

# DREAMS AND FORMULAS: THE ROLES OF PARTICULARISM AND PRINCIPLISM IN THE LAW

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## I. INTRODUCTION

The term “particularism” is encountered only rarely in the law.<sup>1</sup> The basic idea of particularism itself is, however, of great importance in the law. Particularism is, helpfully, much more prominent in contemporary moral philosophy.<sup>2</sup> The opposite of particularism, in moral philosophy and in law, is usually taken to be “generalism” or

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1. For examples, see CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 194 (1996) (“General theories do not decide concrete cases, and case-by-case particularism has advantages over the creation and application of broad rules.”); Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 398 (1989) (reviewing HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988)) [hereinafter Schauer, *Perils of Particularism*] (critiquing the common understanding that Harry Kalven was “a particularist, a devotee of the case-specific methods of the common law, an opponent of grand theory, and a scholar who saw the key to free speech adjudication not in large categories but in ‘thinking small’”); and Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 645, 646 (1991) [hereinafter Schauer, *Rules*] (contrasting “rule-based decisionmaking, in which a generalization provides a reason for decision, even in the area of its under- or over-inclusion; and particularistic decisionmaking, which aims to optimize for each case and treats normative generalizations as only temporary and transparent approximations of the better results a decisionmaker should try to reach”).

2. The leading exposition of moral particularism is JONATHAN DANCY, *ETHICS WITHOUT PRINCIPLES* (2004). For book-length edited collections on moral particularism, see *CHALLENGING MORAL PARTICULARISM* (Mark Norris Lance et al. eds., 2008) and *MORAL PARTICULARISM* (Brad Hooker & Margaret Olivia Little eds., 2000). For a book-length critique of moral particularism, see SEAN MCKEEVER & MICHAEL RIDGE, *PRINCIPLED ETHICS: GENERALISM AS A REGULATIVE IDEAL* (2006). There is substantial article-length literature on the subject; perhaps the most readily accessible authoritative statement is Jonathan Dancy, *Moral Particularism*, STAN. ENCYCLOPEDIA OF PHIL. (2005), available at <http://plato.stanford.edu/entries/moral-particularism>.

“principlism.”<sup>3</sup> For the moment, we may think of particularism in the law as strongly de-emphasizing the roles of principles, rules, standards, policies, and tests.<sup>4</sup> More positively, we may think of particularism in the law as instead emphasizing vivid and concrete analogies, hypotheticals, stories, images, instructive fables, parables, particular incidents, legends and myths, dreams, and similar sorts of narratives.

This Article draws upon the treatments of particularism in recent moral philosophy scholarship in order to shed light on the proper role of particularism in the law. We will find below that particularism and principlism in the law are distinguishable approaches to deciding and justifying the outcomes of case adjudications. They can be thought of as alternative approaches, or as different positions on a spectrum of approaches, to legal decisionmaking.<sup>5</sup> Our main conclusion, however, will be that it is, surprisingly, more important to appreciate how mutually indispensable particularism and principlism are in the law. The synergistic<sup>6</sup> effects of particularism and principlism in the law deserve at least as much attention as their claimed advantages and rivalries.

Probably the best test case for understanding the roles of particularism and principlism in the law invokes the historical and continuing struggle over slavery, segregation, discrimination, and civil rights in general. This vital area of the law, running from the Abolitionists to Dr. Martin Luther King, Jr. to the present date, allows us to contrast particularism and principlism, and to see their mutual dependencies and important synergistic effects.

The synergistic effects and the reciprocal dependence between particularism and principlism in the law lead us to think of loosely parallel relationships found in nature.<sup>7</sup> This symmetrical dependence

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3. See DANCY, *supra* note 2, at 7; MCKEEVER & RIDGE, *supra* note 2, at 3, 5; Gilbert Harman, *Moral Particularism and Transduction*, 15 PHIL. ISSUES 44, 44 (2005).

4. For elaboration on the meaning of particularism, see *infra* notes 11-30 and accompanying text. Most pointedly, see *infra* text accompanying note 28. For a sense of one widely discussed strand of legal thinking that at least overlaps with legal particularism, see, for example, Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 982 (1991) (examining “feminist narrative scholarship as a distinctive form of legal argument”). See generally Richard Delgado, *Rodrigo’s Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995) (showing how the narrative form can be used in legal analysis); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989) (a collection of articles addressing the role of narrative in the law).

5. See Schauer, *Rules*, *supra* note 1, at 650.

6. For a brief illustration of the narrow biological definitions, as well as broader usages, of synergy and synergistic effects, see the OXFORD ENGLISH DICTIONARY 480 (2d ed. 1989).

7. For a parallel brief illustration of the biological, as well as the more extended, uses of the idea of symbiosis, see *id.* at 450-51.

between particularism and principlism in the law may ultimately be broken,<sup>8</sup> in favor of particularism, only at the highest and most abstract stage<sup>9</sup> of comparing particularism and principlism in the law. Otherwise, the mutual dependence between particularism and principlism seems important and stable.

As we would expect with a symbiotic relationship in nature, we shall find that particularism and principlism in the law are often at their most valuable when fulfilling complementary roles.<sup>10</sup> By loose analogy, we expect children to be able to learn and communicate about addition most easily through particularism, such as by adding apples, physically, to other apples in their grasp. But we would be surprised to learn that a competent adult continued to think of addition only in such particularized terms. This sort of role differentiation should not, however, distract us away from the underlying mutual dependencies upon which both legal particularism and legal principlism rely. Let us begin to explore some of these themes.

## II. MORAL PARTICULARISM AND PARTICULARISM IN THE LAW

Particularism in moral theory is currently “popular.”<sup>11</sup> Several leading contemporary moral theorists, including feminist moral theorists, along with some modern and classical antecedents,<sup>12</sup> have been described as moral particularists.<sup>13</sup> Not surprisingly, there are different

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8. See Katherine Brading & Elena Castellani, *Symmetry and Symmetry Breaking*, STAN. ENCYCLOPEDIA OF PHIL. (2008), available at <http://plato.stanford.edu/entries/symmetry-breaking> (discussing the narrower core meaning of symmetry-breaking in various physics contexts); see also IAN STEWART, WHY BEAUTY IS TRUTH: A HISTORY OF SYMMETRY 218 (2007) (discussing “spontaneous symmetry-breaking” and its effect).

9. Options open for our use at lower levels of abstraction may no longer be realistically open to us when a debate moves to a higher level of abstraction; in our case, over finally breaking the symmetry between particularist and principlist emphases in the law. The classic citation on the loosely related idea of levels of preferences is Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, in HARRY G. FRANKFURT, THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS 11, 12-13 (1988) (contrasting first- and more abstract second-order preferences).

10. See in particular the reference to the law of race, *infra* Part IV.B. Of course, both the particular and principle may or may not motivate or even inspire us. See *infra* Part IV.B. Presumably they may both do so in different ways.

11. See Walter Sinnott-Armstrong, *Some Varieties of Particularism*, 30 METAPHILOSOPHY 1, 1 (1999).

12. See *id.* at 1-2 (stating that the doctrine of particularism spans from Aristotle to present-day particularists, who have further developed the view that certain moral judgments should not be based on either general principles or rules).

13. For the possibility of taking a corresponding view in the legal realm, see SUNSTEIN, *supra* note 1, at 194 (“[C]ase-by-case particularism has advantages over the creation and application of broad rules.”). But see Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1907-

varieties<sup>14</sup> of moral particularism, with different degrees of ambition of their claims.<sup>15</sup>

“Moral particularism” can thus mean various things. But our interest in moral particularism is driven by our concern for legal decisionmaking. Given our interests, we can describe moral particularism in several related ways, with no deep commitment to any single formulation. Just to develop the idea, we might say that moral particularism seeks to justify moral judgments in ways that minimize, even if they do not entirely eliminate, any reliance on moral principle.<sup>16</sup> Moral principles, even if they exist, should not guide, inspire, or validate our particular moral judgments.<sup>17</sup>

In saying even this much, however, we have already raised the question of what counts as a moral principle, and indirectly what should count, for our purposes, as a legal principle. Perhaps the legal equivalent of a moral principle should include not only legal principles in a narrow sense, but legal standards, rules, policies, and tests as well. This will depend upon how the idea of moral particularism is worked out.

A moral particularist need not deny that there might be at least one moral principle, properly defined and limited. The leading contemporary moral particularist, Professor Jonathan Dancy, instead “sees little if any role for moral principles.”<sup>18</sup> Dancy thus argues that “moral judgment can get along perfectly well without any appeal to principles.”<sup>19</sup> This seems less a denial of the possibility of one or more moral principles<sup>20</sup> than a claim that the quality of our individual or our collective moral life will

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09 (2006) (expressing discontent with Justice O’Conner’s “minimalist” jurisprudence and providing illustrations of particularist decisions).

14. See generally Sinnott-Armstrong, *supra* note 11 (providing the examples of analytic, metaphysical, epistemological, and methodological particularism).

15. See Harman, *supra* note 3, at 44.

16. See Sinnott-Armstrong, *supra* note 11, at 2. Particularists may be committed at least to the single moral rule that one should (morally) choose particularism over principlism in deciding a moral question.

