Disorder and Discontinuity in Law and Morality

Leo Katz and Alvaro Sandroni***

For every legal concept X, there are clear instances exemplifying an X and clear instances exemplifying a non-X. The cases that come before courts are those that seem to lie in between, being neither clearly an X nor clearly a non-X. It is tempting to think that, being in-between, they should receive an in-between treatment, that is, to the extent that they are an X they should be treated as an X. If they are sixty percent toward being an X, they should get sixty percent of the treatment due an X. But this presupposes that in-between cases can be rank-ordered at least roughly according to the degree of their X-ness. This Article explains why that generally cannot be done and why courts therefore go for an either/or approach: something gets treated either as an X or as a non-X. The explanation is rooted in the kind of phenomena explored in the theory of social choice and multi-criterial decision-making.

Introduction

Legal decision-making is categorical: something either counts as a contract or it doesn't; it's self-defense or it isn't. Never mind that reality doesn't seem nearly as categorical. The law insists on drawing a line even where reality doesn't offer any natural place where that line should be drawn. The resulting discontinuity is especially glaring in private law: once someone is found liable, he is usually liable for all the damages he has caused. But it's pretty extreme in criminal law as well, even if softened somewhat by the possibility of sentences of different levels of severity. This way of doing things

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* Leo Katz, University of Pennsylvania Law School.

** Alvaro Sandroni, Department of Managerial Economics and Decision Sciences, Kellogg School of Management, Northwestern University. Cite as: Leo Katz & Alvaro Sandroni, *Disorder and Discontinuity in Law and Morality*, 22 Theoretical Inquiries L. 31 (2021).

has started to seem increasingly puzzling to legal scholars. Not to the courts, though, who generally cannot conceive of doing things any other way. Why is that? What keeps them from realizing how out of touch with reality that is?

Adam Kolber puts the case of the critics of current practice especially effectively, focusing on the criminal law:

> Leading theories of punishment generally demand smooth relationships between their most important inputs and outputs. An input and output have a smooth relationship when a gradual change to the input causes a gradual change to the output. By contrast, actual criminal laws are often quite bumpy: a gradual change to the input sometimes has no effect on the output and sometimes has dramatic effects. Such bumpiness pervades much of criminal law, going well beyond familiar complaints about statutory minima and mandatory enhancements. While some of the bumpiness in the criminal law may be justified by interests in reducing adjudication costs, limiting allocations of discretion and providing adequate notice, I [would] argue that criminal law is likely bumpier than necessary and suggest ways to make it smoother.[1]

Why don't courts embrace this persuasive sounding view?

The mystery is deepened when we consider settlements: settlements frequently do precisely what courts abhor. They split the difference. They "continuize" in roughly the way Adam Kolber has in mind. Let's consider by way of example the contracts case of Bush v. Canfield.[2] Many other examples could be chosen to make the point, but this one has some further use down the road. The buyer in Bush v. Canfield had made a partial advance payment for some cotton to be delivered at some point in the future in New Orleans, by a seller located some distance away. For simplicity, let's say the amount was $5000. Let us further suppose that the total amount of cotton ordered was going to cost $10,000. By the time the cotton delivery was due, the price of cotton had fallen greatly, resulting in a $3000 loss to the buyer. Obviously not something the buyer was very happy about, in contrast to the seller who should have been. For some reason that we are not told (though all kinds of common sense explanations suggest themselves) the seller did not deliver the cotton, notwithstanding that this was proving to be a really advantageous

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1 Adam J. Kolber, *The Bumpiness of Criminal Law*, 67 Ala. L. Rev. 855, 856 (2016).

2 Bush v. Canfield, 2 Conn. 485 (1818). To be sure, settlements, occurring as they do in the shadow of the law can be thought of as also being a product of judicial practice, but it is notable that judges will not impose them directly. And therein lies the mystery.

bargain to him—inasmuch as the cotton he was supposed to deliver was now only worth $7000, yet he was to be paid $10,000 for it. The buyer sued for breach and wanted his $5000 back. The seller readily acknowledged the breach, but offered to return no more than $2000. That, the seller pointed out, would put the buyer in the position he would have been in if the seller had fulfilled the contract: if the buyer combined the $2000 with another $5000 of his own money, he would have obtained in the local market, at $7000, the cotton he had ordered, and would in the end have paid $10,000 for it. The buyer argued that this was outrageous, because the seller had not done anything to fulfil the contact, and therefore owed him the return of the full advance.

