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LAWYERS AND PROFESSIONAL AUTONOMY: REFLECTIONS ON CORPORATE LAWYERING AND THE DOCTRINE OF INFORMED CONSENT

MARK SPIEGEL*

Professor Jay Katz's book *The Silent World of Doctor and Patient*¹ continues his exploration of decisionmaking between doctors and patients. He argues that the doctrine of informed consent has been so far only a fiction or mirage,² but that it can develop into a viable principle committed to shared decisionmaking between doctors and their patients. For this to happen, we have to understand the historical and psychological barriers to increasing patient participation in decisionmaking. The book is, therefore, devoted to considering these barriers, particularly the psychological ones.

Much of what Professor Katz says is relevant to lawyers. In this article, however, I am not going to consider in general the question whether the doctrine of informed consent should be applied to lawyers or what the current state of the law is. I have attempted to do this elsewhere.³ Neither am I going to discuss the historical or psychological barriers to its implementation. What I wish to discuss in this article is whether there are differences between doctors and lawyers that might create additional barriers or reasons against the application of informed consent to lawyers even if one accepts, as I do, most of Professor Katz's arguments as they apply to doctors.

The difference I will focus on can be illustrated by a story that

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1. J. KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* (1984) [hereinafter KATZ].

2. See also Katz, *Informed Consent—A Fairy Tale? Law's Vision*, 39 U. PITT. L. REV. 137 (1977); Schultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE LAW J. 219 (1985).

3. Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) [hereinafter Spiegel, *Lawyering and Client Decisionmaking*]; Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003.

Professor Katz relates in his book. Katz tells us about a conversation he had with a successful businessman at a dinner party. The businessman became increasingly angry as he described his experiences with doctors during treatment of a mysterious illness. Katz said to the businessman, "I think I know what makes you angry. You are a person whom everybody treats with considerable respect. Yet, once you entered the hospital, everybody from young interns on up called you by your first name, while they expected you to address them as 'doctor'" (p. 211). The businessman then told Katz "about the difficulties he had experienced in conversing with his doctors on the basis of mutual respect" and about how childlike his doctors made him feel (p. 211).

Assuming this story is representative, it illustrates how the professional doctor retains power over a patient regardless of the class and status of the patient.⁴ In law, however, there is an increasing body of literature which argues that the status of the client matters. To be more precise, the argument is that large corporate clients exercise control over their lawyers rather than vice versa.

The argument for the development of informed consent is based on the assumption that the professional doctor or lawyer exercises control over the professional-client decisionmaking process, and that normal rules of contracting are not sufficient to protect the patient's or client's interests. Therefore, a legal rule must be created if one wants to preserve patient or client control over decisionmaking. If, however, in a large and significant part of the legal profession clients control their lawyers, is the doctrine of informed consent needed? Moreover, if the actions of powerful clients can harm third parties, would the application of informed consent to lawyer-client relations have harmful effects? This article discusses these questions by first examining the argument that corporate lawyers lack professional autonomy and then considering what its implications are for applying a rule of informed consent to lawyers.⁵

4. Wealth, of course, is not irrelevant. It buys more and probably better health care as well as more deference. The point is that wealth does not, by itself, eliminate professional control.

5. The terms control and autonomy do not have one unique definition. See Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 506-07 (1985). Within the lawyer-client relationship one can discuss autonomy with regard to who controls the means (the way the lawyering work is performed) or the ends (the goals the client seeks). See *infra* pp. 141-46. Moreover control is not an all or nothing proposition. Lawyers can influence or persuade clients without having the power to make the final decision about either means or ends. Similarly, although lawyers might have control over an issue, clients can influence the lawyer or make the lawyer deal with issues that are important for the client. See Sarat &

I.

Laypersons may have always believed that lawyers are controlled by their clients. Academics, however, have tried to demonstrate that despite this popular mythology, lawyers as professionals exercise considerable control over their clients.⁶ It is only recently that scholars have developed the thesis that corporate lawyers are controlled by their clients and therefore do not fit the classic definition of a professional.⁷

John Heinz and Edward Laumann conducted a major empirical study of the Chicago Bar.⁸ The purpose of the study was to analyze the social differentiation among segments of the Chicago Bar and evaluate the means by which this differentiation was converted into inequality of things such as income and prestige within the legal profession.⁹ The concluding chapter of the study, however, also discussed the question of professional autonomy. In this chapter Heinz and Laumann argued that while lawyers who primarily represent individual clients have professional autonomy, corporate lawyers do not.¹⁰

Their argument is based on two related sets of propositions. First, although corporate lawyers may have high social status and be among the most prestigious and best educated lawyers, their power and standing in society is modest compared to their clients. Second, and more important, corporate lawyering is a "patronage" profession heavily dependent on its clients to maintain its business.¹¹ Therefore, corporate lawyers are unlikely to disagree with their clients because of the fear of losing business.

Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC. REV. 93, 129-30 (1986).

6. See, e.g., D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974); Spiegel, *Lawyering and Client Decisionmaking*, *supra* note 3; Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 9 (1975).

7. See J. HEINZ & E. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982); *The Corporate Law Firm*, 37 STAN. L. REV. 271 (1985). But see Rueschemeyer, *Doctors and Lawyers: A Comment on the Theory of the Professions*, 1 CAN. R. OF SOC. & ANTHROPOLOGY 17 (1964) (stating the corporate control thesis twenty-two years ago).

8. J. HEINZ & E. LAUMANN, *supra* note 7.

9. *Id.* at 8.

10. *Id.* at 355-74. This conclusion is concurred with by several recent studies of the corporate law firm. See Gordon, *Introduction To Symposium On The Corporate Law Firm*, 37 STAN. L. REV. 271, 274 (1985) (discussing several of the studies in the symposium and stating that "[e]ach arrives at the tentative conclusion that outside lawyers on the whole have neither the opportunity nor the desire to reshape their clients' business or political goals and chiefly confine their role to that of technical execution.").

11. J. HEINZ & E. LAUMANN, *supra* note 7, at 359-61.

Is the argument that Heinz and Laumann advance persuasive? Heinz acknowledges that the empirical evidence supporting the thesis of corporate client control is not conclusive.¹² Moreover, the assumption of competition does not distinguish corporate lawyers from lawyers engaged in individual representation.¹³ In addition, status and power by themselves do not distinguish lawyering from medicine. Perhaps, however, it is the combination of the two factors—status and competition—that distinguish corporate lawyering.

In trying to assess whether this combination of status and competition supports the thesis of corporate control, one has to be clear about why we care about the concept of professional autonomy. Different reasons for being concerned about professional autonomy will result in different definitions of lawyer autonomy, and different definitions of lawyer autonomy will lead to different conclusions as to what counts as evidence of whether corporate control over lawyers exists.

Traditionally, commentators have defined professional autonomy as control over how work is performed and evaluated.¹⁴ This autonomy is thought necessary because the services delivered by the professional involve the application of specialized knowledge. The consumers of the service lack this specialized knowledge and therefore they cannot evaluate the services nor determine how they should be performed. Informed consent challenges this traditional view of the professional-client relationship by arguing that if the professional is required to communicate some of his or her specialized knowledge to the patient or client, lay people can share in the decisionmaking process and in determining how the professional work is to be performed. Therefore, what Professor Katz and the proponents of the doctrine of informed consent are interested in is the allocation of power within the professional-client relationship.

Heinz and Laumann are not concerned about these questions of who evaluates professional work and who controls the manner in which it is accomplished. Heinz, in a lecture given at the University of Georgia,¹⁵ distinguished tactics and goals and argued that the relevant issue for analyzing the autonomy of lawyers is not whether they control tactics but whether they control the goals that the client seeks.¹⁶ What the proponents of corporate control are interested in is the ques-

12. See Heinz, *The Power of Lawyers*, 17 GA. L. REV. 891, 903-04 (1983).

13. See generally J. CARLIN, *LAWYERS ON THEIR OWN* (1962); Nelson, *supra* note 5, at 506.

14. See Nelson, *supra* note 5, at 506.

15. Heinz, *supra* note 12, at 891.

16. *Id.* at 897.

tion of power vis-à-vis the outside world. Therefore, their focus is on whether the lawyer changes the client's ends.

Given these different views of what counts as professional autonomy, both the thesis that corporations control their lawyers and the traditional argument that the corporate lawyer as a professional has autonomy in doing his or her work free from client scrutiny may be true. Perhaps, then, the corporate control thesis is irrelevant to the concerns of informed consent and vice versa. I believe, however, that despite their different perspectives on autonomy, informed consent and the corporate control thesis have to contend with each other. The proponents of the corporate control thesis assume too easily that ends (or goals) and means (or tactics) can be separated. In so doing, they ignore the ways in which means can either determine ends or be ends in and of themselves.¹⁷ On the other hand, proponents of informed consent, including myself, must contend with the ends of the lawyer-client relationship, particularly the power of corporate clients to do harm.

