Line Drawing in the Dark

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The law inevitably draws lines. These lines distinguish, for example, whether certain conduct reflects ordinary recklessness constituting manslaughter or more extreme recklessness constituting murder. There is no way to meaningfully draw such lines, however, absent shared ways of representing amounts of recklessness or at least knowledge of the consequences of drawing lines in particular places. Yet legal actors frequently draw lines in the dark, establishing cutoffs along a spectrum with little or none of the information required to do so in a way that suits the law's goals. For example, jurors must decide whether some conduct constitutes extreme recklessness without knowing prior precedent nor the sentencing consequences of drawing cutoffs in particular places. Judges and lawyers cite line drawing precedents from other jurisdictions without considering whether the lines drawn in prior cases had the same consequences as those in the case at bar. And scholars argue about how to classify conduct without making clear what consequences they believe ought to attach once the classification is made, leaving it hard to tell when scholars have substantive or simply superficial disagreements. In this Article, I discuss some line drawing problems and briefly suggest ways we can add meaning to cutoffs. More generally, I argue, we can "smooth" certain features of the law to both reduce our vulnerability to line drawing in the dark and improve the fit between the law and what our best theories of law recommend. Even when we cannot easily

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smooth the law, thinking about the law in a smoother fashion can help reduce the jurisprudential pathologies I describe.

Introduction

Suppose one hundred women line up by height, and you must decide where along the line the women are "tall." You're not told, however, how tall is "tall." To reach the top shelf of some particular closet? To play professional basketball? Absent information about the purpose of the cutoff and what it signifies, it is difficult to draw a meaningful line. When we draw lines across spectra with little information to guide us, I call the creation of such cutoffs "line drawing in the dark." Such line drawing can be especially disconcerting in the legal system: imagine that those you deem "tall" (or "extremely" reckless or to have inflicted "serious" bodily injury) will go to prison for many more years than the rest, but you have little information about where to draw the line and aren't told how many years' incarceration are at stake.

We draw lines in the light when cutoffs reflect well-reasoned judgments consistent with our aims. For example, one way to select a cutoff is to consider the consequences of drawing a line in particular places. When a company decides how many widgets to purchase, it likely has a financial model to help maximize profit given available information and resources. The model helps the company predict what is likely to happen at different places along the spectrum of purchases, and the company makes its decision to best achieve its aim.

Some views of criminal law seek similar precision. If criminal justice should optimally deter socially harmful conduct, we can model how well the lines we draw serve that goal. Alternatively, if criminal justice is supposed to deliver proportional punishment, we can try to draw lines accordingly. Unfortunately, the law frequently draws lines in the dark relative to all plausible ambitions because legal actors and scholars lack or ignore meaningful information about the consequences of drawing lines in particular places.

My goal is to shine light on the darkness in two principal ways. In Part I, I highlight some of the many ways in which we draw lines in the dark. I also note one plausible way to address the problem: we can more transparently identify the consequences of legal decisions and allow those consequences to give meaning to our cutoffs. In particular, I suggest changes to the ways courts consider precedents that are old or from other jurisdictions, along with changes to the ways scholars discuss legal categories.

In Part II, I argue that we sometimes have good opportunities to "smooth" the law.[1] A legal input and output have a smooth relationship when a gradual change to the input leads to a gradual change to the output. We can loosely characterize laws or bodies of law as smooth where smooth input-output relationships predominate. When smooth laws comport with our best moral theories, they can reduce the risk of error caused by line drawing. If a line is drawn a small distance from where it ought to be, our output will only be off by a small amount.

By contrast, an input and output have a "bumpy" relationship when a gradual change to an input sometimes dramatically affects the output and sometimes has no effect at all. When we make line drawing errors governing bumpy legal relationships, small line drawing errors can massively distort outputs. I draw most of my examples from criminal law where inaccurate line drawing can leave people in prison for decades longer than necessary. Line drawing in the dark occurs throughout the law, however, and warrants further examination more globally to see how attending to legal input-output relationships can ameliorate the problem.

I. Drawing Lines in the Dark

We often draw legal lines by declaring that some conduct is just a step past the point of permissibility. In tort law, conduct is lawful until it is a bit too

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1 Adam J. Kolber, *Smooth and Bumpy Laws*, 102 Calif. L. Rev. 102 (2014) [hereinafter *Smooth and Bumpy Laws*]; Adam J. Kolber, *The Bumpiness of Criminal Law*, 67 Alabama L. Rev. 855 (2016); Adam J. Kolber, *Smoothing Vague Laws*, *in* Vagueness and Law: Philosophical and Legal Perspectives 275 (Geert Keil & Ralf Poscher eds., 2016). For related discussion, see Leo Katz, Why the Law Is So Perverse 139–81 (2011); Lee Anne Fennell, Slices and Lumps: Division and Aggregation in Law and Life (2019); Lee Anne Fennell, *Lumpy Property*, 160 U. Pa. L. Rev. 1955 (2012); Talia Fisher, *Conviction Without Conviction*, 96 Minn. L. Rev. 833 (2012); Doron Teichman, *Convicting with Reasonable Doubt: An Evidentiary Theory of Criminal Law*, 93 Notre Dame L. Rev. 757 (2017); Michael Abramowicz, *A Compromise Approach to Compromise Verdicts*, 89 Calif. L. Rev. 231 (2001); Larry Alexander, *Scalar Properties, Binary Judgments*, 25 J. Applied Phil. 85, 95–96 (2008); John E. Coons, *Compromise as Precise Justice*, 68 Calif. L. Rev. 250 (1980); Douglas N. Husak, *Partial Defenses*, 11 Can. J. L. & Juris. 167 (1998); Jeff L. Lewin, *Comparative Nuisance*, 50 U. Pitt. L. Rev. 1009 (1989); Gideon Parchomovsky et al., *Of Equal Wrongs and Half Rights*, 82 N.Y.U. L. Rev. 738 (2007); Edward Fox & Jacob Goldin, *Sharp Lines and Sliding Scales in Tax Law*, 73 Tax L. Rev. 237 (2020).

incautious and becomes unlawful negligence. In tax law, conduct is tax avoidance until it is a bit too sneaky and becomes the crime of tax evasion. In property law, a court might literally draw a line dividing property between parties. Not all line drawing is in the dark, however. In this Part, we will consider examples of line drawing in the dark first by jurors, then by judges, and finally, by scholars.

A. Jury Line Drawing in the Dark

Jurors are asked to decide, for example, whether an alleged tortfeasor acted "reasonably" or whether a defendant's use of defensive force was "reasonable." Such jurors are drawing lines with rather limited information. Jury instructions will provide some sense of what is meant by "reasonable," but jurors typically have little data to assess the matter. Nevertheless, at least jurors have some understanding that a verdict for a tort defendant will likely lead plaintiffs to receive little or no compensation and a determination that a defendant was justified will likely allow the defendant to leave the courtroom without punishment. Such line drawing is not totally in the dark.

