

Unforeseen implications of regulation in clinical practice.

By: Melissa R. Floyd and Daniel Rhodes

[Floyd, M.R.](#), & Rhodes, D. (2011). Unforeseen implications of regulation in clinical practice. *Clinical Social Work Journal*, 39(3), 308-314).

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Abstract:

The authors, both long-time LCSWs, utilize an existential framework and postmodern lens to explore the implications of increased professional regulation in clinical practice. Specifically emphasized, are the themes of litigation-fear and the threat of license revocation that are prevalent in the field of clinical social work at this time. The authors argue that this “climate of fear” can lead to a slippery slope for a profession that has long valued the individual’s right (both client’s and practitioner’s) to self-determination, authenticity, and creativity and call for an increased conversation among practitioners about the desired role of regulation in the profession with the overall goal of protecting a true understanding of ethics in social work.

Keywords: social work | clinical social work practice | social work regulation | existentialism | clinical social work | social work license revocation | social work supervision

Article:

Background

The beginnings of this article occurred at one of our social work continuing education events. The authors (LCSWs and academics in the Southeast) were attending a clinical supervision conference, partly for the joy of learning, partly for obtaining important clinical hours for license renewal. During a break they compared notes about the presenters and the topic, as well as recent other trainings they had attended. Conversation topics centered on situations that started out questionably (the supervisee known in other capacities or—in other words—the dreaded dual relationship) and ended up being mutually enriching. Many of us then shared how the process of walking through these ambiguous situations ended up both increasing our capacity as clinicians and as humans. What would the licensure board have said if they knew? Is it becoming safer to ask for forgiveness instead of permission? Most troubling were the seasoned social workers who, hearing all the risks involved in supervision, were getting out of this practice. All of these issues

sparked a conversation that has now resulted in a manuscript exploring the central question, “How does the increased focus on regulation in the profession negatively affect the characteristics of social work that make us unique?”

Since both authors are existentialists at heart with a bent for radical social work theory, they are placing the debate within those theoretical constructs. We believe that other social workers should join this conversation, so that the development of the clinical social work profession continues to be proactive and intentional rather than reactionary and prescriptive. In short, it is time to contest the landscape (Deweese 2002) of assumptions on which we have built an increasingly policing, regulatory function within clinical social work.

We are offering a discussion and critique about implications to the profession of losing sight of why regulation is important (or the desired end results of regulation) and, instead, seeing regulation as the end in itself. Indeed, absent some seminal work about regulation (Hardcastle 1977) in the 1970s the literature is strangely quiet on this topic. We see a growing move towards a view of clients as potential threats to the livelihood or potential litigants. We want to explore what happens inside social workers themselves as well as social work as a profession when this view prevails over a more traditional “client as partner” stance.

Additionally, since stakes are particularly high for new licensees in a critical conversation about the role of licensure boards in the profession, we, as longer-term licensed professionals are attempting to use our “deviance credits” (Shor and Freire 1987, p. 66) to question the current hegemony of the licensing structures in clinical social work. Deviance credits were conceptualized by Shor and Freire as a way for established members of an institution to use their earned status to criticize from within, in a way that outsiders or newer members cannot. In order to facilitate this discussion, we first discuss the issue of licensure in clinical social work, the evolution of licensing boards, as we see it, into a type of panopticon (Foucault 1977), and the possible results of this type of structure upon existential components of clinical practice. Finally, we examine practical implications to the clinical profession of increased regulation.

Licensure

Most clinical social workers are licensed or are working towards it. Supervising social workers who want to obtain their clinical licenses has long been an activity for more seasoned clinicians. It has also become an area of concern regarding potential vicarious liability (Lynch and Versen 2003; Reamer 1989). The license becomes the lifeblood of a clinical social worker, and without one, most of us could not engage in our chosen field of clinical work. The process of obtaining a clinical license can become costly, arduous, and stressful. Once obtained, however, the stress of having one does not end. There are yearly CEUs to attend and dues to pay, which are not concerns for most clinicians. More troubling is the sense that one’s career somehow hangs in the balance between a regulatory board and liability issues. For example, the possibility of having

ones documentation of continuing education events attended audited; having the names of colleagues who have had their license suspended or revoked listed in periodical publications; supervision horror stories and the proliferation of in-service training on how to avoid getting sued; all of these situations lead to a growing unease among licensed social work professionals.

