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Some Skepticism About Skepticism: A Comment on Katz

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RESPONSE

SOME SKEPTICISM ABOUT SKEPTICISM: A COMMENT ON KATZ

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In response to Leo Katz, *Nine Takes on Indeterminacy, with Special Emphasis on the Criminal Law*, 163 U. Pa. L. Rev. 1945 (2015).

INTRODUCTION

Several different, if related, questions are swirling about in this fascinating and wide-ranging symposium.[1] One question asks whether "law" is "autonomous." A second inquires into the "determinacy" of "legal doctrine." Yet a third concerns whether there are ever legally correct answers to legal questions. I take this third question to be equivalent to asking whether legal propositions are truth-apt and, if so, whether any are true.

If I read him correctly, this third question is the focus of Professor Leo Katz's characteristically inventive and thought-provoking contribution, *Nine Takes on Indeterminacy, with Special Emphasis on the Criminal Law*.[2] What Professor Katz calls "the skeptical thesis" is the contention that no legal propositions are true. It is the contention, in other words, that statements of the form "the law prohibits φing" and "it is legally permissible to ψ" are never true. Professor Katz does not affirm the skeptical thesis. Rather, by

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1 Symposium, *The New Doctrinalism*, 163 U. PA. L. REV. 1843 (2015).

2 Leo Katz, *Nine Takes on Indeterminacy, with Special Emphasis on the Criminal Law*, 163 U. PA. L. REV. 1945 (2015).

drawing on a well-known article on the criminal law authored nearly thirty-five years ago by Mark Kelman,[3] and offering nine "perspectives" of his own, Professor Katz aims to show that there are good grounds both to affirm and to deny global legal skepticism.[4]

I believe that global legal skepticism is false, which is to say that some statements of the form "the law prohibits φing" are true.[5] I cannot offer, in this very limited space, affirmative arguments against global legal skepticism. Instead, I explain why none of Professor Katz's nine perspectives provides the support for global legal skepticism—what I will henceforth often call "skepticism," for short—that he claims.

I. A LITTLE GROUND CLEARING

Three of Professor Katz's nine perspectives or "takes" aim or tend to *undermine* the skeptical thesis. That is, they aim or tend to *support* the proposition that law—at least sometimes—provides determinate answers to legal disputes. These are: the "Moral Instinct Perspective" (Take 2), the "Analogy Perspective" (Take 5), and the "Irrationality-of-Disagreement Perspective" (Take 7).[6] In addition, Professor Katz seems to conclude that two of the remaining six perspectives—the "Incommensurability Perspective" (Take 6), and the "Small World/Large World Perspective" (Take 8)—do not clearly bear on the skeptical thesis one way or another.[7]

We are left with only four perspectives that Professor Katz views as supporting the skeptical thesis: the "Cognitive Therapy Perspective" (Take 1), the "Core-Penumbra Perspective" (Take 3), the "Social Choice Perspective" (Take 4), and the "Residualist Perspective" (Take 9).[8] The next Part addresses these in turn.

II. THE FOUR PERSPECTIVES

A. *The Cognitive Theory Perspective*

The first perspective that, Professor Katz claims, lends support to the skeptical thesis is the "Cognitive Therapy Perspective."

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[3] Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

[4] Katz, *supra* note 2, at 1951.

[5] Whether or to what extent any of us can know which of such statements are true is a separate question of legal epistemology that I do not address.

[6] Katz, *supra* note 2, at 1959, 1968, 1970.

[7] *Id.* at 1969, 1972.

[8] *Id.* at 1954, 1963, 1965, 1972.

> Our feelings about whatever positive or negative encounters we have are quite indeterminate. It seems possible to think about nearly whatever happens to us in a positive or a negative light, about nearly every person who has interacted with us, in a sympathetic or a hostile way. Cognitive therapy capitalizes on that. It teaches us how to turn a bad mood into a good mood by just using the right cognitive strategy for reframing the event that troubles us in a suitably uplifting way.[9]

But, Professor Katz explains, cognitive therapy does not reveal any truths of the matter; it merely provides a strategy for seeing the world in a positive light and thereby feeling happier.[10] And whatever techniques we can employ to make us feel better we could also employ to show things in a worse light and thereby make us feel sadder. If legal argumentation is like cognitive therapy, Professor Katz concludes, then it is just a series of moves and counter-moves that we deploy to serve our ends; there is no truth awaiting discovery.[11]

