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Dreams and Images: The Roles of Particularism and Principlism in the Law

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Dreams and Formulas:
The Roles of Particularism and Principilism in the Law

R. George Wright*

I. Introduction

The term 'particularism' is encountered only rarely in the law.1 The basic idea of
particularism itself is, however, of great importance in the law. The term 'particularism'
is, helpfully, much more prominent in contemporary moral philosophy.2 The opposite of

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The author hereby extends his thanks to _________________.

1 For examples, see Frederick Schauer, Rules and the Rule of Law, 14 Harv. J.L. & Pub.
Pol'y 645, 646 (1991); Frederick Schauer, Harry Kalven and the Perils of Particularism,
56 U. Chi. L. Rev. 397, 398 (1989); Cass Sunstein, Legal Reasoning and Political
Conflict 194 (1996).

2 The leading exposition of moral particularism is Jonathan Dancy, Ethics Without
Principles (2004). For book-length edited collections on moral particularism, see Moral
Particularism (Brad Hooker & Margaret Oliva Little eds.) (reprinted ed. 2003) (2000);
Challenging Moral Particularism (Mark Norris Lance et al. eds. 2008). For a book-length
particularism, in moral philosophy and in law, is usually taken to be 'generalism' or 'principlism.' For the moment, we may think of 'particularism' in the law as strongly de-emphasizing the roles of principles, rules, standards, policies, and tests in the law. 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 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. Our main conclusion, however, will be that it is, surprisingly, more important to appreciate how mutually indispensible particularism and principlism are in the law. The synergistic 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 for civil rights in general. This vital area of the law, running from the Abolitionists to Dr. Martin Luther King to the present date, allows us to

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5 See Frederick Schauer, Rules and the Rule of Law, supra note 1, at 650.

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.\(^7\) This symmetrical dependence between particularism and principlism in the law may ultimately be broken,\(^8\) in favor of particularism, only at the highest and most abstract stage\(^9\) of comparing particularism and principlism in the law. Otherwise, the mutual dependence between particularism and principlism seems important and stable.

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\(^7\) For a parallel brief discussion of biological as well as more extended uses of the idea of symbiosis, see the Oxford English Dictionary Online (Oxford Univ. Press 2d ed. 1989), available at http://dictionary.oed.com/cgi/entry (last visited July 24, 2008).


\(^9\) 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 Frankfurt,
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. By loose analogy, we expect children to be able to learn and communicate about addition most easily through particularism, as in their 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

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Freedom of the Will and the Concept of a Person, in The Importance of What We Care About 11-25 (1988) (contrasting first- and more abstract second-order preferences).

10 See in particular the reference to the law of race, infra Section IV.B. Of course, both the particular and principle may or may not motivate or even inspire us. See id. Presumably they may both do so in different ways.
Particularism in moral theory is currently “popular.”\textsuperscript{11} Several leading contemporary moral theorists, including feminist moral theorists,\textsuperscript{12} along with some modern\textsuperscript{13} and classical\textsuperscript{14} antecedents, have been described as moral particularists.\textsuperscript{15} Not surprisingly, there are different varieties\textsuperscript{16} of moral particularism, with different degrees of ambition of their claims.\textsuperscript{17}

\textsuperscript{11} See Walter Sinnott-Armstrong, Some Varieties of Particularism, 30 Metaphilosophy 1, 1 (1999).

\textsuperscript{12} See id.

\textsuperscript{13} See id.

\textsuperscript{14} See id.

\textsuperscript{15} For the possibility of taking a corresponding view in the legal realm, see Cass Sunstein, supra note 1, at 194 ("case-by-case particularism has advantages over the creation and application of broad rules"). But see Professor Sunstein's own conclusion in Cass R. Sunstein, Problems with Minimalism, 58 Stan. L. Rev. 1899, 1899 (2006) ("a general preference for minimalism is no more defensible than a general preference for rules").

\textsuperscript{16} See Walter Sinnott-Armstrong, supra note 10, at 1.

\textsuperscript{17} See Gilbert Harman, supra note 3, at 44.
'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. Moral principles, even if they exist, should not guide, inspire, or validate our particular moral judgments.

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." Dancy

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18 See Walter Sinnott-Armstrong, supra note 10, at 1. Particularists may be committed at least to the single moral rule that one should (morally) choose particularism over principlism in deciding a moral question.