17. See *id.*

18. DANCY, *supra* note 2, at 1.

19. *Id.*; see also Joseph Raz, *The Trouble with Particularism (Dancy’s Version)*, 115 MIND 99, 99 (2006) (reviewing DANCY, *supra* note 2) (per Dancy, “the possibility of moral thought does not depend on moral principles”). Dancy suggests “that morality can get along perfectly well without principles, and that the imposition of principles on an area that doesn’t need them is likely to lead to some sort of distortion.” DANCY, *supra* note 2, at 2. This formulation raises the possibility of some sort of affirmative harm flowing from recourse to moral principles.

20. *But cf.* Dancy, *supra* note 2 (“Moral Particularism, at its most trenchant, is the claim that there are no defensible moral principles, that moral thought does not consist in the application of moral principles to cases . . .”).

not suffer if we abandon the attempt to identify and apply relevant moral principles when moral judgments are required of us.

We can roughly define moral principlism, or moral generalism, in opposing terms. Thus moral principlism holds “either that specific moral truths have their source in general moral principles, or that reasonable or justified moral decisions and beliefs are based on the acceptance of general moral principles. Moral particularism rejects moral generalism.”<sup>21</sup> Given our interest in legal decisionmaking, we will be especially interested in how moral particularists make decisions—what we might call moral adjudications—as “[w]ithout principles, [a particularist] needs a robust theory of judgment.”<sup>22</sup>

On this crucial point of how moral judgments are to be made without reliance on moral rules, the particularists can offer some degree of clarification. Ultimately, the particularist often may be relying on a form of intuitionism.<sup>23</sup> In turn, an intuition is thought of as a moral judgment that does not follow logically from any set of premises the intuitionist holds and cannot be thus demonstrated to be true.<sup>24</sup> The intuition is still thought of as somehow true, self-evident, and the result of properly attending to the morally relevant features of the situation.<sup>25</sup>

The intuition upon which the particularist relies may be supplemented, if not prompted, by a number of devices and techniques that may not rely on moral principle. The moral particularist—like a legal particularist—can appeal to vivid and concrete images, specific analogies and analogous cases, fictional or hypothetical scenarios, fables, parables, anecdotes, stories, incidents, dreams, legends and myths, and narrative in general, for the sake of enhancing moral vision or insight.<sup>26</sup> More generally, Dancy points to the possibility of progress

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21. Harman, *supra* note 3, at 44.

22. Michael Lagewing, Book Review, 55 PHIL. Q. 684, 685 (2005) (reviewing DANCY, *supra* note 2).

23. For recent accounts of ethical intuitionism, see generally ROBERT AUDI, *THE GOOD IN THE RIGHT: A THEORY OF INTUITION AND INTRINSIC VALUE* (2004) (discussing the history of intuitionism and the principles that intuitionists believe define morality); *ETHICAL INTUITIONISM: RE-EVALUATIONS* (Philip Stratton-Lake ed., 2002) (summarizing the various theories of intuitionism); MICHAEL HUEMER, *ETHICAL INTUITIONISM* (2005) (exploring ethical intuitionism and discussing various concepts important to the study of intuitionism); and Jeff McMahan, *Moral Intuition*, in *THE BLACKWELL GUIDE TO ETHICAL THEORY* 92, 92-95 (Hugh LaFollette ed., 2000) (describing the difference between moral intuition and moral theories).

24. See DANCY, *supra* note 2, at 156; Lagewing, *supra* note 22, at 685.

25. See DANCY, *supra* note 2, at 156; Lagewing, *supra* note 22, at 685.

26. See MCKEEVER & RIDGE, *supra* note 2, at 149; DAVID MCNAUGHTON, *MORAL VISION: AN INTRODUCTION TO ETHICS* 204-05 (1988) (defending moral particularism). For the best-known “dream” reference for our purposes, see *infra* note 130 and accompanying text.

toward agreement as each contending advocate “brings to bear other situations that are both appropriately different from and also appropriately similar to the one before them.”<sup>27</sup> Doubtless the analogies, hypothetical stories, and other techniques of feeding intuition should strike us as relevant and somehow telling. But this does not prove that all such devices must be logically dependent for their very meaningfulness upon some broader principle.

However the idea of moral particularism is developed, is there any reason to believe that there cannot be a legal decisionmaking analogue, in the form of legal particularism? Is it not sometimes possible for judges to rely crucially on some of the intuition-prompting techniques cited above, including hypotheticals and analogies?<sup>28</sup> Certainly the basic terminology of particularism can thus seem apt in discussing legal issues.<sup>29</sup> So it is not surprising to find a philosopher encouraging us to extend the inquiry into particularism from the moral realm into the legal realm.<sup>30</sup>

Admittedly, it has sometimes been argued that legal analogies do not select and prioritize themselves, and that “to identify what count as relevant similarities and when two cases are sufficiently similar we must rely on something else, presumably a prior general rule.”<sup>31</sup> But not all

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27. Dancy, *supra* note 2. In the specifically legal context, see, for example, Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1186-96 (1999) (justifying the use of analogical reasoning by judges in the decisionmaking process) and Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 749-59 (1993) (comparing analogical reasoning to other theories used in the legal field). For reference to Dancy on narratives, see Timothy Chappell, *Jonathan Dancy: Ethics without Principles*, NOTRE DAME PHIL. REV., July 9, 2005, available at <http://ndpr.nd.edu/review.cfm?id=3161> (book review).

28. See, e.g., Sherwin, *supra* note 27, at 1187-89; Sunstein, *supra* note 27, at 759; see also BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 31 (1921) (providing a classic treatment); EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 5 (1949) (same); LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* 65-122 (2005) (providing a contemporary treatment).

29. See, for the use of the term “particularism” in one sense or another in legal contexts, Schauer, *Rules*, *supra* note 1, at 646 (“[M]any existing and justifiable forms of legal decisionmaking are more particularistic than rule-based” but “rule-based decisionmaking, just like particularistic decisionmaking, has a place in any plausible account of what law is.”). Professor Schauer goes on to raise the possibility of “rule-sensitive particularism.” *Id.* at 649-50; see also Schauer, *Perils of Particularism*, *supra* note 1, at 398 (choosing between an interpretation of Kalven’s scholarship in free speech law as either narrow-gauge, case-specific particularism, or grand theories and large categories).

30. See María Cristina Redondo, *Legal Reasons: Between Universalism and Particularism*, 2 J. MORAL PHIL. 47, 58 (2005).

31. Danny Priel, Book Review, 57 J. LEGAL EDUC. 579, 581 (2007) (reviewing WEINREB, *supra* note 28); see also Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 765 (2006) (reviewing WEINREB, *supra* note 28) (“One *always* requires a general understanding of some

use of analogy, and of every other technique priming a particularist judicial intuition, or the intuition itself, must be based on some principle, rule, or policy. We will instead be arguing for a typically symbiotic relationship in the law between particularism and principle, with the persuasive force of a legal argument sometimes exceeding that of the sum total of the particularist and principlist contributions.

Consider that many judicial outcomes rest on an assessment by a judge, or by independently-reflecting jurors, on the credibility of one or more witnesses or one or more items of testimony.<sup>32</sup> It seems questionable that all such intuitive determinations could be reduced entirely to one or more mutually consistent rules. It seems even more questionable that all of the decisionmakers would be able to articulate such rule or rules after the fact, let alone claim to have taken such a rule or rules as the sole basis of their decisionmaking. Even if so, such a rule or rules may not supply all of the persuasive force of the judicial outcome, even if it embodies all of the judicial outcome's logic. Riveting witness testimony, and its persuasive if not its purely logical force, may not always be reducible entirely to principle.

Or suppose, classically, that a judge is confronted with two women who each claim to be the mother of a particular child, in an era without DNA testing technology. Only one of the putative mothers appears willing to sacrifice her claim if necessary to promote the basic interests of the child. The judge, emotionally moved, awards custody of the child to that claimant.

Now, it seems easy enough to devise a principle, or several alternative principles, to account for the judge's decision. But for our purposes, it is still of interest if the judge honestly tells us that the decision was taken without conscious recourse to rule or principle, even if a full justification of the decision would require some such recourse.

Or suppose the judge, at the time of drafting the official case report,<sup>33</sup> actually consciously considered some principle, whether flawlessly formulated or not. Would it still not be possible that this "covering" principle was experienced by the judge as cold, distant, abstract, and unmotivating in this case, however useful the principle might be for logically justifying the decision to the public? Perhaps the intuitive, inarticulable, emotionally-affecting experience of one woman

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sort in order to determine relevant similarities. In a legal case it is an understanding of rules, principles, doctrines, and policies. It is they that do the work in reasoning by analogy.").

32. See Ann Bowen Poulin, *Credibility: A Fair Subject for Expert Testimony?*, 59 FLA. L. REV. 991, 1001 (2007).

33. Credit for this hypothetical goes to 1 *Kings* 3:16-28.

sacrificing her claim was actually far more motivating, and in that sense more explanatory, of the judicial result than any articulable principle.