A study conducted by Robert L. Nelson has been used to support the corporate control thesis.¹⁸ Nelson asked corporate lawyers whether they had, at any time in their careers, refused an assignment from their client because it was contrary to their personal values. Only 36 of 222 corporate lawyers had ever refused assignments.¹⁹ Nelson as well as Heinz and Laumann concluded that this data supports the argument that corporate lawyers do not exercise autonomy.

Nelson's study illustrates the failure to account for the ways in which means might determine ends.²⁰ As Nelson acknowledged, the question he asked called for an all or nothing response.²¹ It did not

17. See generally Spiegel, *Lawyering and Client Decisionmaking*, *supra* note 3, at 101-03.

18. See Nelson, *supra* note 5; see also Heinz, *supra* note 12 (discussion of Nelson).

19. Nelson, *supra* note 5, at 534.

20. There are other difficulties with Nelson's survey. Leaving aside questions of methodological validity, see *id.* at 509-11, drawing support for the thesis of corporate control from the Nelson study depends upon interpreting the meaning of the number of refusals. As Nelson states: is the glass half full or half empty? *Id.* at 536. If one assumes that corporate lawyers and their clients share the same values it is arguable that Nelson's data reveals a high level of professional control. Nelson's answer to this problem is that because his data spans the career of his lawyers it illustrates an extraordinarily low incidence of disagreement. But if one's expectations are that most of the time value disagreements do not arise and that when they do they are converted into technical issues, Nelson's data can be seen as the tip of the iceberg illustrating a large degree of lawyer control and autonomy. Nelson recognizes this objection. He, however, concludes that it does not undermine the validity of his conclusions.

21. *Id.*

ask for the times when a lawyer influenced the client's decision by deliberate framing of legal options but asked only for the times the lawyer refused work. Nelson states that the follow-up probes encouraged his respondents to report these other, more intermediate, methods of affecting their clients' decisions but does not tell us how he accounted for these other "control" devices.²² Refusing an assignment appears to be a drastic step.²³ Moreover, lawyers are more comfortable influencing clients through technical advice.²⁴ Therefore, one would expect a significantly higher incidence of these other methods of control than of outright refusals, but Nelson's study does not discuss them.²⁵ Absent this data about these intermediate methods of control, it is impossible to evaluate whether Nelson's study shows that corporate lawyers lack autonomy, even accepting his specialized definition of autonomy.

The other problem of ends and means that the corporate control thesis illustrates is the assumption that the only ends that are significant are those relating to the outside world.²⁶ In his book, Professor Katz discusses the treatment of breast cancer patients (pp. 90-93, 166-84). The agreed upon end is the cure of the cancer. There are at least two significant problems in deciding what is the appropriate means to achieve this agreed upon end. One problem stems from medical uncer-

22. *Id.*

23. See Kagan & Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 430 (1985) (stating that refusing an assignment based on personal values is a step that calls for "heroism").

24. Indeed, if my own experiences in practice and in teaching have any general applicability, it is my guess that lawyers tend to convert "moral" questions into technical ones. If this is true it is this intermediate category that has to be studied. See G. HAZZARD, *ETHICS IN THE PRACTICE OF LAW* 146-49 (1978) (discussion of using preemptory advice, cast in technical terms, to influence clients).

25. Indeed, it seems plausible to assume that these intermediate modes of influencing clients are more likely to be successful. Outright refusals of work are more likely to lead to clients just going to other lawyers. See Sarat & Felstiner, *supra* note 5 (illustration of this interrelationship between ends and means in the context of a divorce case). Their article illustrates how a lawyer's discussion of means, i.e., the uncertainties of the legal process, leads the client to modify her ends, particularly to abandon her goals of achieving "justice" and vindication.

26. Heinz supports this assumption by quoting a coal miner's monologue from the English revue *Beyond the Fringe*:

You're given complete freedom to do what you like - your absolute free hand . . . provided you get hold of two tons of coal every day. But the method you do it, you can use any method open to you. Hackin' and hewin' is the normal one. . . . But hackin' and hewin', as I say, its quite a varied life you have down there.

