

## **Clash of the Titans: Hercules vs. Dennis Martinez (Reflections on the Fish-Dworkin Debate)**

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NETWORK, Do not circulate)

I must try to exhibit that complex structure of legal interpretation, and I shall use for that purpose an imaginary judge of superhuman intellectual power and patience who accepts law as integrity. Call him Hercules.

- Ronald Dworkin<sup>1</sup>

That is why Dworkin's repeated injunction to arrive at the "best" judgments we possibly can and be the best judges we can possibly be sounds so strange. One wants to say, with Dennis Martinez, "what else could we be or do except what, according to our lights, was the best?"

- Stanley Fish<sup>2</sup>

### **Introduction**

Many scholarly exchanges produce nothing of lasting intellectual value. The debate between Stanley Fish and Ronald Dworkin that took place over the course of the 1980s and early 90s initially seems to be one such exchange. The two scholars, both giants in their fields, seemed to talk past each other, making it difficult to discern the stakes of their quarrel. It would thus be easy to reach the skeptical conclusion that their debate should be happily forgotten, along with the headbands and mullets that marked the style of the decade in which their debate took place.

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<sup>1</sup> Ronald Dworkin, *Law's Empire* (1986).

<sup>2</sup> Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke 1989) 390.

That conclusion is half right. There *is* a sense in which Fish and Dworkin talked past each other. In fact, the two theorists offer interpretations of legal practice that are in some ways the mirror images of each other—two sides of the same methodological coin. But the skeptical conclusion is too quick, because the exchange between them brings out both the question at the heart of their dispute and also why neither theorist offers a satisfying answer to it.

That question is whether law is a genuinely intellectual practice, by which I mean a practice in which ideas matter, both for explaining judicial decisions and legal change over time. Since the law’s rhetoric—whether in law-school lectures, legal briefs, or judicial opinions—makes it appear to be an intellectual practice, the question asks whether legal professionals, from lawyers and judges to law students and teachers, are participating in an activity that is either deceptive or self-delusional or both. And for anyone who could lose their life, liberty, or property—or their democracy<sup>3</sup>—through the American legal process (which is to say, everyone in this country) its answer in part determines how much confidence they should place in that process.

Neither Fish nor Dworkin offers a satisfying answer to this question. Whereas Fish plays the role of skeptic in the debate, denying that legal reasoning amounts to anything more than rhetoric, Dworkin serves as the defender of law’s genuinely intellectual—even philosophical—integrity. But Dworkin’s defense fails, and the purpose of this essay is (1) to show how and why it does so and (2) to suggest what a more robust defense requires. What is needed is to abandon the methodological dichotomy, embraced by both Fish and Dworkin, between the methods, source, values “internal” to legal practice and those “external” it.

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<sup>3</sup> As I write, President Trump and his allies (including the Attorneys General of 17 states) have brought over fifty lawsuits in an effort to overturn the 2020 election result.

My argument proceeds in three steps. In Part I, I first identify what seem to be the main sources of dispute—substantive and methodological—between the two theorists. Both go to the role of ideas in legal practice. I then conduct a thought experiment involving Hercules (Dworkin’s mythical judge) and the baseball pitcher Dennis Martinez (Fish’s hero of anti-theory). Its purpose is to illustrate the difficulty not only of actually adjudicating the dispute between Fish and Dworkin but of even knowing how one might go about doing so.

It turns out that the impasse reached is hardly surprising once we see how heavily each theorist’s claims depend on a dichotomy drawn between “internal” and “external” forms of analysis, evaluation, and critique of legal practice. Explaining why that distinction leads to a stalemate in their argument is the task of Part II.

The solution to the stalemate is simple (and offered in Part III). It is to drop the internal/external (or inside/outside) dichotomy. Doing so means recognizing that law is continuous with other fields of learning, from psychology, sociology and history to moral and political philosophy. That recognition renders legal practice vulnerable to all sorts of skeptical worries that both Fish’s and Dworkin’s accounts attempt to defuse. But for precisely that reason it offers the only hope for making good on Dworkin’s effort to understand legal practice as, at least *sometimes*, a genuinely intellectual enterprise.

