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Through his scholarship and teaching, Jay Katz has sought to lead a world prone to silence toward questions, conversation, contemplation, and then more questions. "What I attempted to accomplish during my life as a teacher of law and medicine," Professor Katz recently remarked, "can be simply stated: to raise questions."[1] Why, above all, questions? "If one wishes to find answers that transcend the moment," Professor Katz explains, "one must first relentlessly search for the right questions."[2]

Professor Katz's scholarship reflects the rich rewards of his lifetime search for the right questions. In each of the major areas that he has examined—medical treatment and decision-making, catastrophic diseases, family and society, psychiatry and law, and experimentation with human beings—his probing questions have unearthed unnoticed issues, exposed preconceptions, and redefined the parameters of debate. We will not attempt to summarize all of his contributions to these areas. Such an effort would take more space than is available here, and would be fundamentally misguided, as the impact of new questions, unlike that of proposed answers, has an enduring and generative quality not easily canvassed.

We propose instead to isolate certain recurring themes in Professor Katz's work, and to discuss them within some of the notable contexts in which he has developed them. His work reflects, at the broadest level, a profound concern for the ways in which human beings come to know themselves and come to treat each other. Within this context, Professor Katz has sought to explore the implications for law, medicine, and public policy of a commitment to psychoanalytic theory and to enhancing the capacity of human beings for self-awareness and self-determination. He has identified and confronted complex tensions between authority and individual freedom, between self-determination and paternalism, and between psychological autonomy and dependence on irrationality and the unconscious. He has not only resisted recourse to simple "solutions" but has identified the hidden assumptions and confusions that render such solutions untenable. We come away from his work persuaded that solutions, if they exist, lie in acceptance of the struggle for greater awareness of human motivations, and in the realization that real progress in that struggle can come only through collaboration with others.

The foundation for his study of human relationships and views of psychological autonomy lies in psychiatry and in psychoanalysis. His second casebook, *Psychoanalysis, Psychiatry, and Law*,[3] identifies some of the important questions that psychoanalysis raises for law about human nature and motivation. The casebook contains a wide range of materials designed to facilitate examination of whether lawyers should "search for a psychological image of man,"[4] what are the components and assumptions behind such an image, and, in particular, what is the nature of the psychoanalytic theory of the human mind. In turning sustained attention to the relevance of psychoanalytic theory and questions for legal study, Professor Katz laid the groundwork for future studies at the intersection of law and psychiatry.

The importance of psychoanalytic theory for Professor Katz is apparent in his early writing on the problem of determining whether the state may treat a person deemed mentally ill against his or her will.[5] This problem starkly poses the value of individual autonomy against society's paternal desire to provide unwanted treatment that it feels is in the individual's best interest. Professor Katz's analysis of this issue foreshadows the more extended attention he would give to the general problem of disclosure and consent in all physician/patient encounters.

In sorting out the implications of positing a duty of

individuals to submit to treatment for mental illness, Professor Katz realized that simply recognizing the importance of protecting individual autonomy, and thereby concluding the debate with the proposition that "persons should be left to pursue their own fate if they if they so 'state' "[6] would not provide an adequate solution to the problem. In his view:

> Such a proposition can be as destructive of human life as its opposite of overreadiness to hospitalize. It is more difficult to pursue a middle ground, which seeks to take into account the complexities of conscious and unconscious dynamics and at the same time attempts to keep such judgments from running wild, but it is truer to the realities of human existence and aspirations. It is always easier to cut than untie Gordian Knots.

In this case, the Gordian Knot is the complex of conscious and unconscious motivations inherent in the psychoanalytic image of human beings. A decision maker who defers completely and exclusively to the conscious messages of a patient risks abandoning the very individual he or she is seeking to respect. As Professor Katz explains:

> [S]trict limitation of the right to treatment to those who from the outset consciously ask for therapy must be evaluated against the reality of psychological behavior. Man may consciously seek one solution to his problems and unconsciously hope for another. It is not rare to observe such conflicts in a person which preclude his asking for treatment; yet once it is imposed, he readily or gradually accepts. The dangers inherent in acting on behalf of others from inferences about non-conscious wishes are great. Yet, if these wishes are disregarded or rejected by preferring to act only on conscious messages, equally important non-conscious messages will be left unacknowledged. Thus a decision to listen to non-conscious voices can lead to an abuse of power, while a decision to heed only conscious voices can abandon persons to an unwished fate. It is a dilemma for which there are no easy solutions.[7]