Having been licensed clinical social workers for more than ten years, we are both admittedly a bit ambivalent towards the licensing process. A clinical license is supposed to demonstrate to the public that the social worker has a certain level of competence and ethics. At times though, it seems to simply become a tool for monetary reimbursement. Most insurance companies and Medicaid will not reimburse practitioners who do not have a clinical license. In effect, clinical social workers become the sum total of their clinical license credentials, since this will generate income for an agency where one is employed. Slater (1976) addresses this issue of credentialing from a radical perspective:

Requirements for credentials are designed not to create excellence but merely to limit membership and keep prices up. In the fields that I know best—university teaching and psychotherapy—the kind of training that leads to proper credentials is often actually detrimental—at best irrelevant. There are equal numbers of excellent therapists, for example, among the credentialed and uncredentialed, and equal number of dangerous incompetents. (p. 131)

There is a certain grain of truth to this assertion. For the most part, one cannot work in the field without a clinical license. The fear of losing one's clinical license, either through some liable action or sanctioning by the licensing board fuels fear for the clinician. Additionally, since many state agencies and even non-profits seem to be moving towards hiring only licensed social workers due to reimbursement issues, there is a group of new MSWs in desperate need of clinical supervision in order to secure a livelihood. Yet, seasoned clinicians, wary of vicarious liability, are voicing their hesitations about providing supervision.

Additionally, power and control of the licensing board is troubling in itself. Increasingly, clinical social work is focusing its energy on the ideas of regulation and liability protection. A concern is that licensing boards are using this fear of liability protection as a way to not only justify their regulatory status, but to increase it. This concern only grows if regulatory board "justice" is seen as capricious and dependent upon the current make up of the board in that particular state. A recent study in *Social Work* examined patterns of state licensure boards in sanctioning social workers and concluded that there was a "wide discrepancy" between states regarding the number of violations (Boland-Prom 2009, p. 353). Additionally, states were noted to have "unique patterns related to the types of offenses that received attention" (p. 359).

During a training on ethics one author, after hearing the presenter discuss in great detail our obligations to the licensing board and how we are held accountable to this board, posed the question, "To whom or to what is the licensing board accountable?" The presenter was not a

member of the licensing board, but a licensed social worker and an attorney who had assisted social workers in defending their licensing status. She looked somewhat puzzled by the question and noted that the members of the licensing board are appointed by the governor of the state and that the members of the licensing board (all volunteers) are not really held accountable to anyone. The follow up question posed, “But, then how is this ethical” went unanswered by the presenter.

In many ethics trainings, the majority of the time is spent generating and debating the ethics of hypothetical situations. This focuses us on liability issues and how to protect ourselves, but more basic issues, such as a regulatory board that defines what is ethical without any input from the individuals that actually practice on a regular basis; are untouched. This overall focus on liability issues in relation to clinical social work and licensing boards is reminiscent of Marjane Satrapi’s (2004) story of *Persepolis* where she notes that in certain political situations when one is constantly asking questions such as “Is the attire you are wearing appropriate?” one no longer asks deeper questions such as, “Where is my freedom of thought?” If we first question if whether what we are doing is liable or if our professional judgment may bring down the wrath of the licensing board, we may no longer be asking other important questions such as, “Am I making a connection with my client? Are we addressing the issues that need to be addressed?” or, on a basic level, “Am I working to end oppression and increase social justice?” In other words, the big questions go un-engaged as we wrestle with “How Not to Get Sued 101.” A real and essential understanding of ethics at the philosophical and spiritual level is given short-shrift when we are primarily preoccupied with questions of risk management.