Line drawing in the dark is more prominent when jurors choose a conviction from one of two offense choices where a single variable separates the offenses. For example, many jurisdictions follow the Model Penal Code in recognizing a spectrum of recklessness that can make an instance of homicide either manslaughter or murder.[2] A driver just above the legal blood-alcohol limit who recklessly fails to come to a complete stop and thereby causes the death of a pedestrian might be charged with manslaughter, a crime that requires a *mens rea* of ordinary recklessness. By contrast, a far more reckless driver with three times the legal blood alcohol limit who drives at high speed in the wrong direction and thereby kills a pedestrian might be charged with murder. Murder requires a greater degree of recklessness than manslaughter.[3]

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2 *See* Sheffield v. State, 87 So. 3d 607, 620 (Ala. Crim. App. 2010) ("The difference between the circumstances which will support a murder conviction and the degree of risk contemplated by the manslaughter statute is one of degree, not kind."); State v. Eddington, 226 Ariz. 72, 82, 244 P.3d 76, 86 (Ct. App. 2010), aff'd, 228 Ariz. 361, 266 P.3d 1057 (2011) ("Second degree murder and manslaughter may both result from recklessness. The difference is that the culpable recklessness involved in manslaughter is less than the culpable recklessness involved in second degree murder."); United States v. Fleming, 739 F.2d 945, 948 (4th Cir. 1984) ("The difference between malice, which will support conviction for murder, and gross negligence, which will permit of conviction only for manslaughter, is one of degree rather than kind.").

3 *See* Fleming, 739 F.2d 945.

Of course, the line between these two kinds of homicide isn't carved by nature. At trials where a defendant's conduct could plausibly constitute either manslaughter or murder, it will usually be the jury's job to draw the line between the two. Jurors will decide whether the defendant murdered the pedestrian by driving "recklessly under circumstances manifesting extreme indifference to the value of human life"[4] or whether the defendant's driving did not manifest such extreme indifference such that he should be convicted at most of manslaughter.[5]

Holding all else constant, the appropriate amount of punishment seems to increase smoothly as a defendant's mental state becomes increasingly reckless (or, if you prefer, as evidence of that recklessness increases).[6] For example, one might gradually increase punishment to reflect greater culpability or need for deterrence. To decide between manslaughter and murder, jurors must draw a line at some point and call certain reckless homicides "manslaughter" and others "murder."

Many courts recognize that manslaughter and murder can exist along a spectrum of recklessness.[7] Telling us to draw the line where recklessness represents "extreme indifference to the value of human life" reveals little about where along the spectrum the cutoff is located. Some conduct will be reckless in ways that manifest a little, a good bit, or even a lot of indifference to the value of human life before creeping right up to the line where extreme indifference is manifested. The language of "extreme indifference to the value of human life" adds little shared meaning, other than establishing that a spectrum exists.

According to one Washington state appellate court, "extreme indifference" "need[s] no further definition" because "the particular facts of each case are what illustrate its meaning."[8] This view gets matters backwards. If jurors are supposed to apply facts to law, they need to know something about where the law draws lines. Jurors are not supposed to both evaluate facts and determine where the law should draw the line—particularly when they are given too little information to decide. We can think of any instance of line drawing as itself occurring along a spectrum from pitch black to brightly lit. While the

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4 Model Penal Code § 210.2 (Am. Law Inst., Proposed Official Draft 1962).

5 *Id*. § 210.3.

6 Recklessness may itself have dimensions of risk taking or of unjustifiability that span spectra. If you believe recklessness or its components do not span spectra, substitute some other jury determination that does span a spectrum that crosses offense boundaries, like the amount of harm leading to a conviction of assault as opposed to aggravated assault.

7 *See supra* note 3.

8 State v. Barstad, 93 Wash. App. 553, 567 (1999).

language given to jurors to distinguish ordinary and extreme recklessness may be better than nothing, we still ask jurors to draw lines largely in the dark.

If recklessness came in clearly defined units, the law could specify precise places along a spectrum (call them "flagpoles") where legal consequences change. Jurors would still disagree about when some legal consequence is warranted, but at least they would know the implications of drawing lines in particular places. Absent flagpoles, however, it's not clear how jurors can appropriately complete their task. Recall the challenge in the Introduction to determine where one-hundred women in order of height switch from "non-tall" to "tall." Some might group the tallest 10% into the "tall" category, while others might group the tallest 40%. There's simply *no meaningful way* to draw a line along a spectrum without additional information. Does "tall" mean "WNBA tall" or "taller than average" or "likely to make people say, 'Gee, she's tall.'"?

There will be easy cases of "tall" for just about any purpose, just as there will be easy cases of murder or manslaughter. But for a wide range of cases, especially those likely to proceed to trial, we are asking jurors to locate a cutoff without meaningful information about how to do so. This is the sense in which we ask jurors to engage in line drawing in the dark. It's not just that the task we give jurors is difficult, as it often will be. The manslaughter-murder cutoff seems essentially impossible to get right in any principled way because we withhold information required to promote retribution, deterrence, prevention, or whatever one takes the criminal law's goals to be.

If jurors were regularly exposed to cases that were somehow correctly classified as murder or manslaughter, perhaps they could sensibly distinguish the two. In fact, however, jurors are given no such information. Most laypeople don't know the meaning of "manslaughter," and what little knowledge of murder they have is likely shaped by inaccurate representations on television and film.[9]

Trial judges sometimes help jurors draw lines by providing instructions that briefly reference hypothetical facts.[10] They are reluctant to give such information, however, for fear that appellate courts will claim that they

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9 John Mikhail offers evidence that certain basic features of homicide are widely shared across cultures. His research does not reveal, however, whether people make consistent distinctions between reckless manslaughter and reckless murder. *See* John Mikhail, *Is the Prohibition of Homicide Universal? Evidence from Comparative Criminal Law*, 75 Brook. L. Rev. 497 (2009).

10 *See, e.g.*, People v. Simmons, 66 A.D.3d 292, 300 (2009) (holding that the hypothetical facts given to jurors were not so similar to the case at bar "as to convey the court's view of the evidence"); *id.* quoting People v. Wise, 204 A.D.2d 133, 134–135, 612 N.Y.S.2d 117 (1994) ("A trial judge 'is not precluded from

invaded the province of the jury. Trial judges are particularly cautious about offering facts from actual cases. As the New York Court of Appeals stated,

> The guilt or innocence of a defendant should be determined solely on the particular facts of the case being prosecuted. Hence, the trial court should not use the facts of reported cases as illustrations in [its] charge for a slight variance in the factual content of the cases might mislead the jury.[11]

Even if trial courts could use such facts, they are likely to reference appellate cases decided on grounds of sufficiency of evidence. In such cases, appellate courts don't reveal whether some line was crossed but only whether a factfinder's determination of the matter was reasonable. Jurors would likely find it difficult to convert information about sufficiency of evidence into information about drawing a line in a case under deliberation.

