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COMMENTARY

THE HIGH PRIESTS QUESTIONED OR AT LEAST CROSS-EXAMINED

*Larry I. Palmer**

EXPERIMENTATION WITH HUMAN BEINGS: THE AUTHORITY OF THE INVESTIGATOR, SUBJECT, PROFESSIONS, AND STATE IN THE HUMAN EXPERIMENTATION PROCESS. By Jay Katz with the assistance of Alexander Capron and Eleanor Glass. New York: Russell Sage Foundation, 1972. Pp. xlix, 1159. \$20.00.

I.

A host of questions that lawyers assume to be important in book reviews are irrelevant in understanding and appreciating this brilliant work. A lawyer might well ask whether this book is a contribution to the field of "Legal Medicine" or "Law and Medicine." Or, if the questioner is an academic lawyer, he might ask whether this book makes a contribution to solving the problems encountered in teaching interdisciplinary approaches in law schools. But the intelligent, well-versed layman's query, "what problems do Katz (the physician-psychiatrist) and Capron and Glass (his lawyer-collaborators¹) seek to address in this book?" is more to the point. Yet even this question may lead to a superficial analysis, for, at first blush, the book appears to deal solely with new therapeutic and experimental techniques used on humans as patients and subjects. Doctors, biological researchers, and technocrats, however, are not the only modern day high priests challenged in the

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1. See J. KATZ, EXPERIMENTATION WITH HUMAN BEINGS: THE AUTHORITY OF THE INVESTIGATOR, SUBJECT, PROFESSIONS AND STATE IN THE HUMAN EXPERIMENTATION PROCESS x-xi (1972) [hereinafter cited as KATZ]:

I began work on the book seven years ago with my colleague and friend Richard C. Donnelly. His tragically premature death, shortly after we had embarked on our initial explorations, made me proceed alone, though in recent years with the able assistance of Alex Capron and Eleanor Glass. And, from the beginning, an ever-renewing collaboration was established with my students at the Yale Law School who contributed much to the development and revision of the book's many drafts.

book. To this order of high priests belongs any definable group that is given authority, because of its "expert" knowledge, to investigate other human beings or act in their behalf. As individuals seeking to improve the human condition, lawyers, legal researchers, and social science researchers must be grouped with doctors, scientists, and technocrats as the high priests who are systematically questioned and cross-examined by Katz.

To comprehend this work, the reader must first exorcise himself of any preconceived notion of the definition of human experimentation.² The sheer variety of materials—selections from medicine, psychoanalysis, biology, appellate opinions, legislative hearings, and philosophy, to name a few—is an indication that human experimentation resists easy categorization. But Katz need not categorize. Rather, as indicated by the subtitle, his approach is one of process. And while many social values must be examined, Katz ultimately achieves his goal of teaching students from a variety of disciplines to ask and subsequently resolve questions about the human experimentation process.³

The book's brilliance is found in its asking the tough questions, both explicitly and implicitly, through the organization of the materials. Those seeking to treat the subject matter systematically will welcome it. Those readers looking for ready answers will be disappointed. But all readers, especially lawyers, should be prepared to cross-examine their own notions and perspectives on most human experimentation problems before undertaking Katz's quest for the tough and unanswerable question.

To bridge the gap between Katz's unique perspective and that of most lawyers, I shall include in this essay traditional assumptions about book reviews. Thus the contents and analytical structure of this massive book will be described in varying degrees of detail. As I describe the content I will attempt to delineate some of the questions I believe Katz is asking. My purpose is to demonstrate to those who might be reluctant to use the book in law school how intellectually enriching this book can be for law students. In so doing I hope to encourage more extensive use of this text and similar texts⁴ in the training of lawyers. I shall conclude with a short epilogue in which I attempt to answer the more typical questions raised at the beginning of this essay. I also

2. *Id.* at 3.

3. *Id.* at 5.

4. See, e.g., R. DONNELLY, J. GOLDSTEIN, & R. SCHWARTZ, *CRIMINAL LAW* (1962); J. GOLDSTEIN & J. KATZ, *THE FAMILY AND THE LAW* (1965); J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* (1967).

hope to raise some questions (and by no means all of them) that lawyers must address after a systematic study of Katz's work.

II.

