

The Uses of Psychoanalysis in Law: The Force of Jay Katz's Example

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Jay Katz has been one of the most profound and enduring influences on my life as a legal scholar. His influence began at the very moment I entered the Yale Law School as a student in 1962. My understanding of the uses of psychoanalysis in legal analysis begins with the memory of my first encounter with him. I believe that my personal experience mirrors more generally how Jay came to influence all of his students—those lucky enough to sit in his classes as well as those who have only encountered him through his writings.

Here then is my memory of my first classroom session with Jay Katz. I had just arrived at Yale Law School in 1962 after two years at Oxford studying law. Yale treated my Oxford degree as the equivalent of the first year course of study; so I began in effect as a transfer student with second-year status. (If you'll excuse the pun, it was transference all the way down from that moment onward.) This transfer status meant that I was immediately eligible for taking some upper-class courses and I enrolled in Family Law—taught by Professors Joe Goldstein and Jay Katz—and this was the first class I attended on my first day at Yale.

Before class, we were told to read the New York state statute governing divorce and then the complaint and counter-complaint filed by a couple, identified by pseudonym as Sadie and Perry Lesser.¹ In their cross-filings, Sadie and Perry alleged that each inflicted indignities on the other, described in considerable detail, drawn from some twenty years of marriage. With this advance reading, I came to class with thirty or so fellow students.

Jay and Joe sat side by side at the front of the room, and Joe began with a classically open-ended question. "What's going on here?" he asked—and then he and Jay sat silently waiting for some response. I was puzzled—not just by the question, which seemed extraordinarily odd to me based on my previous Oxford law classes, but even more by the prolonged silence from the teachers that followed that odd question. (The silence, I would bet, lasted no more than fifteen seconds, but in the garrulous world of lawyering to which I'd already been

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1. JOSEPH GOLDSTEIN & JAY KATZ, *THE FAMILY AND THE LAW* 19 (1965).

initiated, this fifteen seconds of silence seemed like a very long time indeed.) Then one student raised his hand and spoke, and then another and another. The students were drawn repeatedly to the technical details in the statute—the differences between “divorce” and “separation from bed and board,” for example, and the way the parties’ pleadings related to those different standards. Joe and Jay listened respectfully and occasionally commented directly on one or another of the students’ responses. But after all of the upraised student hands had been recognized, Joe said “What else?” and silence again ensued. Then a few more hands up, a few more comments from the teachers and then again, “Anything else?” and then silence once more.

I sat silent throughout all this, impressed at my fellow students’ technical command and self-confidence and unclear about what was expected in an American law classroom (though I soon thereafter learned that this was a very unusual American law classroom, even at Yale). Then Jay spoke. He may have been entirely silent up to this moment, but in any event had not said much, content to leave the prior interactions more to Joe. And Jay spoke, of course, in his accented English which seemed to me at that moment like the very embodiment of Sigmund Freud himself. Jay said, “Here’s one possibility about what’s going on. These two people are at war. They are fighting one another for their self-respect, even for their lives. This is a life-and-death struggle between Sadie and Perry Lesser.”

At those words I remember feeling an enormous release of tension, a sense of recognizing something in myself and in the world that I had only vaguely glimpsed before, an opening of feelings that I had not known were in me. This may sound melodramatic, but for me this was high drama of an intensely personal kind. I had come to that classroom with two years’ previous experience of law training and at least ten years’ prior conviction that I wanted to be a lawyer. But my initial exposure to law training at Oxford had only left me with an unsatisfied question and a foreboding. Why, I had asked myself at the end of this previous two years, did I want to become a lawyer? The law as I had seen it seemed to be a set of intricate finger-exercises; I had learned that I could do the exercises reasonably well, play the game according to the rules at hand. But for what? Why was I there, what did I want from this profession? Suddenly, unexpectedly, in Jay and Joe’s classroom, I had an answer. Or maybe not an answer, but at least the beginnings of an answer—coupled with a conviction that I was in the right place. I was where I wanted to be. I was where I needed to be. I was in a Yale Law School classroom with Joe Goldstein and Jay Katz.

Then Joe amplified Jay’s observation about the war between the Lessers. “Our task in this course,” he said, “is to evaluate the weapons that the law gives to Sadie and Perry to wage this warfare that started outside of the courtroom, and to ask whether the availability of these legal weapons makes matters better or

worse for these two people, for their children, and for society.” I was dazzled, captivated, and enchanted. And I remain so today.

Jay and Joe ultimately took different paths in pursuing these questions—not so noticeably in the many classes that I took with them from 1962 through 1964, but much more in their later writings. In the course of this paper, I will explore some of those differences because they illuminate various possibilities for the uses of psychoanalysis in legal thinking. The lesson that both Jay and Joe taught—the premise that they shared—was that the law properly understood must encompass the entire dimension of the human condition. The law may aspire to rational control in human affairs. And in this pursuit of rational control, the law may aspire to complete transparency among legal actors in acknowledging the relationship between the law’s means and its ultimate goal of rational control. But psychoanalysis teaches that this aspiration to rationality and transparency encounters many stubborn, and even intractable, obstacles because of how pervasive non-rational thinking is in human psychological functioning. And psychoanalysis teaches that the aspiration to rationality and transparency will fail, will even become a perversely self-defeating caricature of itself, unless legal actors persistently give explicit and respectful attention to the non-rational dimensions of their enterprise.

Jay and Joe shared these two premises and imparted them to their students. Their respectful and fearless attention to the non-rational dimensions, buried beneath the confident, imperialist claims of legal rationality, was the shock and the thrill of recognition that I experienced in my first encounter with Joe and Jay and Sadie and Perry Lesser.

From these shared premises drawn from psychoanalysis, two diverging strands emerge—two strands not only exemplified in the different paths that Joe and Jay took in their own work but also in the history of psychoanalytic thinking generally. As in most things psychoanalytic, these two strands can be traced back to the mind of the movement’s founder. At the risk of oversimplification, one could draw a distinction between the early and the late Freud. Freud’s initial ambition was to deploy the insights and methodology of psychoanalysis to tame the irrational—as his famous aphorism put it, “where id was, there ego shall be”²—whereas the later Freud is more skeptical about the attainability of this goal, as in his late essay *Analysis Terminable and Interminable*,³ or in his book,

2. SIGMUND FREUD, *New Introductory Lectures on Psychoanalysis* (1930), reprinted in 22 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 80 (James Strachey ed. & trans., 1964).

3. SIGMUND FREUD, *Analysis Terminable and Interminable* (1937), reprinted in 23 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 209 (James Strachey ed. & trans., 1964).

Civilization and Its Discontents.⁴ This distinction between early and late Freud may be somewhat overdrawn; but as a heuristic, it is helpful for identifying divergent uses for psychoanalysis in law and, in particular, for placing Joe and Jay along this spectrum in Freud's thinking.

As I see it, the dominant ambition of Joe's approach to psychoanalysis in law, as his intellectual career unfolded, was to identify principles for resolving legal disputes that took explicit account of the non-rational and did not simply impose a rational facade on unruly psychological forces. The paradigmatic expression of this approach was in Joe's work on disputes about the welfare of children, with the collaboration of Anna Freud and Albert Solnit (and in later works also with Sonya Goldstein).⁵ With his collaborators, Joe used psychoanalytic premises to demonstrate that children's thinking was organized very differently from conventional adult conceptions of rationality. At a minimum, this demonstration required that children, especially very young children, be understood as deeply embedded in non-rational thinking which only gradually gives way to self-consciously transparent rational thinking; and we must further understand that this is an extended process that requires supportive attention to children's developmentally distinctive non-rationality in order to succeed.