If we can't easily add meaning through archetypical examples, we could try to add meaning through sentencing information. At least if jurors knew the sentencing implications of their decisions, they could decide whether the conduct at issue warrants one or another sentencing range. Perhaps jurors could draw meaningful distinctions if we said, for example, that manslayers in this jurisdiction receive zero to ten-year sentences and murderers receive eleven-year to life sentences. They might assess whether the defendant's culpability (or dangerousness or some combination of factors) warrants a sentence greater or less than ten years and then select a conviction accordingly.

Yet this is precisely the sort of information we have but ordinarily hide from jurors.[12] As a rule, jurors aren't told the sentencing consequences of their verdicts. Most jurors will know little about the typical sentence for murder relative to manslaughter, so it is puzzling how they are supposed to meaningfully draw lines.[13] And while most criminal cases are resolved by plea bargains rather than trials, plea bargains are widely thought to reflect expectations of

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supplying hypothetical examples in its jury instructions as an aid to understanding the applicable law.").

11 People v. Hommel, 41 N.Y.2d 427, 430 (1977).

12 Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury As Fault-Finder*, 2005 U. Chi. Legal F. 91, 91 (2005) ("[T]he jury makes a set of factual findings and votes for a conviction on one or more offenses, without knowing the offense grade or the punishment range attaching to that grade.").

13 *Id.* at 113 (advocating giving jurors more sentencing information "since information about punishment ranges helps jurors assign meaning to otherwise broad and ambiguous legal notions").

how juries would behave.[14] If jury behavior doesn't meaningfully reflect the line between manslaughter and murder, we have reason to doubt the accuracy of plea bargains formed in their shadow.

Jurors draw lines even deeper in the dark when considering less familiar spectra. For example, an assault becomes "aggravated assault" if it caused serious bodily harm.[15] Few jurors have prior knowledge about when an assault has caused just enough bodily harm to qualify as aggravated, yet it is precisely cases requiring difficult line drawing that are likely to go to a jury. (Cases with clear lines are more predictable and more likely to be resolved by plea bargains.) Even the beyond a reasonable doubt standard itself falls along a spectrum of doubt, meaning that line drawing will be ever-present in jury deliberations in criminal cases. And reasonable doubt is a legal term of art that courts are particularly hesitant to clarify for jurors.

Even when line drawing isn't easily spotted, it often occurs in the background. For example, New York makes it assault in the second degree to cause "physical injury" to a non-participant during the course of a felony.[16] While one might think the occurrence of a physical injury is a binary matter, "physical injury" is defined to include "impairment of physical condition or substantial pain," and the substantiality of pain is best understood along a spectrum. While jurors may have personal experience with various amounts of pain, they have no special insight into when pain qualifies as "substantial." Even "impairment of physical condition" likely spans a spectrum of burdensomeness in which we must identify the line where a physical condition qualifies as an "impairment."

1. Replies to Objections

One might respond to the claim that jurors are asked to draw lines in the dark by locating the practice within the traditional division of labor between judges and jurors. Under the traditional view, courts determine the law and, if jurors find sufficient evidence to convict, judges pick appropriate sentences. Were jurors armed with hypothetical or actual court cases in jury instructions, jurors might take over the judicial role of analogizing and disanalogizing cases. Were jurors armed with sentencing information, jurors might similarly usurp the judicial role, perhaps refusing to convict in cases where all elements are proven beyond a reasonable doubt because they believe the offender will face an inappropriate or excessive punishment.

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14 *See generally* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463 (2004).

15 *See, e.g.*, N.Y. Penal Law § 120.10(1) (defining first-degree assault to include the causation of serious physical injury with a weapon).

16 N.Y. Penal Law § 120.05(6).

But even if the traditional approach works well enough in typical cases, we have special reasons to doubt its effectiveness when jurors must draw lines along a spectrum. There is simply too little information given to jurors to equip them to draw lines in ways that aim to satisfy the goals of the criminal law. Return to our lineup of one-hundred women. If you were told the purpose of drawing the line between tall and not-tall, you could make a meaningful contribution to the determination. Or, if you were told that so-and-so is deemed "tall," you might also make a meaningful comparison. But if you are given no such information, it seems doubtful that you can make a meaningful contribution. Worse than usurping the judicial role, jurors forced to draw lines in the dark are adding noise to determinations with very high stakes.

Some say that reckless murders are homicides comparable in seriousness to intentional murders.[17] If that is the appropriate comparison and jurors were so informed, they would have at least some relevant information. But it's not much. The *intentional* murder of a terminal, chronically suffering relative who wants to die is likely less culpable and reflects less dangerousness than that of the typical manslayer. Even if we make consistent assumptions about murder and manslaughter, we likely lack flagpoles for less familiar crimes, as when we must distinguish ordinary assaults from those that inflict serious bodily harm or, perhaps, when we must decide whether some killing in the heat of passion had "adequate" provocation.

Another objection says that even if there is no Platonic conception of murder and manslaughter, there is a different stigma attached to being a murderer as opposed to a manslayer that communicates a different message to the offender and the public. Those who emphasize the communicative nature of punishment might argue that the jury's role is to pick an offense conviction that sends the appropriate message.[18]

The objection fails, however, because unless we can confidently distinguish the seriousness of offenses, we cannot confidently transmit messages using those offense names. If jurors have no sound basis for deciding between two offenses, they cannot accurately communicate the correct level of condemnation. There are heated debates, for example, about when drunk driving causing death constitutes murder as opposed to manslaughter.[19] If you care about the

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17 *See, e.g.,* Model Penal Code and Commentaries, cmt. to § 210.2, at 21-22 (1980) (Am. Law Inst.) ("[R]ecklessness that can be fairly assimilated to purpose or knowledge should be treated as murder and [. . .] less extreme recklessness should be punished as manslaughter.").

18 *See generally* R.A. Duff, Punishment, Communication, and Community (2001).

19 *See, e.g.*, David Luria, *Death on the Highway: Reckless Driving as Murder*, 67 Or. L. Rev. 799 (1988); 60 Minutes, *DWI Deaths: Is It Murder?*, CBS (Dec.

criminal law's expressive message, you should be especially motivated to send an accurate message. We may be unable to do so, however, when juries are ill-informed about the meaning and sentencing consequences of their determinations.

Offense titles only provide the most rudimentary description of an actual person's conduct. No sensible theory of the expressive or communicative nature of punishment would give much weight to proxy, shorthand titles.[20] The meaning of a novel consists not merely in its title but in the content of the book. Similarly, the meaning of an offense cannot be adequately captured using the shorthand terms we use to reference it. If any aspect of punishment communicates a clear message, it is more likely to be a precise sentence (information we withhold from jurors) than an ambiguous offense title (which is really just a category covering many different kinds of behavior).

Of course, some expressive theories focus not on what is actually communicated by the criminal justice system in some objective sense but on how perceived criminal justice messages affect people's perceptions and reactions. On such views, the title of an offense *does* matter to some degree. A rape victim may view victimhood slightly differently than a victim of "sexual assault," even when both were subjected to the exact same conduct. And there is greater stigma attached to the label "murderer" than the label "manslayer," even if we hold constant the conduct that led to the label. In the real world, people generally lack the time and skills to investigate the underlying circumstances of a crime and must rely on shorthand summaries instead. These shorthand summaries plausibly matter to the extent that they have real-world consequences. They do not, however, alter the reality of offenders' conduct. To the extent that we are interested in manipulating people, offense titles may play a useful role. But they do so in a manner that washes away information about culpability and harm that many theorists, particularly those with retributivist inclinations, consider morally relevant.

