

Book Reviews



Norbert Paulo

Confluence of Philosophy and Law in Applied Ethics. London: Palgrave McMillan, 2016, 237 pp.; hardback ISBN: 1137557338; paperback ISBN: 1349718289.

This book is built around an intriguing premise.

Judges applying the law (whether statutory or case law), as well as bioethicists applying principles or paradigm cases face what looks like a similar problem: How to use general principles, paradigms or practices to make judgments about very particular cases or sets of circumstances.

The law has grappled with this problem for centuries, and in the process has evolved a variety of theories and methods for solving it. This suggests that those of us who work in applied ethics might stand to learn something from judges. Norbert Paulo sets out to show that indeed we can.

This goal shapes the structure of the book. After setting up the premise in Part I, he starts with a long and detailed account of Methods in Legal Theory in Part II, which provides a framework for comparison with Methods in Contemporary Ethical Theories in Part III.

Paulo insists that in the law justification for the application of a law or of a precedent has to be deductive in nature (p. 28). The law forbids home invasion. John invaded his neighbor's home. Therefore, John committed an unlawful home invasion. This deductive format provides for the transparency required for the fair application of the law, Paulo claims. But this role for deduction almost immediately requires a number of interesting qualifications, many of which are adopted from prominent legal theorists.

First is the distinction Paulo makes between a rule and a principle. A *rule* is all or nothing, usually either a prohibition or a permission. When the light turns red, motorists must stop; when it turns green, they may proceed. But while *principles* also provide a reason for action, they often don't *dictate* it. They are merely considerations to be taken into account: When granting a mining permit, the agency should take into account the environmental impact. However, there may be a number of other principles to be applied when granting

a permit. When they point in different directions, some judgment needs to be made about where the balance or weight of evidence points. That judgment is not itself the conclusion of a deductive argument, since where the weight of the evidence points will depend on the circumstances (e.g., to what degree the principles are in conflict).

This point is related to another qualification. The cogency of any deductive argument (whether from rule or principle) will depend on the truth of the minor premises, which will include not only assumptions about the facts (not warranted by deduction, of course), but also on *interpretations* of key terms in the rule. Killing in self-defense is lawful. John killed Bill in self-defense. John's behavior is lawful. But is what John did a "killing"? (John pushed Bill into the street, where he was struck by a car.) What counts as "self-defense"? (Could John have easily escaped the threatened force?)

The deductive argument is the "formal" justification. The reasons given for interpretations of the rule (the minor premise) are the "material" justification. (p. 47 ff.) Such interpretations are critical forces driving the development of law and its applications to new circumstances. But these interpretations must be anchored in the law nonetheless. They are always interpretations of *some original*, whether it's the language of the statute itself, the intentions of the lawmakers, or the reasons behind earlier court decisions. (p. 54) This is a critical point I will return to.

Now what about precedents? How does a judge use prior case decisions to justify a legal judgment in the case now before the court? Here too Paulo proposes that arguments from precedent can be cast into a formal deductive structure, abetted by various forms of material justification.

- (1) A precedent case determined that in the presence of the properties f and g, conduct C is lawful.
- (2) The case at hand has properties f, g, *and* h

The case at hand has an additional property, h, not found in the precedent. Applying the precedent to warrant the same conduct C may then require the minor premise

- (3) In a case with properties f, g, and h, conduct C is also lawful (an "Analogy Warranting Rule" per Scott Brewer, p. 72)

Therefore,

- (4) In the case at hand, conduct C is also lawful.