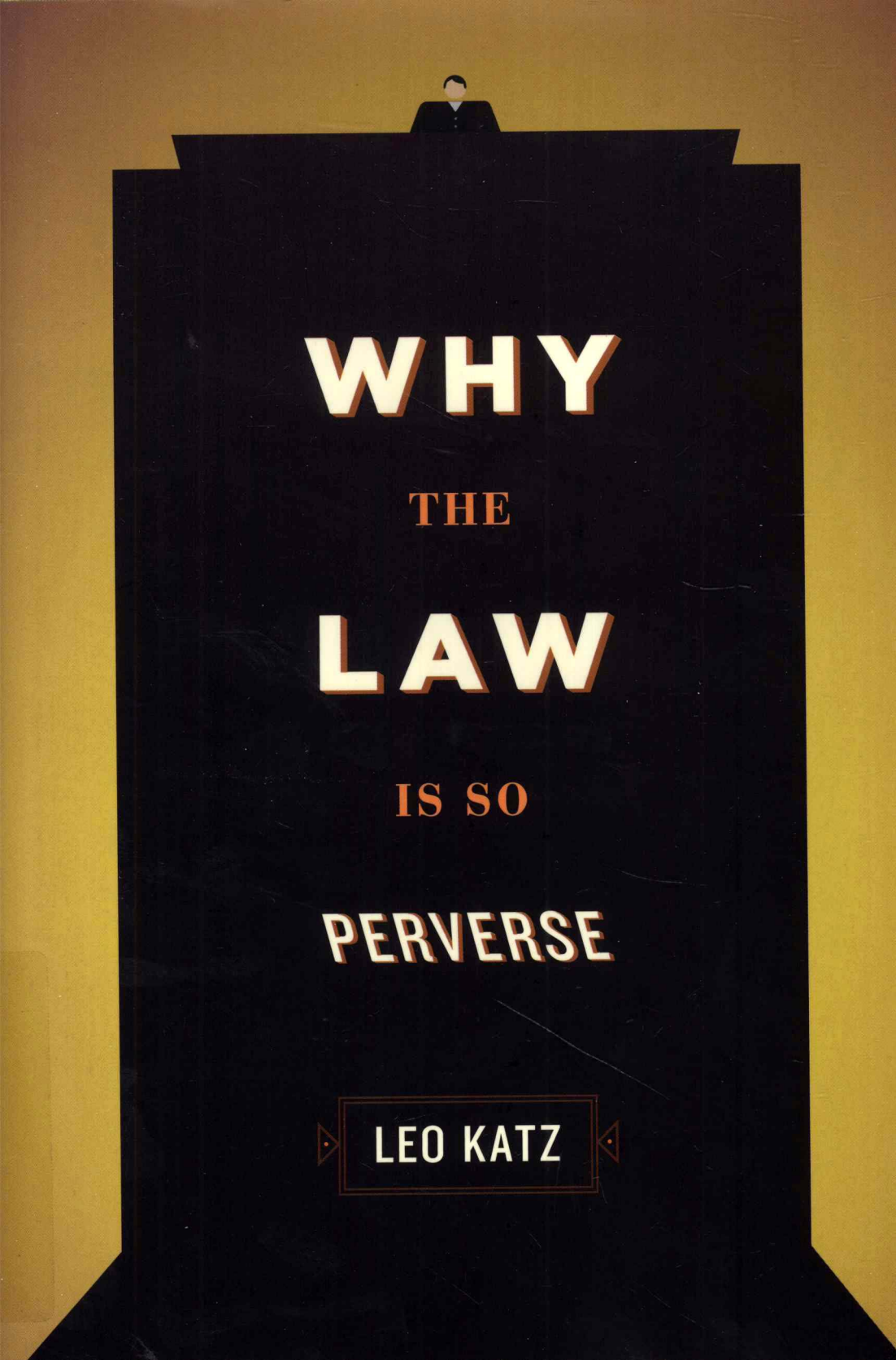
WHY
THE
LAW
IS SO
PERVERSE
LEO KATZ

Why the Law Is So Perverse

LEO KATZ

THE UNIVERSITY OF CHICAGO PRESS CHICAGO AND LONDON

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The University of Chicago Press, Chicago 60637
The University of Chicago Press, Ltd., London

