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# Nine Takes on Indeterminacy, with Special Emphasis on the Criminal Law

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NINE TAKES ON INDETERMINACY, WITH SPECIAL  
EMPHASIS ON THE CRIMINAL LAW

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LEO KATZ<sup>†</sup>

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INTRODUCTION

The claim that legal disputes have no determinate answer is an old one. The worry is one that assails every first-year law student at some point. Having learned to argue both sides of every case, the feeling seems inevitable.

But to assess the “skeptical thesis,” which is what I will hereafter call this claim, in its strongest version, we will do well to look at a particularly vigorous presentation of it, which, in the case of criminal law, is to be found

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in Mark Kelman's justly famous *Interpretive Constructs in the Criminal Law*.<sup>1</sup> What caught people's imagination about Kelman's article were, I think, two features: on the one hand, there was the sheer virtuosity with which Kelman presented each side of a series of cases making up the standard criminal law curriculum; but, secondly, and probably more importantly, there were the patterns he was able to discern in the arguments being made—the recurrent themes, tropes, moves, and perspectives being employed by each side. These two aspects of the article imbued Kelman's presentation of the skeptical thesis with particular zest. The skillful presentation of each side of the argument in cases that he did not especially select for the purpose, along with the suggestion that such arguments could be cooked up, almost as by recipe, using the themes, tropes, moves, and perspectives he identified, made the conclusion that legal doctrine really does not settle any dispute, or at least any dispute of consequence, almost irresistible. Something else, most likely the whims of the judges, must be the real determinants of the outcome.

Much of the force of Kelman's argument thus comes from his particular examples. So let us take a look at several of those.

1. Kelman argues for the indeterminacy of the voluntariness requirement in criminal law, with the help of the case of *Martin v. State*.<sup>2</sup> Martin was arrested and dragged out onto the street. He was drunk and he proceeded to make a nuisance of himself. He was charged under a statute punishing "[a]ny person who, while intoxicated or drunk, appears in any public place where one or more persons are present, . . . and manifests a drunken condition by boisterous or indecent conduct, or loud and profane discourse."<sup>3</sup> Basic criminal law doctrine only permits someone to be convicted of a crime if he performed a voluntary act.<sup>4</sup> The defendant argued that inasmuch as he "appeared in public" by being carried there by the police, he did not perform the requisite voluntary act.<sup>5</sup> Contrariwise, it could be of course argued that he met the voluntary act requirement inasmuch as he performed some sort of voluntary act that induced someone to call for the police to come and arrest him, and that he performed a further voluntary act when he behaved in a "boisterous or indecent" fashion once he had been brought onto the public highway.<sup>6</sup> Which of these

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<sup>1</sup> See generally Mark Kelman, *Interpretive Constructs in the Criminal Law*, 33 STAN. L. REV. 591 (1981).

<sup>2</sup> 17 So. 2d 427 (Ala. Ct. App. 1944).

<sup>3</sup> *Id.* (quoting ALA. CODE § 14-120 (1940)).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

perspectives will prevail depends, as Kelman sees it, on what he calls “time-framing.”<sup>7</sup> If we focus narrowly on what was going on with the defendant at the moment that he first appeared in public, being carried there by the police, his violation of the statute looks involuntary. If we focus more broadly on the conduct preceding his arrest and on the conduct following it, it starts to look voluntary. Which of these perspectives we choose seems to Kelman an arbitrary matter. The court opted for the involuntary perspective, but, as he sees it, could just as easily have gone the other way.

2. Kelman argues for the indeterminacy of the widely accepted precept that we should eschew strict liability in the criminal law, by pointing out that whether a given crime is one of strict liability is entirely indeterminate.<sup>8</sup> When the head of a pharmaceutical company is held liable for letting mislabeled or contaminated drugs be sold, despite the fact that he was neither reckless nor negligent, that looks like an intolerable instance of strict liability, superficially serving neither the ends of deterrence nor retribution. That is the perspective that focuses “narrowly,” as Kelman sees it, on what the defendant was doing at around the time that these defective products were being shipped. But if we consider the actions he took much before that, the decision to enter into this line of business and to run the business in the manner that he did, liability no longer seems so strict and so unfair. There are a number of actions he could have taken along the way to avert liability, including not getting into this line of business in the first place. Nor is it so clear any longer that deterrence would not be in fact improved by a regime of such very expansive liability. Even the demands of retribution might be satisfied once one focuses on the fact that, by getting into this business, the defendant voluntarily undertook the risk of being held liable if something went wrong.

3. Kelman argues that whether a defendant obtained the free and knowing consent of his partner when he had intercourse with her, or did some other action deemed impermissible without such consent, will also often be a matter of time-framing.<sup>9</sup> Focus on the moment at which she said yes, and the conduct looks consensual. Focus more broadly on her vacillating feelings before and after she said yes, and the actuality of her consent starts to seem more uncertain. If in addition, you pay attention to the fact that there surely are some things about the person she is having intercourse with and about the repercussions of doing so that were unknown

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<sup>7</sup> Kelman, *supra* note 1, at 593.

<sup>8</sup> *Id.* at 605.

<sup>9</sup> *Id.* at 614.

to her, we face the problem of whether she was informed enough for the consent not to falter on that ground alone. And what of the deleterious consequences she might have feared if she did not sleep with him? It would not be hard to think of those, Kelman suggests, as constraints that render her consent not truly “free.”<sup>10</sup>

4. Kelman argues that whether an attempt qualifies as “legal[ly] impossible” (and hence should not result in liability) or “factually impossible” is entirely indeterminate.<sup>11</sup> Consider *F*, who goes hunting in September thinking that it is October, a month during which hunting is illegal under the governing statute. Compare *L*, who goes hunting in September, erroneously thinking that the governing statute bans hunting in September, whereas in fact it covers only October. One might at first glance think *F* is guilty of attempting to violate the hunting statute—his case being categorized as one of “factual impossibility.” Similarly, one might at first glance think that *L* is not guilty of attempting to violate the hunting statute—his case being categorized as one of “legal impossibility.” But, Kelman argues, one can just as easily argue both to be instances of factual or legal impossibility. It is not hard to think of *F*’s mistake as being a mistake about law (is the current month one during which the law bans hunting?), or of *L*’s mistake about what the statute prohibits as really being factual (the fact in question being to which month the law happens to refer).

5. Kelman argues that whether the so-called “concurrency doctrine” is satisfied is highly indeterminate.<sup>12</sup> Consider the classic case of one Cunningham, who rips a gas meter out of a basement wall of a duplex building, so as to appropriate the coins that have been deposited in it.<sup>13</sup> (This used to be the way to pay for gas.) By doing so, he ended up releasing toxic fumes into the adjacent unit, poisoning and nearly killing its inhabitant.<sup>14</sup> He was charged with poisoning his victim with malice aforethought, construed to mean poisoning her either intentionally, knowingly, or recklessly.<sup>15</sup> Was he guilty? The court held not, under the criminal law’s concurrency doctrine, which states that if the defendant commits a crime whose mens rea does not “concur” with the actus reus he actually committed, in other words whatever crime he thought he was committing, he was not intentionally, knowingly, or recklessly committing

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<sup>10</sup> *Id.* at 594.

<sup>11</sup> *Id.* at 670.

<sup>12</sup> *Id.* at 633.

<sup>13</sup> *R v. Cunningham*, [1957] 2 Q.B. 396 at 398 (Ct. Crim. App.) (Eng.).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 399-400.

that crime and cannot be held liable.<sup>16</sup> Obviously Cunningham did not actually intend to harm anyone (other than the gas company), or even think he was risking such harm.<sup>17</sup> He had no inkling that ripping out the gas meter would unleash such fumes.

