

MORAL GENERALISM VERSUS LEGAL PARTICULARISM: PRAGMATISM'S DISTINCTION BETWEEN LAW AND MORALS

GENERALISMO MORAL VS. PARTICULARISMO LEGAL: A DISTINÇÃO DO PRAGMATISMO ENTRE LEI E MORAL

Frederic R. Kellogg

George Washington University/UFPE School of Law, Recife

frederickellogg@cs.com

Abstract: In opposition to legal positivists and interpretivists, this paper advances a pragmatist distinction between law and morals as an operational rather than ontological one. Ronald Dworkin's argument, emphasizing "the sovereign importance of moral principles in legal and constitutional adjudication," has had considerable influence on the debate among legal positivists and interpretivists. Dworkin takes the view that general propositions found in legal opinions, such as the principle "no one may profit from their own wrong" in *Riggs v. Palmer*, are moral principles. He concludes that moral principles may ground particular judgments. Pragmatic fallibilism insists that such propositions are distinctively legal, and that a careful examination of the case law demonstrates that particular judgments have a methodological priority and serve to limit their extension. Pragmatic fallibilism criticizes the use of overextended generals for masking particular circumstances that are made relevant by legal precedent. It holds that Dworkin's claim is a license to use morality as a pretext while deciding without regard to particular circumstances. This may even offer the occasion for the influence of hidden subjective and ideological preferences. For the fallibilist, "moral" principles do not decide hard cases, but serve to divert attention from the very facts that make the particular case difficult, and may hide proper reasons for decision from both courts and litigants.

Keywords: Philosophy of Law. Legal Pragmatism. Legal Fallibilism.

Resumo: *Em oposição a positivistas e interpretacionistas legais, este texto propõe uma distinção pragmática entre lei e moral como operacional ao invés de ontológica. O argumento de Ronald Dworkin, enfatizando "a suprema importância do princípio moral na adjudicação legal e constitucional," teve considerável influência no debate entre positivistas e interpretacionistas legais. Dworkin assume a visão de que as proposições gerais encontradas nas opiniões legais, tais como o princípio de que "ninguém pode se beneficiar com seus próprios erros" aplicado em *Riggs vs. Palmer*, são princípios morais. Ele conclui que os princípios morais podem fundamentar julgamentos particulares. O Falibilismo pragmático insiste que tais proposições são proeminentemente legais, e que um exame minucioso do caso de direito demonstra que julgamentos particulares tem prioridade metodológica e servem para limitar sua extensão.*

O Falibilismo pragmático critica o uso estendido de universais pois estes encobrem circunstâncias particulares tornadas relevantes através do precedente legal. Ele sustenta que a asserção de Dworkin é uma licença para se usar a moralidade como um pretexto para se decidir casos desconsiderando circunstâncias particulares. Isto pode até ser ocasião para a influência de preferências ideológicas e subjetivas secretas. Para o falibilista, os princípios morais não decidem casos difíceis, mas servem tão-somente para distrair-nos dos fatos que tornam o caso particular difícil, e podem esconder as verdadeiras razões para as decisões, tanto dos tribunais, quanto dos litigantes.

Palavras-chave: *Filosofia do Direito. Pragmatismo Legal. Falibilismo Legal.*

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I

Ronald Dworkin's thesis, emphasizing "the sovereign importance of moral principle in legal and constitutional adjudication" (2006, *passim*), represents a pronounced form of moral generalism--the view that there are important general moral principles that ground particular judgments (Dreier 2006b, xxii). I will examine this claim in the context of Dworkin's leading example, the case of Riggs v. Palmer, and show that the extension of the so-called "moral" principle in Riggs is limited in its actual application by particular instances, raising the question whether Dworkin is correct in assigning to it the character of being distinctively *moral*.

More specifically, I will show that the principle "no one shall profit from their own wrong," which Dworkin claims to have played a deciding role in Riggs, is and has been demonstrably inapplicable as a general proposition to several other types of legal dispute. Notwithstanding post-Riggs claims seeking to apply it as a general proposition, it has been limited to certain claims where a criminal plaintiff seeks financial recovery arising out of a serious illegal act.