Heinz, *supra* note 12, at 897.

Heinz' other reason for his choice of what autonomy means is that his prime concern is the allocation of resources. *Id.* However, if lawyers influence clients through intermediate forms of behavior, see above, then they may influence the allocation of resources.

tainty. It is unclear which of a variety of treatments ranging from radiation to radical mastectomy is most likely to achieve this agreed upon end in a particular situation. Second, the effects of the various treatments on a woman's sense of self are significant. Professor Katz's discussion illustrates that given this uncertainty and that different patients will value the effects of the various treatments differently, the most important decision in the relationship may be the choice of means.²⁷

Can the goals of the lawyer-client relationship similarly include the means selected to achieve the agreed upon ends? I would argue, at least sometimes, yes. This possibility is clearest with individual clients. For individual clients, goals such as speed, dignity, reputation, and cost may be almost, if not equally as important as achieving the purported ends of the relationship.²⁸ Does this change when the client is a corporation? Certainly concepts such as dignity, autonomy and fear of testifying do not apply to things such as corporations. On the other hand, concern about costs²⁹ and reputation which can depend on the means selected to achieve the agreed upon ends may be very important to corporations.

Indeed, anecdotal evidence reveals that there were significant problems in the relations between corporate lawyers and their clients caused by overlawyering. Corporate clients allowed their law firms a significant amount of autonomy to achieve the agreed upon ends and corporate lawyers used that autonomy, particularly in litigation, to choose strategies regardless of whether they would be cost-effective.³⁰ Recently that appears to have changed.

One of the most important developments in the structure of the legal profession over the past five to ten years has been the increasing reliance on in-house counsel.³¹ This change affects not only the inter-

27. The patient who Professor Katz describes as Iphigenia chose a lumpectomy and radiation therapy over a mastectomy because of the physical effects of the mastectomy. KATZ, *supra* note 1, at 91.

28. See Spiegel, *Lawyering and Client Decisionmaking*, *supra* note 3, at 101-02.

29. *But see* Lochner, *Comment on Chayes & Chayes*, 37 STAN. L. REV. 305, 308 (1985) (costs are not a determinative factor in choosing outside counsel).

30. See M. WESSEL, *THE RULE OF REASON: A NEW APPROACH TO CORPORATE LITIGATION* 126-79 (1976); Goldstein, *Business Sees Lawyers as Necessary Evil*, N.Y. Times, Aug. 10, 1977, at D1, col. 2 (panel of businessmen at ABA meeting criticizing high and unnecessary legal costs. One panelist stated: "Lawyers, especially in New York, travel like Nuns—in pairs or three at a time."). See also Flaherty, *Comparison Shopping Hits the Law: Companies Cut Costs*, NAT'L L.J., Oct. 31, 1983, at 1 (describing use of in-house counsel to monitor costs).

31. See generally Chayes & Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277 (1985).

nal structure of the corporation, but also the corporation's relations with and control over outside counsel. In-house counsel is increasingly performing a monitoring role over the work of outside counsel.³² In so doing, they are performing the role of the informed consumer of legal services who can understand and control the lawyer's work. It is precisely because of the lack of such informed consumers that critics have thought informed consent necessary.

Heinz and Laumann may be correct that corporate clients control their lawyers. If they are correct, however, it is not solely because of status and competition, but also because of the ability of corporate clients to monitor and direct the work of their lawyers. It is this ability to monitor that, at least partially, explains the differences in the power of the corporate president as the client of a lawyer from the corporate president as the patient of a doctor.

II.

If we assume, based upon the reasons cited by Heinz and Laumann and these structural changes in the legal profession, that the corporate control thesis is plausible, we then turn to the question posed earlier: if it is true that corporate clients control their lawyers, is this difference between the legal and medical professions significant? Does it mean that applying the doctrine of informed consent to lawyers is unnecessary or unwise or both?

The argument that applying informed consent to the legal profession is unnecessary would depend upon showing that the situations where lawyers control their clients are so significant and numerous that an informed consent rule would be needed only in a small class of cases. This argument by itself, however, does not seem very persuasive. First, whatever the evidence for corporate clients' control over their lawyers, there is strong evidence that in the case of individual representation the opposite is true.³³ Second, even if one considers individual representation less significant than corporate representation, rules of law are not for the typical case but for the atypical one. Not every lawyer cheats clients; however, fiduciary duties still apply to

32. *Id.* at 289-93; *see also* Flaherty, *supra* note 30. This action includes both scrutiny over work performed, and decisions as to whether the work should be performed in-house or sent to outside counsel. Therefore, for outside law firms competition for business is not only with other law firms but with in-house counsel.