That is one way to look at the matter. Another way to look at it, Kelman points out, is to note that recklessness is customarily defined as the imposition of an unjustified risk, and that the risk Cunningham imposed on the inhabitant of the neighboring unit was surely unjustified, since he imposed it for the sake of stealing something. Looked at in this way, the concurrence requirement is met.

6. Kelman argues that whether someone voluntarily abandoned an attempt and therefore qualifies for the abandonment defense is indeterminate.<sup>18</sup> For someone's abandonment of an attempt to count as voluntary it has to occur

under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. . . . [R]enunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.<sup>19</sup>

What now of someone who postpones a bank robbery because he sees a policeman? It seems that would be clearly involuntary. What if he does so because he learns there is a special alarm system? What if he learns there are alarm systems? What if he learns there are hard-to-break safes? What if he learns there is jail time to serve if he gets caught? There is, Kelman argues, no principled difference between these cases. In all of them, the renunciation only occurs on account of some threatened unfortunate consequence for the perpetrator. The law cannot really justify by the articulated criteria the answer that would typically be given, which is to exonerate in the last case and convict in the first, let alone the unpredictable answers that would be given in the rest of the cases.

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<sup>16</sup> Kelman, *supra* note 1, at 633-34.

<sup>17</sup> *See id.* at 633 ("The court refused to transfer the requisite mental state from the defendant's attempt to steal coins to the poisoning.").

<sup>18</sup> *Id.* at 644.

<sup>19</sup> MODEL PENAL CODE § 5.01(4) (1962).

7. Kelman argues that whether someone who recklessly surmises that he is being attacked and acts in mistaken self-defense should be treated as an intentional or reckless killer is wholly indeterminate.<sup>20</sup> Such a defendant does kill intentionally. That suggests what he did should be thought of as a regular murder. On the other hand, he acted under the admittedly reckless belief that he was under attack. That makes it appear as though he was really just being reckless. Which of those is the right perspective to take on the case is, according to Kelman, wholly indeterminate.

8. Kelman argues that whether attempt law should recognize the abandonment defense is indeterminate. On the one hand, it seems tempting, both from the point of view of deterrence and retribution, to recognize that someone who has attempted a crime but changes his mind before completing it (and does so voluntarily) deserves to be exonerated. On the other hand, we don't really "frame" things that way elsewhere in the law. Ordinarily, we take the view that if someone has committed a crime, even if he later tries to reverse course, he is guilty of that crime. At most, it might serve him in mitigation, that he tried to, say, return the money he stole. Why are things different with attempts?

9. Kelman argues that whether someone meets the mens rea requirement for complicity by intentionally aiding and abetting someone else in committing a crime is very indeterminate.<sup>21</sup> An undercover agent asked the defendant where he could buy some illegal drugs. The defendant referred him to a certain drug dealer. Is he an accomplice of the drug dealer? Is he intentionally assisting the drug dealer? The prosecution argued, yes, inasmuch as he was trying to help effectuate the sale. The defense argued, no, inasmuch as the drug seller did not at the time that this help was rendered intend to make such a sale; nor for that matter did he ever in the future do so, since the undercover agent did not contact him.

10. Kelman argues that the distinction between acts and omissions is indeterminate.<sup>22</sup> Is a doctor who unplugs an irreversibly comatose patient from a respirator killing or letting die? He is actively unplugging the equipment—that makes it look like an act of killing. On the other hand, by doing so, he is simply letting nature take its course. That makes it look like an omission. One could elaborate on each of those classifications, making what the doctor did alternately look more like an act or more like an omission. It is often argued, for instance, that the way to test whether we are dealing with an act or an omission is to ask what would have happened

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<sup>20</sup> Kelman, *supra* note 1, at 616.

<sup>21</sup> *Id.* at 627.

<sup>22</sup> *Id.* at 637.

to the victim if the defendant had not existed. If the victim would have died anyway, we are dealing with an omission. The problem is that, in our medical case, one might say that if the doctor had not existed, he would not have been there to unplug the life support system and the victim would have continued to receive his treatment. That makes it look like an act. But one might also say that if the doctor did not exist, the victim would never have been hooked up to the life support system in the first place, and therefore would be dead. That makes it look like an omission.

Is Kelman arguing that only hard cases are indeterminate? No, he suggests that even easy cases, looked at closely, turn out to be indeterminate. What does he make of the solutions courts purport to offer in these cases? They are make-believe. The cases could easily have come out differently, but the courts deceive themselves about that by semiconsciously or even unconsciously deleting the possible conceptual moves that would have allowed them to reach an alternative outcome. “One real conclusion,” from his article, he suggests, “one possible bottom line, is that I’ve constructed a very elaborate, schematized, and conceptual piece of winking dismissal: ‘Here’s what they say, this is how far they have gotten. You know what? There’s not much to it.’”<sup>23</sup>

A minor clarification concerning Kelman’s thesis is in order. Something that some readers might find confusing in his presentation is what exactly Kelman means when he refers to indeterminate criminal law doctrines. It is often not clear in his examples whether he is referring to what outcome existing criminal codes dictate, or what decisional law implies, or what laws prevailing criminal law norms require us to pass. But it does not matter. All of the above are cases in which criminal law doctrine as customarily conceived, whether allowed to do its work at the lawmaking or the law-applying stage, should give determinate answers. If it does not, that is worrisome.

In what follows, I am going to consider the skeptical thesis from a variety of perspectives, some of which undercut it, others of which do the reverse.

### I. TAKE 1: THE COGNITIVE THERAPY PERSPECTIVE

One reason why the skeptical thesis finds such resonance is that it mirrors an experience we have in everyday life. Our feelings about whatever positive or negative encounters we have are quite indeterminate. It seems possible to think about nearly whatever happens to us in a positive or a negative light, about nearly every person who has interacted with us in a

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<sup>23</sup> *Id.* at 672-73.



sympathetic or a hostile way. Cognitive therapy capitalizes on that. It teaches us how to turn a bad mood into a good mood by just using the right cognitive strategy for reframing the event that troubles us in a suitably uplifting way. This is nicely conveyed by the title of one of the books by Albert Ellis, the foremost practitioner of a variant of cognitive therapy called rational emotive therapy: *How to Stubbornly Refuse to Make Yourself Miserable About Anything (Yes, Anything!)*.<sup>24</sup>

Well, is that possible? Perhaps the most convincing example is offered by another cognitive therapy guru, David Burns, in the introduction to his book *The Feeling Good Handbook: Using the New Mood Therapy in Everyday Life*.<sup>25</sup> He relates the following incident. When his son was born, the baby was having trouble breathing: “He was bluer than a healthy baby should be and he was wheezing and gasping for air.”<sup>26</sup> It was recommended that he be put into an incubator in the premature intensive care unit.<sup>27</sup> Not surprisingly, Burns panicked:

[“]What if he ends up with brain damage or is mentally retarded?”

As I walked through the hospital corridors, frightening thoughts raced through my mind. I developed tunnel vision and I felt as if I were floating across the ceiling. I had fantasies of taking him to clinics for the rest of his life as he struggled with various handicaps. As the night wore on, I was flooded with wave after wave of panic and I felt like a nervous wreck.