Moral principles, meanwhile, may be said to depend for their character on a high degree of generality (Audi 2006, 285). As Kant sought in his Categorical Imperative, they seek universality. Even given the perennial problem of identifying moral principles that are exceptionless, we may follow W. D. Ross in admitting that they must at least claim a *prima facie* universality (Ross 1930, 122-23; Audi 2006, 289). The universality *qua non* of moral principles is not at issue here, but rather the assignment of moral character to general propositions found in legal arguments and decisions, which I claim are grounded in particular cases.

Dworkin came to his position through a critique of H.L.A. Hart's legal positivism, which upheld and updated a tradition dating from John Austin, famously arguing that law and morals are separate, and conceptualizing law as a definable system of rules.

Opposing Hart's separation of law and morals, Dworkin argued from two particular cases, Riggs v. Palmer and Henningsen v. Bloomfield Motors, Inc., that moral principles can "trump" clear rules of law in legal decisions. In Riggs a judge ruled that a named heir who had murdered his grandfather could not inherit a large estate from the latter's will. Dworkin claims that a clear rule of inheritance is overridden in this case by a principle, stated by the court as "No one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." In Henningsen the purchaser of a defective car was permitted to recover for injuries after an accident under a warranty limited only to replacement of defective parts. Here the unequivocal contract was overridden by the "principle" that "courts generally refuse to lend themselves to the enforcement of a bargain in which one party has unjustly taken advantage of the economic necessities of [an]other" (Dworkin 1977, 23-4).

Armed primarily with these examples, Dworkin attacked Hart's strict definition of law as a body of rules with the claim that "when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards" (22).

II

Pragmatic fallibilism, rooted in classical pragmatic method, is a form of particularism--the view that the order of explanation is from particular cases to general legal propositions. This would include the “principle” stated in Riggs. I will elucidate fallibilist legal pragmatism as giving particular legal judgments a methodological priority, by serving to limit the extension of all general legal propositions, while moral ones are not comparably limited. First, I must distinguish pragmatic fallibilism from so-called “neopragmatism” (Hildebrand 2003, 130, 154).

Dworkin is not alone in characterizing contemporary legal pragmatism as a forward-looking consequentialism: “it holds that judges should always decide the cases before them in a forward-looking, consequentialist style. They should make whatever decision is best for the community’s future with no regard for past practice as such.” While this makes an easy target, it is clearly not a fair characterization of pragmatic fallibilism, as exemplified for example in the early scholarship of Oliver Wendell Holmes, Jr. (Kuklick 1977, 51). Dworkin is addressing a viewpoint found less in Holmes than in recent writers often called “neopragmatist”: Richard Rorty, and especially Richard Posner, for whom legal pragmatism does in fact amount to a forward-looking consequentialism (Posner 2003, 24-56).

Fallibilism is the idea that no formulation of a general proposition or principle can be final, as theories must be linked to experience and practice, and the validity of a proposition is dependent upon both its past and its future, in its success as a reflection of experience and as a guide to future conduct. This is not pragmatism in the everyday conventional sense, which tends to skew contemporary discourse. Fallibilism does not disregard the value of legal precedent, unlike such formulations as Dworkin’s, attributing to pragmatism “no regard to past practice as such” (Dworkin 2006, 21).

According to fallibilism, solutions to legal problems derive from patterns of decision in specific individual cases. As decisions of a given type emerge from the trial of legal disputes, patterns are eventually perceived, and a standard of prudence within the pattern deduced, eventually expressed as a rule. An historical example might be the navigation of sailing ships, with cautionary practices adduced in testimony, interpreted as rules of prudence, finally transformed into rules of liability in suits over lost cargo. Juries have played a key role, in sensing and implementing (most commonly in tort cases) the prevailing community standards of prudence. Rules so formed are flexible in the face of novel disputes brought about by advances in commerce or technology. They are subject to adaptive modification--that is to say, they come into the world as inherently fallible.

Moreover, in difficult cases, opposing patterns of conduct (enshrined to some degree in distinct precedents) have frequently come into conflict. The pedestrian, engaged in one rightful course of conduct, is incidentally injured by the commercial carrier engaging in another. Or the white college applicant is rejected and claims injury from the university being engaged in an otherwise defensible course of action to support a diverse student body. How do such conflicts find resolution? Here we find the key difference from Dworkin.