But Joe had a further ambition—and this, I believe, was his distinctive contribution in his collaborative works—which was to identify rules that were themselves respectful of children's developmentally distinct non-rationalities, rules that could be applied by legal decision-makers in resolving a wide range of child welfare disputes. Thus from the premise that every child needs a continuous relationship with an adult caretaker, Joe drew rules to preserve continuity by protecting actual ongoing custodial relationships with children against challenges from biological parents, notwithstanding the fact that the custodians had no biological link with the child. Joe argued that these custodians were the children's sole "psychological parents," and, in psychoanalytic terms, this meant that they were the children's true parents.⁶ In divorce disputes between two

4. SIGMUND FREUD, *Civilization and Its Discontents* (1930), reprinted in 21 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 59 (James Strachey ed. & trans., 1964).

5. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979) [hereinafter GOLDSTEIN ET AL., BEFORE THE BEST INTEREST OF THE CHILD]; JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) [hereinafter GOLDSTEIN ET AL., BEYOND THE BEST INTEREST OF THE CHILD]; JOSEPH GOLDSTEIN, ALBERT SOLNIT, SONYA GOLDSTEIN, & ANNA FREUD, THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE (1986) [hereinafter GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD].

6. See GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD, *supra* note 5, at 39-57

biological parents, Joe applied the continuity principle to require that the day-to-day custodian of the child be given full, legally unchallengeable authority to control all aspects of the child's upbringing—choice of schools, of religious affiliation and even of visitation arrangements with the non-custodial parents.⁷ These examples illustrate Joe's general mission—to use psychoanalytic premises to resolve legal disputes.

Jay had a very different agenda. His central concern was not to resolve disputes but to create them. Jay's mission was to provoke conflict where one or even all parties to a relationship had not previously acknowledged or even understood that they were fighting about anything. The paradigmatic context for Jay's provocative endeavor was the relationship between physician and patient. In the traditional understanding of this relationship—from Hippocrates' time onward, as Jay demonstrated in his historical scholarship⁸—there was no acknowledged conflict between physician and patient. The very definition of the relationship required that the physician was in charge and the patient was compliant; they were “of one mind,” and the physician was that mind, while the patient literally had no mind of his own.⁹

This traditional conception violated norms of self-determination rooted in the ideology of post-Enlightenment Western individualism and Jay invoked these norms to buttress his case against the traditional conception of the doctor-patient relation. But the heart of his case did not rest on these norms. Jay's signal contribution was in his use of psychoanalytic premises to demonstrate that the traditional conception was not accurate, but rather was a crude simplification, even a falsification, that served to suppress awareness of the conflicts that physicians and patients regularly experienced with one another. Even more profoundly, Jay argued that this traditional conception of inherent unity of purpose between physicians and patients served to mask the conflicts that each felt within themselves.

The core of these conflicts concerned the issue of rational control. For the patient, the cherished ideal of rational self-control is threatened by the illness that drives him to seek the physician's assistance. This psychological vulnerability was the basis for the traditional medical stance that patients were inherently incapable of exercising autonomous choice about their treatment regimes. But Jay showed how physicians' cherished ideal of rational self-control is equally

(discussing familial bonds between children and longtime caretakers who are not their parents).

7. See GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD, *supra* note 5, at 31-40.

8. See JAY KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT 30-47 (Johns Hopkins Univ. Press 2002) (1984) [hereinafter KATZ, SILENT WORLD] (tracing the “history of silence” between doctor and patient).

9. See *id.* at xl-xlvi.

undermined by the multiple uncertainties that are an inescapable part of medical practice. The basic goal of scientific medicine during the past 150 years has been to expand the scope of rational mastery over illness and an impressive range of medical interventions has been devised for this purpose. But Jay maintained that the vast array of these interventions in itself creates an unsettling problem for every individual physician who is obliged to “keep up with the field”—to match his or her personal capacity to control a patient’s illness with the complex, ever-burgeoning tools for such control provided by medical science. And even for the most up-to-date physician, uncertainty remains inescapable in dealings with every specific patient due to the inherent biological variability of each patient and because so much remains unknown about disease processes generally.

In the face of these vulnerabilities, patients and physicians both cherish the fantasy that illness will be magically cured. As Jay put it in his influential book, *The Silent World of Doctor and Patient*, “Deep in patients’ unconscious, physicians are viewed as miracle workers, patterned after the fantasized all-caring parents of infancy.”¹⁰ Physicians, on their side of this unconscious transaction, want to be “miracle workers,” to assure both their patients and themselves that the “fantasized all-caring parents of infancy” are still available when needed, whether by their patients or by themselves. Jay’s goal was not to destroy this shared fantasy; psychoanalytic premises instruct us that he could not do so even if he wanted to. But these premises also tell us that fantasies can have both “adaptive” and “maladaptive” consequences and, as the good psychoanalyst that he is, Jay’s goal has been to identify the fantasies that were giving shape to perceptions of real-world interactions and to sort out the ways in which those fantasies were helpful or obstructive to the underlying goals of the participants in these interactions.

To return to the contrast between Jay and Joe: Joe’s goal was to take the law’s promise to protect the best interest of the child and—as he phrased it—to “pour[] content into . . . the law’s standard” through the use of psychoanalytic premises.¹¹ Joe began, then, with a legal standard which was patently indeterminate—it was acknowledged by virtually everyone to be subject to rudderless judicial application—and his ambition was, through psychoanalytic insight, to make this standard clearly determinate.

Jay worked in exactly the opposite direction. Jay began with the law’s standard of “informed consent,” which was widely understood as clearly determinate; physicians are obliged to do only what patients request and, toward that clear-cut end, to inform patients about all available options. Jay embraced this standard for normative reasons quite aside from psychoanalytic premises.

10. *Id.* at 192.

11. Joseph Goldstein, *Psychoanalysis and Jurisprudence*, 77 YALE L.J. 1053, 1074 (1968).

But his basic goal was to unmask the indeterminacy—the multiple, interlocking unconscious fantasies within and between patients and physicians—that was concealed by the misleadingly simple formula of “informed consent.” It is in this sense that Joe used psychoanalysis to resolve conflict where all of the legal actors had previously acknowledged the existence of conflict, while Jay used psychoanalysis to create an awareness of conflict where all of the actors had previously been locked in a mutually reinforcing fantasy that no conflict existed.

Both of these contrasting uses of psychoanalysis fit within the premises of the field. Freud’s original aspiration for psychoanalysis as a scientific medical enterprise is especially congenial to Joe’s ambition for identifying dispositive standards within the discipline to guide conduct—criteria, one might say, of “normal and healthy” versus “abnormal and pathological” behavior. Jay’s goal of introducing complexity and indeterminacy is more congenial to the way that psychoanalysis has evolved in its clinical expression as a therapeutic modality. Jay’s approach also reflects later doubts about the determinate character of the psychoanalytic enterprise that were expressed by Freud, as well as many contemporary psychoanalytic theorists.¹²

Jay’s path of using psychoanalytic premises to identify and amplify conflicts where none had previously been acknowledged is the path that I have tried to follow in my own thinking and legal writing. There is a cost to this approach: The conventional idea of law demands the resolution of disputes whereas Jay’s approach leans much more toward the provocation and prolongation of disputes than to their resolution. Though this inclination cuts against the grain of conventional legal thinking, I believe there is a deep, socially helpful truth that can emerge from this unconventional perspective.