Then I asked myself: “Why don’t you do what you tell your patients to do? Aren’t you always suggesting that distorted thoughts—and not realistic ones—upset people? Why don’t you write your negative thoughts down on a piece of paper and see if there’s something illogical about them?” Then I told myself, “Oh, that wouldn’t work because this problem is real! A silly paper and pencil exercise wouldn’t do me any good at all!” Then I countered this with “Why not try it as an experiment and find out?”

The first thought I wrote down was “Other people might think less of me if I have a mentally retarded son.” I’m a little ashamed to admit that my own ego was already caught up with the accomplishments and intelligence of my own son. But that was how I was thinking! This is such a common trap. We’re programmed to believe that if we’re number one in athletics or scholastics or in our careers, then we’re no longer “average” or “ordinary”

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<sup>24</sup> ALBERT ELLIS, *HOW TO STUBBORNLY REFUSE TO MAKE YOURSELF MISERABLE ABOUT ANYTHING (YES, ANYTHING!)* (1988).

<sup>25</sup> DAVID D. BURNS, *THE FEELING GOOD HANDBOOK: USING THE NEW MOOD THERAPY IN EVERYDAY LIFE* (1989).

<sup>26</sup> *Id.* at xvi.

<sup>27</sup> *Id.*

but “special.” Our children incorporate this value system as they grow up and their feelings of self-esteem get connected with how talented, successful, or popular they are.

Once I wrote my negative thoughts down and thought about it, I began to see how distorted and unloving it was and I decided to look at it this way instead: “It’s not very likely that people will evaluate me based on how intelligent my son is. They’re more likely to evaluate me on what I do. Their feelings about me will depend more on how I treat them and how I feel about them than on my own or my son’s success.”

The more I thought about it, the clearer it became that my own feelings of happiness and my love for my son didn’t have to be connected with his intelligence or career at all. And then a rather sweet realization came to mind. It dawned on me that even if he was only average or below average, it didn’t need to diminish the joy we would share by one iota. I thought of how wonderful it would be to be close to him and to do things together as he grew up. I had the fantasy of going into the coin-collecting business with him when I was old and ready to retire from psychiatry. I had always had an interest in coin collecting, and my daughter, who was five years old at the time, was quite bright and independent. She had always developed her own interests and hobbies and never had much interest in coins. The fantasy of going to coin shows with my son and wheeling and dealing Lincoln pennies and buffalo nickels was so exciting that my anxiety vanished entirely.<sup>28</sup>

Some readers will be tempted to conclude that what Burns has done is prove that the right way to think about his son’s predicament is not to get too upset about it, for just the reasons he gave to himself to “un-upset” himself. Burns’s reference to distorted thinking certainly supports that idea. It makes it appear as though what he has done by changing his perspective is to set things right, to find a way of thinking about his problem that is more appropriate than the panic-stricken way in which he started out. But I think that is too hasty. For in the same spirit that Burns found a perspective that made the problem look less alarming, we could find a perspective that reverses things yet again. We might try arguing somewhat as follows:

Gee, if it isn’t all that bad if the baby were to suffer some brain damage as a result of the birth, because his father and he himself would not be hindered from still having a pretty happy life, then consider the question we would face if we had to ask ourselves how much effort and expense ought to be shouldered to avert that contingency, in other words, the kind of weighing

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<sup>28</sup> *Id.* at xvi-xvii; see also Leo Katz, *Before and After: Temporal Anomalies in Legal Doctrine*, 151 U. PA. L. REV. 863, 866-67 (2003).

of costs and benefits we have to engage in under the negligence standard when we decide what kind of care and precaution is appropriate under what circumstances. Might we not conclude that we do not really have to try too hard to avert such a calamity because we have just concluded that it is not such a calamity after all?

Now, of course no one would agree with that. And doesn't that demonstrate that in fact it is much more of a calamity than Burns's perspective led us to conclude?

Perhaps you are now inclined to conclude that what this proves is that Burns was mistaken, benignly self-deluded. The so-called distorted perspective was not distorted, but correct, and that attempt to un-distort it is what went awry. But I don't think so. I think there are quite persuasive replies available to the argument I just produced. One simply needs to start thinking about those well-known experiments involving quadriplegics who are just as happy or nearly as happy as people who did not suffer such an accident, to restore one's faith in Burns's original argument.

To be sure, there are counterarguments available to that in turn. For instance, the fact that the proverbial quadriplegics, though perhaps nearly as happy as they were before they had their accident, would probably be willing to spend exorbitant sums, and make all kinds of other sacrifices, just to regain their mobility.

It would seem as though this rhetorical game could go on indefinitely. And since it seems as though it is essentially the same kind of game we are playing in law, specifically that we are playing with regard to the controversies sketched out by Kelman, law does indeed look as hopelessly indeterminate as common sense reasoning proves to be in the skillful hands of a good cognitive therapist.

## II. TAKE 2: THE MORAL INSTINCT PERSPECTIVE

Noam Chomsky famously proposed that we all have a "language instinct," an innate capacity to learn language that we are born with and that largely relieves us of the need to do a lot of learning in order to be able to speak.<sup>29</sup> For the most part, the capacity to speak a language is ready-made within us, and only a few external tweaks are required to call forth its actual expression and to determine whether its actual expression will result in our speaking German, Japanese, or English. The most dramatic demonstration of this capacity is our ability to tell whether a given agglomeration of words

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<sup>29</sup> See generally NOAM CHOMSKY, *REFLECTIONS ON LANGUAGE* (1975).

uttered by someone in “our” language is grammatical or not. We are able to do this effortlessly for an infinite variety of sentences, none of which we have ever before been exposed to and taught to recognize as being grammatical. We are able to do so because we are born with an innate knowledge of the rules of grammar. Most of those rules are what linguists call operative principles rather than express principles.<sup>30</sup> We rely on them when classifying an utterance as grammatical or not, but could not actually articulate them—although linguists have gone a long way toward making these operative, but unconscious, principles express.

Lately, a number of psychologists, philosophers and at least one prominent legal theorist, John Mikhail, have argued that it is similar with our ability to make moral judgments.<sup>31</sup> We are born with a set of innate moral principles, which we do not need to be taught but know how to apply automatically.<sup>32</sup> Many of them are merely “operative”: we rely on them without being able to spell them out.<sup>33</sup> We are able to use them without being conscious of what they require.<sup>34</sup> But with time and effort we are often able to figure out what they are.<sup>35</sup> Indeed a lot of legal doctrine consists of doing just that—making these unconscious operative principles express.<sup>36</sup>

If this is right, and I find it very plausible, then it suggests that we will in many cases involving these principles have a false sense of indeterminacy. We will have an intuition about how a case should be decided, without being able to articulate the principle on which we are relying. And being unable to articulate the principle, we may feel less constrained by our raw, free-floating intuition. A good example of this kind is the first of the Kelman cases I presented above, *Martin v. State*.<sup>37</sup>

In discussing *Martin*, Kelman contrasts it with another well-known case, *People v. Decina*,<sup>38</sup> involving an epileptic driver who has a seizure while

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<sup>30</sup> JOHN MIKHAIL, ELEMENTS OF MORAL COGNITION: RAWLS’ LINGUISTIC ANALOGY AND THE COGNITIVE SCIENCE OF MORAL AND LEGAL JUDGMENT 19–21 (2011).

<sup>31</sup> See *id.* (“[A] person’s *operative* moral principles are those principles that are actually operative in her exercise of moral judgment . . . . [A] person’s *express* moral principles are those statements that a person verbalizes in the attempt to describe, explain, or justify her judgments.”).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> 17 So. 2d 427, 427 (Ala. Ct. App. 1944) (concluding that, when police officers arrested the defendant for public exhibition of a drunken condition *after* forcibly removing him from his home to a public highway, an involuntary act cannot give rise to liability).

