Two

THE QUESTIONABLE CONTRIBUTION OF PSYCHOTHERAPEUTIC AND PSYCHOANALYTIC RECORDS TO THE TRUTH-SEEKING PROCESS

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"As Sherlock Homes remarked on more than one occasion, evidence which seems to point unerringly in one direction, may, in fact, if viewed from a slightly altered perspective, admit of precisely the opposite interpretation."

(Meyer, 1974, p. 6)

1. The Cross-Purpose of Cross-Examination of Psychotherapy Evidence

In court, a witness is sworn to "tell the truth, the whole truth and nothing but the truth". What the psychoanalyst asks of patients is radically different, that is, to suspend their rational, moral, or social inhibitions so as to say whatever comes to mind, be it true or false, silly or serious, lurid, or laudable. Within the limits of the therapeutic hour, we promote irresponsibility in speech, the very opposite of what is exhorted on the witness stand. Patients are encouraged to engage in experimental thought and to postpone critical judgment. By this stratagem, the murky and poorly understood parts of our inner life eventually find expression in words allowing them to be contended with.

To delimit my analysis of the contribution of psychotherapeutic and psychoanalytic records to the law's truth-seeking process, I must revisit and insist upon the crucial distinction between expertise and the treatment situation. I see no valid reason why the courts should want to deprive themselves of a prudent and informed awareness of current cognitive and neuropsychological findings by calling upon expert witnesses who have no ongoing professional relationship to the parties before the bench. However, it is a different matter altogether for the court to seek evidence from the psychotherapeutic or psychoanalytic treatment relationship because of the nature of the emotional/psychological bond between therapist and patient. What makes material from "dynamic" forms of psychotherapy of questionable value to the courts are the very same elements that account for its sensitivity to disruption from outside forces.

One way to convey to non-psychotherapists the problematic value of psychotherapy records in the truth-seeking process is by dissecting an actual

court case. I will take as an example the Supreme Court decision of *R. v. Osolin* [1993] in which a rape conviction was overturned by the appellate court because the trial judge had denied the accused an opportunity for cross-examination of the alleged victim regarding a remark her psychiatrist had noted in her dossier. The seventeen-year old had been under psychiatric treatment for depression and anxiety. "She is concerned that her attitude and behavior may have influenced the man to some extent and is having second thoughts about the entire case" (*R. v. Osolin* [1993], p. 661).

It is fascinating to note that although the court acknowledged the potentially misleading impact of this material, nonetheless, relevance was more or less taken for granted. Without access to the tool of cross-examination, the court reasoned, it was impossible "to determine whether there was evidence to support a defense of honest but mistaken belief [in consent] or evidence to support an allegation of fabrication" (*R. v. Osolin* [1993], p. 601).

Unfortunately, established legal avenues for determining relevance and probative value are unsuitable when applied to psychotherapeutic or psychoanalytic documents. The yield is bound to be misleading, unreliable, and prejudicial. The error is akin to one of de-contextualization, of lack of appreciation of the nature of the therapeutic relationship from which the information has been culled. In the *Osolin* decision, the court was quite willing to acknowledge the complainant's interests in privacy with her psychiatrist, as well as recognizing that she could be re-traumatized if forced into a cross-examination of remarks made in the context of her psychotherapy. However, in doing so the court was really only acknowledging the sensitive nature of the subject matter rather than appreciating the uniqueness of her rapport with a psychiatrist. Similar sensitive information could just as easily have been revealed in the secrecy of a personal diary or in confidence to a trusted friend. What the court does not fully comprehend is that when such a statement occurs within a psychotherapeutic relationship, our capacity to investigate it outside of the treatment situation is radically curtailed. The quantum leap has to do with the special nature of the psychotherapeutic interaction and the regressive emotional patterns and fantasies which surface within it.

When the aim of a professional relationship is self-knowledge and personal growth, as is the case in most forms of dynamic psychotherapy, a series of special considerations must guide the outsider's appreciation of confidentiality. These elements characterize the founding principles in psychoanalytic treatment, and, to a greater or lesser extent, other forms of psychotherapy and counseling.