Let me illustrate this truth by examining two specific applications of the contrasting perspectives that Joe and Jay present. First, let us briefly consider Joe’s approach to the child custody dispute in *Painter v. Bannister*,¹³ a decision of the Iowa Supreme Court that attained considerable notoriety as a “culture clash” in the mid-1960s. The object of this clash was Mark Painter, a seven-year-old whose mother and younger sister had died two years earlier in an automobile accident and whose father, Harold, had immediately afterward sent Mark to live with his maternal grandparents on their Iowa farm. After re-marrying, Mark’s father sought to regain custody but Mark’s grandparents, the Bannisters, resisted. The Iowa court awarded permanent custody to the grandparents, characterizing their home as a “stable, dependable, conventional, middle-class middlewest

12. See, e.g., HANS LOEWALD, *Psychoanalysis as an Art and the Fantasy Character of the Psychoanalytic Situation*, in *PAPERS ON PSYCHOANALYSIS* 352 (1980).

13. 140 N.W.2d 152 (Iowa 1966).

background”¹⁴ whereas Harold Painter’s home would be “unstable, unconventional, arty, Bohemian and probably intellectually stimulating.”¹⁵ Joe approved of the Iowa court’s disposition but not of its articulated rationale for rejecting the “arty . . . and probably intellectually stimulating” father.¹⁶

I cannot help but imagine some small smile playing across Joe’s face as he spoke against the virtually unanimous condemnation among “liberal intellectuals” of this corn-fed Iowa ruling. But Joe had a supervening principle drawn from the psychoanalytic premises underlying the “continuity” standard; Mark should stay with his grandparents because the psychologist’s examination conducted in the case demonstrated that the Bannisters had become Mark’s “psychological parents” during the two years he had lived with them.

Joe’s resolution is not vulnerable to the same charge of cultural bias as the Iowa Court’s decision. But I believe he was misled by his underlying conception of the role for psychoanalysis in addressing legal conflict. Put in conventional terms, there was a clear-cut and acknowledged dispute between Harold Painter and the Bannisters—each wanted custody of Mark and each party was willing only to envision some limited visitation arrangement for the other. Conventionally understood, the court’s role was to resolve the dispute in favor of one claimant or the other. There is a powerful practical imperative behind this understanding of the judicial role. A dispute raged between the two parties and each believed that only one of them could prevail. But this practical imperative says nothing about the true “best interests” of the disputed child. Joe’s invocation of the psychoanalytically based continuity principle does purport to speak to Mark’s best interest. But I believe that on the particular facts of Mark’s case this is erroneous and that this specific error illuminates the larger mistake that pervades Joe’s goal of using psychoanalysis for definitive dispute resolution.

In my view, thinking about Mark Painter’s best interests must begin by acknowledging the tragic losses that he had endured. Mark’s psychological need for continuity of caretaking had not been displaced by the sudden deaths of his mother and younger sister. This need was almost certainly intensified—and from this perspective—almost certainly further undermined, by his father’s decision to send him from their family home in Alaska a half-continent away to Iowa and to grandparents whom he had hardly known. Perhaps Harold Painter was so shattered by the death of his wife and daughter that he felt he had nothing to offer Mark in responding to their common loss, but the further disruption of losing contact with his father virtually at the same time when he lost his mother and sister must have taken some added toll on Mark.

14. *Id.* at 154.

15. *Id.* at 156.

16. *Id.*

When Mark's father suddenly re-appeared and sought to resume his custodial role but was rebuffed by Mark's grandparents, there were two different ways of framing the custodial question. One way was, what choice between these two contending parties would best serve Mark's current needs—who should prevail between them? An alternative way of framing the question was, how can these contending parties be led to understand that Mark's needs may best be served (and perhaps can only be served) if his father and grandparents can find some way to transcend their hostility and work together, wholeheartedly, so that Mark might have a continuous, strong relationship with both of them?

I believe this second way of framing the question is preferable based on the psychoanalytic premise of preserving continuity that Joe himself invoked. Mark had already suffered a terrible loss of continuous caretaking. A decision definitively choosing between two of Mark's surviving, psychologically important caretakers would almost certainly be understood by him as another blow, another loss of a continuous relationship. It may be that these two rival contenders for a continuous relationship with Mark were so deeply estranged that they never could be brought to realize Mark's need for both of them to work together. It may be that a judge would be forced, simply as a practical matter, to choose between them, even though the act of choosing itself would be psychologically damaging to Mark. But it would be deceptive, and misleading to the disputing parties themselves, for the legal system to claim that this choice is anything but a disservice to Mark's best interest or, in Joe's preferred formulation, that the choice could yield a "least detrimental alternative."¹⁷ No good—and not even a diminished detriment—can come from this choice for Mark. If the warring members of his extended family truly understood that Mark could only benefit if they could transcend their battle over him, they would realize that a forced choice between them can only cause him harm.

This is the clear, single-minded message that the legal system should present to these warring parties. The system should not pretend for a moment that Mark's interests will be served if a judge makes the choice that the warring parties are demanding. And no experts, whether speaking from a specifically psychoanalytic or from any other professional psychological perspective, should lend the prestige of their authority to this pretense, even if the warring parties or the legal system itself tries to enlist them in this misleading endeavor.

There is a proper role for psychological experts in this dispute. It is to advise the warring parties about Mark's urgent need for them to resolve their conflict, to engage the parties in extended, sympathetic discussions about the bases for their conflict, and to explore possibilities for transcendence through empathic understanding of themselves and their erstwhile adversaries. This is the role

17. See GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD, *supra* note 5.

conception that lies beneath Jay's use of psychoanalytic premises in his approach to legal institutions.

Jay made this clear in his account of the function of the "informed consent" norm in doctor-patient relations. In Jay's account, the informed consent requirement is not a rule that simply shifts the traditional conception that doctors make unilateral decisions that bind patients to a new conception wherein patients make unilateral decisions that bind their doctors. That is, Jay did not see the "informed consent" requirement as a rule for resolving disputes in the way that Joe intended his "psychological parent" rule. For Jay, the "informed consent" requirement can only properly be understood, as he put it in *The Silent World*, as an "obligation for conversation."¹⁸ The goal of this conversation is not for one participant to rule the other, but for doctor and patient to converse honestly and trustingly with one another in order to reach agreement about the best course for treatment.

Jay's vision of both the possibilities for and the obstacles to this conversation—and the ultimate consequences of failure to reach agreement—are elegantly set out in his account of the justification for overriding the norm of "informed consent" through time-limited civil commitment of people with mental illness. Jay's account, *The Right to Treatment—An Enchanting Legal Fiction*, published in 1969, sets out the essential psychological premises which lay beneath all of his work on the role of informed consent in doctor-patient relations.¹⁹ This might appear paradoxical, since Jay's 1969 article deals with mentally ill people who, by strict legal definition, are incapable of giving or withholding informed consent and this incapacity is the essential justification for forcing treatment on them. But Jay's psychological premises erode strict categorical distinctions between mental capacity and incapacity. The way in which Jay dealt with the role of patient consent in civil commitment proceedings ultimately is the same way he addressed informed consent in all treatment relations, even when "mental illness" or "incapacity," strictly speaking, does not seem to be at issue.