<sup>38</sup> 138 N.E.2d 799 (N.Y. 1956).

driving and loses control of his car, killing four children.<sup>39</sup> In *Decina*, the court did not say that because the defendant's conduct during the seizure was involuntary he should be acquitted. Instead, the court focused on the fact that he made a voluntary decision to drive, and concluded that that satisfied the voluntariness requirement.<sup>40</sup> Something perfectly analogous could have been done in *Martin*, Kelman argues.<sup>41</sup> And correspondingly, if the court had been willing to engage in the same kind of "narrow time-framing" in *Decina* that the court engaged in in *Martin*, it would have been led to acquit *Decina*. It is this which makes Kelman conclude that the outcome in the *Martin* case is completely indeterminate, and that the court capriciously settled on one outcome rather than the other, on an acquittal rather than a conviction, when it could just as easily have gone the other way.

Michael Moore has taken Kelman to task for being confused about how the voluntariness requirement operates. In his mind, the outcomes in both *Martin* and *Decina* are determinate and not the least bit inconsistent:

If there were a 'time-framing' choice to be made in criminal cases, Kelman is right in his observation that there would be no principled way to make it. But where did Kelman get his assumption that there is such a choice to be made? . . . [If] the court can find a voluntary act by the defendant, accompanied *at that time* by whatever culpable *mens rea* that is required, which act in fact and proximately causes some legally prohibited state of affairs, then the defendant is prima facie liable for that legal harm. There is no 'time-framing' choice here. If there is *any* point in time where the act and *mens rea* requirements are simultaneously satisfied, and from which the requisite causal relations exist to some legally prohibited state of affairs, then the defendant is prima facie liable. . . .

. . . Kelman thinks that the Alabama court [in *Martin*] could justify its decision (of no voluntary act by Martin) only by a 'narrow time-framing'; for a broad time-framing would reveal earlier acts by Martin that were voluntary . . . . What Kelman overlooks is that those earlier acts by Martin were not the proximate cause of his being drunk in public. The police officers' intentional placing of Martin in a public place constitutes an intervening cause on anyone's reading of that notion, making Martin not a proximate cause of the legally prohibited state of affairs. In addition, had the [*Martin*] statute required any *mens rea* with respect to the element of public place, as it should have, Martin's earlier acts of drinking in his home

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<sup>39</sup> *Id.* at 800-01.

<sup>40</sup> *Id.* at 803-04.

<sup>41</sup> See Kelman, *supra* note 1, at 603 ("[T]he defendant in *Martin*, as well, may have done something voluntarily . . .").

were unaccompanied by such *mens rea* and were thus ineligible to be the basis for his conviction for that reason too.<sup>42</sup>

Moore is explaining that, once one construes the voluntariness requirement as meaning that the defendant is guilty if and only if one can find a moment in time in which his conduct could be described as falling within the statute and in which such conduct was voluntary, he can be held liable. In *Martin*, such a moment could not be found. The voluntary actions preceding Martin's appearance in public did not constitute an "appearance"; they simply caused such an appearance later on. By contrast, Decina's starting to drive, knowing he was prone to seizures, constituted dangerous driving within the meaning of that statute, as well as being a voluntary act, since he was not at that moment having a seizure.

I think Moore is half right and half wrong. He is right insofar as he correctly, I think, analyzes how the voluntariness requirement ought to operate. And if it is applied in that fashion, the time-framing indeterminacy Kelman identifies disappears. He is wrong, however, in suggesting that this is something everybody has always understood and Kelman alone misunderstood. I think what Moore managed to do is to identify an operative, but never previously expressed, principle that silently operates to fill out the meaning of the voluntariness requirement. He is therefore right to argue that there is in truth not much of an indeterminacy here, although someone who does not see the principle that Moore sees might well conclude that there is, if he is disturbed enough not to trust his intuition about the case and insist that only intuition fortified by the principle that lurks behind it is to be followed.

Yet another of Kelman's examples that may qualify as such a case of pseudo-indeterminacy is the case of the man who steals a gas meter, which unleashes a cloud of gas that nearly asphyxiates the inhabitant of a nearby dwelling. He did not anticipate that this would happen. Can he be found to have been reckless? A literal-minded application of the usual formulation of the recklessness standard, as Kelman rightly points out, would result in a conviction, since he imposed a substantial and unjustified risk.<sup>43</sup> This is so not because the risk was particularly high, but because he acted without a trace of a justification: he imposed the risk for the sake of carrying out an antisocial act, the theft of the gas meter. But we would in fact be reluctant to declare that someone who precipitated any harm whatsoever in the course

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<sup>42</sup> MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 35-37 (1993) (citations omitted).

<sup>43</sup> Kelman, *supra* note 1, at 634.

of committing some collateral crime acted recklessly. In so doing, we are relying on some operative but hitherto unexpressed principle that tells us that this is the right outcome, a principle which in the law and economics literature is expressed as the activity level–care level distinction.<sup>44</sup> I think that quite a few of Kelman’s other examples would qualify as such instances of pseudo-indeterminacy.

Indeed, I believe there are many more such cases of pseudo-indeterminacy throughout the law. Saul Levmore, in an extraordinary article some decades ago, identified the similarly hidden principles in corporate tax law that determine outcomes we are hard-pressed to explain—until, that is, Levmore came along to tell us how it is to be done.<sup>45</sup> Suppose that *A* and *B* are 50% shareholders in a corporation. The corporation pays out \$500,000 to *A* alone; nothing to *B*. How is one to characterize, for tax purposes, what went on here—as a dividend to *A*, as salary to *A*, or as a gift to *A*? What about characterizing it in even weirder ways: as a gift of \$700,000 to *A*, followed by a gift back from *A* to *B* of \$200,000? He identifies several hidden rules by which courts choose among these various possibilities. The first is what he calls the “principle of completeness”:

A “complete” recharacterization is one with components that explain all available data without contradicting reality. . . . [A]ssume that *A* and *B* are each 50% shareholders of a corporation that pays money to *A* alone. Completeness might be satisfied by a claim that this payment to *A* was a salary, especially if *A* planned to work for the corporation. Completeness would not be satisfied, however, by a claim that there was a redemption of *A*’s shares alone. So long as *A* and *B* continue to enjoy equal voting power, there will be evidence contradicting the claim that only *A*’s shares were redeemed.<sup>46</sup>

A second principle is that of “consistency”: “A ‘consistent’ recharacterization does not contradict another recharacterization or ordering that is deemed acceptable by the tax system. For example, if *A* is taxed as having received compensation from the corporation, then it would be inconsistent to deny the corporation a deduction for that payment if it is reasonable.”<sup>47</sup>

A third principle Levmore identifies is “directness”:

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<sup>44</sup> Steven Shavell, *Liability for Accidents*, in 1 HANDBOOK OF LAW AND ECONOMICS 143-47 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

<sup>45</sup> Saul Levmore, *Recharacterizations and the Nature of Theory in Corporate Tax Law*, 136 U. PA. L. REV. 1019 (1988).

<sup>46</sup> *Id.* at 1020.

