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MANY SILENT WORLDS

MARTHA MINOW*

INTRODUCTION

Jay Katz's probing book, *The Silent World of Doctor and Patient*¹ affords a close look at the secluded world of doctor-patient relationships. With sensitivity to both the political and psychological dimensions of power in those relationships, the book demonstrates how doctors' control of information and decisionmaking for their patients historically has served seemingly paradoxical human needs. On the one hand, doctors have responded to patients' desires for care—and yet on the other, they have abandoned patients by ignoring the whole person and demanding passive surrender to their ministrations (pp. 207-09). Doctors have advanced their own desires for power, and doctors also have acted to deny the pain of their patients, and to avoid confrontation with universal human powerlessness before severe threats to health and life.

Jay Katz's exploration of the silent world of doctor and patient made me wonder whether there are similar silent worlds bounded by other relationships. Locating human relationships on a spectrum, moving from the most intimate and daily toward the least familiar and most discontinuous, I imagine we could place family relationships on the first end, and relations between strangers on the other. Falling somewhere in between would be relationships established and limited by contract, including professional-client bonds. And standing beyond these relations—but also shaping each of them—are the special and unavoidable relationships between the state and the individual. Does the search for conversations and shared decisionmaking between doctors and patients, as advocated by Jay Katz, hold promise for people in these other kinds of relationships? I will speculate about these other contexts, and close with a thought about the continuing problems of silence.

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

I. A RANGE OF RELATIONSHIPS

A. *Parents and Children*

Analogies between the paternalism of doctors and the paternalism of parents are not difficult to draw. Combining the role of caregiver with the assumptions of knowledge and expertise, both doctors and parents can, and often have, adopted a stance of "I know best" with regard to those under their care. Like doctors, parents have long enjoyed a presumption of acting in the interests of those they care for.² And yet this presumption increasingly has come under both factual and philosophic challenge.³ Statistics about child abuse and neglect,⁴ child abandonment, and parent/child conflict over issues such as teen sexuality⁵ challenge the assumption that parents and children always share the same interests. If left unchallenged within legal doctrines about families, the assumption that parents and children share interests can disguise and perpetuate severe risks for many children. Extreme risks from unchecked parental power include the dangers of child abuse, undue punishment for misbehavior, and exclusion from a range of opportunities and experiences that the child might want or need.⁶ Short of these extreme risks, parental power may have devastating effects on the child's formation of a sense of self.

Psychoanalyst Alice Miller explored some of these consequences for the child whose parents, preoccupied with their own needs, de-

2. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (Georgia statute providing for voluntary admission of children under 18 to state hospitals with parental consent, did not violate the due process clause of the fourteenth amendment).

3. *Nevada v. Bill — and Muriel —*, 91 Nev. 275, 534 P.2d 1264 (1975) (child abandoned in garbage container). See also Miller & Miller, *Protecting the Rights of Abused and Neglected Children*, 19 TRIAL, June 1983, at 68.

4. From 1978 to 1982, the incidence of child abuse and neglect cases rose from 2.7 cases per 1000 to 4.0 cases per 1000. Statistics taken from an ongoing study entitled "National Study on Child Abuse and Neglect" funded by the American Humane Association and the National Center on Child Abuse and Neglect.

5. See Mnookin, *Belotti v. Baird: A Hard Case*, in *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM AND PUBLIC POLICY* 150, 155-60 (R. Mnookin, ed. 1985) (giving statistics showing sharp increase in teen sexual activity and motherhood and discussing teenagers' difficulties discussing sex with parents). This essay also provides a detailed case study of the successful constitutional challenge to legislation requiring parental consent to minors' abortions, and reveals the mixed legacy of Massachusetts' response of individualized judicial hearings to avoid parental consent.