The judge could thus have endorsed some principle—perhaps something like: “In an otherwise close case, give custody to the claimant who alone seems willing to make great sacrifices for the basic well-being of the child.” Some such principle, thus articulated, can sometimes itself be deeply moving, and powerfully motivating,<sup>34</sup> but need not be. A judge and a public might candidly admit to being far more moved by the story or the testimonial experience itself, at the level of particularist intuition, than by any covering principles at a more general or abstract level. The principle might, in a given case, leave everyone cold. And for many legal purposes, this might well be important.

Someone might still be troubled, though, by an attempt to map moral particularism onto the legal landscape. Many leading contemporary jurists seem to subscribe to one variety or another of what is called legal positivism.<sup>35</sup> Does legal positivism pose a serious obstacle to transposing moral particularism, in some fashion, onto the legal landscape?

We can hardly think so. Let us take legal positivism<sup>36</sup> to require some sort of separation between law and morals, such that the existence of a law or legal system is independent of any moral quality thereof, or at least from any moral quality not embodied in the social institutions that generate the law. Of course, constitutional law may refer to reasonableness,<sup>37</sup> to cruelty,<sup>38</sup> to due process,<sup>39</sup> and to equal protection,<sup>40</sup>

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34. Consider, perhaps, the Kantian injunction to “use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.” IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 38 (Mary Gregor ed. & trans., Cambridge Univ. Press 1997) (1785).

35. See generally MATTHEW H. KRAMER, *IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS* (1999) (an overview of the arguments in favor of legal positivism); W. J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994) (a defense of legal positivism and the theories it incorporates); Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982) (distinguishing between different forms of legal positivism).

36. See sources cited *supra* note 35.

37. See, e.g., *Graham v. Connor*, 490 U.S. 386, 399 (1989) (“The Fourth Amendment inquiry is one of ‘objective reasonableness’ under the circumstances, and subjective concepts like ‘malice’ and ‘sadism’ have no proper place in that inquiry.”).

38. See, e.g., *Weems v. United States*, 217 U.S. 349, 368 (1910) (“What constitutes a cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous, torture and the like.”).

39. See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 285 (1936) (“[T]he freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law.”).

so the separation between law and morals may in some respects be tenuous.

In any event, we have instances in which a judge can legitimately take something like “evolving standards of decency,”<sup>41</sup> or “fundamental fairness,”<sup>42</sup> or the “collective conscience”<sup>43</sup> of the public, or a “shocks the conscience”<sup>44</sup> standard directly into account in deciding cases. There seems all the room necessary for morality and moral particulars even in a landscape of legal positivism. But we need not, for our purposes, insist on anything like even this. Our interest is mostly in how the particularism itself in moral particularism translates into the legal realm, with or without retaining the moral element of moral particularism. An enhanced understanding of particularism and principlism in the laws can draw, as we will see below, from the merely particularist, as distinct from the specifically moral, dimension of moral particularism.

### III. COMPARING PARTICULARISM AND PRINCIPLISM: SOME INCONCLUSIVE SKIRMISHES

We can at this point consider more fully the roles and relationships in which moral and legal particularism and principlism may engage. We shall first see contrasts, and then some important symbiosis, before we reach any ultimate accounting. But we should first ensure the levelness of the playing field. We have referred above to particularism as typically involving some form of intuition.<sup>45</sup> We shall also refer briefly to the idea of intuitionism in our concluding section.<sup>46</sup> For now, though, it is important to avoid improperly biasing the comparisons below.

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40. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (“The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises.”).

41. See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008). This standard was enunciated in *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (The Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

42. See, e.g., *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001) (“[T]he Due Process and *Ex Post Facto* Clauses safeguard common interests—in particular, the interests in fundamental fairness . . .”).

43. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (arguing that, in determining which rights are fundamental, judges should look to the collective conscience of the people).

44. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (citing *Rochin v. California*, 342 U.S. 165, 172-73 (1952)) (explaining that, in *Rochin*, the Court found “the forced pumping of a suspect’s stomach enough to offend due process as conduct that ‘shocks the conscience’”).

45. See *supra* notes 23-28 and accompanying text.

46. See *infra* Part V.

Particularism is indeed typically dependent upon the exercise of intuition. But not all intuitions, to be fair, are particularist intuitions. Some intuitions are intuitions of broader principle.

Or at least so some intuitionists have argued. There are thus particularist intuitionists, and principlist intuitionists. Among modern intuitionists, consider, for example, the particularist intuitionism of Professor E.F. Carritt: “I morally apprehend that I ought now to do this act and then intellectually generalize rules.”<sup>47</sup> More elaborately, “no number of moral rules will save us from exercising intuition; for a rule can only be general, but an act must be particular, so it will always be necessary to satisfy ourselves that an act comes under the rule, and for this no rule can be given.”<sup>48</sup> Professor H.A. Prichard concurred,<sup>49</sup> and argued that “[t]he sole value of formulating the principle is that it brings out . . . just that feature of the act which constitutes it an obligation.”<sup>50</sup> Thus, there are some intuitionists who emphasize the particular.

Intuitionists have not always been clear on the respective roles of particularized intuitions and of more general principlist intuitions.<sup>51</sup> But some leading modern intuitionists, such as Sir David Ross, have clearly emphasized the decisive role of principlist intuitions. Ross argued that “[o]ur judgments about our actual duty in concrete situations have none of the certainty that attaches to our recognition of the general principles of duty.”<sup>52</sup>

For Ross, principlist intuitions, despite their importance, only gradually come to be self-evident to us, through accumulated experience and reflection. Thus “[w]e find by experience that this couple of matches and that couple make four matches . . . and by reflection on these and similar discoveries we come to see that it is the nature of two and two to make four.”<sup>53</sup> And in the moral realm, Henry Sidgwick maintained that “[t]here are certain absolute practical principles, the truth of which,

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47. E.F. CARRITT, *THE THEORY OF MORALS: AN INTRODUCTION TO ETHICAL PHILOSOPHY* 116 (1928).

48. *Id.* at 114.

49. See H.A. PRICHARD, *MORAL WRITINGS* 5 (Jim MacAdam ed., 2002) (“We first recognize the particular obligation and then by reflecting on it discover the principle . . .”).

50. *Id.*; see also C.D. BROAD, *FIVE TYPES OF ETHICAL THEORY* 282 (7th impression 1956) (“Reason needs to meet with concrete instances of fitting or unfitting intentions and emotions before it can rise, by Intuitive Induction, to the insight that *any* such intention or emotion would necessarily be fitting (or unfitting) in *any* such situation.”).

51. See HENRY SIDGWICK, *THE METHODS OF ETHICS* 103 (7th ed., Hackett Publ’g Co. 1981) (1907).

52. W.D. ROSS, *THE RIGHT AND THE GOOD* 30 (Philip Stratton-Lake ed., 2002) (1930).

53. *Id.* at 32-33.

when they are explicitly stated, is manifest.”<sup>54</sup> The problem, according to Sidgwick, is that such principles “are of too abstract a nature, and too universal in their scope, to enable us to ascertain by immediate application of them what we ought to do in any particular case; particular duties have still to be determined by some other method.”<sup>55</sup>

We might then wonder about the character of our own moral intuitions. Suppose, for example, that we came upon a group of children inflicting gratuitous pain on an animal. If we have an intuition of moral wrongness, does the intuition seem to be of the wrongness of the particular act before us, or more broadly of the wrongness of the general kind of act, at the level of principle? We can leave this question unresolved, however. All we need is that the idea of intuition itself does not seem unfairly biased as between particularism and principlism.

As we examine particularism and principlism on a level playing field, their contrasts, interactions, and dependencies quickly begin to emerge. It is often taken for granted, to begin with, that in the words of Justice Holmes, “[g]eneral propositions do not decide concrete cases.”<sup>56</sup> This would suggest a need for crucially supplementing general rules or principles, in concrete application, as Holmes’ contemporary Henry Sidgwick was arguing in the realm of ethics.<sup>57</sup>

Justice Felix Frankfurter later complicated Justice Holmes’ famous but terse observation. According to Justice Frankfurter, whether general propositions decide concrete cases “often depends on the strength of the conviction with which such ‘general propositions’ are held.”<sup>58</sup> Suppose we have a case of first impression in which we must decide whether racial segregation in the use of Twenty-Fourth Century public transporter facilities is permissible. Can we really say that the particularities of future transporter technology are likely to make a significant difference? Is the vagueness of general rules really significant here? Doesn’t the general proposition do the crucial work even in this more specific case?

On the other hand, Justice Frankfurter acknowledged with Justice Holmes that “the impact of an immediate situation may lead to deviation from the principle.”<sup>59</sup> As particularists point out, neither morality nor our

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54. See SIDGWICK, *supra* note 51, at 379.

55. *Id.*

56. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

57. See *supra* notes 54-55 and accompanying text.

58. *Harris v. United States*, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting), *overruled* by *Chimel v. California*, 395 U.S. 752 (1969).