2. Aspects of Psychotherapeutic and Psychoanalytic Treatment which Militate Against the Truth-Seeking Process of the Court

A. Division in the Patient-Subject: Who is Speaking to Whom?

It is well known that psychoanalysis presupposes that human beings are divided from parts of their own psychic life by internal repressive forces. No person finds it easy to accept awareness of parts of self that do not coincide with personal or social ideals. These parts may be leftovers from earlier experiences in which unwanted identifications have taken place with negative adult models or they may derive from unconscious compliance with parental expectations. Though the adult subject may explicitly disavow them, these split-off parts of self continue to influence attitudes and behavior

When a patient says something in therapy, the therapist must be curious about whom, in the internal psychological sense, he or she is actually speaking and to whom, as an unconsciously targeted listener, the statement is being made. Is it a child confessing to a parent? Is it a little boy trying to hit back at a primitive and persecutory mother figure? The patient may not be fully aware of the hidden reverberations, present and past, of interactions with the therapist. The adolescent complainant in the *Osolin* trial had been having a lot of difficulties with her parents in the months prior to her turbulent encounter with the defendant. We can wonder what aspects of her conflicts over sex and authority were triggered in her psychotherapy whenever references to the alleged traumatic events came up.

Psychotherapists are trained to listen for unacknowledged turmoil in the human heart and to realize that more often than not patients are speaking to them with richly forked tongues—that is addressing them as unconscious stand-ins for other significant individuals in the patient's current life or history. In fact, the bread-and-butter, as it were, of therapeutic work counts on the ambiguity of address in speech, an ambiguity that exists in non-therapeutic situations as well but which is fostered and deepened by the particular framework of the psychoanalytic situation. It is unwise of courts to wade into this marshy territory of latent meaning in efforts to second-guess the credibility or memory of witnesses. For instance, whether or not a man was browbeaten by his mother should not alter the court's assessment of the factual question of his having committed rape. Yet such a history, perhaps forgotten or denied, might be an important topic in psychotherapy as a crucial element undermining his interactions with women. If, for the sake of argument and as a fictitious example, we imagine him as having confided to his psychiatrist that the woman was "forcing him to have sex with her," cross-examination on such a remark (and the family history behind it) would only muddle all our traditional and necessary assumptions about legal responsibility and free action.

B. Transference and Counter-Transference: The "Relativity" of Meaning

In psychotherapy and psychoanalysis, speech is not a simple descriptive communication. Speech is understood as communication related to the wish by one human being to be recognized and validated by another. Speech is not just about something. It is *addressed to someone* about something. We referred earlier to parallel psychological processes which "double" or "shadow" the professional encounter with conscious and unconscious personal meaning. These meanings may derive from earlier relationships or present-day fantasies of the patient and, we must underline this, they are activated on both sides of the professional relationship. Typically, they are not integrated by the conscious self, and are often repudiated. Technically, they are known as "transferences" when they occur in the patient and "counter-transferences" when they occur in the doctor or analyst.

The most important difference between the medical and psychotherapeutic relationship lies in the way these transference and counter-transference processes are handled. In the doctor-patient relationship, transference may play a secondary role of some importance, but outside of the controversial placebo effect, it has no recognized medical involvement. The diagnosis and treatment of organic pathology requires no exploration of the relationship between doctor and patient and is normally conducted without reference to the meaning, for the patient or the doctor, of the patient's symptoms or the therapeutic relationship itself.

In sharp contrast, psychotherapeutic treatment largely consists of attention to transference and counter-transference phenomena. The invitation to identify and put into words the experience of transference feelings and behaviors brings old or chronic conflicts into the therapist's office. In this way, psychotherapy avoids becoming a purely intellectual exercise. One of the distinguishing features of psychoanalytic and dynamic therapies is this mobilization and exploration of traumatic patterns within the therapeutic relationship.

It is common nowadays for analysts to conceive of treatment as a "two-person" process. Subtle interpersonal pressures brought to bear by the personality and subjectivity of the healer must be taken into consideration in assessing the patient's behavior in the consulting room. Working from an independent paradigm, the philosopher Ian Hacking has referred to this inter-subjective dialectic as a "looping effect" specific to human beings by which they react to and integrate, in more or less conscious ways, what is mirrored back to them from others (Hacking, 1999, p. 34). In fact, contemporary cognitive science research converges with psychoanalysis in the view that all human memory is a dynamic retrospective narrative constantly being rearranged according to categories which are shaped in part by interpersonal forces in the present (Schacter, 1996). Human beings are not indifferent to the feedback they get from

others and can, in some cases, adjust their self-image instantaneously and unconsciously.