Printed in the United States of America
20 19 18 17 16 15 14 13 12 11 1 2 3 4 5

ISBN-13: 978-0-226-42603-7 (cloth)
ISBN-10: 0-226-42603-3 (cloth)

Library of Congress Cataloging-in-Publication Data

Katz, Leo.
Why the law is so perverse / Leo Katz.
p. cm.
Includes bibliographical references and index.
ISBN-13: 978-0-226-42603-7 (cloth : alk. paper)
ISBN-10: 0-226-42603-3 (cloth : alk. paper) 1. Law—Interpretation and construction. 2. Law—Social aspects. 3. Law and ethics. I. Title.
K290.K38 2011
340'.11—dc22

2010049618

♾ This paper meets the requirements of ANSI/NISO Z39.48-1992 (Permanence of Paper).

Acknowledgments

I have worked on this book about as long as I have been married, a round decade, and my wife, Claire Finkelstein, has thus not had any chance to escape thinking it through with me. If there be readers who, having read something else of mine, find signs of progress and maturation here, the credit, I suspect, belongs to her, and it is to her that, in small recompense, I dedicate this book.

As with my other books, one of the first to read and react to it was Skip Bean, who managed to make time for it while running a legal practice and a business at the same time. I received another very complete early reading from Peter Huang, whose expertise in social choice theory and the mathematics behind it protected me from many a howler. (But please don't blame him for any that crept back in *after* he read it.) Bruce Chapman, one of the pioneers on whose work this book builds, gave me the benefit of multiple readings, and I got to spend some of the most stimulating days of my professional life with him at the University of Toronto as he patiently went through every one of the book's major arguments with me.

One of the easily overlooked pleasures of completing a book is that one gets to call on, and occasionally strike up a friendship with, people one otherwise had no legitimate reason for imposing on. Such pleasures were particularly ample for me in connection with this book. In the course of seeking out the reactions of economists to what I had to say, I got to know Alvaro Sandroni at the University of Pennsylvania's economics department, now (sadly for me) at the Kellogg School at Northwestern University, who read and commented on the manuscript and whose interests turned out to be so astonishingly convergent with mine that we are now determined to write something together. Gabriela Chichilnisky came to a conference I organized called "Sharp Boundaries and the Law," and

we got the benefit of having Chichilnisky's theorem explained to us by its originator. Matthew Spitzer, probably the first scholar to forge a connection between social choice and the law, invited me to his law and economics workshop at the University of Southern California, where I also met Alan Miller, then a graduate student at Cal Tech, now a professor at the University of Haifa, who is in the process of opening up all kinds of new avenues between law and social choice. Melvin Hinnich and Larry Sager at the University of Texas offered memorably trenchant comments on the loophole section of the book when I presented it there. Lewis Kornhauser came over from NYU to give a detailed critique of the book's penultimate draft and to participate in a workshop on it, hosted by Cary Coglionesi and Howard Kunreuther's Seminar in Risk Regulation, which escalated into something close to a six-hour event. Andy Postlewaite's vigorous participation in that same workshop, pressing me on the exact connection between Arrow's theorem and loopholes was a particular bonus of that event.

At an earlier stage in the book's evolution, I derived great inspiration from a seminar I cotaught with my colleague Ed Rock on the philosophy of corporate law. It was Ed who first taught me about the profound significance of the Kornhauser-Sager discursive paradox.