Both sides here have a delightfully compelling argument. The seller's point that he owes no more than to make the buyer whole seems quite persuasive, and can be made more so, if we imagine that the advance payment had been made in full, and that the seller sent the buyer $7000 to pay to someone in New Orleans whom the seller had contracted to deliver cotton to the buyer upon receipt of the $7000. The buyer's position, however, seems pretty persuasive as well and can be made more so if we consider a hypothetical scenario in which the buyer has never made any advance payment to the seller, and the seller, upon breaching, asks nonetheless to be paid $3000, the amount the buyer would have lost on this transaction. The buyer, it seems, would then really be paying something for nothing. That both perspectives have considerable persuasiveness is evident from the conflicting opinions the case generated in the court before which it came, though in the end the buyer prevailed. It is easy to imagine that the parties might have settled the case, it being quite hard to predict which way the case was going to go, and if they had, they almost surely would have settled for an amount that split the difference, perhaps half the $3000 in dispute. Why would a court not find this kind of resolution equally appealing, precisely because it reflects the fact that there are two equally compelling alternatives?

What makes this especially striking is that it does not seem to be an exclusively, or even primarily, legal phenomenon. Morality operates in much the same way. When we find ourselves in an in-between situation, we don't generally produce a split-the-difference verdict even when the practical considerations that constrain the law are absent. So something deeper than the practicalities of the law is at work here. When considering what should happen in a case like Bush v. Canfield, our reaction is not that the compromise the parties might strike by way of a settlement is in fact the right answer to their dispute. Our feeling is that it should really be one or the other, though we readily acknowledge that we don't know which and might even acknowledge that it is somehow utterly indeterminate which it should be.

Some time ago Saul Levmore pointed out that legislatures often structure decision-making in an artificially binary way. There usually are many more than just two alternatives that a legislature has an interest in considering, but they stand in a cyclical relationship that gives rise to the voting paradox whereby a majority supports alternative a over b, b over c, and c over a.[3] To suppress from view the fact that whatever alternative is chosen, a plausible, seemingly superior, alternative exists, the choice process is structured—typically by what he calls the motion-and-amendment-process—so that only two alternatives are present for consideration at any one time. What we will be suggesting here is that something like this—or at least something loosely analogous—is going on far more generally in legal decision-making, most notably by the courts, when instead of continuizing in the way Adam Kolber has in mind, they stick to a rigidly either/or mode of decision-making.[4]

We will look at the matter from three vantage points, though fundamentally it is the same phenomenon that we are describing in each case, just from shifting points of view. The first vantage point is that of social choice theory, and will serve to set out our core thesis as to the root of the problem with trying to continuize the law: in between-cases cannot be ranked and therefore the project of stating where in the spectrum of cases between the two extremes the disputed case lies is doomed. The second vantage point is the challenge facing those trying to construct quantitative indices for various phenomena, the difficulty of which turns out to be another manifestation of the root problem with trying to continuize the law. The third vantage point is the phenomenon of cycling and intransitivity in the law, which helps to penetrate a bit deeper yet to what one might say is at the root of the root problem.

I. The Disordered Middle

Let us start, then, with an example planted firmly within the domain of social choice theory. Suppose a committee has to fill six vacancies for a particular kind of job. They interview a hundred candidates. They are unanimous in rejecting ninety of them. They are also unanimous with regard to hiring three. There are seven with regard to whom they are in disagreement. What

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3 For those unfamiliar with it, here is a simple illustration of the voting paradox. Imagine three voters, ranking three alternatives. Voter One ranks a first, b second, c third. Voter Two ranks b first, c second, and a third. Voter Three ranks c first, a second, and b third. Thus a majority supports a over b, a majority supports b over c, and a majority supports c over a.

