

Institution: University of Reading
Unit of Assessment: 43 Philosophy
Title of case study: The Influence of Moral Particularism in Law and Ethics
<p>1. Summary of the impact</p> <p>Prof. Jonathan Dancy has over several decades developed the theory of ethical particularism, culminating in seminal publications dating from his time at the University of Reading, most notably his magnum opus <i>Ethics Without Principles</i> (2004). Particularism has had an impact within the legal profession, not just among legal scholars but on practitioners themselves, even to the extent of its being applied in judicial decision-making. It has also, partly through serendipitous means capitalised upon by Dancy himself, found its way into public ethical debate - directly contributing to the enrichment of civil society and stimulation of cultural life by introducing non-academics to a powerful and provocative new view of morality.</p>
<p>2. Underpinning research</p> <p>Dancy (Reading 1996-2011, 2013-2016, also part time at University of Texas, Austin) is the 'father figure' of ethical particularism, the theory that there are no moral principles for the guidance of action (a theory with its historical roots in the intuitionist tradition). Ethical generalists, as they are often called, believe that to be a moral person you must know and act on principles, which at their strongest are exceptionless commands and prohibitions, such as 'Love your neighbour' and 'Don't steal'. Without moral principles there can be no difference between right and wrong, and no hope for an agent to be fully virtuous.</p> <p>Over several decades of sustained research, Dancy has argued forcefully against this traditional view of moral reasoning. He holds that there are moral principles in the sense of rules of thumb, maxims, counsels, etc., but their function is not to guide action in an invariable way across circumstances. Rather, a feature of a situation that makes an act, say, wrong in one case may work differently in another situation to make that act right. That A has taken B's property without permission does not invariably contravene the supposed principle against theft, though it is a feature of the case that usually counts against what A did, even if not overwhelmingly. If B's property is a samurai sword and B is insane, it would be right for A to take it off him without consent if he can. But if B is sane and the sword is a mere ornament hanging harmlessly on B's wall, taking it without permission would be theft.</p>
<p>2. References to the research</p> <p>The body of research has been externally peer-reviewed and assessed as of at least 2* quality</p> <p>Books:</p> <ol style="list-style-type: none"> 1. <i>Practical Reality</i> (Oxford: Clarendon Press, 2000), pp. 187; paperback edition published 2002. 2. <i>Ethics Without Principles</i> (Oxford: Clarendon Press, 2004), pp. 229; paperback edition 2006. <p>Articles:</p> <ol style="list-style-type: none"> 3. 'Defending Particularism', in <i>Metaphilosophy</i> vol. 30, nos 1-2, Jan/April 1999, pp. 25-32. 4. 'The Particularist's Progress', in B. W. Hooker and M. Little eds. <i>Moral Particularism</i> (OUP 2000), pp. 130-56; reprinted in T. Rønnow-Rasmussen and M. Zimmerman eds. <i>Intrinsic Value</i> (Kluwer/Springer), 2006. 5. 'Enticing Reasons', in <i>Reason and Value: Themes from the Moral Philosophy of Joseph Raz</i>, ed. R. Jay Wallace, Philip Pettit, Samuel Scheffler, and Michael Smith (OUP 2004), pp. 91-118; reprinted in C. Nimtz and A. Beckermann eds. <i>Philosophy – Science – Scientific Philosophy. Main Lectures and Colloquia of GAP.5</i>, Fifth International Congress of the Society for Analytical Philosophy, (Paderborn: MENTIS, 2005) pp. 10-32. 6. 'McDowell, Williams and Intuitionism', in <i>Luck, Value and Commitment: Themes from the Ethics of Bernard Williams</i> eds. U. Heuer and G. Lang (OUP, 2012).
<p>4. Details of the impact</p> <p>Ethical particularism is important in this case study because it is now being discussed and debated within the legal profession, not just among scholars but also practitioners. Specifically, tort lawyers have taken cognizance of ethical particularism in the context of whether and to what extent negligence determinations should be left to a jury, given the variation of features across similar cases and the impossibility of proposing hard and fast negligence rules.</p>

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In addition, particularism has become an important part of general ethical debate among the public. This has partly arisen serendipitously, via opportunities presented to Dancy, and capitalised on by him, to publicise his research to a broad audience. He has on various occasions presented his theory in an accessible way to non-academics, using concrete examples of moral reasoning to illustrate abstract ideas in an engaging and provocative way – especially the clash between our belief in exceptionless general principles of morality, and our willingness to make exceptions and qualifications in particular cases

Impact on the legal profession

Dancy's particularist theory has – in a way that is rare for the work of a philosopher who is not a jurist – entered legal discourse as a theory to be taken seriously in helping lawyers understand recent and past rulings.

