

Introduction

In this issue of *Theoretical Inquiries in Law*, we address a topic that crosses many fields of the law: the continuity of legal categories. We examine the concept of legal continuity and discontinuity to provoke academic discourse about it in general and in the context of specific fields or doctrines throughout the law.

The articles are organized thematically into four parts. The first is a preliminary, introductory part that addresses issues of continuity that relate to all areas of the law. The next three parts address continuity in specific fields of law: criminal law, private law, and tax law. Each field raises unique considerations and provides readers with an in-depth and exhaustive context-dependent perspective, while embracing a broad perspective on the subject of discontinuity in law overall.

Our first part examines the foundations underlying the issue of legal continuity. To some extent, the discussion proposed in the articles of this part is a preliminary discussion of the following discussions regarding continuity in specific fields. The articles address general principles of continuity in the broader legal context, dealing with matters of legal policy and categorization, the moral justification for continuity, and the possible discontents of continuization.

We then move on to particular areas of law, starting with discontinuity in criminal law. This part offers two views by leading advocates of the continuity project, and one view that posits a more skeptical perspective, doubting the project's feasibility and normative desirability. On the endorsement side, the focus is on the linkage between the input and the output as a relationship. Whereas the input can be described as the threshold for determining whether a particular behavior falls into a category, the output mostly refers to the sanction accompanying that behavior. On the skeptical side, the move is to sever the knot, underscoring the fact that each – either input or output – can be binary, regardless of a change that occurs in the other. The articles approach the discussion from substantive, procedural, and expressionist aspects of criminal law, often engaging with additional elements of the law in general, while dealing in particular with issues like the purposes of punishment (such as retribution and condemnation), as well as legal interpretation and the use of precedents.

The third part of the issue engages with discontinuity in private law. It explores discontinuity in private law at various levels, covering many aspects

of it: factual uncertainty when deciding a case, information disclosures at the procedural level, and the ability to reach a settlement, which is affected by a wide range of incentives, factual uncertainties, and procedural requirements.

Moving on to the fourth and final part of this issue, dealing with tax law, our articles offer a rigorous critique of distinct doctrines within American tax law. They provide a broad view of those doctrines, based on both theoretical and practical considerations, allowing a better understanding of the tradeoffs and implications of continuity in this area. They may be of help when examining public policy in general and tax law in particular.

An alternative way of reading this issue of continuity in the law is proposed by Adam Kolber,¹ the organizer of the conference along with Talia Fisher. Kolber suggests reading the issue of “legal discontinuity” through an examination of legal input-output relationships, characterizing some relationships as “smooth” and others as “bumpy.” In his view, the articles can be roughly aligned along a spectrum in terms of how strongly they favor smooth law: from roughly pro-smooth, toward smooth neutrals, to smooth sceptics. As he notes, this issue of *Theoretical Inquiries in Law* recognizes a series of deeply interesting interconnected questions about law, morality, and policy where any particular decision about how to structure the law’s input-output relationships will be highly contextual and likely dependent on both theoretical and empirical considerations. We recommend engaging with both reading suggestions.

The opening article of the issue and the preliminary part is Lee Fennell’s article, which examines the nature and effects of categorization, while striving to identify the optimal categorization model. She shows that larger categories provide offsetting effects of the informational signal that could, under certain circumstances, provide fewer incentives for those either included in or excluded from a category to manipulate the classification system. Thus, broad categorizations allow better informational signals for the category and ensure the category’s stability.

Leo Katz and Alvaro Sandroni discuss the gap between judicial decision-making, which is often made categorically and binately, and the changing reality, which is often non-categorical and includes interim situations. They argue that courts will continue to apply a discontinuous, either/or approach, regardless of whether legal results are consistent with the reality or not. The reason for this can be found within the theory of social choice and multi-criteria decision-making, which the article explores through three different

1 Adam J. Kolber, *Legal Discontinuities — Opening Remarks* (May 10, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3597427.

examples. The analysis of these examples demonstrates that there is an inherent difficulty in ranking intermediate states. Consequently, and due to the impossibility of lining up cases on one continuum, they argue that courts will inevitably continue to apply a binary approach.

Re'em Segev deconstructs the continuity argument, according to which the law should be continuous in a certain aspect that involves morality. Throughout his article, he tackles the two premises that establish this conclusion. He begins by contrasting a view of morality as binary with a continuous outlook and arguing for the latter. Seeking a plausible theory among deontological and consequentialist options, he offers a theory of scalar consequentialism. He then questions the extent to which the law should track the part of morality that is concerned with the moral status of actions and agents, portraying a more complex relationship than what one might initially expect, and highlights various considerations that support or disfavor legal continuity.

Moving forward to our first specific part, Talia Fisher's article provides a general treatment of the issue of continuity in criminal law. Fisher targets the "on-off" categorization of conviction and punishment and investigates three possibilities of deviating from the usual discontinuous policy. In her three-part piece, she explores the theoretical justification for continuity in three aspects of criminal law: substantive criminal law, procedural law, and plea bargaining. Accordingly, she suggests that continuizing criminal law in those three areas could lead to better outcomes in terms of prosecutorial equality and deterrence.

