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Cover Page Footnote

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REGULATION AND RESPONSIBILITY FOR LAWYERS IN THE TWENTY-FIRST CENTURY

*Benjamin Zipursky**

INTRODUCTION

Deborah Rhode's sweeping reformist work, *In the Interests of Justice: Reforming the Legal Profession*, provides the American legal profession with equal measures of carefully honed facts, balanced evaluation, and realistic agendas for change. Given the care with which it has been written, and the detail in which it is enmeshed, one cannot do justice to it by singling out broad themes and dwelling upon them. Nevertheless, that is what I shall do.

There are two of Rhode's contentions with which I take issue in this essay. First, there is the contention that the legal profession needs greater external regulation than it now has.¹ Second, there is the contention that lawyers are responsible for the consequences of their conduct.²

I. GREATER EXTERNAL REGULATION OF LAWYERS

Rhode's list of lawyers' wrongs is disturbing, but disturbingly credible.³ On one level there is a variety of unacceptable, negligent conduct that seriously injures clients and is typically never compensated or sanctioned. At a second level, there is a list of attorney behaviors that are regarded by the profession and the world not only as unacceptable, but as unethical. This includes not only exorbitant fees, but willful blindness to a client's wrongdoing, and sometimes dishonesty with clients, colleagues, and courts. Finally, there is conduct that the legal profession itself might deem adequate, but that Rhode argues effectively is morally troubling. This includes, for example, efforts to impeach witnesses one believes are telling the truth, withholding of vital information on grounds of confidentiality, manipulation of advantages in bargaining, availing oneself of statutes

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1. See Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* 144-47 (2000).

2. See *id.* at 213.

3. See *id.* at 3-16.

of limitations on otherwise valid claims for which adequate non-stale evidence is obtainable or possessed.

For all of these reasons, Rhode argues that there needs to be a different system for determining the permissible bounds of lawyers' conduct, and that a system of substantive ethic-setting and of enforcement needs to exist independent of the largely self-serving legal profession. Society should not tolerate this level of harmful and essentially anti-social conduct by lawyers; it should require more of them, and enforce those requirements independently.

A. *Lessons from Medicine*

Without commenting on the question of whether this level of wrongdoing is occurring, I want to voice a note of skepticism over the "more regulation" concern. Of course, there are many reasons for being skeptical. A few examples include: the libertarian's concern with reducing the cost of regulation; the liberal's concern with reducing the chilling effect on legal rights of greater regulation; or the taxpayers' concern with greater expense of the judicial system; and the judges' concern with more litigation about lawyers' conduct. All of these merit attention, but I would add a further concern that stems from my experiences as a physician's spouse and as a Professor of Torts. We have, in the field of medicine, an example of a profession that has, in the past twenty-five years, faced a much greater degree of external regulation than ever before. And have the results been good? The answer remains unclear.

On the one hand, there have been certain salutary developments. For example, the rate of increase in health-care costs has been reduced, and the level of unexposed malpractice has decreased. More information is provided than once thought appropriate. Overcharging for medical services has gone down to some degree. And the long term prospect of ever-escalating, uncontrolled medical costs has, arguably, been averted.

A downside has, nonetheless, persisted as well. Indeed, until the tragic events of September 11, Congress had as its top legislative priority federal legislation intended to undo the effects of changes in our health-care system. The managed care revolution, ostensibly aimed at bringing financial and quality controls to the profession from outside the field itself, has presented extraordinary problems. Of course, one might argue that managed care is privatization, whereas Rhode advocates increased regulation, making the analogy inapt. But, I think a broader view of changes in medicine suggests that a high degree of caution is warranted.

In my view, possibly warped by overemphasis on torts, the changes in medical care delivery systems in the 1980s and 1990s were the

second phase of a movement that began in the 1960s and 1970s.⁴ During those decades, several changes occurred in the medical profession. First, physicians fell off of their throne. The privilege and elitism that attached to the Marcus Welbys⁵ of the world was inconsistent with the egalitarianism and the more deeply politicized views of the 1960s. Hand in hand with these changes, the idea of suing one's doctor became much more popular in the United States and malpractice litigation mushroomed. As is well known, something of a liability insurance crisis occurred in the 1970s. At this time, American physicians began practicing much more defensive medicine, and began seeing themselves much more as businesses that needed to structure their contractual relationships with patients as cautiously as they could, in many cases with an almost adversarial attitude.