Professor Katz illustrates his point with an example provided by "cognitive therapy guru" David Burns.[12] When Burns's son was born he had trouble breathing and was placed in an incubator in the intensive care unit, causing Burns to worry: "What if he ends up with brain damage or is mentally retarded?" The prospect "flooded [Burns] with wave after wave of panic."[13] So he practiced cognitive theory on himself by writing down his "negative thoughts" to see whether he could expose to himself respects in which they were "illogical."[14]

> The first thought I wrote down was "Other people might think less of me if I have a mentally retarded son." I'm a little ashamed to admit that my own ego was already caught up with the accomplishments and intelligence of my own son. But that was how I was thinking! . . . Once I wrote my negative thoughts down and thought about it, I began to see how distorted and unloving it was and I decided to look at it this way instead: "It's not very likely that people will evaluate me based on how intelligent my son is. They're more likely to evaluate me on what I do . . . .
>
> And then a rather sweet realization came to mind. It dawned on me that even if he was only average or below average, it didn't need to diminish the

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9 *Id.* at 1951.

10 *Id* at 1954.

11 *Id.*

12 *Id.* at 1952.

13 *Id.* (quoting DAVID D. BURNS, THE FEELING GOOD HANDBOOK: USING THE NEW MOOD THERAPY IN EVERYDAY LIFE at xvi-xviii (1989)).

14 *Id.* (quoting BURNS, *supra* note 13).

> joy we would share by one iota. I thought of how wonderful it would be to be close to him and to do things together as he grew up. I had the fantasy of going into the coin-collecting business with him when I was old and ready to retire from psychiatry. I had always had an interest in coin collecting, and my daughter, who was five years old at the time, was quite bright and independent. She had always developed her own interests and hobbies and never had much interest in coins. The fantasy of going to coin shows with my son and wheeling and dealing Lincoln pennies and buffalo nickels was so exciting that my anxiety vanished entirely.[15]

That's an introduction to cognitive therapy. What follows? "Some readers," Professor Katz surmises, "will be tempted to conclude that what Burns has done is prove that the right way to think about his son's predicament is not to get too upset about it, for just the reasons he gave to himself to 'un-upset' himself."[16] But that judgment is not stable. "For in the same spirit that Burns found a perspective that made the problem look less alarming, we could find a perspective that reverses things yet again."[17]

If Burns's perspective is the true or correct one, then it should follow that we ought not to spend much money or effort to prevent babies from being born with brain damage. However, that conclusion strikes us as clearly wrong. Perhaps, then, "you are now inclined to conclude that what this proves is that Burns was mistaken, benignly self-deluded. The so-called distorted perspective was not distorted, but correct, and that attempt to un-distort it is what went awry."[18] But that too is mistaken, says Professor Katz, for any good cognitive therapist will have many more counter-arguments and then counter-counter-arguments to deploy. Indeed, "[i]t would seem as though this rhetorical game could go on indefinitely."[19] Because "it seems as though it is essentially the same kind of game we are playing in law, . . . law does indeed look as hopelessly indeterminate as common sense reasoning proves to be in the skillful hands of a good cognitive therapist."[20]

There are many things to say about this arresting discussion. Most fundamentally, I find Burns's analysis horrifying. Confronted with the prospect that his newborn son may have brain damage, Burns's "first thought" was that this would be a misfortune because people would think

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15 *Id.* at 1952-53(quoting BURNS, *supra* note 13).
16 *Id.* at 1953.
17 *Id.*
18 *Id.* at 1954.
19 *Id.*
20 *Id.*

less well of him, Burns. Not a very attractive thought, but we do not have control over the thoughts that enter our minds and they do not all redound to our credit. What is creepy is what follows this first thought. Recognizing—correctly—that his self-centered focus was "distorted and unloving," Burns "decided" to look at it differently: "It's not very likely that people will evaluate me based on how intelligent my son is."[21]

This is grotesque. What made Burns's first take "unloving" was not that it was based on a mistaken prediction about how others would view him. What made it unloving was that it was all about *Burns* and not about his *son*. Remarkably, Burns's reasoning only gets worse. The "sweet realization" that vanquishes his anxiety boils down to the thought that a child of "below average" intelligence would lack his own independent interests and therefore would be willing to share in Burns's own interests in a fashion that Burns's daughter, then five years old, would not. Being "bright and independent," Burns's daughter had "her own interests"—a fact that, remarkably, appears as something to *regret* when viewed through Burns's narcissistic lens. But a "below average" child? He would cheerfully share in the interests that his father had independently and antecedently developed. Burns may have succeeded in making himself feel better, but at no point did he exhibit care or concern for the wellbeing of his son as a human being who matters in his own right.