19 See id.

20 See Jonathan Dancy, Ethics Without Principles, supra note 2, at 1.
thus argues that "moral judgment can get along perfectly well without any appeal to principles." This seems less a denial of the possibility of one or more moral principles than a claim that the quality of our individual or our collective moral life will 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." Given our interest in legal decisionmaking, we will be especially

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21 Id. See id. at 2 ("I suggest 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"). This formulation raises the possibility of some sort of affirmative harm flowing from recourse to moral principle. See also Joseph Raz, The Trouble With Particularism (Dancy's Version), 115 Mind 99, 99 (2006) (per Dancy, "the possibility of moral thought does not depend on moral principles").

22 But cf. Jonathan Dancy, Moral Particularism, supra note 2, at 1 ("[m]oral 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 . . .").

23 Gilbert Harman, supra note 3, at 44.
interested in how moral particularists make decisions -- what we might call moral adjudications -- as "[w]ithout principles, Dancy needs a robust theory of judgment."\textsuperscript{24}

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.\textsuperscript{25} 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.\textsuperscript{26} 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.\textsuperscript{27}


\textsuperscript{25} For recent accounts of ethical intuitionism, see, e.g., Robert Audi, The Good in the Right: A Theory of Intuition and Intrinsic Value (2004); Michael Huemer, Ethical Intuitionism (2005); Jeff McMahon, Moral Intuition, in The Blackwell Guide to Ethical Theory 92 (Hugh LaFollette ed. 2006); Ethical Intuitionism: Re-evaluations (Philip Stratton-Lake ed. 2003).

\textsuperscript{26} See Jonathan Dancy, Ethics Without Principles, supra note 2, at 156; Michael Lagewing, supra note 24, at 685.

\textsuperscript{27} See Jonathan Dancy, Ethics Without Principles, supra note 2, at 156: Michael Lagewing, supra note 24, at 685.
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. More generally, Jonathan Dancy points to the possibility of progress 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." Doubtless the analogies, hypothetical, stories, and other techniques of feeding intuition should strike us as relevant

28 See Sean McKeever & Michael Ridge, supra note 2, at 149; David McNaughton, Moral Vision: An Introduction to Ethics 204-05 (1991) (defending moral particularism). For the best-known 'dream' reference for our purposes, see infra note 124 and accompanying text.

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?30
Certainly the basic terminology of particularism can thus seem apt in discussing legal
issues.31 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.32

30 See, e.g., Emily Sherwin, supra note 29; Cass R. Sunstein, supra note 29, as well as
(1949); Benjamin N. Cardozo, The Nature of the Judicial Process 31 (1921), and
contemporary texts such as Lloyd L. Weinreb, Legal Reason: The Use of Analogy in
Legal Argument ch. 3 (2005).

31 See, for the use of the term 'particularism' in one sense or another in legal contexts,
Frederick Schauer, Rules and the Rule of Law, supra note 1, at 646 ("many 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." See id. at 649-50. See also Frederick Schauer, Harry
Kalven and the Perils of Particularism, supra note 1, at 398 (Kalven as emphasizing either
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."\textsuperscript{33} But not all 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 principiist contributions.

\textsuperscript{32} See Maria Cristina Redondo, Legal Reasons: Between Universalism and Particularism, 2 J. Moral Phil. 47, 58 (2005).

\textsuperscript{33} Danny Priel, Book Review, Lloyd L. Weinreb, Legal Reason: The Use of Analogy in Legal Argument, 57 J. Legal Educ. 579, 581 (2007); Richard Posner, Reasoning by Analogy, 91 Cornell L. Rev. 761, 765 (2006) ("one always requires a general understanding of some 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").
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 on one or more items of testimony. 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 rules 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, actually consciously considered some principle, whether flawlessly formulated or not. Would it

34 Credit for this hypothetical goes to 1 Kings 3:16-28.
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 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, 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 jurisprudences seem to subscribe to one variety or another of what is called legal positivism. Does legal

35 Consider, perhaps, the Kantian injunction to treat "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. and trans. Cambridge Univ. Press 1988) (1785).
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\textsuperscript{36} 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, to cruelty, to due process, and to equal protection, 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,"\textsuperscript{37} or "fundamental fairness,"\textsuperscript{38} or the "collective conscience"\textsuperscript{39} of the public, or a "shocks the conscience"\textsuperscript{40} standard directly into account.