### **I. The Problem: Where’s the Beef, Exactly?**

Let me first briefly summarize the debate with the goal of getting clear what each party’s views on the matters in dispute are. Then we can see what the essential disagreement between the two theorists seems to be about. Once the bone of contention is in clear view, we will try to figure out who is right—or how we might know who is right—by conducting a brief thought experiment.

### A. Fish and Dworkin: Perfect Strangers?

Ronald Dworkin's theory of law puts questions of interpretation at its center. Both in his article, "Law and Interpretation," which was the target of Fish's initial critique, and in *Law's Empire*, Dworkin seeks to offer a rival account of law to legal positivism. He argues that legal propositions are neither purely factual, descriptive statements (as a legal positivist might argue), but nor are they merely "subjective" expressions of desire (as a legal realist might argue).<sup>4</sup> Rather they are "interpretive," by which Dworkin means that they are both descriptive *and* evaluative. They aim both to "fit" the relevant legal materials but also to put them in their best light, just as literary critics aim to make sense of a poem or novel by making the best sense of it (where one's "best sense" flows from the critic's sense of aesthetic value).<sup>5</sup> In *Law's Empire*, Dworkin calls this process "constructive interpretation."<sup>6</sup>

Stanley Fish, too, denies the possibility of "objective" interpretations of texts, whether legal or literary. There are no literal meaning of words or sentences, according to Fish; rather, meaning is imposed upon texts by the interests, values, and expectations of their readers.<sup>7</sup> But it does not follow that there are no constraints on interpretive possibilities because those readers – and the perceptions, interests, expectations, and values that constitute them – are themselves determined by the "interpretive communities" to which they belong.<sup>8</sup> Both texts and human agents are *constructed* (not discovered), but they are *socially* (not individually) constructed.<sup>9</sup>

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<sup>4</sup> Ronald Dworkin, 'Law as literature' (1982) 60 Tex L Rev 527-28. I frame the distinction this way because some would argue that the legal realists were also legal positivists.

<sup>5</sup> Ibid 531.

<sup>6</sup> Dworkin, *Law's Empire* 52.

<sup>7</sup> Fish, *Doing What Comes Naturally* 3.

<sup>8</sup> Ibid 25.

<sup>9</sup> Ibid 140.

If both Dworkin and Fish see interpretation as neither wholly “subjective” nor wholly “objective,” what’s the difference between them? Arguably, not much.<sup>10</sup> In his first essay on Dworkin, Fish acknowledges that he finds Dworkin’s account of interpretation “attractive” and similar to Fish’s own.<sup>11</sup> But he insists there is a difference, and it goes to how each theorist thinks interpretation works. This difference can be seen most clearly in Fish’s critique of Dworkin’s effort in *Law’s Empire* to reinterpret traditional jurisprudential debates about the “concept” of law as essentially normative debates about how judges ought to decide cases.

There Dworkin distinguishes among three rival “conceptions” of law, which he dubs conventionalism, pragmatism, and law-as-integrity. According to Dworkin, each conception offers its own “constructive interpretation” of legal practice, interpreting in different ways the demand that the state’s coercive power only be deployed in ways that are “licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.”<sup>12</sup> The conventionalist judge is concerned primarily about procedural fairness and predictability and so thinks such rights only exist when they are explicit in those previous decisions. The pragmatist judge, meanwhile, only cares about past political decisions insofar as abiding by them serves some future-looking goal and so does not treat them as genuine constraints at all.

Finally, the judge who subscribes to “law-as-integrity” sees himself as constrained by the principles of personal and political morality implicit in past political decisions that best fit and justify those decisions.<sup>13</sup> Dworkin’s burden in *Law’s Empire* is to show that law-as-integrity offers the best constructive interpretation of legal practice. He does so by showing

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<sup>10</sup> See Dennis Patterson, *Law and Truth* (OUP 1996) 73.

<sup>11</sup> *Ibid* 87.

<sup>12</sup> Dworkin, *Law’s Empire* 93.