Many others, colleagues as well as family, read and commented on large portions of the manuscript (or its predecessor articles). With no pretense at completeness, they include, in no particular order: Charles Silver, Mitch Berman, Claire Hill, Dan Shaviro, Michael Moore, Heidi Hurd, Greg Keating, Eric Posner, Howard Chang, Douglas Husak, Matthew Adler, Stephen Morse, Ken Simons, Jacqueline Ross, Friedrich Katz, Jana Katz, Larry Solum, Joseph Bankman, Brant Hellwig, Michael Knoll, Michael Finkelstein, Chris Sanchirico, Larry Solan, David Weisbach, Saul Levmore, Richard Arneson, Larry Alexander, Stephen Perry, Roy Sorensen, Eviator Zerubavel, Michael Abramowicz, Peter Schuck, Paul Robinson, Stephanos Bibas, Joachim Hruschka, Sharon Byrd, Maimon Schwarzschild, Emily Sherwin, Richard McAdams, Richard Ross, Sandy Kadish, George Fletcher, Jim Jacobs, Peter Cane, Jane Stapleton, Geoffrey Brennan, Yochanan Shachmurove, Larry Temkin, Christoph Engel, and several successive classes in my law and morality seminar at the University of Pennsylvania.

I had the help of two excellent research assistants, Vadim Cherepanov, a graduate student in the Penn economics department, and Levent Kutlu, a graduate student of the Rice University economics department.

I had the benefit of being able to present portions of the book at workshops at the University of Toronto, the University of Minnesota, Temple University, Rutgers University (Camden), the Australian National University, the University of Southern California, the University of Illinois, the Max Planck Institute for Common Goods in Bonn, and New York University.

One of the luckiest breaks of my publishing career has been to fall early on into the hands of John Tryneski, my editor at the University of Chicago Press. John's astute reactions to my work, his choice of readers, and his warm encouragement are what every academic author dreams of.

Early versions of some of the arguments in this book appeared in several articles: "Villainy and Felony: A Problem Concerning Criminalization," *Buffalo Criminal Law Review* 6, no. 100 (2002): 451–82; "Choice, Consent and Cycling: The Hidden Implications of Consent," *Michigan Law Review* 104 (2006): 627–70; and "A Theory of Loopholes," Journal of Legal Studies 39, no. 1 (2010):1–31.

I began this book under the auspices of a Guggenheim Fellowship, and I thank the Guggenheim Foundation for its support. I largely completed it during a stay at the Berlin Wissenschaftskolleg, and I thank that institution for a memorable year. Last, but hardly least, there is my professional home, the University of Pennsylvania Law School, whose students, faculty, dean, and generous alumni have been the indispensable mainstays of my professional support system.

Philadelphia 2010

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Introduction

There are ideas that are preposterous on their face, and yet one is hard pressed to say why. This book is about such ideas.

Here is an example. Let us imagine a maverick legislator who advances a proposal for reforming our penal system, which he says will cut prison costs by 99 percent. What he would like to introduce, he says, is a system he refers to as "voluntary torture, but with the emphasis on voluntary." "The point of punishment is pain," he begins the speech in which he unveils his idea. "Without pain, there is neither deterrence nor retribution." Then he gets to the point: "If you think about it, prison is just one of many possible pain-delivery systems and unfortunately one of the most expensive. We could accomplish the same thing much more cheaply if instead of making a prisoner's life moderately painful for a prolonged period of time, which is what prison does, we made it intensely painful for a very short period of time: a lot of pain, but for a short duration—that should give us as much retribution and deterrence as before, but at a fraction of the cost."

Seeing the expression on your face, he adds: "I know, I know, you're going to say this is hardly new, and civilized countries have gotten beyond it. But my system is really very different from what we had in the Middle Ages: it is entirely voluntary. No one will be tortured unless he asks to be and unless we are sure that he is of sound mind and knows what he is doing. In other words, everyone will continue to have the option of serving his regular prison term, but whoever doesn't want to can opt for the torture alternative instead. And if you are wondering why anyone would opt for torture, my idea is that we make the torture alternative just slightly more attractive than the prison sentence. We will make it not quite long enough and not quite severe enough to be judged by most prisoners the exact equivalent of a long sentence. What we are offering them is a 'torture

discount,' a little like the prepayment discount you get for paying your real estate taxes by a certain date. Although the discount is slight, prisoners will come to view torture much like a very painful medical procedure for curing paralysis—the paralysis of jail. The amount of deterrence and retribution we get out of the new system is virtually the same as before, but it will come so much more cheaply. Torture doesn't cost much; that's why they could afford it in the Middle Ages. As you can see, it's a win-win situation."