6. Similarly, assumptions about mutuality of interests among family members can shield from public or legal review risks and harms some family members pose to others. Recent exposes about the abuse of spouses and of elderly relatives reveal other silent worlds of misused power within the family. See, e.g., Eastman, *Elders Under Seige*, *PSYCHOLOGY TODAY*, Jan. 1984, at 30; O'Riely, *Wife-Beating: The Silent Crime*, *TIME*, Sept. 5, 1983, at 23.

mand performance, excellence, and compliance but give little regard for the child's individual and personal needs.⁷ The child's desire to please the parent may lead to the construction of a false self, accompanied by rejection and shame about the child's innermost feelings.⁸ In the name of guiding the child toward successful adulthood, the parent may thus silence the child's own needs so powerfully that the child can no longer acknowledge them. Alternatively, the child may grow dependent on the parent while the parent comes to enjoy and rely on that dependence. This pattern could hamper the potential for growth for both parent and child—and for their relationship over time.

Yet what are the alternatives? Within the family dynamic itself, pretending that the parent is a "friend" of the child instead of a parent could prove disastrous. Denying power differentials, and denying how different roles and responsibilities shape the contours and identity of a relationship, simply would preserve sources of silence and repression. The doctor possesses what the patient does not: knowledge and expertise about medical treatment, and legal responsibility for medical advice. So, too, does the parent have much that the child does not: resources, knowledge about the world, and legal and moral responsibilities to care for the child. Rejecting the legal presumption that parents act in their children's interests could justify limitless state investigations and involvement with families, especially given the vague and controversial criteria for such governmental activities.⁹

Jay Katz's work suggests that in the analogous situation of the doctor and patient, disparities in power, knowledge, and role can mark the beginning, not the end, of conversation. Perhaps parents and children, too, can engage in conversations about needs, desires, roles, and obligations, at least once the child is able to communicate and reason. Children do learn to say "no" quite early,¹⁰ and in so doing challenge parents to seek compliance through persuasion. Yet children learn very quickly that the reason offered by a parent for refusing a child's

7. A. MILLER, *DRAMA OF THE GIFTED CHILD* (1981).

8. *Id.* at 49-58.

9. See Mnookin, *Foster Care—In Whose Best Interest*, 43 HARV. ED. REV. 158 (1973).

10. Indeed, it is this capacity that gives twenty-four-month-olds the label, "the terrible twos." See R. KEGAN, *THE EVOLVING SELF: PROBLEMS AND PROCESS IN HUMAN DEVELOPMENT* 83 (1982). The differentiation between self and others hinted at during this stage along with subsequent cognitive developments assure that the child, as an independent person, can ask for reasons and can choose to accept them. *Id.* at 83-110; J. KAGAN, *THE NATURE OF THE CHILD* 112-53 (1984). See also Pines, *Children's Winning Ways*, *PSYCHOLOGY TODAY*, Dec. 1984, at 58 (some children are naturally skilled at silent persuasion; their rewards are affection and power). See generally J. PIAGET, *THE LANGUAGES AND THOUGHT OF THE CHILD* (1959).

desire can acquire an independent life, and the child can cite the reason the next time around. This begins a conversation that may indeed hold the parent accountable and put the parent to the test of persuading the child. Is this a promising direction for family relations?

A commitment to conversation can hardly resolve the looming problems of child abuse and neglect and similar consequences of unchecked parental power. Moreover, I would be wary of a legal rule premised on a commitment to conversation between parent and child given the backdrop risks of abusive exercise of parental power. A state law requiring a pregnant adolescent to communicate with her parents before seeking an abortion, for example, could subject the child to abuse rather than promote trusting relations.¹¹ Perhaps the commitment to conversation demands a deeper look at the legal, social, and economic settings in which parents and children relate. What would laws governing families look like if designed to be conducive to trusting, communicative relations between parent and child, while still permitting external checks on abusive use of unequal power within the relationship? I suspect that it is this kind of deeper inquiry that Jay Katz points to in the context of doctors and patients as well.