> I do suggest that a cardinal difference between the traditional natural and social sciences is that the classifications employed in the natural sciences are indifferent kinds, while those employed in the social sciences are mostly interactive kinds. The targets of the natural sciences are stationary. Because of looping effects the targets of the social sciences are on the move (Hacking, 1999, p. 108).

Mutual suggestion, conscious and unconscious, between patient and therapist is an unavoidable and completely necessary part of the work they do together. It follows that the therapist is always, inevitably, and necessarily, a stimulating factor, a contaminant, in treatment. The whole nightmare of false allegations of sexual abuse based on memories recovered in therapy illustrates both how this can happen and why this material should never be exported outside of the treatment situation. As with other ideas, defenses against memory arise because of the current meanings of those memories. For contemporary analysts, it is as important to ask what role a reported memory or feeling plays in the current interaction of analyst and patient as it is to puzzle out its impact on the person's development.

To illustrate the point, let us imagine, among other possibilities, one scenario between the *Osolin* complainant and her psychiatrist. The complainant's remark to her psychiatrist in the *Osolin* trial might plausibly have been unconsciously determined by transference feelings towards her psychiatrist who was male, an authority figure, and perhaps a paternal substitute. In voicing her doubts about the trial, the victim could have been simultaneously expressing, and displacing onto the male therapist, similar feelings about her father, perhaps wishing to placate the latter or please him by appearing to exculpate her alleged assailant. However, such unconscious attitudes would not be accessible to direct questioning, and no amount of cross-examination could hope to elucidate them without in the process setting up another spiral of expectation and submission on the part of the witness. It is only within the special parameters of the treatment setting, in a private relationship of one-on-one, that such underlying attitudes can be teased out in a subjectively convincing fashion. The stance of "benevolent neutrality" and relative "anonymity" of the psychoanalytic practitioner constitutes a prime technical device for the observation of the patient's personal, historically determined, "looping process" and for the arrest of further spirals of this inter-subjective process. Since clinical material is inextricably welded to the interpersonal dynamic activated in treatment, it is quite simply fallacious to consider it pertinent to the fact-finding task of the court.

During oral argument of the *Jaffee v. Redmond* case, Justice David Souter

pointed out how untenable the usual distinctions between objective and subjective are when sought-for evidence derives from psychotherapy or psychoanalysis. "What if a patient says [to the psychotherapist], 'I feel bad about killing someone.' Is that a statement of fact or feeling?" Justice Souter asked the plaintiff's lawyer.[1] Impossible in the legal setting for Justice Souter to have asked is the very question the psychotherapist or psychoanalyst must ponder in her consulting room: "And to whom (really) was the patient expressing this 'bad' feeling?"

C. Therapy as a Thought Experiment or Deliberative Process

The human being is the only animal that cannot function effectively and authentically without a personal theory of his or her existence and mind, a personal theory repetitively jostled by the fortunes and misfortunes of a lifetime. In order to allow our patients to delve into themselves, to critically examine their hopes and fears, their memories and their identities, we ask them—*for the time of the psychotherapeutic or psychoanalytic session*—to suspend conventional, learned, and expected ways of speaking, and to voice whatever comes into mind without censorship. It is only in this way that previously disowned ideas, prejudices, and impulses can break the surface of the stable self-narratives with which patients enter treatment. The object is not just to permit the patient to unburden him- or herself of socially unacceptable thoughts, whether it be, for example, that of a man's wish to violently possess a woman, or a woman's wish to be violently possessed. The object is also to permit for the first time a space and a time for thinking these thoughts out loud and exploring their significance and signification for self-concept and self-esteem.

These thoughts, it must be pointed out for the reasons given above, are not necessarily taken at face value by the therapist. In fact, it is assumed that there are latent meanings that will only emerge in the uncensored, neutrally empathetic, atmosphere encouraged in the treatment. When we speak about a *transitional space* (Winnicott, 1978), we mean that in the treatment session, a cigar does not necessarily mean a cigar, and that the wish to murder someone might paradoxically express feelings of impotence, depressive despair, or a wish for magical possession, to name just a few of the possibilities.