Is there anything wrong with this proposal? If there is, it isn't easy to say what. The system is voluntary. Society is a lot better off because it costs so little, and the prisoner is slightly better off because he gets the torture discount. That's why the legislator sees this as a win-win transaction. Despite all that, we would not dream of adopting it. Nor am I suggesting that we should. But there is something perverse here that requires explanation. We have the possibility of an all-round beneficial reform but are adamantly refusing to avail ourselves of it. Why?[1]

In this book I seek to explain why the law is full of perversities of this kind: strange and counterintuitive features that one cannot justify but that one would not want to eliminate either. They all have, I will try to show you, a common cause.

The cause turns out to be not, as one might have thought, historical or political or psychological but, rather, logical in nature. Creating laws that do not suffer from such problems turns out to be logically impossible. Oliver Wendell Holmes famously said that the life of the law is experience, not logic. He was more wrong than right. Historical experience surely counts. But some of the most fundamental as well as fundamentally strange features of the law are rooted in logic rather than experience.

What are those fundamentally strange features? Here are a few more examples:

1. The law is replete with loopholes. No one seems to like them, but somehow they cannot be made to disappear. Why?
2. The law answers almost every question in an either/or fashion: guilty or not guilty, liable or not liable. Either it's a contract or it's not. But reality is rarely that clear-cut. Why aren't there any in-between verdicts?
3. There is a lot of conduct that we intensely dislike—ingratitude, for instance—but refuse to make illegal. Why? There are ingrates who strike us as much worse than, say, a petty thief. We have no compunction about punishing petty thefts. Why not also ingratitude?

What we shall find in the course of this book is that all of the problems I just listed, as well as many others I did not, closely resemble problems in another area that are much better understood and that are known to be essentially logical in character. That area is the theory of voting. Voting rules are notorious for exhibiting innumerable logical paradoxes. What I will try to show you is that many of the things that vex us about law are presentations of those same paradoxes in a different garb.

To really understand why this is true, one will have to read the book, but by way of introduction I will offer a glimpse of why it might be true. That will require, however, that I first provide you with a little bit of background on the paradoxes of voting.

A Brief Tour of the Voting Paradoxes

The eighteenth-century French mathematician Jean-Charles de Borda, much like academics today, was preoccupied with rankings. Ranking students is of course what academics are expected to do, but the habit quickly generalizes to ranking their colleagues, their colleagues' departments, and the universities to which these departments belong. They rank them by publication record, citation count, honorary degrees, memberships in learned academies, prizes, their students' credentials, their students' first jobs, their students' ratings of the quality of their teaching, their reputation among others in their field, and various weighted combinations of all or some of these. Borda's particular preoccupation apparently was with making sure that only the right people were elected to various elite academies, and this preoccupation led him to an interesting discovery.[2]

A common way to make such elections was by majority vote. Borda imagined a case in which the electors of such an academy have to choose among three candidates. Which candidate should be chosen, he asked, if a majority prefers Candidate Bertrand to Candidate Cecil, and a majority prefers Candidate Alain to Candidate Bertrand? One would think that, Bertrand being superior to Cecil, and Alain in turn being superior to Bertrand, Alain is the one who should prevail. In other words, one would be inclined to reason that the electors have directly and unequivocally expressed their collective judgment that Alain is better than Bertrand and that they *indirectly* expressed their judgment that Alain is better than Cecil when they collectively declared Cecil to be less good than Bertrand. If, therefore, we hold a vote in which Bertrand prevails over Cecil and

then another vote in which Alain prevails over Bertrand, we should then declare Alain the overall winner.

The problem with that, Borda showed, is that if we asked the electors to choose between Alain and Cecil, we might well find out that a majority actually prefers Cecil. That's right: a majority might prefer Alain to Bertrand, a majority might at the same time prefer Bertrand to Cecil, and yet it might also be the case that a majority would prefer, not as one would expect, Alain to Cecil, but the reverse. Majority voting, as the matter is usually put, is not transitive. (We shall see later how this comes to happen.)