Professor Katz's analysis interweaves historical evidence about doctors' ideologies and political struggles with a study of the micro-politics of doctor-patient dynamics (pp. 30-47). With this textured analysis, his inquiry into how doctors and patients together give meaning to authority, autonomy, and certainty in their shared interactions yields a vivid sense of how power is constructed in relationships, and how relationships have both social and psychological dimensions (pp. 85-90). The analysis reveals how conflict between patients and doctors is inevitable, given their separateness. Not even doctors—or parents—who sincerely believe they work in another's interests avoid this conflict (p. 100). Trusting relations, Professor Katz concludes, must build on a recognition of potential conflict, inequalities of experience and irrational as well as rational expectations between doctor and patient (pp. 99-102).

By analogy, thoughtful inquiry into parent-child relationships would also start by recognizing potential conflicts of interest, inequalities of strength and experience, and irrational as well as rational motives that parents and children bring to their relationships. Trust

11. *H. L. v. Matheson*, 450 U.S. 398, 438-39 (1981) (Marshall, J., dissenting). See Comment, *Parent versus Child; H. L. v. Matheson and the New Abortion Litigation*, 1982 WIS. L. REV. 75, 115 ("parental notification rights requirements present an unprecedented interference in intra-family communication and relationships, and may have serious consequences to the physical and emotional health of pregnant teenagers").

cannot be imposed or demanded. Instead, like doctors, parents need to surrender their own power to shield abuses from view and make themselves vulnerable by sharing their own uncertainties.¹² Yet to whom should parents surrender their pretense of certainty? Not to infants or very young children, although even in the case of very young children, rather than hiding behind pretended certainty parents could share doubts with other adults (neighbors, relatives, or friends), with better consequences for the parent-child relationship.

B. *Professionals and Clients*

A similar, deeper inquiry may be necessary to address the conditions of distrust between clients and professionals other than doctors. Mounting numbers of malpractice suits against not only doctors,¹³ but also lawyers,¹⁴ accountants,¹⁵ and engineers¹⁶ hint at the unsatisfactory qualities of communication and service within the ongoing relationships between professional and client. Interestingly, malpractice suits may express the failure of a solely contractual approach to the law governing professional services. People bring to professional relationships expectations and desires to invest their trust in someone with expertise. Malpractice suits represent a collateral assault on those relationships when such expectations and desires are unfulfilled. Contractual boundaries on those relationships cannot contain such expectations, especially when clients suffer injury at the hand, or by the neglect, of their hired professional.

Malpractice suits often betray failures not just in the services provided, but also in the communication in the course of the professional relationships. Again, Jay Katz's insights about doctors and patients suggest that the real work to be done in professional relationships must take place long before a malpractice suit. The professionals must learn to share information, critical facts, and analysis of risks with

12. Cf. Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REF. 933, 988-1009 (1985) (building trust in debates over medical treatment for handicapped newborns should start with recognition of distrust and antagonism).

13. See Danzon, *The Frequency and Severity of Medical Malpractice Claims*, 27 J.L. & ECON. 115 (1984). See generally Mechanic, *Some Social Aspects of the Medical Malpractice Dilemma*, 1975 DUKE L.J. 1179, 1183 (malpractice suits related to loss of trust).

14. See Gates, *The Newest Data on Lawyers Malpractice Claims*, A.B.A. J., Apr. 1984, at 79.

15. See Collins, *Professional Liability: The Situation Worsens*, J. ACCT., Nov. 1985, at 57.

16. According to a 1982 article, the incidence of claims against engineers per 100 insurance policies was 36.3/100 in 1978; 44.2/100 in 1979; and 45/100 in 1982. Berreby, *Architects After the Fall*, NAT'L. L.J., July 19, 1982, at 31, col. 4.

clients; clients must learn to demand such sharing. Professor Katz may, however, underestimate the extent to which younger doctors have already begun to communicate options to their patients,¹⁷ but doctors often still fail to build the bases for trust by neglecting to educate patients to demand and then scrutinize critical medical judgments. The pressing question, then, is whether professionals can learn to help equip their clients to become self-empowered, critical monitors of professional power. What legal rules, aside from the crude tools of malpractice law, would promote this process? These too are questions that emerge if we draw on the insights of Jay Katz (pp. 46-47).