4 Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 Va. L. Rev. 971 (1989).

is likely to happen? What should happen? Two numbers here stand out: three and ten. Three is the number unanimously endorsed, ten is the number not unanimously rejected. Let us assume that the number of vacancies, six, is mostly aspirational. The committee can get away with hiring somewhat fewer and hiring somewhat more. That will make it extremely tempting to either hire three or hire ten, but not some number in between, not even the designated number of vacancies, six. Why not? Because of the familiar, "Arrovian," problem of aggregating the preferences of a group. Solutions in between hiring three or ten do not arrange themselves in a linear fashion. There is no compelling way to select any number of candidates between three and ten: one or another plausible aggregation principle is going to be violated. That is, social choice theory teaches us that there is no compelling way to rank the candidates about whom there is less than unanimity. Many plausible ranking methods exist, each resulting in a different ranking. Three and ten, however, can be readily justified—except for the choice among them. *That* is going to be a rather ad hoc decision.

How does this apply to decisions that do not involve ferreting out the collective will of a group? Here Timothy Endicott's deeply insightful analysis of vagueness helps point the way. The customary picture we have of vague concepts, especially in the law, is that there is a solid core, surrounded by a penumbra, surrounded by cases that clearly do not qualify as falling within the concept. Specifically, the thought is that cases can be lined up in accordance with how far out on the penumbra they lie. In fact, says Endicott, that is not possible. His primary example is the concept of a "rave," defined by the UK's Criminal Justice and Public Order Act as a "gathering which amplifies music … played during the night [which] by reason of its loudness and duration and the time at which it is played is likely to cause serious distress."[5] The Act empowers police to shut down such raves and makes it a crime to refuse to do so. There are going to be uncontroversial cases of raves and uncontroversial cases of non-raves (silence, for one). And then there are the cases "in between," that might well be litigated. These cases, however, Endicott points out, do not arrange themselves in increasing order of rave-ness. Why not? Consider just one ingredient of the concept of a rave, the notion of a crowd.

> The problem with … vague expressions [such as crowd] is that their applicability cannot be plotted along a line. 'Crowd', for example, does not automatically apply with increasing strength as numbers of people increase, but also depends on density of people. … Think of a group of 1000 people scattered here and there in Hyde Park (group

5 Criminal Justice and Public Order Act, 1994, c. 33.

> A) and an angry knot of six people shouting outside a government building (group B). Suppose that both groups are borderline crowds, and suppose that group C is like B but includes one more person. The consistency principle will require a speaker to rank C above B in a ranking for applicability of 'crowd'. But C need not be more truly a crowd than A, even if B is ranked equally with A. That is, there is something wrong with the notion of 'equally truly a crowd' applied to A and B: the relation 'more truly a crowd' is incomplete.
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> Words whose application is immensurable … cannot be plotted on a dimension like height: sometimes we can say that one person is balder than another, but there is no measure of baldness. There are various scalar qualities associated with baldness (number of hairs, length of hairs …) but they cannot be combined to generate an ordering. And other grounds of application of 'bald', such as arrangements of hair, are not scalar at all. Immensurate criteria of application are common and important. It makes sense in some cases to say that one person is nicer than another, but it does not make sense to set out to measure niceness. There is no scale of niceness on which people could be plotted, in the way that they could be plotted on a scale of height.[6]

Let's apply this to the kind of concepts that "continuizers" like Adam Kolber are inclined to treat as matters of degree. Causation and its various determinants are frequently thought to be good candidates. One such determinant is the bizarreness—or abnormality or foreseeability—of an outcome. Straightforward non-bizarre cases are easy to think of: a deadly bullet successfully fired into the heart of its victim. So are extremely bizarre cases: the defendant's shot misses its target but stirs up a herd of buffaloes, seemingly out of nowhere, that tramples the victim to death. Then there are the cases in the middle, which it is tempting to treat in accordance with their degree of bizarreness. The problem is that bizarreness does not lend itself to being ordered any more clearly than raves or niceness. It is not hard to think of some arguably bizarre cases, which cannot be rank-ordered as to bizarreness because as soon as one thinks one has been able to do so, a third case can be thought of that is more bizarre than the seemingly more bizarre of the first two cases and less bizarre than the seemingly less bizarre of the two.

