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JURISPRUDENCE, HALAKHAH, AND MORAL PARTICULARISM

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HALAKHAH is, perhaps maddeningly, about the particular. Examples abound: Jewish law forbids wearing clothing that mixes wool and linen. Except if one is a *kohen* (Temple priest), in which case one *must* wear wool and linen. But only when in the Temple compound; or, according to a different school, even then only when performing Temple duties.¹ Or again: On the Sabbath, a day of rest, one is prohibited from writing by hand. But not by foot or mouth. Old-school Scrabble does not count as writing, but playing on a more modern board with grooves that hold the letters in place does. The contortions and distinctions in these examples find counterparts all over the original codification of the oral tradition and the centuries of commentary that followed. Halakhah is alive, byzantine, and seemingly wild.²

Given halakhah's complexity, one might have thought that it would defy theorization, envisioning it as recalcitrant to the scholar's aim to discipline, unify, generalize. Yet sometimes coherence and cohesion come apart. The true insights are irreducibly plural. The scholar can tease out trends and practices but there is no unitary foundation from which all stems. Instead, there is a mosaic of themes, and not even a regularly patterned one at that. And yet the theoretical product revealing this unruly richness is no cause for lament. It is instead a remarkable and true reflection of its object of study and, in the case of law—both halakhic and secular—perhaps also of the world that law is meant to govern.

Chaim Saiman's treatment of halakhah in *Halakah: The Rabbinic Idea of Law* offers a beautiful, reverential, and completely absorbing rendering of this complexity. As rewarding as the book is on its own terms—as a fascinating window into rabbinic legal thought—one unavoidably reads it, or reads into it, comparisons with secular law and legal theory. These function, Talmudically, as commentary on commentary. The resonances and dissonances they yield could likely be mined indefinitely.

In what follows, I restrict myself to one such comparative enterprise, focusing on the interplay between law and morality in both halakhic and Anglo-American jurisprudence. I aim, in particular, to bring *moral particularism* to bear on debates about the nature of law. Moral particularism is the view that moral reasons are context-dependent—that is, the fact that a

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1. See, e.g., CHAIM N. SAIMAN, HALAKHAH: THE RABBINIC IDEA OF LAW 199–200 (2018).

2. *Id.* at 20.

reason can point in favor of an action in one context does not entail that reason counts in favor of the action in all contexts. To illustrate with a favorite example of the particularist, “that Y would bring pleasure” often functions as a reason that commends the pleasure-bringing act. I have reason to eat this ice cream cone because doing so will be pleasurable. But suppose now that the person to whom the pleasure would be brought is a sadist, and the pleasure-bringing act is one of torture. That it would bring pleasure to the sadist if another person were tortured is a feature that recommends against the act.³ That is, we should not think of the sadist’s pleasure as a good-making feature of the act that is *outweighed* by the pain of the torture. Instead, the prospect of pleasure for the sadist actually tips the balance *further* against performing the action.

Moral particularism poses an under-appreciated challenge to jurisprudential theories that take the polarity of thick evaluative terms (e.g., “cruel,” “reasonable”) to be fixed.⁴ I seek to argue that any successful theory of law must be sensitive to moral particularism, and I evaluate halakhic law as well as the dominant secular jurisprudential theories in light of this requirement. I conclude, tentatively, that halakhic law’s orientation to morality aligns with moral particularism, but that not all secular jurisprudential theories fare as well. I focus in particular on the debate between legal interpretivism, which takes moral reasons to be an ineliminable part of the law, and legal positivism, which does not. I suggest that legal interpretivism cannot survive the particularist’s critique without emendation. But since I otherwise find the interpretivist’s account compelling, I end by sketching the way in which the account might be revised to accommodate the moral particularist’s insights.

This Article proceeds as follows. I describe moral particularism in greater detail in Part I. In Part II, I focus on the notion of compromise to show how both secular law and halakhah function in accordance with moral particularism. But the law and legal theorizing are not everywhere compatible with moral particularism. Part III aims to draw out the points of divergence and their implications. Part IV concludes by suggesting ways legal theorizing might be revised in light of the insights moral particularism bestows.

I note at the outset that the analysis I offer is preliminary, sketchy, and very much subject to amplification, contestation, consternation, revision, supercession—perhaps my own at a later time or that of others who would choose to engage with these ideas. In other words, I take up the Talmudic spirit of ongoing inquiry and dialog to allow myself to here offer a say, but not a final word, on a topic that might ring more of the Talmud’s penchant for the arcane than for the grand and grave. Still, as Saiman

3. See, e.g., Brad Hooker, *Moral Particularism: Wrong and Bad*, in *MORAL PARTICULARISM* 1, 7 (Brad Hooker & Margaret O. Little eds., 2000).

4. I say more about the distinction between thin and thick evaluative concepts below. See *infra* text accompanying notes 19–20. I describe the scant role moral particularism has played in legal theorizing in Part III, *infra*.

notes, studying the details can be a devotional act.⁵ Meaning is disclosed in the minutiae.⁶

I. WHAT IS MORAL PARTICULARISM?

The central thesis of moral particularism is that normative reasons function holistically—that is, whether they count in favor or against a particular act depends entirely on the context in which the act arises.⁷ As Jonathan Dancy, arguably the leading moral particularist, writes, a “feature that is a reason in one case may be no reason at all, or even an opposite reason, in another.”⁸

Now the thesis that a reason can count as a positive consideration in one context and a negative consideration in another might sound uncontroversial. And it is for one class of reasons—viz., motivating reasons. Motivating reasons provide a causal explanation for what an agent has done.⁹ Whether or not they function as reasons at all for an agent will depend on that agent’s intentions, aims, desires, and so on. For example, “that it’s cold outside,” is a reason for Alex, who hates the cold, to put on a sweater when she goes out, but a reason for Bria to go out in a t-shirt and shorts if, for example, Bria has been dared to do something unpleasant. In this way, motivating reasons are context-dependent, or *holistic*.

What is controversial about the moral particularist’s position is that he or she believes that *normative* reasons function holistically, as well. Normative reasons, unlike motivating reasons, hold independent of anyone’s desires, goals, hopes, fears, etc. That is, a normative reason counsels as it does no matter who one happens to be, what one desires, what projects or commitments one has, and so on.¹⁰ These are the reasons that tell the

5. See SAIMAN, *supra* note 1, at 6.

6. *Id.* at 125.

7. See, e.g., JONATHAN DANCY, MORAL REASONS 60 (1993) [hereinafter DANCY, MORAL REASONS]; Margaret O. Little, *Moral Generalities Revisited*, in ESSAYS ON MORAL PARTICULARISM 276, 278 (Brad Hooker and Margaret O. Little eds., 2000).

8. Dancy, *Are There Organic Unities?*, 113 ETHICS 629, 629 (2003); see also Margaret O. Little, *On Knowing the “Why”: Particularism and Moral Theory*, 31 HASTINGS CTR. REP. 32, 34 (2001).

9. See, e.g., Michael Smith, *Is There a Nexus Between Reasons and Rationality?*, in MORAL PSYCHOLOGY 277, 293 (Sergio Tennenbaum ed., 2006).