59. *Id.*

common law is strictly codifiable.<sup>60</sup> Judge Richard Posner elaborates upon Justice Holmes by observing that “[j]udges expect their pronouncements to be read in context.”<sup>61</sup> This tends to promote the role of legal particularism. As a further complication, a general proposition is sometimes subordinated not to another principle at the same level of generality, but to an even more general principle.<sup>62</sup>

There thus seems to be no consensus on the priority of either general rules or particular judgments that can be drawn from Justice Holmes’ observation on general propositions and the case commentary thereon. Nor does the idea of the holding or the *ratio decidendi*<sup>63</sup> of a case offer us any uncontroversial resolution of the conflicts between particularism and principlism in the law. It is at best unclear that interesting reported legal cases have determinate holdings, at least at the time of decision.<sup>64</sup>

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60. The uncodifiability of law and of morality is recognized, without conceding the truth of particularism, in Raz *supra* note 19, at 118 and Sinnott-Armstrong, *supra* note 11, at 8. For the problems of excessive attempts at codification, see DANCY, *supra* note 2, at 11-12.

61. *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005). Judge Posner may here be endorsing, at most, some sort of context-bound principlism; but reading him in this way may itself inadequately respect the narrow contextual purposes and limits of Judge Posner’s language.

62. See *Gallagher v. Gallagher*, 212 P.2d 746, 750 (Or. 1949) (“[G]eneral rules frequently do not decide specific cases. Moreover, all rules of the kind just mentioned must yield to the one . . . that the welfare of the child is of supreme importance.”).

63. The debate over the nature and determining of the necessary rule or justification of a case is a longstanding one. See generally A.L. Goodhart, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 117 (1959) (clarifying the idea that the *ratio decidendi* is gleaned from a judge’s conclusions of the material facts of a case); A.W.B. Simpson, *The Ratio Decidendi of a Case*, 22 MOD. L. REV. 453 (1959) (arguing that there are serious flaws in Goodhart’s theory of the *ratio decidendi* of a case).

64. As a high profile example, consider the ongoing debate over both the scope of and the precise constitutional test adopted in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), in which the Court found that, under the specific facts of the case, two consenting adults in the privacy of their home are protected by the right to liberty under the Due Process Clause of the Fifth and Fourteenth Amendments. See, e.g., *Seegmiller v. Laverkin City*, 528 F.3d 762, 771 (10th Cir. 2008) (“But nowhere in *Lawrence* does the Court describe the right at issue in that case as a fundamental right or fundamental liberty interest. It instead applied rational basis review to the law and found it lacking.”); *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 813-18 (9th Cir. 2008) (summarizing the holding of *Lawrence* and concluding that the Court did not actually apply a rational basis analysis in deciding the case); *Cook v. Gates*, 528 F.3d 42, 48-56 (1st Cir. 2008) (collecting useful authorities related to *Lawrence*). Another pertinent example may be made of the status of *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that a state’s prohibition on assisted suicide does not violate the Fourteenth Amendment) after *Lawrence*. See generally, Symposium, *Can Glucksberg survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 106 MICH. L. REV. 1453 (2008) (collecting the thoughts of scholars such as Erwin Chemerinsky, Yale Kamisar, and Steven D. Smith on the future viability of *Glucksberg* after the Court’s decision in *Lawrence*). In a different way, the scope of the holding of the admittedly unusual alienage education case of *Plyler v. Doe*, 457 U.S. 202, 227-30 (1982), affirming the right of undocumented children to public education, remains murky. See generally Maria L. Ontiveros & Joshua R. Drexler, *The Thirteenth*

Nor is it clear that case holdings should be construed narrowly or broadly, independent of context. The classical judicial defense of narrowness, modesty, and avoidance of unnecessarily broad judicial pronouncements is Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority*.<sup>65</sup> *Ashwander* narrowness, however, is unfortunately largely irrelevant to our present concerns. The multiple dimensions of *Ashwander* narrowness and avoidance actually cut across our concern for particularism and principlism in the law. *Ashwander* narrowness often operates merely to help a court choose between principlist approaches, and not to choose, say, a particularist approach over any principlist approach.<sup>66</sup> If *Ashwander* tells us, for example, to decide a case on statutory grounds without reaching some presumably broader constitutional issue,<sup>67</sup> we may in either case still be opting for a principlist, as opposed to a particularist, approach. And it is possible that the avoided constitutional principle might in some sense have been narrower or less controversial than the broad particularist vision underlying, say, an important civil rights statute that is used to decide the case.

A similar situation exists with respect to the related "judicial minimalism" discussed by Professor Cass Sunstein.<sup>68</sup> Minimalism in this sense involves a judicial preference for narrowness or fact-attunement in judicial rulings.<sup>69</sup> Judicial minimalism will often not be preferable to broader, more general rules, especially if we factor in losses in legal transparency, legal guidance, legal predictability, and even equality when following minimalism in inappropriate contexts.

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*Amendment and Access to Education for Children of Undocumented Workers: A New Look at Plyler v. Doe*, 42 U.S.F. L. REV. 1045 (2008) (observing that the holding of *Plyler* is doctrinally shaky, suffers from problems of local law enforcement, and may fare better under a Thirteenth Amendment analysis).

65. 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring); see also Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 83, 89 (noting the significant costs of *Ashwander*'s straining for narrowness and issue avoidance).

66. See *Ashwander*, 297 U.S. at 347-48 (Brandeis, J., concurring).

67. See *id.*

68. See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 9-23 (1999) (describing judicial minimalism and minimalists' tendency to make judicial decisions based on the facts of a case rather than a general rule); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 362-86 (2006) (summarizing minimalism and describing key arguments for and against Burkean minimalism, which is summarized as a preference for incrementally constructed constitutional principles with deference to established traditions). Incidentally, we think of Edmund Burke as distrusting broad, abstract political and moral systemization, as in Jeremy Bentham, more than consistently resisting any recourse to principle.

69. See SUNSTEIN, *supra* note 68, at 10-11; Sunstein, *supra* note 68, at 362; Sunstein, *supra* note 13, at 1907-08.

As with *Ashwander* narrowness,<sup>70</sup> however, the problem from our standpoint is the crosscutting between the categories of minimalism and non-minimalism on the one hand and particularism and principlism on the other. The minimalist may take a narrower principle to be preferable, rightly or wrongly, to a broader principle.<sup>71</sup> But, again, each of the minimalist legal principles, rules, or standards, along with their broader counterparts, embody a principle in our sense, and thus a principlist is distinct from a particularist approach to the judicial decision. And it is also possible that a vivid particularist vision or image, as in a civil rights context, might inspire and motivate exceptionally broad legal change.

Legal particularism is sometimes targeted, however, by a different sort of critique. The critique in question, briefly put, is that principles operate as a useful constraint on “the all too familiar tendency to engage in special pleading and rationalization”<sup>72</sup> on behalf one’s own, or a favored group’s, interests. Otherwise put, “with particularism as a decision procedure, people would persuade themselves that what they wanted to do was, in the particular circumstances, morally allowed.”<sup>73</sup> However appealing some may take this critique to be, it seems the sort of critique which ought to be alert for empirical evidence where available.

One problem with this critique of particularism is that any principle that is sensitive enough to be generally appealing may, in its sensitivity to circumstances, also be vulnerable to manipulation in favor of self or favored groups.<sup>74</sup> And one person’s consistently principled judge may be another person’s merely ideologically-biased judge. A judge who minimizes principle in favor of particularized intuition could at the same time also display rigidity, and not just capriciousness.<sup>75</sup> In any event, even if either particularism or principlism has some overall advantage in this regard, it seems that neither has a monopoly as an instrument of judicial self-indulgence. In the meantime, without real evidence, it is not clear that particularism is really more vulnerable to self-interested manipulation.

It might then be tempting to try to score points for either legal particularism or legal principlism by linking one approach to any

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70. See *supra* notes 66-67 and accompanying text.

71. See *supra* notes 68-69 and accompanying text.

72. MCKEEVER & RIDGE, *supra* note 2, at 199.

73. Brad Hooker, *Moral Particularism and the Real World*, in CHALLENGING MORAL PARTICULARISM, *supra* note 2, at 12, 27; see SIDGWICK, *supra* note 51, at 214; Chappell, *supra* note 27.

74. MCKEEVER & RIDGE, *supra* note 2, at 199.

75. See *id.* at 207.

advantages of either facial or else as-applied challenges in the law.<sup>76</sup> The initial hope might be that as-applied challenges, as assumedly narrower than facial challenges,<sup>77</sup> might link up usefully with the more particularist forms of legal decisionmaking.

But even if we set aside all the complications, we are ultimately left with no consistent linkages between facial challenges and principlist adjudication, or between as-applied challenges and particularist adjudication. The most obvious problem here is that we can easily imagine a broad statute being struck down facially, in its entirety, not on grounds of principle, but on visionary, intuitive, narrativist, romantic, or imagistic grounds apart from principle. And in contrast, we can even more easily imagine a particular application of a statute as applied being struck down as violating some remarkably broad principle or rule.<sup>78</sup>

A more interesting possibility, though, involves the idea that some or all principles controversially claim absoluteness or exceptionless universality within their proper scope of applicability. We find related disputes over whether any particular moral or legal consideration could count in favor of one outcome in some contexts, but against that same outcome in other contexts. The idea is that if some single consideration, such as wealth maximization or increasing pleasure, counts in favor of an outcome in some contexts, but against that outcome in other contexts, this change in the “polarity” of that consideration might impeach the whole idea of principled decisionmaking.

