

Spying on Psychiatrists: Surreptitious Surveillance of the Forensic Psychiatric Examination by the Patient Himself

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Lawyers have argued that surveillance of the forensic psychiatric examination is often necessary to protect clients' rights and assure more accurate reporting of the findings. This paper reports a new phenomenon which adds a disconcerting dimension to the current controversy over surveillance of such examinations, namely, surreptitious recording by patient/examinees of their own forensic examination. Their motivations range from psychotic delusions to perceptions that they are acting to protect their legal interests. Neither legal nor ethical code prohibitions in any way serve to bar such conduct. Moral arguments for and against secret recording by patient /examinees are explored, and its relationship to other techniques used to monitor professional practices in the health fields (such as pseudopatient studies) is discussed.

In view of the preeminent importance of forensic psychiatric examinations in determining the ultimate outcome in certain legal proceedings, whether criminal or civil in nature, lawyers have argued that surveillance of such examinations is often necessary to protect clients' rights and assure more accurate reporting of the findings. In order to achieve such objectives, lawyers have contended

that surveillance of such examinations should be mandated and that they should be allowed to be physically present (as nonparticipant observers) or, alternatively, that audio or videorecording of the examination should be a minimal requirement.^{1,2} In response to these contentions, psychiatrists have expressed concern that the presence of lawyers or recording devices at forensic examinations might introduce contaminating factors which could impair the inherent validity of the examination itself. In a previous paper, Goldstein³ presented an overview of this subject, concluding that the current state of scientific knowledge

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on this issue does not allow us to assess confidently whether the perceived need for surveillance safeguards outweighs the possible cost in terms of interfering with the validity of forensic examinations in significant ways.

In this context, I would like to expand upon an earlier brief preliminary report of a new phenomenon of which all psychiatrists should be aware,⁴ which adds a novel and disconcerting dimension to this controversy; namely, surreptitious surveillance of the examination by the patient himself. The new electronic technology has reduced bugging devices to ultraminiature size. The dangers of *official* monitoring of private discourse, by wiretapping and electronic eavesdropping, are well recognized as undermining "that confidence and sense of security of dealing with one another that is characteristic of individual relationships between citizens in a free society."⁵ As Justice Douglas said:

if we are to live under a regime of wiretapping and other electronic surveillance. . . it is the greatest of all invasions of privacy. It places a government agent in the bedroom, in the business conference, in the social hour, in the lawyer's office—everywhere and anywhere a "bug" can be placed.⁶

As a consequence, certain safeguards and restrictions are constitutionally mandated when law enforcement agencies undertake electronic surveillance, such as requiring a judicially issued warrant as authorization.⁷ Likewise, certain safeguards and restrictions are in effect to protect both psychiatric patients and legal clients from surreptitious surveillance. The code of ethics of both professions absolutely prohibits surreptitious

taping of patients or clients without their knowledge and/or consent.^{8,9} However, neither legal sanctions nor ethical code restrictions in any way act to bar patients or examinees from surreptitiously recording their own psychiatric session. Generally, participant monitoring of a private conversation is not an illegal act, because it takes place with the consent of at least one party to the conversation. (The consent of *either* party is legally sufficient to legitimize monitoring. This is based on the tortured legal logic that because one does not have a justifiable or constitutionally protected expectation that the other party to a conversation will not later transcribe or reveal that conversation to others, it therefore matters little if the other party simultaneously tapes it.)*^{10,11}

This report presents two cases in which patients or examinees surreptitiously recorded their own forensic psychiatric examination.