<sup>13</sup> *Ibid* 94-96.

how a “judge of superhuman intellectual power and patience” would reason through various legal issues. Famously, Dworkin dubs such a judge Hercules.<sup>14</sup>

Fish’s critique of Dworkin is not that judges do not practice law as integrity but that they do not so do so in the deliberate, reflective way Dworkin imagines them to. Instead, law-as-integrity is the form of “judicial practice already and necessarily takes” because judges always and necessarily give their “best” interpretation of the relevant legal materials. A judge’s “constructive interpretation” of a set of materials *just is* whatever that judge believes those materials to mean.<sup>15</sup> Dworkin’s mistake to think that the process by which judges make such judgments is a *theoretical* one in which the judge looks at the materials, makes an evaluative judgment about what purpose or principle best justifies those materials, and then applies that principle to the case at hand. Instead, judges practice law-as-integrity “naturally”: since her standards of evaluation are built into her understanding of what the enterprise is when she perceives a case *as a legal case* she is already seeing it as “the best it could be.”<sup>16</sup>

Fish recounts a story about the pitcher Dennis Martinez to illustrate his point.<sup>17</sup> When asked by a reporter what his manager told him before a game, Martinez responded that the manager had told him to “[t]hrow strikes and keep ‘em off the bases,” then adding, “What else could he say?”<sup>18</sup> As in baseball, so, too, in legal interpretation or any other interpretive activity. To perform competently in any practice depends on craft or tacit knowledge, rather than theoretical knowledge. It requires knowing *how*, not knowing *that*.<sup>19</sup>

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<sup>14</sup> Ibid 239.

<sup>15</sup> Ibid 369, 114. Fish also argues that Pragmatism and Conventionalism are impossible (for different reasons) and so do not even warrant Dworkin’s normative criticisms of them. Fish, *Doing What Comes Naturally* 356.

<sup>16</sup> Fish, *Doing What Comes Naturally* 364.

<sup>17</sup> According to Wikipedia, Dennis Martinez, nicknamed “El Presidente,” was the first Nicaraguan to play in Major League Baseball. His career spanned 22 years (1976-98), including 4 years as an all-star: [https://en.wikipedia.org/wiki/Dennis\\_Mart%C3%ADnez](https://en.wikipedia.org/wiki/Dennis_Mart%C3%ADnez)

<sup>18</sup> Ibid 371.

<sup>19</sup> Ibid 352.

As Fish explains, “[t]o think within a practice is to have one's very perception and sense of possible and appropriate action issue ‘naturally’ without further reflection from one's position as a deeply situated agent.”<sup>20</sup> What is true of baseball players is true of judges: they are not engaged in a theoretical and reflective enterprise but instead performing moves in a game.<sup>21</sup>

To Dworkin, Fish's view reflects a stunningly impoverished understanding of legal practice. Fish fails to see that “in some jobs [like judging] theory itself is second nature. Some things we do are more argumentative than throwing a forkball: Denny Martinez never filed an opinion.”<sup>22</sup> Because Fish fails to appreciate this theoretical, reflective, and introspective character of legal practice, his account, Dworkin explains, “leaves no room *for puzzle or progress or controversy or revolution*: It cannot explain how lawyers can worry or disagree or change their mind about what the law is.”<sup>23</sup>

So that is the substantive dispute between Fish and Dworkin: Is legal reasoning of the kind judges engage in as unreflective as pitching a forkball (as Fish argues)? Or would such a conclusion fail to account adequately for the “puzzle or progress or controversy or revolution” that actually marks legal practice (as Dworkin argues)?

But that substantive dispute seems to carry even deeper, methodological implications for the legal scholar or would-be theorist. If law is not an intellectual, reflective practice, then efforts like Dworkin's to illuminate and guide it are doomed to failure. Thus, in the end, Fish concludes, “[t]hat finally is what is at stake in the debates between us, whether or not Dworkin has a project.”<sup>24</sup>

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<sup>20</sup> Ibid 385-86.

<sup>21</sup> Ibid 387.

<sup>22</sup> Ronald Dworkin, ‘Pragmatism, Right Answers, and True Banality’ in Brint and Weaver, *Pragmatism in Law and Society* 382.

<sup>23</sup> Ibid 388 n. 25 (emphasis added).

<sup>24</sup> Stanley Fish, ‘Almost Pragmatism: The Jurisprudence of Posner, Rorty, and Dworkin’ in Michael Brint and William Weaver (eds), *Pragmatism in Law and Society* (Westview Press 1991) 79.