31, 2008), https://www.cbsnews.com/news/dwi-deaths-is-it-murder/.

20 Charles Nesson has argued that "the object of judicial factfinding is the generation and projection of acceptable verdicts—verdicts that the public will view as statements about what actually happened, which the legal system can then use as predicates for imposing sanctions without further considering the evidence on which the verdicts were based." Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 Harv. L. Rev. 1357, 1358 (1985). While there may be practical reasons for acting *as if* verdicts capture all we need to know about offenses, no sensible theory could actually believe that they do. Such a theory would have great difficulty explaining why we ought to free those erroneously convicted.

So far, several efforts to find good reason for limiting juror information have fallen flat. About the only plausible goal we serve by having juries resolve questions without meaningful information is to help state actors avoid responsibility for difficult decisions. If the determination to be made is essentially a coin toss, then there may be little harm and some benefit to allowing jurors to play the role of the tossed coin. On this view, jurors really are drawing lines in the dark in some contexts, but that's the best we can hope for. This conclusion is rather extreme, however, particularly when we have additional information we deliberately withhold.

B. Judicial Line Drawing in the Dark

When defendants waive their jury rights before trial, judges serve as factfinders and are uniquely equipped to anticipate the consequences of particular verdicts.[21] Nevertheless, judges frequently draw lines in the dark in their more typical role as legal decision makers. Through custom or general lack of sensitivity to the issue, they often ignore flagpoles provided by sentencing information and fail to consider how the location of flagpoles can vary across time and place.

1. Ignoring How Sentencing Can Aid Statutory Interpretation

Courts often decide whether particular conduct implicates a statutory term. As our ongoing example of "recklessness" shows, such terms are often best understood as spanning a spectrum and therefore raise line-drawing issues. Jurors generally cannot find the right place to draw a line on a spectrum of recklessness because they don't know the sentencing implications of different line locations. By contrast, courts *could* use the implications of line locations to inform statutory meaning, but, as we will soon see, they often don't or do so in haphazard, non-transparent ways.

a. Example: Harsh Sentence Casts Doubt on Cutoff Location

In *Smith v. United States*,[22] the defendant offered to trade his automatic weapon for cocaine.[23] The most serious offense he was charged with was knowingly "using" an automatic weapon "during and in relation to . . . any

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21 They are, nevertheless, in the dark about a great deal. For example, they are not well-positioned to know how inmates will experience incarceration. *See* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 Colum. L. Rev. 182 (2009).

22 508 U.S. at 223 (1993).

23 *Id*. at 225.

drug trafficking crime," an offense with a thirty-year minimum sentence.[24] While the provision clearly applies to those who brandish or even just carry an automatic weapon, Smith was charged only with *using* the firearm, and there was a circuit split as to whether trading a weapon for drugs constituted using it during and in relation to a drug trafficking crime.[25]

Smith noted that "nothing in the record indicates that he fired the [automatic weapon], threatened anyone with it, or employed it for self-protection."[26] He "argue[d] that he cannot be said to have 'use[d]' a firearm unless he used it as a weapon, since that is how firearms most often are used."[27] The U.S. Supreme Court disagreed, holding that Smith's treatment of the gun was a "using" under the "ordinary or natural meaning" of the term.[28]

There are a variety of spectra that might help us understand the case. We could examine a spectrum of "using firearms during and in relation to drug trafficking offenses."[29] Smith's effort to trade a firearm for drugs is not an archetypical instance of such a using. Even the majority seems ready to admit some "uncertainty about the scope of the phrase 'uses . . . a firearm' in" the statute.[30] On one extreme, we have clear instances of "using" as when a weapon is deliberately fired to support a drug transaction. On the other, there are cases that clearly lack usings or implicate such minimal usings that the legislature may not have intended them to count.

For example, suppose Smith agreed to display an antique firearm in exchange for a small amount of drugs so that his trading partner could sketch the weapon. Or, suppose Smith, in a bid to develop a friendly rapport with a potential drug purchaser, agreed to snap a photo of the firearm he used when he was in the military by quickly driving himself home, taking a picture of it, and driving back to show the photo and complete their transaction.[31] Or, suppose Smith

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24 *Id*. at 226-27.

25 *Id*. at 227.

26 *Id*. at 228.

27 *Id*.

28 *Id*. at 228-29.

29 It may be conceptually clearer to use the more general spectrum of "appropriateness of the application of facts to statutory terms" which will range from clearly applicable to clearly inapplicable.

30 *Id*. at 232. The majority also recognizes "boundaries" to the requirement that the using be "in relation to" a drug crime, *id*. at 237-38, but believes that to the extent there is some uncertainty, related statutory provisions resolve the matter against the defendant. *Id*. at 234-36.

31 While this may seem like the use of a photograph rather than a firearm, the firearm was used to create the photograph. Hence, one might conclude that a firearm was used during the drug trafficking itself. Or suppose the trade was not

had the gun locked up in a safe during the drug transaction but its presence nearby eased his anxiety disorder and gave him the confidence to proceed with a drug sale. Would any of these be usings of firearms during and in relation to a drug trafficking offense? The Court makes clear that scratching one's head with a firearm does not qualify as a using because it wouldn't "facilitate the crime."[32] In my examples, however, the firearm does provide some facilitation during and in relation to the offense.

The Supreme Court majority seems to think the case can be decided based on the ordinary meaning of "using." This view seems disingenuous, however.[33] As a native English speaker, I don't know whether to classify Smith's barter as a using of a firearm. Indeed, there was a circuit split for good reason. The facts of this case, and those like it, fall in a place where statutory meaning is not plainly clear. Some conduct can more or less appropriately be deemed a "using," just as some people can more or less appropriately be deemed "tall."

The Court could have added meaning to the spectrum by taking sentence severity into account. Yet the Court gave no *explicit* consideration to the severity of the sentence when it implicitly drew its cutoff. This is regrettable for two main reasons. First, if we seek to honor the intent of the legislature, the size of the punishment may inform what the legislature intended. Courts sometimes explicitly take sentencing consequences into account when interpreting statutes, particularly when deciding whether a criminal statute makes defendants strictly liable for violating some element of it.[34] But courts' explicit reliance on sentencing information to interpret statutes is haphazard at best.