Defense lawyers and some judges are perfectly willing to grant the subjective and unreliable nature of communication in psychotherapy. They merely insist upon the right to use acceptable legal methods to tease out the relevant nuggets of fact suitable for the court. The tentative, experimental, nature of patients' communications within the emotional lines of force of an intense rapport with a psychotherapist is simply not grasped. In the Supreme Court's *Osolin* decision, Judge Cory expressed it this way:

> what the complainant said to her counselor ... could well reflect a victim's unfortunate and unwarranted feelings of guilt and shame for actions and events that were in no way her fault. If this is indeed the basis for her statement to the counselor, then they could not in any way lend an air of reality to the accused's proposed defense of mistaken belief in the complainant's consent. However, in the absence of cross-examination it is impossible to know what the result might have been (*R. v. Osolin* [1993], p. 525).

Following common law method, the proper thing to do, as asserted by the Canadian Council of Criminal Defence Lawyers' (CCCDL) factum in another sexual assault case, is to "put the statement to the witness so that its significance can be tested in a meaningful fashion" (Response of the Intervener of The Canadian Council of Criminal Defence Lawyers (CCCDL) to the Factum of the Intervener Canadian Psychiatric Association, *R. v. Mills* [1999], point 11). The CCCDL added, "As always, an actual, contextual, examination is preferable in the search for the truth" (point 12). What these advocates for relevance have failed to realize is that a mutually suggestive interpersonal field is a technical necessity in treatment and that it is this real "context" that should militate for its exclusion from searches for legal truth. One can only wonder if in large part their miscomprehension stems from the failure of mental health professionals to undertake a sustained campaign to explain our work to other disciplines.

Contrasting metaphors come to mind which illustrate differences in understanding. The CCCDL's perspective invokes the ancient task of threshing in which wheat is separated from chaff. The patient's doubts, fantasies, and rehashing of the alleged events, as expressed in psychotherapy sessions, are tossed into the cross-examination threshing machine, in the mistaken belief that judge and jury can pick out kernels of wheat-truth without denaturing the healing relationship. A metaphor more respectful of the psychoanalytic point of view is a special-effects image from the film, *The Abyss*. On the ocean floor, a stranded group of deep-sea oceanographers experience close encounters with other worldly beings who take shape from the water itself. At once astonishing, enchanting and eerie, humanoid faces gracefully coalesce, solidify, glide about, and then dissipate in the ambient water. This film image is more faithful to the delicate inter-subjective tissue of the psychotherapeutic dialogue than that of the robust thresher. The alien, other worldly faces are inherent in the water just as the patient's words are inherent, immanent, in the "other-dimension" emotional dynamic of the treatment relationship and cannot be teased apart in the outside world of the courtroom. Peter Brooks' conclusions on, as he puts it, the "difficulties of passing confessional discourse of the psychotherapeutic sort through the eye of the legal needle" (Brooks, 2000, p. 129) are entirely consistent with mine. For instance, commenting on the use, in court, of evidence of

recovered memory in therapy, he avers: "The problem I detect here is the court's bland assertion that memory, as a concept, can be separated from its content, and that judgment of that content—its credibility--can go forward without establishment of the validity of the memory as recall. There appears to be here a collision of psychotherapeutic and legal understandings" (Brooks, 2000, p. 123).

A legal avenue already exists which appears to dovetail with many of the arguments advanced in this paper and that thus might be extended to encompass a strong protection for the psychotherapeutic and psychoanalytic relationship. The reasoning behind what is known as the privilege of the deliberative process (Morissette, 1994) has the potential of providing an entirely appropriate legal shield. To my knowledge, it has never been asserted in this fashion. Covered by this privilege are cabinet meetings, certain phases of labor arbitration and mediation proceedings, and judges' personal trial notes. This concept has the heuristic value of offering an alternative platform to other utilitarian-based professional privileges that assert confidentiality as a basis of client "trust." The deliberative process privilege offers a separate ground of public interest: that of sheltering a creative trial-and-error speech or thought in certain professional relationships. Confidentiality of the psychoanalytic or psychotherapeutic relationship would thus join the specific areas demarcated by common law where frank discussion, experimental thinking, and speculation can occur without the risk of disclosure or repetition out of context. It should be emphasized that traditional applications of the deliberative process all relate to governance or to the legal system itself. Yet we may ask, is there any logical, moral, or philosophical impediment preventing the extension of this privilege to the self-and-other deliberative function of psychotherapy?