Thus it is said, first, that “the question whether universal, exceptionless moral principles govern morality . . . lies at the heart of the debate between particularism and generalism.”<sup>79</sup> And it is then argued that some consequence or “feature that is a reason in one case may be no

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76. For discussions illustrating the murkiness and unsettledness of the distinction, see *Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175 (1996) (mem.) (Stevens, J.) (denying certiorari); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 294 (1994); and Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1336-37 (2000).

77. See, e.g., *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1146 (10th Cir. 2007); *McGuire v. Reilly*, 386 F.3d 45, 61 (1st Cir. 2004).

78. Consider a public school district rule prohibiting the wearing of hats—typically, baseball caps—in class. Swept up in the dragnet is perhaps a single individual who wears what is within the definition of “hat,” as a matter of a binding and well-recognized religious requirement. We can imagine a judge striking down the rule only as thus applied, but on majestically broadly principled grounds, referring crucially to the free exercise of religion, liberty of conscience, respect for the most fundamental commitments of the individual, and such.

79. Vojko Strahovnik, *Introduction: Challenging Moral Particularism*, in CHALLENGING MORAL PARTICULARISM, *supra* note 2, at 1, 1.

reason at all, or even an opposite reason, in another.”<sup>80</sup> But the most reasonable view of such matters, it turns out, leaves sensible versions of both particularism and principlism on the table in both moral and legal contexts. No clear advantage for particularism or principlism in the law seems evident here.

It is thus certainly common enough for moral philosophers<sup>81</sup> and legal decisionmakers<sup>82</sup> to refer to universal rules. But it is not always clear how much support there is for the idea of genuinely universal and exceptionless moral<sup>83</sup> or legal<sup>84</sup> rules. Thomas Aquinas classically observed that “although there is necessity in the general principles [of the natural law], the more we descend to matters of detail, the more frequently we encounter defects.”<sup>85</sup> Some leading writers have endorsed, for example, even the intentional targeting of innocents in cases of genuine “supreme emergency.”<sup>86</sup>

The principlist thus may or may not wish to concede “the particularist point that we can always find an exception to any moral principle.”<sup>87</sup> Consider, for example, one possible universal rule: that

80. DANCY, *supra* note 2, at 7.

81. See, e.g., JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH 2* (1991); IMMANUEL KANT, *LECTURES ON ETHICS 203* (Peter Heath trans., Peter Heath & J.B. Schneewind eds., 1997) (“Whoever may have told me a lie, I do him no wrong if I lie to him in return, but I violate the right of mankind; for I have acted contrary to the condition, and the means, under which a society of men can come about, and thus contrary to the right of humanity.”); Brad Hooker, *Moral Particularism: Wrong and Bad*, in *MORAL PARTICULARISM*, *supra* note 2, at 1, 8 (“[G]eneralists are right to say that at least all non-sadistic pleasure is a moral plus.”); cf. VICTOR HUGO, *THE HUNCHBACK OF NOTRE DAME 228-31* (Walter J. Cobb trans., 1965) (narratively illustrating the negative “polarity” of the crowd’s sadistic pleasure).

82. See, e.g., *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 452 F.3d 1284, 1285 (11th Cir. 2006) (Barkett, J., dissenting) (“[I]t is clear that there exists a universal, definable, and obligatory prohibition against cruel, inhuman, or degrading treatment or punishment . . .”).

83. See, e.g., KANT, *supra* note 81, at 204 (“But if, in all cases, we were to remain faithful to every detail of the truth, we might expose ourselves to the wickedness of others, who wanted to abuse our truthfulness.”); ALLEN W. WOOD, *KANT’S ETHICAL THOUGHT 87-88* (1999); see also G.E. MOORE, *PRINCIPIA ETHICA 204* (Thomas Baldwin ed., Cambridge Univ. Press 1993) (1903) (“We can secure no title to assert that obedience to such commands as ‘Thou shalt not lie’ . . . is *universally* better than the alternative[] of lying . . .”).

84. See *Texas v. Johnson*, 491 U.S. 397, 430 (1989) (Rehnquist, C.J., dissenting) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)); cf. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (“All rights tend to declare themselves absolute to their logical extreme.”).

85. THOMAS AQUINAS, *1 SUMMA THEOLOGICA*, pt. I-II, q. 94, art. 4, at 1011 (Fathers of the English Dominican Province, trans., Benzinger Bros., Inc. 1947).

86. See Michael Walzer, *World War II: Why Was This War Different?*, 1 *PHIL. & PUB. AFF.* 3, 18-19 (1971). For discussion, see R. George Wright, *Combating Civilian Casualties: Rules and Balancing in the Developing Law of War*, 38 *WAKE FOREST L. REV.* 129, 158-68 (2003).

87. Richard Holton, *Principles and Particularisms*, 76 *ARISTOTELIAN SOC.* 191, 207 (2002).

judges should seek to be impartial. Judges should strive for neutrality, but judges might also strive to be friends of the outcast. Or a more humble example: Desire and ambition in a job candidate seem positive qualities, except when they are not. Or else: Is even slavery really a matter of utterly exceptionless, universal rules? What then is the moral status of buying slaves, if the buyer thereby immediately and deliberately brings an end to the entire practice of slavery? Each of these cases may arguably amount to an exception to a principle of one sort or another. And in each, the moral “polarity” of the act or quality may seem to “reverse” with the exception.

What does seem clear, though, is that the moral and legal principles discussed above can still be genuine principles, of distinctive value in moral and legal decisionmaking, even if they involve exceptions.<sup>88</sup> Suppose we do accept the “supreme emergency” exception to the rule against the intentional military targeting of civilians.<sup>89</sup> But let us suppose as well that every military combatant scrupulously observed what remained of the rule, in all non-supreme emergency circumstances. Would we not think of the remaining rule as not only a broad genuine rule, or principle, but as of great theoretical and practical importance as such?

As well, under those assumed circumstances, would we find the limited reversal of moral or legal ‘polarity’ to really undermine the usefulness of the very idea of a rule or principle?<sup>90</sup> Suppose we somehow determined that in a truly exceptional instance, deliberately inflicting a civilian casualty could be morally or legally justified. Could that justification itself not be a genuinely principled, if complex, “all things considered” justification? Would we not still want to say that even if deliberately inflicting that civilian casualty was permissible, it was in such a case nonetheless deeply regrettable? Could we not still think of intending civil casualties as generally *prima facie*<sup>91</sup> morally and legally wrong?

More generally, then, the exceptions to moral and legal principles, and the variable moral and legal significance of some considerations

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88. See Mark Norris Lance & Maggie Little, *From Particularism to Defeasibility in Ethics*, in CHALLENGING MORAL PARTICULARISM, *supra* note 2, at 53, 54 (referring to the “widespread assumption that generalizations must be exceptionless if they are to do genuine and fundamental theoretical work . . .”).

89. See *supra* note 86 and accompanying text.

90. For discussion, see David Bakhurst, *Ethical Particularism in Context*, in MORAL PARTICULARISM, *supra* note 2, at 157, 170 and Hooker, *supra* note 81, at 10.

91. For a classic treatment of *prima facie* or conditional duties, see ROSS, *supra* note 52, at 19-20.

under different circumstances, do not even begin to decide the debate between principlism and particularism in favor of the latter.

#### IV. THE ROLES OF PRINCIPLE AND THE PARTICULAR: DISTINCTION AND SYMBIOSIS

##### *A. Distinction and Symbiosis in General*

Decisionmaking is often said to begin with the particular.<sup>92</sup> As the philosopher John McDowell puts it, “one knows what to do, if one does, not by applying universal principles but by being a certain kind of person: one who sees a situation in a certain distinctive way.”<sup>93</sup> In the legal realm, Justice Cardozo wrote that the common law “method is inductive, and it draws its generalizations from particulars.”<sup>94</sup> From the legal particulars, though, a legal principle that unifies and rationalizes the particulars then tends to arise and press itself forward.<sup>95</sup> In fact, while Justice Cardozo himself may begin with the particular, in the end he sees the law as striving for something like the universalism of Immanuel Kant.<sup>96</sup>

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92. See, e.g., *id.* at 32; Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 98 (2006) (“Virtue ethics is famous for embracing ‘particularism’—the notion that judgments about particular cases take priority over abstract principles.”). Of course, virtue itself could easily involve acting courageously, honestly, or prudently, consistently and in all contexts, despite temptations and disincentives. *But see* Hooker, *supra* note 73, at 23 (“I flatly deny that moral knowledge always does start off with judgments about particular cases.”).

