

REVIEW

Public Choice and Law's Either/Or Inclination

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Why the Law Is So Perverse
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INTRODUCTION

Public choice theory has had an easy time infiltrating law where interest-group activity is manifest. It has had less success appealing to lawyers when it comes to legal decision making. A handful of academics have mastered the idea that appellate courts are multimember decision bodies, apt to cycle, or reveal intransitivities, as they consider multiple subjects in a single case.¹ A larger group of academics and judges, influenced perhaps by the fluid, debatable, and yet hardly mysterious annual rankings of college football teams, recognizes that judicial results might depend on the order in which cases are considered, much as two teams with one defeat might be ranked differently depending, among other things, on when each suffered its loss.² But analogy and integration are not the same thing. Occasionally, Professor Leo Katz's marvelous book, *Why the Law Is So Perverse*, is brave enough to suggest that law and collective choice are so connected as to be one thing. The title might seem to promise that a few strange outliers can be speared with a single tool—and the book certainly delivers on that assurance—but at times the volume can be understood as beginning with seemingly perverse results and then expanding the argument until a monumental and parsimonious claim is made. Such audacity needs to be approached in a few steps.

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¹ See, for example, Maxwell L. Stearns, *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making* 97–106 (Michigan 2000). See also David Post and Steven C. Salop, *Rowing against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 *Georgetown L J* 743, 749–50 (1992).

² See, for example, Stearns, *Constitutional Process* at 28–30 (cited in note 1); Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 *Notre Dame L Rev* 221, 244–46 (1999).

I. THE CONNECTION BETWEEN LAW AND PUBLIC CHOICE

Katz's stated strategy is to look at four kinds of oddities in law.³ I will focus on two of these when summarizing his insights and launching into new terrain, but, as it turns out, the entry point does not much matter because the four oddities eventually yield to common analysis. Consider a case that Katz characterizes as a "loop-hole." A defendant, Charles (as in *Bronson*, the illusory vigilante), would like to kill A without suffering legal consequences. If A attacks Charles, Charles can kill in self-defense (the "Self-Defense" option) or choose to allow A, the attacker, to kill him (the "Suffer Injury" option). Either is permissible; we have no reason to rank one above the other, or so Katz insists (p 110). He then adds a third possibility: Charles can run away in retreat (the "Retreat" option). Retreat is now law's favorite option—except in the case where Charles is being attacked in his own home, but let us not complicate things unnecessarily, especially because Katz resists doing so. The interesting thing is that the introduction of this third option demotes the first option. Charles can still choose to stand his ground and be hurt, but, in the presence of the option to retreat, he cannot kill A in self-defense. This sets the stage for the legal loophole, or perversity. If Charles wants to kill A, he needs to plan in advance in order to eliminate his own option to retreat. If Charles can arrange to be attacked where there is no easy means of retreat, then Charles can kill as he pleases (pp 76, 109–14).

Readers who have not yet read Katz's book will trust me, I hope, when I say that Katz pulls off such examples with great skill. There are many objections one might have to this particular oddity, and I have tried to sprinkle several about in the retelling, but Katz does a fine job of developing details in order to parry the likely objections and make the examples compelling. There is no point in rehearsing all these maneuvers in this Review.

Katz's great insight is to map this loophole strategy—along with other legal perversities—onto the backbone of public choice theory and Kenneth Arrow's Impossibility Theorem.⁴ The first step toward

³ Katz seeks to employ social choice theory to explain four regularly observed "perversities" in legal doctrine: (1) why the law prohibits certain mutually beneficial transactions between consenting parties; (2) why the law permits loopholes, or creative workarounds, that appear to subvert its purpose; (3) why the law strictly delineates between acts that give rise to criminal or civil liability and acts that do not when actual cases are much less clear-cut; and (4) why the law occasionally seems inconsistent with general, intuitive moral principles (pp 8–11).

⁴ See Dennis C. Mueller, *Public Choice II: A Revised Edition of Public Choice* 385–407 (Cambridge 1989). See also note 5.

understanding this connection is to see that the doctrine of self-defense seeks to accommodate two different and sometimes competing principles: that of “no disproportionate punishment,” such that the attacker does not deserve the death penalty, as well as that of a “rights principle,” such that one can stand on one’s rights and do what it takes to forestall another’s interference with them (p 111). If only one principle were in play, it would be relatively easy to rank options according to this principle. But as additional principles are introduced, options are no longer ranked on a single spectrum, and it becomes easier, if not inevitable, to experience the different principles as discontinuities and inconsistencies.

If we had three people voting on what to do in the event of an attack and they weighted the two underlying principles differently, they might rank the options in any possible order. One might prefer Retreat, followed by remaining to Suffer Injury, followed by killing the attacker in Self-Defense. Another might insist on Self-Defense (weighting the rights principle heavily), followed by Retreat and, only last, to Suffer Injury. And a third might pacifically favor the Suffer Injury option (perhaps Retreat wounds pride or rewards the attacker), followed by Self-Defense, and then Retreat. We might think of law as the outcome of a vote, and we can see that there will be no stable result here. There is a case to be made for Retreat over Injury (preferred by two voters), and then one for Injury over Self-Defense, but finally one for Self-Defense over Retreat. Such a cycle is perverse in the sense that if Texas is bigger than Oklahoma, and Oklahoma bigger than Delaware, we would find it odd for Delaware to be bigger than Texas. To be sure, the law of self-defense is not exactly a vote among competing principles; choosing among the options is *not* the same as deciding the flavor of ice cream that three people ought to purchase and enjoy for dessert. In such settings there is only one principle at stake, satisfying the group’s preference for a tasty dessert; this will involve ascertaining each individual’s preferences and then aggregating preferences across the group. The presence of multiple options and multiple voters famously sets the stage for inconsistency or other oddities.⁵