Unlike the method of most law school texts, Katz's approach is to set forth his analytical perspective on the problems of human experimentation in the five page introduction. Although some law teachers might object to this straightforward approach of "laying it (the 'law') out," they need not worry that the "law of human experimentation" is spelled out for the student. Rather, the series of questions posed in the introduction serve as the means of integrating the book's four parts and as an explanation of the long subtitle. Part one, entitled "An Introduction to the Human Experimentation Process,"⁵ provides an analytical framework for examining the tough problems that follow. Once the reader is equipped to ask questions in Katz's fashion through a study of part one, he is prepared to question the investigators of modern society (the high priests) in a sympathetic and objective manner in part two. Thus this section is entitled "The Authority of the Investigator as Guardian of Science, Subject and Society."⁶ Part three, in line with the subtitle, is entitled "The Authority of the Subject as Guardian of His Own Fate."⁷ This section contains three chapters on the problems of consent. The role of the state and recognized social authority is examined in part four. This part, entitled "The Authority of Professional and Public Institutions,"⁸ contains material on many pressing problems such as experimentation on prisoners and dying patients and the development and marketing of new drugs.

Although the important questions that the reader will face throughout the materials are set forth in the main introduction or the introductory sections to each part, the law teacher and students need not worry about boredom. On the contrary, this straightforward approach to the questions asked in the book is necessary in light of the wide range of materials examined. Unless the law teacher has ready answers to such questions as:

6. To what extent and for what purposes should a coexisting intention to give or receive "benefits" affect the authority of decisionmakers?
 - a. Who, and by what standards, has the authority to decide whether an intervention is "beneficial"?

5. KATZ at 7-280.

6. *Id.* at 281-520.

7. *Id.* at 521-724.

8. *Id.* at 725-1108.

- b. Should any constraints imposed on the participants in experimental settings apply equally to therapeutic ones?⁹

he need not worry about boredom. Questions like these can be asked, re-asked, and traced systematically through the entire book. To the high degree of intellectual integration of vastly different materials achieved by the author, the law teacher must add a particular perspective of law as a process of intervention into the existing social mechanism of control and noncontrol. As a law teacher examines these materials with law students, he will have to ask what goals were sought and what results were achieved by the particular form of legal intervention or non-intervention into the human experimentation process.¹⁰

Chapter one, "The Jewish Chronic Disease Hospital Case,"¹¹ is the perfect case to introduce human experimentation as a process. This, however, is no ordinary first case in a law school text. The experiment in question, the injection of "live cancer cells" into some patients of the Jewish Chronic Disease Hospital, has many of the elements of the human experimentation process subsequently discussed in the book. A researcher, who is associated with both a university and a famed research institute, is given permission by the hospital medical director to experiment in a therapeutic setting. Through a series of bizarre events, a lawsuit is brought by a member of the hospital's board of directors, and the researcher and medical director are disciplined by the state's medical licensing board. Shortly after the researcher and the medical director are found to have conducted themselves unprofessionally in failing to obtain "proper consent," the researcher is elected president of the American Association of Cancer Research.¹² The reader is left with the ironic feeling that legal intervention in the form of professional disciplining had little, if any, effect upon researchers as a group.

While there are many facts that would justify calling the disciplinary procedure unfair,¹³ if all the participants were acting in good faith, some even more troublesome questions arise. The researchers had previously conducted the same experiment, without complaint or apparent harm, on dying cancer patients and healthy prisoners.¹⁴ Did those prev-

9. *Id.* at 4.

10. *See* note 4 *supra*.

11. KATZ at 9-65.

12. *Id.* at 65.

13. There was evidence from other researchers in the field that indicated that the failure to tell the patients that the injections were "live cancer cells" was proper. This was because the present state of scientific knowledge indicates that cancer could not be transmitted from one human to another through the injection. *See id.* at 50-52.

14. *Id.* at 34-36.

ious experiments go unquestioned because the subjects were people who nobody knew or cared about? More disturbing is the possibility that the desire to find a cure for cancer is an implicit authorization to some physician-medical researcher to experiment on human beings. Was this researcher and medical director labelled "immoral" or "unprofessional" solely to protect the rest of us from knowledge that human beings must be used in man's apparently humane quest for the cure of a dreaded disease?

A lawyer might chuckle as he reads chapter one, but the other introductory case study in chapter two will not prompt smug laughter, for lawyers, legal researchers, and social researchers are the high priests questioned in "The Wichita Jury Recording Case."¹⁵ As a different case study in the human experimentation process, chapter two raises the following blunt question: is it possible that legal and social researchers from the prestigious University of Chicago violated deeply felt societal norms in their investigation of a legal institution? This chapter, involving the "recording" (read modernly "wiretap") of civil jurors (read in Katz's view "human subjects") without their or the litigants' knowledge, does tend to suggest that some unarticulated social values were violated in the famous Chicago jury study. After an investigative hearing, Congress made the recording of jury deliberation a crime. Such congressional action might be viewed as a social decision that important societal values were violated during the research.