10. For a general statement of the distinction between motivating and normative reasons, see, for example, Derek Parfit, *Reasons and Motivation—Parfit*, in Derek Parfit & John Broome, *Reasons and Motivation*, 71 PROC. ARISTOTELIAN SOC’Y 99, 99 (1997). Of course, one and the same consideration can function as both a motivating and a normative reason, ideally because the agent feels the motivating force of doing what she should. See, e.g., Errol Lord, *Dancy on Acting for the Right Reason*, 1 J. ETHICS & SOC. PHIL. 1 (2008); Joseph Raz, *Reasons: Explanatory and Normative* 17–18 (Oxford Legal Studies Research Paper No. 13/2007), <https://www.princeton.edu/~msmith/mycourses/Raz-Reasons-Explanatory-Normative-draft.pdf> [<https://perma.cc/WMB5-G2VG>].

agent what he or she ought to do, and the reasons to which we appeal in evaluating what the agent chose to do.¹¹

Most moral philosophers are generalists about normative reasons. That is, they hold that normative reasons always point in the *same direction* in all circumstances in which these reasons make an appearance. Utilitarianism provides the most basic example: For the utilitarian, there is one and only one source of value (e.g., pleasure),¹² and one always has a reason to perform an act that conduces to that value. Indeed, one has decisive reason to do so unless there is some other act that will yield still more of the value in question. Nor need one be a value monist¹³ to think that certain values always count in favor of performing the acts that produce them. W.D. Ross's view of ethics illustrates the point.¹⁴ Unlike the utilitarian, Ross is committed to the existence of multiple, irreducible sources of value, which relate in no fixed hierarchy.¹⁵ Like the particularist, then, Ross relies on the particulars of a situation to determine the relative weights of the considerations pointing in favor or against a course of action one could undertake in that situation. But unlike the particularist, Ross believes that the valence of each consideration is fixed; one and the same consideration must always and everywhere point in favor (or against) an act. Put differently, for Ross, the particulars can affect the strength of a reason but never the direction it points.

The moral particularist diverges from both the monistic generalist (e.g., the utilitarian) and the Rossian generalist in holding that the particulars can affect not only the strength of a reason but also, and crucially, the direction it points—whether for or against a particular act. Particularists like to describe the fact that reasons can switch sides by borrowing a metaphor from chemistry: Just as it is an atom's valence electrons that are involved in transforming it into a positive or negative ion, where the polarity of the resulting ion's charge is determined by the other atoms with

11. Jonathan Dancy argues that there are not two different kinds of reasons, “[t]here are just two questions that we use the single notion of a reason to answer.” DANCY, *PRACTICAL REALITY* 2 (2000).

12. As Jeremy Bentham famously said, “Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. They alone point out what we ought to do, and determine what we shall do.” JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 6 (Jonathan Bennet ed., 2017), <https://www.earlymoderntexts.com/assets/pdfs/bentham1780.pdf> [permalink unavailable].

13. For a value monist there is but one source of fundamental value; all other goods derive their value from that source, such that they are valuable only because and to the extent that they conduce to the fundamental value. See, e.g., Selim Berker, *Particular Reasons*, 118 *ETHICS* 109, 110 (2007); Miles Tucker, *Two Forms of Value Pluralism*, 28 *UTILITAS* 333, 335 (2016).

14. See W.D. ROSS, *THE RIGHT AND THE GOOD* (1930).

15. For an overview of the history and arguments in favor of value pluralism, see Ruth Chang, *Value Pluralism*, in 25 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES* 21–26 (James Wright ed., 2d ed. 2015) and Berker, *supra* note 13, at 117–18.

which the initial atom was mixed, so too reasons have “valences” leading them to be charged positively (i.e., to commend actions) or negatively (i.e., to oppose actions) depending on the naturalistic features of the context with which they are “mixed.”¹⁶

An example illustrates the difference between generalism and particularism in ethics: That an act X is painful, the generalist would say, is always a reason not to do X. To be sure, the generalist may conclude that other considerations sometimes outweigh the painfulness, such that one has all-things-considered reason to perform the act. Ripping off a Band-Aid or relaying certain truths can be painful but the pain is sometimes necessary for some even more valuable end. Where it is, one has reason to rip off the Band-Aid or tell the truth. Still, the important point to notice about ethical generalism, including Rossianism, is that pain always has the same polarity or valence: that an act would cause pain is, for the ethical generalist, always a reason not to perform that act, even if not a decisive reason.¹⁷

The moral particularist, by contrast, recognizes that the pain-creating nature of an act only sometimes counsels against that act, and at other times counsels in its favor. For example, the pain of painful truths might on some occasions be a reason to regret offering them. But on other occasions the fact that a truth will cause pain is a further reason in *favor* of offering it. This seems eminently plausible, for instance, where we aim for the uttered truth to have a reformatory or punitive end (think here about an “intervention” meant to confront someone about their addiction, or an unleashing of blame meant as punishment).

Or to take an example closer to law: that an act would be aggressive or cunning is generally a reason not to pursue that act. But think now of the zealous trial advocate. His or her aggressiveness or cunning is not just something to be tolerated—an unfortunate means to the positive end of effectively representing her client. Instead, in the context of trial advocacy, aggression or cunning are *in themselves* qualities that take on a positive valence.

Importantly, the particularist holds that valence-switching is not something peculiar to a few normative reasons. Instead, according to the particularist, *all* normative reasons function holistically. The claim might sound far-fetched. After all, *thin* normative concepts, like “fairness” and “goodness,” would seem always and everywhere to be good-making fea-

16. See, e.g., JONATHAN DANCY, *ETHICS WITHOUT PRINCIPLES* 190 (2004).

17. Much has been written about Ross’s infelicitous term for characterizing the variability of reasons—viz., that they give rise to prima facie duties. As Ross himself acknowledged, *see supra* note 14, at 20, the “prima facie” qualifier could be read to suggest that these are merely illusory duties, or that only some of them are binding. See generally John Atwell, *Ross and Prima Facie Duties*, 88 *ETHICS* 240 (1978). H.J. McCloskey helpfully proposes that we should instead understand a prima facie duty as something that stands to be binding just in case it is not outweighed by some other duty. See H.J. McCloskey, *Ross and the Concept of a Prima Facie Duty*, 41 *AUSTRALASIAN J. PHIL.* 336 (1963).

tures of an act. In response, the moral particularist is inclined to deny that thin normative concepts are reasons at all.¹⁸ These concepts are so general as to be entirely unhelpful in guiding conduct, which is what normative reasons are supposed to do. They become contentful, and thus action-guiding, only by being incorporated into *thick* normative concepts. Thick normative concepts have an irreducible normative component to them, despite their naturalistic guise. One would not have a grasp of these concepts if one did not apprehend their normative dimension.¹⁹ Examples of thick normative concepts are “selfish,” “courageous,” “polite,” and so on.²⁰ It is with respect to these concepts that the particularist’s challenge is intended to take hold.