93. John McDowell, *Virtue and Reason*, in VIRTUE ETHICS 141, 162 (Roger Crisp & Michael Slote eds., 1997). Again, though, as the example of honesty or truth-telling illustrates well, the exercise of a moral virtue may be difficult to distinguish in practice from faithful, consistent adherence to principle. See KANT, *supra* note 81, at 204. In the legal realm, see the discussion of Frank Michelman’s particularism in Gerald Dworkin, *Philosophy, Law, and Politics*, 72 IOWA L. REV. 1355, 1356-57 (1987).

94. CARDOZO, *supra* note 28, at 23.

95. See *id.* at 31; cf. FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 153-54 (1960) (arguing that law must in some sense be general and impersonal); see also Dworkin, *supra* note 93, at 1357 (asserting that principles have a role in the law where judges must give public reasons for their decisions).

96. For case references to Cardozo’s dedication to Kantian universalism, see, for example: *Finwall v. City of Chicago*, 239 F.R.D. 494, 503-04 (N.D. Ill. 2006); *Cosmopolitan Homes, Inc. v. Weller*, 663 P.2d 1041, 1046, 1051 (Colo. 1983) (Rovira, J., dissenting) (“[The judge] is to draw his inspiration from consecrated principles.”) (quoting CARDOZO, *supra* note 28, at 139-41); and *Reiss v. Financial Performance Corp.*, 279 A.D.2d 13, 23 (N.Y. App. Div. 2000) (Saxe, J., dissenting in part), *aff’d in part and modified in part, remitted by, certified question answered by* 97 N.Y.2d 195 (2001). Of course, universalism in the law is tempered with equitable concerns tracing back to at least Aristotle. See ARISTOTLE, *NICOMACHEAN ETHICS* 100 (Roger Crisp ed. & trans., 2000); Solum, *supra* note 92, at 99. Equity itself, however, crucially involves and depends upon clearly recognized principles. See, e.g., *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 645 (1835) (referring to

Universalism, however, then itself requires the tempering and limitations of equity.<sup>97</sup> But equity is in its own turn itself largely a matter of principle.<sup>98</sup> Considering these various dizzying turns in the argument gives us some idea of the reciprocal dependence between principlism and particularism in the law.

The philosopher Martha Nussbaum, along with others,<sup>99</sup> begins with the “priority of the particular.”<sup>100</sup> Nussbaum argues, in a way that suggests mutual dependence,<sup>101</sup> that “[t]he general is dark, uncommunicative, if it is not realized in a concrete image . . . . In the end the general is only as good as its role in the correct articulation of the concrete.”<sup>102</sup> But along with this apparent subordination of principle, Professor Nussbaum argues that “a concrete image or description would be inarticulate, in fact mad, if it contained no general terms.”<sup>103</sup> Taken as a whole, then, Professor Nussbaum’s argument suggests a reciprocal dependency between principle and particular.<sup>104</sup>

A reciprocal dependency between principle and particular would not necessarily completely erase any claimed advantages of either approach. It has been claimed, for example, that “[e]thical generality facilitates the teaching of ethics to children, the guidance of moral decisions, the justification of moral judgments, and the formulation of laws and social policies.”<sup>105</sup> Or one might again claim that “the adoption of a principle raises the stakes in situations in which we might be tempted to violate the principle knowingly, and can provide further

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“the principles of equity”); *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 837 (Can.) (“The great advantage of ancient principles of equity is their flexibility . . . .”); Thomas M. Franck & Dennis M. Sughrue, *The International Role of Equity-as-Fairness*, 81 GEO. L.J. 563, 563 (1993) (equity has “come to represent a set of principles designed to critique the law and ensure fairness among nations”). While law and equity are thus hardly respective synonyms for principle and particularism in the broader law, the relationship between law and equity begins to suggest the mutual dependence of principlism and particularism in the law.

97. See *supra* note 96; see also *supra* note 83 (noting Immanuel Kant’s concessions on the scope and status of lying).

98. See *supra* note 96. But see Redondo, *supra* note 30, at 67-68 (asserting the standard assumption that particularism is especially associated with equity, at least in an informal sense).

99. See *supra* note 92.

100. MARTHA C. NUSSBAUM, *LOVE’S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* 93 (1990); see also Andrew Gleeson, *Moral Particularism Reconfigured*, 30 PHIL. INVESTIGATIONS 363, 363 (2007) (“particular cases have priority over rules (or ‘principles’ . . . .”).

101. See *infra* Part IV.B (discussing the mutually dependent interaction of principle and particular in the context of the law of race).

102. NUSSBAUM, *supra* note 100, at 95.

103. *Id.*

104. See *id.* at 93-96.

105. Robert Audi, *Ethical Generality and Moral Judgment*, in CHALLENGING MORAL PARTICULARISM, *supra* note 2, at 31, 31.

motivation to act in accordance with the principle.”<sup>106</sup> These claimed advantages, if real, might hold even though principle and particular in the law are crucially mutually dependent.

On the other hand, it has been claimed that principlism can be vulnerable to decisionmaking that is insensitive, mechanical,<sup>107</sup> morally blind,<sup>108</sup> or “rule fetishist.”<sup>109</sup> And it has also been observed, disturbingly, that rules are expected to be obeyed in at least some cases where the scope of the rule is either over-inclusive or under-inclusive of the underlying justification or reason for the rule.<sup>110</sup> To the extent that these considerations argue for particularism over principlism in the law, they also might survive recognizing the mutual dependence of particularism and principlism.

The choice between legal particularism and legal principlism must take all such contrasting considerations somehow into account. But even if we take any of the above claimed advantages to be real and substantial, we must still put any such advantages in the context of the mutual dependencies of legal particularism and principlism we have begun to illustrate above.<sup>111</sup> Ultimately, the mutual dependencies seem more important and clearer than any of the asserted advantages. To more fully appreciate the nature and importance of the symbiotic relationships involved, we should consider the roles of particularism and principlism in the obviously crucial context of the historical struggle against slavery, segregation, and racial discrimination. In this context, we shall see the symbiosis of particularism and principlism as particularly clear and important.

*B. Race and the American Legal Argument:  
Universal Principles and Particular “Badges and Incidents”*

One hint at the mutual interdependence of particularism and principlism in this context lies in the fact that we can hardly imagine a more particularized approach than through the remarkably concrete

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106. MCKEEVER & RIDGE, *supra* note 2, at 205. For related discussion, see *supra* notes 72-75 and accompanying text.

107. See Gleeson, *supra* note 100, at 365.

108. See *id.*

109. See *id.* (defining “rule-fetishism”); Bakhurst, *supra* note 90, at 157, 169.

110. See Larry Alexander, *Can Law Survive the Asymmetry of Authority?*, 19 QUINNIPIAC L. REV. 463, 465-77 (2000); Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1195-96 (1994); see also Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953, 996-1003 (1995) (proposing multi-factor balancing tests to avoid the simultaneous under-inclusiveness and over-inclusiveness of rules).

111. See *supra* Part IV.A.

image or analogy<sup>112</sup> of a “badge,” as in the “badges and incidents”<sup>113</sup> of slavery, while at the same time there can hardly be more clearly principled language than that of the Thirteenth Amendment.<sup>114</sup> In this crucial context, the techniques of legal particularism and principlism are not simply rivals, but complementary techniques, generating a more powerful effect jointly than either could generate alone.<sup>115</sup>

In fact, particularism and principlism in the campaign against racial inequality occasionally involve an intertwining.<sup>116</sup> We see this, for example, in the speeches and writing of Frederick Douglass. There is the particularism of Douglass as he departs from England to join his American brethren in seeking Emancipation: “I go to suffer with them; to toil with them; to endure insult with them; to undergo outrage with them; to lift up my voice in their behalf . . . .”<sup>117</sup> But Douglass could also focus his audience’s attention on unmistakable, undiluted principle: “I am for the ‘immediate, unconditional, and universal’ enfranchisement of the black man, in every State in the Union.”<sup>118</sup>

We might well think of the work of Douglass’ contemporary, Harriet Beecher Stowe, as the epitome of particularist moral and legal argument. *Uncle Tom’s Cabin*, immensely widely read since its publication,<sup>119</sup> has been thought “the single most influential book in

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112. See *supra* note 28 and accompanying text.

113. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968); *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

114. See U.S. CONST. amend. XIII, § 1 (“[N]either slavery nor involuntary servitude . . . shall exist within the United States . . .”).

115. Something of this can be drawn from William Wilberforce’s belief that while the logic and rhetoric of natural rights can be effective, vivid and detailed description of concrete abuses, in a particularist fashion, can be even more motivating. See William Wilberforce, *An Appeal to the Religion, Justice, and Humanity of the Inhabitants of the British Empire, in Behalf of the Negro Slaves of the West Indies*, in *SLAVERY IN THE WEST INDIES* 1, 7-11 (Negro Univ. Press 1969) (1823).

116. Intertwining and close juxtaposing of principle and particular are clearly different from the middle ground possibilities referred to *supra* at text accompanying note 5.

117. See Frederick Douglass, *Farewell Speech to the British People, at London Tavern, London, Eng. (Mar. 30, 1847)*, in PHILIP S. FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: EARLY YEARS 1817-1849*, at 206, 232 (1950); see also Frederick Douglass, *The Church and Prejudice, Speech Delivered at the Plymouth Church Anti-Slavery Society (Dec. 1841)*, in FONER, *supra*, at 103, 104 (discussing observations of racism in northern churches).