The reader should not, as I initially did, dismiss the hearing before Senator Eastland's Internal Control Subcommittee as simply an example of the 1950's anti-intellectualism.¹⁶ Instead, the legal intervention during the research project raises serious questions about the political climate necessary for social science research. A careful reading of the materials indicates that the researchers redefined the purposes of their research project during the hearings. When the project was formulated, the goal was to study the "justice or injustice" of the jury system.¹⁷ Given this research design, it was entirely possible that researchers could, in good faith, have recommended that the jury system be abolished. But after the limited recording of some jury deliberation became public, the project's goal was consciously or unconsciously reformulated. Under intense public criticism in the press and questioning from legal investigators, the researchers claimed repeatedly that their research purpose was to strengthen the jury.¹⁸

15. *Id.* at 67-109.

16. *See, e.g., id.* at 86.

17. *Id.* at 68.

18. *See, e.g., id.* at 83, 85, 95.

From a purely methodological point of view, one might wonder about the effect on the researchers of the legal condemnation of some of the investigative techniques. While that academic question might interest persons from many disciplines, lawyers and law teachers must start facing tougher questions. For instance, is it possible that the seminal work on the American jury¹⁹ subsequently published by the legal and social researchers is not a "scientific" study because the researchers' objectivity was affected by irrelevant considerations?²⁰ It is easy for me as a lawyer to point the finger at medical researchers in chapter one and think that they need constraints on their research efforts. I do not, however, find the thought that someone ought to place restraints on me, a legal researcher, an easy issue to face. But by facing the question early in this volume, the reader will realize in a tentative fashion that law might be a constraint on legal and social science research as well as medical science research.²¹ Chapter two introduces a more disturbing problem for lawyers who think law provides or can provide the proper control mechanism for problems in human experimentation. Given my question about the "scientific" objectivity of the Chicago jury study, one wonders whether (in order to be as objective as possible) the investigator must operate in secret and without nonscientific influences during the research process.

The other chapters in part one are excellent complements to the two case studies in the previous two chapters. Chapter three, an examination of the impact of social dynamics on human experimentation, is divided into three parts.²² By beginning in part A with an examination of the value structure that supports "Man's Quest for Knowledge and Mastery,"²³ chapter three begins to furnish the reader with information that he can use to refine his somewhat diffuse questions about the two introductory case studies. After all, it was the quest for knowledge about legal institutions and a dreaded disease that motivated the human experiments in the previous chapters. Although there is not a

19. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966). For a vigorous and well reasoned dissent from the accepted view that *THE AMERICAN JURY* is a seminal work, see Walsh, *The American Jury: A Reassessment*, 79 *YALE L.J.* 142 (1969).

20. Ordinarily one might not be concerned about academic questions of this nature. This study, however, has had more than academic effect. *THE AMERICAN JURY* was heavily relied upon in the United States Supreme Court's determination that the jury was "fundamental" to the administration of the criminal law. *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968).

21. Cf. Zeisel, *Reflections on Experimental Techniques in the Law*, 2 *J. LEGAL STUDIES* 107 (1973). See also KATZ at 734-35.

22. KATZ at 111-235.

23. *Id.* at 112-48.

single selection from legal materials in part A, I believe lawyers will want to read this section. Besides simple intellectual curiosity, practicality should prompt the lawyer to read this section since the values discussed, such as "faith in progress," may influence legal decisions. The possibility that scientific values will influence legal decisions becomes a certainty if the reader continues to part B, on "Man's Willingness to Risk Human Life."²⁴ By dealing primarily with the congressional hearings on the health and safety of coal miners, the organization of materials suggests that it may be the legislative process that compromises the value of human life with other social values. If we ask the traditional question of whether the legislature ought to pass legislation to protect the health and safety of coal miners, our answer would obviously be "yes." But the reader is given enough materials at least to question the traditional response. By studying the materials carefully, the reader discovers another more fundamental question. After the legislature has spent nearly twenty years trying to determine what health and safety standards will save the lives of coal miners, why do coal mine disasters still occur? While we are critical of non-enforcement of safety laws when human lives are lost in mine disasters, we cannot explain why the public supports or allows such non-enforcement.²⁵ Since the reader is already acquainted with the value structures of scientists and technologists because of part A, he might wonder if legislatively enacted health and safety standards are somehow inappropriate.²⁶ Or, since lawyers are part of this scientifically oriented society, we might think that more public health research is necessary before the right kind of legislation can be enacted. But, before further research projects are proposed, lawyers might consider whether law can achieve the result of preventing death or ill health in coal mines when a variety of actors—the miners, the operators, the society generally—are willing to risk human life in order to achieve other social goals. After all, we all need the energy supplied by the coal miners' labor to live comfortably in our technological world. I wish the book offered some real reassurances that we have even the capacity to see the social dynamics of this and other so called environmental problems.²⁷ Rather the book offers only Professor Calabresi's admonition:

24. *Id.* at 149-84.