A recognition of the "reality of psychological behavior" thus leads Professor Katz to approve of coercion, although only in narrowly defined circumstances. "Without coercion, society will abandon many people to their self-destructive and uncared-for fate. Such an approach is as insensitive as the abuse of power that leads to . . . indefinite incarceration without treatment . . . "[8]

In *The Silent World of Doctor and Patient*, Professor Katz refines the concept of autonomy to reflect the concerns just discussed, and he thereby brings the questions and insights of psychoanalytic and legal theory powerfully to bear on the relations between doctor and patient. He argues that doctors must relinquish their traditional view that they know and have an obligation to decide what treatment is best for their patients. This view, according to Professor Katz, is based on the flawed assumptions that patients do not want to participate in making decisions about their treatment and that patients lack the capacity to make good decisions; such a view is also based on the unexamined wishes of physicians to protect the position of power and authority they currently enjoy.

By turning our attention to the psychology of doctor/patient encounters, and by refining the concept of autonomy, Professor Katz exposes the flaws in these assumptions. He begins by breaking the concept of autonomy into two basic parts, "rights" and "capacities." He distinguishes the right of self-determination, which he defines as "the right of individuals to make their own decisions without interference from others," from "psychological autonomy," which "speaks to persons' capacities to reflect about contemplated choices and to make choices."[9]

In deciding whether and to what extent a patient's right to self-determination must be respected, Professor Katz urges us to recognize that patients' capacities to choose may be enhanced through introspection and conversation. It is here that psychoanalytic considerations become crucial. Professor Katz asks us to acknowledge that unconscious and irrational motivations exist, and that they may influence our conscious expressions of preference and choice in ways of which we are unaware. A patient's apparent willingness to cede all authority to the doctor, though consciously expressed, may reflect nothing more than an instinctive regression to childhood and projection onto the doctor of unrealistic hopes and fears rooted in early childhood memories. Yet these patients/children are, in fact, adults and, Professor Katz argues, have the capacity to respond to their illness as adults if doctors attempt to facilitate such a response by refusing, at least initially, to take sole responsibility for making treatment decisions.

Professor Katz therefore would impose a duty on physicians to engage patients in conversation about their illness and the range of treatment options available to them. He acknowledges that there is an element of paternalism, even coercion, in insisting that such conversations take place. He defends this coercion, however, by pointing out that conversation is an essential pre-requisite to enhanced psychological autonomy, and thus to meaningful self-determination. Such conversation is also essential if physicians are to avoid imposing, however unwittingly, their own value preferences on patients.

Professor Katz believes that if physicians are to con-

verse candidly with patients they must reveal the uncertainty inherent in the clinical practice of medicine. This uncertainty of knowledge is due to limitations of the medical profession's current knowledge, the individual physician's incomplete mastery of available knowledge, and his or her difficulty in distinguishing between personal ignorance and the limitations of available information.[10] Twentieth-century clinical medicine adopted the scientific method, which has proved to be a powerful means of dissipating our profound ignorance about human health and pathology. Professor Katz rightly contends that this potential for greater clarity of what is known and unknown makes it imperative for physicians to clarify for patients and themselves the extent of the underlying uncertainty in their therapeutic advice.[11]

The traditional justification for not discussing the subject of uncertainty is based on the patient's incapacity to comprehend abstruse information and the patient's possible intolerance to intimations about uncertainty. Professor Katz persuasively argues, however, that this traditional focus on the patient's incapacity and intolerance for uncertainty is misplaced. He observes:

> [I]t must be recognized that, in physician-patient interactions, professionals' defenses against ignorance and uncertainty are a greater problem than patients' ignorance. . . . Patients' supposed intolerance of medical uncertainties may thus turn out to be a reflection less of an inherent incapacity to live with this tragic fact and more of an identification with the perceived incapacity of physicians to live with it. Patients' supposed intolerance may turn out to be significantly affected by a projection of physicians' intolerance onto patients.[12]

Because of physicians' scientific training and their consultations with their colleagues, Professor Katz believes that physicians are *consciously* aware of their uncertainty of knowledge. When physicians collaborate among themselves, they freely discuss the limitations in the interpretations and applications of empirical studies to their clinical work. During conversations with patients, however, their psychological response is an *unconscious* denial and habitual suppression of this awareness in order to make matters "seem clearer, more understandable, and more certain than they are; it makes action possible."[13] Professor Katz further observes:

> Human beings' defensive and adaptive needs to make both their internal and external worlds intelligible, to shun incomprehensibility, doubt, and uncertainty, are formidable. In dreams, it is the simultaneous presence of contradictory, "absurd" and irrational unconscious thoughts and of more accustomed rational thoughts—all of which make up the content of dreams—that is largely denied. Witnesses to accidents defend against the faulty nature of their external sense perceptions. Both examples illustrate the pervasive and fateful human need to remain in control over one's internal and external worlds by seemingly understanding them, even at the expense of falsifying the data.[14]

Thus the unconscious denial and habitual suppression of knowledge of uncertainty by physicians leads to an exaggerated projection of certainty in their conversations with patients and, ironically, leaves patients in a state of greater uncertainty due to the lack of candor.[15] Furthermore, this denial and suppression creates a hidden pressure favoring medical intervention, sometimes in the forms of unnecessary surgeries and secret prescriptions of placebos.

After making these psychoanalytic observations, Professor Katz asks a new question, which in fact challenges the medical profession: "Can hope and reassurance be offered to patients without resorting to deception and without inviting disappointment?"[16] Professor Katz holds the conviction that a patient's faith in a physician should be premised on a realistic appraisal of medical uncertainties, rather than on a deceptive silence that may lead to disappointment. He suggests that uncertainty itself may aid physicians and patients if physicians would be explicit about their uncertainty of knowledge. A physician's willingness to expose uncertainties is likely to lead to greater trust and intimacy with patients. Because the physicians' disavowals of uncertainty are the result of unconscious denial and habitual suppression, however, the disclosure of medical uncertainties could become incorporated into medical practice and custom only through institutional changes in physician training.

Looming in the background of all this questioning is Dostoevsky's Grand Inquisitor. For Professor Katz, the Grand Inquisitor embodies most dramatically the essence of medicine's paternal/authoritarian world view. The Grand Inquisitor argues that in the inevitable "fearful moments of life," human beings will lack the strength to "stick to the free decision of the heart," and will turn instead to anyone, including charlatans, who provides "miracle, mystery, and authority."[17] The attraction of providing patients with miracle, mystery, and authority has proved to be very great, and yet, as Professor Katz pointedly observes, physicians' willingness to provide such ascientific therapies tends to blur the distinction between medicine and quackery.[18] Adherence to scientific practice means resisting the urge to promise more than medicine can realistically deliver, and speaking candidly with patients about what their expectations should be. While such an approach may drive some patients into the arms of quacks, it will serve

to "reassure the vast majority of patients who remain in their care that physicians will exercise only those skills they truly possess."[19]

Professor Katz has not limited his analyses of physician-patient relationships to those that occur in the standard clinical setting. He is also renowned for his pioneer study of relationships between medical investigators and subjects in human experimentations. This study explores the fundamental tension between the values of freedom of scientific inquiry and individual autonomy. In the introduction to his now classic casebook, *Experimentation With Human Beings*, he defines the parameters of debate by describing this tension and asking a question:

> When science takes man as its subject, tensions arise between two values basic to Western society: freedom of scientific inquiry and protection of individual inviolability. Both are facets of man's quest to order his world. Scientific research has given man some, albeit incomplete, knowledge and tools to tame his environment, while commitment to individual worth and autonomy, however wavering, has limited man's intrusions on man. Yet when human beings become the subject of experimentation, allegiance to one value invites neglect of the other. At the heart of this conflict lies an age-old question: When may a society, actively or by acquiescence, expose some of its members to harm in order to seek benefits for them, for others, or for society as a whole?[20]

Professor Katz himself conducted experiments with human subjects on hypnotic dreams in the 1950's, and his reflections on the limited disclosure made to the subjects of these experiments stimulated much of his early thinking in this area. Although he has repeatedly emphasized in his writings the value of freedom of scientific inquiry,[21] he has also insisted, in the face of much criticism from his peers in medicine, that government must exercise its authority to define and limit the human costs it is willing to bear in order to advance knowledge.