## B. The Greatest American Judge: Hercules or Martinez?

But is there really a difference between these two views of legal practice? How would we know? I propose to answer those questions through a thought experiment. Let's imagine a fictitious judge, who has written an opinion in a hard and important case involving statutory interpretation that ends up transforming the law in the area to which it applies. The judge goes by "Judge Ralph," but he is actually either Hercules or Dennis Martinez (who has changed careers and now decides cases in the way he used to pitch forkballs), but we don't know which. He often seems like the Theoretician, Hercules, but can we rule out the possibility that he is really the Natural, Martinez? How might we do so? Let us see.

*1. Form of Argument?* We might start by examining Ralph's written opinion, which seems to reflect the three main stages of "constructive interpretation" that Dworkin describes.<sup>25</sup> The opinion lays out a series of cases, statutes, and other materials (pre-interpretive stage), ascribes a purpose to the statute in question (interpretive stage), applies that purpose to the facts of the case, yielding a conclusion as to which party wins (post-interpretive stage). Can we conclude that Judge Ralph is Hercules?

Not yet. When judges write their opinions they are, according to Fish, "engaging in the practice of self-presentation, that is, the practice of offering a persuasive account of why they have done what they have done . . . which is not the same thing (why on earth should it be?) as offering an account of how they actually did it."<sup>26</sup>

*2. Quality of Argument (and Disagreement over it)?* But it's not just the form of Ralph's argument. His opinion is also novel and bold in that it considers but then dismisses as irrelevant legislative history from the statute's sponsor in Congress that contradicts Judge Ralph's interpretation of the statute. Ralph's colleague makes much of this evidence in a

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<sup>25</sup> Dworkin, *Law's Empire* 52.

<sup>26</sup> Fish, *Doing What Comes Naturally* 388.

vigorous dissent, but based on our own reading of Ralph's opinion, and related materials, we think Ralph's view superior. It is an ingenious, tightly reasoned opinion; indeed, we think it is *right*. Evidence of Hercules?

Hardly. True, Hercules is not constrained by the subjective intent of legislators. But neither is Martinez.<sup>27</sup> Nor does the brilliance of the opinion help. Fish and Dworkin both deny the existence of any independent standard against which we might compare the opinion in order to judge its correctness.<sup>28</sup> And since we can only make our own interpretive judgments as participants in legal practice, controversies and disagreements (like those with Ralph's dissenting colleague) are inevitable.<sup>29</sup> Ralph could still be either Hercules or Martinez.

3. *Time and Labor?* Then we learn that Ralph spent days on his opinion, pouring over the statute, legislative history, and relevant case law, rarely leaving his office and hoping for further inspiration. His wife was concerned; he wasn't showering much. Surely that is evidence of a conscious, reflective, *Herculean* effort, no?

Nope. Martinez struggles over cases, too. It's just that he's not struggling for *theoretical* reasons; he feels himself under pressure to figure out the best way to frame what he's already decided (naturally) in a way that will avoid making his colleagues raise their eyebrows.<sup>30</sup>

4. *Brain scans?* Maybe judging by time and labor alone is inadequate, but surely if we hooked up Ralph to some sort of futuristic brain-scan technology, we could tell whether he is deliberating in the conscious, reflective way that Hercules does or, instead, if he is

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<sup>27</sup> Ibid 98-99.

<sup>28</sup> Ibid 88; Dworkin, 'Law as Interpretation' 527-28.

<sup>29</sup> Dworkin, *Law's Empire* 14.

<sup>30</sup> Fish, *Doing What Comes Naturally* 356.

merely going on instinct, doing what comes naturally. Even current fMRI technology may be able to give us a clue as to whether Ralph is “thinking fast” or “thinking slow,” no?<sup>31</sup>

Not necessarily. Ralph may be Martinez only somewhat self-deluded. The baseball great Ty Cobb, according to Fish, thought that he used a formula to judge when and how to swing at pitches, but there’s good reason to think that he was deceiving himself.<sup>32</sup> So Martinez may just be going through the motions of “constructive interpretation” because he thinks that’s what judges are supposed to do, even though the real basis for his decision was just his “feel” for the relevant materials.<sup>33</sup>

5. *A (Progressive) Revolution?* Suppose we now learn that the case has had an enormous impact on the relevant law. Though considered radical at the time of the decision, within a few years Judge Ralph’s view of the statute had been widely adopted. A few years after that, a unanimous Supreme Court validated it. Moreover, the law is much better for it—morally, social, intellectually. Surely only Hercules, or someone of his Caliber—a Holmes, Hand, or Cardozo—could pull that off!?