I want to quote an extended passage from Jay's 1969 article. In this passage, and in the article generally, Jay purports only to speak about people with mental illnesses. But as I quote this passage, I urge you to listen for resonances with his account of the psychological vulnerabilities of all people facing serious illness, whether physical or mental. Here is what Jay said:

18. KATZ, *SILENT WORLD*, *supra* note 8, at 130.

19. Jay Katz, *The Right to Treatment—An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755 (1969).

Most persons whom society involuntarily commits are consciously and unconsciously so convinced that no one cares, indeed they look at offers of help with such suspicion, that a sustained period of exposure to an unaccustomed world of trust, respect, and care is required in order to attempt to modify these beliefs. It is possible, without precisely knowing when it is and when it is not, to change defiant, ignorant, and fearful attitudes about treatment through patient and persistent efforts in an institutional setting. Behind the conscious refusal of treatment, other unconscious wishes also operate—to be protected, to be cared for, to be sustained, to be helped. What weight should be given to these wishes when they are almost drowned out by words which damn their own self and the world?²⁰

If there are, as I believe there to be, significant psychological similarities between the people whom Jay thus describes as appropriate candidates for civil commitment and many people who refuse to accept treatment regimes offered by physicians for physical and mental illnesses, do these similarities mean that physicians generally are justified in overriding patients' refusals? Jay refused to accept this corollary. But his refusal is not based on any categorical distinction between mentally "abnormal" and mentally "normal" refusals of treatment. Jay ultimately refused to accept coerced treatment for mentally "abnormal" people on the same ground that he refused to accept it for mentally "normal" people. For civil commitment, Jay endorsed what he called "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."²¹

Jay's "middle ground" was to permit some coerced interaction with a physician, but coercion limited to a definite and relatively short time period. During this time-limited forced relationship, Jay said, the psychiatrist's interventions would necessarily

be restricted to an exploration of resistances to treatment and thus would extend only to an opportunity to learn to appreciate the value of treatment and those who offer it.

. . . [But t]he imposition of time limits will suggest to both patient and therapist that the day will arrive when both will have either to bow to the strength of unconscious forces that prevent therapy or to respect the conscious and unconscious convictions that deny its necessity. . . . The participants will know that the task before them is to reach consensus or to respectfully differ on

20. *Id.* at 771 (footnote omitted).

21. *Id.*

the need for treatment.²²

If, according to Jay's prescription, consensus is not reached and "respectful" difference on the need for treatment persists, then treatment cannot go forward. In this way, but in this way alone, the individual's autonomous right to refuse treatment comes into the foreground.

I believe that this depiction of the permissible role for coercion in doctor-patient relations when the possibility of mental illness is at issue precisely parallels Jay's account of the role of informed consent in the doctor-patient relationship generally. Unlike the conventional lawyer's account which begins with the premise—one might say, with an almost irrebuttable presumption—of individual autonomy, Jay's psychoanalytic perspective instructs that the capacities for individual autonomy and for rational self-control are inevitably at issue in the opening phase of the doctor-patient relationship. The goal for this opening phase is for both parties, the doctor and the potential patient, to explore this capacity. This exploration, moreover, must acknowledge and explore the doubts not only for the potential patient, whose capacity for rational self-control may be clouded by the impact of illness, but also for the doctor whose passion for rationalist scientific control of disease may be frustrated by the challenge of the potential patient's condition.

It is psychologically misleading to characterize this opening phase of the doctor-patient relationship as a free interchange between autonomous, rationally self-controlling individuals. The threat that both parties inevitably feel about their capacity to maintain rational self-control dictates that the relationship itself will feel mutually coercive in crucially important respects. This mutual coercion is not wrong or normatively inappropriate on either the patient or the doctor side of the transaction; it is psychologically inevitable and wrongful only if unacknowledged. Through the "obligation of conversation" that Jay prescribed, these mutually coercive elements should be brought into explicit, acknowledged visibility. As Jay observed, for interactions between psychiatrists and potential patients, as well as for the opening phases of all interactions between doctors and potential patients, "the task before them is to reach consensus or to respectfully differ on the need for treatment."²³

If disagreement persists, then disengagement must follow. But this consequence is not necessarily a victory for individual autonomy as psychologically understood. As Jay observed in his 1969 article, the conventional, relentlessly rationalist, legal account of individual autonomy

asserts that no matter what the balance of instinctual and ego forces or of

22. *Id.* at 773-74.

23. *Id.* at 774.

libidinal and destructive superego forces or of inner and outer world distortions, persons should be left to pursue their own fate if they so “state.” Such a proposition can be as destructive of human life as its opposite of over-readiness to hospitalize. . . . Such an approach is as insensitive as the abuse of power that leads to indefinite incarceration without treatment and with treatments that are of no value or ineffective or even harmful.²⁴

Jay’s goal throughout his work was not to reject the law’s rationalist account of individual autonomy but to identify the shortcomings of that account as measured by a psychoanalytically informed perspective on human psychological functioning and to show ways that this humane psychological vision can be brought into harmony with the law’s rationalism. This approach does not yield rules for settling legal disputes. Such dispositive rules, as with the conventional account of the patient’s right to self-determination, can too readily serve as barriers to self-exploration by patients and physicians—in effect, as conversation stoppers. Jay’s goal has always been to provoke conversation and to use psychoanalytic premises to identify the proper subject-matter for these conversational disputes.

In my own work on issues of biomedical ethics specifically²⁵ and constitutional adjudication more generally²⁶—even from my first encounter with him when I was a law student in 1962—I have been guided by Jay’s example. I thank him for that.

24. *Id.* at 770-71.

25. *See, e.g.*, ROBERT A. BURT, *DEATH IS THAT MAN TAKING NAMES: INTERSECTIONS OF AMERICAN MEDICINE, LAW, AND CULTURE* (2002); ROBERT A. BURT, *TAKING CARE OF STRANGERS: THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS* (1978).

26. *See, e.g.*, ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992).

Response

Our Debt to Jay Katz

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Professor Jay Katz is a giant in the field of law and medicine. His particular interest in law and psychoanalysis drew many students to his classes and his office for stimulating conversation. As a person with a longstanding interest in psychoanalysis and law (indeed, I am in training now to become a “research psychoanalyst”), I turned to Jay Katz as someone to learn from and emulate. How might we best bring to bear the insights from a deep inquiry into human nature on our understanding of the law? Law requires a theory of the person, and psychoanalysis provides one of the richest that exists. Still, combining psychoanalysis with the law raises many challenges. Working at the interface of these two disciplines, Professor Katz has been a model for others interested in this endeavor. It is a deep honor to be asked to reflect on and celebrate the work of Jay Katz in this symposium

In this brief response, I focus on three things. First, I address the interesting distinction between the work of Professors Katz and Goldstein that Robert Burt has so carefully laid out. Second, I discuss how I see psychoanalysis informing Katz’s work. Third, I discuss how his work has led other investigators, including me, to pursue a research agenda that probably could not even have been formulated without his influence.

I. RECONCILING GOLDSTEIN AND KATZ

Let us turn first to Burt’s paper.¹ The distinction that Burt draws between the work of Goldstein and that of Katz is extremely rich and well-taken. Burt suggests that Goldstein uses psychoanalytic principles to pour content and

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1. Robert Burt, *The Uses of Psychoanalysis in Law: The Force of Jay Katz’s Example*, 6 YALE J. HEALTH POL’Y L. & ETHICS 401 (2006).

meaning into indeterminate legal standards, to make them determinate so as to resolve legal disputes. To take Robert Burt's example, Goldstein suggests that the child's best interests in a custody dispute are to be placed with the person who is the child's "psychological parent." By contrast, Katz uses the insights of psychoanalysis to *create* disputes in order to complicate situations where there is seemingly the absence of any dispute. Consider, for example, the myth that doctors' and patients' interests are the same, thus obviating the need for rigorous informed consent.