⁵ I assume familiarity with the basic Voting Paradox, attributed to Condorcet, and even with Arrow’s famous theorem, but here is a quick refresher course. Imagine three voters, or groups of voters: X, Y, and Z. X likes Chocolate, Vanilla, and Strawberry ice cream in that order. Y’s ordering is Vanilla, Strawberry, and then Chocolate. Z’s is Strawberry, Chocolate, and, lastly, Vanilla. The group can buy one quart of ice cream to share, and prepares to vote. A simple majority prefers Chocolate over Vanilla, and Vanilla defeats Strawberry by a similar, but different, 2–1 majority. And yet if we allow a vote on Chocolate versus Strawberry, we find an intransitivity, for Strawberry wins, with Y and Z preferring that result. Nor will there be

The ingenuity of this book is in its showing that multiple principles are like multiple voters. Unlike ice-cream lovers,

principles never change their preferences, but . . . each principle [has] its way depending on which of the options under consideration are in fact available. And this is exactly what the law does: the law follows the principle of no disproportionate punishment when all three possible options—retreating, allowing oneself to be injured, killing one’s attackers—are available, and it follows the rights principle when only two of them—allowing oneself to be injured or killing one’s attacker—are available. Once again, that entails a violation of the independence of irrelevant alternatives: how two things are ranked—namely the option to allow oneself to be injured and the option of killing one’s attacker—now necessarily depends on the presence or absence of a third “irrelevant” alternative, namely the option of retreat. This then produces a loophole in homicide law: the opportunity to “con-
trive” a defense by removing the retreat option (pp 111–12).

stability, or consistency, if the voting is strategic, with each voter planning ahead so as not to suffer its last choice, or looking to form coalitions. The outcome will depend on the procedure used for voting. Kenneth Arrow famously showed that no decision-making method can be guaranteed to satisfy a set of reasonable-looking assumptions: (1) Transitivity (that is, the condition just shown to be violated); (2) Unconstrained Range (if the group chooses between two flavors and no further options are allowed, there will be a majority vote and no intransitivity, or “cycling”); (3) Nondictatorship (the group can avoid intransitivity by decreeing that A gets her way, or that A wins in the event of cycling, but this delegation is ruled out, we might say, as too undemocratic); (4) Unanimity (if all voters agree that chocolate is the best, then chocolate ought to be purchased, so this rules out a constitutional rule in favor of chocolate as a means of solving the intransitivity problem); (5) Independence of Irrelevant Alternatives (if a voter prefers chocolate over vanilla, and strawberry is then introduced as an option, the voter might switch to strawberry, of course, but ought not to suddenly prefer vanilla over chocolate). For a fuller discussion, see Kenneth J. Arrow, *Social Choice and Individual Values* 59–60 (Wiley 1951); Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J Polit Econ 328, 328, 330, 334–42 (1950).

A large fraction of Katz’s book can be understood as linking public choice theory (or Arrow’s Theorem in particular) with law, or “perverse” law, by putting pressure on the fifth assumption—as critics of public choice have done with different aims. See, for example, Gerry Mackie, *Democracy Defended* 131–42 (Cambridge 2003) (arguing that Arrow’s independence of irrelevant alternatives condition may be rationally violated in individual preferences or voting dynamics). Thus, the “right” to kill in self-defense disappears, or is demoted in ranking, when the option to retreat is introduced. With respect to many issues, it is likely the case that there are relevant, though not patently relevant, alternatives that can be introduced in order to unsettle previous votes or legal rules. Once we see that legal decisions often involve many principles or rights—or are “multicriterial,” as Katz calls them—the link between public choice and legal decisions becomes apparent (pp 111–12). But I doubt this would be apparent to many readers before reading Katz’s book. In any event, its cleverness and insights are in the details and the examples.

Students of public choice are amused when this assumption about the independence of irrelevant alternatives is first described, for it seems absurd suddenly to switch one's relative ranking of vanilla and chocolate after the option of strawberry is introduced. In the contrived killing case, the dependence on a seemingly irrelevant alternative (the fall and rise in ranking of the right to Self-Defense when the Retreat option is introduced or removed) materializes because of the multicriterial character of the decision making.⁶ Once we see this, we also see that it is impossible to eliminate loopholes. The key here is not to object to the claim that Retreat is a relevant alternative (because Katz could have introduced other options) but to see that when we rank three or more alternatives in a way that tries to accommodate two or more principles, we can get just such a contradiction, or loophole.

Katz offers many examples and certainly enough to convince a skeptical-but-dogged reader that the backbone of public choice is embedded within many legal perversities. As is often true with legal puzzles, there are distracting elements of each example, but Katz parries these, and he finds a nice balance between arguing details and pressing ahead with his overarching point.

Loopholes form just one category of perversity that Katz links to Arrow's insight about aggregation.⁷ Consider the book's favorite paradox. A and C arrive at a hospital following an automobile accident. A is at risk of losing both legs, and C a finger. There is one doctor and sufficient time to make just one patient whole. A wants the doctor to treat C. (Katz is good at the details; A and C are married, and C is a passionate pianist). Just as the doctor is about to give in and treat C, unrelated B arrives and requires immediate treatment in order not to lose one leg. The hypothetical succeeds in revealing the connection between law or ethics and Condorcet's Voting Paradox, and then Arrow's Theorem, in its most direct way. We can see why the doctor first favors A over C, but if A consents and indeed insists that C be treated, it is as if we have two votes for treating C rather than A. But then B has a superior claim when compared to C's. And yet, if the doctor is about to operate on B, A can say, "Fine, operate on me instead, for I have a claim superior to B's." And then we start all over again (pp 25–27). One can argue that A's desire, or preference regarding C's passion, is less important than A's (or B's) own claim, or priority to treatment. But my goal here is not to reargue

⁶ Katz defines "multicriterial" decision making as the "attempt[] to synthesize a variety of criteria into a final choice" (p 107–09).

⁷ See note 5.

these cases, but rather to communicate the subject of the book. It is the hidden but frequent connection between legal problems and (collective choice's) aggregation problems.