Not at all. It only shows that Martinez had a good feel for when the time was right – politically, socially, culturally – to make his bold move.<sup>34</sup> There is no reason to think that it was the persuasiveness of Ralph’s legal theory that prompted the change.<sup>35</sup> And our judgment that the subsequent legal changes qualify as “progress” only means that we consider them to be an improvement relative to our own interpretive judgments—as has already been clarified in Question 2, above.

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<sup>31</sup> Daniel Kahneman, *Thinking, Fast and Slow* (FSG 2011). Cf. Berry van den Berg, ‘Thinking fast or slow? Functional magnetic resonance imaging reveals stronger connectivity when experienced neurologists diagnose ambiguous cases’ (2020) *Brain Comms* 1.

<sup>32</sup> Fish, ‘Almost Pragmatism’ 78.

<sup>33</sup> *Ibid.*

<sup>34</sup> Fish, *Doing What Comes Naturally* 23, 26.

<sup>35</sup> *Ibid* 23.

6. *Debunking History?* Perhaps we can try some evidence that cuts the other way to see if we can reveal Ralph to be Martinez. Imagine we turned up evidence that Ralph had massive investments in, and personal ties to, various industries his decision ended up benefiting. If Martinez does not decide cases for the legal reasons expressed in his opinions, then surely these facts would count as at least some evidence that Judge Ralph is Martinez insofar as it suggests another plausible—and discreditable—motivation for the decision?

Unfortunately, this won't work either. Such historical evidence is perfectly consistent with Ralph being Hercules. Remember that Hercules is a mythical hero, not an actual human being. What we are interested in, Dworkin informs us, is the argumentative structure of his legal theories, not some explanation for why he developed those theories.<sup>36</sup> So Ralph's motivations are beside the point.

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So where does this leave us? Well, on the one hand, our thought experiment seems to contradict Dworkin's claim that Fish's account of legal practice is so "flat" and "passive" that it leaves it robbed of any intellectual integrity. For it appears that Fish can account for all the features that Dworkin thought emblematic of legal practice. Even if all judges are like Martinez, deciding cases and writing opinions "naturally," they can *puzzle* over decisions (Question 1) *disagree* with other judges (Question 2), participate (or even commence) legal *revolutions* we consider *progressive* (Question 6). Anything Hercules can do Martinez can do better.

On the other hand, it's hard to shake the idea that something is amiss. It's a bit like the experience of attending a zoom cocktail party. True, drinks were imbibed and

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<sup>36</sup> Dworkin, *Law's Empire* 12-13. See *infra*, pp. \_.

pleasantries exchanged, so technically it qualified as one. But at the same time, one can't fight this feeling that a vital element was lacking.<sup>37</sup>

Consider how we would need to interpret these various features under the assumption that Judge Ralph was Martinez. Martinez's "puzzle" isn't really a genuinely intellectual one at all—it's just about how to arrange various terms from the legal lexicon to get the result desired. His disagreement with his colleagues does not actually seem to be about the best reading of the relevant legal materials, but rather an underlying political dispute. The revolution Ralph helped launch was not a revolution *in thought* so much as a rapid shift societal attitudes.<sup>38</sup> And if we think those changes to count as "progress," that fact simply reveals our own participation in that societal shift. Moreover, our judgment that those changes did constitute progress is immune to any historical or sociological explanation that might undermine the decision's moral or legal stature.

## II. The Diagnosis: Bosom Buddies, After All

So what went wrong? Let us take stock of where we are. After acknowledging the superficially similar interpretive approaches of Fish and Dworkin, we identified what seemed to be a real, substantive dispute between the two scholars over whether legal practice was an intellectual practice in which ideas and argument matter in adjudication. Furthermore, that dispute seemed to carry even deeper methodological implications as to the profitability of Dworkinian-style moral and legal theorizing. But once we tried to adjudicate the substantive disagreement to see how we might go about vindicating one theorist's view of legal practice

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<sup>37</sup> While I recognize that the technical philosophical issues raised differ, I see my Hercules/Martinez thought experiment as similar in relevant respects to John Searle's Chinese Room Argument and to arguments for the conceivability of philosophical zombies. The Stanford Encyclopedia of Philosophy has useful entries on both. See The Chinese Room Argument, The Stanford Encyclopedia of Philosophy, available at: <https://plato.stanford.edu/entries/chinese-room/>; Zombies, Stanford Encyclopedia of Philosophy, available at: <https://plato.stanford.edu/entries/zombies/>.