Burt's distinction captures, and is meant to capture, something aspirational for Goldstein and Katz, even if their aspirations are not always fulfilled in practice. The psychoanalytic principles which Goldstein invokes may, when applied, be no less indeterminate than the general rules they are meant to explicate. For instance, the concept of a "psychological parent" can be extremely hard to apply. How many years do we look back? What if both parents are psychological parents? What if the psychological parent also poses some kind of harm to the child? What if one parent takes care of the daily needs of the child, but is emotionally cold and detached, while the other parent has poor skills in providing daily care, but is warm and connected to the child? One could propose a bright-line rule, for example, that the parent who has spent the most hours with the child in the last two years is deemed to be the "psychological parent." But, while such rules may be relatively easy to apply and certainly bind the decision-maker, they also risk getting things badly wrong.

In contrast, Katz introduces complexity at one stage of the process, but may then invoke determinate principles at another (e.g., that the patient must be willing to converse at the risk of an intervention being imposed on him or her). Conversation may be open-ended, but ultimately, if the parties cannot agree, there must be a decision and hence a rule. Yet if people know this decision rule in advance, the party whom it benefits may have less incentive to talk; conversation may be stopped in its tracks. If the outcome will (eventually) be in my favor, what incentive do I have to keep the conversation going?

What the above suggests is that if we take a temporal perspective, both Katz's and Goldstein's approaches may find their natural homes. We do not have to choose between the two, for they each are appropriate at different points in the course of a conversation. Goldstein looks at the point at which it is obvious that conversation alone cannot resolve the dispute, when the resources of conversation have been exhausted and a decision has to be made. And Katz looks at an earlier point where careful and honest searching may lead, so to speak, to a negotiated truce.

In the end, as much as Goldstein would like to resolve disputes with clear rules and little room to fudge, he cannot avoid the parties negotiating at times when the rules are unclear; and as much as Katz would like conversations to

continue and ultimately yield an agreement, he cannot avoid ending conversation at times by imposing some definitive resolution between the parties.

Finally, the differences between Katz and Goldstein may also have more to do with their normative preferences regarding the exercise of discretion by authorities than with their beliefs concerning psychoanalysis. Goldstein is worried about abuses of power and therefore attempts to articulate determinate rules, based on determinate psychoanalytic positions, which constrain authority. Although Katz is also mindful of abuses of power, he is more hopeful about the power of conversation to lead to optimal solutions.² Goldstein fears discretion and Katz embraces it. Ultimately, a decision to take either of these positions may turn on one's tolerance for ambiguity. But how much tolerance is optimal in this context, and for legal actors in particular, is an open question.

II. THE SILENT WORLD OF PSYCHOANALYSIS

Katz's work is thoroughly influenced by psychoanalytic ideas. A central theme throughout his work is that unconscious and irrational influences on decision-making are pervasive. This of course is Freud's central insight.³ Also important are Katz's psychoanalytic ideas about how those unconscious and irrational processes affect the doctor-patient relationship in particular. For example, the patient may unconsciously and irrationally endow the doctor with omnipotent powers to cure him, and the doctor may have unconscious fantasies about being an all-powerful rescuer or savior. These fantasies emerge most pointedly in the course of a psychoanalytic treatment, and, as an analyst, Katz will have experienced them at close hand. A third and extremely important insight in his work is that we must apply these principles not only to patients, but also to doctors. Psychoanalysts are trained to be mindful of their own fantasies

2. Thus, in an especially hopeful passage, Katz writes:

If doctors could learn, and in turn teach their patients, that it is possible to sit down and reason together about the most important personal anxieties and fears that illness and its treatment engenders, then they could also point the way to living life not by submission but by mutual respect, with careful attentiveness to one's own and the other's rationalities and irrationalities. Living the life of medicine in such new and unaccustomed ways could extend the dominion of reason and thus make doctors true healers to mankind.

JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* 226 (Johns Hopkins Univ. Press 2002) (1984) [hereinafter KATZ, *SILENT WORLD*].

3. See, e.g., SIGMUND FREUD, *The Interpretation of Dreams* (1900), reprinted in 4, 5 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 1 (James Strachey ed. & trans., 1964) [hereinafter, FREUD, *Interpretation of Dreams*]; SIGMUND FREUD, *The Psychopathology of Everyday Life* (1911), reprinted in 6 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 1 (James Strachey ed. & trans., 1964).

and fears as they treat patients. They must maintain their vigilance lest they fall into unwitting “enactments” with their patients.

All of the above leads Katz to propose a new understanding of psychological autonomy that takes into account the influence of the unconscious and the irrational. He is not satisfied with abstract principles, such as Kant’s, that lack a foundation in both the rational *and* the irrational aspects of human nature.⁴

Finally, Katz proposes a means of accommodating the decision-making frailties he describes: a searching conversation about the patient’s—and the doctor’s—thoughts and fantasies. Psychoanalysis is the “talking cure,”⁵ and that, in part, is what Katz wants for all physician-patient interactions. He is, of course, mindful that doctors cannot be expected to conduct a mini-analysis when they are informing patients. Yet for the analyst, as for Katz, insight is key: The truth shall set one free.

One striking thing about Katz’s approach is its origins in a discipline that, until relatively recently, involved the most “silent” doctor of all—the analyst. Classical analysts are meant to be anonymous to their patients, sparing in what they will say, and neutral as to the values of their patients. Analyst neutrality is an important part of Katz’s perspective. But the traditional anonymity and abstinence—which may lead to virtual silence—seem to conflict with Katz’s prescription for conversation. The good analyst will be conversing with herself, so to speak, in order to be mindful of her participation in the phenomena emerging in the consulting room. But she will not reveal her thoughts and fantasies to the patient.

Even among classical analysts, of course, the “blank screen” is currently understood as somewhat mythic.⁶ And there are also other psychoanalytic schools that bring the doctor’s relationship with the patient into sharper focus as the agent of change.⁷ There are also raging debates about how “self-disclosing”

4. See, e.g., KATZ, SILENT WORLD, *supra* note 2, at 108.

5. See SIGMUND FREUD, *Five Lectures on Psycho-Analysis* (1910), reprinted in 11 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 1, 21 (James Strachey ed. & trans., 1964).

6. See, e.g., James L. Fosshage, *Toward Reconceptualizing Transference: Theoretical and Clinical Considerations*, 75 INT’L J. PSYCHOANALYSIS 265 (1994); Jay R. Greenberg, *Prescription or Description: The Therapeutic Action of Psychoanalysis*, 17 CONTEMP. PSYCHOANALYSIS 239 (1981); Irwin Z. Hoffman, *The Patient as Interpreter of the Analyst’s Experience*, 19 CONTEMP. PSYCHOANALYSIS 389 (1983).

7. See, e.g., JOSEPH M. NATTERSON & RAYMOND J. FRIEDMAN, A PRIMER OF CLINICAL INTERSUBJECTIVITY (1995); ROBERT D. STOLOROW ET AL., PSYCHOANALYTIC TREATMENT: AN INTERSUBJECTIVE APPROACH (1987); Howard B. Levine & Raymond J. Friedman, *Intersubjectivity and Interaction in the Analytic Relationship*, 69 PSYCHOANALYTIC Q. 63 (2000); Thomas H. Ogden, *The Analytic Third: Implications for Psychoanalytic Theory and Technique*, 73 PSYCHOANALYTIC

analysts should be.⁸ It would be interesting to explore whether Katz's ideas would lead him to recommend a different relationship between analysts and patients than classical analysts have prescribed. It would also be interesting to see whether he would think disclosure is desirable in order to respect patients, even when this is not optimal therapeutically (and, to make things harder, when what is optimal therapeutically will have the effect of increasing the patient's overall autonomy).