While he acknowledges that medical research is motivated in large measure by altruism and scientific curiosity, Professor Katz reminds us that scientific investigators are also influenced by other, less conscious motivations. He observes that a physician-investigator's conscious willingness to care for patients is intertwined with human proclivities for aggression. Professor Katz explains that investigators are not only susceptible to these proclivities, but "they are particularly vulnerable to them because their dedication to the advancement of science can blind them to the human costs of research. Denials and rationalizations are powerful allies of aggression."[22]

His casebook documents in detail the dark side of experimentation, including the Nazi experiments conducted in the concentration camps, the 1932 Tuskegee Syphilis Study that followed the natural history of untreated syphilis in subjects who were told that they were getting free treatment,[23] and the 1963 experiment at the Jewish Chronic Disease Hospital that involved the injection of cancer cells into chronically ill patients without obtaining their informed consent. Professor Katz has helped us come to understand these experiments not as aberrant acts of madness, but as the predictable results of the unchecked power of human aggression camouflaged in scientific garb. "We must remember," he cautions, "that *habet mundus iste suas noctes et non paucas* (this world has its nights and they are not few in number)."[24]

Professor Katz has therefore proposed that government regulation should ensure joint decision-making by investigators and subjects:

> Decision making in medicine ought to be a joint undertaking and should depend more on the nature and quality of the entire give-and-take process than on whether a particular disclosure has or has not been made. If decision making is viewed as a joint undertaking, then investigators and subjects have responsibilities both to themselves and to each other. Then one person can neither overpower the other, nor surrender responsibility to the other (except under carefully defined circumstances), nor not feel responsible for the other. One of the first questions ever raised—Am I my brother's keeper?—has many intertwined answers: Yes, I am my brother's keeper, and he is my keeper, and I am my own keeper, and he is his own keeper. Thus investigator and subject are both each others' keepers and their own keepers.[25]

Professor Katz concedes that government regulation that is aimed at ensuring joint decision-making may, to some degree, inhibit scientific inquiry. He reminds us, however, in the words of a colleague, that:

> scientific progress is an optional goal, not an unconditional commitment. . . . [A] slower progress in the conquest of disease would not threaten society . . . [but] society would indeed be threatened by the erosion of those moral values whose loss, possibly caused by too ruthless a pursuit of scientific progress, would make its most dazzling triumphs not worth having.[26]

Professor Katz, in collaboration with Professor Alexander Capron, critiqued the role of government regulation of health care in yet a different setting in their book, *Catastrophic Diseases: Who Decides What?*[27] They portray the relationship between physician-investigators and patient-subjects in the context of so-

cial policies that determine the way in which scarce life-saving resources are distributed. The question raised throughout this book is: "Who will make the decisions and by what means?"[28] Professors Katz and Capron propose as an ideal an informed consent model, which they describe as a "mutually informed joint working relationship." The authors then examine the interactions between this ideal model and relevant institutions, including professional groups, government agencies, and interested private institutions.

The Katz and Capron study of catastrophic diseases is a groundbreaking contribution to medicolegal literature. Instead of merely detailing a comprehensive scheme for catastrophic disease decision-making, the authors sought to identify the relevant values and goals. Professors Katz and Capron contend that decision-making in the treatment of catastrophic diseases should be a mutual and collaborative effort. They acknowledge that the informed consent model must take into account the unusual tensions that shape catastrophic disease decision-making. Terminal patients often deny their condition as a psychological defense. This defense, coupled with feelings of helplessness, dependency and further depression, may seriously interfere with the patient's ability to make realistic decisions.[29] Dying patients may unconsciously express a too-eager willingness to be used for scientific work in return for special favors that facilitate avoidance of the realization that their lives are imperiled.[30] If decision-making is truly to be a mutual and collaborative effort, the informed consent model requires physical and psychic rededication to equal participation by patient and physician alike through a process of contracting, negotiating, and recontracting.[31]

Professors Katz and Capron furthermore propose that the collaboration include the involvement of third parties, whether they be family, other health care providers, professional organizations, government bodies, or interested private institutions. They note that collective decision-making is particularly justifiable in the context of catastrophic diseases. Collaboration among these third parties "can better take into account the benefits derived by individuals from public health actions, which will affect not only the total amount which ought optimally to be spent on catastrophic disease treatment but also the distribution of the resulting resources among the potential recipients."[32] More important, such mutual decision-making ensures that diverse values will be considered in the process. For example, the formulation of the definition of death should not be within the sole competence of the medical profession; instead the formulation should reflect pluralistic perspectives within society.

Another central theme of the *Catastrophic Diseases* study is that responsible decision-making can be best ensured by identifying the roles of the decision-makers and making the process visible to the public eye. Identifying the collaborative responsibilities of patients and physicians helps to overcome the natural tendency of each participant to hand over total responsibility to the other. Public identification of roles serves the additional purpose of making the individual consciously aware of his or her social responsibility to be thoughtful and conscientious.