\textsuperscript{36} For background, see, e.g., Matthew Kramer, In Defense of Legal Positivism (1999); W. J. Waluchow, Inclusive Legal Positivism (1994); Jules Coleman, Negative and Positive Positivism, 11 J. Legal Stud. 139 (1982).


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.41 We shall also refer briefly
to the idea of intuitionism in our concluding section.42 For now, though, it is important to

40 See, e.g., County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998) (citing, inter
alia, Rochin v. California, 342 U.S. 165, 172-73 (1952)).

41 See supra notes 25-28 and accompanying text.

42 See infra Section V.
avoid improperly biasing the comparisons below. 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." 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." Professor
H. A. Prichard concurs, and argues that "[t]he sole value of formulating the principle is

43 E. F. Carritt, The Theory of Morals: An Introduction to Ethical Philosophy 116
(reprint ed. 1952) (1928).

44 Id. at 114.

45 See H. A. Prichard, Moral Writings 5 (Jim MacAdam ed. 2002) ("[w]e first recognize
the particular obligation and then by reflecting on it discover the principle").
that it brings out . . . just that feature of the act which constitutes it an obligation." 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. 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." 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." And in the moral realm, Henry Sidgwick maintained that “[t]here

46 Id. See also C. D. Broad, Five Types of Ethical Theory 282 (1948 ed.) (1930) ("Reason needs to meet with concrete instances of fitting and unfitting emotions and intentions before it can rise, by Intuitive Induction, to the insight that any such intention would necessarily be fitting (or unfitting) in any situation") (emphasis in the original).


49 Id. at 32.
are certain absolute practical principles, the truth of which, when they are explicitly stated, is manifest . . .."50 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 shall have to be determined by some other method."51

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 play 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."52 This would suggest a need for crucially supplementing general rules or

50 See Henry Sidgwick, supra note 47, at 379.

51 Id.

principles, in concrete application, as Holmes' contemporary Henry Sidgwick was arguing in the realm of ethics.  

Justice Robert Jackson later complicated Justice Holmes' famous but terse observation. According to Justice Jackson, whether general propositions decide concrete cases "often depends on the strength of the conviction with which such 'general propositions' are held." Suppose we have a case of first impression in which we must decide whether racial segregation in the use of 24th 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 Jackson acknowledged with Justice Holmes that "the impact of an immediate situation may lead to deviation from the principle." As particularists point out, neither morality nor our common law is strictly codifiable.

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53 See Henry Sidgwick, supra note 47 and accompanying text.


55 Id. (Jackson, J., dissenting).

56 The uncodifiability of law and of morality is recognized, without conceding the truth of particularism, in Joseph Raz, The Trouble with Particularism (Dancy's Version), 115
Judge Richard Posner elaborates upon Justice Holmes by observing that “[j]udges expect their pronunciamentos to be read in context.”\textsuperscript{57} This tends to promote the role of legal particularism. As well, and 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.\textsuperscript{58}

There thus seems 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

\textsuperscript{57} 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.

\textsuperscript{58} See Gallagher v. Gallagher, 187 Or. 625, 634, 212 P.2d 746, 750 (1949) (“general 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”).
decidendi\textsuperscript{59} 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.\textsuperscript{60}

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’

\textsuperscript{59} For the merest sampling of the debate over the nature and determining of the necessary rule or justification of a case, see, e.g., Arthur Goodhart, The Ratio Decidendi of a Case, 22 Mod. L. Rev. 117 (1959); A.W.B. Simpson, The Ratio Decidendi of a Case, 22 Mod. L. Rev. 453 (1959).