Accordingly, when the licensing board is no longer an entity that is actually there for the protection of social workers and the public, but an end in itself, it becomes hegemonic. The fear of liability and sanctioning by the licensing board begins to dictate what type of clinical interventions social workers engage and where, “Assessments are procedural and time-limited; supervision is focused on targets and outcomes” (Ferguson and Woodward 2009, p. 33). In essence, such a focus on an assembly line-style practice may lead to a de-skilling of clinical social work (Giroux 2001). De-skilling is a concept borrowed from Giroux’s critical educational theory work and describes the dubious phenomena of reducing teaching to a series of lesson plans and formulas so that curricula can become “teacher-proof.”

As clinical social workers, afraid of liability issues and licensing boards, we have adopted a very narrow model of clinical work, one where we are focused on our protection. This is understandable as litigation is now seen as a, “fixture on the professional landscape” (Reamer 1993, p. 11). However, do we make a jump in logic when we assume that preoccupying ourselves with protections against litigation and/or professional censure, actually protects us from it as a possibility? Does our fear make us a functionary of the licensing board, as best noted in how clinical supervisors are urged to act towards those we are supervising? For example, there appears to be an increased emphasis on supervisors as the “eyes and ears” of the licensing board and as “gatekeepers,” but not as much on the importance of the supervisory relationship. This in

turn is reminiscent of Kropotkin's (1987) statement, "A whole mechanism of legislation and of policing has to be developed in order to subject some to the domination of others" (p. 10). We must ask whether the licensing board is there for the protection of both the public and clinical social workers or if it is there to establish and maintain homogeneity instead independence and autonomy? In effect, is the licensing board losing its original purpose and becoming hegemonic? The next section explores the consequent idea of the licensing board as a panopticon or an all-seeing entity, and how this affects the spirit of collegiality and willingness to risk in the profession.

Panopticon

Returning to the conference we mentioned earlier, fear of liability and losing one's license was instilled in participants during the earlier part of the day which then set the stage for a board member presenting that there are "new rules" and those in the field will just have to accept them. Once fear of liability and losing one's license is secured, then acceptance of the authority of the licensing board is set in place, and the licensing board has thus established its "epistemology of rule" (Bookchin 2005, p. 159). This epistemology of rule is based on fear, and, where fear is present, there is then the urge to cling to something that imparts security. The inflexible rigidity of the licensing board offers this illusion of security: If I just follow what the licensing board tells me, no questions asked, I will be safe and will not be alone in this. I will not be liable. I will not lose my clinical license. As Erich Fromm (1969) notes, "in our effort to escape from aloneness and powerlessness, we are ready to get rid of our individual self either by submission to new forms of authority or by a compulsive conforming to accepted patterns" (p. 134).

This climate of fear is reminiscent of Jeremy Bentham's theory of the panopticon. Postmodern and poststructuralist philosopher Michel Foucault (1977) helps us understand Bentham's model of the panopticon (pan-optic, "all seeing") and how it was originally designed and used for prisons where:

This enclosed, segmented space, observed at every point, in which the individuals are inserted in a fixed place, in which the slightest movements are supervised, in which all events are recorded, in which an uninterrupted work of writing links the center and periphery, in which power is exercised without division, according to a continuous hierarchical figure... (p. 197)

The structure of the panopticon is set up so that, with the use of angles, shadows, and light, people must assume that they are being watched at all times, thus establishing a sort of internal source of power and control. According to Foucault (1977, p. 201), the major effect of the Panopticon is, "...to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power." Those who watch the inmates are invisible, "and this invisibility is a guarantee of order" (p. 201). What made the panopticon so effective was not its actual structure, but the sense that at any given moment, there is the possibility of being

monitored. The construction of the panopticon establishes an embodiment of external control as a substitute for fallible internal control. The structure of the panopticon becomes irrelevant; the idea of regimentation is what is important: “Whenever one is dealing with a multiplicity of individuals on whom a task or a particular form of behaviour must be imposed, the panoptic schema may be used” (p. 205).