Case 1

Ms. A, a 32-year-old woman, was arrested on federal charges of conspiracy to sell a controlled substance and obstruction of justice. Because of her past psychiatric history and present bizarre behavior, the court ordered a psychiatric

* Westin disagrees with this assumption, arguing that secret recording has a special character, unlike other forms of surveillance. Obtaining a *permanent* recording without the subject's knowledge is called "reproducibility." The subject now has to contend with a documented record which insures full and accurate memorialization of all that was said, free of error or oversight. This "gives the person who conducted the surveillance the power to reproduce, at will, the subject's speech or acts. All of the offhand comments, sarcastic remarks, indiscretions, partial observations. . . and many similar aspects of private intercourse are now capable of being 'turned on' by another for his own purposes."¹²

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examination to assess her competency to proceed to trial. At the time of the examination, Ms. A was out on bail. During the examination, she expressed paranoid delusions of a persecutory nature, indicating that she believed that the psychiatrist, the presiding judge, and her own lawyer were plotting against her. She accused the psychiatrist of being a Mafia informer who was determined to have her declared incompetent in order to "silence" her. During a hearing on the issue of her competency to stand trial, the defendant attempted to introduce into evidence a tape recording she had surreptitiously made during the psychiatric examination. She insisted that the tape would prove conclusively that the psychiatrist was conspiring against her. The tape was not admitted into evidence. She was found to be incompetent and remanded for psychiatric treatment. She received a diagnosis of paranoid schizophrenia. Subsequently, she improved and was returned to court. She was ultimately acquitted of the charges against her.⁴

Case 2

Mr. B, a 42-year-old salesman, was involved in an acrimonious custody dispute with his ex-wife. Each was seeking custody of their 10-year-old daughter. The court appointed an independent child psychiatrist to evaluate each of the parties and the child. After one or two sessions with the psychiatrist, Mr. B became convinced that she was inappropriately antagonistic and unprofessional in her attitude towards him. Fearing that her animus would result in unfavorable recommendations to the court, he de-

cidated to tape record the next two sessions with her, in order to document the tenor of the examination and protect his legal interests. During the custody trial, his lawyer attempted to introduce the tapes into evidence, in order to impeach the credibility of the child psychiatrist. The judge refused to admit the tapes into evidence, condemning the taping as "scurrilous" conduct that was tantamount to "entrapment." Mr. B. intends to appeal the court's decision to exclude the tapes from evidence, should he eventually lose the custody dispute.

Surreptitious Surveillance by Patient/Examinees: A Moral Analysis

Surreptitious surveillance by patient/examinees of their own psychiatric examination is not prohibited by either legal strictures or the precepts of a formal code of ethics. In this section, I will attempt to explore the moral arguments for and against secret recording by patient/examinees,[†] as well as discuss its relationship to other techniques used to monitor professional practices in the health fields (such as pseudopatient studies).

Society's concerns about the development and use of "menacing technological means for intruding upon privacy"¹³ and the pervasiveness of lying and deception in public and private life¹⁴ are reflected in a growing legal and philosophical literature.^{15, 16} Brandeis¹⁷ referred to privacy as "the right to be let alone—the most comprehensive of

[†] These comments may not necessarily apply to psychotic patients who may not be acting as free moral agents.

rights and the right most valued by civilized men." He warned almost 100 years ago that "numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house tops.'"¹⁸ Scanlon¹⁹ describes a system of social conventions that takes the form of a set of prohibitions defining a *zone of privacy*, immune from specified intrusions. He cites surveillance as the most obvious and central of these offensive intrusions:

our conventions of privacy are motivated by our interests in being free from specific offensive observations and, more generally, in having a well-defined zone within which we need not be on the alert against possible observations.

Bloustein¹³ views such intrusions on privacy as demeaning to individuality and an affront to personal dignity: "A man. . . whose conversation may be overheard at the will of another, is less of a man, has less human dignity, on that account."

Concerns about stripping the individual naked of all human dignity by exposing his private and intimate conversations to public scrutiny address only one side of the problem. Privacy has been a central assumption of man's social interaction since the dawn of civilization. Sociological analysis of the functions of privacy has delineated its central importance in terms of the individual's relations with others, in terms of communications in group settings, and situations of intimacy. Violation of these social norms and rules of social etiquette within a civilized society (by means of

surveillance) impairs many of the critical functions that privacy performs. Words would be carefully measured and communication inhibited and distorted if one always suspected that one's conversations were being transmitted and transcribed.⁵ When surveillance becomes a prevalent practice, it destroys the fabric of social trust. In this context, Bok¹⁴ states:

trust is a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged, the community as a whole suffers; and when it is destroyed, societies falter and collapse.

