup>©</sup> worn in sessions and graciously supplied by the Department's sponsors, and the patented Retina Register for mental data as well as the remarkably innovative and person friendly Your Recta!<sup>©</sup>, a rectal suppository for the measurement of retentive versus evacuative responses to interpretation. It is four years since the outcome study examined the mutative (or not) effects of Classical, Kleinian,

Lacanian, Jungian, and Confused (i.e. Independent) interventions on the DSM 4 nosology group. The unit is pleased to produce the evidence of the DME or Digestive Metabolic Effect of target interpretations aimed at the different anxieties, depressions, and desires. The results are in some cases surprising, exhilarating, and even harrowing, but the Unit is pleased to provide wine and medication graciously supplied by Dow Chemical, Aerospatiale, and the Norwegian Department of Commerce.

## Notes

<sup>1</sup> Downloaded from the internet, [http://biotech.law.lsu.edu/cases/pro\\_lic/NAAP\\_v\\_CA.htm](http://biotech.law.lsu.edu/cases/pro_lic/NAAP_v_CA.htm) p. 11.

<sup>2</sup> Downloaded from the internet, <http://www.parliament.the-stationery-office.co.uk/pa/ld200001/ldhansrd/v.../10119-05.htm>

<sup>3</sup> Downloaded from the internet, <http://www.parliament.the-stationery-office.co.uk/pa/ld200001/ldhansrd/v.../10119-05.htm>

<sup>4</sup> Personal communication.

<sup>5</sup> Adam Phillips, *Equals* (Faber, 2002), p. 31.

<sup>6</sup> Please see 'Free Association' (Icon, 2002).

<sup>7</sup> Downloaded from the internet, <http://www.fja.gc.ca/en/cf/1996fcaa0069.p.en.html>

<sup>8</sup> John Rawls, *A Theory of Justice* (Harvard, 1999).

<sup>9</sup> Christopher Bollas and David Sundelson, *The New Informants* (Aronson, 1995).

<sup>10</sup> See 'Treatment choice in psychological therapies and counselling: evidence based clinical practice guideline'. Department of Health. Downloaded from the internet, <http://www.doh.gov.uk/mentalhealth/treatmentguideline/index.htm>

<sup>11</sup> *Journal of the American Psychoanalytic Association* 45, 656-672, 1997.

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## Article Citation

Bollas, C. (2003). Confidentiality and Professionalism in Psychoanalysis. *Brit. J. Psychother*, 20:157-176

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