D. The Neutrality of the Therapist

In scientific studies, double blinds and random assignment are designed to limit the influence on results of both experimenter bias and subject expectation. A plethora of research in a number of inter-related fields has amply demonstrated the need to control for powerful suggestive forces. It should surprise no one then to learn that the presence of external pressures, such as parental or spousal wishes for the patient to behave in a certain way or work-related deadlines or financial compensation that is linked to disability status can seriously obstruct the spirit of open self-inquiry which is essential in meaningful treatment. In order for psychoanalytic therapy to work properly, the therapist must not ally with one part of his patient's mind, with a specific expectation or basic assumption, against other parts of it.

Even in psychotherapy with sexual assault victims, a psychotherapist should avoid pronouncing for or against recourse to the courts, for or against any

particular aspect of the victim's "story," in order to hear in more depth about the subjective repercussion of the assault in the context of other relationships and experiences. If the psychiatrist in *Osolin* had testified before the court about his patient's doubts about the trial or if he had allowed his dossier to be handed over to the court as evidence, he might well have been reinforcing self-punitive and authority-pleasing aspects of his patient's personality. Having a conscience is not always an indication of personal maturity and independence. In fact, it can be just the opposite, acting as an internal slave driver, harsh and primitive, in its evaluation of good and evil.

Not only would any co-operation by the treating psychiatrist in *Osolin* with the court's use of his work as evidence have automatically forfeited his neutrality vis-à-vis his patient's internal conflicts, he would have been simultaneously altering his status as an object of transference. The knowledge that patients attribute to their psychotherapists, in contrast to other medical and academic disciplines, should remain for the most part virtual, a much needed fantasy on the part of the patient that justifies and strengthens his or her optimal trust and capacity to "let go." When, however, the analyst or therapist is requested to share his or her "observations" of the patient in court, this imaginary differential is suddenly transformed into a very concrete legal reality. Though the law may differentiate witnesses of fact from expert witnesses, such niceties are lost on the patient for whom any public utterance about his or her psychological condition is necessarily heard as an expression of the therapist's "expert" perspective. Whether what the patient hears confirms or shatters the previous perception of the therapist makes little difference insofar as either occurrence can be expected to disrupt the natural course of their relationship.

Since most patients begin treatment expecting their therapists to act as expert witnesses to their lives, it can appear a small step for them to consent to the subpoenaing of their therapists. Patients often beg their therapists to tell them what to do, to make pronouncements about their personalities, to take sides in their disputes. They often ask their therapists to tell them if a memory actually happened or if they have done the right thing or made the correct choice. It is part of the therapeutic process for the therapist to sidestep these requests until he or she can offer insight into the internal forces underlying the patient's indecisiveness. An analogy with certain principles in particle physics is possible. Just as any attempt to measure the position of the electron alters the indeterminacy of its path, so too will any attempt to "measure" the evidentiary value of psychotherapy material alter the quality of that relationship. And just as light behaves as a wave until, encountering an obstacle, it displays particle-like properties, so too does the nature of the psychotherapy relationship, when drawn into considerations extraneous to therapy, mutate from an enterprise of self-knowledge to an adversarial agenda with respect to the outside world. The professional ethic must be, claims Allen Dyer, "defined by the needs of those

who come for help, not by the rival interests of society" (Dyer, 1988, p. 12). In a dispute with the provincial government over the quality of care patients receive in emergency rooms, Dr. André Green, spokesperson for the *Quebec College of Physicians and Surgeons,* made a similar distinction: "By tradition and history in countries around the world, our code of ethics makes a doctor responsible to his patient, not to the people" (quoted in the *Montreal Gazette*, 25 July 2002, p. A-4).

3. The Truth-Seeking Process

I hope that you can now appreciate why the usual justifications for accessing psychotherapeutic material as evidence betray a lack of comprehension of the therapeutic process. The most common reasons for requesting disclosure are based either on this misapprehension or on the following questionable assertions related to it.