The most important evidence of the impact of particularism in the law comes from the American Law Institute's (ALI's) Restatement of the Law of Torts, 3rd edition, pub. 2010. ALI Restatements are internationally recognised as highly significant legal documents. They are essentially codifications of case law, i.e. common law judge-made doctrines that develop gradually over time. Although Restatements are not binding authority in and of themselves, they reflect the consensus of the American legal community as to what the law is (and in some areas, what it should become). There are then good grounds for viewing the Restatements as the most influential secondary authority in this area. The above Restatement (Ch.3 sec.8) says: 'Tort law has thus accepted an ethics of particularism, which tends to cast doubt on the viability of general rules capable of producing determinate results and which requires that actual moral judgments be based on the circumstances of each individual situation. Tort law's affirmation of this requirement highlights the primary role necessarily fulfilled by the jury.'

The citation for this passage names Dancy as the progenitor of particularism and refers to a paper of his from 1983. It is extremely rare for a contemporary philosopher to receive mention in an ALI Restatement (indeed we are aware of no other examples). Although this citation refers to a very early publication which predates Dancy's employment at Reading, it is clear that it is the theory of particularism itself, developed over several decades and reaching its mature and complete form in 2004, that has led to the impact here, as opposed to a single early paper. This assumption has been confirmed by email correspondence with the lawyer in charge of the project. Furthermore, it is worth stressing that this impact is on legal practice itself, not merely on academic discussion. The theory of particularism is providing part of the intellectual toolkit by which legal practitioners conceptualise and structure their domain, with ensuing changes and benefits to practice and understanding amongst this community.

- The reach of particularism into judicial practice is also discussed in a paper in the Hofstra Law Review, 2008. Here an academic lawyer argues that a preference for particularism explains the way in which judges decide certain cases and he makes explicit reference numerous times to Dancy. Again, the point to stress here is that it is the judges and lawyers on whom particularism is held to have had an influence, even if it may be through the medium of academic legal interpretation: the decisions judges reach are being shaped by, and can best be understood by practitioners in terms of, ethical particularism.
- Finally, a recent US Supreme Court decision, *Hosanna-Tabor* (2012) has received much discussion amongst legal experts. One blog, *Mirror of Justice*, discusses it at some length, with the author, a legal academic, referring to the work of Dancy and 'judicial particularism' as a way of interpreting the decision. This leads to posts by a non-academic (as it seems) debating the issue with the author (<http://mirrorofjustice.blogspot.com/mirrorofjustice/2012/01/what-does-it-mean-to-call-a-judicial-opinion-particularist.html>). If the interpretation by the original post's author is correct, then it can also be claimed with plausibility that particularism has influenced the Supreme Court justices themselves, even if they have not heard of Dancy by name.
- Given the influence and importance of ALI Restatements and the recentness of this evidence of impact, we think it reasonable to suggest that the impact seen thus far, though significant in its own right, also constitutes only the initial stages of potential impact. The Department is committed to working closely with Dancy to consolidate the impact of his research in this crucial area, ensuring maximum reach for his important philosophical work.

General impact outside academia

Dancy's research has also found its way into the arena of general public debate about morality:

- Dancy, extremely unusually for a professional philosopher, was invited to appear on a popular TV show in 2010. His interview on the US late-night talk show *The Late Late Show with Craig Ferguson* (audience 1.4 million) was devoted almost entirely to explaining moral particularism to a general audience, which Dancy did admirably well. Not only was the interviewer enthralled, but follow-up comments on the Internet show non-academics engaging with the topic. Ferguson himself joked that the research was just the thing to appeal to the 18-35 'kids' in his audience demographic.
- The cultural reach of moral particularism is also evidenced by a lengthy discussion, with Dancy prominently named, in a 2013 article for the digital magazine *Aeon* (which 'seeks to invigorate conversations about worldviews...open to diverse perspectives and committed to progressive social change'). The discussion has thus far generated 62 comments from interested lay readers (<http://tinyurl.com/ompx87e>), together with 1000 'likes' on Facebook and 200 tweets.
- Members of the public engaged with Colin Allen and Jonathan Dancy in general ethical debate about whether there could be 'moral machines' in the blog *On The Human* (2011). Allen, an academic, tries to use Dancy's particularism (cited by name) in the context of defending the possibility of 'moral machines' or 'moral robots' capable of responding to novel and variable moral situations rather than being programmed (impossibly) to follow general principles. This leads to a response by Dancy himself, debating with Allen over the extent of their agreement/disagreement, as well as a number of non-academics weighing in with various opinions about particularism and the possibility of moral machines.
- A blog for discussion of theology and philosophy of religion (2010) contains posts by non-academics discussing moral particularism, with Dancy mentioned by name. His Stanford Encyclopaedia article on moral particularism is cited, as well as the Wikipedia entry on him.
- Finally, Dancy's *Philosophy Bites* podcast (a series aimed at presenting philosophical research in a format accessible for non-specialists), discussing moral particularism, has been downloaded nearly 49,000 times. We can very safely be sure that the vast majority of downloaders are non-academics for whom the podcasts are designed. Again, we take this as evidence that his work has helped to inform and shape views about morality among this group.