Second, to the extent the Court is trying to further the policy objectives underlying criminal law, it also makes sense to consider the consequences of its decision. In this regard, we can imagine a spectrum of the dangerousness or culpability of various usings of firearms. Whatever policy considerations we take to be relevant, some fact scenarios will more aptly warrant the thirty-year sentence than others. Given that legal sources did not reach a clear conclusion in *Smith*, the Court could consider how the amount of the punishment in the statute informs the morally appropriate cutoff. Yet the decision makes no reference at all to such issues, making quite real the possibility that the Court

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for an automatic firearm but for digital blueprints to create such a weapon using a three-dimensional printer. Would trading such information constitute using a firearm during and in relation to a drug trafficking crime if the defendant took a brief detour home during the transaction to digitally scan the dimensions of the firearm in order to pass the data to his counterparty?

32 *Id*. at 232.

33 *See* Adam J. Kolber, *Supreme Judicial Bullshit*, 50 Ariz. St. L. J. 141 (2018).

34 *See, e.g.*, People v. Olsen, 685 P.2d 52, 57-58 (Cal. 1984).

left someone in prison for decades longer than necessary because he merely tiptoed into an unusually punitive category of criminal activity.

2. Cross-Jurisdictional Line Drawing in the Dark

Line drawing in the dark can also occur when courts rely on precedents from other jurisdictions. Suppose a judge in State A lacks a clear precedent as to whether the case at bar presents sufficient evidence to constitute an extremely reckless murder as opposed to just reckless manslaughter. The judge might turn to precedent in State B to help decide, implicitly assuming that words like "murder" and "manslaughter" have the same or similar meanings across jurisdictions. But while they are rooted in a shared common law tradition, the tremendous variation in sentencing practices across U.S. jurisdictions casts doubt on the view that every jurisdiction means the same thing by "murder" and by "manslaughter" even when they use the same statutory language to describe them.

Assume murderers in State A receive sentences of 11 years to life while manslayers in State A receive sentences of less than 11 years. In State B, by contrast, the division between manslayers and murderers is at the 15-year mark. Murder and manslaughter seem to mean somewhat different things in State A and State B. We cannot accurately compare the two offenses, particularly in cases that fall near the border of murder and manslaughter, without considering sentencing consequences. Homicide warranting ten years' incarceration happens to be called *manslaughter* in State A and *murder* in State B. Perhaps it's no surprise that courts rarely engage in this more careful analysis, as it requires them to look not only at the facts of a published opinion but also the sentencing regime that applied at the time it was issued.[35]

In my example, I didn't specify whether the ranges represent indeterminate sentences in which release dates are ultimately decided by parole boards or whether they represent ranges in which judges use sentencing guidelines and discretion to pick determinate sentences within a range. The ambiguity highlights how broad the challenges of comparison can be. Comparison cases need to be analogous not only in their substantive facts (where courts

35 For example, in Jeffries v. State, 169 P.3d 913, 919–20 (Alaska 2007), the Supreme Court of Alaska defended its determination that particular drunk driving was murder rather than manslaughter by, among other things, drawing an analogy to a drunk driving murder decision by the U.S. Circuit Court for the Fourth Circuit. *Id*. The Alaskan Supreme Court made no reference, however, to whether the two jurisdictions' sentencing schemes or average sentences made the comparison apposite.

usually focus their attention) but also in their legal treatment of sentencing broadly construed.

Unfortunately, cross-jurisdictional comparison cases will only rarely be both substantively analogous *and* have sufficiently similar sentencing schemes to offer meaningful comparisons. I focus on examples where the sentences for offenses along a spectrum do not overlap and have a clear boundary between them. In reality, such sentences (including murder and manslaughter) will often overlap to varying degrees and require more complicated analysis. Moreover, even when sentences appear the same in name, the jurisdictions will likely have prison systems with different levels of severity and different collateral consequences upon release.[36] Taken together, these and related concerns cast doubt on the possibility of ever meaningfully comparing criminal cases across jurisdictions.

Underlying this discussion is the question of what exactly is defined by an offense. Is it the set of circumstances that constitute violation? Are the punishment consequences of a violation part of the meaning of the offense itself? Whatever precisely offenses mean, however, we cannot be confident offenses have the same meaning across jurisdictions when they rely on specialized legal terms and differ substantially as to their sentencing implications. Hence, it is dubious to look to other jurisdictions to decide whether an offense has been committed (or has sufficient evidence) if the jurisdictions assign the offense sharply different consequences.

Two different families may decide to "ground" their children, but there is no sense in which these groundings are comparable if one family grounds for a day while the other grounds for a month. What we care about are the conditions for a "one-day grounding" or a "thirty-day grounding" and not just a "grounding" as if that word encompassed all that we care about for purposes of comparison. The same general principal applies to state punishment. We can't decide whether there is sufficient evidence of a fifteen-years-in-prison homicide by comparing it to a five-years-in-prison homicide. Whether courts assign such homicides the same name (i.e., murder vs. manslaughter) depends on how they somewhat arbitrarily carve up the spectrum of reckless homicides.

Even if jurisdictions have identical sentencing regimes, prison conditions, and collateral consequences, we still cannot assume that these jurisdictions distinguish the culpability of offenses in the same places (assuming for now that culpability is what most concerns us). Let's call units of culpability "culpatrons." A ten-year sentence could correspond with ten culpatrons in one jurisdiction but twenty in another. That would mean that even if jurisdictions

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36 Adam J. Kolber, *Against Proportional Punishment,* 66 Vand. L. Rev. 1141, 1158-71 (2013).

have identical offense definitions and sentences, they may have radically *different* cutoff points in terms of the seriousness of manslaughter relative to murder. The jurisdiction that deems a ten-year sentence proportional to twenty culpatrons is much *less punitive* than one that deems a ten-year sentence proportional to ten culpatrons. A given amount of culpability leads to a much shorter sentence in the former jurisdiction than the latter. In other words, we cannot easily infer how culpable a jurisdiction deems particular conduct by looking at its associated sentence because jurisdictions can differ systematically in how punitively they treat a given amount of culpability.

Judges are clearly in a difficult bind when considering criminal precedents from other jurisdictions. Unless the other jurisdiction has the same statutory definitions, sentencing arrangements, and punitiveness, comparison to the jurisdiction is at least somewhat dubious. Perhaps we can make some general comments about jurisdictions' relative punitiveness. It is widely recognized, for example, that federal sentencing in the U.S. is systematically more punitive than most state sentencing.[37] Such judgments are very rough, however, and likely too inexact to help translate sentences across jurisdictions. A short sentence for some conduct could mean it is deemed not very culpable, or it could mean that the jurisdiction is not very punitive; a longer sentence could reflect a higher assessment of culpability or just more punitive treatment.

Comparison may be even harder if we speak not of culpability but of consequentialist considerations such as deterrence, incapacitation, and rehabilitation. Once again, even if some other jurisdiction has identical sentencing practices with respect to manslaughter and murder, we don't know whether that should be persuasive as to the case at bar. Does the other jurisdiction share the same consequentialist values with the home jurisdiction as to crime seriousness and other matters? Does it make superior empirical predictions in terms of expected benefits from selecting a particular cutoff? If the other jurisdiction's decision was based on empirical judgments, they are likely inferior to those made by a judge with the benefit of the more detailed and particularized facts of the case at bar. In the real world, comparisons are even harder as jurisdictions likely use a combination of retributivist and consequentialist considerations (and may look at precedents concerning

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37 *See, e.g.*, Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1328–29 (2005)

> [B]y any standard the severity and frequency of punishment imposed by the federal criminal process during the [federal sentencing] guidelines era is markedly greater than it had been before. Incarcerative sentence [length] has nearly tripled [. . .] The terms being served by [federal drug] defendants are long both in absolute terms and by comparison with sentences for other federal crimes and with state drug sentences.

evidentiary sufficiency rather than trial-level line drawing), making the hope of identifying cross-jurisdictional meaning perhaps something of a pipe dream.