III. OUR CONTINUING DEBT

This leads me to discuss three directions that Katz's works suggest we take, and that I and others have begun to pursue. The first is to study informed consent in Katz's very domain—that of psychoanalysis. What are psychoanalysts' practices regarding informed consent, and what should those practices be? Should analysts simply assume consent if the patient keeps coming back? Or should analysts inform patients at the beginning of treatment about the nature, risks and benefits of, and alternatives to, the treatment? Are there other or different elements of informed consent, in this context, and if so, what are they?

Perhaps most intriguing is the question whether informed consent is even possible in the psychoanalytic context. Perhaps the patient can understand, for example, transference and regression⁹ only after they have already occurred, at which point it might be too late to act on that understanding since the patient can no longer easily extricate himself from the relationship with the analyst. Another important issue is whether informed consent in the psychoanalytic process is likely to be therapeutic or counter-therapeutic. Analysts' norms concerning abstinence, for example, might be such that the informed consent process would be in tension with these norms and might therefore be counter-therapeutic.

I intend to do legal, theoretical, and empirical research on this question.¹⁰ It

Q. 167 (2004); Robert D. Stolorow & George E. Atwood, *Deconstructing the Myth of the Neutral Analyst: An Alternative from Intersubjective Systems Theory*, 66 *PSYCHOANALYTIC Q.* 431 (1997); Robert D. Stolorow, *From Isolated Minds to Experiential Worlds: An Intersubjective Space Odyssey*, 54 *AMER. J. PSYCHOTHERAPY* 149 (2000).

8. See, e.g., NATTERSON & FRIENDMAN, *supra* note 7.

9. "Transference" refers to the "displacement of patterns of feelings, thoughts, and behavior, originally experienced in relation to significant figures during childhood, onto a person involved in a current interpersonal relationship." *PSYCHOANALYTIC TERMS AND CONCEPTS* 196-97 (Burness E. Moore & Bernard D. Fine eds., 1990). "Regression" means a "return to a more developmentally immature level of mental functioning." *Id.* at 164-65.

10. My project on informed consent is supported by grants from the International Psychoanalytic Association's Research Advisory Board and the American Psychoanalytic Foundation. See Elyn Saks, *Informed Consent and the Therapeutic Alliance* (Feb. 12, 2006)

will be interesting to see what analysts do, what their reasons are, and whether obtaining patients' informed consent has been helpful or harmful. Looking at the informed consent question directly in the psychoanalytic process should lead to insights that will be helpful in other medical contexts. Indeed, Katz has already shown that bringing psychoanalytic ideas to bear on understanding informed consent in the general medical context is a fruitful approach.¹¹ At a minimum, one would expect analysts to be more sensitive than others to unconscious and irrational forces at work in the informed consent process.

The second direction in which Katz's work leads us concerns our stance toward the seriously mentally ill. Katz writes mostly about non-psychiatrically ill patients (the exception is his *Enchanting Legal Fiction* article¹²). His emphasis on the pervasive influence of the irrational and the unconscious has the effect of breaching a perhaps idealized and distinct boundary between the mentally ill and the mentally healthy. Psychoanalysis teaches that we all have many unconscious and irrational fantasies. Psychiatric patients and other patients (indeed, people generally) are on a continuum. Two paths are then possible: to restrict the freedom of some apparently rational people or to protect the choices of some apparently irrational people.

In my own work on abrogating patient choice¹³ I draw on three broad principles, all rooted in Katz's work: protecting the right to be unconventional (our "autonomy interest"); protecting those incapable of caring for themselves (our "paternalism interest"); and not discriminating on the basis of irrational beliefs that are pervasive among the non-ill and ill alike (our "nondiscrimination interest"). Katz has given special emphasis to the idea that all of us are pervasively irrational.¹⁴

Another principle that comes from Katz's work is to identify culprits that may compromise patients in the doctor/patient relationship, e.g., fantasies about doctor omnipotence. With these pitfalls in mind one can design instruments to assess people's capacity in different contexts. Katz's ideas have certainly

(unpublished manuscript, on file with the author). The empirical part of the project has just begun, four hundred surveys having been recently sent to analysts around the country.

11. This is the central endeavor of KATZ, SILENT WORLD, *supra* note 2.

12. Jay Katz, *The Right to Treatment—An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755 (1969) [hereinafter Katz, *Enchanting*].

13. See, e.g., ELYN R. SAKS, REFUSING CARE: FORCED TREATMENT AND THE RIGHTS OF THE MENTALLY ILL (2002); ELYN R. SAKS, *Competency To Decide on Treatment and Research: The MacArthur Capacity Instruments*, in 2 COMMISSIONED PAPERS BY THE NATIONAL BIOETHICS ADVISORY COMMISSION: RESEARCH INVOLVING PERSONS WITH MENTAL DISORDERS THAT MAY AFFECT DECISION-MAKING CAPACITY 59 (1999); Elyn R. Saks, *Competency To Refuse Treatment*, 69 N.C. L. REV. 945 (1991).

14. KATZ, SILENT WORLD, *supra* note 2, at 118-19.

influenced my colleagues and me in formulating the “California Scale of Appreciation” (CSA), an instrument we have designed to measure one aspect of capacity to consent to research.¹⁵

The CSA measures deficiencies in a subject’s understanding of the factors bearing on a decision to participate in research. An example of a “deficiency” in this regard is a subject’s belief that the researcher is omnipotent—an item coming directly from Katz’s work. Another example would be a subject’s belief that withdrawing from the study would cause some catastrophic event to occur. Katz’s underscoring of the pervasive influence of the irrational has also led us to require a gross departure from the norm in how one fails to appreciate the issues in order to be classified as incompetent; to do otherwise would be to risk discriminating against the mentally ill. To that end, we make use of the idea of a “patently false belief” in judging patients’ appreciation.

One interesting problem arises, though, when one accepts Katz’s account of our compromised decisional abilities: Why *should* we distinguish between the mentally ill and the mentally healthy in a case in which their decisions are motivated by the same fantasy?¹⁶ For example, if a psychotic patient says his reason for agreeing to undergo surgery is that his doctor is God and therefore no harm will befall him, we would say he was incompetent to decide. But what about the non-ill patient who has the same *unconscious* fantasy that leads him to the same decision? What difference does it make whether the fantasy is conscious?

In his *Enchanting Fiction* paper, Katz speaks of the primary process overrunning secondary process ways of thinking in this situation.¹⁷ Although descriptively true, this does not address why consent is invalid, as a normative matter, when this “overrunning” occurs (and not when it does not). Put differently, why does the invasion of the primary process matter if both patients

15. Elyn R. Saks et al., *The California Scale of Appreciation: A New Instrument To Measure the Appreciation Component of Capacity To Consent to Research*, 10 AM. J. GERIATRIC PSYCHIATRY 166 (2002).