It is neither original nor well-established to comment that the rise in liability insurance rates and the increase in defensive medicine sparked, in some part, the soaring costs of healthcare. Undoubtedly, there were other reasons as well, such as the increased urbanization of medicine and, particularly, the increases in biotechnology and the life span. But, in any case, it is not a wild exaggeration to see the need for managed care and reduced hospital stays and utilization review in part as a response to the pendulum having swung too far in the direction of mindlessly defensive medicine, which in turn resulted in part from an explosion in liability. If this picture has an element of truth then it is ironic, to say the least. For if it is true, then the increase in medical malpractice litigation, and legal accountability was unfortunately part of the cause of a structure that systematically ignored the patient's quality of care in a spirit of efficiency. I conjecture that the following occurred: as the malpractice and the insurance systems began to supplant physicians' judgments of what ought to be done, physicians began to lose their confidence and grip on how to practice in a manner that was reasonable and safe. It is just at this juncture that it is tempting to send in more legal reinforcements. Having overcompensated with law on the end of liability imposition, it was a natural development to use legal structures—in this case privatized quality review and managed care—to provide a balance on the other side with a set of incentives against inefficient costly medicine. And yet this set of external signals further weakened whatever internal compass—a professional ethic of care, with all of its pluses and minuses—physicians had. And now, having had state tort law

4. See Sylvia A. Law & Barry Ensminger, *Negotiating Physicians' Fees: Individual Patients or Society? (A Case Study in Federalism)*, 61 N.Y.U. L. Rev. 1 (1986) (discussing historical changes in health care cost structures, reimbursement, schemes, and trends in controlling physicians' costs and patient access).

5. Marcus Welby is the title character of "Marcus Welby, M.D.," which aired on the ABC television network from September 1969 through May 1976. Joseph Turow, "Marcus Welby, M.D.," at http://www.mbcnet.org/archives/etv/M/htmlM/marcus_welby/marcuswelby.htm (last visited February 25, 2002).

balanced by private contractual regulation and market mechanisms, we find that these market mechanisms need to be counterbalanced by federal regulatory legislation. In my view, although I support patients' rights legislation that, all tolled, resembles the Senate version more than President Bush's, I believe the President is right to be concerned that there will be costs to patients and risk of reduced coverage for some, and if these costs do rise, many of them will inure to the benefit of plaintiffs' firms. There is no reason, moreover, to believe that this now multi-complex set of external signals will fortify the internal ethic that once played a larger role in the profession, arguably to the benefit of patients, doctors, and society at large.

Whether we should endorse such legislation now is, of course, a different question than whether we are better off now than we were before the malpractice explosion and all the cycles I have described, and both questions are different than the question of whether another path might have been the best. I am inclined to respond to the latter two questions by saying that, in any case, physicians and patients alike have sustained a deeply regrettable loss, and the society of lawyers, clients, and the public should take a hard look before heading down that path. To exaggerate, we have dramatically altered the balance of social and professional norms, on the one hand, and legal norms on the other. The legal and business structures have come to dominate in an area once dominated by other norms. The obvious costs are the tertiary costs of extra bureaucracy. Another, and widely noted, cost, is the dissatisfaction of physicians with their work, and patients with their relationships with doctors. But the most disturbing possibility is that the quality of the medical care itself has dramatically decreased; that there was an activity in which excellence was being achieved and we pulled out part of the structure that made it work—much like replacing educational institutions with distance learning, food with vitamins and fat, sexual liaisons with hard core pornography and artificial insemination, and so on. Of course, the question of how much this has occurred, and what advantages have been reaped through it, are empirical questions, and I have not tried to answer them. I am simply voicing a concern.