One could argue that even if terms like murder and manslaughter have different meanings across jurisdictions, our current haphazard comparisons may make the law more predictable by allowing for more cross-jurisdictional cases to consider. There are at least two reasons, however, to be skeptical. First, there is the "garbage in, garbage out" concern. If cross-jurisdictional comparisons blur important differences in meaning, then it's not clear that additional blurry comparisons are helpful. Applying precedents from a child's one-day grounding to another's thirty-day grounding may be worse than making no comparison at all.

Second, to the extent that cross-jurisdictional differences are considered, they are considered selectively and unpredictably. Courts clearly give less weight to cases that are disanalogous in terms of their underlying substantive facts, but do they also discount precedents from states that punish offenses differently? Or do they principally discount decisions from other states because different groups of people elect different leaders with different priorities such that law from other jurisdictions carries less persuasive force? Though cross-jurisdictional precedents give us data, uncertainty about how to weigh the data weakens their value.

Judges could shed light on line drawing by more transparently and uniformly addressing how sentencing differences across jurisdictions should affect legal interpretation. For example, they could decide that cross-jurisdictional comparisons should often take sentencing differences into account. Or, for reasons of practicality perhaps, they could decide that such differences cannot be taken into account unless they reach some threshold of disparity. In any event, taking the issue on directly would make the matter more transparent and possibly more uniform. In the meantime, lawyers can take advantage of judges' general inattention to the matter. Whenever a judge or adversary is likely to rely on an unfavorable line-drawing precedent from a different jurisdiction, advocates can argue that the precedent is disanalogous because, as will virtually always be the case, the line drawn in that case has different consequences.

3. Intra-Jurisdictional Line Drawing in the Dark

Courts also draw lines by citing precedent from their own jurisdictions. As precedent grows old, however, reliance can be just as risky as in cross-jurisdictional cases. Within a single jurisdiction, sentencing ranges and practices change over time in ways that ought to be taken into consideration. Interpretations under the old scheme may be inapt. Suppose a legislature used to punish manslaughter with zero to ten years' incarceration and murder with

more than ten years' incarceration. Then, the legislature shifts the boundary to fifteen years. Was the legislature trying to hold interpretation of the offense constant but make punishment more severe? Or was it trying to treat more conduct as manslaughter rather than murder? Perhaps the legislature explained its motivations, but judges often fail to address such matters in their opinions. We usually don't even know whether judges checked to see if punishments have changed since the time of the prior case or looked at the legislative reasons for any changes that might have been made.[38]

Moreover, even if a jurisdiction's sentencing scheme remains the same over decades, it's hardly obvious that the jurisdiction's punitiveness has stayed the same. Even if a jurisdiction has a murder-manslaughter sentencing boundary that has been unchanged for generations, changes to other offenses could indicate a general shift in the jurisdiction's punitiveness. That could make it ambiguous whether legislative inaction as to the murder-manslaughter sentencing boundary (assuming there is a clean boundary) reflects a decision to freeze its meaning in time or to allow the cutoff between the offenses to shift as the overall punitiveness of the jurisdiction has changed.

a. Example: Prioritizing Categories over Spectral Cutoffs

The U.S. Supreme Court arguably failed to consider a certain sort of intra-jurisdictional change in severity in *United States v. Watson*.[39] In that case, a postal inspector had probable cause to arrest Watson for a felony, namely possessing stolen mail.[40] Watson argued that his arrest violated the Fourth Amendment because the inspector failed to obtain an arrest warrant despite having time to do so.[41] The Supreme Court deemed Watson's arrest lawful based partly on the view that the Fourth Amendment reflects a longstanding common-law rule that warrants are not required when law enforcement officers have probable cause to believe a felony has occurred.[42]

As Justice Marshall emphasized in dissent, however, the meaning of the term "felony" has changed dramatically over the centuries.[43] "[A] felony at common law and a felony today bear only slight resemblance, with the

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38 For example, in People v. Poplis, 30 N.Y.2d 85, 88–89 (1972), the New York Court of Appeals used intra-jurisdictional cases from 1924 and even 1854 to help draw the murder-manslaughter boundary, recognizing changes to substantive law over time but saying nothing about changes to sentencing laws and practices.

39 U.S. v. Watson, 423 U.S. 411 (1976).

40 *Id*. at 414-5.

41 *Id*. at 426 (Powell concurrence).

42 *Id*. at 418; 420-25.

43 *Id*. at 438-42 (Marshall dissent).

result that the relevance of the common-law rule of arrest to the modern interpretation of our Constitution is minimal."[44] Even crimes such as kidnapping and assault with intent to murder were misdemeanors under the common law but would now be felonies because they are punishable by more than one year of incarceration.[45] So, many crimes that would have required arrest warrants in the past (absent exigent circumstances), including kidnapping and assault with intent to murder, no longer do because the category of "felony" has grown much wider.

The standard rationale for requiring arrest warrants is that arrests are substantial deprivations of liberty that should ordinarily require judicial oversight. We are willing, however, to give up that oversight when officers have probable cause to believe a serious crime has occurred in public. If so, one would think the cutoff between crimes that do and do not require a warrant occurs somewhere along a spectrum of crime seriousness.[46]

The common-law principle embedded in the Fourth Amendment was meant to require arrest warrants for less serious offenses. During the period when the Fourth Amendment took up the common-law rule, Watson's offense might well have fallen into the category of less serious offenses for which an arrest warrant *is required*. The justices in *Watson*, however, disagreed about what counts as a less serious offense in the present day. Watson's crime was indeed labelled a felony at the time it was committed, so allowing the distinction between crimes that require arrest warrants to track the evolution of the word "felony" meant that Watson's crime did *not require* an arrest warrant.

The majority's use of a felony-misdemeanor cutoff is puzzling because it doesn't seem to reflect a reasoned judgment about crime seriousness. Rather, the majority adopts the quite arbitrary cutoff that reflects the way the word "felony" happened to evolve. If it evolved in a way that sensibly traded off crime seriousness and invasion of liberty, there might be some grounds to accept its evolved meaning. Yet the majority offers no evidence for such a view (and the evolution of the word "felony" likely has more to do with the development of the prison system and changes to sentencing practices rather than anything focused on the circumstances of arrests).

The seriousness of offenses falls along a spectrum and the Court would have had greater fidelity to the common-law tradition had it focused on

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44 *Id*. at 438.

