

Mandatory Reporting and the Psychoanalytic Treatment

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In the course of my paper to the 2010 Congress, I asked a rhetorical question which has become all-too-relevant to the modern psychoanalytic clinic: “(A)s subjects of the Law of the Father and the Fundamental Rule, what part does ‘mandatory reporting’ play in eliciting true speech?”¹

Since the Congress, colleagues have engaged me in further discussion about the topic, acknowledging the encroachment of various institutional demands upon the analytic session. As part of my work is a Child and Adolescent practice, I have had to frequently negotiate the demands of parents and institutions (e.g. schools, courts, multi-disciplinary teams). However, the current widespread support for a reporting which will be mandatory poses a particular dilemma for psychoanalysis and highlights the lack of statutory support for the privilege many of us assume pertains to analytic material.

Mandatory reporting poses an ethical dilemma for psychoanalysis because ours is a discourse distinguished from any other by the transference, the fundamental rule, the exploration of fantasy and the drive. To report from the session is to quote from a discourse of the Other, an exchange of signifying material whose meaning is presented for interpretation by the analyst and analysand, not judgement by the superego.

Since 1964, when the mandatory reporting of suspected child abuse was first introduced in Maryland, the boundary of the analytic session has been serially attacked in jurisdictions all over the world. As psychoanalytic psychotherapy and psychoanalysis became more widely practiced so the opportunities to encroach upon its boundaries have grown. Sex abuse, homicidal intent, suicidal ideation - legislation for mandatory reporting of the in-session disclosures of each in turn has compromised the supposed confidentiality of the analytic session². I believe that individual analysts and APPI, our professional body, should explore how this encroachment is affecting the way we work and stipulate what constitutes *responsible* reporting, in order to protect the limits of the discourse.

The latest revision of these ‘protectionist’ measures demands that any disclosure by adult analysands of an experience of childhood sexual abuse

¹ Paper presented at 2010 APPI Congress, ‘An act that is a Cut’, unpublished.

² Bollas, C., & Sunderson, D., *The New Informants: The Betrayal of Confidentiality in Psychoanalysis and Psychotherapy*, Aronson Press, 1996.

must be reported to the relevant investigating authorities. In the analytic session, whose basic referent is regression to the infantile state whether in reminiscence, acting out, affect, dream, such disclosures may be far from unusual. It was Freud's exploration of the hysteric's paradigmatic Oedipal fantasy that led directly to his theory of infantile sexuality: '(T)he origin of neurosis is the child's fantasies.'³ The analytic interpretation of Oedipal guilt, of subjective responsibility in the fantasy, is compromised by a mandatory stipulation to report as an outcome what is yet a work-in-development.

In the aftermath of worldwide revelations of clerical and institutional sexual abuse, there has been a reactive explosion of moralising outrage. Underlying this reaction is a demand that modern, civilised institutions distance themselves from such behaviour henceforth and that society be redeemed by legislation. The paedophile has become the modern phobic object and in acceding to the demands of an hysterical Other we risk colluding in a statutory neurosis.

Lacan wrote that there can be no third party to the clinical dyad of analyst and analysand, no other discourse in the session but theirs, a discourse within the transference relationship. Precisely because the transference relation is so fundamental to our work, therefore, it behoves us to examine and defend the permeability of this psychic envelope in training modern analysts and in continuing professional development programmes. The privilege that anecdotally pertains to the analytic session, that assumption of confidentiality we are so blithely assured of in our work, may have general public sympathy but it has no guarantee in law. At the moment, in certain institutional situations, analysts are compelled to maintain and preserve clinical notes and even to present these notes in court. Such compulsion cannot but have radical consequences for the practice of psychoanalysis, whose ethic is not commensurate with society's moral binary of good and evil.

In 'Civilisation and Its Discontents'⁴, Freud warned that the Other of psychoanalysis does not equate with the cultural 'Other'. Morality, the social and cultural benchmark, is not to be confused with the ethics which are the real limit of psychoanalysis. Moral binaries of 'abuser' and 'abused', 'truth' and 'lie', are not what we base our interpretations upon.