Based on Bentham’s ideas, the point of the panopticon was to instill a sense of certainty, “regiment uncertainty out of existence, put in its place certainty of necessity, however sad and sorrowful, and you are almost there: in the happy world of born-again order” (Bauman 1995, p. 108). Clinical social workers become, through this instilled fear, less autonomous and less unique. We are afraid to stand against this uncertainty, to engage in an existential practice, to evolve individually, since, “when one has become an individual, one stands alone and faces the world in all its perilous and overpowering aspects” (Fromm 1969, p. 29). The licensing board establishes an internal panopticon, where clinical social workers regulate and legislate themselves. Since we are encouraged to become the eyes and ears of the licensing board, we help reproduce that internal panopticon in a new generation of clinical social workers. Thus, authenticity is not at the top of the licensing board’s agenda.

The licensing board members become, through this process, nebulous entities, which Erich Fromm (1969) labels “anonymous authority:”

Anonymous authority is more effective than overt authority, since one never suspects that there is any order which one is expected to follow. In external authority it is clear that there is an order and who gives it; one can fight against the authority, and in this fight personal independence and moral courage can develop. But whereas in internalized authority the command, though an internal one, remains visible, in anonymous authority both command and commander have become invisible. (p. 166)

Taking the panopticon to another level there becomes a danger of group think, or of what Chomsky (2002a, b) refers to as “manufacturing consent” (p. 14). Chomsky critiques how bigger institutions, such as the media, are used to establish or manufacture a certain amount of consent in the population. The overt regulatory component of the licensing board is there to manufacture consent of clinical social workers. Consent to the standards of the board becomes the most important issue, regardless of whether these standards conflict with the personal or professional ethics of the individual. When social workers consent to the board, they will not challenge or question the board or its decisions. Once the board embodies itself as the bearer of the ethics banner, the board can define and dictate ethical standards. According to Shor and Freire (1987) those acting outside the realm of best practice or established rules, perhaps in response to a novel situation, find the need to “police themselves against their own freedom” (p. 25). Ferguson and Woodward (2009) extend this idea to social work: “How social workers ought to behave is now set in stone within codes of practice, giving rise to the ‘24/7 social worker,’ someone who is now

under the gaze of colleagues, service users and the public at all times in their professional and private lives” (p. 61).

Originality may become a casualty of such a climate. Risk and deviance become dangerous commodities in the face of such regulation, an issue with multi-level consequences for social workers and the profession. The loss of willingness to take risks in clinical practice then affects the level of authenticity of the clinical relationship and has spiritual consequences for the practitioner. Existential theory is useful at this point in the discussion due to its core ideas—authenticity, risk, guilt, and the anxiety of becoming—all of which can be negatively impacted when one is afraid to take risks.

Existential Concepts

Krill (1996) describes existential theory in psychotherapy as more of a stance or philosophical viewpoint than an actual therapy or protocol of do's and don'ts. In order to understand these ideas' pertinence to the current discussion about implications of increased regulation in clinical social work, we first present and define the existential concepts of being, being-in-the-world, authenticity, and bad-faith and followed with an exposition of ontological guilt and ontological anxiety.

Being and Being-in-the-World

Existential philosophers place a great deal of emphasis on being. Maddi (1996) points out that the German word for being or “daesin” does not carry the static connotation that “being” has in the English language. Instead, the word becomes more active and actually means “becoming.” In this way, the existential focus is on human potentiality. In order to always be “becoming” and not have stagnated, the person must continue to act authentically and avoid bad faith actions that delude and detract from the metamorphic becoming process. As it applies to clinical social work, the concept of being would connote continuing to develop as an excellent practitioner, working hard to lend individuality to every practice situation, and having a dynamic, present orientation. These are difficult to achieve when a clinician is preoccupied by malpractice concerns.