33. *See, e.g.*, A. BLUMBERG, *CRIMINAL JUSTICE* (1967); Hosticka, *Legal Services Lawyers Encounter Clients: A Study in Street Level Bureaucracy* (June 1976) (unpublished Ph.D. thesis available in M.I.T. Library); Macaulay, *Lawyers and Consumer Protection Laws*, 14 *LAW & SOC'Y REV.* 115 (1979); ROSENTHAL, *supra* note 6.

all lawyers. Therefore, the argument that informed consent is unnecessary depends upon showing not only that informed consent is not needed in all segments of the legal profession but that there is some harm caused by its application to the legal profession.

The most significant potential harm results when the decisions made by lawyers with their clients can harm third parties.³⁴ This is not the case with most medical decisions. Applying a rule of informed consent to lawyers could increase the number of times lawyers participate in or facilitate behavior that harms others. Moreover, the problem of harm to third parties would seem to be most troublesome in the area of practice where the corporate control thesis applies. It is here that we have the most powerful clients and hence the largest potential for public harm. Therefore the proponents of a doctrine of informed consent for lawyers must contend with not just a tradeoff between autonomy and professional prerogatives, but also questions of client interests versus interests of others.

A rule of informed consent may lead to increased harm to third parties in two ways. First, a rule of informed consent may cause fear of malpractice suits because of refusal to follow a client's directions. This fear could result in additional pressure on lawyers to violate ethical norms, particularly in those situations where the client's requests are legal but arguably immoral or unethical. Second, a rule of informed consent could further reinforce the ideology that a lawyer has no moral responsibility for the consequences of his or her professional actions.

The assumption underlying the first concern is that clients, because of their own self interest, want their lawyers to engage in unethical behavior and will instruct their lawyers to act accordingly. This assumption may be wrong. Lawyers may impute selfish ends and mo-

34. Another harmful effect is related to this idea that in a significant part of the legal profession informed consent is unnecessary. Here the argument would be that imposing a rule of informed consent upon the legal profession as a whole has significant costs. Some of the costs are administrative, incurred in enforcing the rule; other costs stem from the way the issue would arise in litigation, particularly because such a rule encourages retrospective evaluation of decisions. Therefore, it is too costly to try and "isolate the few cases in which the doctrine [would] assist a plaintiff who deserves to recover." Epstein, *Medical Malpractice: The Case for Contract*, 1976 AM. B. FOUND. RES. J. 87, 125. Evaluating the cost argument is beyond the scope of this article. A few comments, however, can be made. The argument about cost is similar to those made in the medical profession. If one finds it persuasive there, one would probably find it persuasive with regard to the legal profession. However, if the thesis that corporations control their clients tips the balance on the cost question, then an issue arises of whether the appropriate response is rejection of the rule of informed consent or creation of different rules for different segments of the profession.

tives to their clients too often.³⁵ If informed consent were to cause lawyers to discuss such issues with their clients and discover that clients did not want their lawyers to engage in ethically suspect behavior, then it could lead to less harm rather than more.

This possibility that informed consent might reduce unethical behavior must contend, however, with the second concern about the impact of a rule of informed consent: its effect on the ideology of the profession. The question of informed consent's impact on ideology seems particularly important when we consider corporate lawyering. It is in this sphere of practice that scholars argue that the lawyer performs a mediating function between the selfish instincts of the client and the needs of society.³⁶

Under this view, the corporate lawyer both refers to the law and to principles of public policy and justice in giving advice. Hence the corporate lawyer "plays a crucial role in pushing business toward socially responsible behavior."³⁷

If it is true that corporate lawyers have performed this mediating function, then the effect of informed consent could be to diminish this role. Imposing a doctrine of informed consent could further tilt the balance toward lawyer as mouthpiece rather than lawyer as spokesperson for society's norms. This argument is similar to the general argument that informed consent is inappropriate for all "true" professionals. Professionals, it is argued, adhere to a set of internalized norms that include commitment to a client's best interests and quality services. By questioning these professional motives, informed consent may decrease the likelihood of these internalized norms developing because they will no longer be part of the professional's self-definition.