Actually things could get even worse. If there are four candidates—Alain, Bertrand, Cecil, and Daniel—it might happen that while a majority prefers Cecil to Daniel, and Bertrand to Cecil, and Alain to Bertrand, so that it really looks as though Alain is top dog, if we then hold a vote between Alain and Daniel, every single vote might be cast for Daniel, not Alain. In other words, if we aren't careful we might end up selecting Alain even though every single elector thinks Daniel is better.

Borda suggested what he thought was a far superior method because it did not have these problems. It came down to this: ask the electors to rank each of the candidates from first to last. Then calculate each candidate's average rank, and the one with the highest average wins.

Unfortunately, it was soon pointed out to Borda by a younger colleague, one Marie-Jean de Condorcet, that this method had a different kind of flaw. Suppose that Alain comes out the winner, with Bertrand second, and Cecil last. Just as Alain is about to be given his appointment, someone brings to the academy's attention that it was grossly misinformed about Bertrand: much of the work he is renowned for has been attributed to him mistakenly! That might seem like a complete irrelevancy, since Bertrand was not chosen. The problem under Borda's method, however, is this: Suppose the information about Bertrand had come out before a vote was taken. Needless to say the electors' estimation of Bertrand would have plummeted, and he would have become everyone's last choice, ending up with the lowest average rank. But what about the average rank of Alain and Cecil? No elector has changed his mind about their relative merits compared with each other. Nevertheless it might well turn out that their average ranks would now be the reverse of what they were before. That's right: with Bertrand having fallen to the bottom of everyone's list, Cecil might end up with a higher average rank than Alain and would thus end up with the appointment. But that seems absurd.

Voting theorists like to drive home the full absurdity of this sort of thing with a joke about a man who goes into a restaurant, sees chicken,

steak, and fish on the menu, and thinks he would prefer the chicken. But before he even has a chance to place his order, the waitress informs him that the fish that day is not as fresh as it should be, whereupon he changes his mind and orders steak instead. That's right—he decides to have steak rather than chicken, having heard that the fish isn't so fresh. If the academy used Borda's system for choosing among Alain, Bertrand, and Cecil, it would be doing the exact equivalent: Between Alain, Bertrand, and Cecil, it first opts for Alain. Then, having heard that Bertrand isn't as appealing a candidate as he seemed at first, it changes its mind and opts for Cecil instead. This seems utterly irrational—and hardly an improvement on the intransitivity of majority voting.

For nearly a century and a half after Borda's and Condorcet's discovery of these voting paradoxes, no one much cared to think further about the logic of voting—which is more than a little surprising, given our constant resort to voting as a way of finding out what a collectivity really wants. In the late 1940s a Columbia PhD student in economics named Kenneth Arrow was inspired to ask a question that seems totally natural in retrospect but which neither Borda nor Condorcet nor anyone since had bothered to ask: Can one come up with a voting system that does not suffer from these flaws? Specifically, a voting system that is not incoherent (i.e., intransitive) the way majority voting is, is one that would respect the unanimous preferences of the voters (which majority voting does not do either: recall that Daniel was able to beat out Alain, even though voters unanimously preferred Alain) and one that would not fall prey to the chicken-steak-fish problem the way Borda's method does. Arrow's answer is perhaps the most surprising finding in all of twentieth-century social science: such a thing cannot be done. Any even vaguely democratic voting system is going to suffer from at least one of these flaws.[3] Arrow's impossibility theorem, as it is generally known, is thus the biggest voting paradox of them all. (Later I will give a very simple rendition of the logic that gives rise to it.)