45 *Id*. at 439-41 (citing 18 U.S.C. s.1(1)). Of course, crimes punishable by death are also considered felonies.

46 The spectrum of crime seriousness plausibly has one or more components such as dangerousness or deservingness of punishment that are themselves arrayed along spectra.

the severity level at which the common law drew the misdemeanor-felony distinction rather than sticking with the words "misdemeanor" and "felony" as they evolved somewhat arbitrarily over time.

On the other hand, the majority view does bolster certain pragmatic considerations. If the Fourth Amendment reflects a common-law tradition, it's not obvious whether it reflects the letter or the spirit of the tradition. The majority picks one way to solve a coordination problem by sticking to the words that characterize the tradition even as the meanings of those words change. The best explanation may be that the Court decided to *ignore the meaning* of old intra-jurisdictional law for practical reasons. The misdemeanor-felony line is easy for police officers to apply, and that matters more than any substantive concerns about where the actual cutoff between the two should be on policy grounds. The majority doesn't give that explanation, however, so if that is its view, it doesn't articulate it.

C. Scholarly Line Drawing in the Dark

Scholars sometimes fall into the same traps as lawyers and judges. They consider precedent without regard to temporal or cross-jurisdictional changes in meaning. Scholarly inattention to cutoffs can also lead to situations where scholars seem to agree but actually disagree or seem to disagree but actually agree.

For example, a major debate among criminal law scholars concerns the meaning of consent in cases of sex crimes.[47] Suppose Scholar A argues that sex without an affirmative expression of consent is rape. Scholar B believes that such sex is condemnable but argues that it does not constitute rape. There appears to be a substantive disagreement between A and B. Many would assume that Scholar A thinks that sex without affirmative consent is more culpable and deserving of punishment than does Scholar B.

Unless we know more about their views, however, quite the opposite is possible. States usually have crimes of sexual misconduct that fall short of rape. Maybe Scholar A envisions a spectrum of culpability for sexual conduct from "no crime to sexual misconduct (with a punishment of up to 4 years' incarceration) to rape (with a punishment of 4 to 10 years' incarceration)." And maybe Scholar B envisions a spectrum of culpability for sexual conduct from "no crime to sexual misconduct (with a punishment of 4 to 10 years' incarceration) to rape (with a punishment of 10 years' incarceration or more)."

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47 *See, e.g.*, Kevin Cole, *Better Sex Through Criminal Law: Proxy Crimes, Covert Negligence, and Other Difficulties of "Affirmative Consent" in the ALI's Draft Sexual Assault Provisions*, 53 San Diego L. Rev. 509 (2016).

If that's the scheme each envisions, then there are numerous possible descriptions of the alleged conflict between the two scholars. Maybe they would deem any particular instance of sex without an affirmative expression of consent equally culpable and simply give the conduct a different offense name. Or maybe they'd even flip flop and Scholar B would generally judge such conduct more culpable than Scholar A would. And as discussed earlier, even if we know their views about culpability, we don't know how punitive each is per unit of culpability.

So absent open discussions of cutoffs and relative punishments and general views about punitiveness, about the only thing we know is that they disagree on the name to assign to a type of conduct. Is that a significant debate? Well, if it amounts to arguing about where to draw the cutoff between "tall and non-tall" in a one-hundred-woman array, it may be an argument about nothing.

To be sure, disagreements over offense titles can have substance, even when scholars agree on all pertinent questions about culpability and punitiveness. As discussed earlier, scholars who emphasize the expressive or communicative nature of punishment might think different offense titles send different messages. It is not obvious, however, how the expressive or communicative nature of particular conduct changes when we hold amounts of punishment constant. Generally speaking, total punishment seems more the coin of the realm than offense titles for retributive and communicative purposes.

True, different offense titles may have significance from a publicity perspective. The title "rapist" generates more stigma than the title "sexual misconduct offender." Similarly, some offense titles may have shared meaning or cultural resonance that make them more recognizable descriptors than others and put potential victims on guard for certain bad behaviors. So there may be consequentialist reasons for selecting among plausible titles. But that's not the sort of debate Scholars A and B are likely to present themselves as having.

The key point, then, is that without discussions of cutoffs and punishment amounts (topics scholars often leave out as not directly relevant to the meaning of "rape"), we may simply never know what the disagreement is about, how significant it is, and where we need to focus scholarly attention to resolve the disagreement. Shining light on scholarly line drawing may lead to more fruitful exchange.

II. The Smoothing Solution

So far, I have mentioned possible methods of reducing the harms of line drawing across spectra. Jurors could be given more information about sentencing or more exemplars of where lines are supposed to be drawn. Judges could be

more mindful of differences in background sentencing (and other) conditions when citing old or cross-jurisdictional precedents. They could also be more transparent about what consideration, if any, they give to changes in meaning across time and place. From an advocacy perspective, lawyers can use differences in sentencing to disanalogize unfavorable precedents. If lawyers press on these issues more frequently, courts will say more in response, and perhaps develop clearer interpretive conventions.

None of these suggestions is a silver bullet. There may be no unproblematic ways to draw lines across spectra and compare spectral cutoffs across time and place. I have simply offered avenues for further consideration. There is, however, a more general way to address problems of line drawing. In many situations, we can diminish the role of line drawing by smoothing the law, as I explain in the coming sections.

A. Legal Input-Output Relationships

Line drawing is just one part of a more general task facing every legal system: mapping legal inputs to outputs (or sets of inputs to sets of outputs). This more general task is itself dependent on the prior selection of *relevant* inputs and outputs, choices that will sometimes be controversial.

In legal contexts, we select pertinent inputs and outputs based on our best theories. For example, what one takes to be pertinent input-output relationships may depend on whether tort law is about corrective justice, efficiency, or social insurance and whether criminal law is essentially retributivist, consequentialist, or a hybrid of both. Notice that one can have both a descriptive view of the law's pertinent inputs and outputs as well as a normative view that may or may not coincide.

While lawyers, judges, and scholars spend a lot of time thinking about line drawing, they have spent far less time thinking about how inputs and outputs ought to relate to each other. Once we have a view about what sort of input-output relationships positive law should have, we can then bolster or critique the law depending on whether it has the proper relationships.

B. Smooth and Bumpy Laws

To assess how well we handle some legal issue, we must decide on the relevant inputs and outputs. Suppose you think that, in the context of accidents, tort law maps amounts of incaution to amounts of compensation owed. In typical cases, the law exhibits a perhaps surprising input-output relation. As we gradually move from no incaution toward greater risk taking, the input has no effect on damages whatsoever. At a critical point, however, incaution is

deemed unreasonable. At that point, a gradual change in the input (amount of incaution) has a dramatic effect on the output. The output (amount of compensation owed) moves from nothing to full compensation in what looks like an instant. I call this a "bumpy" relationship. An input and output have a bumpy relationship when a small change to the input sometimes has dramatic effects on the output and sometimes has no effect at all.[48] Whether the relationship ought to be bumpy depends on one's underlying theory of tort law. But any theory that purports to defend the status quo should say something in defense of this bumpy relationship.