She equates deceit with violence, as two forms of deliberate assault on others. Deceit has a potential for coercion and destruction that breaks down psychological barriers and spreads, giving rise to practices that are very damaging to the community's foundations and institutions.¹⁴

Within this context, most spied-upon psychiatrists would claim that they have been assaulted in their private relationship with patient/examinees. They would regard surreptitious surveillance within the sanctity of their consulting room as a reprehensible invasion of privacy. Is this *assault* excused by some countervailing public policy or social interest? What are the conflicting values, if any, that must be weighed in the balance?

The forensic psychiatric examination evokes substantial elements of secondary gain and adversarial tension, as compared to other types of examination.^{‡3}

‡ "The examinee does not consult the psychiatrist with a therapeutic objective. No doctor-patient relationship

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Under these circumstances, in an age of "situational ethics," some patient/examinees may regard measures such as surreptitious surveillance as a form of justifiable self-help. Bok¹⁴ concedes that deception (like violence) can sometimes be used in self-defense, even for sheer survival. However, in view of the harm from deceptive practices already described, she argues for the clear moral superiority of nondeceptive methods. In this instance, if monitoring is deemed necessary or desirable, the psychiatrists ought to know they may be monitored and should be able to give or withhold their consent. In a related area, some social scientists have condoned deceptive experimentation on the basis that the knowledge gained thereby justifies the cost. Thus, for example, in pseudopatient studies (such as Rosenhan's classic experiment²⁰) psychiatrists were deliberately lied to, caught off guard, and their private relationships with patients invaded. Similar approaches have been used to monitor professional practices in the health field to protect consumer interests and to regulate compliance with the law. For example, pseudopatients have been used to investigate Medicaid fraud.¹⁴ The social interests that presumably justify such practices and override the moral concerns involved are the advancement of scientific knowledge and the exposing of suspected abuses and errors. Proponents of such studies assert that far from consti-

is established, and confidentiality does not apply. In reality, the psychiatrist is correctly perceived as an agent of the examinee's adversary, regardless of his or her impartiality."³

tuting an invasion of the doctors' privacy, professional practices ought to be open to public scrutiny. The public has a legitimate interest in these matters and monitoring may also result in greater honesty in future patient care, greater respect for patients, and enhanced protection for those at risk of being exploited. Bok disagrees, contending that in the final analysis, deception is not the only (or the best) way to achieve these objectives and that surreptitious practices (as compared to consented-to monitoring) are difficult to justify.¹⁴

In weighing these arguments pro and con, there does not appear to be a persuasive demonstration of moral entitlement on the part of patient/examinees who secretly record the psychiatric examination. Aside from purely moral considerations, such a practice raises difficult questions about the validity of such examinations. When only the patient/examinees are aware of the ongoing surveillance, to what extent does that interfere with the reliability of the examination in terms of possibly "setting up the psychiatrist" or playing to the microphone and "'pitching' their material to advance their causes"?²¹ Surreptitious surveillance complicates the difficulties that are already inherent in surveillance of such examinations even when undertaken on an open and consented-to basis.³

Conclusion

Surveillance of the forensic psychiatric examination is an issue of increasing importance in the courts now, with new cases continuously rising to the fore.^{22, 23}

This paper should serve to alert psychiatrists and put them on notice that patient/examinees themselves may, under certain circumstances, feel impelled to take matters one step further and surreptitiously record their own forensic psychiatric examination. Motives which range from psychotic concerns to reality-based perceptions of a need for self-protective measures may incite them to take matters into their own hands. Patient/examinees are not bound by law or ethical codes to refrain from such conduct. Although under certain circumstances patient/examinees may view such measures as justifiable self-help, it is difficult to support such conduct on moral grounds. Furthermore, surreptitious surveillance could impair the validity of such examinations. In this era of sophisticated electronic technology, patient/examinees who are wired-for-sound add a new and disconcerting dimension to the current controversy over the need for surveillance of forensic psychiatric examinations. This may become an increasingly familiar phenomenon in criminal cases, child custody disputes, and other areas of litigation (including cases of psychiatric malpractice).

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