25. *Id.* at 174-75.

26. *Id.* at 168.

27. *Cf.* Calabresi & Melamed, *Property Rules, Liability Rule, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

Our society is not committed to preserving life at any cost. In its broadest sense, the rather unpleasant notion that we are willing to destroy lives should be obvious.²⁸

If you find distressing the notion that our legal institutions provide the means for society to risk human life in certain enterprises, part C, on "Man's Readiness to Delegate Authority to Experts,"²⁹ will not sit well with you. From specialized knowledge and expertise come the notions of professionalism.³⁰ Just as the scientist demands the right to work in isolation, the professional demands the right to develop standards to govern his own conduct and the authority to exclude others. The three sections of the chapter make sense only if one asks whether society authorizes the professionals to risk human life. The sections on doctor-patient relationships seem to be quite pertinent to this question. The selections dealing with new roles for lawyers are reminders that in experimenting with new professional roles for lawyers, we are in a sense experimenting with human beings.³¹ But to say that there is an experiment to ascertain the best way to deliver legal services and to develop methods of professional control over lawyers is not necessarily to condemn this legal experiment.

In chapter four on "Perspectives on Decisionmaking,"³² Katz puts together readings from economics, political science, philosophy, and jurisprudence that might provide a basis for legal decisionmaking about the human experimentation process. The clear indication is that there is presently no model of how law should or should not intervene in the human experimentation process. The explanation of this state of affairs may lie in law's inability to define its purposes in intervention.

If the book has any definite point to make it is clearly presented in part two. Katz seems to be saying to lawyers, and to the professions generally, "Do not think you have adequately defined your professional authority as investigators." I say the message is directed to lawyers because chapter five, "Experimentation without Restriction," involves the alleged "crimes against humanity" by Nazi doctors.³³ While Katz specifically states in his preface that these cases of human experimentation originally inspired the casebook, the point not to be missed is that the experiments were "not isolated instances of 'crimes against

28. G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 21 (1970) (excerpted in KATZ at 177) (footnotes omitted).

29. KATZ at 185-235.

30. *Id.* at 186-96.

31. *Id.* at 234.

32. *Id.* at 237-80.

33. *Id.* at 283-321.

humanity.'"³⁴ Furthermore, several human beings, Nazi doctors and scientists, were hanged for following state authority instead of their "professional code" in conducting their human experiments.³⁵

The materials on the concentration camp experiments, as presented by Katz, question the law's purpose in hanging these scientists. If scientists and medical doctors had previously conducted experiments, such as inducing syphilis to discover its exact cause,³⁶ why is the military doctor held to a higher standard in the Nuremberg trials?³⁷ But lawyers must reexamine this question carefully since the defendant's arguments of legal principle were ignored in the judgment. For instance, to refute the charge that his client had conducted "criminal human experiments," one counsel made the following argument:

No one will contend that human beings really allowed themselves to be infected voluntarily with venereal disease; this has nowhere been stated explicitly in literature.

* * *

It is repeatedly shown that the experiments for which no consent was given were permitted with the full knowledge of the government authorities. It is further shown that these experiments were published in professional literature without meeting any objection, and that they were even accepted by the public without concern as a normal phenomenon when reports about them appeared in popular magazines.

* * *

Voluntariness is a fiction; the emergency of the state hard reality.³⁸

Despite this line of argument, the judgment starts its pronouncements of the "principles" of human experimentation with a requirement that "voluntary consent" is an absolute essential for human experiments.³⁹ Without an articulated explication of why the particular form of utilitarianism (quoted above to justify the risking and taking of human lives at the time of war) was impermissible, the judges proceed to condemn some of the defendants to death and others to long terms

34. *Id.* at 283.

35. *Id.* at 306.

36. *Id.* at 284-92. Given our retrospective condemnation of the Tuskegee Syphilis Study initiated in 1932 by the United States Public Health Service, I wonder if we can afford to suggest to ourselves that the research project was really proper for that time. HEW, FINAL REPORT OF THE TUSKEGEE SYPHILIS STUDY AD HOC ADVISORY PANEL, 14-15 (1973).

37. *Cf.* *Levy v. Corcoran*, 389 F.2d 929, 932 n.1 (D.C. Cir. 1967) (Bazelon, C.J., dissenting).