B. *Legal Regulation*

Let us turn now to the legal scenario. Rhode wants more regulation in law.⁶ She wants an expansion beyond our cloistered professionalism. She wants more malpractice litigation and liability. What are the analogous risks? I think there are several. *Prima facie*, greater liability will make legal services costlier, and if we are talking about levels of legal service that cannot be done without, then those service costs will, in total, rise. It will bring the insurance industry into

6. Rhode, *supra* note 1, at 143-83.

play in a bigger way, producing a higher level of tertiary costs for legal services. More defensive law is hardly what we need. More litigation is unlikely to ease the court access problems of the lower and middle classes. Indeed, one of the greatest reasons for difficulty in access to low cost legal services is that being a plaintiff's lawyer is an increasingly costly business because of the crowdedness of courts.

Greater regulation and liability for lawyers will likely give lawyers a different attitude toward their work. Their professional judgment comes to take a different, and lesser role, as the law and the prospect of liability loom larger. In medicine, few individuals are willing to pay for their most exorbitant medical costs out of pocket. Realistically, this means that if the insurance market caps the products that it offers, then the expensiveness of services will likely have a maximum as well. The same may or may not be true in law, where the universe of clients is far more likely to be self-insured, and in any case less dependent upon one-size-fits-all first-party liability insurance. Increased costs from heavier regulation and liability, therefore, are more likely to spiral higher and higher in law, and are increasingly likely to separate well-heeled corporate clients from individual ones; obviously attorneys with a choice of buyer are likelier to go for the former. In short, it seems probable that increased regulation and liability are at least as likely to drive up the costs of legal services, and to segment the market further based on wealth; neither of these is a result that Rhode seeks. Of at least equal concern, increased regulation is likely to demagnetize the lawyer's internal moral compass, which critics have argued has already been seriously weakened. It is, moreover, likely to intensify already disturbing trends of antagonism between lawyer and client.

Let me step back from the argument in a couple of ways. First, many of these issues are empirical ones, and I have only offered op-ed page type of conjecture; this is a framework for thinking through hypotheses and raising concerns, not an actual case. Second, both in law and in medicine, there is sometimes a tendency to over-romanticize the past professional world, and to underestimate the significance of certain changes, including legal ones. I recognize that the advent of informed consent law, for example, the loosening of expert witness rules in that area, and the loosening of privity rules in legal malpractice may present salutary developments. A much more guarded account is needed. Third, and more defensively, I do not think the argument I have offered is simply a hybrid of Kronman-like Aristotelianism and libertarian anti-regulatory complaints.⁷ Rather, I am joining a literature both within contemporary-norms theory and within the common law generally, which questions the wisdom of using legal incentives to reshape our practices, without adequate

7. See Anthony T. Kronman, *The Lost Lawyer* 36-37 (1993).

attention to the guiding power of non-legal norms within the relevant communities.⁸ Finally, given that I am not taking issue with Rhode's demonstration of problems in the legal profession, it will be necessary for me to say something about how those problems might be solved, if not through different legal norms and incentives. My comments there will be even slighter, but I will delay them until I have unpacked my second set of concerns.

II. TAKING RESPONSIBILITY FOR THE CONSEQUENCES OF ONE'S ACTIONS

A central feature of Rhode's book is the assertion that lawyers must take responsibility for the consequences of their actions.⁹ I think this statement is implausibly broad in two distinct but interrelated ways. First, it does not say which consequences they are responsible for, and it is untenable to suppose that they are responsible for all of the consequences of their actions. Thus, for example, if a matrimonial lawyer assists an unhappily married couple in their early 60s in a divorce, and a consequence of the divorce is that one of the adult children commits suicide, it is far from clear that this consequence is something that the attorney should take responsibility for. If a criminal defense attorney gets her client acquitted, and the client then commits a rape, it is not clear that the defense attorney is responsible for this consequence, or that she should take responsibility for it.

Second, not all kinds of taking responsibility are the same. If a large company does a public offering and an attorney provides advice in regard to a prospectus sent to prospective investors, it may well be that the attorney should take some responsibility for losses that occurred because the prospectus contained some false statements. But, if the attorney performed her job diligently and simply failed to uncover the false statements, it is not clear why she should take responsibility in the sense that an auditor who performed a negligent audit should, or a client who negligently or intentionally misstated her company's condition should take responsibility. The point that an attorney cannot necessarily disclaim all responsibility does not mean that the attorney's responsibility for consequences of conduct is, or should be, the same as the client's responsibility.