<sup>47</sup> *Id.*

A “direct” recharacterization is one that does not overshoot and then return to its mark. An itinerary that takes a traveler from New York to Chicago by way of Seattle is quintessentially indirect. Similarly, it would be indirect to describe *A*, . . . in the earlier example, as first having received an amount larger than she now really enjoys and then returning the difference to the corporation as a gift.<sup>48</sup>

A particularly noteworthy feature of these rules is that they do not really reflect any policy. That is because many features of a well-designed tax system, while being neither “unfair [n]or inefficient,” are nonetheless inherently “arbitrary.”<sup>49</sup> Inasmuch as they are arbitrary, “it is virtually impossible to develop normative arguments about questions that arise as a result or in the shadow of these basic starting points. The nature of corporate tax law often defies normative argumentation.”<sup>50</sup> But that does not render these rules indeterminate. Instead the courts have resort to these extremely steady and persuasive “hidden” principles. Much like the hidden linguistic rules uncovered by linguists, the hidden moral rules John Mikhail claims suffuse all of law.<sup>51</sup>

### III. TAKE 3: THE CORE-PENUMBRA PERSPECTIVE

Lawyers are inclined to think that a great deal of indeterminacy emanates from the need to draw a line along a perfect continuum with no natural breaks. The consent problem that Kelman presents might be the clearest instance of this kind of case. One can think of a continuum of cases in which someone assents to an act which would be an impermissible harm if carried out without consent (e.g., intercourse) yet is unobjectionable if carried out with consent. Such consent, however, needs to be free and informed to be valid. Since one can easily picture varying degrees of information and misinformation, as well as varying degrees of freedom and coercion, the cases seem to arrange themselves along some kind of continuum, from perfectly free and perfectly informed to strongly coerced and very ill-informed.

Somewhere on that continuum we let a judge draw a line to declare that on one side of the line consent is lacking and on the other it is not. Because there is little guidance on where exactly that line is to be drawn, there is a sense of indeterminacy. H. L. A. Hart conveyed this same idea by speaking

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<sup>48</sup> *Id.* at 1021.

<sup>49</sup> *Id.* at 1062.

<sup>50</sup> *Id.*

<sup>51</sup> See *supra* notes 30-36 and accompanying text.



of the core of a rule, surrounded by a penumbra of vagueness.<sup>52</sup> And since the boundary between core and penumbra is itself somewhat penumbrous—one might call it a meta-penumbra—and the boundary between meta-penumbra and core is penumbrous as well, one is left with a sense that there may be no easy cases—that even the darkest part of the core, on closer scrutiny, turns out to be more penumbra than core, which is what Kelman repeatedly suggests.<sup>53</sup>

Still, many people—although not Kelman, I suspect—actually feel that this kind of indeterminacy is not all that worrisome. They think this because they see indeterminacy as an artifact of the law's habit of treating an attribute as binary that is really scalar, and of insisting on drawing a line where there is really a continuum. Exactly where that line is drawn is not all that consequential so long as it is drawn within the penumbral region.<sup>54</sup>

But there is reason to think that the penumbra picture is incorrect. The law's attempt to draw a line is not merely an effort to impose an unnatural boundary where there is really a continuous spectrum. Instead, there is good reason to think that what the law is replicating is a sharp line that exists in the underlying reality. This is rather counterintuitive, and yet likely to be true. To see how and why, a slight digression is in order into one area where this seems particularly implausible and yet can rather convincingly be shown to be the case.

The digression I have in mind will take us into John Broome's exploration of population ethics in his book *Weighing Lives*.<sup>55</sup> Consider the following question with which the book is preoccupied: would it be desirable to add an extra person to an existing population—would it be desirable if a particular set of parents had another child?<sup>56</sup> That would presumably depend on how well off that child would be.

Let us consider a number of possibilities. Suppose the child would be unrelievedly miserable, wracked by pain throughout its life. Then presumably it would make things worse if such a child were added to the existing population. Nothing complicated or puzzling so far. What about the opposite possibility? The child would be blissfully happy and successful for

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<sup>52</sup> See H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-09 (1958).

<sup>53</sup> See, e.g., Kelman, *supra* note 1, at 661 (considering “whether the court believes that the core conduct described by [a] statute—conduct clearly fitting *within* its murky boundaries—is substantively innocent”).

<sup>54</sup> See generally Larry Alexander, *Scalar Properties, Binary Judgments*, 25 J. APPLIED PHIL. 85 (2008) (illustrating how seemingly deontic judgments depend on factors with various gradations).

<sup>55</sup> JOHN BROOME, *WEIGHING LIVES* (2004).

<sup>56</sup> See *id.* at 143-45.

its entire life. Then we would probably be inclined to say it improves the world if this child were born. Well, maybe. Some people might say it neither improves the world nor makes it worse, but many would say it does improve things. What about the cases in between? About those, most people would say it makes no difference. In other words, whether a child whose happiness lies within some “normal” range would make the world a better place, the answer to that is it would not make a difference. Broome calls this the neutrality intuition.

Here is Broome’s way of putting the matter:

We think intuitively that adding a person to the world is very often ethically neutral. We do not think that just a single level of wellbeing is neutral, and that a person’s living at any other level is either better or worse than her nonexistence. . . .

. . . .

Suppose a couple are wondering whether to have a child. Suppose they decide their own lives will be better on balance if they remain childless, and because of that they remain so. Our intuition is that they are not acting wrongly. Moreover, it is not that we think the couple might have a reason to have a child, stemming from the child’s own wellbeing, but this reason can justifiably be outweighed by the couple’s own good. Instead, we think there is no positive reason at all why they should have a child. If having a child would be bad for the couple themselves, even to a small degree, it is right for them not to have one.

There are limits to this intuition of neutrality. Suppose that, if this couple had a child, her life would be short and full of suffering. Then we think they should definitely not have a child. So existence at a poor level is not neutral; we are against it. Nevertheless, for a wide range of lives the child might live, having a child seems an ethically neutral matter.

Some people think this range is infinitely wide. They think that a person’s existence is neutral, however good her life would be if she did exist. It is not neutral if her life would be bad, so there is a lower boundary to the neutral range. But there is no upper boundary. That is one view. A more moderate view is that the range has both an upper and a lower boundary, but there is nevertheless a range of neutral lives in between.<sup>57</sup>

The neutrality intuition is widely embraced. Broome offers the following example for the “neutrality intuition at work”:

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<sup>57</sup> *Id.* at 143-44.

Economists often concern themselves with setting a value on people's lives. For example, they do cost-benefit analyses of projects that will improve safety on the roads or railways, where one of the benefits is the saving of lives. . . . Economists also advise on priorities in the health service: for example on priorities between the old and the young. . . . Both these problems are likely to involve the addition of people to the world. If a young person's life is saved, she is likely to have children and grandchildren who would otherwise never have existed. . . . But when they make their judgements, economists never, or almost never, take account of these added people. Why not? The explanation has to be that they think their existence is ethically neutral.<sup>58</sup>

Broome further notes that

[t]he neutrality intuition is part of a broader way of thinking known as the 'person-affecting view'. This is the view that only benefits or harms that come to people can be ethically significant; a change must be ethically neutral unless it affects a person for good or ill. A change is neutral unless it makes someone either better or worse off than she would otherwise have been; that is the view. Now, a person's coming into existence makes her neither better nor worse off than she would otherwise have been. It does not affect her for better or worse. So according to the person-affecting view, it is ethically neutral, unless it has some good or bad effects on other people. Jan Narveson says: 'We are in favour of making people happy, but neutral about making happy people.'<sup>59</sup>

There are many other reasons for embracing the intuition of neutrality. For instance, unless one embraces it, one ends up stuck with something known as the repugnant conclusion. One is driven to conclude that if given the choice between a population of the earth's current size, with each person living at a level corresponding to that of the wealthiest person now on earth, and a population consisting of people just above the average level, the latter is preferable given there are enough of those people—that is a preferable state of affairs. That certainly seems implausible—indeed repugnant.