Further similarly startling discoveries followed in its wake, such as the finding that different voting systems can generate wildly different results. This seems to make it impossible to speak coherently about a group having a "collective will" of some sort, which of course flies in the face of what political philosophers have believed since antiquity. Then there was the discovery by Amartya Sen that any voting system that tries to respect people's rights is bound to override their unanimous wishes on at least some occasions. Much more recently, there was the discovery by Graciela Chichilnisky that all voting methods are bound to be weirdly discontinuous. For instance, suppose we want to rank all candidates by the extent of

the support they command from the electorate. There are of course many different ways of measuring that support. I already mentioned Borda's method, which would have each voter rank the candidates, and averages those rankings for a final, overall ranking, but that is just one way of doing it. What Chichilnisky found is that whatever method we use, something quite odd will happen at times: if only a few voters change their minds very slightly, perhaps moving one candidate up a notch and another down, it might be enough to turn the end result completely upside down, and suddenly a candidate who was near the top might drop to the bottom and vice versa.

The outpouring of strange results about voting systems has not so far abated. An entire new field has come into being, known as the theory of social choice, devoted exclusively to exploring the perverse ins and outs of voting systems.

The Law Takes Account of Arrow's Theorem

It was not until about thirty years after Arrow's discovery that legal scholars began to think about the implications Arrow's insight might have for law, and a formidable body of scholarship resulted.[4] That makes a lot of sense: after all, a good deal of lawmaking and of judging is a collective enterprise, and therefore Arrow's theorem should have interesting implications for this aspect of law. A wide variety of questions were investigated and many long-held shibboleths discarded. For instance, people used to think of interpreting statutes as being not very different from interpreting a will. Just as a judge interpreting a will should try to get into the testator's head to resolve any ambiguity in the will, a judge interpreting a piece of legislation should try to get into the legislature's collective "head" to resolve an ambiguity in the law. Arrow's theorem and its progeny tell us, however, that we cannot think about a legislature as having anything like a collective head. There not being a collective head, how, then, should one go about resolving statutory ambiguities?

Soon the legal literature began to generate collective choice paradoxes of its own. One of the more startling results was something Lewis Kornhauser and Larry Sager found that has come to be called the discursive paradox.[5] Consider a contracts dispute in which one of the parties seeks to get out of a contract on the grounds that (1) it was made under duress and (2) it is too indefinite. The issue is to be decided by a panel of three

judges, on the basis of majority vote. Judge A does not think the contract is too indefinite, but he thinks there was duress and therefore the contract is invalid. Judge B does not think there was duress, but he does think that the contract is too indefinite and therefore he too would hold the contract invalid. Judge C does not think there was duress and does not think there is indefiniteness and therefore thinks the contract is valid. Now let's count up the votes. Two judges believe the contract is *not* too indefinite; two judges believe the contract was *not* made under duress; two judges believe the contract is invalid. Those three things of course don't fit logically together. If on the basis of majority vote we decide that there was no duress and no indefiniteness, then the logical implication is that the contract is valid. But a simple majority vote of the judges is to the contrary. Should the case ultimately be decided on the basis of the issue-by-issue majority vote of the judges or on the basis of their overall majority vote? Who knows. That's why it's a paradox.

What This Book Does

Thus one way of connecting the theory of social choice with law is to focus on the collective character of law creation. But there is another way, yielding insights of a different kind, that has only recently begun to be explored. To see what it is about requires some further background.

It was understood from early on that Arrow's theorem is not just about voting but can be extended to tell us something far more general about all decision making, whether it involves collectivities or not. Most decision making is of the type decision theorists like to call multicriterial. It was soon realized that when you are synthesizing a multiplicity of criteria into a final decision, you are doing something very similar to synthesizing the preferences of a multiplicity of voters into a final selection among candidates. To be painfully explicit about it, suppose you are trying to decide which of several cars you should buy. You rank the cars along a variety of relevant dimensions: price, safety, looks, and so forth. In the end, you have to somehow aggregate these various rankings into a master ranking that dictates which car you will actually buy. Whether you do this formally in the way I describe or with only vague awareness of what you are doing is unimportant. The fact is that your decision is fairly analogous to that of aggregating the preferences of voters into a master ranking. It is therefore subject to a version of Arrow's theorem and a version of the voting paradoxes.[6]