Many jurisdictions used to have policies of contributory negligence that relieved tort defendants of liability when plaintiffs' negligence contributed just a little to their harms.[49] These policies created very bumpy relationships between a plaintiff's negligence and the amount defendants owed in damages. A tiny amount of plaintiff negligence could drop compensation to zero.

Over the last several decades, however, most jurisdictions have switched to some form of comparative negligence where plaintiffs can recover the percentage of harm caused by the defendant's negligence.[50] Pure forms of comparative fault have what I call a "smooth" relationship. Gradual changes to a legal input (say, plaintiff's fault) lead to gradual changes in the amount the defendant owes.[51]

Notice too that legal input-output relationships are not stagnant. It was a live question precisely how smooth or bumpy plaintiff negligence should be, and it continues to be debated as many jurisdictions have modified forms of comparative fault that are only partly smooth. This bit of history reminds us that we are unlikely to have perfected the law's input-output relationships.

C. Smoothing Reduces the Need to Draw Lines in the Dark

The smooth and bumpy distinction helps us see that some laws make line drawing very important and some less so. As discussed earlier, in *Smith*, the defendant faced a thirty-year minimum sentence for bartering an automatic

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48 Kolber, *Smooth and Bumpy Laws*, *supra* note 2.

49 Restatement (First) of Torts § 467 (Am. Law Inst.1934); *See also* Restatement (Second) of Torts § 467 (Am. Law Inst.1965); *See id*. §§ 479–80.

50 Some jurisdictions use a modified form of comparative negligence in which plaintiffs can only recover when defendants' negligence is responsible for more than half of the injury. Once the defendant is responsible for more than half of the injury, the defendant is responsible for the percentage of the injury attributable to his negligence. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 67, at 473 (5th ed. 1984).

51 Kolber, *Smooth and Bumpy Laws*, *supra* note 2.

firearm in a drug trafficking transaction. Such large minimum sentences make line drawing extremely important: if Smith's conduct was on the "using" side of the line, he would receive a thirty-year minimum sentence. If it were on the non-using side, he'd receive a far lighter sentence for just the drug transaction itself. While it's possible that even the most *de minimis* "using" should trigger a thirty-year minimum sentence, many would criticize the statute for having an output that is too bumpy. A plausible moral theory would try to make a modest change in the defendant's culpability (caused by a *de minimis* using of an automatic firearm) have only a modest effect on punishment. We can criticize a legal input-output relationship to the extent that it deviates from what our ideal moral theory would recommend.

As another example, consider the felony-murder rule: if someone commits certain felonies and a bystander dies as a result, the felon can be charged with murder, even if the death was accidental (meaning the defendant had no culpable mental state with respect to the death). Because murder can have very long sentences, including substantial minimum sentences, small differences in culpability can lead to dramatic differences in ultimate criminal liability. Hence, the felony-murder rule can be quite bumpy relative to moral theories that focus on proportional punishment.[52]

None of this means we should always prefer smooth relationships. The law governing arrests that I discussed in *Watson* helps make the point. Assuming we want to require arrest warrants only for less serious crimes and we need a rule that's easy for police officers to apply, it's hard to think of a better distinction than the one between felonies and misdemeanors. This solution won't score well from a narrow policy perspective because it does not carefully tailor concerns about unchecked liberty invasions to crime seriousness, but it certainly scores well from an ease-of-use perspective.

What we want is for our legal input-output relationships to match what our best theories recommend (taking transaction and other real-world costs into account if our theory doesn't already do that). As I've argued in the past,[53] there are likely many opportunities to smooth the law and thereby improve the fit between the law and our best moral theories. But any particular change requires careful analysis.

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52 Some jurisdictions have a "misdemeanor-manslaughter rule" which reduces but does not eliminate the bumpiness of the felony-murder rule.

53 *See* Kolber, *supra* note 2; *see also* Larry Alexander & Kimberly Kessler Ferzan, Crime and Culpability: A Theory of Criminal Law 263-324 (2009) (arguing for an approach to criminal justice that more smoothly connects culpability and punishment severity).

To be sure, there are aspects of criminal law that help smooth it, especially discretionary sentencing. I gave examples where manslaughter is punished with, say, zero to ten years and murder is punished with eleven years to life. We might expect that in cases right on the manslaughter-murder cusp, the exact jury determination won't matter very much if the judge is allowed to pick a sentence within a range. If the jury mistakenly selects murder instead of manslaughter, a judge with substantial sentencing discretion might give, say, an eleven-year sentence rather than the ten-year maximum permitted for manslaughter. There would still be at least a year of overpunishment, but discretionary sentencing may limit the magnitude of error. In many cases, the sentencing ranges for offenses on the same spectrum will overlap to a large degree, affording judges considerable opportunities to fix or fine-tune sentences.

Frequently, however, judges have limited sentencing discretion, and there may be gaps in the allowable sentencing ranges between offenses on the same spectrum. Moreover, judges probably give independent weight to jury determinations.[54] If the jury returns a verdict for murder rather than manslaughter, the verdict itself may shift the sentence that the judge otherwise would have given. This is not easy to prove, nor is it easy to determine whether such shifts are overall helpful or harmful to the criminal justice system. The point is that if judges are swayed in substantial ways by jury determinations, we cannot be confident that judges, even when they have substantial sentencing discretion, will undo whatever damage line drawing in the dark causes.

Conclusion

An important feature of legal spectra is often missed when juries assess facts, judges consider precedents, and scholars characterize offenses. Namely, when dealing with hard to quantify variables such as crime seriousness and culpability, the principal way to give meaning to places along a spectrum is through the legal consequences that attach to them. If those consequences

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54 For example, when a jury's rejection of a defense is a close call, judges could give substantially lower sentences in recognition of a kind of "partial defense." Some judges, however, fear that substantially reducing a sentence would appear to reject the jury's denial of the defense. *Cf.* Hines v. State, 817 So. 2d 964, 965 (Fla. Dist. Ct. App. 2002) (overruling a trial court's decision not to depart downward at sentencing because "[c]onduct that is legally insufficient to excuse the defendant's actions may nevertheless be legally sufficient to warrant a downward departure sentence").

are unknown or unexamined, there is a good chance that we are drawing suboptimal lines in the dark.

There are many ways to address line drawing in the dark, but some of the problems may be quite intractable. One jurisdiction's decision to draw a line in a particular place may be unique to its sentencing system, degree of punitiveness, views on distributive justice, state constitutional norms, and so on. It may go too far to say that cross-jurisdictional precedents are useless in criminal cases (and maybe other domains) that depend on spectral decision making, but we need to assess such precedents with more caution than we do now.

A more general solution is to look for opportunities to smooth the law. Smooth laws mean that small errors in the treatment of inputs lead to small errors in outputs. They are sometimes better than bumpy laws where small errors in the treatment of inputs can lead to dramatic errors in outputs. Whether any particular input-output relationship should be smooth or bumpy depends on many factors, but smooth laws have the potential to reduce errors relative to bumpy laws when drawing lines in the dark.