Katz develops the interesting idea that law's frequent inclination to categorize rather than to work with continuities serves as a means of suppressing paradoxes.⁸ Thus, law asks whether there was consent, not how much consent (pp 166–68). In the emergency medicine example, it intuits that A has a better claim for treatment than does C or B and asks implicitly whether A can transfer his treatment priority to C, and not whether A can undertake a partial transfer. It does not entertain the possibility that A had transferred 0.7 of his right to C (so that B's one leg defeats the remaining 0.3 of A's claim). One reason, or perhaps *the* reason, law is so categorical, or “either/or” as the book labels it, is that it cannot help being so; apparent continuities run up against boundaries (pp 179–81). One is either pregnant or not, dead or not, and perhaps guilty (or negligent) or not.

Another very different but equally subtle reason for law's categories is that they help suppress paradoxes. Students of public choice are familiar with this strategy, or reality, of making underlying incoherence invisible. The presence of two dominant political parties suppresses evidence of voting paradoxes.⁹ We experience this during presidential election cycles when we notice intransitivity and instability during primary season but then a calm head-to-head choice—with confusion sown only rarely by third-party candidates—in November. More generally, voters might prefer candidate X over Y, and Y over Z, but then Z over X, but this will be hidden from view if elections pit only one candidate against one other, as occurs when additional candidates are excluded for failure to garner enough signatures, sufficient votes in an earlier multi-candidate round, or simply the support of a major political party. The same is true for bills voted on in a legislature; party discipline or severe restrictions on range (public choice's word for the admissibility of alternatives) can turn a continuum into a limited set of categories.

One might say that we have evolved toward a first-past-the-post system, and thus a two-party system, *because* this comfortably suppresses voting paradoxes that would otherwise paralyze us.¹⁰ If this

⁸ I confess that Katz does not put it this way and might even disagree with the statement in the text (p 174).

⁹ See Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 Va L Rev 971, 980 n 27, 988 (1989).

¹⁰ For a discussion of the first-past-the-post voting system, see Kenneth A. Shepsle and Mark S. Bonchek, *Analyzing Politics: Rationality, Behavior, and Institutions* 179 (Norton 1997). To be sure, multiparty parliamentary systems have other means of hiding instability, but the

provocative conclusion is found wanting because of the absence of a causal or evolutionary story, then one might simply say that because we have two political parties, potential cycling is hidden from view. Similarly, consider the rule in parliamentary law making it difficult to reintroduce a defeated motion.¹¹ If motion E beats D and F beats E, we do not normally observe whether F loses to D because D is not easily reconsidered once it loses to E; without evidence of cycling, the assembly can move forward without risk of paralysis. Sophisticates will understand that the order of voting on the motions D, E, and F could make all the difference in the world, and some might prefer a randomizing device in order to eliminate the power of the agenda setter, but the deeper point is that there is really nothing we can do to avoid the problem of the absence of a stable, majoritarian outcome. In many ways Katz is expanding this notion to a yet deeper one about law. If we look hard enough, we will find multicriterial decision making almost everywhere, and so it is not surprising that law develops devices to suppress this nearly inevitable incoherence and instability.

In the case of C's precious finger, I framed the legal and ethical question in a manner intended to reveal the suggested link between multicriterial decision making and collective choice. I intimated that we could count heads and that this might matter to the doctor. In that example, both A and C preferred for C's finger to take priority over A's legs, so that the doctor was outvoted. And then, when B came along, both the doctor and B preferred treating B rather than C, so that the AC-coalition lost some of its power. It is a tie vote, and the doctor might well serve as tiebreaker, although the head counting and tie are suggestive rather than literal and dispositive. Many instances of multicriterial decision making can be seen this way, inasmuch as most of law is explicitly or implicitly about group decision making, whether in legislatures, on appellate panels, or more subtly, in the norms humans have developed (pp 6–7). Katz dares us to think that multiple criteria can, or perhaps will always, put even one decision maker in a paradoxical, Arrowian bind (pp 125–26). This is not the place to sort out that claim, but it would seem that a single voter could assign points or construct a continuum in order to be

impact of a two-party system, where three options are necessary for cycling, presents a ready example. For a discussion of the stability of systems with proportional representation, see Dennis C. Mueller, *Constitutional Democracy* 106–11 (Oxford 1996).

¹¹ See Levmore, 75 Va L Rev at 980–81 n 28, 985 n 42, 1010 & n 113 (cited in note 9).

consistent. In contrast, a group cannot avoid inconsistencies or other perversities by following this strategy.¹²

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At some points Katz's ambition seems to be to show the link between legal oddities, including loopholes and either/or categories, and the Impossibility Theorem, drawn from the core of public choice theory. On occasion, however, he comes close to saying that all of law is connected to public choice in this way because everything can be turned into a multicriterial decision.¹³ The more daring version has a counterpart in public choice itself. There are thoughtful political scientists who think cycling is rare,¹⁴ and then there are others who think it only looks rare but is everywhere unless suppressed;¹⁵ if we are free to introduce alternatives that divide the majority, it would appear that we can regularly generate cycling.¹⁶ My aim thus far has been to communicate at least one version of Katz's ambition, and perhaps the essence of his claim. I turn now to several questions that are triggered by the asserted link between law and collective choice.

One question is where we do or should deploy markets rather than law. The book is about law and not markets; if Katz were on a different law faculty he would not so completely and silently exclude markets from his thinking. Still, as soon as we think of either/or choices, loopholes, and not punishing all we condemn (another one of Katz's perversities),¹⁷ it is tempting to draw a line between legal/political decisions and markets because markets rely on prices, which decentralize decisions, aggregate as a matter of course rather than through law or other coercive methods, and make less use of categories. One possibility is that some of the oddities that mark

¹² Katz might mean that the point system or continuum will eventually run into discontinuities, though that is not always the case.

¹³ For example, Katz notes that "[l]egal doctrines can be thought of as multicriterial decision-making devices. That means they are structurally very similar to the voting rules that form the subject of the Arrow impossibility theorems" (p 125). He draws the connection between law and public choice even more explicitly—even syllogistically—later in the book: "As we well know by now, the insights social choice theory provides about voting . . . apply wherever rankings of any kind are aggregated. In other words, they are really insights about multicriterial decision making. Legal doctrines being instances of multicriterial decision making, [social choice theories] should be applicable to them" (p 177).