38. KATZ at 304.

39. *Id.* at 305.

of incarceration.⁴⁰ The case obviously raises difficult jurisprudential problems which I will not attempt to address here.⁴¹ However, the failure of the decision to meet the defendant's arguments directly questions the supposition that lawyers should assume that the Nuremberg "principles" are appropriate starting points to solve all problems of human experimentation. The ease with which lawyers use the Nuremberg Code is disturbing. One wonders if the label of "Nazi concentration camp experiments," so easily invoked by lawyers and doctors when there is a human experiment to condemn,⁴² is not a way of justifying the law's failure to develop a systematic analysis of the problems of human experimentation.

In raising these tough questions, Katz is motivated partly by a desire to see law students face squarely the question of the efficacy of professional codes of ethics. Since the materials on experiments since World War II demonstrate that clear ethical violations still occur,⁴³ the reader becomes skeptical of the international and national codes of ethics. One might even go so far as to suggest that the professional codes are really means of ignoring the tough ethical questions of research in both medical and social fields. As an educator, Katz appears to think that the most immediate answer lies in explicit modification of the professional education at least of doctors and lawyers. Since society is without any well developed legal theories of control, it is apparently willing, through inaction, to delegate a great deal of authority to control human experimentation to the individual professions.

After this rather jarring analysis, chapter six—on how the investigator, as professional, should judge the consequences to the subject—appears almost straightforward in its questioning. Given the two introductory case studies, it is not surprising that "harm" includes inter-

40. *Id.* at 306.

41. The defendants' arguments might be met in two ways. First, the case might establish the principle of "consent" as a necessary element for therapeutic and experimental intervention. Such justification for the punishment, however, does not indicate how defendants were to know of the principle's existence since it had been regularly violated. Second, despite the fact that consent may be called a "legal fiction," the concept promotes a number of goals, in defining law's relationship to the human experimentation process. Part three of the Katz book, dealing with the function of consent and its limitations, might provide a starting point for such a theoretical justification. *See generally id.* at 521-724.

42. The lawyers and doctors involved in the "Jewish Chronic Disease Hospital Case" used the epithet quite frequently. *See generally* notes 11-12 and accompanying text *supra*.

43. *Id.* at 306-21.

ferences with self-determination and privacy as well as threats to anonymity and reputation.⁴⁴ Since Katz is concerned with investigators of all kinds, his concern with investigative interferences with psychological integrity appears quite natural.⁴⁵ He leaves the problem of interferences with physical integrity for last because this traditional concern looks quite different after the other less traditional materials.⁴⁶ If we could answer the questions he asks first, we might not be so ready to go immediately to the question of physical integrity. In the remaining portions of the chapter, Katz shows an intellectual boldness (to which the reader has become accustomed) in the questions propounded. Should social researchers misrepresent their identities to gain information?⁴⁷ Can social researchers claim to have no values?⁴⁸

As might be expected in a book that integrates materials through questions, the reader must start facing multiple questions in chapter seven. The questions in chapter six are relevant to the question of chapter seven, "What Consequences to Society Should Affect the Authority of the Investigator?"⁴⁹ While there are problems from human genetics and physical control of human behavior through brain surgery, two features of this chapter demonstrate that Katz is willing to allow full exposure to all possible ideas. By publishing parts of an unpublished manuscript, Katz allows the reader to consider whether there is any justification for preventing an experimental hybridization of apes and man.⁵⁰ Is the lawyer's only objection to this well-designed experiment the same as Blackstone's, that the result might be "a monster"?⁵¹ The second *tour de force* comes by reproducing the materials on the *Dr. Martin* case⁵² after materials from modern studies of sexual behavior by Masters and Johnson.⁵³ If Dr. Martin, the therapist, is labelled criminal for "treating" young patients by performing sexual acts upon them, why are Masters and Johnson, the scientist-therapists, allowed to recruit surrogate female sexual partners for single impotent male patients in apparent violation of laws against prostitution?⁵⁴

44. *Id.* at 325-52.

45. *Id.* at 338-68.

46. *Id.* at 369-76.

47. *Id.* at 428-29.

48. *Id.* at 414-17.

49. *Id.* at 435-520.

50. *Id.* at 461-64.

51. *Id.* at 464.

52. *Id.* at 470-82 (*reprinted from R. DONNELLY, J. GOLDSTEIN, & R. SCHWARTZ, CRIMINAL LAW 11-28 (1962)*).