What several legal scholars came to realize—chief among them Bruce Chapman and Matthew Spitzer—is that this makes for another interesting and hitherto unexplored connection between Arrow's theorem and the law.[7] Legal decision making can be thought of as a kind of multicriterial decision making, and therefore Arrow's insights should be relevant. Spitzer used this approach to show why the decisions of administrative agencies will inevitably turn out to offend against one or another relatively basic requirement of justice that legislatures try to impose on them. He gives as an example the process by which the Federal Communications Commission used to award broadcasting licenses. Congress gave the commission a list of criteria that it was to consider in making its decisions, having to do for instance with the applicant's financial soundness and control over other media outlets in the area. Congress insisted that the stated criteria and no other factors enter into the commission's decision. Using the social choice perspective, Spitzer was able to show that (under some very basic assumptions) the commission would not be able to avoid being influenced by certain other factors Congress considered irrelevant—not because of any cognitive shortcomings on the part of the commissioners, but purely as a matter of logic. What Congress had asked the commission to do turned out to be logically impossible.

Bruce Chapman has used this way of looking at law to explain a long-standing puzzle about the structure of legal rules. Here is an example. The criminal code contains a long list of specific offenses (murder, theft, rape, etc.) as well as a separate list of defenses (self-defense, insanity, etc.). This kind of division into offenses and defenses is characteristic of most areas of law. Usually the prosecutor, or the plaintiff, has the burden of proving that the defendant is guilty of the offense, and it then falls to the defendant to show that he was acting in self-defense or out of insanity or whatever. Now, one might wonder why things are set up that way. One might for instance define murder not as it currently is, as an intentional killing, but as an intentional killing *other* than in self-defense or while insane. One might then require the prosecution to make the case not merely that the defendant killed intentionally but that he was not acting in self-defense and that he was sane. The law generally does not do it that way. Using the social choice perspective, Chapman is able to explain why.

This, then, is the groove into which I will be stepping, the perspective from which I will be proceeding—legal doctrines thought of as instances of multicriterial decision making. Specifically, what I aim to do is take four particularly vexing peculiarities of the law and explain them as inevitable

by-products of the fact that legal doctrines are multicriterial. Each of these four peculiarities will turn out to be the counterpart of a certain well-known insight from the theory of social choice.

Why these particular problems? First, because they lend themselves superbly well to this kind of an explanation and, second, because they are so very fundamental. To see just how fundamental they are, let's consider briefly what makes up the bulk of the typical hour in a law school class. A new case introducing the students to a new legal doctrine is taken up. One of the principal things the professor will do is to explore the purpose, or justification, of the doctrine. A commonplace way of doing this is to ask whether the doctrine is one the parties would have voluntarily imposed on themselves had they thought about it long before doing whatever it was that got them into a conflict with each other. For instance, if the dispute has to do with whether a seller can rescind his offer only up until the buyer has mailed his acceptance, or up until the acceptance has actually reached him, the instructor might then ask what most of us would want to happen long before we ever became embroiled in litigation over this question. If the doctrine corresponds to what we would want, that represents a strong justification for having it. But if it does not, that raises the question of why the law is so perverse as to impose such a doctrine on us. Wouldn't everyone be better off if the law did not do this? More colloquially put, wouldn't it be a win-win solution if the law let the parties have things the way they wanted them? Answering this question is closely wrapped up with the first perversity this book takes up, the one embodied by the title of part I, "Why Does the Law Spurn Win-Win Transactions?"

The second thing the law teacher does is ask his students to picture themselves as lawyers planning to do the most for a client who finds that the doctrine somehow does not let him do what he wants to do. "Say your client is a doctor who has made some unfortunate investments in some real estate partnerships," he might say. "Creditors will soon be at his doorstep. He might lose everything he owns in repaying them. Is there any way he can avoid that?" The perceptive student might reply: "I'd tell him to move to Florida, buy a house there, and invest his money in some special kinds of pensions and some special kinds of insurance until all his money is spent. Then he should declare bankruptcy. Creditors will have to content themselves with whatever is left and leave him alone forever after. Later he can sell the house and cash in his pension and his insurance, but they can no longer touch it." In this way students learn about the myriad ways in which they can "restructure" someone's affairs so as to circumvent a