¹⁴ See, for example, Mackie, *Democracy Defended* at 85–92 (cited in note 5).

¹⁵ See, for example, Bernard Grofman, *Public Choice, Civil Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71 *Tex L Rev* 1541, 1553–62 (1993).

¹⁶ See Shepsle and Bonchek, *Analyzing Politics* at 101–02 (cited in note 10) (conceptualizing Richard McKelvey's idea that in multidimensional settings, there will always be instability).

¹⁷ Katz refers to "undercriminalization" as an apparent legal perversity (p 185).

multicriterial legal decisions are avoided when markets are deployed. In turn, this might encourage courts and legislatures to leave certain decisions to the market. Alternatively, perhaps we mysteriously resort to markets—or to law—when the other threatens us with its inconsistencies. This turns out to be a matter requiring more extensive analysis than is possible in a section of a Review, but I offer some ideas about this connection in Part II.

A second, equally difficult, question focuses on the shadow rather than the light. *Why the Law Is So Perverse* is tantalizing in its argument as to why law exhibits certain oddities, but such theorizing necessarily stimulates questions about why and when law is *not* perverse. If the link to collective choice explains so many of law's twists, and if there is something of an equivalence between Arrow's Impossibility Theorem and the quest to resolve conflicting legal claims, then why is anything in law straightforward?

Focus, for example, on the observation about either/or categories where a continuum would have been possible. Law sometimes insists on categories with consequences, apparently as a means of avoiding multicriterial decision-making problems. The choice between the doctrines of contributory and comparative negligence in tort law offers a striking example. Contributory negligence is either/or in exactly the way Katz means. Where that doctrine governs, a plaintiff found contributorily negligent has her recovery from a negligent defendant, or a manufacturer of a defective product, reduced to zero. But law has moved rather dramatically from contributory negligence to comparative negligence, introducing a continuum where there had been either/or categorization. Denying recovery to one who had unclean hands is a plausible principle, so here is an example where multiple and potentially conflicting principles eventually and almost universally generate a continuum rather than an either/or legal framework.¹⁸

The example is hardly unusual. Had our legal system replaced comparative negligence with contributory negligence, Katz could say that law moved to an either/or method of decision making in order to avoid paradoxes or other oddities. A jury that could entertain more options, or compromises, regarding fault and liability allocation would of course be much more likely to cycle than one that was

¹⁸ Of course, the jury (if it is a jury case) deciding on comparative negligence numbers must overcome its own aggregation problems in order to reach a decision, so there is plenty of suppression of voting paradoxes there. But there remains the question of why and when law moves to the ostensible continuity of comparative negligence. Law helps the jury compromise, we might say, even though compromise is not a solution to Arrow's problem.

asked only, “Was the plaintiff contributorily negligent?” before moving on to the next step—especially where there was some hurdle to reconsidering once-defeated proposals.¹⁹ But here, as in many other areas of law, doctrine has moved from either/or to a continuum. This seems to make Katz’s theory a rather extreme kind of just-so explanation. It may be that he has identified an equivalence of sorts, but unless we have a theory of when law willingly tolerates perversity, we are left only with an observation and with no prediction or even explanation. I turn to this question, or serious threat to Katz’s theory, in Part III.

II. LAW VERSUS MARKETS

Markets do not solve voting paradoxes. Imagine that multiple diners, seeking to share a quart of ice cream for dessert, rank the three flavors available for purchase. If a vote by them would reveal a paradox, the embedded cycle is not eliminated by imposing a point system or by resorting to a market mechanism whereby the group simply decides on the flavor to purchase and serve by letting the highest bidder prevail. Markets cannot promise to deliver on all of Arrow’s assumptions; various kinds of auctions and other market mechanisms are all devices that fall within the set shown by Arrow to be unable to satisfy five primitive assumptions.²⁰ A sophisticated way to see this is to think of the voters as trying to form coalitions in order to finance the highest bid, so that they have more flexibility than a group bound by the one-person-one-vote norm. The participants will find themselves cycling because of what game theorists call an empty core. Every coalition can be defeated by another coalition unless defections are prohibited or range otherwise restricted.²¹

And what if coalitions are ruled out or barred by a first-round vote or other decision? It is still easy to see that markets cannot guarantee that which we seek. Even if all participants start out with equal resources and we hold auctions, a participant is at a loss to know when to bid high and when there will be little competition so that one ought to bid little. Every experienced consumer knows that

¹⁹ See Shepsle and Bonchek, *Analyzing Politics* at 53–55 (cited in note 10).

²⁰ See Arrow, 58 *J Polit Econ* at 339–42 (cited in note 5) (explaining the five assumptions undergirding the Impossibility Theorem and concluding “the market mechanism does not create a rational social choice”).

²¹ Returning to an earlier example, if X likes Chocolate, Vanilla, and Strawberry in that C-V-S order, and Y’s ordering is V-S-C, and Z’s ordering is S-C-V, then perhaps X would pay \$10 to get C, and X suggests that Z join him by paying in \$5 in order to be sure of Z’s second choice. But Y wants to avoid getting his third choice and so he might pay to encourage Z to join him in gaining Z’s first choice. X might respond by lowering the price to Z, and so forth.

one can end up with an outcome that would never have been agreed to in advance. The fact that prices are dependent on what others have bid sets the stage for perversities. We might say that markets usually violate Arrow's assumptions because irrelevant alternatives (in terms of preferences) lose their independence through price and income effects. Matters are even worse when we allow for different endowments.

And yet, markets can play an important role because, among other things, they decentralize decisions. As soon as we allow something to be decided politically, there is the possibility of coercion, often embedded in a decision about taking advantage of economies of scale. Imagine that a group is deciding whether to build a one-lane bridge at point X on a river, as opposed to more expensive two-lane or three-lane structures.