(1) To avoid the conviction of innocent people. There is to my knowledge no empirical evidence justifying such a fear. Known cases of wrongful conviction have occurred for reasons other than lack of access to confidential psychotherapy files. The three main causes in cases of wrongful convictions have been: mistaken eyewitness identification, improper police interrogation, and sloppy investigative work (Dwyer, Neufeld & Scheck, 2000). While no one should make light of the need to safeguard against the jailing of innocent persons, this risk must be empirically confirmed rather than merely asserted. In my limited reading, I have come across only one criminal case in which access to confidential psychiatric records—though pertaining to a hospitalization not to a psychotherapy—avoided a wrongful conviction (*R. v. Kliman* [1994]). On the other hand, there are many documented cases, such as those involving memories of sexual abuse recovered in therapy (see for example *Ramona v. Ramona* [1994], and *Johnston* [1997]), in which evidence from psychotherapy led astray the truth-seeking process.

(2) To seek an alternate version of the alleged events. The court is trying to have its cake and eat it too. Any discussion about the likely relevance of this material sidesteps the crucial question from the therapeutic point of view; that irrespective of mental status, mental illness, or specific diagnosis, psychotherapy and psychoanalysis encourage patients to "think" about their lives. A basic premise of our legal system is the expectation that citizens behave responsibly and that they assume responsibility for their actions. The irony of the *Osolin* case is that whereas the alleged assailant admitted several times during proceedings

that, "I just wasn't thinking" as the events unfolded which culminated in his sexual encounter with the complainant, his conviction was overturned by the Supreme Court so that the "thinking" of the complainant to her psychiatrist could be cross-examined. Surely, it is unreasonable of courts to delve into the very private space where a witness (or a defendant for that matter) can examine her or his own conscience and motives, a necessary prelude to taking "responsibility" for her or his role in the affair? In the dissent he penned in the United States Supreme Court decision of *Jaffee v. Redmond* ([1996], p. 3 of Scalia dissent), Justice Antonin Scalia wondered why the law should allow a witness protection when confessing a crime to a therapist and not when confessing a crime to his or her mother. Scalia too misses the fundamental difference between speaking to a professional therapist and speaking to a family member or friend. Speech in the former relationship aims not only to obtain relief in a confessional catharsis of painful secrets but also, and more importantly, to bring about a change in the patient, a psychic change, through the process of thinking about self and others without external or self-censorship.

(3) To establish the credibility of a witness or to have information on his or her mental status at the time of the event or of the complaint. This apparently rational assertion of grounds for likely relevance also loses solidity when deconstructed with respect to a true appreciation of the psychotherapeutic process. If, for the sake of argument, an alleged victim in a sexual assault trial has begun proceedings with a deliberate falsehood, she is far more liable to eventually deliver reliable testimony if the privacy of her psychotherapy remains respected. In her psychotherapy, she will have the freedom to question her motives, as well as the freedom to investigate their emotional roots, and to hear her therapist's interpretations of them. Moreover, if she believes herself to be telling the truth, an undisrupted psychotherapeutic relationship will counteract the traumatic impact of testifying before the court and by virtue of the benefit of a confidential unburdening of her doubts, fears, and misgivings, strengthen the reliability of her court testimony. Neither patient nor psychotherapist can be expected to sustain an unbiased examination of emotional and imaginary features connected with the events in question or, for that matter, with the decision to initiate and continue court proceedings, if their work together will become, or might become, subject to an eventual review (even in *huit clos*) by that court or by the opposing party and legal representation.

(4) To determine whether the therapeutic relationship has been a factor in the complaint. Even if a complainant's allegations might have been consciously or unconsciously influenced by the therapeutic interaction, it remains prudent for courts to base their decision on other sources of evidence so as to leave patient and therapist to work this out in the therapy. It is an ironic sequel to the recovered memory debate that requests for production of psychotherapy files before the courts are increasingly couched in the need to assess whether treatment has contaminated complainants' allegations. On the contrary, it is precisely because of the inherently and necessarily affect-laden quality of these relationships that they should be carefully excluded from the legal arena, and this is true whether requests come from the Crown or the defense. As argued earlier, the court's assumption that it possesses truth-finding techniques that can be legitimately applied to the psychotherapeutic interaction is erroneous. Unless there is good reason to doubt the competency of the mental health professional involved, the court must acknowledge the limitations of its methodology by "leaving unto Caesar that which is Caesar's," and confining its investigation to evidence drawn from outside this relationship.