Accordingly, we may wonder if, within the set of thick normative concepts, there are any whose polarity is invariant. In legal decisions, for example, aren’t arbitrariness and randomness always considerations that count against the validity of a ruling? One way to respond to this question is to note that, even in the law, where our convictions about what counts as a valid ground upon which to reach a decision seem settled, departures from these convictions are not uncommon. Arbitrariness and randomness *can* sometimes function to support a particular decision (even while they usually count against it). Take an early and now-famous tale of legal adjudication²¹—the judgement of King Solomon. Faced with the (bluffed) prospect of sawing the baby in two, we can confidently say that it would have been better for the baby, even if not for both of the purported mothers, if Solomon had arbitrarily chosen one of them.²² Or, to vary an example that Ronald Dworkin offers,²³ for someone who opposes the death penalty, permitting executions only for victims killed in the month of March is better than permitting executions on every day of the week. It is also better than permitting executions for murderers whose victims are white but forbidding executions for murderers whose victims are black.²⁴ Faced with a choice between instituting the death penalty on totally arbitrary grounds—again, that the offender struck in March—versus instituting it on race-based grounds, arbitrariness speaks in favor of the date-

18. See, e.g., David McNaughten and Piers Rawling, *Unprincipled Ethics*, in MORAL PARTICULARISM 258, 268 (Brad Hooker & Magaret O. Little eds., 2000) (describing Dancy’s view that “there are no properties, apart from the thin moral properties right, wrong, etc., that have universally and counterfactually invariant valence”).

19. For more on this point, see Little, *supra* note 7, at 284.

20. See generally Pekka Vayrynen, *Thick Ethical Concepts*, STAN. ENCYCLOPEDIA PHIL. (2016), <https://plato.stanford.edu/entries/thick-ethical-concepts/> [https://plato.stanford.edu/entries/thick-ethical-concepts/].

21. See Hermann Gunkel, THE FOLKTALE IN THE OLD TESTAMENT 156 (Michael D. Rutter trans., 1987).

22. It is perhaps notable in this context that the Talmudic word for “compromise” is “splitting.” See SAIMAN, *supra* note 1, at 155.

23. RONALD DWORKIN, LAW’S EMPIRE 178–84 (1986).

24. Cf. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

based policy.²⁵ Further, this is so even though avoiding arbitrariness is generally a hallmark of the rule of law. In other words, while the fact that a decision would be arbitrary is generally a reason to avoid it, in some instances a decision's arbitrariness can actually count in its favor.²⁶ This is just as the moral particularist thinks it should be.

There is a more general response to be made to the claim that the polarity of at least some normative reasons is fixed. While the proponent and opponent of particularism may volley back and forth with examples and counterexamples, a more promising way to defend particularism is to point out that, once we acknowledge that even one normative reason functions holistically, we must concede that all can do so. For the particularist's claim about reasons is a metaphysical one, while the objector's strategy of invoking seemingly invariant reasons relies on an epistemic claim, pointing out that we have never before encountered an occasion when the reason invoked has a polarity opposite to that with which it usually presents itself. But this strategy can demonstrate no more than that our fund of experiences is limited. Far from impugning the particularist thesis about reasons, then, the objector succeeds only in indicting the extent of our knowledge.

One final element of moral particularism bears mention: While moral particularism mandates that we pay attention to context, it is nonetheless distinct from the claim of some theorists that all normative requirements must, of necessity, be "open-textured."²⁷ The latter claim has special currency in legal theories. More specifically, some legal theorists have recognized that all legal requirements, whether those encoded in statutes or those developed from precedents, must be open-ended because "we labour under two connected handicaps . . . [the] first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim."²⁸ This suggests that we cannot expect our legal requirements to fully codify

25. One might contend that the race-based policy is arbitrary too and surely it is in one respect—the race of the victim is irrelevant to the moral worth of the victim. But the racist who would support the racial disparity described in the hypothetical obviously denies that black lives matter as much as white lives do—he is not proceeding on the basis of a consideration he thinks arbitrary.

26. This example is likely to meet with objections. Ronald Dworkin, for example, might argue that a coin flip is a sort of "internal compromise," and he rejects these on the ground that they conflict with our intuitive commitment to the notion that everyone be an equal before the law. DWORKIN, *supra* note 23, at 178. Given this equality, when there is no principled way for a judge to decide between two equally meritorious parties, the judge should (allegedly) not decide at all. In the absence of further argument, however, it is hard to see why refusing to decide does, in fact, best honor the parties' equal status. This is especially true if the two parties know that they will come before a court several more times and that, on subsequent occasions, the outcome of the flip may be reversed.

27. H.L.A. HART, *THE CONCEPT OF LAW* 128 (3d ed. 2012) (1961).

28. *Id.*

in advance either the exact dictates that fall out of them or the complete range of cases to which they are intended to apply.²⁹

The moral particularist would no doubt appreciate the flexibility that these legal theorists describe. Nonetheless, the claim that legal requirements are of necessity open-textured does not amount to the particularist's claim about reasons. For the former is motivated by an epistemic concern while the latter is based on a metaphysical commitment. In particular, the claim about the open texture of requirements is driven by a recognition of the constraints on our knowledge, and not by a recognition of the fluctuating way in which reasons behave. As such, this claim is compatible with a denial of the holistic behavior of reasons.³⁰

In sum, the insight of the moral particularist is that it is in the nature of moral properties that they do not have a fixed polarity: a given moral consideration might often count in favor of an act but it need not do so in each and every context. The valence or polarity of moral considerations can shift depending on the contexts in which they arise.

II. MORAL PARTICULARISM AND THE LAW

Before turning to a sustained study of the implications of moral particularism for legal theorizing, it will be useful to assess the ways the law itself—both secular and halakhic—might incorporate or reflect the moral particularist's insights. To that end, I turn now to discussions of compromise in both halakhah and Ronald Dworkin's work to show that, at least with respect to compromise, both align with the particularist's insights.

In general, we might think of compromise as a virtue when it comes to resolving disagreements.³¹ That is, we can take the following as a rule of thumb: that a decision would involve a compromise is often a reason to favor that decision. Indeed, even while the adversarial posture of the law often yields a winner-takes-all result, it also incorporates mechanisms that allow for litigants to share the spoils or burdens—think here of settlements, or alternative dispute mechanisms, or even doctrines like contributory negligence.

29. We can view Jules Coleman's claim that legal officials need not even share the same formulation of the rule of recognition that they practice as an extreme form of Hart's claim about the difficulties in complete codification. JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 81 (2001).

30. Indeed, Hart's discussion here indicates that he is a generalist about reasons. As he writes, the exercise of discretion or the developing and qualification of rules that is undertaken by courts and officials "must not disguise the fact that both the framework within which [these activities] take place and their chief end-product is one of general rules." HART, *supra* note 27, at 136.

31. See, e.g., Carrie Menkel-Meadow, *The Ethics of Compromise*, in *GLOBAL ENCYCLOPEDIA OF PUBLIC ADMINISTRATION, PUBLIC POLICY, AND GOVERNANCE* 1 (Ali Farazmand Ed., 2018). Saiman notes the bivalent nature of the term. See SAIMAN, *supra* note 1, at 155; see also Amy J. Sepinwall, *The Challenges of Conscience in a World of Compromise*, in *NOMOS LIX: COMPROMISE* 220–47 (Jack Knight ed., 2018).