	First Choice	Second Choice	Third Choice
Voter A	3 Lanes	1 Lane	2 Lanes
Voter B	1 Lane	2 Lanes	3 Lanes
Voter C	2 Lanes	3 Lanes	1 Lane

We have a familiar cycle because a majority prefers the two-lane bridge over the more expensive three-lane version (Voters B and C rank 2 ahead of 3, reading from left to right); a majority (A and B) prefers 1 over 2; but a majority (A and C) prefers 3 over 1! We know that such intransitivities, or other violations of Arrow's criteria, are impossible to avoid, and no nondictatorial decision-making scheme—not a majority vote and not a market—will solve this problem.²² Imagine now that the two-lane option is approved, perhaps because the smallest bridge project was voted on first and, after it lost, the two-lane version sailed through. Voters A and B might or might not realize that they ought to be dissatisfied because their majority coalition in favor of a single lane would have defeated the two-lane version in head-to-head competition.²³

But why is the group voting on a bridge in the first place? Why did the report on the voters' preferences exclude the possibility of zero lanes, or at least none financed by the government? Perhaps bridges should be left to private markets. There is a transaction cost

²² Arrow, 58 J Polit Econ at 342 (cited in note 5).

²³ For a discussion of the role of dissatisfaction, see Levmore, 75 Va L Rev at 993-96 (cited in note 9) (suggesting that common legislative mechanisms were developed against the backdrop of an intuitive understanding of voting paradoxes and under pressure from majority coalitions that could perceive losses).

to charging tolls or other user fees, so perhaps a publicly owned bridge is "better," at least for some voters, but lost in that statement is the possibility that a noncoercive decision is possible. Note that the question of privatizing bridge building might be a separate criterion, although rational voters might think that some bridges should be built by the government and some left to the private sector. A majority can also approve the two-lane bridge and then charge tolls below the average cost of the bridge, so that there is something of a mixed public and private project. Even our hackneyed ice cream example might conceal the possibility that the market could provide a greater mix of smaller containers, so that each participant could simply buy the flavor she wants. Everyone could have her first choice, and no one would be coerced at all.

Alternatively, there could be a path-dependent economy of scale involved. The market or group might really prefer boysenberry ice cream, but no entrepreneur produces that flavor; it only looks as if everyone is happy with the flavor or flavors currently sold. Boysenberry might even be a Condorcet winner of sorts, defeating all other flavors in head-to-head competition, but only if it can be sold at a price that gives it a large market share, and it will take some time for an entrepreneur to discover that millions of consumers will switch to it from vanilla. Moreover, there may be no first-mover advantage in the ice cream market, so that it really does not pay for anyone to start down the boysenberry path. It is more profitable to let others experiment and spend the money advertising and testing the new flavor. This in turn can produce a collective action problem, so that no one ever introduces the preferred flavor. All these obstacles to perfect markets are meant to remind us that it is no simple task to decide what we do by voting and what we leave to markets.

Tangentially, when the choice between markets and politics is framed this way, it is hard to understand contemporary hostility to mandates, including a health care mandate. When the majority builds a bridge, the minority's bridge buying has been mandated. If there is a constitutional problem with forcing individuals into health care plans, a determined government could provide the health care free of charge, or at an irresistibly low price, and finance most of the plan out of other taxes. With health care, as with bridges and ice cream, the important decision is whether to bring the good, entirely or partially, into the public sector.

Returning to legal perversities, the larger point is that markets often decentralize decisions, for they remove the bias in favor of coercive group decision making. At the same time, well-organized

groups recognize that they have an advantage in the political arena, as they can externalize costs.²⁴ They are unlikely to deregulate and yield much decision making to markets. There is a kind of market paradox, in which a majority might agree to have a large private sector, but it is difficult to commit to this in advance as most public-private decisions are made one industry, or even one item, at a time. Each subgroup enjoys the public sector for some goods but loses with respect to most and must compete with wasteful rent seeking for all. Again, it is not that markets solve Arrow's problem, it is that markets might reveal that there was no need for a coercive group decision in the first place.

Markets are much less likely than law to be either/or, for they specialize in continua rather than categories. We now know that many institutions and legal rules are neatly explained as avoiding cycling (or some other horror).²⁵ One such method is to offer but two choices. To take another of Katz's examples, an abortion is permitted or not, and law decides one way or another (pp 171–74, 226–27 n 7). As always, every category is tested, and there is give and take at the edges. A group that wanted to ban abortions and lost can begin to work against government money for hospitals that perform abortions or in favor of an earlier point in gestation after which abortions remain impermissible. Still, the either/or character of legal regulation is there, and markets are by their nature less coercive, especially if wealth differentials can be eliminated.²⁶ But why is the continuous nature of most markets found unattractive in law?

Consider two politically incorrect proposals that aim to test the either/or character of law. In the more market-like of the two, the proposal is to retain the ban on abortions in the last two months of pregnancy but to allow private decisions ("choice") before that time, except that \$1,000 (or perhaps some fraction of income) must be

²⁴ See William N. Eskridge Jr, *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va L Rev 275, 284–85 (1988).

²⁵ See text accompanying notes 8–16.

²⁶ I am sensitive to the possibility that law is no more categorical than markets. As a matter of theory (or ironically, categorization), markets must also deal with discontinuities, and law's categories often have an element of continuous pricing, so that the two are not logically or categorically different. For example, one buys a shirt in units of one, and a small shirt normally sells for the same price as an extra-large one even though they incorporate different amounts of material and present different inventory challenges. In turn, one is either speeding or not, but fines depend on speed. A pharmaceutical is either approved or not, but the government might offer fast-track approval and might not enforce some prohibitions against off-label use. Still, it is plain that when markets use prices they are *more* continuous than law tends to be, and it is surely true that law deploys categories more than markets do. I return to this distinction in the text. See note 34 and accompanying text.

paid by the abortion seeker to a fund that will be used to help poor and disabled children. The plan requires this \$1,000 for an abortion that takes place in the first month of pregnancy and then another \$1,000 for each additional month of pregnancy, so that an abortion in the third month is half the cost of one chosen in the sixth month. I suspect that the plan will attract no devotees, but the idea is to appeal to pro-choice constituents by expanding the period during which choice is available, while signaling that the choice is not undertaken lightly. And the attraction to pro-life voters ought to be the likely and perhaps dramatic decrease in the number of abortions. Why do we not see such a proposal, and why is it likely to fail or even offend?