Authenticity Versus Bad-Faith Actions

Authenticity is often used as a synonym for genuineness. In their widely-used direct practice social work textbook, Hepworth et al. (1997) define authenticity as, “the sharing of self by relating in a natural, sincere, spontaneous, open and genuine manner” (p. 120). The authors further describe authentic social worker verbalizations as congruent with their thoughts and

feelings. Thus, authentic social workers relate to consumers as real people, expressing and taking responsibility for their feelings instead of denying them or blaming the client for them. This focus on congruency between thoughts and feelings and assuming responsibility for both, whether or not they fit in with societal ideas of what is normal or good, is closely related to the existential focus on authenticity. The existential hero exemplified in texts such as Camus's (1946) *The Stranger* and Sartre's (1947) *The Age of Reason*, embodies this ideal authenticity. Therefore, the existential hero is often seen as abnormal or strange as she or he strives to realize being in an existential stance. By acting in accordance with internal guidance, the existential hero avoids being deluded by the trappings of normality and the conformity of society. In this way bad-faith actions are guarded against, and individuals continue their process of "becoming."

Bad-faith actions are the antithesis of authenticity. When an individual acts in a bad-faith way, they are acting against what their inner voice is directing. If individuals continually choose bad-faith actions over authentic responses, they stop progressing as a "becoming" human being. They may also stop taking responsibility (another key existential concept) for their choices. In the example above the social workers may blame their choices on society, a difficult family, or even the consumers themselves. It is when the becoming process halts, that individuals become aware of feeling bad or being in psychological pain. According to existential psychology, individuals feel bad due to the weight of ontological guilt they accumulate through frequent bad-faith actions. Maddi (1996) suggests this is what Soren Kierkegaard, one of the first existential philosophers, meant by the "sickness unto death" (p. 162) and what Thoreau was getting at when he said most people "lead lives of quiet desperation" (p. 162). Both ideas could also be considered elements of burn-out.

Ontological Anxiety Versus Ontological Guilt

Rollo May (1983), a prominent existential author, wrote that the German word that Freud and Kierkegaard, among others, use for anxiety is "angst." While it has no English equivalent, angst has been translated as "dread" as well as "anxiety" and captures the experience of being "torn" or in a dilemma. Accordingly, May points out that anxiety, "always involves inner conflict" (May 1983, p. 111).

Anxiety has a "becoming" quality that can lead to growth (Maddi 1996). One has daily choices either to continue becoming and face the resulting ontological anxiety, or to simply choose comfort and stasis and therefore stagnate. Quite simply, ontological anxiety is the price of living authentically. Choosing the more comfortable, non-anxiety provoking course of action will create a short-term feeling of safety, but in the long-term leads to the more malignant state of ontological guilt. Ontological anxiety, while uncomfortable is more a pain of risk or a growing pain. Ontological guilt is the pain of not accessing one's potential and the ache of regret about

what might have been. Series of bad faith actions result in heavy ontological guilt, which weighs individuals down in shame and regret, paralyzing their process of becoming.

Social Work's Identity Crisis?

Disturbing trends in the profession are certainly not a new topic. Margolin's (1997) *Under the Cover of Kindness*, takes the premise of Specht and Courtney's (1994) *Unfaithful Angels* to another level when he argues that the problem with social work is not so much the abandonment of its mission (through the flight into private psychotherapy) but the actual mission itself. In other words, Margolin says that social workers often "talk" Jane Addams (we're all equal, fellow travelers, let's do some "friendly visiting") but we tend to "do" Mary Richmond (let's figure out the diagnosis, I'm the professional, this is a science, how are my notes looking?). Attending trainings would certainly affirm Margolin's assertion since we discuss empowerment, the strengths perspective, and the social worker as a change agent. In sharp contrast, what concerns licensing boards are hours, dual relationships, status of the profession, and reimbursement rates. As licensed clinicians, the authors are in favor of increased regard for what we do and the maintenance of professional standards: however, might we be going too far? Are we more concerned with being agents of change or with protecting our status? Are we, just, like the aging radical's song now powering the luxury car commercials, in danger of becoming a profession of sell-outs? If we are "selling out," what does that do to us? One of the authors has written about the phenomenon of professional dissonance (Taylor 2005, 2006, 2007; Taylor and Bentley 2005) and its relation to burn-out. Professional dissonance, most basically, is defined as a feeling of discomfort that occurs when what we say we do as professionals does not match what we are actually doing in our work—kind of an on-the-job bad-faith action.