(5) Because the sheer number of decisions in which psychotherapy evidence has been produced supports their potential relevance. There is little doubt that mental health professionals are partially responsible for the increase in records production, as they have sometimes allowed themselves to be drawn into an active form of "helping" under pressure from their patients, as well as from the pressure of their own wishes to be useful in furthering their patient's presumed best interests. It is, nevertheless, misguided for psychotherapists to become patient advocates before the courts. Increasingly, experts have argued for the complete exclusion of the treating psychotherapist from court proceedings (Shuman, Greenberg, Heibrun & Foote, 1998).

In summary, witness credibility, in the overwhelming majority of cases, can only be enhanced by the protection of the psychotherapeutic relationship.

The former president of the Law Commission of Canada, Roderick Macdonald, has asked "[h]ow willing are we to jettison the beliefs that the state has a monopoly on law-making and that courts are indispensable to solving human conflict?" (Macdonald, 1999, p. 5). The legal profession has failed to notice that safeguarded psychotherapeutic relationships constitute multiple, miniature, sites favoring what Macdonald has called a "more just living law" (Macdonald, 1999, p.5). Psychotherapy certainly counts among the institutions of civil society that "are better attuned to preventative law and to transformative

justice than are courts" (Macdonald, 1999, p. 6, note 9). Revisited and revamped within the confines of these specialized therapeutic relationships, in the space and time of their individual needs, a more authentic, personal, and diversified response can be anticipated from citizens interacting with official legal bodies.

4. Privilege and Admissibility

If courts continue to insist on basing their determinations of access to psychotherapeutic documents on the grounds of relevance, psychotherapists will be facing an impossibly slippery slope. Given what the court requires, it is logically impossible to refute the "likely" relevance of this material. If we were to exclude from the therapeutic consulting room discussions about the dramatic, conflicted, and often traumatic events prompting claims before the court, psychotherapy would become a meaningless exercise. Justice Doherty came to a similar finding in the Ontario Court of Appeal hearing of *R. v. Batte*:

> If the likely relevance bar is that low, it serves no purpose where the records relate to counseling or treatment connected to allegations of sexual abuse. It is impossible to imagine that such records would not contain references to the alleged abuse or matters that could affect the credibility of the complainants' allegation of abuse. ...[T]he mere fact that a complainant has spoken to a counselor or doctor about the abuse or matters touching on the abuse does not make a record of those conversations likely relevant to a fact in issue or to a complainant's credibility (*R. v. Batte* [2000], p. 449, para. 71).

In my opinion, we are lead to the conclusion that determinations must be made, not on assessments of likely relevance, but rather on the intertwined and double grounds: 1) of inadmissibility as evidence because of the potential for leading astray the court's search for truth and, 2) on the grounds of privilege as a protection for the integrity of the therapeutic endeavor.

Justice L'Heureux-Dubé has reminded us of the contrast between privilege and other rules of exclusion:

> It is important to remember that the rationale underlying resort to privilege and privacy rights is diametrically opposed to that underlying most ordinary evidentiary rules of exclusion. Privilege and privacy interests would exclude evidence despite the fact that such evidence might further the truth-seeking process. On the other hand, ordinary rules of exclusion are generally motivated by the desire to further the truth-seeking process, in that they tend to exclude evidence which might be unreliable, which might

mislead or prejudice the trier of fact, or which might otherwise prejudice the fairness of the trial (*R. v. O'Connor* [1995], p. 170, para. 147).