<sup>38</sup> Fish, *Doing What Comes Naturally* 23.

over the other's, it became clear that there was no way to do so. Every judicial action or thought that Dworkin might point to as evidence of law's intellectual character, Fish could use as evidence of its essentially rhetorical or "natural" (i.e., non-reflective) quality.

The problem was this: the summary above gets the logical priority of the substantive and methodological issues backwards. Fish's and Dworkin's methodological disagreement as to the existence and value of legal theory does not *grow out of* their substantive dispute over the character of legal practice; rather, their methodological commitments *entail* that substantive dispute. That is because each theorist's methodological stance guarantees at the outset what his evaluation of legal practice will ultimately reveal.

We can say more. Both authors' methodological commitments flow from precisely *the same* assumption. That assumption, which Pierre Schlag detected decades ago,<sup>39</sup> is that one can and should distinguish between those methods, sources, arguments, and values "internal" to legal practice and those "external" to it. The difference between Fish and Dworkin, then, is just that Dworkin sees himself as actively operating within legal practice, whereas Fish imagines himself to be passively observing it from the outside.<sup>40</sup>

Let's take Dworkin first. Dworkin insists that law is an argumentative practice, one in which lawyers and judges (and theorists, like himself) argue about what rights and duties people have, what they are legally forbidden and permitted to do.<sup>41</sup> In order to understand the argumentative structure of this practice, the theorist must engage with those arguments rather than simply explain them away. Thus, before expounding his theory of law in *Law's*

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<sup>39</sup> See Pierre Schlag, 'Normativity and Politics of Form' (1991) 139 U Pa L Rev 801, 920 (criticizing Dworkin's use of the distinction); Pierre Schlag, 'Theory and the Uses of Dennis Martinez' (1987) 76 Geo L Rev 53, 55 (noting Fish's reliance upon it).

<sup>40</sup> As stated below, Dworkin states explicitly that he adopts the "internal" or "participant's" point of view when developing his theory of law and adjudication. Dworkin, *Law's Empire* 12-13. Meanwhile, Fish occasionally acknowledges that his interpretations of intellectual growth, change, or learning are issued "from the perspective of neither the one who is newly aware or those who have brought him to his awareness." Fish, *Doing What Comes Naturally*, 461. It almost seems like Fish takes his account to be more *accurate* on account of such detachment.

<sup>41</sup> Dworkin, *Law's Empire* 12-13.

*Empire*, Dworkin clarifies that his argument adopts the “internal point of view,” which roughly means the judge’s point of view. This point of view is not concerned with the historical or social-scientific explanation of legal practice. Those are “external.” The reason he does so, he explains, is that judges “want theories not about how history and economics have shaped their consciousness but about the place of these disciplines in argument about what the law requires them to do or have.”<sup>42</sup>

Dworkin’s distinction between internal and external forms of argument is a quite general one that applies to law, morality, and aesthetic forms of interpretation.<sup>43</sup> Its function is to exclude various forms of skepticism that might cast doubt on the sorts of normative judgments those interpretive practices involve. In Dworkin’s view, no skeptical challenge to some first-order interpretive claim (whether legal, moral, aesthetic) can get off the ground unless it engages substantively with the claim on its own normative terms. It cannot announce from the “outside” that all such interpretive judgments within some domain do not have the right kind of metaphysical status or that they are the expression of some more basic, non-normative social phenomenon.<sup>44</sup>

In short, Dworkin’s conclusion that law is a reflective, intellectual practice follows necessarily from his requirement that to understand legal practice, one must engage with it from a normative posture (i.e., treat it from the “internal point of view”).<sup>45</sup> Other forms of

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<sup>42</sup> Ibid.

<sup>43</sup> Ronald Dworkin, ‘My Reply to Stanley Fish (and Walter Benn Michaels): Please Don’t Talk about Objectivity Any More, in W. T. Mitchell (ed.) in *The Politics of Interpretation* (Chicago 1982) 297.