Professors Katz and Capron accordingly suggest that scarce medical treatments should be allocated through a national system employing a mixture of collective standards and a lottery.[33] They acknowledge that the open administration of such a system:

> threatens to undermine the myth of societal commitment to life as a "pearl beyond price" because the process itself shows that we as a society are only willing to commit limited resources to certain types of medical care or to treat only a portion of those who suffer. Yet most people are already aware of our collective deviation from our professed beliefs. If the proposed system serves to reduce some of the obfuscation which has surrounded this point, we find its advantages as a method of selection more than outweigh the resulting loss in societal peace of mind and self-image.[34]

Professors Katz and Capron recognize the pain of conscious awareness of a tragic reality by individuals and society, but point out the greater costs of obscuring the basis for decisions, including confusion, misunderstanding, and abuse. Thus they insist on continually raising the question, "Who decides what?"

Professor Katz's contribution to the field of family law is the product of an intense collaboration with Professors Joseph Goldstein and John Simon, and with his students. His collaboration with Professor Goldstein led to the creation of a casebook, *The Family and the Law*.[35] That book provokes students by repeatedly posing hard questions and by requiring a dynamic interaction with multidisciplinary materials. Because we are all familiar with the tensions of family life, the descriptions of social pathology in family relationships may often bring forth memories of conflicts that readers have personally felt as family members. In the introduction to the casebook, Professors Katz and Goldstein wrote:

> The question underlying all of these general and specific questions is whether, how, and to what extent the state should not or should be authorized to regulate the relations of man. In answering this question the decisionmaker must resolve the important issue of why, when, and how the state ought or ought not to intervene. . . .
> The reader who opens himself to these questions and materials will be unable to keep his thoughts

> from straying to reflections about himself and his family. This may cause feelings of uneasiness, particularly if the boundary between the people in the materials and those in personal fantasy becomes hazy. Such an experience can be likened to that of the medical student who frequently "suffers" from all of the symptoms he is studying in his textbooks. "As a matter of fact, it is most unsatisfactory to be immune to 'medical students' disease. A touch of the ailment is a sign that the reader is really opening himself to his subject, trying to grasp it and feel it rather than just reading about it."[36]

Professor Katz's commitment to collaboration and candor in human relationships is not limited to his scholarship, but is evident in his classroom and his personal relationships with students and colleagues. He has often chosen to team-teach some of his courses in order to ensure exposure to contrasting views of controversial subjects, and to capture in the classroom some of the synergism that has fueled his scholarship. He is a demanding professor, offering students the challenge of collaborating with him in addressing the questions he raises and in uncovering additional questions. Whatever insecurity a student may feel when confronted with such a challenge is overcome quickly, however, typically over lunch at Mory's, on walks through campus, or over drinks at his home. His immense success as a teacher is reflected by the prominent presence of his former students on law faculties nationwide. His remarkable insights have led many of us to begin in-depth explorations of our own capacities as family members, patients, health practitioners, attorneys, researchers, and policymakers.

One theme that emerges from his diverse scholarship and teaching is that in refusing to acknowledge and take responsibility for choices we make, we choke our own growth as mature individuals, and the growth of our humanity as well. Choice is inevitable—and the terrifying prospect of making choices in situations involving human experimentation or catastrophic disease tempts us to deny that choice exists, to hand over choice to others. By relentlessly asking "Who decides?" Professor Katz has illuminated the human proclivity to answer (in effect), "Anyone but me!" The stark light that this exchange casts on the human predicament no doubt fosters denial, but fortunately does not foreclose more constructive responses.

Perhaps his work ultimately leads to a single most important question: whether we can accept responsibility for our choices. If we are to transcend the world of the Grand Inquisitor, most tellingly represented today by the "miracle" of modern technology and the magic solutions it promises, we must not only answer this question affirmatively, but begin the difficult process of learning to take responsibility. In so doing, we can derive comfort from his related message, which is that although the burden of choice is one we each ought to shoulder, it is also one that we can and ought to share with others, through conversation, collaboration, and mutual trust.

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29. Id.: 93.
30. Id.: 114.
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34. Id.: 194–195. Professors Katz and Capron were responding to comments prepared by Guido Calabresi, now Dean of the Yale Law School, as a consultant to their projects. Dean Calabresi's ideas were later expanded as the Fels Lectures at the University of Pennsylvania and published in G. Calabresi and P. Bobbit, *Tragic Choices,* New York: W.W. Norton & Co., 1978.
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