Or consider the other determinant of proximate causation, voluntary intervening acts. There are two types of clear cases at either end of what at first might seem like a linear spectrum. A clear case at one of end of the spectrum would be the woman who tells her husband she is leaving him. He

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6 Timothy A. O. Endicott, Vagueness in Law 146-47 (2000).

steps on the windowsill and threatens to jump, worse yet, kill someone, if she does. She leaves him and he does what he threatened. Since she knows what he will do, there is no question of either the but-for connection or the foreseeability of his actions. Still, we impose no liability, and the intuition is pretty clear. She is not to have her liberty constrained by his threat of wrongful behavior. At the other end of the spectrum is foreseeably negligent conduct by an intervening actor, which does not generally relieve the causer of such misconduct of liability. Once again, the in-between cases that populate the casebooks do not lend themselves to any particularly persuasive ranking. What might seem at first like a plausible relative ranking will frequently change as soon as a third case is added to the mix.[7]

Even the most compelling looking candidates for such an ordering on closer inspection often resist continuization. Take the spectrum that ranges from a not yet fertilized human egg to a neonate. This is a case in which continuization has seemed irresistible to many: If we picture a spectrum, which shows day by day how the unfertilized egg progresses through fertilization and further cell division, with the unfertilized egg at the extreme left and the fully grown neonate at the right, then it does indeed seem as though one's status as a human is a matter of degree, and all the crimes associated with its mistreatment should accordingly be treated as matters of degree. In other words, it would seem quite sensible for the law to treat the growing humanoid as continuously gaining value, and its extinction as ever more serious as we move from left to right. What makes this problematic is that the valuation attached to the growing humanoid does not exhibit the same continuity as the underlying biology. That's because the following assertion, though seemingly true, is in fact false: Whenever we move from right to left, the value of what's to the left is a little lower, or at least no greater, than what is to the right. That's definitely true at the neonate-end of the spectrum. But take a closer look at the other end. There is a fundamental fact about what's going on at the other end that tends to be overlooked. More of what's on the right end is clearly more valuable. Two neonates are more valuable than one neonate, and would warrant more efforts to preserve them. But two unfertilized eggs, or even two just-fertilized eggs, or even the biological substance that succeeds these in the initial period, does not have this property. More of it is not better. In fact more of it is worse, because, were it to remain at that stage, it would be detritus that would have to be discarded. This means that as we move to the left, in the realm of something that has negative rather than positive value, the fact that it diminishes in quantity is a plus and not a

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7 *See e.g.* Sanford H. Kadish et al., Criminal Law and Its Processes: Cases and Materials (any edition).

minus, meaning that what is to the left is actually more valuable than what is to the right (more valuable in the sense that it constitutes less detritus that has to be discarded). A lot of cases that are most tempting to the continuizer actually look like this. Which makes for a disordered middle, much like that exhibited by raves or baldness.[8]

Now there is in fact a way in which in such situations the law does frequently split the difference, but not quite in the way continuizers have in mind. It does this by treating structurally almost identical cases quite differently from each other. Bush v. Canfield is a good illustration. Consider the following slight variation on the case. Suppose that the breaching party is not the seller of the goods, but the buyer, in the sense that he has not paid the seller who has already delivered his goods. Suppose further that just as in the original case, the breacher is the person who actually benefits from the transaction, because, let us say, the price of the goods has risen, and he gets to buy them more cheaply than what it would now cost on the open market. The seller therefore tries to rescind the transaction on the same ground that the buyer did, and succeeded in doing, in the original Bush v. Canfield: he wants to get his goods back on the ground that the breacher has done nothing to keep his side of the bargain. But the law does not here take the position one would expect it to take based on Bush v. Canfield. It will not allow the transaction to be rescinded. All the breacher can insist on is being paid. Presumably, as a matter of basic principle the two alternative resolutions to the case seem as tempting here as they do in the original case, but for the fact that ordering someone to make an outstanding payment is such a straightforward remedy that it tips the balance. Treating like cases unalike is a way of splitting the difference, and one commonly chosen by the law, though not one continuizers are likely to welcome.