For fallibilism, notwithstanding the bearing of relevant legislative or constitutional language, this is also a gradual finding process that has been expressed as “marking points on a line.” Excepting the obvious case, judges should not in the first instance look for a deciding rule or principle. Beneath legal disputes often lies a clash between ways of doing things,

ways that are unhelpfully characterized as embodying irreconcilable “principles.” Following what other writers have called a “minimalist” approach to judicial decisions, judges should recognize that “A line has to be drawn to separate the domains of the irreconcilable desires. Such a line cannot be drawn in general terms.” (Holmes 1901, 123, Sunstein 1999).

We may note that this account (emphasizing “desires” over “principles”) avoids a language of fixed legal rights, and hence also discussion focused on balancing opposing policies or choosing between applicable moral principles. It sees the two sides of a difficult case (as are many cases that reach the higher appellate levels) as only partially representative positions within separately evolving modes of goal-oriented activity that have converged in conflict. This, in a nutshell, implies the fallibilist argument against Dworkin: judicial moralizing short-circuits a fact-specific reconciliation process that favors small case-specific steps on the way to generalization, which itself may require time and experience.

This is not to imply that moral standards are absent from the legal process. The standard of prudence applied to the specific facts in a tort or personal injury case is, after all, an ethical standard, embedded in the practices of the community. The body of legal precedent is an embodiment of diverse moral experience, expressed in distinct precedents. Fallibilism does not deny that judges should ever engage in generalizing, when sufficient prior experience may warrant or require. The roots of general legal principles or propositions, insofar as they invoke moral standards, lie in retrospective articulation of case-specific experience (Holmes 1881, 127). Fallibilist legal pragmatism gives particular legal judgments a methodological priority, by serving to limit the extension of all general legal propositions, as opposed to moral ones. This raises the question whether Dworkin is correct in assigning to general propositions found in legal argument the character of being distinctively *moral* propositions.

III

With this background we may now evaluate Dworkin's claim insisting upon the judicial need for moral principles. While Dworkin has originally argued from two cases, I will focus on the better-known case of Riggs v. Palmer. In both cases, however, we may find a conflict that a fallibilist would characterize as between opposing bodies of precedent rather than between a legal rule and a moral principle.

As stated above, Dworkin claims that the New York Court of Appeals in Riggs reasoned from the moral principle “no one shall profit from their own wrong.” In fact, the court used the following formulation: “No one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.” Immediately following this formulation, the court cited an 1886 decision by the Supreme Court of the United States, holding that a plaintiff who procured a life insurance policy on another person, payable on death, and then murdered the insured to receive the insurance, could not recover in court. New York Life Ins. Co. v. Armstrong, 117 U.S. 591.

Thus, the Riggs decision can be viewed as an extension of the rule of the Armstrong case, which was decided in case-specific terms. We should note that the principle “no one should profit from their own wrong” is a conflation of the actual language of the Riggs opinion. Dworkin has paraphrased it in the most general terms, accompanying his claim that

a moral principle can play a role in a “hard case.” How should we decide whether to adopt Dworkin’s way of viewing the Riggs case?

We may approach this question by noting that Riggs is not, as Dworkin says, a “hard case” in the sense of posing real difficulty in choosing between opposing sides or outcomes. For the fallibilist, a truly difficult hypothetical case would be one that could have gone either way, such as if the bequest had said “I recognize that my beloved grandson was orphaned at the age of 3 and obliged to grow up in desperate circumstances, and despite his mercurial nature and proclivity toward troubles with the law I leave him the sum of \$5,000 to help with the costs of rehabilitative education.” By comparison, Riggs is an easy case. The testator, Francis Palmer, had left small legacies to his two daughters and a life estate to his wife, with the remainder to his teenage grandson Elmer. The latter, then living with his grandfather and aware that the bequest was under reconsideration, poisoned him to retain and effectuate the bequest.

In the actual case it might have been surprising, though perhaps not shocking, if the court had overridden the will with no more than a simple statement that “noone shall profit from their own wrong.” Yet the court took pains to emphasize the extreme circumstances of the case--clear and specific intent to gain a large bequest already under reconsideration--as well as to show that 1) the applicable statute was open to construction denying the bequest, 2) there was legal precedent outside American jurisdictions for holding a bequest inoperative in the event of murder, and 3) that the United States Supreme Court had recently held that a person who murdered someone on whom he had procured a life insurance policy could not recover.