Rhode is perhaps more interested in making a more negative, and modest, statement about attorneys: a person who does work as an attorney cannot disclaim responsibility for all of the consequences of her conduct, merely by virtue of the fact that she is engaging in that conduct in the role of attorney. To put the point in Kierkegaardian dressing, attorneys should not suspend ethical judgment when acting

8. See Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. Cal. L. Rev. 1273, 1276 (1998).

9. Rhode, *supra* note 1, at 213.

as attorneys.¹⁰ Lawyers should engage in first-order moral judgment in many scenarios as lawyers, rather than casting off all moral judgment in order the more completely to adopt the role of the lawyer. Yet, as Rhode herself points out in a number of places, a moderate and tempered position is the key;¹¹ lawyers should not necessarily act in avoidance of their role, and should not necessarily act as if the decisions in question were their own moral choices in their own lives.

The problem, then, is how to make progress in the articulation, adumbration, and application of a moderate or intermediate position regarding first-order moral and political judgments by lawyers. Taking responsibility for all of the consequences of one's actions as a lawyer, or taking responsibility for the actions as if they were one's own, does not provide a tenable or defensible way of understanding the lawyer's role. Neither does the complete avoidance of responsibility, or the dogmatic crafting of rules by which an attorney may integrate her values as a matter of discretion in certain selective situations. Rhode's own position, as I understand it, is that moderation and judgment are the answer to this question, as they are in many other areas where both ends of a spectrum are clearly wrong.¹² But—and I don't think Rhode would disagree—this is really only the beginning of an answer, not the answer itself.

Contemporary analytic jurisprudence, particularly the work of Ronald Dworkin, may provide some direction in thinking about these issues. As numerous critics of Dworkin's jurisprudence have pointed out, his theory is keyed almost entirely to the judicial role, rather than to the question of what law itself is. (Of course, he himself does not view these as in tension.) The starting point for Dworkin is how to avoid a narrow positivist's strict separation between law and morality on the one hand, and yet to remain clear of the position of the natural law adherent who so thoroughly embraces the unity of law and morality as to fail to produce a tenable account of the judge as having a role distinct from lawmaker.¹³ There is a parallel between this challenge and the one that I take Rhode to have set up: we must now reject the hard-nosed putative neutrality of the now-conventional view of the legal profession. As I have briefly argued, however, this does not mean we must eradicate the distinction between the lawyer and the primary actor, or client; it does not mean that lawyer's decisions are simply a subset of ethical decisions generally. Just as the Dworkinian challenge in jurisprudence can be depicted as the

10. Soren Kierkegaard, *Fear and Trembling*, in *Fear and Trembling and The Sickness Unto Death* (Walter Lowrie trans., Princeton University Press 1954) (1843) (introducing the teleological suspension of the ethical).

11. Rhode, *supra* note 1, at 66-70.

12. *Id.* at 67.

13. Ronald Dworkin, *Taking Rights Seriously* 22-58 (1977).

question of how a judge can reject the separation of law and morality, even without morality swamping the law, so Rhode's challenge in legal ethics is how a lawyer can reject the suspension of morality, even without losing the distinction between her role as a lawyer and the place of the client whom she is advising.

CONCLUSION

Of course, we all like to find unity in our thought and I am no exception to this. I would like to think, therefore, that the two issues I have raised may actually connect at a deeper level with one another. For if we are to solve the problems raised by Rhode within the legal profession without resorting to extra layers of regulation—as I have suggested—we will need to think in the twenty-first century about how to strengthen and revise the norms that guide the legal profession internally. And, presumably, this must also be part of the answer to the responsibility dilemma posed by Rhode: the concept of an attorney's responsibility for what she does must be elaborated and rethought in a manner that connects with the real events that her conduct brings about, while distinguishing it from all the client does. This too, will require an enriching and a rethinking of our professional norms. Where, better, to begin to do this than in a laboratory of students and academics in search of the interests of justice in the twenty-first century? I thank Deborah Rhode, my Fordham colleagues, and all of you, for inviting me to tinker in this laboratory with you.