\textsuperscript{60} As a high profile example, consider the ongoing debate over both the scope of and the precise constitutional test adopted by the Court in Lawrence v. Texas, 539 U.S. 558, 578 (2003). For one line of references, see, e.g., Seegmiller v. LaVerkin City, 538 F.3d 762, 771 (10\textsuperscript{th} Cir. 2008); Witt v. Dep’t of Air Force, 527 F.3d 806, 813-18 (9\textsuperscript{th} Cir. 2008); Cook v. Gates, 528 F.3d 42, 48-56 (1\textsuperscript{st} Cir. 2008) (usefully collecting authorities), as well as the status of Washington v. Glucksberg, 521 U.S. 702 (1997) after Lawrence. See, e.g., Steven D. Smith, De-Moralized: Glucksberg in the Malaise, 106 Mich. L. Rev. 1571 (2008) and other contributions to the associated Symposium. In a different way, the scope of the holding of the admittedly unusual alienage education case of Plyler v. Doe, 457 U.S. 202 (1982) remains murky.
concurring opinion in Ashwander v. TVA. 61 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. If Ashwander tells us, for example, to decide a case on statutory grounds without reaching some presumably broader constitutional issue, 62 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” 63 discussed by Professor Cass Sunstein. Minimalism in this sense involves a judicial


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

63 See, e.g., Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 9-23 (1999); Cass R. Sunstein, Burkean Minimalism, 105 Mich. L. Rev. 353 (2006). Incidentally, we think of Burke as distrusting broad, abstract political and moral systemization, as in Bentham, more than consistently resisting any recourse to principle.
preference for narrowness or fact-attunement in judicial rulings. 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 in equality when following minimalism in inappropriate contexts.

As with Ashwander narrowness, 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. 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 as 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

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64 See the sources cited supra note 63; Cass R. Sunstein, Problems with Minimalism, 58 Stan. L. Rev. 1899 (2006).

65 See supra notes 61-62 and accompanying text.

66 See the sources cited supra notes 63-64 and accompanying text.
“the all too familiar tendency to engage in special pleading and rationalization” 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.” 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. 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


69 Sean McKeever & Michael Ridge, supra note 67, at 199.
time also display rigidity, and not just capriciousness.\textsuperscript{70} 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 advantages of either facial or else as-applied challenges in the law.\textsuperscript{71} The initial hope might be that as-applied challenges, as assumedly narrower than facial challenges,\textsuperscript{72} 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-

\textsuperscript{70} See id. at 207.


\textsuperscript{72} See, e.g., Colorado Right to Life Committee v. Coffman, 498 F.3d 1137, 1146 (10th Cir. 2007); McGuire v. Reilly, 386 F.3d 45, 61 (1st Cir. 2004).
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.\textsuperscript{73}

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.

\textsuperscript{73} 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.
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.”\textsuperscript{74} And it is then argued that some consequence or “feature that is a reason in one case may be no reason at all, or even an opposite reason, in another.\textsuperscript{75} 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.

\textsuperscript{74} Vojko Strahovnik, Challenging Moral Particularism, in Challenging Moral Particularism 1, 1 (Mark Norris Lance et al. eds. 2008).

\textsuperscript{75} Jonathan Dancy, Ethics Without Principles 7 (2004).
It is thus certainly common enough for moral philosophers \(^{76}\) and legal decisionmakers \(^{77}\) 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 \(^{78}\) or legal \(^{79}\) rules.

\(^{76}\) See, e.g., John Finnis, Moral Absolutes: Tradition, Revision, and Truth (1991); Immanuel Kant, Lectures On Ethics 203 (Peter Heath trans. 1997) (Peter Heath & J. B. Schneewind eds.) (“[w]hoever 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 1, 8 (Brad Hooker & Margaret Little eds. reprint ed. 2003) (“generalists are right to say that at least all non-sadistic pleasure is a moral plus”). Cf. the negative “polarity” of the crowd’s sadistic pleasure in Victor Hugo, The Hunchback of Notre Dame 229-31 (Signet Penguin ed.) (Walter J. Cobb & Phyllis LaFarge trans. 1965) (1831).

\(^{77}\) See, e.g., Aldana v. Del Monte Fresh Produce, 452 F.3d 1284, 1285 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing en banc) (“it is clear that there exists a universal, definable, and obligatory prohibition against cruel, inhuman, or degrading treatment or punishment”).

\(^{78}\) See, e.g., Immanuel Kant, surpa note 76, at 204 (“[b]ut 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
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 we encounter defects.”

Some leading writers have endorsed, for example, even the intentional targeting of innocents in cases of genuine “supreme emergency.”

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Thought 87-88 (1999). See also G. E. Moore, Principia Ethica 204 (rev. ed.) (Thomas Baldwin ed. 1993) (1913) (“[w]e can secure no title to assert that obedience to such commands as ‘Thou shalt not lie’ . . . is universally better than the alternative of lying”).