<sup>44</sup> Dworkin, *Law’s Empire* 78-3. It is in this sense—and *only* in this sense—that Dworkin insists upon the “objectivity” of interpretive judgments. See Dworkin, ‘My Reply to Stanley Fish’ 297 (“I have no argument for the objectivity of moral judgments except moral arguments, no argument for the objectivity of interpretive judgments except interpretive arguments.”). See also Daniel Priel, Making Sense of Nonsense Jurisprudence, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3696933](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696933)

<sup>45</sup> Dworkin raises as an objection to his theory the worry that it makes skepticism impossible. See Dworkin, ‘My Reply to Stanley Fish’ 301. His response is that skepticism is not ruled out because one can offer a global but “internal” skeptical account to the effect that a set of judgments within some domain are too “unstructured and disconnected to count as beliefs within that enterprise.” Ibid. But if one concludes that all or nearly all of the judgments made by those within a practice fail to cohere in the way the practice’s participants claim they do, then the pressure for an alternative, “external” explanation of those judgments would be great. It is but a small step

inquiry, which might seek to *explain* law as a social phenomenon, cannot reveal law to be anything else because (by definition) such inquiries are “external” to law.<sup>46</sup>

Fish, meanwhile, reaches the opposite conclusion from the identical methodological premise. One of Fish’s central claims in *Doing What Comes Naturally* is that theory has “no consequences.” Here is the argument: A theory is a “a set of principles or rules or procedures that is attached to (in the sense of being derived from) no particular field of activity, but is of sufficient generality to be thought of as a constraint on (and an explanation of) all fields of activity.”<sup>47</sup> But there are no rules or principles that belong to “no particular field of activity.” Therefore, “there can be no such thing as theory, and something that does not exist cannot have consequences.”<sup>48</sup> In short, “theory” has no consequences only because Fish defines it out of existence.<sup>49</sup>

But there’s more. Even though “theory,” in Fish’s thick sense, does not exist, some people *try* to offer such principles and procedures. Those people have even developed a whole practice around such efforts. They call themselves “philosophers” and their activity “philosophy.”<sup>50</sup> Even though they cannot actually produce theories (since they don’t exist), philosophers can form “very general” beliefs about various matters, including legal ones.<sup>51</sup> Unfortunately, those very general beliefs will also fail to have any consequences for any practice (such as law or literary criticism) other than the practice of philosophy itself because

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to acknowledge that the relative plausibility of rival explanatory accounts bears on the strength of the initial interpretive judgment, which is the point I develop below. See *infra*, pp. \_\_.

<sup>46</sup> Dworkin, *Law’s Empire* 13, 273.

<sup>47</sup> Fish, *Doing What Comes Naturally* 13.

<sup>48</sup> *Ibid.*

<sup>49</sup> See Schlag, ‘Uses of Dennis Martinez’ 56; Terry Eagleton, ‘The Estate Agent’ (Review of Fish, *The Trouble with Principle*) (2000) 22 *London Review of Books* 2.

<sup>50</sup> Fish, *Doing What Comes Naturally* 396.

<sup>51</sup> *Ibid.* 327.

those practices stand outside philosophy and vice versa.<sup>52</sup> In short, philosophers can say anything they'd like, but they can have no effect outside their own rhetorical practice.

That is why Dworkin has no project, according to Fish. Dworkin's effort to theorize about law is doomed to fail because any such effort "emerge[s] from the special context of academic philosophy." But, just as Dworkin's did, Fish's own conclusion follows necessarily from his own starting premise, namely that "law is not philosophy."<sup>53</sup> Anything internal to law is rhetoric, and anything external to law is impotent—because it is outside law.

Fish and Dworkin thus seem to have more in common (as we first suspected) than one might otherwise think. Both see a critical difference between understanding law from the "inside" and understanding it from the "outside." Both treat "external" critiques of legal practice as ineffectual (or even incoherent), and they both insist that internal forms of analysis and argument are the only kind that matter.<sup>54</sup> No surprise, then, that Fish praises Dworkin's critique of "external" skepticism,<sup>55</sup> or that Dworkin claims to have anticipated nearly all of Fish's criticisms,<sup>56</sup> or that in the end Fish comes close to acknowledging that the apparent differences between them may have evaporated completely.<sup>57</sup>

In some ways, this should all have been obvious from the start. In *Law's Empire*, Dworkin announces at the outset that "thoughtful working lawyers and judges" reject the "plain-fact" or positivist view of law that constitutes Dworkin's main foil. In their "less guarded moments," these judges – Dworkin here cites Cardozo's *The Nature of the Judicial*

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<sup>52</sup> Ibid 333 (observing that "philosophy is one thing, and literary criticism is another") and 396 (observing that "law is not philosophy").