II. The Impossibility of Satisfactory Indices

It is worth looking at our problem from a slightly different angle, the construction of indices. That's because the difficulty of an either/or concept and continuizing is especially easy to appreciate here. When social scientists are interested in a phenomenon, such as equality, influence, market power (or simply power), agreeableness, or introversion, they will try to construct an index.

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8 For other discussions of this example, see Larry S. Temkin, *An Abortion Argument and the Threat of Intransitivity*, *in* 263 Well-Being and Morality: Essays in Honour of James Griffin (Roger Crisp & Brad Hooker eds., 2000); Leo Katz, Why the Law Is So Perverse 139-81 (2011).

To an extent not commonly understood, these indices usually turn out to be highly unsatisfactory.[9] Not useless, just not up to the hopes with which they are initially invested. A specific example will serve to drive home the point, namely the attempt to construct an index for inequality. The problem with constructing such an index is demonstrated in Larry Temkin's penetrating study *Inequality*.[10]

Temkin asks us to consider the following series of cases involving different degrees of inequality in a population of 1000, in which differing numbers of people live at one of two levels: Very High or Low. In case 1, 1 person is Low, and 999 are Very High. In case 2, 2 persons are Low, and 998 are Very High. In case 3, 3 persons are Low, and 997 are Very High, and so forth until case 999: 999 persons are Low, and 1 person is Very High. In other words, we have a sequence that looks like this:

[999 VH, 1 L]; [998 VH, 2 L]; …..[1 VH, 999 L]

The degree of inequality is evidently changing, but in what direction? As it turns out, there are plausible arguments to be made for at least four different positions.

First, one might say that as we move from left to right, things get better and better. At the extreme left, there is a single person being humiliated by the fact that he is the only one left behind at the Low level. Temkin suggests by way of analogy "the case of a prison warden … who regularly suspended the exercise and visitation privileges of each person whose last name began with a letter from A through L … [W]e would find it even more objectionable if the warden selected one or two inmates instead."[11]

Second, one might say that as we move from left to right, things get worse and worse quite simply because there are more and more people who are going to have a grievance based on inequality.

Third, one might say that as we move from left to right, things first get worse and then get better. In the left-most case, "the worse-off group represents an ever so slight perturbation in an otherwise perfectly homogenous system. …The deviations from absolute equality become larger, and as they do the Sequence appears to be getting worse and worse. After the midpoint, however, the deviations from absolute equality begin to get smaller."[12]

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9 Amartya Sen, Choice, Welfare and Measurement 226-63 (1982).

10 Larry S. Temkin, Inequality (1993).

11 *Id.* at 29.

12 *Id.* at 42.

And fourth, one might say that all cases in the sequence, each being a departure from perfect equality, are really the same, on the ground that they all exemplify societies that tolerate inequality. Temkin explains the intuition thus:

> Suppose there were three Greek city-states, A, B, and C. Suppose that in A any foreigner could be enslaved and treated in any manner whatsoever, whereas in both B and C only adult male foreigners could be enslaved and only if they were properly clothed, sheltered, and fed. Now even without knowing how many people were enslaved in each of these societies, there are two senses in which one could plausibly claim that B was better than A and equivalent to C with respect to slavery. One might mean by such a claim that the kind of slavery in B—how well the slaves fare—is the same as in the kind of slavery in C, and better than the kind of slavery in A. One might also mean by such a claim that the principles and institutions responsible for the systems of slavery in those societies are equally unjust in B and C, and even more unjust in A. In this second sense our judgment about how bad the societies are with respect to slavery would not depend on the number of people affected by it. Our judgment would be, as it were, judgments about the character of those societies. If one adopts the relative to the best-off person view of comparison and if one thinks of the worlds of the sequence as representing societies whose principles and institutions are responsible for the kind of inequality in those worlds but not the number of people who are in the better and worse-off groups, then one might regard each of those worlds as equivalent, in the sense that insofar as the inequality in those worlds is concerned each of those societies would be equally unjust.[13]