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See, e.g., Texas v. Johnson, 491 U.S. 397, 421, 430 (1989) (Rehnquist, C.J., dissenting) (“it 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, 571-72 (1942)). Cf. Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (per Holmes, J.) (“[a]ll rights tend to declare themselves absolute to their logical extreme”).

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The principlist thus may or may not wish to concede “the particularist point that we can always find an exception to any moral principle.”\footnote{Richard Holton, Principles and Particularisms, 76 Proc. Aristotelian Soc. 191, 207 (Supp. vol.) (2002).} Consider, for example, one possible universal rule: that 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.\footnote{See Mark Norris Lance & Maggie Little, From Particularism to Defeasibility in Ethics, in Challenging Moral Particularism, supra note 74, at 53, 54 (referring to the “widespread assumption that generalizations must be exceptionless if they are to do genuine and fundamental theoretical work”).} Suppose we do accept the “supreme emergency” exception\footnote{See supra note 81 and accompanying text.} to the rule against the intentional military targeting of civilians.
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?\textsuperscript{85} 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 morally and legally wrong?

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

\textsuperscript{85} For discussion, see Brad Hooker, supra note 76, at 10; David Bakhurst, Ethical Particularism in Context, in Moral Particularism, supra note 76, at 157, 170.

\textsuperscript{86} For a classic treatment of prima facia or conditional duties, see W. D. Ross, The Right and the Good 19-20 (Philip Stratton-Lake ed. 2002) (1930).
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. 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.” In the legal realm, Justice Cardozo wrote that the common law

87 See, e.g., id. at 32; Lawrence B. Solum, Natural Justice, 51 Am. J. Juris. 65, 98 (2006) (“[v]irtue 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 Brad Hooker, supra note 76, at 21 (“I flatly deny that moral knowledge always does start off with judgments about particular cases”).

88 John McDowell, Virtue and Reason, in Virtue Ethics 141, 161-62 (Roger Crisp & Donald 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
“method is inductive, and it draws its generalizations from particulars.” From the legal particulars, though, a legal principle that unifies and rationalizes the particulars then tends to arise and press itself forward. 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.

From faithful, consistent adherence to principle. See Immanuel Kant, supra note 76, at 203. 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 (1987).


90 See id. at 31. For an argument that law must in some sense be general and impersonal, see Friedrich A. Hayek, The Constitution of Liberty 153-54 (Chicago ed. 1978) (1960). See also Gerald Dworkin, supra note 88, at 1357 (principles as having a role in the law where judges must give public reasons for their decisions).

Universalism, however, then itself requires the tempering and limitations of equity. But equity is in its own turn itself largely a matter of principle. Considering

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Of course, universalism in the law is tempered with equitable concerns tracing back to at least Aristotle. See Aristotle, Nicomachean Ethics book V, ch. 10 at 100 (Roger Crisp trans. 2000); Lawrence Solum, supra note 87, at 99. Equity itself, however, crucially involves and depends upon clearly recognized principles. See, e.g., Thomas M. Franck & Dennis M. Sughue, 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”); Pettkus v. Becker, [1980] 2 S.C.R. 834, 847, 117 D.L.R.3d 257, 273 (“[t]he great advantage of ancient principles of equity is their flexibility”); Livingston v. Story, 34 U.S. 632, 645 (1835) (referring to “the principles of equity”). 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.

92 See supra note 91. See also Immanuel Kant’s concessions on the scope and status of lying, as in note 78 supra.

93 See id. Compare the standard assumption that particularism is especially associated with equity, at least in an informal sense, as in Maria Cristina Redondo, Legal Reasons: Between Universalism and Particularism, 2 J. Moral Phil. 47, 67-68 (2005).
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,94 begins with the priority
of the particular.95 Nussbaum argues, in a way which suggests mutual dependence,96 that
“[t]he general is dark, uncommunicative, if it is not realized in the concrete image . . . [i]n
the end the general is only as good as its role in the correct articulation of the concrete.”97
But along with this apparent subordination of principle, Professor Nussbaum argues as
well that “a concrete image or description would be inarticulate, in fact mad, if it
contained no general terms.”98 Taken as a whole, then, Professor Nussbaum’s argument
suggests a reciprocal dependency between principle and particular.