But now note that the fact that a decision would involve a compromise is not everywhere a reason that counts in its favor. Indeed, sometimes, compromise is a bad-making feature of a decision; it is a reason that counts against the decision in question.

We can see this in Ronald Dworkin's discussion of integrity as a principle that should guide legal interpretation.³² Dworkin aims to explain why compromise is sometimes morally desirable but at other times not just outweighed by other considerations but bad in itself. His discussion on the death penalty is instructive. Given the deep, intractable divide over the moral permissibility of the death penalty, one might have thought that the law should reflect a position of compromise—say, by allowing executions for all convicted murderers born in a particular calendar year. But now compare that policy with a policy that allows executions only for those who undertake mass shootings in cold blood. The death-penalty opponent might well prefer the mass shooting exception to the calendar year exception, and this would be so even if more executions would result under the mass-shooting exception policy than the calendar-year exception. But then we should ask: why should the death penalty opponent prefer the policy that yields more executions—that is, the policy that would restrict the death penalty to mass shooters? After all, insofar as the birth year is chosen at random, there is nothing unfair about it. And insofar as the birth-year policy responds to deeply felt political disagreement, there is nothing inherently unjust about it—any more than there would be an injustice in setting the tax rate for helping the poor at the midpoint between what Democrats and Republicans prefer. The problem with the birth-year policy is that there is no principled justification the state can offer to explain why some convicted murderers escape the death penalty and others do not.

The demand for principled justifications, Dworkin tells us, is a demand for *integrity*.³³ Put differently, whereas compromise may count in favor of legal decisions in scalar contests—contests, for example, about how much money to devote to the poor—it counts *against* legal decisions in checkerboard contests—where some people will be absolute winners and others absolute losers. Better that all should lose than that the state should bestow wins on no meaningful basis at all.³⁴

This outcome is just what the moral particularist would mandate, for it respects the variability of moral concepts. The law understands that thick moral concepts, like compromise, behave just as the moral particularist expects them to.

Interestingly, compromise operates in just this way in halakhic law too. To take one of the examples Saiman offers, consider the biblical story

32. DWORKIN, *supra* note 23 at, 78–84.

33. *See id. passim.*

34. *Id.* at 178–86.

of Joseph.³⁵ Joseph, whom Jacob loved best of all his twelve sons, is sent to retrieve his brothers who had traveled with their sheep to pasture far from their father's home. When Joseph arrives, the brothers decide to act on their roiling jealousy of this golden child. They dig a pit and plan to leave him for dead. But one of the brothers balks, insisting that they save Joseph. A second brother, Judah, steps in to broker a compromise. Judah proposes that they sell Joseph into slavery—this will spare Joseph's life, but still inflict immense hardship on him. On its face, and as Saiman describes, Judah looks to be the hero of the day—he spares Joseph's life.³⁶ But two facts make Judah's intervention, which results in Joseph's enslavement, not just wrong on the whole but indeed *worse* because it involves compromise.

First, notice that selling Joseph into slavery earns Judah, along with his brothers, money, whereas killing Joseph would have earned them nothing. As the Bible recounts, Judah prods his brothers by asking, "What will we profit by killing our brother?" This is a brokered, self-serving compromise. Whereas preventing Joseph's death might have mitigated the guilt Judah bears for selling Joseph into slavery, the fact that Judah is motivated by profit enhances his guilt rather than undercutting it. Normally it is good to lessen the harm one inflicts on another. But when weighing Judah's responsibility, it is not that we subtract his self-interest from the goodness of his preferring enslavement to death. His preferring enslavement to death ceases to be good at all, because the preference results from nothing more than base self-interest.

Here is a second way the compromise is aggravating rather than mitigating. Suppose that murdering Joseph had never been on the table and Judah had proposed out of the blue that they sell Joseph into slavery. In that instance, there would be no counterfactual to weigh against his slavery proposal—we could not say, "well at least he saved Joseph from the worse fate of death." So Judah would incur the full force of our blame for having sold his brother into slavery. Now return to the story as it unfolds: slavery is the lesser of two evils, the other one being death for Joseph. Why should Judah get credit for retreating from the worse evil of killing Joseph? Choosing the lesser of two evils counts as a compromise that mitigates guilt when, but only when, one is *forced* to choose one or the other evil. It is no mitigating factor if one could have chosen not to pursue evil at all. Instead, in that case, choosing the lesser evil just highlights one's bad character, for it shows one to be willing to transgress even though one was fully free to do otherwise.

The lesson for us is this: as in Dworkin's discussion, halakhah recognizes that morally thick concepts can change valence, depending on the context in which they arise. Nor is compromise the only halakhic concept that operates as the moral particularist thinks it should. Saiman's book is

35. See SAIMAN, *supra* note 1, at 160.

36. *Id.*

rife with examples. In one passage, Saiman describes how the Rabbis valorize a conception of man-as-war-hero in the pre-messianic age but anticipate jettisoning that conception of manliness in favor of a pacifistic one once the Messiah comes.³⁷ A passage on the moral meaning of stolen goods draws out the particularist lesson too: Normally, that bread has been sanctified provides a reason (additional to the standard ones—taste, nutrition, etc.) to eat it. But suppose now the wheat used to make the bread is stolen. That *this* bread has been sanctified provides no counterweight to the bread's taint; instead, the Rabbis instruct, the blessing provides a further reason *not* to eat it. The stolen good that is blessed is doubly tainted, first by the theft and then by the misapplication of the blessing.³⁸

More generally, it is plausible to think that all of Jewish time is structured along particularist lines. The separation between Shabbat and the quotidian, which informs much of Jewish law, has the idea of valences built into it: Rest is indolence during the week but commanded on the Sabbath and holy days; comfort is welcome during most of the year but abjured on the Day of Atonement.

The general insight to draw from both the secular and halakhic examples is that there is nothing in the nature of law that renders it in principle incompatible with the insights of moral particularism. Law could reflect a valorization of some thick evaluative concept in one context and a rejection of it in another. This is just the way compromise operates, as we saw. It remains to be seen whether legal theorizing can encompass this same flexibility.

III. MORAL PARTICULARISM AND LEGAL THEORY

Moral particularism has made few incursions into legal theory.³⁹ To be sure, legal theorists often speak of “particularism” but they have in mind a situationist or context-sensitive approach to deciding cases, allowing the details of a particular situation to determine the weights of the relevant considerations.⁴⁰ They do not typically have in mind the meta-

37. *Id.* at 114.

38. *Id.* at 159.

39. “The term ‘particularism’ is encountered only rarely in the law.” R. George Wright, *Dreams and Formulas: The Roles of Particularism and Principlism in the Law*, 37 HOFSTRA L. REV. 195, 195 (2008).