16. Elyn R. Saks, *Mental Health Law: Three Scholarly Traditions*, 74 S. CAL. L. REV. 295 (2000).

17. See Katz, *Enchanting*, *supra* note 12, at 769-70. For the distinction between “primary process” and “secondary process” see FREUD, *Interpretation of Dreams*, *supra* note 3, at ch. 7. According to Moore and Fine, the concept of primary process, on a descriptive level, “embraces such characteristics of unconscious mentation as the disregard of logical connections, the coexistence of contradictions, the absence of a temporal dimension and of negatives, and the use of indirect representation and concretization (imagery).” Secondary process thinking is “[g]overned by the reality principle: it accounts for reality-attuned, logical thought, exemplified by delayed, modulated drive gratification through problem-solving (the internal activity of trial and error).” PSYCHOANALYTIC TERMS AND CONCEPTS, *supra* note 9, at 148.

have the same belief and that belief is the real reason they are making their decision? Why should we care whether the primary process thinking has become conscious?

One response to the notion that unconscious and conscious fantasies should be equally regarded is that unconscious fantasies are not accessible. But psychoanalysts make judgments all the time (fairly reliable judgments, one hopes) about fantasies the patients themselves may be unaware of. The ability to do so is the whole premise of psychoanalysis. Indeed, many patients do not acknowledge these fantasies even after they are brought to their attention, and yet the analyst may be quite certain that they exist and are exerting force toward certain action.

In addition to the “access” issue, more general proof issues may exist. The best way to *establish* that the psychoanalyst got it right is if the patient acknowledges that she did. But this is not the only way. In the end, notwithstanding the issue of practicality, the question of unconscious fantasies underlying choice is one of immense theoretical interest.

This puzzle aside, Katz’s work normalizing the pathological and pathologizing the normal is extremely important as we think about how to treat those with serious mental illness. A few points seem to follow from his humane, yet sophisticated, approach. Even severely mentally ill people have pockets of health that can and should be tended. Like healthy people, they deserve respect and respectful conversation. Indeed, psychiatric patients desire to be treated with dignity just as do the mentally healthy. Moreover, given their patent vulnerabilities, these patients perhaps should receive more, rather than less, respectful conversation. As Katz rightly points out, many seriously ill psychiatric patients have the unconscious fantasy that they are not deserving of respect.¹⁸ How much more important, then, to give it to them. The conversation should help empower even psychotic patients to mobilize what strengths they have to make competent decisions.

In fact, empirical research shows that patients with schizophrenia are capable of normal decision-making.¹⁹ For instance, on the California Scale of Appreciation, only between approximately eight and thirteen percent of older outpatients with psychosis were incompetent.²⁰ This percent of the patients held patently false beliefs—again, the barometer of unacceptable beliefs—bearing on their condition and the research they were participating in. This result should

18. See Katz, *Enchanting*, *supra* note 12, at 768, 771.

19. Laura B. Dunn et al., *Assessing Decisional Capacity for Clinical Research or Treatment: A Review of Instruments*, AM. J. PSYCHIATRY (forthcoming 2006) (manuscript at 32-41, on file with author).

20. *Id.* at 170.

perhaps not be surprising given Katz's work. The mentally ill and mentally healthy may be much closer to each other than we might have expected or would wish to believe.

The third and final direction that Katz's work suggests is toward new efforts to enable seriously ill psychiatric patients to make competent choices even when they initially appear incompetent. For example, my colleagues at University of California, San Diego School of Medicine and I are designing and studying "enhanced consent" protocols which allow schizophrenic patients to attain as much understanding as normal controls in a brief period of time.²¹ Our notion is that the problem may not be in the patients' capacities but rather in the investigators' way of presenting the material. That is, the problem lies with the means of informing for consent and not with the patients' ability to be informed. Katz's prescription of searching for ways of communicating and obtaining consent has fueled much of this research.

In closing, I would like to say one thing about the idea of "conversation." Some people might say that this idea represents a desire and goal of very verbal people. In the same way, some people might say that psychoanalytic conversations are only attractive to and effective with "sophisticated" people. But I think this criticism misses the point of Katz's call for conversation. This call is about respecting people, wherever they are, and helping them, in their own language, to understand and explore what is happening to them, and some of their deeper feelings about what is happening to them. You do not have to be a college graduate to appreciate the enormous benefits of conversation. Everyone, at some level, wants and can be benefited by such conversation.

Jay Katz has begun a deep and rich—as well as important—conversation with the discipline of psychoanalysis which shows no sign of ending. Our debt to him is enormous.

21. Laura B. Dunn et al., *Improving Understanding of Research Consent in Middle-Aged and Elderly Patients with Psychotic Disorders*, 10 AM. J. GERIATRIC PSYCHIATRY 142 (2002); Laura B. Dunn & Dilip V. Jeste, *Enhancing Informed Consent for Research and Treatment*, 24 NEUROPSYCHOPHARMACOLOGY 595 (2001). In addition, my colleagues and I are engaged in an NIMH-funded empirical study of an enhanced consent procedure using DVDs.

Response

A More Skeptical Bioethics

Charles Bosk, M.A., Ph.D.*

When I first read Professor Burt's paper, *The Uses of Psychoanalysis in Illuminating Biomedical Ethics*,¹ I was overcome by feelings of regret and self-pity occasioned by not having ever had as part of my graduate coursework the intellectually provocative experience that the paper describes so well. But after working through these feelings, I began to be able to identify the qualities that make Jay Katz's work so rich and, by contrast, the features that make more pedestrian efforts in bioethics so irritating.² Professor Burt describes two basic methodological lessons he discovered while sitting in Jay Katz's class and reading his writings. From these, I draw one substantive principle.

The first methodological lesson Burt describes is to look for the tensions underneath the smooth surface of social relations, to look for conflicts where social arrangements are organized in ways that deny their existence. The second lesson he describes is to never trust policies, regulatory regimes, or social processes that celebrate the rational self-control that they provide decision-makers. The substantive lesson I draw from this is that we should know better than to trust those social fictions we create in an effort to convince ourselves that we are the kind of decision-makers rational choice theories assume that we are. Uncertainty and indeterminacy cannot be eliminated from social life by grants of autonomy that deliver something much less in practice than what they promise in theory. There are some enduring, existential difficulties built into group life that no organizational policies or bureaucratic procedures can erase.

Now some might say that these are difficult lessons. I would agree, but add that it is the hardness of these lessons, their unblinking look at the human

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1. Robert Burt, *The Uses of Psychoanalysis in Law: The Force of Jay Katz's Example*, 6 YALE J. HEALTH POL'Y L. & ETHICS 401 (2006).

2. The work of Jay Katz on informed consent, JAY KATZ, *THE SILENT WORLD OF DOCTOR AND PATIENT* (Johns Hopkins Univ. Press 2002) (1984), is the touchstone for this commentary. But the same points could just as easily have been made focusing on Jay Katz's work on human experimentation or reproductive rights.

condition, especially the vulnerabilities and anxieties of both the ill and their care-takers, that make Jay Katz's work so worth reading and re-reading. Jay Katz never pretends that one can achieve informed consent in a single encounter. The achievement of what we once ponderously called "fully informed voluntary consent" is more an aspirational goal than it is an easily measured, concrete outcome. Vulnerable and anxious patients can understand something one moment and forget it the next. Nor are physicians neutral channels through which information passes without distortion. Far from disinterested parties, physicians often convey, albeit unintentionally, an unreasonable optimism, if only to quiet underlying feelings of inadequacy created by a social role that places them both in charge and powerless in the face of incurable illnesses. False hope prevents the motivation of physicians from flagging. At the same time, desperate patients and their families hang on to the thin reed of the statistically improbable medical remedy, which inhibits them from either giving voice to vague anxieties or framing specific questions. On the shop floor of the modern hospital "consent" has become an intransitive verb. The question that one commonly hears there—"Has the patient been consented yet?"—is evidence of how hard it is to absorb the lessons Jay Katz has tried to teach. The usage also signals that we ought to continue trying to teach the deeper lessons contained in his teachings and writings.