There is thus much to be said for this neutrality intuition. And yet, if we embrace it, we end up with paradoxes.

Consider the following possible population alternatives:

Alternative *A*: the relevant world encompasses ten people, each with a welfare level of one unit.

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<sup>58</sup> *Id.* at 144-45 (footnotes omitted).

<sup>59</sup> *Id.* at 145.

Alternative *B*: the relevant world encompasses (instead of the above) eleven people, each with a welfare level of one unit.

Alternative *C*: the relevant world encompasses instead ten people with a welfare level of one unit, and an eleventh person with a welfare level of two units.

When comparing these alternatives, under the neutrality intuition, *B* is no better than *A*. Adding an extra person in the “neutral” range is neutral—in other words, it does not make the world better.

Let us next compare *B* and *C*. Surely a world in which the eleventh person has two units of welfare and everybody else is as well off as they were before is better than one in which the eleventh person has only one unit of welfare. Therefore, *C* is better than *B*.

Finally, let us compare *A* and *C*. Adding an extra person in the neutral range will not make the world better. Therefore, *A* and *C* are equal. But that leads to a contradiction, since *C* is better than *B*, which is equal with *A*.

This is just the beginning of a larger welter of incoherencies that one is led to if one makes the assumption that there is a neutral range. The only way out of the incoherence is to conclude that there is no neutral *range*, only a neutral *level*, and anyone born above that level makes the world a better place and anyone born below it makes the world a worse place.

The startling thing, however, is that we are in a state of what is sometimes called “non-epistemic uncertainty” about where that level is to be drawn. It is a binary distinction, which cannot be located except in a very rough and ready way.

The same is probably true of most of the other uncertainties listed by Kelman.<sup>60</sup> This helps account for a peculiar aspect of the way we perceive legal attributes. Typically, we vacillate between seeing the outcome of a certain case one way or another, similar to how we vacillate between seeing a Necker cube bulge inward or outward, or a rabbit–duck as a rabbit or a duck. This is not something one would expect with a scalar attribute. It is what one would expect of an attribute with a sharp discontinuity, whose dividing location is uncertain.

#### IV. TAKE 4: THE SOCIAL CHOICE PERSPECTIVE

One of the earliest insights of social choice theory was the fact that in making sense of the idea of a collective will many different options are available, each of which is somewhat plausible, but which lead to contradictory results. There are many plausible ways of aggregating the

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<sup>60</sup> See *supra* notes 1-23 and accompanying text.

wishes of a collectivity into something that can reasonably be regarded as being the collective wish of that collectivity. Different means of aggregation respect different principles, and depending on which of these competing principles one regards as most compelling, one arrives at one or another radically different outcome. It has since been realized that this lesson does not merely apply to collective decisionmaking, but also to multi-criterial decisionmaking. The paradoxes that plague the aggregation of individual preferences also plague the synthesis of many divergent criteria into one overall ranking and final decision.

That makes such aggregation a promising model for legal decisionmaking. Legal decisionmaking is a particular kind of multi-criterial decisionmaking. When we consider what manner of criterial aggregation is most appealing, we have to choose between different competing principles of aggregation. Many are plausible, and the answer therefore has a familiarly indeterminate ring to it.

Let me make all of this more concrete. Consider again the question whether *F* and *L*, each of whom goes hunting when they mistakenly believe it to be illegal, are guilty of attempting to violate the hunting law. *F* goes hunting in October erroneously thinking that it is September, when it is in fact illegal to hunt. *L* goes hunting in October erroneously thinking that this is a month during which the law forbids hunting, whereas it is the month of September during which hunting is forbidden, not October. An appealing symmetry principle would say that these two kinds of mistakes are about certain facts that are insignificantly different from each other—the fact of which month it is right now, and the fact of which month, September or October, is listed in the statute. A perceptible difference, but one that looks like it should not matter. But there is a competing symmetry principle that leads to treating the two cases differently from each other. Mistake questions don't merely arise in the context of attempt law, but also completed offenses.

Suppose we consider two cases which are twins of the two we have considered. Let us consider one involving *F'*, who goes hunting in September, when hunting is prohibited, but mistakenly thinks it is October. And consider also *L'*, who also goes hunting in September, when hunting is prohibited, but mistakenly thinks that hunting is allowed during that month. In both cases, the defendants think what they are doing is innocent, whereas objectively speaking, it is not. We would ordinarily acquit *F'* because his mistake was factual. We would convict *L'* because he is pleading ignorance of law, which ordinarily is no defense. Symmetry would suggest that if we do not allow ignorance of the law to exonerate *L'*, we should also

not allow it to serve to inculcate  $L$ , who mistakenly thinks that he is committing an illegal act when he is not. If law is irrelevant to the guilt of  $L'$ , it should also be irrelevant to the guilt of  $L$ . Correspondingly, if factual ignorance is permitted to exonerate  $F'$ , it only seems fair that it be permitted to inculcate  $F$  in the case in which he mistakenly thinks what he is doing is forbidden when it is not. The competition between symmetry principles is precisely what we have to deal with in the social choice context. And the indeterminacy that results is as tractable or intractable as it is in the social choice context.

#### V. TAKE 5: THE ANALOGY PERSPECTIVE

There is a reason lawyers are so fond of argument by analogy. It is a rich source of arguments when all other sources of argument seem to have dried up. It is a well that never dries up. Yet, it also provides more determinacy than is commonly appreciated. The work of Douglas Hofstadter is replete with demonstrations of this in various informal contexts. A nice example is his discussion of what in the analogy literature are called “Ob–Platte problems” in reference to a classic analogy problem involving those two rivers. Hofstadter explains that

a shivering Siberian contemplating emigration to the Great Plains of the United States might worriedly inquire, “But what is the Ob of Nebraska?” Knowing, of course, that the Ob is the mighty river traversing Siberia, any red-blooded Nebraskan would proudly reply, “The Platte, of course!” Because of this classic example, such geographical analogy questions have traditionally been called “Ob–Platte puzzles” . . . <sup>61</sup>

An especially illuminating example of the power of analogical intuitions is Hofstadter and Robert French’s discussion of the following Ob–Platte puzzle:

*What is the East St. Louis of Illinois?*

Initially, this might sound either trivial or nonsensical, given that East St. Louis is in Illinois to begin with. However, the mere posing of the puzzle suggests that one could make it make sense—but that to do so will require looking at East St. Louis in a new light. Fortunately, this is not too hard: thanks not only to the physical proximity of St. Louis and East St.

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<sup>61</sup> DOUGLAS HOFSTADTER & ROBERT FRENCH, TABLETOP, BATTLEOP, OB–PLATTE, POTELBAT, BELPATTO, PLATOBET, *reprinted in* DOUGLAS R. HOFSTADTER & THE FLUID ANALOGIES RESEARCH GRP., FLUID CONCEPTS AND CREATIVE ANALOGIES: COMPUTER MODELS OF THE FUNDAMENTAL MECHANISMS OF THOUGHT 333 (1995) (citation omitted).