40. See, e.g., Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1274 (2019) (“Particularism is the view that constitutional practice should be guided by salient situation-specific normative considerations in particular constitutional situations.”). For a paradigmatic account of situationism, see ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* (1988). For legal theorists who understand particularism along situationist lines, see for example, 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, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 645, 646 (1991) (contrasting “rule-based decisionmaking, in which a generalization provides a rea-

physical thesis described in Part I—viz., that it is not only the weight of a moral reason that can shift but it's very valence too. It is this directional shift that distinguishes garden-variety particularism from moral particularism.

Where legal theorists do reference moral particularism, this is often only by way of digression, if not outright dismissal.⁴¹ For example, in characteristically brash style, Richard Posner casts off the theory with no argument at all. Posner defines moral particularism as the view that “although there are universal moral truths, they must be applied to particular moral issues with greater sensitivity to social context.”⁴² He then goes on to announce that “[a]s I don't think that there are universal moral truths that have any bite, I reject moral particularism.”⁴³ The statement is odd not only because it is so categorical and yet unsubstantiated but also because it is not even based on a clear conception of what moral particularism is!⁴⁴

son 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”). R. George Wright offers one of the most extended treatments in the legal literature, *see* Wright, *supra* note 39, but he references the valence-shifting dimension of moral particularism only in passing, *see id.* at 209–11, and he defines “moral particularism” in ways that make it fully compatible with a Rossian intuitionism, *see, e.g., id.* at 196, 197–200. *Cf.* Andrew B. Ayers, *What If Legal Ethics Can't Be Reduced to a Maxim?*, 26 GEO. J. LEGAL ETHICS 1, 27 (2013) (“Many virtue theorists accept a limited kind of particularism: They recognize that rules exist and play an important role in morality, but they also think rules are not the whole story.”).

41. Wright, *supra* note 39, is an exception. He aims to establish that both particularism and its opposite, which he terms “principlism,” are indispensable to legal-decisionmaking. Roughly his view is that general principles are useful aids in guiding decisions, but we should recognize that every principle or rule admits of exceptions. The problem with this view is that once one concedes that every principle admits of exceptions, one is already squarely in the particularist camp. For even the particularist can allow that rules and principles have their place, so long as we treat them as heuristics or rules of thumb. *See, e.g.,* Mark Norris Lance & Maggie Little, *From Particularism to Defeasibility in Ethics*, in CHALLENGING MORAL PARTICULARISM 53, 54 (Mark Norris Lance et al. eds., 2008) (denying the “widespread assumption that generalizations must be exceptionless if they are to do genuine and fundamental theoretical work . . .”); MARK TIMMONS, MORAL THEORY: AN INTRODUCTION 320 (2012). By contrast, a devotee of principles must insist that they are absolute. *Cf.* Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

42. Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1645 (1998).

43. *Id.*

44. To hold that moral particularists embrace “universal moral truths” is at best obscure. What moral truths could be universal for the particularist? Only those that obtain in identical circumstances. And since any well-defined set of circumstances is either unique or at least very unlikely to be repeated, the set of universal moral truths to which the moral particularist subscribes is either empty or very, very small. Posner therefore aims either at a straw man or at an exceedingly minor facet of the particularist's commitments. At any rate, his understanding of moral particularism makes it sound no different from a situationist ethic, when the former diverges from the latter in important ways, as we have seen.

It is easy to see why legal theorists might have ignored or rejected moral particularism. Taken narrowly, the view might be thought to impugn the most basic features of a legal system, like obedience to law, reasoning from precedent, and so on. Surely legal theorists need not take seriously a theory that entails rejecting features so foundational to law itself. In this Part, I first describe how moral particularism need not strike at these basic elements of law. I then spell out its implications for legal theories.

A. *Moral Particularism and the Law*

Does the truth of moral particularism entail that a legal requirement to X can actually be a reason not to X, or that a legal requirement to forbear from doing Y can actually be a reason to do Y? That is, does moral particularism imply that legal requirements impose obligations on us only if the context is right?⁴⁵ If we think of legal requirements as normative reasons, then this certainly seems to be the implication. It behooves us to be more careful, however. It need not be the content of the legal requirement itself that functions as the normative reason; it could instead be the fact that this content has the imprimatur of the law that does so.⁴⁶ That is, we have a reason to follow this requirement *because it's the law*. Now, the fact that P (e.g., “pay your taxes!”) is the law can function in some contexts to recommend obedience to P, and to recommend disobedience in others. Indeed, we could even imagine a situation where “it’s the law” is a normative reason both for obedience and disobedience in one and the same context. Were an individual to become convinced that the legal regime to which she was subject was evil, for example, both obedience and disobedience would be prescribed for her.⁴⁷ Notice,

45. We can find motivation for these questions in Hart’s claim that, for law to be an instrument of social control, it must be possible to communicate “general” (by which he means, presumably, “non-varying”) standards of conduct. See HART, *supra* note 8, at 124.

46. This is not to suggest that the content of the legal requirement can *never* function as a normative reason. A legal requirement not to murder, for example, derives its normative force both from its content (namely, the moral prohibition against murder that it contains) and from its status as law. As such, both of these sources of normativity may vary in the way that the particularist suggests. Because I am concerned here, however, with whether particularism obliterates the possibility for legal requirements as such, I consider only the possibility that the reason “it’s the law” might switch its valence depending on the context in which it arises.

47. One might object that the conflict in this example arises not from a normative reason present in its two opposing guises but instead from a clash between two different normative reasons, or a clash between a normative reason to subvert the evil regime and a motivating reason to avoid the sanctions that this subversion may invite. I consider each possibility in turn. On the first, the person subject to the law bears a political obligation to obey the law, resulting from the law’s distinct normativity, and a moral obligation to disobey. The first would seem to always commend obedience. But the fact that the second shifts—commending obedience only when the legal regime is morally justifiable—is enough for the particularist to vindicate her position. On the second possible clash, the normative

though, that what this example illustrates is only that one's reasons for adhering to the law can fluctuate in the way that the particularist describes. That P is the law is a matter of fact, not a matter of prescription, however, and so it will not fluctuate in this context-dependent way. In other words, particularism does not entail that legal requirements impose obligations on us only in the appropriate contexts (although, again, whether we have reason to respect these obligations will depend on contextual factors).⁴⁸

Related to the issue of whether particularism entails that legal requirements lose their invariant obligatory status is the issue of whether legal reasoning can proceed as we know it if particularism is true. Much of legal reasoning is analogical—most centrally, the doctrine of precedent necessarily relies on applying lessons from past cases to current ones.⁴⁹ If particularism is true, however, then we cannot infer that the normative considerations in the earlier case will point in the same way that they do in the present case. To see this, consider the following example:

If the defendant's activity in the previous case had not created a net benefit, it would have been legally impermissible.

So one of the reasons for deciding that the defendant ought to prevail in this case is that his activity produces a net benefit.

Or again:

The fact that the plaintiff could have exercised greater care in the previous case was a reason for reducing the damages award that she received.

reason to obey conflicts with a motivating reason to avoid sanctions. But the person who cares about obeying the law only in order to avoid sanctions has necessarily adopted an "external point of view" toward her legal regime. See HART, *supra* note 8, at 102. Yet I do not believe that she must conceive of the unjustifiable legal regime from the standpoint of the outsider. If this regime was originally justifiable, she would have adopted an internal point of view toward it. And, if the transition of the regime from justifiable to evil was gradual, she might still consider herself to be legitimately subject to the laws of this regime even while, as the example suggests, she would also have reason to subvert these laws. To make the possibility of her being under conflicting obligations even more plausible, we could imagine that a majority, though not all, of the legal requirements in this evil regime were unjustifiable and that the content of P itself was morally neutral.