Beneficiaries

Lawyers are now seeing particularism as a way of understanding judicial determinations, especially in negligence cases (see for instance the discussion of the decisions made by Justice Stevens at <http://www.scotusblog.com/2010/04/justice-stevens-particularist/>). It has caused them to reflect on whether general principles can actually determine a decision in factually similar cases.

Members of the public who have expressed opinions about the theory are divided as to its strength. Some see it as a challenge to the very idea of objectivity in ethics, others as a welcome alternative to a rigorously rule-based application of morality to various situations. Some have clearly been stimulated to apply particularist thinking to their own specific concerns. All are provoked and challenged by the theory to think more deeply about the content of an ethical system.

Reach and significance

It is hard to think of a much more significant impact on the American legal profession than being mentioned in an ALI Restatement. Together with the articles and online discussion cited above, we think this can ground a claim for the highly significant reach of particularism in the profession. Furthermore we know from a 2010 *Wake Forest Law Review* study that nearly one third of US Supreme Court decisions cite academic articles published in law reviews (http://www.abajournal.com/magazine/article/the_high_bench_vs_the_ivory_tower/), suggesting that the impact of particularism is also being enhanced by its discussion in academic legal journals. As far as wider cultural impact is concerned, as with most philosophy it is hard to assess the number of people influenced by a position or theory. The Craig Ferguson show regularly attracts around 1.4 million viewers, of whom one can be certain that thousands would at least have been challenged by the interview to think more about ethical decision-making. Again, intensity of

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influence is difficult to measure. Some viewers were sufficiently interested to read up on particularism, especially Dancy's article in the Stanford Encyclopaedia; one found the theory 'very appealing' and wondered whether further reading might 'keep me from sleeping tonight'.

Evidence

In the case of Dancy's impact on legal reasoning in general and judicial reasoning in particular, the evidence is that cited above. Furthermore, there are a significant number of references to Dancy's work on ethical particularism in various other legal journals, including his most recent work such as the 2004 book, as well as secondary literature discussing his theory. These include The Supreme Court Review (2004), The Stanford Law Review (2002), The University of Chicago Law Review (2008), The Modern Law Review (2005), and The Oxford Journal of Legal Studies (2009).

There are two points to make about this evidence. First, all of these publications are contributed to and read by legal academics, who then disseminate the ideas at conferences and workshops, where they often become the common currency of debate within the legal profession itself. We cannot prove that judicial particularist leanings in various decisions such as Hosanna-Tabor were informed by ideas that originated in academic journals. Judges do not usually cite academic works or opinions in their decisions (but see above concerning the US Supreme Court). Nor, however, do their interpretations of the law emanate from nothing more than their personal and idiosyncratic predilections. Rather, their judicial work is informed by, and taps into, the existing climate of debate over interpretation, policy, the use of precedent, etc. This debate is to a large extent shaped by the original work of academic specialists, some of whom are practitioners themselves. Secondly, judges and legal practitioners read academic journals and are directly informed by their contents. We are therefore confident that Dancy's particularism has had an impact, albeit indirect and via academic discussion in legal journals, on non-academic thinking in the legal profession.

In the case of Dancy's work as it pertains to the wider community, there can be no doubt that particularism has become a lively topic of discussion among philosophically interested members of the public. The examples above are typical. And here is a TV critic for Entertainment Weekly commenting on Dancy's appearance on the Craig Ferguson show:

"True to his desire, Ferguson hosted a segment with Dancy last night. May I say that I not only found it a more entertaining segment than the one that had preceded it — someone named Robin Williams was the first guest — but that I want to take a class with Professor Dancy right now? Dancy is a very big cheese in his field. [He] came very close to making a dunderhead like me understand what he was getting at in making distinctions between right and wrong and the context in which such terms have meaning. If, say, PBS still stood for what it used to (that is, educational programming for the good of the nation rather than a few good shows sprinkled into a schedule of antiquing and repair series), Jonathan Dancy would be doing for moral particularism what Robert Hughes once did for modern art in *The Shock of the New*: teaching us via vivid language and examples. I found Prof. Dancy exhilarating. How about you?" (<http://watching-tv.ew.com/2010/04/02/craig-ferguson-jonathan-dancy-claire-danes/>, 2 April 2010).

There follow 79 comments, quite a few of them mentioning Dancy. Typical comments include: 'I was so confounded during that interview and at the same time, I didn't want it to end' and 'I felt as if I had been invited to sit in on a conversation rather than being "performed" to, which was down to both Ferguson and Dancy.'

5. Sources to corroborate the impact (Contact details for individuals below provided separately)

The Late Late Show with Craig Ferguson, CBS Corporation

Editor At Large for Entertainment Weekly (Commenting upon Dancy's Late Late Show appearance and its impact on television viewers who read his widely influential blog)

Associate Professor of Law, St John's University (The impact of particularism on judicial decision-making and legal practice)

Professor of Law, Indiana University (The impact of particularism on judicial decision-making and legal practice)

David and Mary Harrison Distinguished Professor of Law, University of Virginia (The impact of particularism on judicial decision-making and legal practice)