This argument about self-definition becomes more focused when it is applied to lawyers. The question here is whether the effect of the doctrine of informed consent will be to internalize further the norm of lawyer as the spokesperson for the client at the expense of the norm of lawyer as transmitter of society's values. Moreover, it is particularly in

35. See Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 53-59.

36. See, e.g., Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51 (G. Gawalt ed. 1984) [hereinafter Gordon, *The Ideal and the Actual in the Law*]; Kagen & Rosen, *supra* note 23. This image of lawyer as mediator has had two audiences: the public at large and corporate lawyers. What I am concerned with here is how adoption of a rule of informed consent would affect this second audience - corporate lawyers themselves.

37. Kagan & Rosen, *supra* note 23, at 409-10. See also Gordon, *supra* note 7, at 274-75.

the corporate sphere that commentators have discussed the image of lawyer as spokesperson for societal interests.³⁸

There are reasons for rejecting this vision of lawyers as spokespersons for society's interests. However, assuming that this is a desirable role for corporate lawyers, it is precisely this image of lawyer as mediator between private and public interests that Heinz and Laumann have attempted to rebut. If Heinz and Laumann are correct, the corporate lawyer currently is not performing this role of mediator. We may lament this conclusion, but our question about informed consent then becomes one of whether acceptance of informed consent would block change in the future. By further reinforcing the ideology of client control, informed consent may eliminate debate about alternative models.

Looking to the past provides insight about the validity of this possibility, because the idea that the corporate lawyer had the dual functions of being spokesperson both for his or her client and for society's values developed at the end of the nineteenth century. Robert Gordon has explored the attempt of New York City elite lawyers from 1870 to 1910 to construct an ideal science of the law which would reconcile public demands with the clients' private needs. He concluded that this project failed even though its proponents truly believed in the effort they were attempting.³⁹

If Gordon is correct about the failure of turn of the century elite lawyers to reconcile conflicting private and public aims, it appears unlikely that such a vision would work under the changed conditions of today.⁴⁰ Therefore, rejection of the application of informed consent because it may prevent development of a more responsive ideology for corporate lawyers is not warranted. Without other changes, such an alternative ideology would not develop anyway.

Moreover, the best way to implement public goals may not be through lawyers' attempts to override their clients' decisions. This assumes that the lawyer is in a better position than the client to decide questions of fair dealing and equity, but there is nothing about the

38. This is not surprising given that it seems harder to make virtue out of the necessity to represent your client's interests when your client is a large corporation than when your client is an individual. Adding the possibility of being a mediating influence makes it easier to justify one's role as advocate.

39. Gordon states, "For the most part corporate lawyers did little more than select and in some instances devise the most legally defensible and advantageous forms through which decisions already made could be executed." Gordon, *The Ideal and the Actual in the Law*, *supra* note 36, at 78.

40. See Kagan & Rosen, *supra* note 23, at 423-30.

selection and training of a lawyer that supports this assumption. Indeed, lawyers' preoccupation with rules and procedural regularity may lead to a one-sided view of morality.⁴¹ Furthermore, allowing lawyers this license implies that moral problems are somehow capable of technical resolution.⁴²

The concern, however, about ideology and its relationship to the power of corporate lawyers and their clients to do harm is not misplaced. I agree with the views of Professors Rhode and Schwartz that, at a minimum, we should be looking for ways to change the prevailing professional ideology which grants lawyers immunity from moral criticism as long as they break no law or professional rule. Instead, lawyers should assume moral responsibility for the consequences of their actions.⁴³ Paradoxically, I believe that informed consent could play a role in bringing about such a change.

Professionals generally have viewed informed consent as a formal requirement that can be satisfied by the obtaining of signatures on forms. Professor Katz's vision is different; he argues that it can become a way of promoting dialogue between professional and client. If informed consent can become a way of promoting dialogue then it may lead to change.⁴⁴ At present, the separation of responsibility between ends and means allows both lawyer and client to disclaim responsibility for the consequences of the lawyer-client relationship.⁴⁵ A conversation about the effects of different decisions would make it harder for either side to disclaim responsibility. They cannot claim they did not know.

More importantly, informed consent questions the dominance of professional role. It does not accept the claim that the professional is entitled to make decisions because of specialized knowledge that is inaccessible to the client, and it does not accept the professional claim that the lawyer can be trusted to act always in the best interests of the client. By eroding these claims of professionalism, informed consent can lead to questioning the professional retreat to role as justification for engaging in what would otherwise be immoral behavior.