³ Jane Gallop in 'Keys to Dora', p-213-214. from *In Dora's Case: Freud-Hysteria-Feminism*, C. Bernheimer (ed.), 1990, Columbia Uni. Press

⁴ Freud, S. (1930). *Civilization and its Discontents*. SE Vol XXI (1927-1931): *The Future of an Illusion, Civilization and its Discontents, and Other Works*, 57-146

Within the boundary of the session, the subject on the couch is not a criminal or a victim, only an analysand. Society may judge him but the analyst must forego such simplistic reductionism. This is what Lacan meant, in 'Direction of the Treatment', when he said that the analyst has to pay with his person 'as a support for the singular phenomenon that analysis has discovered in the transference'. The analyst must strive to act within the transference and not out of his own counter-transference, bearing in mind Freud's caution that "no psychoanalyst can go further than his own complexes and internal resistances permit".⁵

Two clinical papers from 1949 are particularly relevant to this debate: Ferenczi's paper, 'Confusion of Tongues'⁶, and Winnicott's 'Hate in the Counter-transference'⁷. In Ferenczi's paper, he reveals the problems posed in his clinic by his unconscious counter-transferential dislike of certain analysands, calling it his 'professional hypocrisy'. He encouraged the analysand to express these feelings, rather than submitting silently to the treatment for 'fear of occasioning displeasure in us'. Likewise, Winnicott addresses the clinical consequences for his analysands of being able to contain such antipathy:

'A main task of the analyst of any patient is to maintain objectivity in regard to all that the patient brings, and a special case of this is the analyst's need to be able to hate the patient objectively.'

We learn from these papers that it is not necessary to *like* a subject to be his analyst, nor to approve his behaviour. The analytic position must be one of curiosity and benign skepticism. The only crime with which we may charge him is that of having ceded his desire.

Analysts can take heart from the ISPCC report⁸ which observed that 'international experience has shown that mandatory reporting increases rather than decreases the number of both children and adults who do seek and receive help.' However, the same analysts may be discouraged by Berlin⁹, who found that mandatory reporting by psychiatrists deterred abusers

⁵ Freud, S., (1910), The future prospect of psychoanalytic therapy, SE 11, p. 145.

⁶ Ferenczi, S. (1949). Confusion of the Tongues Between the Adults and the Child (1949). International Journal of Psycho-Analysis, [30](#):225-230

⁷ Winnicott, D.W. (1949). Hate in the Counter-Transference. Int. J. Psycho-Anal., 30:69-74.

⁸ Another Brick from the Wall: The Case for the Introduction of Mandatory Reporting of Child Abuse and Neglect in Ireland, 1996 www.crin.org/docs/resources/treaties/crc.../Ireland_ISPCC_NGO_Report.pdf

⁹ Am J Psychiatry 1991; 148:449-453, Effects of statutes requiring psychiatrists to report suspected sexual abuse of children, FS Berlin, HM Malin and S Dean.

from attending or presenting themselves for treatment. When made aware that disclosures of acts of abuse, historical and/or current, would have to be reported to the authorities, many preferred not to be treated. Working with the abuser is not an area that attracts every analyst but I believe it is a betrayal of the ethics of our profession to deny treatment to anyone who would seek it.

The fundamental rule of free association is the subversive, subjective 'Truth' that underpins our discourse. When considering how mandatory reporting stipulations may inhibit the analysand's speaking or our own hearing in the session we should recall what Freud wrote when teaching on the 'Fundamental Rule':

*"Finally, never forget that you have promised to be absolutely honest, and never leave anything out because, for some reason or other, it is unpleasant to tell it... It is naturally impossible to carry out analysis if the patient's relations with other people and his thoughts about them are excluded..."*¹⁰

In my 2010 paper, I referred to a client whose speech was pre-emptively 'cork'-ed by the referral agency's stated policy of mandatory reporting. Modern clinical work is constrained by other reporting stipulations regarding criminality or suicidality in various organisations. If accepted without negotiation, such constraints limit the analyst's desire in the transference. To bracket the session with such policies curtails our desire to hear, to act, to be the Other for this subject.

The psychoanalytic act is assumed to give meaning, mobilise desire, point to a signifier, castrate jouissance. Disclosing the analysand's material in response to the demand of a third party external to the dyad, if mandatory, cannot be an *act*. *It cannot unequivocally represent desire*. Instead, there may be an interpretation to be made as to the resistance of the analyst who discloses, rather than hear from the analytic position. The opportunity to interpret the resistance of the analysand to freely disclose such material and to explore his position in the fantasy relation is limited, if not utterly lost.

The 2002 Irish SAVI Report¹¹, in discussing the incidence of historical sexual violence among psychiatric patients, noted that questions regarding sexual history are not routinely asked. It speculated that such discretion may be due, in part, to the requirement in certain organisations for mandatory

¹⁰ Freud, S. (1913). On Beginning the Treatment (Further Recommendations on the Technique of Psycho-Analysis I), pp133-134.