C. *Strangers and Strangers*

Just as malpractice law has developed to express clients' disappointed expectations with professionals and professional service contracts, products liability law has communicated consumers' frustration with defective products and with consumer contracts law. Breaking away from the exchange of party expectations captured by contract law, these tort theories shock defendants with the power of plaintiffs' disappointments, and break the silence that might otherwise prevail between strangers.

It may seem odd to include strangers at all in a discussion of interpersonal relationships. And yet it is possible to see a relationship between the stranger who produces a defective tire and the stranger who purchases it and suffers injury as a result. It is a relationship of silence and distance. The impossibility of conversation in this context may explain the development of strict liability rules over time,¹⁸ even though this same impossibility, in earlier times, justified immunity for the producer of the defective product.¹⁹ Perhaps strict liability is the better solution, not just the more humane one, because a strict liability

17. Interview with Dr. Robert Singer, family physician in the Boston area (Mar. 16, 1986).

18. See *Greenman v. Yuba Power Products*, 59 Cal. 2d 57, 377 P.2d 897 (1962) (consumer's lack of knowledge of a product's defect which makes the product unsafe for its intended use justifies recovery from the manufacturer if the consumer is injured while using the product for its intended purpose); *Macpherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (knowledge of a probable danger and of the fact that a product will be used by people other than the buyer is enough to charge a manufacturer with a duty independent of its contract). Accord RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1977) (seller is liable for injuries attributable to product even if the seller has exercised all possible care in the preparation and sale of his product).

19. See, e.g., *Winterbottom v. Wright*, 10 M. & W. 109 (ex. Ch. 1842) (lack of privity, and therefore, communication between manufacturer and user justifies restricting a cause of action for injuries only to those who entered into a contract regarding the product).

rule in effect breaks the silence. Strict liability communicates to the producer the risk of injury to the buyer, and invites the producer to internalize the needs of the buyer in advance of any injury. Jay Katz's work, then, offers a way to think about even the rules governing relationships between strangers as ways to break silence, bridge the gaps in communication, and check previously unchecked power.

D. *States and Individuals*

There is one more set of relationships that may also be marked by silence, power and dependency. Each individual has a continuing relationship with the state, whether or not the individual ever breaks a law or appears before a judge. Even in private dealings between individuals, the state offers a continuing presence as the enforcer and protector of individual rights and freedoms.²⁰ Indeed, the reliance of individuals, under our legal system, on rights enforced by the state, could be understood as part of a pattern of dependency about which we remain largely silent. And this silence may undermine the possibilities for realizing democracy in practice.

How could this be so? For rights to have meaning, they must exist in their enforceability by the state, not only in individuals' sensibilities about their own entitlements. Yet this demand for enforceability makes the individuals dependent on the state, and on particular state officials' willingness to recognize and give meaning to a given asserted right in a particular factual context. It is also true, as with all relationships of power, that this dependence works two ways. Unless individuals seek legal enforcement of their rights, the state officials have little occasion to exercise power. And the state's power, at least ideally, is guided by the shape of the claims of rights individuals can use to persuade state officials. Power, then, is the quality of the relationships between people, not a quantitative item parceled out in some dim, dark past.

Would it be possible for individuals to experience their rights not as supplicants for state enforcement but as crafters of their own self-governance? Many political philosophers have speculated about this issue.²¹ I am most taken by those who make central to their specula-

20. See Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 836-42 (1985) (examining laws governing families by reinforcing parental or state authority).