53. KATZ at 466-70.

54. *Id.* at 469. Is it not predictable in light of chapter three, *id.* at 111-236, on

Part three might be viewed by some lawyers as the portion most relevant to legal studies since the problem of consent is addressed here in three chapters. The lawyer's search for firm ground, however, is dispelled in the introduction to chapter eight:

the concept of informed consent has been accepted in case and commentary as a cardinal principle for judging the propriety of research with human beings. *Yet law has neither defined sufficiently well the substance and ambit of informed consent in therapeutic settings nor determined clearly its functional relevance for human experimentation.*⁵⁵

The reader must ask chapter eight's question, "What Are the Functions of Informed Consent?"⁵⁶ as he examines the first large selection of cases and legal commentaries in the materials. If one tries to reconcile the cases for the "law," one will be confused by suggestions that higher standards for consent should be imposed in therapeutic situations than in investigation.⁵⁷

Strict adherence to the analytical structure makes chapter nine, "What Limitations Are Inherent in Informed Consent?"⁵⁸ quite interesting since lawyers will understand Katz's point that we need a legal theory of consent. Such a legal theory, as pointed out earlier in the discussion of chapter four on decisionmaking, will not, however, be easy to formulate.

One possible starting point in a search for a legal theory might be suggested by chapter ten's title of "What Limitation Should Be Imposed on Informed Consent?"⁵⁹ Perhaps we might be able to determine the functions of consent in human experimentation by delineating the situations where consent will be prohibited by law or professional standards of ethics. Neither Katz nor I am hopeful that appropriate legal or professional standards can be readily achieved through such a process. The age-old problems of euthanasia⁶⁰ and whether patients with fatal illnesses should be informed of their impending death⁶¹ are still there for resolution. As the reader finishes this chapter and part three,

the interrelationship of man's quest for knowledge and professionalism, that the "sex experts," Masters and Johnson, want the medical profession to work towards professional standards for sex therapists and a licensing law? *See* TIME, May 14, 1973, at 72.

55. KATZ at 523 (emphasis added).

56. *Id.* at 523-608.

57. *Id.* at 575.

58. *Id.* at 609-73.

59. *Id.* at 675-724.

60. *Id.* at 702.

61. *Id.* at 701.

he will realize that since chapter six the chapter titles have posed unanswerable questions.⁶²

The remaining four chapters, while not titled with questions, present the truly difficult problems without any pretense of providing answers. Because of Katz's intense (some might think brutal) questioning to this point, the reader approaches the materials with newly acquired objectivity. In chapter eleven, the lawyer reformulates the question of whether law should intervene in the experimentation process by examining two medical case studies again. While we are accustomed to mitral valve surgery today, are we willing to endure a ninety-percent failure rate in the development of new wonder cures?⁶³ Before the reader answers, "yes", he ought to consider the effect on scientists and doctors of a stated national policy to "Conquer Heart Disease."⁶⁴ The reader might wonder if this national policy is not an implicit authorization to experiment with human beings. The other case study, the development of oral contraceptives through field studies in Puerto Rico, raises another issue.⁶⁵ Should legislation be drafted to prevent United States investigators from experimenting in foreign areas under fewer restrictions than allowed in the continental United States? Many other matters that are presently subject to public debate are presented in this chapter. Is legislation necessary to protect human subjects?⁶⁶ Should professionals try to control unethical research efforts by refusing professional recognition to those who employ unethical research methods?⁶⁷

Chapter twelve, "Experimentation with Uncomprehending Subjects,"⁶⁸ also appears more timely than even Katz could have expected. Katz properly chose children as the example for study, knowing that the same analysis applied to "mentally ill" patients.⁶⁹ Children, instead of those labelled "mentally ill," are the appropriate starting point for lawyers since, for many purposes, the law has traditionally viewed children as incapable of important decisionmaking. Contracts and criminal law are only two examples. However, to assume that there are adults who are unable to make proper legal decisions is a modern problem of a different complexion for law, although the problem has always

62. *Id.* at xxiii-xxxiv.

63. *Id.* at 802.

64. *Id.* at 822.

65. *Id.* at 742.

66. *See* H.R. 7724, 93d Cong., 1st Sess. (1973).

67. KATZ at 934.

68. *Id.* at 955-1012.

69. *Id.* at 956.

existed. The resolution of the latter problem will depend a great deal upon the ability of law to adapt and use in its decisionmaking newer scientific views of human beings. Before attempting to address this latter problem, it would behoove lawyers to understand the limitations of the law's treatment of the traditional problems of experimentation on children. In addition, lawyers should have a healthy skepticism of the scientific validity of all views of human behavior which are offered to authorize experiments on those human beings labelled "mentally ill."

In suggesting that these studies raise questions of public policy as well as scientific merits, chapter twelve appears almost prophetic. The public, and now legislative committees, are concerned with the sterilization of young girls by governmentally funded agencies.⁷⁰ But Katz's analysis is even broader than most public discussion since he includes within his discussion the issues of fetal research⁷¹ and cloning⁷² in his questions about the uncomprehending subjects. Both the fetus and the cloned man are uncomprehending subjects because they do not yet exist to consent to participation in the experiment. If pending legislation prohibiting fetal research is passed,⁷³ lawyers might find systematic study of this material essential. Legal decisionmakers may have to decide if such legislation is constitutional.⁷⁴ More importantly, lawyers will have to make their own value choices as to whether such legislation is desirable.