So much for my thoughts about Burns as a guru. Does the story have any bearing on legal skepticism? I am not so sure. It is not as clear to me as it is to Professor Katz that the task of managing one's emotional state "is essentially the same kind of game we are playing in law."[22] But, to the extent that the two are analogous, I think the story does more to undermine than to strengthen the skeptical thesis. Let us not lose sight of the many truths plausibly in play here: it is a bad thing for a baby to suffer brain damage; we should try to prevent it; parents have obligations to love and care for their children, whether they suffer from brain damage or mental retardation or not. If evaluative and normative propositions such as these are true, then legal propositions can be true as well—even if our techniques for discovering those truths are fallible and manipulable.

B. *The Core–Penumbra Perspective*

Although I am treating the "Core–Penumbra Perspective" among those that are offered in support of the skeptical thesis, I confess that it is not

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[21] *Id.* at 1953.

[22] *Id.* at 1954.

clear to me that that is how Professor Katz intends it. I discuss it here to err on the side of inclusion.

Professor Katz's analysis proceeds as a three-step dialectic. The first step rests on the idea that many legal rules involve "the need to draw a line along a perfect continuum with no natural breaks."[23] Take consent:

> One can think of a continuum of cases in which someone assents to an act which would be an impermissible harm if carried out without consent (e.g., intercourse) yet is unobjectionable if carried out with consent. Such consent, however, needs to be free and informed to be valid. Since one can easily picture varying degrees of information and misinformation, as well as varying degrees of freedom and coercion, the cases seem to arrange themselves along some kind of continuum, from perfectly free and perfectly informed to strongly coerced and very ill-informed. Somewhere on that continuum we let a judge draw a line to declare that on one side of the line consent is lacking and on the other it is not. Because there is little guidance on where exactly that line is to be drawn, there is a sense of indeterminacy.[24]

If this "sense of indeterminacy" supports skepticism, the second step pushes back. Let us suppose that, at least in some cases, law "treat[s] an attribute as binary that is really scalar, and [] insist[s] on drawing a line where there is really a continuum."[25] That fact alone should not undermine legal determinacy so long as the location of the line is clear. Presumably, there is no line in nature that cleanly separates mature from immature or adult from child. Still, the law draws lines along these continua for legal purposes—eighteen years old to vote, twenty-one years old to drink, thirty-five years old to serve as President of the United States, and so on. That the underlying reality is scalar not binary does not seem to pose a threat to the truth of the proposition that persons younger than twenty-one, no matter how mature, are legally prohibited from purchasing alcohol.

Enter now the third step:

> [T]here is reason to think that the penumbra picture is incorrect. The law's attempt to draw a line is probably not merely an effort to impose an unnatural boundary where there is really a continuous spectrum. Instead, there is good reason to think that what the law is replicating is a sharp line that exists in the underlying reality.[26]

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23 *Id.* at 1959.
24 *Id.*
25 *Id.* at 1960.
26 *Id.*

As Professor Katz acknowledges, this claim "is rather counterintuitive" and requires a "digression" into population ethics to demonstrate its plausibility.[27] The digression is fascinating. Fortunately, we need not pursue it for present purposes.

Because the first step of the dialectic was offered to support legal skepticism, and the second step pushed against legal skepticism, it is natural enough to expect that the third step, in customary point–counterpoint fashion, will revive skepticism once more. However, I do not see why it should be understood to do so. As the brief discussion of age cutoffs in the law suggests, what often matters for purposes of legal determinacy is whether the law can succeed in marking boundaries, not whether those legal boundaries map onto boundaries in the underlying phenomena. If that is true with respect to seemingly scalar attributes that are scalar, it seems to be true as well with respect to seemingly scalar attributes that are in fact binary. The Core–Penumbra Perspective does not, therefore, support global legal skepticism.

C. *The Social Choice Perspective*

Modern social choice theory, founded on the path-breaking work of Kenneth Arrow,[28] demonstrates that there are many different ways to aggregate individual preferences into a collective will or social welfare function. Professor Katz notes:

> [T]his lesson does not merely apply to collective decisionmaking but also to multi-criterial decisionmaking. The paradoxes that plague the aggregation of individual preferences also plague the synthesis of many divergent criteria into one overall ranking and final decision. That makes such aggregation a promising model for legal decisionmaking. Legal decisionmaking is a particular kind of multi-criterial decisionmaking. When we consider what manner of criterial aggregation is most appealing we have to choose between different competing principles of aggregation. Many are plausible, and the answer therefore has a familiarly indeterminate ring to it.[29]

He illustrates with a well-known hypothetical from criminal law that concerns the chestnut of impossible attempts. Mr. Fact (*F*) and Mr. Law (*L*) go hunting together in October, each mistakenly believing that their

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27 *Id.*

28 *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).