One reading of Katz suggests that the simpler the either/or choice in law, the fewer balls are in the air, and the less evidence of cycling there will be (p 174). We avoid a paradox by limiting range, and the former is somehow worse or more obvious than the latter. A related possibility is that the proposal links the price with months of pregnancy, and this implies too strongly that the later the abortion, the closer it is to taking a life. This is offensive to the pro-choice mindset, just as the idea that an earlier abortion is better is offensive to the pro-life perspective and not just because the lower price might rush the decision to abort. The either/or approach embedded in *Roe v Wade*²⁷ and its trimesters does the same,²⁸ but perhaps less so because it uses categories rather than a continuum.

Another reaction to this proposal is a bit removed from the present subject. It is simply that the monthly fee commodifies abortion, or life, in an unacceptable manner. One can imagine the bumper stickers: "Fetuses are *not* for sale." This thrusts the either/or nature of abortion regulation into a discussion of commodification in law more generally. There are, of course, many subjects where commodification is resisted, including body parts, voting, and citizenship. The resistance is sometimes greater where prices are unlikely to induce greater supply, though that is not the case for abortion.

If commodification is the problem, then consider a continuum strategy that avoids explicit pricing. What if an abortion were provided and legal for every woman who agreed to one month of community service for every month of pregnancy before the requested abortion? The community service obligation could be fulfilled by a man, who certified that he had contributed to the unwanted pregnancy. The idea is to show respect for life, decrease the overall number of abortions, staff worthy community services, provide job training

²⁷ 410 US 113 (1973).

²⁸ *Id.* at 163.

to teenagers, and so forth. If such a proposal would easily lead to cycling, then we might understand the meta-rule, or inclination, against a continuum and in favor of either/or lawmaking.

	First Choice	Second Choice	Third Choice
Group A	Anti-Abortion	Service Proposal (fewer abortions)	Choice
Group B	Service Proposal	Choice	Anti-Abortion
Group C	Choice	Anti-Abortion	Service Proposal

But the cycling, while not impossible, seems far-fetched. It is hard to imagine pro-life voters preferring complete choice over this proposal (unless the community service is of a kind designed to provide a service that is even more offensive to pro-life advocates), and it is difficult to see why pro-choice supporters would prefer a complete ban over this proposal. If Katz is right, it must be because of a more general claim that in many situations either/or suppresses cycling, even if there is not that danger here. It is also plausible, if not likely, that this proposal is simply misguided. A large-scale community service program may be unwieldy, too close to the commodification problem, or simply not yet conceived. Alternatively, existing law may have already divided the erstwhile majority by introducing waiting periods, parental notification requirements, restrictions on federal funding, rights for protestors, and so forth, all of which put a price on abortions. Note, however, that this would explain the expenditure and dissipation of political energy but leave abortion regulation looking much more either/or than structured along a continuum.

The more fundamental and hostile reaction to the proposed continuum with respect to abortion regulation is of a piece with the idea that the political virtue of integrity requires us to do what we think is right rather than to accept internal compromises, or “checkerboard” solutions.²⁹ In some contexts this can be linked to the counterintuitive notion that errors are minimized through an all-or-nothing rule, as when a negligent tortfeasor, found just more likely than not to have caused a plaintiff’s loss, is required to pay the entire damage bill. Similarly, if a majority of the community, or its judges, thinks abortion a matter of choice (or wrong), then it does less injustice by applying the result to all cases rather than to a subset of them in the spirit of a compromise. This approach to explaining law’s either/or inclination suggests that some serious issues like abortion will be

²⁹ See Ronald Dworkin, *Law's Empire* 178–90 (Belknap 1986).

either/or, and then that structure will necessarily create some perversities near the edges. But it does not explain why we must make believe we are sure of a defendant's guilt or innocence, and the no-checkerboard approach is even less helpful with respect to tort law and many other areas that are sometimes either/or and sometimes continuous.

In choosing another example where we might be weaned from either/or, it is useful to be mindful of still other explanations of why abortion regulation has not turned into a continuum. From a public choice perspective, a compelling argument is that once something is in the political domain, it is attractive if it is stable, so that there is not constant rent seeking and other costly activity as groups try to change the law. If abortions were on a price or regulatory continuum, the argument goes, then interest groups would constantly be working to nudge the price higher or lower. The either/or norm might make the law more stable, perhaps because dissatisfied groups can see that it will be hopeless to try to move law all the way to the other extreme. The argument bears some relation to the case for final-offer arbitration, which is either/or for a different kind of transaction cost reason.³⁰ In fact, *Roe v Wade* is often praised for having introduced stability to an area of law that might have been extremely volatile.³¹ In turn, this argument is related to the conjecture that interest-group activity is more likely where there is unlikely to be a Condorcet winner, so that the interest group need only influence the procedure by which things are voted upon.³² If correct, then the naive view would be that interest groups work to make law less either/or in order to influence it. But of course the more sophisticated approach would be to say that law establishes an either/or convention precisely to limit interest-group influence.

The foregoing conjecture about stability suggests an example drawn from international law. It has been observed that international law and norms now consider borders between countries to be nearly inviolable. For much of history borders were altered by war,

³⁰ See Elissa M. Meth, Comment, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 Am Rev Intl Arb 383, 388–89 (1999) (arguing that final-offer arbitration facilitates bargaining by motivating parties to develop and exchange their most reasonable positions prior to the arbitrator's decision).

³¹ See, for example, Neal Devins, Book Review, *The Countermajoritarian Paradox*, 93 Mich L Rev 1433, 1445, 1449–55 (1995) (“The Court designed *Roe v. Wade* to put an end to the abortion dispute. Justice Harry Blackmun put forth a trimester test governing state authority over the abortion decision both to make clear what the Court intended and to limit future governmental efforts to sidestep the Court's decision.”).

