

ETHICS AND ECONOMICS

Why the Law Is So Perverse

Leo Katz

Chicago, Illinois: University of Chicago Press, 2011 (239 pages)

In *Why the Law Is So Perverse*, University of Pennsylvania Law School Professor Leo Katz uses social-choice theory to analyze anomalies he attributes to the common law. His erudite work entertains. Its premise, though, is limited in a way that the lay reader might not appreciate. Law, conceived broadly, is quite different from Professor Katz's thesis.

Consider first Katz's thesis. Social-choice theory developed out of studies of voting. Social-choice theory reveals elections and other social choices as complex in a manner about which we are unaware or to which we are unwilling to admit. Social-choice theory identifies that complexity not so much as historical or political as logical. It shows, for instance, that popular choice is not transitive. Just because the electorate prefers A to B and B to C does not mean that it will prefer A to C. It might instead prefer C to A.

Katz uses social-choice theory to evaluate four anomalies he attributes to the common law. First, the law prohibits what Professor Katz identifies as win-win transactions such as prostitution, the sale of one's own body parts, and voluntary torture as a substitute for incarceration. Second, the law has loopholes; for example, forum shopping, tax shelters, asset protection through corporate forms, and obstruction of justice through electronic-document destruction. Third, the law has a binary guilty-not guilty, liable-not liable character, when graduated compromise outcomes would be better. Fourth, the law under-criminalizes or otherwise under-condemns conduct properly worth condemnation.

Katz attributes those anomalies to the impossibility of logical treatment, demonstrated by social-choice theory. Space limits this review to just one example. Social-choice theory

shows the postulated win-win transactions of prostitution to involve a hidden third interest proving the loss. The value of Katz's work certainly lies in his using social-choice theory largely to justify the law as it is.

That point highlights the limit and likely misapprehension of *Why the Law Is So Perverse*. Law is not to any substantial degree perverse. Katz has the wrong view of law practice when he asserts on page 63 that "[t]he exploitation of loopholes is in fact the lawyer's daily bread" and questions at the same place, "What can a profession whose main preoccupation consists of this kind of activity say for itself?"

We can say simply that the good professor is wrong about law and its practice. The law practiced every day by American lawyers is instead sound, accessible, and hugely important to American productivity. Lawyers draw on that sound law for humane and valuable work.

Consider the evidence. Public defenders coach clients to admit a basic humanity in a first step toward restoring a wayward life. Divorce lawyers help make two functioning households out of one dysfunctional one. Estate planners help with the orderly transfer of wealth across generations. Personal-injury lawyers help accident victims recover wealth pooled to internalize and distribute the predictable cost of unpredictably realized risk. Transactional lawyers help structure, govern, and protect profitable relationships. Immigration lawyers promote the orderly migration of labor. Lawyers help clients do sound and sensible things, using law that accounts for history, politics, science, philosophy, economics, theology, and logic. Ask a struggling Italy the economic value of a sound and accessible means to enforce civil obligations. (See Svetozar Pejovich, *Law, Informal Rules, and Economic Performance—The Case for Common Law* [Edward Elgar, 2008].)

Law is not always sound, although legislated law produces far more anomalies than the accretive common law that Katz addresses. Law's enforcement can seem arbitrary in heavily regulated fields or heavily patrolled neighborhoods. Law is not our savior, although it points mercifully in salvation's direction. Yet these are not the legitimate problems that Katz addresses.

A law scholar's work is to make law sound and demonstrate law's soundness rather than represent law as perverse. Law teachers should represent law practice as a valuable calling rather than as exploitative work.

At Harvard University's 1886 ceremony awarding Justice Thomas Cooley an honorary law degree on the occasion of its 250th anniversary, Justice Cooley represented law teaching as "inculcating the nobility of the lawyer's calling, which should be at once the effective instrument of justice and of true benevolence." Justice Cooley only tried "to make the fact obvious that, aside from physical needs, the State is most of all dependent for the happiness of its people upon a clear recognition and ready acceptance of the rules which determine and protect our rights." Justice Cooley cautioned that "the sense of security upon which public content not less than public liberty depends must spring mainly from a steady administration of just laws," making the profession's "reason for being ... the effective aid it renders to justice, and ... the sense it gives of public security through its steady support of public order." "These are commonplaces," Justice Cooley

finished, “but the strength of law lies in its commonplace character; and it becomes feeble and untrustworthy when it expresses something different from the common thoughts of men” (from *A Record of the Commemoration, November Fifth to Eighth, 1886, on the Two Hundred and Fiftieth Anniversary of the Founding of Harvard College*, 92–96 [John N. Wilson and Son, 1887], 92–96).

We should only wish that Professor Katz’s book were titled *Explaining Why the Law Is Not So Perverse*.

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Art in Public: Politics, Economics, and a Democratic Culture

Lambert Zuidervaart

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2011 (338 pages)

To his credit, Lambert Zuidervaart acknowledges there is plenty of blame to be assigned to both sides of the public art-funding debate. Those concerned about the transgressive tendency of modern art often fail to notice or credit the social importance of art’s unique contribution to cultural self-knowledge; many of those who produce modern art fail to respect their audiences or recognize the legitimacy of aesthetics. This balanced assessment is refreshing, especially from an arts advocate, but the contribution *Art in Public* makes to this debate beyond this is a more complicated matter.

The book’s overall goal is to develop a justification for governmental funding of the arts that navigates the Scylla and Charybdis of much modern discourse on art and public arts funding. Understandably, one has to wait until the book’s final chapter for the rather complicated argument to come full circle, but an unfortunate fact remains once the argument does so: we have indeed traveled in a circle, arriving nowhere different from where we began.

Zuidervaart’s argument breaks down to this: Society requires what he calls imaginative disclosure, something like the consciousness-making power of art; art’s ability for imaginative disclosure is threatened by both the administrative state and the market economy; in order to ensure what Zuidervaart calls democratic communication, cultural communities and institutions, especially those marginalized, must be able to speak in the public square and participate in imaginative disclosure; the state’s obligation to safeguard public justice and democratic communication requires the state not only to protect cultural organizations and social institutions (such as arts organizations), but also to support them; this is especially so for arts organizations, since they are the primary way in which individuals participate in arts-based imaginative disclosure; direct subsidies do more to protect arts institutions than nondirect subsidies; therefore, direct subsidies are warranted both in terms of the government’s responsibilities and society’s needs. However, it must be noted that direct subsidies must uphold “cultural rights,” and must uphold the autonomy of art.