What Temkin's analysis reveals about inequality readily extends to law. Consider the concept of negligence, for one. Suppose we wanted to "scalarize" or "continuize" it, that is, make it a matter of degree, an index of negligence, as it were, in the same way Temkin considered doing with inequality. We would face the same overabundance of competing ranking methodologies. Suppose we stick with the Learned Hand cost-benefit conception of negligence. How should we rank-order various instances of cases in which the expected downside exceeds the expected upside of an action? We could rank-order them simply by the extent of the downside, the probable harm. And a considerable intuition backs this up. We often condemn something in proportion to the amount of harm something does, or threatens to do, once we have decided that the action was wrongful. We could also plausibly focus on the gap

13 *Id.* at 48.

between the upside and the downside, on the ground that that is really the social harm that renders the action objectionable. There is probably a case to be made for rank-ordering in accordance with the size of the competing benefit that somewhat, but not sufficiently, justifies risk being imposed. There are combinations and variations of those. In the case of negligence's close cousins, necessity and duress, there is the further need to choose between evaluating the downside in terms of the harm being done or the wrongfulness of the action that inflicts such harm. If, for instance, the defendant is required to commit a crime of some sort, which is partially but not fully justified by the threat he faces, do we judge the crime by the seriousness with which it is ordinarily regarded or by the amount of harm it inflicts—which is what we typically do when the doctrine of necessity is applied to a case in which it actually exonerates the defendant as opposed to partially diminishing his guilt? The same kinds of possibilities arise with concepts such as coercion and deception. In rank-ordering degrees of coercion, do we focus on the severity of the threat? Or do we focus on the benefit being extracted by that threat? The same with deception: do we focus on the extent of the lie or the extent of the advantage being obtained by it? Indeed this could be done with just about every tort or crime, every one of whose ingredients could be made the decisive basis for a rank-ordering, and various ways of combining them, as well. The most general strategy for generating a multiplicity of such rankings would be to consider the various ways in which a given instance of blameworthy conduct could be modified so as to render it innocent: How much would it take to render the defendant's killing involuntary? How much would it take for it to qualify as self-defense? How much would it take for it to be purely accidental? Each of these "distances" (or some method of aggregating them) could be the basis for a rank-ordering à la Temkin. That is the hazard the law avoids by not making offenses a matter of degree. But that states the matter too pragmatically. It is morality that does not treat these concepts as matters of degree, because the principles that are brought into play when one tries to do so are as mixed and inconclusive as those about inequality.

III. Triangular Transactions

There is yet a third vantage point from which it is helpful to consider our problem, since it helps one see more clearly why cases "in the middle" defy a linear rank-ordering. It is the fact that such cases are plagued by cycles, or intransitivities.

Some time ago Bruce Chapman introduced the immensely fruitful idea of partitioning for thinking about legal decision-making. He began with a simple

example borrowed from Amartya Sen.[14] Consider a person who is asked to choose among items of dessert: a large apple, a small apple, and an orange. What interested Sen was that if one were asked to choose between these items, two at a time, one might easily, and without being guilty of any irrationality, end up making intransitive choices. One might choose the orange over the small apple because one prefers the more substantial piece of fruit, the large apple over the orange, because one likes apples better than oranges (and they are equally substantial), but as between the large apple and the small apple, the smaller one, because it would be impolite to choose the larger. Chapman is more interested in what might happen if one faces all three items at the same time. Several ways of mentally partitioning the choice are then conceivable, leading to three different plausible outcomes. One might start by considering the choice between the large apple and the small apple, feel constrained to choose the small apple, then compare that with the orange, and end up with the orange. Or one might start by considering the choice between the large apple and the orange, judge the large apple preferable, compare that to the small apple, and feel constrained to switch to that one. Then again, one might start by considering the choice between the small apple and the orange, judge the orange preferable, compare that to the large apple, and end up with the latter. A lot of legal decision-making, he suggests, looks like that.