118. Frederick Douglass, *What the Black Man Wants, Speech at the Annual Meeting of the Massachusetts Anti-Slavery Society in Boston (Apr. 1865)*, in PHILIP S. FONER, *4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: RECONSTRUCTION AND AFTER* 157, 158 (1955).

119. See Bryan F. LeBeau, “*She Told the Story, and the Whole World Wept*,” 38 AM. Q. 668, 670 (1986) (book review).

American history.”<sup>120</sup> In the words of the poet Paul Laurence Dunbar, referring to Stowe, “[s]he told the story, and the whole world wept.”<sup>121</sup>

And yet Stowe intersperses broad principle with particularist storytelling.<sup>122</sup> Perhaps there is a clue to Stowe’s reliance on both approaches in her rhetorical question: “What is freedom to a nation, but freedom to the individuals in it?”<sup>123</sup> This question itself seems to join principle and particular. Stowe then moves immediately to the concrete and particularist meaning of freedom for the character George Harris.<sup>124</sup> But it should also not be entirely surprising that the work’s original subtitle was the utterly principlist—almost Kantian—“The Man That Was a Thing.”<sup>125</sup>

We also see something of a combination of particularist and principlist strands in Justice Harlan’s noted dissenting opinion in *Plessy v. Ferguson*.<sup>126</sup> Consider, for example, his image-based observation that “[t]he destinies of the two races . . . are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.”<sup>127</sup> There are some limited particularist elements as well in *Brown v. Board of Education*,<sup>128</sup> but *Brown* leaves us most distinctively with principlist conclusions, such as that “[s]eparate educational facilities are inherently unequal.”<sup>129</sup>

Perhaps the best known combination of particularism and principlist, in the context of racial justice, is Reverend Dr. Martin Luther King, Jr.’s “I Have a Dream” Speech, delivered on April 28,

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120. *Id.* at 671.

121. Paul Laurence Dunbar, *Harriet Beecher Stowe*, CENTURY MAG., Nov. 1898, available at <http://www.iath.virginia.edu/utc/africam/afpo33at.html>; see also Alfred L. Brophy, *Harriet Beecher Stowe’s Critique of Slave Law in Uncle Tom’s Cabin*, 12 J.L. & RELIGION 457, 504 (1995-96) (characterizing the novel as “rechanneling existing emotions”); Robert S. Levine, *Uncle Tom’s Cabin*, in *Frederick Douglass’ Paper: An Analysis of Reception*, 64 AM. LIT. 71, 74 (1992) (suggesting that sympathy was the key concept Stowe used to promote social change).

122. See, for example, the discussion of freedom in particularized and principlist terms in HARRIET BEECHER STOWE, *UNCLE TOM’S CABIN* 440-41 (Barnes & Noble Classics 2003) (1852).

123. *Id.* at 441.

124. *See id.*

125. *See* LeBeau, *supra* note 119, at 670. For a sense, as well, of the abolitionist William Lloyd Garrison’s combination of the particularist and the principlist, see William Lloyd Garrison, Speech at Charleston, S.C. (Apr. 14, 1865), available at <http://www.spartacus.schoolnet.co.uk/USASgarrison.htm>.

126. 163 U.S. 537, 552, 560 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

127. *Plessy*, 163 U.S. at 560.

128. *See* 347 U.S. at 494 (positing permanent effects on “hearts and minds”).

129. *Id.* at 495.

1963 at the Lincoln Memorial.<sup>130</sup> Along with explicit references to the abstractions of “sacred obligation,” democracy, gradualism, segregation, and freedom,<sup>131</sup> we also find concretizing language associated with each abstraction.<sup>132</sup> And along with reference to specific geographic places, to his own “four little children,”<sup>133</sup> and to the central motif of the dream,<sup>134</sup> we find reference as well to the self-evident principlist truth “that all men are created equal.”<sup>135</sup>

Even this very brief tour of the American law, morality, and rhetoric of slavery and racial inequality suggests an important conclusion. The attempts we have surveyed above<sup>136</sup> to establish general advantages and disadvantages of particularism and principlism in the law are in their place important. But they do not provide any knock-down arguments for exclusive reliance in the law on either approach. Rather, the modest, limited, and often counterbalanced advantages of each with respect to the other, where they genuinely exist, serve another purpose. Such advantages and disadvantages help to establish the proper roles that both particularism and principlism should play in the overall scheme of legal decisionmaking. The relationship between particularism and principlism in the legal system is thus symbiotic, and not unstructured.

Our consideration of the language of race and racial reform clearly illustrates the mutual dependency of particularist and principlist moral and legal argument. If we take, say, only the particularism of that racial reform argument, we do not match the power and scope of the argument overall. Similarly, if we take only the principlism of the racial reform argument, we again do not match the power and scope of the overall argument. Even merely adding together, in some purely mechanical way, the particularist and principlist strands does not yield the overall effect of their joint deployment through memorable, moving, timeless argument.

If someone insists, we can say that particularism is prior, in the sense that as a matter of our own moral development, we tend to start with the concrete. We learn the counting of particular matchsticks before

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130. Martin Luther King, Jr., *I Have a Dream*, Keynote Address at the March on Washington, D.C., for Civil Rights (Aug. 28, 1963), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 217 (James Melvin Washington ed., 1986).

131. *Id.* at 217-18.

132. *See id.*

133. *Id.* at 219.

134. *Id.*

135. *Id.*

136. *See supra* Parts II-IV.

we grasp the ideas of numbers and counting as a matter of abstract principle.<sup>137</sup> But particularism and principlism both need each other. Each, on its own, is not merely fallible, but potentially blind, or insufficiently motivating.<sup>138</sup>

There can of course be no guarantees of the power of either approach, or both jointly. Neither the most vivid imagery, the most compelling universalism, nor even their joint deployment, was able to prevent the moral disagreement that, in part, underlay the American Civil War.<sup>139</sup> We can be grossly insensitive to the concrete circumstances before us, as well as to abstract principle. We are capable of seeing cruelty and exploitation as easily defensible, and even as needing no defense.

And on behalf of principlism, we can say that thinking of counting as only a matter of particular matchsticks amounts to an underdevelopment of the understanding. Similarly, there would be something unfortunate about an entire culture that quite rightly found first one person, and the next person, and then the third person, and so on, to be unworthy of enslavement, but that had no ability to generalize or abstract. A culture should be able to universalize, articulate, and be motivated by the unfolding general pattern. In their own way, general principles, stated as such, can be motivating, evocative, and even inspiring on their own terms.<sup>140</sup> The motivational power of the particular and of principle can, under the best circumstances, operate in something like a stereoscopic fashion, adding a further and richer dimension to our understanding and motivation.<sup>141</sup>

#### V. CONCLUSION: THE PROBLEM OF CHOOSING TO EMPHASIZE EITHER PARTICULARISM OR PRINCIPLISM

Can anything at all be said about how to recognize a legal system that makes the most of the respective advantages—however debatable they might be—of particularism and principlism, and their potential for symbiosis as well? We will not attempt to press any further in this

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137. See *supra* note 53 and accompanying text. In the general and moral realm, see JOSEPH REIMER ET AL., *PROMOTING MORAL GROWTH: FROM PIAGET TO KOHLBERG* 29-32 (2d ed. 1990) (discussing the “concrete operations” stage of Jean Piaget).

138. For further discussion, see the arguments formulated dramatically by Professor Martha Nussbaum, *supra* notes 99-104 and accompanying text.

139. See *supra* notes 116-25 and accompanying text.

140. See *supra* text accompanying note 135, as further universalized.

141. As in Dr. King’s “I Have A Dream” Speech, taken as a whole. See *supra* note 130 and accompanying text.

Conclusion than we already have in assessing the various claims of advantage and disadvantage. We will assume a significant role for both particularism and principlism in any worthy legal system, given their respective limits and their symbiotic potential.

One way to approach this problem of choosing which approach to emphasize would be to set before us two or more competing legal systems. At least one of the competing legal systems would emphasize particularism in some plausible way, and at least one would emphasize principlism in some other plausible way. We could then try to mentally take in as much of what we considered their respective advantages as we could, as well as of the assumed importance of those advantages. Our final judgment as between the more particularist legal system and the more principlist legal system could then be left to some form of intuition.<sup>142</sup>

Of course, intuitions, especially of such complex matters, are not infallible or immune to disagreement.<sup>143</sup> Suppose different persons have conflicting intuitions as to which legal system best recognizes the advantages and disadvantages of particularism and principlism. This would certainly not be a surprising outcome. If we do not want to leave this dispute at the level of conflicting intuitions, one further alternative is to apply what is called “coherentism”<sup>144</sup> in assessing the merits of

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142. See *supra* notes 45-55 and accompanying text. We can have intuitions of an overall comparison between two complex systems, as when someone decides where to vacation, where to attend college, or where to live, based on some sort of examination-based intuition. For background on contemporary intuitionism, see generally AUDI, *supra* note 23; HUEMER, *supra* note 23. For an examination of intuition in the legal system, see generally R. George Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381 (2006).