Louis but also to the sonoric proximity of their names, East St. Louis is on a certain *conceptual* level more attached to Missouri than to Illinois. This deep association between East St. Louis and Missouri hints that the puzzle makes some sense after all, and that we should begin our search for an answer by solving this subproblem:

*What is the St. Louis of Illinois?*

This is a piece of cake: Chicago, of course. The next step is to look for Chicago's analogous sidekick—in other words, to attack this problem:

*What is the East St. Louis of Chicago?*

One's first instinct might be to look within Illinois, but given the relationship between East St. Louis, St. Louis and the Mississippi River, it would perhaps seem better to look eastwards across the Chicago River into Indiana. This leads us . . . to Gary[, Indiana], which is not an awful answer. However, as a potential counterpart to East St. Louis, Gary is a bit hefty (their populations are roughly 50,000 and 150,000), and furthermore, the name "Gary" bears no relationship to that of the landmark city, Chicago. Consideration of these flaws suggests looking further, and fairly quickly, at least if one knows Chicago's eastern suburbs reasonably well, one comes across another potential answer: East Chicago (population: roughly 40,000). This rather small and mostly black suburb of Chicago is, like East St. Louis, close to its landmark city in both location and name. It also lies east, across both the river and the state line from the landmark city. All this leaves little doubt that "the East St. Louis of Illinois" is East Chicago, Indiana.

Of course, from a narrow and rigid point of view, East St. Louis itself ought to be the unhesitating answer, and no cities in Indiana should ever be considered at all. However, narrowness and rigidity are the antithesis of what analogy-making is all about, and in our opinion, East Chicago is a convincing and charming answer.<sup>62</sup>

The answers suggested by analogy are not merely interesting, but have the power to constrain our actions. Hofstadter and French nicely illustrate this with the following example:

International analogies are of great import and influence . . . . Consider, for instance, what happens when a conflict suddenly flares up in some unexpected portion of the world. As soon as this happens, every noninvolved country, no matter how far away, is forced to scrutinize the conflict for possible resemblances to its *own* situation, and then must take a stand according to any analogies perceived—and the stronger the analogy,

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<sup>62</sup> *Id.* at 350-51.

the more compelling the argument. If a country's stance concerning another country's behavior is inconsistent with its own behavior in an obviously analogous situation, it runs the risk of appearing hypocritical in the court of world opinion, and thus undermining the legitimacy of its own behavior. A sufficiently blatant analogy will override any other pressures, including prior ideological commitments.

To make all this more concrete, take the case of Greece during the Falkland Islands conflict. One would think that this rather poor and backward third-world-leaning, socialist-oriented nation would have instantly sided with poor, backward, underdeveloped Argentina when the latter tried to reclaim the insignificant *Islas malvinas*, right off its coast, from the clutches of the rich, industrialized, right-wing, anachronistically colonial, and—most important of all—enormously *distant* nation of Great Britain. And yet no. The Greeks were in fact staunchly in solidarity with the British on this issue. Why? Because Greece's position *vis-à-vis* the Falkland Islands conflict could hardly be determined without taking into account the blatantly obvious existence, to the world community, of “the Falkland Islands of Greece”—namely Cyprus, an island to which Greece lays claim but that is in fact much closer to *another* country (Turkey) that also claims sovereignty over it. Given this obvious analogy in the eyes of the world, how could Greece conceivably have sided with Argentina, no matter how much it would have liked to do so for other reasons? It *had* to side with Britain, because siding with Argentina over the Falklands would have been so analogous to siding with Turkey over Cyprus that doing so would have totally undermined whatever legitimacy Greece's claims to Cyprus may have.<sup>63</sup>

To illustrate how analogy might come to the rescue in rendering determinate a seemingly indeterminate Kelman problem, consider the following problem associated with the *Martin* case. Martin, we noted, was charged with appearing in public and behaving badly.<sup>64</sup> He defended on the ground that his violation of the statute did not meet the voluntariness requirement.<sup>65</sup> One argument the prosecution could have raised was that although Martin's appearance was not voluntary, the misconduct he subsequently engaged in certainly was voluntarily. The question then arose what to do in the case of a statute that prohibited the doing of  $A + B$ , when the defendant did  $B$  voluntarily but not  $A$ . Could one say he behaved

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<sup>63</sup> *Id.* at 331-32.

<sup>64</sup> *Martin v. State*, 17 So. 2d 427, 427 (Ala. Ct. App. 1944).

<sup>65</sup> *Id.*



voluntarily because it was within his control whether the statute would be violated, or that he behaved involuntarily because some of what he is charged with doing he did not do voluntarily? Cases can be imagined illustrating each possibility. If the defendant were forcibly carried into his car and then proceeded to drive while drunk, he surely would not be able to defend on the ground that his appearance in the car was involuntary. On the other hand, if we imagine that a certain offense, say, child abuse, requires three instances of a certain type of misconduct—e.g., beating one's child—then the fact that one of these instances was carried out involuntarily probably would mean that it should not be counted, and the defendant could not be found guilty. Deciding what to do about Martin might then be guided by the question whether his case is more closely analogous to the first or the second of these imagined cases, the kind of question to which Hofstadter's example suggests we will generally have rather precise responses.

#### VI. TAKE 6: THE INCOMMENSURABILITY PERSPECTIVE

I have to choose between two alternatives—a career in law (*X*) or in medicine (*Y*). Suppose I cannot decide. Does that mean that I consider the two alternatives equally attractive? It might; but if it did, then if a career in medicine should prove ever so slightly more lucrative than it seemed when the two were in the balance, I should now immediately opt for medicine. That will ordinarily not be the case. This shows that my inability to decide does not show them to be equal, but incommensurate.

Many difficult choices are difficult because they are like that. Famous tragic choices often have this flavor.

A classic example is Jean-Paul Sartre's. During the Second World War, one of Sartre's students had to make a choice between staying in France to look after his mother, and leaving to join the Free French Forces in Britain. His mother very much needed him to stay, because his father had been revealed to be a traitor and his brother had been killed by the Nazis. Staying with her was a way to meet her needs. On the other hand, leaving for Britain was a way to promote the honour and freedom of France. The student was unable to weigh up determinately the values promoted by his two alternatives. The question 'Which is better: to stay or to leave?' seemed to him to have no right answer.<sup>66</sup>

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<sup>66</sup> BROOME, *supra* note 55, at 165 (footnote omitted).

It should be clear that Sartre's choices are therefore not equal. Because if they were, then, if his mother were to need him ever so slightly less, or if his effectiveness on behalf of the Free French were ever so slightly greater than it actually is, he should choose to leave his mother. And that seems implausible.

Many people have argued that legal decisions involve choices among a plurality of values that create incommensurable alternatives.<sup>67</sup> That may well be true, but it does not seem to describe the difficult cases that make up Kelman's list. These do not seem to involve values that stand in the relationship of the above incommensurate alternatives. They seem difficult in a different way.

#### VII. TAKE 7: THE IRRATIONALITY-OF-DISAGREEMENT PERSPECTIVE

Several decades ago, the game theorist Robert Aumann proved a startling theorem demonstrating the inherent unreasonableness of agreeing to disagree.<sup>68</sup> A good way to convey the gist of Aumann's insight is with the help of an example from Ken Binmore's game theory textbook.<sup>69</sup> Imagine two hyper-rational detectives—Sherlock Holmes and Hercule Poirot—investigating a murder.<sup>70</sup> There are five suspects: *A*, *B*, *C*, *D*, and *E*.<sup>71</sup> The detectives proceed independently of each other, interviewing suspects and witnesses and conducting whatever other forensic techniques they think appropriate, and each reaches a conclusion.<sup>72</sup> As it happens, their conclusions differ.<sup>73</sup> Let us imagine that Holmes thinks it 90% likely that *A* did it, 10% likely that *B* did, and virtually impossible that either *C*, *D*, or *E* was involved. Poirot thinks it 80% likely that *B* did it, and assigns a 5% probability to each of the remaining four. Does that mean that either Holmes or Poirot is being irrational? No, of course not.<sup>74</sup> They started out with different priors; they have different lifetime experiences to fall back

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<sup>67</sup> See generally, e.g., Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994) (analyzing views of incommensurability and its relation to choices).