Chapter thirteen, "Experimentation with Captive Subjects,"⁷⁵ although containing only a few selections from law, presents the greatest challenge to law. While discussing the problems of experimentation on soldiers, the materials also comment upon experimentation on prisoners, who now loom large in the public conscience.⁷⁶ I would suggest

70. *The Involuntary Sterilization of Minors*, 10 MEDICAL-MORAL NEWSLETTER (1973).

71. KATZ at 976.

72. *Id.* at 977-79.

73. See 119 CONG. REC. 16349 (daily ed. Sept. 11, 1973) (proposal to limit fetal experimentation until Institutional Review Boards have been established).

74. If the recent Supreme Court opinion, *Roe v. Wade*, 410 U.S. 113 (1973), prohibiting criminal sanctions and limiting state regulations on abortions is analyzed in terms of "substantive due process," can a complete prohibition on fetal research be viewed as "arbitrary action" in violation of due process? Cf. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 52 n.229 (1973).

75. KATZ at 1013-52.

76. Perhaps we ought to consider more seriously the social effects of increasing the numbers of persons under direct state control through compulsory national service programs. *Id.* at 1026.

that our scientific or medical view of man, *i.e.* that the criminal can be rehabilitated or treated, has led to a dilemma.⁷⁷ Our correctional administrators, those most likely to formulate research policies for prisoners, are increasingly trained in this view of man's misbehavior. Thus scientists share a common value structure with those the law has authorized to "treat" or control prisoners. At the same time there are few if any legal rules that attempt to limit the authority of correctional administrators or to alter their view of the human beings under their direct control. Given the "lawlessness" of corrective practices,⁷⁸ I would not be optimistic about law's having much effect upon human experimentation in prison. A few dramatic cases might catch public attention for a short while. But I wonder if administrators, acting in good faith, and without legal guidance, might employ experimental techniques of various kinds.⁷⁹ I also wonder if society wants the experimentation in prison to go on as a way of finding out why we label persons criminal.⁸⁰

Chapter fourteen, "Experimentation with Dying Subjects,"⁸¹ ordinarily a quite controversial topic, ends this book in a surprisingly sobering manner. From the first introductory case study, the reader knows that this kind of experimentation is a continuing practice and now should see the many themes of the book come together. We always publicly applaud the doctors who successfully transplant kidneys, hearts, and other organs. But we are unwilling to make judgments about the high costs, economic and social, of such spectacular medical cures.⁸² Do people in our society readily support a great scientific venture to save a human life, but ignore the poor quality of medical service delivered to the rest of the community?⁸³ Will the society allow the medical professional to answer the previous question, as lawyers are doing, by experimenting with redefinitions of their professional obligations?⁸⁴ Or will legislative attempts to regulate the transplantation of organs or to define death, in effect, obscure the important questions

77. A. Goldstein, *Introduction to L. ORLAND, JUSTICE, PUNISHMENT, TREATMENT* xxv-xxvi (1973).

78. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

79. Why shouldn't a correctional-dispositional official of a state treatment center for addicts, in good faith, seek authorization for a limited experiment in heroin maintenance if current legal analysis views heroin addiction as "an illness"? Cf. *Robinson v. California*, 370 U.S. 660 (1962). See also note 90 *infra*.

80. KATZ at 1037.

81. *Id.* at 1053-108.

82. *Id.* at 1069.

83. *Id.* at 1070.

84. See text accompanying note 31 *supra*.

of public policy?⁸⁵ In attempting to formulate an answer to the last question, the reader might refer back to questions in the introduction and specifically questions 6a and 6b quoted in the text above.⁸⁶

EPILOGUE

To return to the questions of the typical lawyer (*i.e.* is this book a contribution to the field of "Legal Medicine" or "Law and Medicine") the answer is that Katz's book creates a new "field" for the law school curriculum. While it might be used in courses or seminars in "Law and Medicine," it would do some damage to the intellectual structure of the book not to take it on its own terms. This book should be used for a new experiment in legal education—teaching students about the human experimentation process. This book does more than mix legal and nonlegal materials together; consequently, it is beyond categorization as interdisciplinary. Because of its excellent analytical table of contents, variety of materials, table of cases, table of authors, and table of books, articles, and other sources,⁸⁷ this book is the starting point for legal research in the human experimentation process. It can be used either in courses or in seminars, but the teacher will have to experiment with selections.