48. Cf. Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1928 n.57 (2012) ("[I]t is worth thinking about what constitutional reasoning would look like if [moral particularism] were correct.").

49. For a general discussion of the challenges posed by the doctrine of precedent to some legal theories, see JOSEPH RAZ, *THE AUTHORITY OF LAW* 201–06 (1983). It may be worth noting, as Jonathan Dancy does, that the mere fact that something was done in the past can be a reason to continue in this way in the present or instead a reason to do something different. As such, the doctrine of precedent is itself grounded on a reason with whose variant instances we are familiar. See DANCY, *MORAL REASONS*, *supra* note 7, at 61.

So the fact that the plaintiff before the court now could also have exercised greater care is a reason for reducing his damages award.

In the first example, the fact that the defendant's activity produced an overall benefit would be no reason for him to prevail if the activity itself were morally repugnant. To see this, consider that it is widely believed that the murder of one person to save two is no better than the murder of two people to save one, despite the "better" consequence that the first produces. Notice further that the fact that the defendant, say, killed only one person instead of two is not a factor commending the act that is then outweighed by the fact that the defendant did still kill one person. Instead, that the defendant chose not to kill one person does not speak favorably of him or her at all, since no one should get credit simply for doing what is minimally necessary, e.g., refraining from grave wrongdoing.

In the second example, the plaintiff's failure to exercise due care in the present case would not be a reason for mitigating the damages award if, for example, the defendant's activity was so undesirable that we wanted to deter it as forcefully as possible. This deterrence consideration would hold no matter whether the plaintiff was contributorily negligent, thereby negating the reason-giving force of the fact that the plaintiff in the current case did not exercise adequate care. For example, we would not think that the residents of Flint, Michigan, should receive a smaller damages award for the lead poisoning of their water supply because the residents could have bought water filters for themselves and thereby lessened the amount of lead they ingested.

Both of these examples are variants of "switching arguments"—i.e., arguments that use analogies "to pre-empt the authority of the present case."⁵⁰ That is, these arguments mistakenly suppose that the past case should dictate the outcome of the present case because they take the valence of normative reasons to be fixed, which is just what the moral particularist denies.

At this point, one might worry that these "switching" arguments fail only because the reason in each of the earlier cases was not sufficiently specified. Had it been better specified, we would have seen that each later case was relevantly different from the case with which it was being compared. As Joseph Raz argues:

[S]ince, regarding any evaluative concept and any two situations, if it applies to one and not to the other there is an explanation for this difference, it must be in principle possible to amass all the points which all these explanations may rely on and formu-

50. DANCY, *MORAL REASONS*, *supra* note 7, at 65; Koppelman, *supra* note 48, at 1928–29 (applying this insight to the Thirteenth Amendment).

late one principle which sets a comprehensive and exceptionless rule for the use of that evaluative concept.⁵¹

But if reasons really do behave holistically, then the “principle” at which Raz’s proposal arrives will just be a long list of all the known instances in which a reason pointed in one direction along with all the details of each instance. In other words, it will be no principle at all, for it won’t reliably extend to any case different from the ones it includes. As such, Raz’s contention does no more than beg the question against moral particularism.

With that said, we should not take the truth of moral particularism to doom the actual use of precedent by judges. For that use is dictated by the law itself—that is, there is a legal requirement to the effect that judges ought to rely on precedent. And, as we saw earlier, the truth of the existence of particular legal requirements is not something about which particularism has anything to say. So long as the reliance on precedent emerges from a social fact and not from a commitment to the invariant status of normative reasons, then the moral particularist need not reject it.

At this juncture, one might wonder, what justifies the social fact? For example, jurists and scholars justify reliance on precedent by appeal to the values of predictability, individual autonomy, separation of powers, etc.⁵² But whether each of these is in fact worth promoting will depend, the particularist would maintain, on context. It is just at this point in the dialectic that we must engage with moral particularism’s implications for legal theory.

B. *Normative Reasons and Legal Theory*

We have just seen that much of the law, as applied and enforced, is left untouched by the particularist’s critique. In this Section, we begin to consider the implications of this critique for legal theorizing. To that end, we inquire into the roles that normative reasons could play in legal theories. In particular, I consider theories that rely on moral reasons at their foundations (i.e., the theory as a whole rests on a set of moral considerations), and then theories that rely on moral reasons in deriving the content of law.

1. *The Foundations of Normative Jurisprudence*

As a first cut, we can divide jurisprudential theories into two broad classes, depending on their ambitions. Descriptive jurisprudential theories aim, as their name suggests, to describe the law as it is. Normative jurisprudential theories aim not only to describe the law but also to justify

51. Joseph Raz, *The Truth in Particularism*, in *ESSAYS IN MORAL PARTICULARISM* *supra* note 7, at 55–56.

52. See, e.g., Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 *YALE L.J.* 2031, 2039 (1996).

its being so. The considerations that justify the propounded theory of law are often moral and political, but they need not be—one could defend one's theory, say, in light of its exegetical virtues (e.g., parsimony, or offering an explanation with as few elements as is necessary to capture it adequately). Even if exegetical values function holistically, as a particularist might suppose, I set them to one side since we are concerned with the context-varying behavior of *moral* reasons specifically. So, are normative jurisprudential theories that rely on moral considerations for their justification doomed by the moral particularist's critique?

I do not think so. Moral particularism is compatible with a theory whose justification rests on moral or political values because the considerations justifying a given theory operate at such an abstract level that context would seem to be irrelevant. That is, normative arguments made on behalf of the theory assume an ideal situation, abstracting away from the kinds of details that could prompt a change in valence. Insofar as the theories pretend or aspire to apply everywhere that the world is as the ideal supposes, they will not run afoul of the particularist's account. For if the particulars don't change then neither does the polarity of the considerations justifying the theory. In this way, moral particularism fails to penetrate legal theories at the stage where the theorist might offer a defense of the theory as a whole.

C. *Moral Considerations and the Content of Law*

A second distinction one might make is the familiar one between legal positivism and legal interpretivism, where only the latter *necessarily* appeals to moral considerations in justifying *legal decisions*.⁵³ That is, only the latter requires that moral considerations inform the content of law. As such, one might think that only the latter would be subject to the moral particularist's critique. But that would be to move too quickly.

We should note first that there is a divide within legal positivism as to the propriety of moral considerations. All legal positivists believe that what is law is a matter of social fact, but they do not all agree on whether the law can validly prescribe appeal to moral considerations. *Exclusive* legal positivists, like Raz, insist that the existence and content of *every* law be fully determined by social sources.⁵⁴ Raz's position is captured in his sources thesis, which is satisfied when the facts that identify the law's content and in virtue of which it is valid can be determined without recourse to moral argument.⁵⁵ Indeed, this independence from moral argument is necessary, according to Raz, if law is to be authoritative for its subjects. As such, moral and political values provide neither the content nor the justification for particular laws on Raz's account. By contrast, *inclusive* legal

53. See, e.g., David Plunkett and Timothy Sundell, *Dworkin's Interpretivism and the Pragmatics of Legal Disputes* 19 *LEGAL THEORY* 242 (2013).