³² See Saul Levmore, *Voting Paradoxes and Interest Groups*, 28 J Legal Stud 259, 261–75 (1999).

by purchase, and by agreements among rulers, or even unilateral maneuvers by monarchs. But the last century, and the post–World War II treaties, marked a profound shift toward stable boundaries. No longer do we see many purchases of territories or wars over borders.³³ This stabilizing influence, if it is that, is not exactly an example of evolution toward either/or, but an instance of a move away from a continuum. Previously fluid boundaries have become fixed.

It would be interesting to see some natural experiments. Imagine that South Korea offered North Korea \$1 billion for each ten kilometers their shared border was moved northward. And then what if Greece's debt burden had been reduced in 2012 by Germany's buying some of Greece's islands? If these transfers destabilized other borders in the world, then we might have a nice explanation of stability. It comes close to Katz's explanation of law's taste for category rather than continuum, albeit one we might have discerned without any understanding of, or connection to, the Impossibility Theorem. But my sense is that the Korean example would be accepted in the international community and the German-Greek (hypothetical) agreement would not. If so, Katz's point is strengthened. In the Korean case there are few "voters" who want the North's claim to be stable and, in any event, the destabilizing risk of the land sale might be preferred over the destabilizing influence of famine in North Korea or fighting between the two countries. In the case of Greece, however, it is easy to see that the introduction of a new option might lead to cycling and other instabilities. To be sure, the inalienability of the Greek islands is not necessarily welfare enhancing, for it is possible that debt repayments and forgiveness impose costs on the parties that exceed those which would accompany border instability. But Katz's powerful insight makes no claim about efficiency.

One last example is even more conjectural but directs the discussion back in the direction of law versus markets. It begins with the observation, or concession, that the claim cannot possibly be that law is entirely either/or and that markets always operate with a continuum, but rather that each is inclined in the stated direction. And of course sometimes markets have categories because of law (as when law refuses to title land in the increments parties would like) (pp 21–22), though at times markets develop their own categories because of transaction costs, network externalities, or comparable reasons. Shirts come in specific sizes through no fault of law, and in any event a tailor is free to customize and not be bound by the industry's

³³ See Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 *Intl Org* 215, 221–24 (2001).

categories.³⁴ The example is of an area that has developed a continuum, along the lines of comparative negligence. In criminal law it appears that long ago penalties were more categorical. In ancient times there was capital punishment or not, exile (excommunication) or not, and perhaps maiming or not.³⁵ The development of prisons created something of a new continuum, and lawyers began to think more often in terms of the proportionality of punishment. But even before prisons, punishment could have been more continuous. We do not, for example, see much in the way of debates regarding the length of a wrongdoer's exile. Additional intermediate punishments might well have introduced new criteria (if only because there might be independent reasons to favor or disfavor temporary exile) and thus generated paradoxes and instability.

A conjecture about criminal law is that plea bargaining is a function of the modern continuum and might even have been unknown in the days of either/or. This conjecture is rooted in Katz's theory, and then draws on the earlier discussion about where we find law displacing markets and where we do not. When law is either/or it might well miss efficient solutions, but the argument is that it promotes a kind of stability and an avoidance of paradoxes and other apparent horrors. Once law becomes more market-like, as it does when it deploys prison sentences of varying lengths, we might as well see market-like behavior, which is to say bargaining and trading of prison time for other goods, even though new criteria threaten instability.

III. WHEN IS LAW NOT PERVERSE?

An anodyne reaction to this question is to criticize Katz for failing to answer it and to declare ourselves ill equipped to make progress on it. Indeed, this is a fair criticism of an otherwise enthralling book. I have lauded the author for showing us the astonishing connection between collective choice problems and some legal questions, but the theory he offers is neither falsifiable nor, equivalently,

³⁴ I will not dwell on market-based categories, or lumpiness, except to note that they can be puzzling. Thus, a retailer's return policy is more either/or than seems efficient. "Your money back if the item is returned within seven days; a store credit is available for any return up to twenty-one days" is unsurprising if not representative. "Perishable and seasonal goods are accepted for return only within three days of purchase" is another sensible either/or market-based term. But why do we never see "Return for a full credit minus 1 percent for each day since purchase"? Such a continuum might be slightly more difficult for the consumer to comprehend, but it avoids the friction that either/or terms generate when the customer is just on the wrong side of the divide, and it surely better tracks staleness and other retailer concerns.

³⁵ See James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 *BU L Rev* 29, 40-55 (1996).

predictive. We discern a remarkable common ground among various legal phenomena, but there is no claim that we can predict or explain where these oddities will fail to materialize. And if the claim includes the audacious idea that law, like other decision making, will *always* cycle if we give it unlimited range, then we must be puzzled by the fact that law is not always either/or. In any event, Katz has not identified any mechanisms that bring other components of the Impossibility Theorem into play when law is continuous and not either/or. Moreover, there are areas of law that have evolved away from either/or, as we have seen with regard to comparative negligence and prison sentences,³⁶ but not because of any identifiable relaxation of another of Arrow's conditions. There are surely many areas of law that are not and have not been either/or in character, and all these must be puzzling to those who see potential cycling everywhere. The public choice insight would be more useful if it helped us understand the continuum-either/or divide that separates tax law, liability rules, and criminal sentences from safety standards, liquidated damages, and free speech.

We can make some progress on these questions by reexamining the relationship between either/or and instability, as well as cycling in particular. Either/or will sometimes promote stability and reduce rent seeking not because it prevents cycling but because it weakens any group's incentive to invest resources in a bid for change.³⁷ A criminal defendant either is or is not found insane, a secured party either does or does not gain priority in bankruptcy, and a government either does or does not build a bridge (partial investments in private sector bridges are virtually unknown), but there does not seem to be any cycling problem that is suppressed by these either/or conventions. However, each of these either/or frameworks discourages parties from trying to slide along the scale toward its preferred position. The bridge builder does not waste resources lobbying for a partial government investment when it is clear that the legislature will not decide to construct the bridge in question.

³⁶ See text accompanying notes 17–19, 34–35.