143. See, e.g., AUDI, *supra* note 23, at 2. Something analogous could of course be said of any more substantive approach to this problem, including any of the multiple varieties of utilitarianism. Which school of thought considered at a general level, does not then break down into competing schools of thought, within that general overall framework?

144. For a mere suggestion of the large literature on coherence theories in several philosophical contexts, see generally NICHOLAS RESCHER, *THE COHERENCE THEORY OF TRUTH* (Univ. Press of Am. 1982) (1973); Laurence Bonjour, *The Coherence Theory of Empirical Knowledge*, 30 PHIL. STUDIES 281 (1976) (exploring and defending the coherence theory of empirical knowledge); Keith Lehrer, *The Coherence Theory of Knowledge*, 14 PHIL. TOPICS 5 (1986) (an in-depth discussion of the coherence theory of knowledge and the theory of justification); and Nicholas Rescher, *Foundationalism, Coherentism, and the Idea of Cognitive Systematization*, 71 J. PHIL. 695 (1974) (comparing and contrasting coherentism to foundationalism). For discussions of coherentism in specifically legal contexts, see R. George Wright, *Two Models of Constitutional Adjudication*, 40 AM. U. L. REV. 1357, 1379-82 (1991) and Benjamin C. Zipursky, *Legal Coherentism*, 50 SMU L. REV. 1679, 1705-07 (1997). Perhaps the best known specific version of coherentism is the interest in wide “reflective equilibrium” in JOHN RAWLS, *A THEORY OF JUSTICE* 48 (1971); see also the excellent treatment in Norman Daniels, *Reflective Equilibrium*, STAN. ENCYCLOPEDIA OF PHIL. (2003), available at <http://plato.stanford.edu/entries/reflective-equilibrium>. Professor Daniels may assume that wide reflective equilibrium must take account of moral principles, but there seems no

emphasizing particularism versus emphasizing principlism in a legal system.

In our context, coherentism would focus not on any single intuition supporting our overall evaluations of the competing legal systems, but on how well or poorly those evaluations fit with all of our other beliefs. Applying coherentism, we evaluate competing legal systems—whether emphasizing or de-emphasizing particularism—as fitting more or less well with a variety of other beliefs we hold at various levels.

Thus under coherentism, we ultimately ask whether our preference for one possible legal system over another is supported well, or poorly, by the web or “interlacing network”<sup>145</sup> of other beliefs we hold. Some of those networking beliefs will be about the law, and others not. Of course, some of our other beliefs are more relevant than others. A very loose analogy is that we have confidence in a crossword puzzle answer to the degree that our answer is supported by the sustaining network of letters and words that are in turn supported by similar networking, and also by our confidence in the answer’s responsiveness to the clue.<sup>146</sup> Or we could say that our belief that Australia exists is supported not by some single intuition or any foundational belief, but by an elaborate network of many supporting beliefs of various kinds.

The choice between emphasizing particularism or principlism in the law is thereby linked to a dense, multi-dimensional network of belief. Merely for example, moral beliefs as to the status of both typical and unusual cases may be implicated. If we believe that the law must usually discount unusual cases that belief may cohere well with a more principlist legal system. If, on the other hand, we believe that the law should normally make every reasonable effort to accommodate unusual cases that belief may cohere better with an emphasis on particularism. How we prioritize avoiding self-indulgent judicial decisionmaking is another consideration. Whether we think judges respond better to vivid imagery than to abstract rules seems relevant as well. What we might call the civic educational needs of the public, as we believe those needs to be, will also seem relevant. Do people learn racial equality better through vivid example, or through broad principle? More broadly, whether we think of morality in general as owing more to principle than

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reason why someone who rejected moral principles could not still apply coherentism, or something like wide reflective equilibrium.

145. Rescher, *supra* note 144, at 699.

146. My analogy of the crossword puzzle is admittedly over-simplified. See SUSAN HAACK, EVIDENCE AND INQUIRY: TOWARDS RECONSTRUCTION IN EPISTEMOLOGY 84-86 (1995); Nancey Murphy, *Truth, Relativism, and Crossword Puzzles*, 24 ZYGON 299, 303-06 (1989).

to the particular will be relevant, as will our beliefs about what motivates us when we do the right thing. We will want our chosen legal system to cohere well with our beliefs not only as to morality, but as to social facts, including what best motivates us.

These complexities in applying coherentism are not, however, our only problem. There are many possible forms of coherentism.<sup>147</sup> Coherentism is really more of a family of possible approaches, each with its own definitions, scope, values, priorities, and emphases.<sup>148</sup> We unfortunately cannot choose from among these possibilities merely by asking what coherentism in general requires;<sup>149</sup> there is no coherentism apart from how we may choose to flesh out the initial vague, metaphorical idea. We thus might all choose different forms of coherentism.

So if some persons try to use coherentism to decide between a legal emphasis on particularism and a legal emphasis on principlism, there will almost unavoidably be problems in reaching consensus. Minimally, there might be “ties.” The ties might be real ties, in the sense that, say, two versions of particularism, or one version each of particularism and principlism, are found to be equally coherent. More likely, though, we would end up with, say, one legal system emphasizing particularism, and another emphasizing principlism, each system with its defenders, but where those defenders are relying on different versions of coherentism. If, as seems likely, we cannot all agree on how to define and measure coherence in all respects, coherentism alone cannot realistically offer to determine a single best emphasis as between particularism and principlism in the law.

We may thus be left with no generally acceptable way to choose the right balance, or the proper scope, of particularism and principlism in the law. Perhaps that is the best we can do. It is at this point, though, that the intuitionist<sup>150</sup> might re-enter the scene. There is nothing to stop an intuitionist at this late stage from choosing, through intuition, precisely from among the remaining candidates for the most overall coherent legal system, with their different emphases on particularism and principlism. An intuitionist might thus have an intuition as to which of the remaining possible legal systems was most coherent.

Of course, we may choose not to follow the intuitionist here, or to agree with the intuitionist’s result. A certain level of dispute and

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147. See Wright, *supra* note 142, at 1415-16.

148. See *id.* at 1413.

149. See *id.* at 1415.

150. See *supra* notes 45-55 and accompanying text.

uncertainty here as well seems inevitable.<sup>151</sup> But if we do follow the intuitionist, at this highly abstract stage of the argument, we do, finally, break the symmetry between particularism and principlism.<sup>152</sup> The intuitionist at this point is, after all, no longer assessing something vivid and concrete like the mistreatment of an animal. In that context, there can realistically be intuitions of principle as well as intuitive particularized judgments.<sup>153</sup> One might equally intuit either that this specific behavior is wrong, or that abuse of animals in general is wrong.

But in our context, the intuitionist is now choosing between two entire complex legal systems with different balances of particularism and principlism. Some of us would have no clear intuition at all in such a case. There are limits to our cognitive abilities. But of those who did, it seems far more likely that the intuition involved would be a particular intuitive judgment, although of large, complex, abstract legal systems, rather than an intuitive judgment of much broader principle.<sup>154</sup>

Such abstract skirmishing between particularist and principled intuitions should not distract from the essential points recognized above. Particularism and principlism in the law can and should contend for advantage and priority, mostly without any clear resolution. However we might choose to total up their respective advantages, far more important is their mutual dependence and complementarities of role.

To the extent that judges are unfamiliar with or uncertain about a legal matter, they may appreciate the opportunity to focus on the concrete, the vivid, and the particular. In some respects, the particular can also move us emotionally and motivate our efforts.<sup>155</sup> The particular thus certainly has its place.

We may, on the other hand, be instructed and moved by articulated principle as well.<sup>156</sup> And it would be odd to resolve a series of slavery

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151. See ARISTOTLE, *supra* note 96, at 4-5.

152. See *supra* note 8 and accompanying text.

153. See *supra* notes 45-55 and accompanying text; see also Daniels, *supra* note 144 (“The inquiry might be as specific as the moral question, ‘What is the right thing to do in this case?’ . . . Alternatively, the inquiry might be much more general, asking which theory or account of justice or right action we should accept . . .”).

154. This seems mostly a matter of the realistic limits of human intuition, abstraction, and experience. At some level of complexity and abstracting, we run out of intuitive principles running far beyond the cases in our experience. This is not to suggest that we could not, for example, try to calculate which of the contending legal systems maximized overall utility. A utilitarian could certainly try to decide between our contending legal systems on utilitarian grounds. The point is merely that complex utilitarian calculations do not generally qualify as intuitions, let alone as intuitions at the level of principle.

155. See, most distinctively, *supra* Part IV.B.

156. See *supra* Part IV.B.

cases mostly through a memory of how we have decided each of the preceding slavery cases, individually and in turn. Principle also has its vital role. At some point, it behooves us to recognize the broader principle that no person can be an appropriate candidate for slavery. Our motivation to carry that and similar principles forward in the law is at its best and strongest when we are conscious of both the particularities and the universalities of slavery and freedom.<sup>157</sup> Given who we are, the particular and the principled in our legal system will crucially depend on one another.

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157. *See supra* Part IV.B.