54. See, e.g., RAZ, *supra* note 49, at 46.

55. *Id.* at 47.

positivists, like Hart and Coleman, believe that moral reasons can be part of the law so long as they have the appropriate pedigree (e.g., the accepted practice accepts them as valid sources of law).⁵⁶

Does that make the inclusive legal positivist's account vulnerable to the particularist's critique? I do not believe it does because moral and political values can play the role the inclusive legal positivist permits them to play only if, and because, they are grounded in social (i.e., non-moral) considerations. That is, the reason to adhere to a law, even one that incorporates moral considerations, is that it is the law. And the fact that it is the law is not itself a consideration whose polarity shifts depending on context, as we have seen. Still, if the theory wants the appeal to moral considerations to track the way moral reasons actually work—which is to say, holistically—then its instructions for when and how moral considerations may enter the picture should abide by the particularist's insights.

The situation is more complicated for a theory that takes appeal to moral considerations to be crucial to the law, rather than a purely contingent social fact. I take Ronald Dworkin's legal interpretivism to be a paradigmatic example of a theory that insists that the law must be answerable to moral as well as social facts.⁵⁷ Moral particularism poses a challenge to Dworkin's theory because his theory relies on moral and political values in its derivation of legal content. Dworkin posits three stages of interpretation that inform that derivation.⁵⁸ At the pre-interpretive stage, the rules and standards that are taken to provide the tentative content of a practice are identified. For legal interpretation, these would be the rules governing the practice of developing the law by judges.⁵⁹ At the interpretive stage, the interpreter offers a justification for the rules and standards identified at the first stage. Broadly, this justification is grounded in a consideration of what the practice actually consists of, and of what the practice ought to consist of. Finally, at the post-interpretive stage, the interpreter revises and refines the justification that she offered at the second stage.

Moral and political considerations contribute to the justification offered at the second stage in two general ways. First, they inform the interpreter's conception of what the practice ought to consist of. This is the dimension of value for Dworkin. It describes the reasons for which the practice is worth pursuing, and it attempts to construe the practice "in its best light."⁶⁰ The second way in which moral and political considerations play a role is in fixing the extent to which the actual practice needs to be reflected in one's interpretation of it. This is Dworkin's dimension of fit and its role is constrained by the moral and political commitments contained in the interpreter's notion of value. To synthesize the role of value

56. See JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 107 (2001); HART, *supra* note 27, at 240–43.

57. See, e.g., DWORKIN, *supra* note 23.

58. *Id.* at 65–67.

59. *Id.* at 87.

60. *Id.* at 67.

in the two sorts of contributions just described, then, we can say that considerations of value are invoked to offer an explanation of what is done that makes the practice worthy of pursuit.

It is in specifying the sort of considerations that would render the practice of law in its best light that Dworkin commits this practice to the invariant operation of normative reasons. More specifically, there are three principles that Dworkin thinks ought to be reflected in legal practice if law is to be justified, and these are justice, fairness, and integrity.⁶¹ Now, recall that the particularist's claim about the holism of reasons will take aim at any theory that relies on the invariant behavior of normative considerations. Dworkin's account clearly presumes that fairness, justice and integrity always function invariantly—that is, they always count in favor of a particular interpretation of legal practice. Yet, fairness, justice and integrity (as Dworkin conceives of it)⁶² are thin normative concepts. As such, they are poor candidates for the particularist's attack. Does Dworkin's reliance on these normative concepts save his account from the particularist's clutch?

Sadly no, for these concepts will need to be specified into thick normative considerations if they are usefully to be put to work. Dworkin justifies integrity, for example, by arguing *inter alia* that it promotes efficiency, impartiality, self-governance and so on.⁶³ Yet even if integrity always functions to promote these values, there is no reason to think that these values are always worth promoting, according to the particularist's line of argument. Legislators could seek to make the imposition of the death penalty more efficient—say, by doing away with some of the layers of appeal. Yet we may rightly think efficiency the wrong value to promote here—not just all things considered but wrong to pursue at all.⁶⁴

61. *Id.* at 178.

62. In other contexts, integrity would no doubt count as a thick normative concept (e.g., “to act with integrity”). Yet because Dworkin describes it as a requirement to “act in a principled way,” he construes it in the very general terms of a thin normative concept. *Id.* at 183. As such, we will treat the concept of integrity in the same way that we treat the concepts of fairness and justice here. Cf. Denise Reaume, *Is Integrity a Virtue? Dworkin's Theory of Legal Obligation*, 39 U. TORONTO L.J. 380, 381 (1989) (“[I]ntegrity is not, in fact, an independent virtue, and therefore cannot ground an obligation to obey the law in the face of a contrary reason of justice or fairness.”).

63. Dworkin, *supra* note 23 at, 188–89.

64. That's not to suggest that efficiency could have no role to play. When process becomes redundant and respect for the convicted individual has already amply been secured, the state might decline to add further levels of post-conviction review (that is doubtfully the situation in most states now). But assume a system in which we have the minimal review necessary to achieve fairness, and some technocratic state official decides to trim that review in the name of efficiency, thereby rendering the system unfair. One would then be right to think that efficiency is no reason at all; or, more strongly, to the extent that pursuing it disrespects convicted individuals, one would reasonably think efficiency a contemptible consideration here.

A similar problem will arise in the specifications and applications of justice and fairness. Again, these concepts are too vague to be directly applied to the rules and standards that we seek to interpret. We will need to have principles of interpretation that mediate between these concepts and the entities to be interpreted. These intermediate principles will contain directives for interpretation that are guided by fairness or justice, so that the interpretation that takes place reflects these values. But therein lies the problem, the particularist would charge: the value that the principle promotes cannot be counted on *always* to produce fairness, or *always* to produce justice; in some contexts, adherence to the principle might actually produce unfairness or injustice.

Consider the following example of an intermediate principle, intended to conduce to an understanding of law as a *just* practice: The principle could be something like, “interpret constitutional provisions so that they are sensitive to the needs and concerns of one’s time.” This principle presumes that this sort of sensitivity always promotes justice. Is this true, however? When what is at stake is, for example, the meaning of “cruel and unusual” in the Eighth Amendment’s prohibition on that treatment, it does seem like justice mandates departure from the Framers’ understanding of what counts as “cruel”⁶⁵ (we don’t flog prisoners any longer).⁶⁶ But, in other cases, sensitivity to changing mores might count against a particular interpretation’s justness because interpreting in this way diminishes the predictability and certainty of the law. This would especially be so where the mores currently in place were more draconian than the governing mores at, say, the time of the conduct now subject to legal sanction (imagine that, in the intervening period, the public came to embrace corporal punishment again). To be sure, the valence of predictability is the same in both cases; it should incline us against making the change in each case. But the valence of the precept that legal interpretation should keep up with changing mores *does* shift between the two cases: keeping up with the times is justice-promoting when the prevailing values are justifiable in their own right; it should have no purchase when society’s prevailing values have deteriorated. The problem the example illustrates arises because the interpretive strategy relies on fixed principles to guide the interpretation—a reliance incompatible with reasons holism.