Because I have limited space, I am going to ask the reader's indulgence as I make several sweeping—but not, I believe, inaccurate—generalizations. One reason that medical residents think nothing of asking each other, "Has the patient been consented yet?" is that the understanding of the ethical problems in American bioethics encourages such usage. American bioethics shares with American culture an ethos of meliorism, a "can-do" optimism.³ American culture, and American bioethics as a concrete manifestation of that culture, often seem to be guided by the implausible notion that all problems are soluble if we use scientific methods to analyze social difficulties. Such analyses will then lead us to adopt better procedures, to formulate better rules, and to provide better training, all of which lead to improved outcomes.

What is striking in the theories that I was taught oh-so-long-ago as a graduate student was just how naïve they appeared to be about human nature.⁴

3. See, e.g., PHILIP RIEFF, *FREUD: THE MIND OF THE MORALIST* 392 (1961). For a presentation and critique of the views of the American Progressive Movement see *THE PROGRESSIVE MOVEMENT: 1900-1915* (Richard Hoftsadter ed., 1965). A trenchant critique of the "helping professions" is contained in C. Wright Mills, *Professional Ideology of Social Pathologists*, 49 *AMER. J. SOC.* 165 (1943). For a discussion of how melioristic optimism has impacted medical care, see SHELIA ROTHMAN & DAVID J. ROTHMAN, *THE PURSUIT OF PERFECTION: THE PROMISE AND PERILS OF MEDICAL ENHANCEMENT* (2003).

4. A great deal of American Social Theory sits uneasily between attempts to develop a

For progressive social theorists in the first third of the twentieth century, when groups conflict, better communication solves all difficulties. There is no recognition that the resolution of some conflicts requires structural change, a redistribution of resources, rather than simply more complete sympathy, empathy, and understanding among contending parties.⁵ Lacking a dynamic theory of the unconscious, American social theorists had no convincing way to explain the intrapsychic, structural, or cultural forces that might, operating below the surface, block amity and cooperation.⁶

This spirit of American meliorism has crept into bioethics by a reliance on bureaucratic fixes that move decision-making authority from physician to institutional ethics committee and a reliance on procedures that are “legitimized” by the proper signatures on official documents. What we have failed to do is to pay equal attention to the forces that may inhibit the new policies and procedures from achieving the intended goals. For example, as production pressures on physicians mount, as more tasks have to be accomplished and more information fitted into the typical doctor-patient encounter, as supervisory authorities monitor more closely the time physicians spend with patients—so that unproductive physician outliers are more easily sanctioned—informed consent has become a casualty to the pressure to control costs and to increase productivity.⁷ Not only

“scientific” approach to society, pragmatic philosophy, and the political movement that we identify as “progressivism.” The sociologist/philosophers that I am drawing on most heavily for these discussion are CHARLES HORTON COOLEY, *HUMAN NATURE AND THE SOCIAL ORDER* (1902) and GEORGE H. MEAD, *MIND, SELF AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST* (Charles W. Morris ed., 1934). For two interesting discussion of how Mead’s philosophy “geared into the world”—to borrow a term from the phenomenologist Alfred Schutz—and guided his involvement in urban reform politics in Chicago, see Dmitri N. Shalin, *G.H. Mead, Socialism, and the Progressive Agenda*, 93 *AMER. J. SOC.* 913 (1988).

5. For an example of how much American Social Theory in the Progressive age rested on communication as a solution to the social problems that trailed in the wake of mass immigration, urbanization, and industrialization, see the “Society” section of Mead’s *Mind, Self and Society*, and pay particular attention to how many times Mead invokes communication as necessary for human progress. MEAD, *supra* note 4, at 227-336. For a good analysis of how fundamental the idea of communication is to American civil religion, see ROBERT N. BELLAH, *BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD* 168-89 (1970).

6. The absence of a dynamic theory of the unconscious means that failures of memory, various misspeakings and mis-hearings—that is, shared misunderstandings—and all the other accidents and misfirings of social life not only lack meaning but, more importantly, cannot be imbued with meaning at the level of in our individual or collective lives.

7. See David Mechanic et al., *Are Patients’ Office Visits with Physicians Getting Shorter?*, 344 *NEW ENG. J. MED.* 198 (2001) for an interesting discussion of how, although the actual amount of time of an average encounter has marginally increased, both patients and physicians report feeling more rushed during the typical visit. For a discussion of the impact of this sense of being

are our policy solutions often unmindful of the structural and psychic barriers that stand in the way of their implementation; our ways of talking about the success and their failure of those solutions are often equally thin.

This thin conceptualization of the dilemmas of the human condition embedded in medical care that leads to policies that are both simplistic and unrealistically optimistic is not true of Jay Katz's work. However, the policy solutions and value commitments found in his work are not markedly different than those offered by mainstream American bioethicists. He too would like to see patients exercise more decision-making authority. His value commitments are no less egalitarian or democratic than the more optimistic cast of much of American bioethics. What makes Jay's work both so inspiring to me, and such a model of "the reality principle" is that Jay recognizes that there are some problems that can be confronted but not definitively resolved, and that such recognition is the first step towards developing honest ways of dealing with them.

As a graduate student I was taught that the notion that some problems recurred in the human condition was the gloomy response of Weber, Durkheim, and Freud to modernity.⁸ Tragic Europeans were compared to sunny Americans. Though my teachers were careful to emphasize that sunny and tragic were merely descriptive, not evaluative, terms, we all realized that these adjectives carried career implications. Thus, many of us were confronted with a very difficult choice as we went about our work. One alternative was to embrace a sunny but impoverished understanding of human behavior that promised to improve some perceived social problem. The rationale for such cheery self-delusion went no deeper than the realization that those who fund social research prefer promises that their investments will yield returns. The second alternative was to adopt a more sober but also more powerful perspective that recognizes the irremediable difficulties built into social life, acknowledges that defending against some dangers in social life creates new vulnerabilities, and takes the law of unintended consequences seriously. The second alternative required some courage. Sponsors of funded research prefer results to a more profound understanding of problems that will recur in one form or another no matter how social life is organized. Journal editors prefer positive results to a demonstration that the more some

rushed on trust within the doctor-patient relationship, see David Mechanic, *The Functions and Limitations of Trust in the Provision of Medical Care*, 23 J. HEALTH POL. POL'Y & L. 661 (1998); and David Mechanic & Marsha Rosenthal, *Responses of HMO Medical Directors to Trust Building in Managed Care*, 77 MILBANK Q. 283 (1999).

8. See generally EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* (Karen E. Fields trans., The Free Press 1995) (1912); MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., Routledge 1992) (1930); SIGMUND FREUD, *Civilization and Its Discontents* (1930), reprinted in 21 *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 59 (James Strachey ed. & trans., 1964).

things change the more they stay the same.

Jay Katz's work stands as a model of how we can be honest, realistic advocates for positions at the same time that we acknowledge the inherent limits not only of those positions but of our own inherent human limitations. Nothing is to be gained from pretending the existential dilemmas involved in becoming ill, trying to heal, or acting as a caregiver are anything other than difficult work that require much more than we are able to give. Rather than simply mourn our failures to achieve the rational utopias that our policies seem to promise, we need to learn from the failures, and since our failures are multiple, there will always be much to consider. Determining what constitutes sensible action in trying times and under trying conditions is difficult. So long as we only blink, but do not shut our eyes in the face of these difficulties, there is much that we can learn.