41. Cf. J. SKHLAR, *LEGALISM* (1971).

42. See Post, *On Professional Prerogatives*, 37 *STAN. L. REV.* 459, 463 (1985).

43. See Rhode, *Ethical Perspectives on Legal Practice*, 37 *STAN. L. REV.* 589, 643 (1985); Schwartz, *Comment on Rhode*, 37 *STAN. L. REV.* 653, 653 (1985).

44. See Spiegel, *Lawyering and Client Decisionmaking*, *supra* note 3.

45. Dauer and Leff have characterized the situation this way: "Client: 'Thats up to my lawyer (and anyway I can't be responsible since I don't understand all that stuff).'
Lawyer: 'The choices aren't mine and the system demands that I protect my client.'"
Dauer & Leff, *Correspondence: The Lawyer as Friend*, 86 *YALE L.J.* 573, 583 n.40 (1977).

This argument is not one based on logical necessity. It is possible that some professional prerogatives could be denied and still the professional would hold on to a claim of role differentiated morality. However, it would make it harder to justify the claims of professionalism based on the pretense that the lawyer, as professional, has some special claim to doing good by assuming responsibility for client actions. Informed consent may restore focus to the question of how the lawyer can do good, or at least less harm, by assuming responsibility for his or her own actions.

By itself, however, informed consent is unlikely to accomplish this acceptance of responsibility. It must be accompanied by other changes. Although this symposium is not the place for a full discussion of other possible changes, I will mention two. First, at a minimum, changes in the provisions of professional regulations must be made. The Code of Professional Responsibility attempts to set out aspirational standards, but the structure of the Code vividly communicates that adherence to these standards is discretionary and the subject of individual choice.⁴⁶ The Model Rules eliminate the tripartite structure of the Code, but aim only to set out minimum enforceable standards.⁴⁷ The legal profession needs a structure which communicates that these rules are meant to be both enforceable and more stringent than the Model Rules.⁴⁸ Changes are needed which impose upon lawyers a greater accountability for their own behavior.⁴⁹

Second, however, the studies of corporate lawyering have shown that ideology is only part of the picture. Change in ideology without attention to structural aspects of the profession is unlikely to accomplish anything. The whole point of Heinz and Laumann's study is that representing corporate clients is different in significant ways than representing individual clients. Therefore we should seriously consider having different rules for different segments of the profession.⁵⁰ This is necessary not only because corporations have more power than most

46. See Spiegel, *Lawyering and Client Decisionmaking*, *supra* note 3, at 1013.

47. See Rhode, *supra* note 43, at 647.

48. It is easy to argue that these changes will have little or no effect. However, as Deborah Rhode has recently argued: "Whatever the likelihood of enforcement, a collective affirmation of professional values may have some effect simply by supplying, or removing, one source of rationalization for dubious conduct. . . . Conversely, standards pitched at a more demanding level can reinforce the lawyer who would prefer the ethical course but is reluctant to appear sanctimonious." Rhode, *supra* note 43, at 648.

49. Informed consent may allow more assumption of responsibility by lawyers because of less concern of overreaching in terms of controlling clients.

50. The suggestion of developing different rules for different segments of the profession is not new. See, e.g., Bellow & Kettleon, *From Ethics to Politics Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U.L. REV. 337 (1978); Rhode, *supra* note 43,

individuals but because a corporate entity is not an individual. Rules based upon an individual's right to autonomy may make no sense when transferred to an organizational setting.⁵¹

CONCLUSION

Professor Katz's book teaches us that we cannot change legal rules to increase client participation and expect professionals to follow those rules without taking account of the historical and psychological underpinnings of professional dominance. The corporate control thesis teaches us that we cannot think about the issues of client autonomy and professional control without being aware of the structural and ideological context of the professional-client relationship. In both cases, however, the answer to the difficulties presented is not to abandon client autonomy; it is to confront the difficulties directly. In medicine this means dealing with the psychological barriers to sharing decisionmaking power; in law this means putting limits on lawyers participating in behavior that harms others. For what we need is not professional control over clients, but professional responsibility for one's own actions.

at 606-08 (discussing opposition to providing different treatment for organizations and individuals during drafting of Model Rules).

51. Rhode, *supra* note 43.