¹¹ SAVI Report, 2002, H. McGee, R. Garavan, M. de Barra, J. Byrne and R. Conroy, RCSI, Liffey Press in association with Dublin Rape Crisis Centre

reporting of such incidents. It also referred to a 'professional discomfort' with the topic of sexual violence. Psychoanalysis, as Freud practised it, is a discipline whose discourse is associated with what is sexual, traumatic. We hear that which is frequently inarticulable in other settings.

Above all, this is a discourse which concerns the subject's fantasy relation and drive object. The subject's relation to his object and the Other in his fantasy is not a matter for moral judgement; it is not diagnostic but *structural*. In the case of historical reporting of abuse cases, the issue of what is 'fantasy' and what is 'reality' for the analysand may be extremely difficult to judge. In the narrative truth of the paranoid subject, in the neurotic's infantile regression, what is at stake is always their fantasy and where the drive cannot be signified it must present in traumatic jouissance. To prohibit the articulation of a subject's fantasies is to prohibit the castration of jouissance and to deny the relief of the signifier may compel a symptomatic repetition, an acting out or even a passage à l'acte.

It is imperative that the analyst not collude with the analysand in his fantasy, becoming what Zachrisson calls 'a co-actor in the drama the patient enacts'¹². When one of the dyad acts out of reparation or retribution, this is colluding in the fantasy. It is critical that mandatory reporting not result in the implication of the analyst in the subject's fantasy, or the exploitation of the analysand's situation to satisfy a fantasy of the analyst¹³. The analysand may be unaware of his unconscious motives for disclosing abuse or ideation that must be reported to a third party but the analyst must be so aware. Acting ethically is a choice made in the particular context of this subject, not at a global level.

If mandatory reporting is not negotiated with the analysand, becoming part of the analytic discourse, perhaps discovering new signifiers along the way, then the analyst is reduced to the position of a ferocious Superego, representing a finite Knowledge. If the analyst satisfies the demand of, what Lacan called in 'Television', a 'you who's not already in the transference' then the analyst's desire must be called into question.

The phrase 'already in the transference' points to what might be one solution to the ethical dilemma posed by '*mandatory*' reporting, proposing a reporting that might better be called 'responsible', one that emerges from within the session. For Ferenczi, his analysands responded well to his offer to work with them in an 'honest endeavour':

¹² Zachrisson, A., Countertransference and changes in the conception of the psychoanalytic relationship, *International Forum of Psychoanalysis*. 2009; 18: 177-188

¹³ *Ibid.*

'Something had been left unsaid in the relation between physician and patient, something insincere, and its frank discussion freed, so to speak, the tongue-tied patient...'

If the disclosure can be made while obeying the Fundamental Rule and then the decision to report negotiated within the transference, then its subsequent revelation beyond the boundaries of the session may prove ethical and have symbolic signification. If not, then reporting only subverts the therapeutic alliance, re-traumatising the subject.

In summary, to act psychoanalytically, and above all to act ethically, free association is essential. It is essential to our ethical practice, to our own psychological well-being and to the subject on the couch, that he may speak according to Freud's Fundamental Rule. What is mandatory in the analytic session is true speech, full speech.

The mandatory reporting dilemma is situated at the intersection of the psychoanalytic clinic and the gaze of the Big Other as Superego, as malevolent master. It may be psychopathogenic to those already victimised and deter others from attending for treatment. In imposing a Truth whose points of reference are exterior to those of the analytic dyad, it is contrary to the established purpose of that dyad - to elicit a truth particular to each subject. If the analyst has to abandon his position of Subject-supposed-to-know and act as the One-Who-Does-Know, then I do not believe that we can continue to call our work psychoanalysis.

This article is not an attempt to deny or denigrate the dreadful experiences disclosed on the part of generations of abused children and adults over the past few years. Each of those one in four who will be sexually abused before the age of 18¹⁴ are subjects, not statistics. I regret that the hitherto fragmentary response of the State and institutions to the revelations of historical and current abuse has only resulted in further infantilisation and disintegration of these subjects. However, the current widespread appeal in various sections of the media for mandatory reporting and any other universal panacea to human suffering has radical implications for a practice based upon the split subject.

¹⁴ Finkelhor, D. (1994). Current information on the scope and nature of child sexual abuse. The future of children: Sexual abuse of children. The David and Lucile Packard Foundation, Los Altos, CA. Vol. 4, No. 2, 31-53.