³⁷ Abortion provided a weak example. The proposed "tax" on months of pregnancy revealed the either/or character of the debate. Were the tax not something quickly and viscerally rejected, it could destabilize *Roe v Wade*, and then pro-life and pro-choice groups would battle over the size of the tax. In our present either/or world, perhaps pro-life groups do not battle for a complete ban on abortions, beginning with a reversal of *Roe v Wade*, because they think it too unlikely that abortions will be altogether banned. If so, either/or has that feature, noted earlier, of promoting stability by disallowing incremental changes. I regard this as a weak example because there is plenty of battling over parental notification and federal funding, which are probably best understood as forming something of a continuum between the two extreme, either/or positions.

Correspondingly, and more importantly, it is not the case that every continuum promotes instability. Public choice enthusiasts will recognize “single peaked” preferences in this claim,³⁸ but I prefer to say that we must be on the lookout for multicriteria rather than a continuum. To see this, compare comparative negligence cases with international boundary disputes. In the case of comparative negligence, it is hard to see why the continuum available to the jury will promote instability. A juror who thought the defendant entirely to blame, in terms of fault and causation, will vote against a contributory negligence defense and will prefer a 100 percent allocation of fault to the defendant. But if the requisite supermajority cannot be found for that result, it is hard to see why this juror would prefer a 30 percent allocation of liability to the defendant over an 80 percent allocation. If some jurors prefer greater and greater allocations, and others prefer less and less liability, and still others prefer, say, 60 percent and then like it less as we move away from that particular allocation, there will not be cycling. There are, after all, no multicriteria but just a different assessment along a single spectrum. Cycling requires some perversity or orthogonal criterion to be introduced.³⁹

In contrast, it is easy to imagine cycling, and thus instability, where an international boundary is concerned. A voter, or a government, might like it less and less as a boundary is moved northward, but then suddenly like it better if the boundary moved another five kilometers north in order to keep an entire city or ethnic group together. The integrity of that group is a second criterion.⁴⁰ It is therefore interesting, and perhaps even explicable, that law has moved away from contributory negligence but toward fixed boundaries. Only one of these either/or conventions is easily linked to the suppression of cycling.

A dedicated positivist would continue the argument with the example of criminal penalties. Death may be either/or, but once prisons became feasible, there was every reason to follow the intuition—and perhaps efficiency argument—for proportionality because the preferences voters have with respect to sentence length rarely admit cycling. If I think a defendant deserves thirty years for his crime, it is

³⁸ See Stearns, *Constitutional Process* at 71–77 (cited in note 1).

³⁹ See *id.* (explaining that cycling can arise where voters’ preferences are multipeaked along a single dimension or single peaked along multiple dimensions).

⁴⁰ Cycling might also come about because of domestic reactions to boundary alteration. As the boundary moves, there are serious questions about the future of internal populations affected by the change in sovereignty. There is also the question of who will pay for the boundary change (if it was a sale) and who will pay for the integration of the populations (if that is attempted). It is quite likely that these matters implicate multiple criteria.

easy to imagine that I might like twenty years a bit less and ten years even less than that, but very hard to understand why I would then rank twenty-five years as inferior to ten. The same is not true once capital punishment is on the table because some people have an independent objection to that penalty. It is therefore noteworthy but unsurprising that legal systems often eliminate that option. It is also easier to see why law is often internally either/or; we do not ask juries to combine prison sentences with community service, time on work details, or even maiming. Preferences regarding the appropriate level of the two currencies, or penalties, will often not be well correlated, so a combination would introduce multiple criteria and then instability.

If we return to the question of markets versus politics, or law, we might now make more headway on the question of when the legal system displaces markets. We know that law is significantly more either/or than markets, though the latter are not free of either/or conventions (they have their own weak categories, like shirt sizes).⁴¹ Moreover, law often responds to pressure regarding its either/or framework by adding categories and developing something closer to a continuum. A pharmaceutical is either approved or not, but then there is pressure to offer fast-track approval. One is either a murderer or not, but law has added various other crimes to the menu and thus weakened the either/or description. It is tempting to start with the observation that markets exhibit more continuity, if only because of prices and entrepreneurs' ability to add categories and thus fill in the continuum, and then conclude that we find law to be less either/or when the law is doing something market-like. Thus, tort law tries to get parties to internalize the risks and harms they impose, and it does this with a liability rule that is very market-like, and indeed perhaps just what the parties would contract for in the absence of serious transaction costs (and law itself). Fines for polluters offer another example of market-like law. In contrast, restrictions on late-term abortions are not market-like at all and, correspondingly, the law there is more either/or. It is arguable, then, that law is less either/or when it is more like a market.

But this theory about law versus markets is just a bit circular. It credits the symptom rather than the cause and misses the deeper connection developed here. When law is market-like, it is deploying a continuum that does not risk cycling because multiple criteria are not in play. It is not the continuum that brings on instability but

⁴¹ See Part II.

rather multiple criteria, or multiple voters and multiple options, that bring that on and then generate legal perversities.

CONCLUSION

Why the Law Is So Perverse is unusual and attractive because it connects public choice theory to law from a vantage point that is deeply within law. It is a difficult vantage point, in that it forces the reader to struggle with other means of understanding law and its puzzles, or perversities, before accepting the idea that Arrow's insight about the aggregation of preferences might illuminate a good deal of law's structure. The effort required of the reader is well rewarded. Professor Katz has made it impossible to think of any legal loophole, either/or restriction, or constraint on transferability without looking about to see if there are multiple balls in the air, by which I mean a looming instability of the kind found in voting paradoxes because of multiple options and decision makers—or, more subtly, conflicting principles.

The book provides a lens but not a set of predictions. I have tried to work with its powerful insight to sketch the beginning of a theory that would truly answer the question posed by the volume's title. If we are to understand why law is sometimes perverse, or even the subset of circumstances in which it categorizes, and declines to present a continuum of the kind we normally experience in markets, then we must understand when it is not so. A quest for such an understanding took us to the important and even larger question of how and why we allocate decisions between the marketplace and the law.







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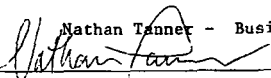
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