What is significant for our purposes is that a lot of legal disagreements can be understood as disagreements about what partition should be chosen in making a decision, and that the choice between partitions, growing as it does out of a disordered assembly of alternatives, does not particularly lend itself to plausible compromise solutions. Here is one example: the dispute about the duty to retreat in the face of deadly force, when the opportunity to safely do so is available. Consider the three alternatives facing the threatened person. (1) He could kill the attacker. (2) He could allow himself to be killed. (3) He could make his escape, i.e., retreat. Should he be required to retreat, or should he be allowed to stand his ground? One plausible way to "partition" the choices is to focus on the choice between dying and killing, conclude that both are acceptable, next to consider the choice between retreating and dying, conclude that either of those are acceptable, and derive from that the conclusion that both killing and retreating should be acceptable. Another plausible way to partition the choices—the more commonly chosen one—is to focus first on the choice between retreating and killing, conclude that the life of the attacker is more valuable than the pride of the victim, next ask

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14 Bruce Chapman, *Rational Choice and Categorical Reason*, 151 U. Pa. L. Rev. 1169 (2003); Amartya Sen, *Internal Consistency of Choice*, 61 Econometrica Soc'y 495, 501 (1993).

whether the presence of the option of dying should change that judgment, and conclude that manifestly it should not. One would expect the law to go for one of these, not find a way to split the difference, there not really being a plausible way of doing that.

To be sure, there is in fact a way in which the law does split the difference, but as in Bush v. Canfield, not in a way the advocate of continuization is going to welcome. When the alternative to killing or dying is not retreat, but the giving up of some property, the law does allow the victim to "stand his ground," as it were by refusing to give up the property.[15]

We have called this section triangular transactions, rather than, say, non-binary choices, because the choice among the alternatives is just a special case of a larger category of transactions in which partitioning is possible. Consider a person in need of rescue. He is out at sea, drowning, and there is someone on shore who has it in his power to rescue the victim by throwing him a life ring or rowing out and picking him up. Now add a further character, the defendant, who takes it on himself to sabotage the rescue, resulting in the victim's drowning. How does he sabotage the rescue? It doesn't much matter. He might tackle the would-be rescuer, or destroy his equipment, or perhaps just distract him. One way of "partitioning" this transaction is to treat the connection between him and the outcome as one of proximate causation. But there is another way of partitioning it that is possible. We might first sort out the relationship between the defendant and the would-be rescuer. We would note that once the defendant has compensated the would-be rescuer for whatever wrong he inflicted on *him,* there would really no longer be any basis for imposing liability on him for a harm to the victim which the would-be rescuer was entirely at liberty to inflict. A lot of triangular transactions permit these two kinds of perspectives, and the longstanding debates about product liability, tortious interference with contractual relations, third-party beneficiaries and related doctrines are simply reincarnations of these. In all of them the law has at various times chosen one or the other of the possible partitions available, but never something "in between," the cyclically disordered nature of the alternatives making that an unappealing, and often downright inconceivable, possibility.

Let's connect this more directly with what we said in section 1 about the disordered middle. Consider again Timothy Endicott's example of a rave. He asks us to consider three potential examples of a rave: group A, "one thousand people scattered here and there in Hyde Park," group B, "a knot of six people shouting outside a government building," and group C, a knot of seven rather than six people shouting outside a government building. Group

15 Model Penal Code § 3.04.

A might be considered as much of a crowd as B, yet C would probably be considered more of a crowd than B (because it has seven rather than six people), but eligible to be considered as much of a crowd as A because in relation to A it seems not really different from B. Well, that's intransitivity. It makes it impossible to arrange A and B and C linearly. The various triangular scenarios discussed are just variations on this theme. But if they can't be arranged linearly, continuization as Kolber envisions can't really be achieved.

Conclusion

What each of the foregoing perspectives in different ways helps to show is that a major premise on which the urge to continuize is built is in fact mistaken. That premise is what we referred to earlier as the penumbra picture, of orderly concentric circles of increasingly difficult cases surrounding a core concept, and thus inviting a graduated treatment. To put the matter slightly differently, to make the law continuous we would need to be able to line up controversial cases along a continuum ranging from an easy case of, say, self-defense, to an easy case of something that is not self-defense. As we tried to show, that is generally impossible, which is why courts insist on allocating cases to either the self-defense or the non-self-defense bin.

Now there is a question lurking here which we will raise but will have to answer elsewhere. What about the settlements that parties reach on their own? Why don't those qualify as demonstrations of the existence of a suitable "in-between" solution which a judge could aim for? The problem is that the settlements are parasitic on the judge's evaluation of the cases. If he has no principled basis for rank-ordering cases, the settlements will not generate a principled basis either.