At this point, a supporter of Dworkin could point to his third stage of interpretation in an effort to save it from the particularist’s challenge—namely, the opportunity to revise and refine the proffered interpretation. Yet I am doubtful that this feature will in fact be availing. For the justification that could be subject to revision and refinement is not specific to the particular interpretation but pertains to the practice as a whole. As Dworkin says, what may be revised and refined is a wholesale conception of the

65. Lawrence Lessig provides one justification for the change in meaning. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1188 (1993).

66. See *id.* at 1187.

“point” of law, writ large.⁶⁷ And the only way to arrive at a justification that synthesizes the whole practice is to rely on general principles that one can argue are instantiated in the practice. The justification itself is then beleaguered by considerations that the interpreter must believe function everywhere in the justification in the same way. Dworkin’s examples of the sorts of refinements that would arise in an interpretation of the concept of courtesy demonstrate this. These refinements modify the scope of application of courtesy (for example, by dictating that one tip his hat before soldiers, in addition to royalty),⁶⁸ or the particular dictates of courtesy (for example, by developing new rules to meet the demands of modernization, such as rules pertaining to when and where cell phone use is impolite). But the question of whether courtesy is worthy of pursuit in a particular case never arises in the process of revising; it is simply taken for granted.

In general, Dworkin’s interpretive project is incompatible with moral particularism because his theory codifies in advance the principles mediating between the values of fairness, justice, and integrity, on the one hand, and the decisions to which they will be applied, on the other. But this a priori codification then flouts the context-sensitivity of reasons that moral particularism entails. Relying on intermediate principles that one takes to function invariantly will inevitably lead one to interpret some parts of the practice in a way that is not most justifiable, and hence does not reflect the practice in its best light.

To be clear, it is not Dworkin’s use of moral and political values themselves that occasions the particularist’s critique. Instead, it is that the theory takes these values to be fixed. Put differently, the kind of justification constructive interpretivists offer seeks generality and universality. Dworkin for example wants his justification to make sense of *all* of the content of a given legal system.⁶⁹ A legal system, as he says, should “speak with one voice, . . . act in a principled and coherent manner toward citizens, and . . . extend to everyone the same substantive standards or fairness it uses”⁷⁰ Or to take a gloss on Dworkin’s position, “a proposition is legally valid only if it conforms to the same set of moral principles to which all other legal propositions conform.”⁷¹ But it is just here that the theory runs afoul of moral particularism.

To see the point more fully, consider an analogy to moral theory. Suppose that we envision the normative ethical theorist in the role of a

67. DWORKIN, *supra* note 23, at 88, 92–96.

68. See DWORKIN, *supra* note 23, at 47.

69. Cf. Gregory C. Keating, *Justifying Hercules: Ronald Dworkin and the Rule of Law*, 1987 AM. BAR FOUND. RES. J. 525, 528 (characterizing the role of normative reasons in Dworkin’s theory in this way: “Interpretation in both legal decision and legal theory is thus deeply normative, seeking to purify and perfect the object interpreted in light of some conception of that object’s aim.”). I note that the converse is not true—a theory can have normative ambitions but avoid using moral and political considerations at the interpretive stage.

70. DWORKIN, *supra* note 23, at 165.

71. OFER RABAN, *MODERN LEGAL THEORY AND JUDICIAL IMPARTIALITY* (2003).

Dworkinian interpreter who seeks to develop an account that synthesizes our moral judgments while also reflecting moral practice in its best light. The project itself must presuppose that there are general considerations that percolate through our moral judgments and always function in the same way. For the intention behind the project is not merely to report what people happen to believe about the evaluative properties of acts and characters. It is also to shape these beliefs into a coherent, action-guiding whole where the chosen shape is itself molded by moral and political values. And so the ethical theorist must presume, contrary to the moral particularist, that these values are fixed. By the same token, the Dworkinian interpreter gets an explanation and a justification for the whole practice of legal interpretation only by presuming that the moral and political values that paint the practice in its best light are also fixed. But this is just what moral particularism denies.

What all of this suggests is that there is no way for Dworkin, or any legal theorist for that matter, to arrive at a unified, normative theory of what the law is without relying on the fixed operation of moral principles that function everywhere in the same way⁷²—without relying, that is, on the very proposition that moral particularism rejects.⁷³

IV. CONCLUSION: RESCUING LEGAL THEORY FROM MORAL PARTICULARISM

The problems that particularism poses for Dworkin arise because he could not abandon the justificatory part of his project without thereby rendering the interpretive part entirely arbitrary. These problems would beset any legal theory that relied upon normative considerations at the interpretive stage. But a legal theory could have a normative bent and exclude, indeed even eschew, the use of normative considerations at the justificatory stage if the theorist took a critical stance toward the account that she advanced. Legal positivist theories that are not purely conceptual or descriptive are normative in just this way.

But what if one agrees, as I do, with the central insight of legal interpretivism: that the content of law must be responsive to moral considerations not merely as a matter of social fact, but because law deserves no less if it is to count as “law”? Could a theory like Dworkin’s be made compatible with moral particularism? Here I can do no more than gesture to the ways in which one could retain a commitment to the role of morality in determining the content of law consistent with the holistic behavior of reasons. First, the legal interpretivist could argue for certain values that he or she believes a legal system ought to embody. These arguments, how-

72. Cf. Keating, *supra* note 68, at 527 (“Hard cases are the law in quest of itself, the law’s pursuit of self-understanding. Legal theory is this enterprise writ [sic] large.”).

73. This statement will overreach to the extent that local interpretation, or the interpretation of a handful of decisions, does not contravene the particularist’s thesis. Nonetheless, we would be hard-pressed, I think, to call a project of such a small scale an instance of legal theorizing.

ever, can be founded on no more than perceived regularities in the behavior of those values—they are values that tend to count in favor of or to conduce to a good system of law. On this way of proceeding, moral or political principles would function not as rigid rules but instead as reminders of the sorts of considerations that are often relevant, and that the interpreter would want to be sure to bear in mind as she proceeded with her construction.⁷⁴

What is crucial here is the radical metaphysical shift that particularism demands of the legal interpretivist. He or she must give up the notion that moral or political values have features intrinsic to them that determine their polarity independent of the contexts in which they may be found. The epistemic implications of the shift, however, are less far-reaching. To see this, consider that in non-normative contexts, we are warranted in making presumptive judgments on the basis of past experience, even if we do not have knowledge of all of the particulars of the case at hand (there was no epistemic promiscuity in my belief that my students would show up for class today). So too the legal interpretivist will be justified in pursuing her project so long as she recognizes that the tools of her trade—the moral values justifying the content she derives—typically, but not invariantly, function in the ways she supposes.

74. This is Dancy's suggestion for the reformation of moral principles. See DANCY, *supra* note 2, at 67.