Implications of a Fear-Based Climate

After exploring the concepts of licensure as increased regulation, license processes becoming like a panopticon, and the concomitant risk to authenticity and the professional becoming process, we arrive at practical implications of what continued growth of a fear-based, liability-centered mentality could cost our profession. We must disclaim that there is simply very little professional literature about the effects of litigation and what we call "censorial fear" on social work practice. Our observations are simply ours, based on our own longevity as LCSWs and the experiences we are privy to from former students, current professional colleagues, and those all important, off-the-record conversations.

In our experience an overemphasis on liability engenders fear in practitioners. This can result in practitioners who are less willing to take risks with supervision or to work with acutely ill or suicidal clients. Taken to another level, focusing primarily on policing and protection, could

potentially decrease the number of practitioners willing to risk engaging in emerging practices, that have yet to be stamped “best” or “evidenced-based.” Supervisors willing to take the risks that come with supervising pre-licensed social workers are also casualties of a fear-based licensure climate when they are repeatedly told their license is on the line if they make mistakes. What happened to social work practitioner-hood as a process of becoming, of making mistakes and learning from them? What pre-licensed social worker (or even long-term licensed social worker) does everything right with every client? With such an emphasis on not failing, what happens to our willingness to try? If being a “work in progress” is important to us, is it not reasonable to assume that our profession, and a result, our licensing bodies, are also works in progress?

Clinical social work and supervision become “social-worker proof” if we focus only on assembly-line, automated practice with a beginning, middle, and end (Giroux 2001). Taken to the next degree, we end up with a profession full of social workers doing the same, safe things. Autonomy and personal characteristics of the individual clinician become less important in such a climate, as the license becomes the ultimate stamp of legitimacy and authority.

Finally and perhaps most importantly, social work has a long tradition of valuing the humanity of both ourselves and our clients. Perhaps one of the most disturbing trends in the movement from licensure boards as agents of the profession, to monitors of the profession, is the growing fear with which we begin to view our clients and each other. If we begin to see our clients as potential vehicles of our own professional destruction, then we cannot avoid the negativity with which the therapeutic relationship becomes tinged. Without the satisfaction of authentic therapeutic relationships, what then is left in this often challenging profession? As clinical social workers we are then even more at risk for professional dissonance (Taylor 2007), burn-out and compassion fatigue.

Continuing the Conversation

Far from wanting to return to a completely unregulated profession, we are simply calling for increased introspection and, most importantly conversation as a profession about what we want from our licensing board. Through the current critique, we want to make apparent that licensure entities are constructed by the profession, for the profession in response to our needs and concerns. Having breathed life into our creation of regulation, we are shirking our professional stewardship duties if we simply confine our conversation and ideas for revision to lunch time chats about problematic conference topics.

Some beginning steps to continue the conversation may include increasing the accountability of licensing structures as well as increasing opportunities for due process in sanctioning of individual practitioners brought before the board. Focus and/or online groups consisting of seasoned colleagues who are able to utilize their own “deviance credits” is also a way of

enlarging the conversation and expanding the diversity of thought that this very complex issue stimulates. Finally, further quantitative research (Boland-Prom 2009) is needed to better understand reporting patterns of licensing board across the country. Qualitative interviews with professional social workers are needed to better understand how fear of censure and litigation is impacting collegial as well as client relationships.

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