Adam Kolber further engages with discontinuity in criminal law by discussing the challenges of legal line drawing along a spectrum. Kolber argues that jurors, judges, and scholars often draw lines along a spectrum without sufficient information to do so in a principled manner. Kolber calls the general phenomenon "line drawing in the dark" and argues that it is particularly troublesome when laws are "bumpy," meaning that a gradual change to a legal input, such as the severity of recklessness, dramatically affects the output, such as the amount of punishment an offender receives. According to Kolber, this distortion can be mitigated in various ways by, for example, giving jurors more sentencing information or encouraging judges to interpret cross-jurisdictional precedents in new ways. He ends by encouraging readers to consider how smoother laws can help us sidestep the problems with line drawing in the dark.

Avlana K. Eisenberg takes a more skeptical stance toward our ability to continuize decision-making in criminal law. Accordingly, she reveals the conceptual, doctrinal, and practical challenges that efforts to smooth discontinuous input-output relationships may raise. Accepting as a starting premise that smoother relationships in criminal law are desired, Eisenberg

sets out to unravel some of the core principles of criminal law that make it inherently binary. She explores three aspects of criminal law that might pose a challenge for the continuity project by being inevitably binary – the carceral/non-carceral binary, the stickiness of stigma, and the defenses that the criminal law offers – focusing on battered women and provocation defenses, and the standard of reasonableness and its alteration when examining police shootings.

Opening the part on private law, Omer Y. Pelled discusses factual uncertainty, a central issue in legal disputes. His article explores which of two possible evidentiary rules (proportional liability versus preponderance of the evidence) should prevail in different states of factual uncertainty. Pelled distinguishes between three types of factual uncertainty: mutual uncertainty, unilateral uncertainty, and institutional uncertainty. Building on this typology, the article reveals that in cases of mutual uncertainty, a proportional rule should be applied; in cases of unilateral uncertainty, a proportional rule should in most cases be applied; and in cases of institutional uncertainty, the preponderance of the evidence rule should be applied.

Mark Spottswood's article analyzes the impact of legal rules in civil procedure from a pretrial perspective. Notably, the article examines the impact that a legal rule has on the quantity and quality of settlements. Under the current binary rule, most cases end during pretrial motions and do not go through a trial. Thus, the choice of a legal rule is significant as it determines which and what amount of cases will appear before a court of law and how accurate settlements will be. The article examines three types of burden of proof rules: the existing discontinuous rule (in which damages are ruled at 0.5 jury confidence), a linear rule (in which the level of sanctions is based on the level of jury confidence), and a logistic burden rule (which provides an intermediate approach between the linear and discontinuous rules). Data simulations and their results have led the author to conclude that the linear rule would be slightly more favorable under a regime that prefers settlements, while the logistic burden and the discontinuous rule would produce similar results in this scope.

In his article, Saul Levmore discusses the intrinsic vagueness of information disclosures required by law in general, by corporate law in particular. He argues that while more detailed disclosures could be of great use for different beneficiaries, the law discourages useful disclosures in practice, due to the fear of legal liability if the information were found to be inaccurate. Using corporate law as a testing ground, he proposes to create a "safe harbor," which will shield the disclosing parties from legal liability whenever an error was detected in the information that they were not obliged to disclose, thereby providing an incentive for greater information sharing and transparency for the benefit of the addressees of such information. In doing so, Levmore

explores how the law can transition from discontinuous – clear and divided categories – to continuous, and admittedly much vaguer, categories; and vice versa. Relatedly, he argues that the categories' continuity varies within the social demarcations of the phenomena categorized by law. Therefore, his offer tends to operate within those demarcations, making it more resistant to manipulations by future parties.

Moving on to tax law, Eric Kades investigates the discontinuity of tax deductions for donations. Drawing the line between what is charitable and what is not raises a variety of questions regarding fairness, efficiency, pluralism, and the public good of donations. Under the current U.S. tax code, Kades argues, there is a stark dichotomy that either makes a donation 100% deductible or not deductible at all. However, examining the wide range of charitable donations and their purposes suggests that there ought to be a charitable continuum. Complex values that might favor deductibility are not binary but rather spread out along continua. Thus, as Kades proposes, the tax code should reflect these continua, and charitable deductions should in most cases be fractions between zero and one. The article suggests that in this way, large and redundant errors would be significantly minimized, reflecting our understanding of the many degrees of charitableness.

Lastly, Julie Roin discusses different approaches to determining a U.S. taxpayer's state of residency. Such determinations allow taxpayers to manipulate their tax liability considerably. She focuses on whether more discontinuous approaches to determining residency may reduce distortion and allow beneficial inter-jurisdictional mobility without encouraging exploitative mobility. She tests the idea by examining several continuous channels, including mark-to-market taxation, source taxation, and dual residency and income apportionment approaches, while reviewing discontinuities in retirement income taxation. Ultimately, the article concludes that solving the distortion caused by the discontinuous treatment would result in new distortions.

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