94 See supra note 87 and accompanying text.

95 Martha Nussbaum, Love’s Knowledge: Essays on Philosophy and Literature 93
(1992). See also Andrew Gleeson, Moral Particularism Reconfigured, 30 Phil.
Investigations 363, 363 (2007) (“particular cases have priority over rules (or
‘principles’”).

96 See Section IV.B. infra for the interaction of principle and particular in the context of
the law of race.

97 Martha Nussbaum, surpa note 95, at 93.

98 Id.
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.”\textsuperscript{99} 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 motivation to act in accordance with the principle.”\textsuperscript{100} 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 insensitive, mechanical,\textsuperscript{101} morally blind,\textsuperscript{102} or ‘rule fetishist’\textsuperscript{103} decisionmaking. And it

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\textsuperscript{100} Sean McKeever & Michael Ridge, supra note 67, at 205. For related discussion, see supra notes 67-70 and accompanying text.
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\textsuperscript{101} See Andrew Gleeson, supra note 95, at 365.
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\textsuperscript{103} See id.; David Bakhurst, Ethical Particularism in Context, supra note 85, at 157, 169.
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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. 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. 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.

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105 See supra Section IV.A.
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 image or analogy\(^\text{106}\) of a ‘badge,’ as in the “badges and incidents”\(^\text{107}\) of slavery, while at the same time there can hardly be more clearly principled language than that of the Thirteenth Amendment.\(^\text{108}\) 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.\(^\text{109}\)

\(^{106}\) See supra note 28 and accompanying text.


\(^{108}\) See U.S. Const. amend. XIII (“[n]either slavery nor involuntary servitude . . . shall exist within the United States . . .”).

\(^{109}\) 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
In fact, particularism and principlism in the campaign against racial inequality occasionally involve an intertwining.\textsuperscript{110} 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 . . . .”\textsuperscript{111} 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 of the Union.’”\textsuperscript{112}

\textsuperscript{110} Intertwining and close juxtaposing of principle and particular are clearly different from the “middle ground” possibilities referred to supra at text accompanying note 5.


\textsuperscript{112} See the speech on The Equality of All Men Before the Law, delivered in Boston in April, 1865, after the assassination of President Lincoln, at id. (visited July 24, 2008).
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, has been thought “the single most influential book in American history . . ..” In the words of the poet Paul Laurence Dunbar, referring to Stowe, “[s]he told the story, and the whole world wept . . ..” And yet Stowe intersperses broad principle with particularist story-telling. Perhaps there is a clue to Stowe’s reliance on both approaches in her rhetorical question:


114 Id. at 671.


“What is freedom to a nation, but freedom to the individuals in it?”

117 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. 118 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.” 119

We also see something of a combination of particularist and principlist strands in Justice Harlan’s noted dissenting opinion in Plessy v. Ferguson. 120 Consider, for example, his image-based observation that “the 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

117 Id. at 378.

118 See id. at 378-79.


of the law.” ¹²¹ There are some limited particularist elements as well in Brown v. Board of Education, ¹²² but Brown leaves us most distinctively with principlist conclusions, such as that “[s]eparate educational facilities are inherently unequal.” ¹²³

Perhaps the best known combination of particularism and principlistism, in the context of racial justice, is Reverend Martin Luther King’s “I Have a Dream” Speech, delivered on April 28, 1963 at the Lincoln Memorial. ¹²⁴ Along with explicit references to the abstractions of “sacred obligation,” democracy, gradualism, segregation, and freedom, ¹²⁵ we also find concretizing language associated with each abstraction. ¹²⁶ And along with reference to specific geographic places, to his own “four little children,” ¹²⁷

¹²¹ Id.

¹²² See Brown, 347 U.S. at 494 (positing permanent effects on “hearts and minds”).

¹²³ Id. at 495.

¹²⁴ A transcript and audio version of this speech is available at http://www.americanrhetoric.com/speeches/mlkihaveadream.htm (visited July 24, 2008).

¹²⁵ See id. at 5.

¹²⁶ See id.

¹²⁷ Id.
and to the central motif of the dream, we find reference as well to the self-evident
principlist truth “that all men are created equal.”

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 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 above 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

128 See id.

129 Id.

130 See supra Sections II-IV.B.
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 we grasp the ideas of number and counting as a matter of abstract principle. But particularism and principlism both need each other. Each, on its own, is not merely fallible, but potentially blind, or insufficiently motivating.