<sup>68</sup> See Robert J. Aumann, *Agreeing to Disagree*, 4 ANNALS STAT. 1236, 1236 (1976) ("In brief, people with the same priors cannot agree to disagree.").

<sup>69</sup> KEN BINMORE, *PLAYING FOR REAL: A TEXT ON GAME THEORY* (2007).

<sup>70</sup> *Id.* at 370.

<sup>71</sup> In Binmore's actual example, there are three suspects. See *id.* ("One of Alice, Beatrice, and Carol is guilty of a crime.").

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 370-71.

on; they use different techniques; and this is a difficult case.<sup>75</sup> That can easily lead reasonable people to disagree in their conclusions.<sup>76</sup>

What Aumann pointed out was that this only holds true as long as each person does not talk to the other.<sup>77</sup> But what happens when they each share their conclusions with the other, and possibly the bases for these conclusions as well? What should we then expect their final conclusion to be? Aumann argues that if they are truly rational, they cannot be left disagreeing.<sup>78</sup> What exactly they will agree on, we cannot say, given what we know of the facts so far—but Aumann believes that we can insist that they cannot reasonably disagree.<sup>79</sup> How come?

Each is able to reason thus: inasmuch as we are both equally rational, if I had been in the other's shoes, I would have reached the conclusion he reached. That means that, in effect, each has undergone two different hypothetical experiences, one of which he knows leads him to one conclusion, the other of which leads him to a different conclusion. The final conclusion clearly needs to be one that synthesizes the upshot of the two paths. Both Holmes and Poirot will reason thus and thus will ultimately arrive at the same verdict.

One could generalize from this to reach the conclusion that a determinate conclusion, even in this relatively indeterminate environment, is possible, provided that one includes among determinate conclusions one which gives only qualified endorsement to a variety of possibilities. But that is a notable degree of determinacy nonetheless, and could be carried over to Kelman's cases.

#### VIII. TAKE 8: THE SMALL WORLD/LARGE WORLD PERSPECTIVE

In a wide-ranging discussion of decision theory, the game theorist Ken Binmore recently revived an old distinction, originally made by Leonard Savage, between what he calls "small world" decisions and "large world" decisions.<sup>80</sup> Leonard Savage was one of the creators of the dominant model of decision theory currently in use.<sup>81</sup> It is of course a highly sophisticated

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<sup>75</sup> *Id.* at 370-72.

<sup>76</sup> *Id.*

<sup>77</sup> See Aumann, *supra* note 68, at 1236 ("The result is not true if we merely assume that the persons know each other's posteriors.").

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Ken Binmore, *Rational Decisions in Large Worlds*, 26 ANNALES D'ÉCONOMIE ET DE STATISTIQUE 25, 25-30 (2007).

<sup>81</sup> See generally LEONARD J. SAVAGE, *THE FOUNDATIONS OF STATISTICS* (Dover Publ'ns 1972) (1954).

model that captures a great deal about the way rational decisionmakers do and should proceed, in weighing alternatives, taking into account the information they now have, the information they may acquire in the future, and the desirability of various outcomes, as well as the probability distributions associated with them. Because Bayes' theorem figures prominently in this model, this approach is often called Bayesian. Some theorists are so enamored of this model that they think that this is really all there is. By which they mean, this model describes what rational decisionmakers should be doing in every realm. Leonard Savage did not think so. The most severe limitation he saw the model to possess is that it had no room for surprise.<sup>82</sup> In a Bayesian model, a decisionmaker starts out with certain prior assessments as to the likelihood of certain contingencies, as well as an elaborate contingency plan as to how he would revise his beliefs, and resulting actions, if certain other contingencies were to come to pass and make certain outcomes more or less probable. And that's it. There is no room for surprise in this model, except in the very limited sense that it is a surprise when I roll a die and a four comes up rather than a five. I knew there were six possibilities. Whichever one the die produces is a surprise in the limited sense that I obviously could not foresee that it would. I only knew that there was a certain probability that it would. If all possible developments in the future are of this variety, then the Bayesian decision model fits it perfectly. But not all developments are of this variety. As Binmore observes, there *are* surprises.<sup>83</sup> Bayesian decision theory guarantees that we will do the right thing in a world in which because of the lack of surprises, the optimal strategy is one in which we are logically consistent. But, as Binmore observes,

[W]hy should a rational decision-maker wish to be consistent? After all, scientists are not consistent, on the grounds that it is not clever to be consistently wrong. When surprised by data that shows current theories to be in error, they seek new theories that are inconsistent with the old theories. Consistency, from this point of view, is only a virtue if the possibility of being surprised can somehow be eliminated. This is the reason for distinguishing large and small worlds. Only in the latter is consistency an unqualified virtue.<sup>84</sup>

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<sup>82</sup> See *id.* at 43-50.

<sup>83</sup> Binmore, *supra* note 80, at 28.

<sup>84</sup> *Id.*

The world in which traditional decision theory works, the world without surprises, Binmore, following Leonard Savage, calls the “small world.”<sup>85</sup> The “large world” is the real world, in which surprises are possible, in which scientific theories have to be chosen and all manner of other things have to be decided as to which the Bayesian decision theory model is no longer an appropriate model.<sup>86</sup> But what is an appropriate model? We do not have it yet. Various models are under construction, but none has yet swept the field.<sup>87</sup>

What is the point of this excursion about decision theory? What lawyers are looking for in explaining what courts do in so-called indeterminate cases is an explanation—a model of what happens when hard cases get decided. There is what really happens and there is of course what ought to happen. Ideally one would like to have a model that explains roughly what does happen and points the way to what ought to happen, a model that fulfills both a descriptive and a normative function. We will not have that until people who are experts in decision theory have come up with one. We legal scholars might help them because the law is a fertile source of suggestive examples. But it might be that until such a theory is found, no real light will be shed on the indeterminacy problem.

#### IX. TAKE 9: THE RESIDUALIST PERSPECTIVE

Cases get to judges because they are hard. If they were not hard—if a resolution were apparent to the parties—the parties would not wait for the judge’s decision. They would agree on what they foresee to be the judge’s decision. Predominantly, then, a judge has to decide a case where others fail to see a compelling, or maybe even just a halfway persuasive, way out. And he does decide, and writes an opinion justifying that decision. He is no smarter than the parties and will come up with nothing more than they came up with generally speaking. He will simply opt for one among the several resolutions, none of which the parties or the rest of the world viewed as more obviously right than the alternatives available. Nothing other than chance seems to determine his choice, because if something else did, the case would not have reached him. Moreover, the chance has to be of the Knightian uncertainty-type rather than the statistical risk-type, or predictability would have gotten into the act far enough for settlement once again to have likely preempted the judicial decision. Looked at in this way,

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 40.

the process seems to be one that virtually guarantees that the judge's decision is going to be indeterminate.

#### CONCLUSION

I have offered nine different perspectives on the problem of indeterminacy. As Albert Einstein said when a volume was published with several supposed refutations of relativity, "If I were wrong, one would have been enough."<sup>88</sup> If I thought that any of these nine takes truly resolved the problem, I would rest content with that. But while I think they offer some illumination, for the most part they vindicate my sense that this is a really hard problem.

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<sup>88</sup> KAREN C. FOX & ARIES KECK, *EINSTEIN A TO Z* 187 (2004).