21. See, e.g., K. MARX, *CRITIQUE OF HEGEL'S PHILOSOPHY OF RIGHT* 31 (A. Jolin & J. O'Malley trans. 1970) (state cannot govern for the good of all unless it is controlled by all); J. S. MILL, *REPRESENTATIVE GOVERNMENT* 341-50 (Great Books ed. 1952) (1861) (community governance—each citizen taking part in shaping and enforcing law—is the

tions the individual's need for communal identity as part of the individual's political and civil rights.²² Moving toward these speculations, in practice, requires at least the initial step of speaking about our interdependence. We must, in turn, speak about the problems of founding relationships between state and individual on the basis of unspoken dependence. Again, Jay Katz's work provides an initial lexicon, a language to discuss what has not often been discussed: the patterns of dependency, power, and silence within relationships.

II. FINDING WORDS FOR SILENCE

The hope of finding words where there has been silence, then, provides a direction for legal and nonlegal efforts to challenge abuses of power. Yet this hope must be modulated by the sobering recognition of complexity. Each person is simultaneously involved in more than one relationship, and these involvements influence the construction and experience of power. A woman's support in her intimate relationships, for example, may strengthen her stance as a professional; or it may instead contribute to deeper experiences of dependency.

Feelings of powerlessness may at times preclude speech, even speech about powerlessness. In this context, I am reminded of a poem so expressive of the difficulties in finding words that it conveys silence even as it speaks.

The poet W. S. Merwin wrote this short, abrupt verse, entitled "Elegy":²³

Who would I show it to

Ending with a preposition, in mid-thought; ending without punctuation, and relying on reference without definition; stand-in words like "who," "I," and "it" for undisclosed references: the poem is perplex-

ideal form of government; best way for individuals to enjoy rights is to stand up for them); MONTESQUIEU, *THE SPIRIT OF LAWS*, BOOKS II, III, IV (T. Nugent trans. Great Books ed. 1952) (1748) (comparing government by law rather than despotism, and commending education for a democracy that imbues love of law); J. J. ROUSSEAU, *SOCIAL CONTRACT*, BOOK III 411-12 (G. Cole trans. Great Books ed. 1952) (1792) (true democracy is impossible because people cannot remain assembled to govern their affairs and it is best to have the wisest govern).

22. See H. ARENDT, *THE HUMAN CONDITION*, (1958); J. COHEN & J. ROGERS, *ON DEMOCRACY: TOWARD A TRANSITION OF AMERICAN SOCIETY* (1983); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); Wolin, *Revolutionary Action Today*, in *POST-ANALYTIC PHILOSOPHY* 244 (J. Rajchman & C. West eds. 1985).

23. W. S. MERWIN, "Elegy," in *THE CARRIER OF LADDERS: POEMS BY W. S. MERWIN* 137 (1978).

ing.²⁴ Incompletion and dependence on what remains forever unsaid weigh heavily in the poem, and at least in some measure, may be its message. Yet, probing for some more specific meaning, the reader could try to relate to the text and draw from the reader's own experience. "Why such incompletion?" the reader can ask. What could be the "it" in the poem—perhaps the elegy in the title. The "I"—perhaps the poet. The "who"—perhaps no one known, no one alive. Perhaps the poem means the poet's relationship with someone has been so interrupted, so cut off, perhaps by death, that the very idea of memorializing the lost one seems futile. The one person who could understand and appreciate the poet's efforts to write an elegy is gone. The possibility of mourning that could reach closure is so dim that the poet cannot even complete the thought about how to try.

And yet, if any of this discussion echoes the meanings the author intended or meanings sensed by readers other than me, another twist in the meaning remains. If I am able to grasp some portion of the poet's thought and feeling, some sense of how great would be the poet's grief, loss, and interruption that produces such a statement of the impossibility of statement, then indeed the poet has communicated. And the silence, between strangers, between author and reader, has indeed been broken. Conversation where there has been silence may best begin this way, in expressions of what has been and perhaps remains inexpressible. Our ability to say just that may help us share, and therefore, transform our silent worlds.

24. My understanding of the poem has been enhanced by R. SCHOLES, *SEMIOTICS AND INTERPRETATION* 37-40 (1982).