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. We can be grossly insensitive to the concrete circumstances


132 See the arguments formulated dramatically by Professor Martha Nussbaum, supra notes 95-98 and accompanying text.

133 See supra notes 111-119 and accompanying text.
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 always 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. 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.

V. Conclusion: The Problem of Choosing to Emphasize Either Particularism or Principlism

134 See supra text accompanying note 129, as further universalized.

135 As in Dr. King’s Lincoln Memorial Speech, taken as a whole. See supra note 124 and accompanying text.
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 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 such 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.\textsuperscript{136}

\textsuperscript{136} See supra notes 41-51 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 Robert Audi, The Good in the Right: A Theory of Intuition and Intrinsic Value (2004); Michael Huemer, Ethical Intuitionism (2005); Ethical Intuitionism: Re-evaluations (Philip Stratton-Lake ed. 2002). For an examination of intuition in the legal system, see R. George Wright, The Role of Intuition in Judicial Decisionmaking, 42 Hous. L. Rev. 1381 (2006).
Of course, intuitions, especially of such complex matters, are not infallible or immune to disagreement.\textsuperscript{137} Suppose different persons have conflicting intuitions as to which legal system best recognizes the advantages and disadvantages of particularism and principism. This would certainly not be a surprising outcome. If we then do not want to leave this dispute at the level of conflicting intuitions, one further alternative is to apply what is called “coherentism”\textsuperscript{138} in assessing the merits of emphasizing particularism versus emphasizing principism in a legal system.

\textsuperscript{137} See, e.g., Robert Audi, supra note 136, 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?

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”\(^\text{139}\) of other beliefs we hold. Some of those networking beliefs will be about the law, and other 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

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Perhaps the best known specific version of coherentism is the interest in “wide reflective equilibrium” in John Rawls, A Theory of Justice 46 (original ed. 2005) (1971). See also the excellent treatment in Norman Daniels, Wide Reflective Equilibrium, [http://plato.stanford.edu/entries/reflective-equilibrium](http://plato.stanford.edu/entries/reflective-equilibrium) (published April 28, 2003) (visited June 19, 2008). Professor Daniels may assume that wide reflective equilibrium must take account of moral principles, but there seems no reason why someone who rejected moral principles could not still apply coherentism, or something like wide reflective equilibrium.

\(^{139}\) Nicholas Rescher, Foundationalism, supra note 138, at 699.
responsiveness to the clue. 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 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.

140 For reference to the admittedly oversimplified “crossword” analogy, see Susan Haack, Evidence and Inquiry 85 (1999); Nancey Murphy, Truth, Relativism, and Crossword Puzzles, 24 Zygon 299, 303-06 (1989).
These complexities in applying coherentism are not, however, our only problem. There are many possible forms of coherentism. Coherentism is really more of a family of possible approaches, each with its own definitions, scope, values, priorities, and emphases. We unfortunately cannot choose from among these possibilities merely by asking what coherentism in general requires; 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

141 See R. George Wright, Two Models, supra note 138, at 1415-16.

142 See id.

143 See id. at 1415.
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[^144] 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 uncertainty here as well seems inevitable.[^145] But if we do follow the intuitionist, at this highly abstract stage of the argument, we do, finally, break the symmetry[^146] between particularism and principlism. 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

[^144]: See supra notes 41-51 and accompanying text.


[^146]: See supra note 8 and accompanying text.
principle as well as intuitive particularized judgments. One might equally intuit either that the behavior before one 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, than an intuitive judgment of much broader principle.

Such abstract skirmishing between particularist and principled intuitions, however, 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

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147 See supra notes 41-51 and accompanying text. See also Norman Daniels, Wide Reflective Equilibrium, supra note 138, at 264.

148 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. Our point is merely that complex utilitarian calculations do not generally qualify as intuitions, let alone as intuitions at the level of principle.
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.\footnote{149} The particular thus certainly has its place.

We may, on the other hand, be instructed and moved by articulated principle as well.\footnote{150} And it would be odd to resolve a series of slavery 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.\footnote{151} Given who we are, the particular and the principled in our legal system will crucially depend on one another.

\footnote{149} See, most distinctively, Section IV.B. supra.

\footnote{150} See id.

\footnote{151} See id.