Katz, a psychiatrist who has taught in law school for many years, is the co-author of other law school texts,⁸⁸ and has spent nearly a decade creating this masterpiece. The book was designed to be used in the professional training of lawyers, as well as doctors and scientists. As such it raises problems in professional ethics, criminal law, torts, contracts, social values, and jurisprudence. Such problems are all part of the formulations of professional and legal standards that Katz, in true scholarly fashion, thinks are possible only after systematic study. The law teacher and law students undertaking a study of this book will find the unanswerable questioning quite disturbing. As lawyers, we are expected to have answers to most difficult social problems, and Katz dares to suggest that for many of the most important ones we do not.

It is hard to explain my sense of hope after reading this book

85. Cf. Capron & Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal*, 121 U. PA. L. REV. 87 (1972). See also KATZ at 1090-91.

86. See text accompanying note 9 *supra*.

87. KATZ at 1127.

88. J. GOLDSTEIN & J. KATZ, *THE FAMILY AND THE LAW* (1965); J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND THE LAW* (1967).

about "man's inhumanity to man."⁸⁹ I am optimistic about our ability to solve some of the existing and rapidly emerging problems of human experimentation. This optimism stems from my belief that the world will be "better" if the society's professionals are equipped in their training with a deep intellectual understanding of the problems that society has faced and will probably face during their professional lifetime. If heresy were defined as thinking the unthinkable, then heresy confronts the reader of Katz's work. The reason that I find Katz's approach so appealing is that the crime of heresy runs rampant throughout the book.

If you are prepared to question or at least cross-examine propositions like the following:

1. Human Experimentation involves solely questions of physical intrusions into the human body.
2. Law is not a form of human experimentation.
3. Empirical research in law is not only desirable, but must be pursued vigorously and without limitation.
4. The judgments in the case of Nazi physicians and scientists at Nuremburg provide starting points for legal standards for human experimentations.⁹⁰

89. KATZ at 5.

90. A special three judge court in *Kaimowitz v. Department of Mental Health*, Civil No. 73-19434-AW (Cir. Ct. Mich., July 10, 1973), used the Nuremberg judgment to support its conclusion that an involuntarily detained mental patient cannot give his consent to an "experimental psychosurgery" operation. *Id.* at 23-25. One wonders if the court's conclusion is based partially on the view that those who are "captives" and "mentally ill" are too incompetent to "consent" at all. Such a use of the Nuremberg judgment is somewhat surprising since it did not address the issue of when experiments were permissible if we view the subjects as uncomprehending and thus unable to "consent." See text accompanying note 38 *supra*. A host of other issues—the "standing" of the legal services lawyer to bring the suit, whether the consent form used was inadequate by some standard, *id.* at 4, and whether the review mechanisms used to select the first patient-subject were defective, *id.* at 3—are all worthy of scholarly discussion. The case was well reported in the national press. See, e.g., N.Y. Times, Apr. 5, 1973, at 26, col. 1. It is hoped that the full opinion and appendix are made available in published form so that scholars generally will have the opportunity to discuss this case.

I wonder, however, if a tougher question might be troubling the court, the legal decisionmakers. Is invoking the obvious moral rightness of the "Nuremberg Judgment" a way of not examining the law's purpose in confining the patient-subject? After all, a careful reading of the facts reveals that the patient-subject had been charged with the murder and rape of a nurse at a state mental hospital where he had been confined 17 years. *Id.* at 2. He had originally been confined in the state mental hospitals under the state's criminal sexual psychopath statute. Was this seventeen year confinement a means of confining the patient-subject in a situation where we could not justify, consistent with other principles of law, confining him for the murder and rape? Cf. Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963). I raise the question for two reasons. It appears arguably "logical" to try radical and "experimental" techniques after seventeen-plus years of trying to "treat" unsuccessfully.

5. Informed consent is the primary legal determination to be made in analyzing the legal problems posed by human experimentation.
6. Improving the professional training of lawyers to meet their professional responsibility might best be achieved by increasing law students' contact with human subject-clients.

you will find this book immensely valuable in teaching one set of high priests, law students.

Katz's major mistake, in my opinion, is that he wrote a law school text that intelligent laymen can read, understand, and enjoy. What will we lawyers do if non-experts understand our inadequacies in an important area like human experimentation? Will they look to others for leadership? How can we, the high priests of social problems, let the non-priests know that our expertise leads us to the following answer: It all started with Eve when she ate the apple. We should not blame her for our present troubles, after all the apple was there to be tested. Some readers might find the length of this book somewhat troublesome, but I do not. It is all so good, much like Eve's apple.

Second, if we take Katz's perspective of viewing the problems of human experimentation as a process, we must start asking the questions of what forces provide the impetus to "experiment with human beings"?

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