I hope I have succeeded in communicating the wisdom of excluding evidence from psychotherapy or psychoanalysis *on both of these usually oppositely affirmed grounds.* In the first place, regardless of any potential usefulness to the courts, this "evidence" should be excluded on the basis of privilege in order to protect the integrity of the professional relationship of psychotherapy or psychoanalysis. In the second place, this "evidence" should be just as vigorously excluded as inadmissible because of its enormous potential for leading astray the pursuit of justice. Cross-examination for "probative value" of phrases, ideas, or perceptions exported from a psychotherapy relationship is like poring over the entrails of a bullock for guidance in major decisions. Not only is the estimate of dubious scientific value, but the poor bullock is an appropriate parallel for the evisceration of the therapeutic relationship as this prognostication is taking place! Moreover, it can be said that the contents of entrails (read evidence culled from psychotherapy) are more instructive of the bullock's relationship with the human who was responsible for his last meal (read the patient's relationship with the psychotherapist) than of the unknowable future.

The legal profession has acknowledged the need for fundamental principles that could inform judicial determination about requests for access to confidential documents. In the last decade, the Supreme Court of Canada has made several attempts at agreeing on such a set of principles, the most recent example is *R. v. Mills* [1999]. In determining whether to order disclosure of the records by the person in possession of them, the judge must now consider the factors set out in section 278.5(2) of the *Criminal Code*, and confirmed in *R. v. Mills* [1999], which read as follows:

> (*a*) the extent to which the record is necessary for the accused to make a full answer and defence;
> (*b*) the probative value of the record;
> (*c*) the nature and extent of the reasonable expectation of privacy with respect to the record;
> (*d*) whether production of the record is based on a discriminatory belief or bias;
> (*e*) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
> (*f*) society's interest in encouraging the reporting of sexual offences;
> (*g*) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
> (*h*) the effect of the determination on the integrity of the trial process.

To allow for a separate assessment of confidentiality issues on its own specific grounds, I would propose two additional factors to the eight already enunciated above, which the judge should take into account:

> i) *the effect of the determination on the integrity of the professional relationship and on the quality (the deliberative process) of treatment,*
> j) *whether the information available in the files, or from the therapist, would be prejudicial or misleading when exported outside that professional relationship.*

The guidelines in *Mills* allow an intensive analysis of privacy interests in sexual assault cases. Whereas privacy is a factor contributing to the integrity of the individual, I have tried to show how confidentiality of the professional relationship, among other things, reinforces the integrity of treatment.

5. Conclusion

Evidence based on material drawn from psychotherapeutic treatment situations has a high potential for leading astray the court's search for truth and justice. This assertion applies specifically to psychotherapy and psychoanalysis understood as treatments by which individual healing and self-understanding are found within specialized professional relationships of completely uncensored speech. A "self-deliberative" process is set in motion in these circumstances by which the troubled person can review his or her life in a spirit of open-ended inquiry without distortion or pressure from outside interests. The common motives for production requests must be critically examined in light of the inevitable distortion that occurs when clinical material is taken out of context. It is argued that witness credibility will be enhanced by the protection of the psychotherapeutic relationship where self-doubts, exaggerated urges for vengeance, possibly distorted perceptions, conflicting memories, and so on can first be examined by the witness herself in a nonjudgmental and neutral atmosphere before the decision to seek redress is taken.

While capable of acknowledging the subjective and unreliable nature of communication in psychotherapy, defense lawyers and some judges, nevertheless, insist upon the right to use acceptable legal methods to tease out relevant facts. This emphasis on relevance belies appreciation of the tentative, experimental nature of patients' thoughts and speech and the inevitable coloring of this material by the emotional lines of force of the intense rapport with a psychotherapist. Advocates for relevance have failed to realize that a mutually suggestive interpersonal field is a technical necessity in treatment. The "self-deliberative" nature of this process cannot, therefore, remain internally unbiased and honest if threatened with the risk of becoming potential evidence before the courts.

We hold that integrity, not obligation, is the hallmark of psychotherapeutic and psychoanalytic work. As the British psychoanalyst, Anne Hayman, wrote some years ago, "In principle, there may be less conflict between our moral obligations to the law and the rules of professional conduct than would appear at first sight. Justice as well as our ethic, is likely to be served best by silence" (Hayman, 1965, p. 785).

Note

[1] Referred to by Barry Landau in "Confidentiality Considerations in Regard to 'Documentation of Psychotherapy' in the Light of the Supreme Court *Jaffee v. Redmond* Decision." Discussion at the American Psychiatric Association Meetings, Chicago, Thursday, 18 May 2000. Available on the American Psychoanalytic Association website: http://apsa.org/pubinfo/redmond.htm.

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