In the hypothetical case, where the bequest contains language that appears to balance the grandson’s unlawful act, it would indeed be both surprising and shocking for the court to override the will with a simple statement of Dworkin’s principle, and without further explanation or analysis of the facts and relevant precedent. A fallibilist would view this as a misuse of moral argument and a dereliction of the duty to analyze and decide on specific and relevant grounds. This is because, in a truly hard case, Dworkin’s principle “noone should profit from their own wrong” entirely loses what Dworkin calls its explanatory power or “weight” (Dworkin 1977, 22ff), for two reasons. First, a *competing* principle is now clearly visible, the principle of fidelity to the testator’s intention. Second, we may now see the problem of *overextension* of Dworkin’s principle: it applies to many circumstances where the law may indeed hold otherwise.

If we follow the history of the Riggs case in subsequent decisions by the same court, we find a distinct awareness that the extension of its principle, without narrowing conditions, would take in more cases than the law could justify: indeed the proposition “noone shall profit from their own wrong” would apply to virtually any defendant claiming the operation of the common rule limiting the time for filing legal claims, or of contributory negligence, where a defendant claims that the plaintiff is partially responsible for an injury. It would apply regardless of the nature, circumstances, and extent of the “profit” and “wrong.”

Subsequent to the Riggs case, the New York Court of Appeals has circumscribed efforts to broaden its application. It has disallowed only suits to enforce payment of money claimed from serious crimes such as fraud, gambling, bribery, unlawful practice of law and pornography. In 1960 the court stated, “It is not every minor wrongdoing in the course of contract performance that will insulate the other party from liability for work done or goods furnished. There must at least be a direct connection between the illegal transaction and the

obligation sued upon. Connection is a matter of degree. Some illegalities are merely incidental to the contract sued on (citations omitted). We cannot now, any more than in our past decisions, announce what will be the results of all the kinds of corruption, minor and major, essential and peripheral.” McConnell v. Commonwealth Pictures Corp., 7 N.Y.2d 465, 471; 166 N.E.2d 494, 497 (1960).

The court has also disallowed suits for damages from injuries acquired in the course of unlawful conduct, such as making a pipe bomb and riding in a stolen vehicle, but circumscribed these as follows: “The . . . rule is based on the sound premise that a plaintiff cannot rely upon an illegal act or relationship to define the defendant’s duty. We refuse to extend its application beyond claims where the parties to the suit were involved in the underlying criminal conduct, or where the criminal plaintiff seeks to impose a duty arising out of an illegal act.” Alami v. Volkswagen of America, Inc., 97 N.Y.2d 281, 287; 766 N.E.2d 574, 577 (2002) (permitting recovery against automobile manufacturer by driver who was drunk when his car crashed).

It should be noted parenthetically that, throughout the subsequent case law, the court has always described the principle of Riggs v. Palmer in legal terms, and has never characterized it as a “moral” principle.

IV

To summarize the argument of this paper, Ronald Dworkin’s thesis, emphasizing “the sovereign importance of moral principle in legal and constitutional adjudication,” takes the view that general propositions found in legal opinions such as Riggs v. Palmer are moral principles, assuming that general principles such as “noone may profit from their own wrong” may ground particular judgments. Pragmatic fallibilism insists that these propositions are distinctively legal, and that a careful examination of the case law demonstrates that particular judgments have a methodological priority and serve to limit their extension.

Why should we prefer the methodology of fallibilist particularism over Dworkin’s moral generalism? The answer given by the fallibilist focuses upon the hard or difficult case, the very type of case that Dworkin claims to be decidable by moral principle. As shown by the hypothetical case discussed above, Riggs v. Palmer is not the archetype of a hard or difficult case, perched precariously on the border between the competing legal principles of “profiting from wrong” and “fidelity to wills.” In truly hard cases, judicial reliance on a general proposition would serve to divert attention from the very facts that make the particular case difficult. Dworkin’s judicial permission to denominate a general proposition, like “noone shall profit from their own wrong,” as a “moral principle,” gives it a *prima facie* claim of privilege that the fallibilist would vehemently oppose.

Pragmatic fallibilism criticizes the use of overextended generals for masking particular circumstances that are made relevant by legal precedent. It holds that Dworkin’s claim can be a license to use morality as a pretext while deciding without regard to particular circumstances. This may even occasion the influence of hidden subjective preference. In this sense “moral” principles do not decide hard cases, but may hide proper reasons for decision from both courts and litigants.

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