29 *Id.* at 1964.

conduct is illegal. *F* believes, correctly, that hunting is legal in October but not in September, and also believes, mistakenly, that they are still in September. *L* believes, correctly, that they are now in October while believing, mistakenly, that hunting is prohibited in October while permitted in September. Most commentators think that the two hunters are similarly situated with respect to punishment-relevant considerations (e.g., desert, dangerousness), in which case, says Professor Katz, one "symmetry principle" dictates that they ought to be treated the same.[30] But now consider a variation in which *F'* and *L'* both go hunting in September when hunting is illegal. *F'* mistakenly believes that they are hunting in October; *L'* mistakenly believes that hunting is lawful in September but prohibited in October. "In both cases," Professor Katz observes, "the defendants think what they are doing is innocent, whereas objectively speaking, it is not. We would ordinarily acquit *F'* because his mistake was factual. We would convict *L'* because he is pleading ignorance of law, which ordinarily is no defense."[31] No problem thus far, except when we consider a second symmetry principle:

> [I]f we do not allow ignorance of the law to exonerate *L'*, we should also not allow it to serve to inculpate *L*, who mistakenly thinks that he is committing an illegal act when he is not. If law is irrelevant to the guilt of *L'*, it should also be irrelevant to the guilt of *L*. Correspondingly, if factual ignorance is permitted to exonerate *F'*, it only seems fair that it be permitted to inculpate *F* in the case in which he mistakenly thinks what he is doing is forbidden when it is not.[32]

The upshot is that we have a tension between symmetry principles: on the one hand, *F* and *L* should be treated the same; on the other, *F* should be convicted while *L* is exonerated.

It is a lovely puzzle and a great teaching tool. But one lesson it does not fairly teach is that legal propositions are never true. Indeed, it cannot, for true legal propositions are incorporated into the telling: hunting is legally permitted in October, legally prohibited in September. Beyond that, the tension between symmetry principles would entirely disappear if the law were changed—as many critics recommend—to grant mistake of law defenses more liberally (or even, for that matter, if the law were changed to make hunting out of season a strict liability offense). No reason for global legal skepticism here.

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30 *Id.*

31 *Id.*

32 *Id.* at 1964-65.

D. *The Residualist Perspective*

Professor Katz's final take is his shortest. It is the familiar puzzle of why so many cases get litigated at all:

> Cases get to judges because they are hard. If they were not hard—if a resolution were apparent to the parties—the parties would not wait for the judge's decision. They would agree on what they foresee to be the judge's decision. Predominantly, then, a judge has to decide a case where others fail to see a compelling, or maybe even just a halfway persuasive, way out. . . . Nothing other than chance seems to determine his choice, because if something else did, the case would not have reached him. . . . Looked at in this way, the process seems to be one that virtually guarantees that the judge's decision is going to be indeterminate.[33]

This is, as I say, a familiar puzzle. It provokes a familiar response, one that I had thought legal scholars generally find persuasive. Asymmetries of information, asymmetries of risk aversion, optimism bias, the tactical value of delay, and so on—all sorts of reasons can explain why parties litigate cases even when their disputes are governed by legal norms that are determinate as applied to the relevant facts. The fact of litigation does not, therefore, support global legal skepticism.

CONCLUSION

The papers and comments in this symposium explore a host of related but distinct questions that have traditionally occupied "Legal Realists" and "Doctrinalists." One two-part question (but only one) concerns whether legal propositions are truth-apt and whether any are true. A negative answer to this question—or to either part of it—may be termed global legal skepticism. That is a robust thesis. It should not be confused—though it frequently is—with the much more modest theses that some legal propositions are indeterminate or that legal practitioners sometimes (even often) do not or cannot know what the law provides.

In his rich and erudite contribution to the symposium, Leo Katz has offered reasons, arguments, analogies, and insights that bear on the debate. Some of his "perspectives," he claims, bolster legal skepticism while others weaken it. I have presented no arguments against global legal skepticism,

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[33] *Id.* at 1972.

though I believe it to be false. I have, however, sought to show that such skepticism gains no support from any of Katz's nine perspectives.

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