<sup>53</sup> Ibid.

<sup>54</sup> For this reason, I am inclined to label both Fish and Dworkin metaphysical *quietists*, by which I mean someone who holds the view that "metaphysical debates about whether some phenomenon or set of phenomena is 'real' or not tend to be fruitless and so should be abandoned." In that way, Fish's view is similar to Richard Rorty's. See Charles Barzun, 'Metaphysical Quietism and Functional Explanation in the Law' (2015) 34 Law & Phil 89, 91. Fish rejects that label, though I'm not sure he is using it in the same way I am. Fish, *Doing What Comes Naturally* 463-64.

<sup>55</sup> Fish, *Doing What Comes Naturally* 369.

<sup>56</sup> Dworkin, 'My Reply to Stanley Fish' 287.

<sup>57</sup> Fish, 'Almost Pragmatism' 79.

*Process* –tell a “more romantic story.” They say that “judging is an art not a science,” one in which the judge “blends analogy, craft, political wisdom” into “an intuitive decision.” They say that the judge “sees’ law better than he can explain it.”<sup>58</sup>

But after enlisting the “craft’ view” of adjudication in support of his rejection of legal positivism, Dworkin goes on to explain why he finds it wanting. The problem is that it is “too unstructured, too content with the mysteries it savors” to qualify as a theory of legal argument. Dworkin’s aim, he explains, is to “throw discipline over the idea of law as craft, to see how the structure of judicial instinct” differs from other forms of moral and political theory.<sup>59</sup>

The difference between Fish and Dworkin then comes down to this. Both recognize that adjudication *is* in many ways is like baseball insofar as experienced judges perform their tasks “naturally,” rather than in a self-conscious, methodical manner. But they draw different lessons from that fact. Because Dworkin sees a logic underlying the judge’s craft, his project is to express that underlying logic in normative, theoretical terms. Because Fish thinks there is no knowledge but craft knowledge (for judges, or anyone else), he denies there is any underlying logic there to express. In short, whereas Dworkin seeks to elucidate the “mystery” of judicial craft, Fish seeks to eliminate it.

But *is there* an underlying logic to judicial craft? Is Dworkin right that law is really a “reflective” and “argumentative” practice? Or is Fish right that it is merely “rhetorical”? Fish maintains that he and Dworkin differ on this question and insists that it is a critical difference.<sup>60</sup> One can see why: it goes to the heart of the issue I suggested at the outset should be of concern to lawyers, judges, legal scholars, and law students.

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<sup>58</sup> Dworkin, *Law’s Empire* 10.

<sup>59</sup> *Ibid* 10-11.

<sup>60</sup> *Ibid*.

The problem is that, as we have now seen, neither theorist's methodological approach is well equipped to investigate that question. The reason is that both are impervious to any facts we might learn that might bear on how we should think about the intellectual vitality of legal practice. Consider our failed effort to discern the true identity of Judge Ralph. None of our evidence or analysis was up to the task. The fact that Ralph's opinion is theoretically sophisticated and morally correct? Dworkin: *See, it's Hercules!* Fish: *No, Martinez is just practiced at the art of persuading people like you (participants in legal practice).* Our evidence that Judge Ralph stood to gain financially from his decision? Dworkin: *Irrelevant; only the internal point of view matters.* Fish: *Exactly. Such arguments belong to a different interpretive community.*<sup>61</sup> The bottom Line is that for all we know Hercules and Martinez could be constantly trading places, and we would have no of knowing it. There must be a better way.

### **III. The Solution: Get Back to the Facts of Life and Law**

There *is* a better way, and the remedy is simple enough. It is to stop talking (and thinking) about "internal" and "external" forms of argument and analysis. It is, after all, just a metaphor; neither legal theory nor literary criticism can literally be physically separated in the way the language of "inside" and "outside" suggest. Once that spatial metaphor is abandoned, the question of whether law is an intellectual practice can be investigated as an open question to be answered only after investigation.

Still, the distinction clearly holds intuitive appeal since Dworkin and Fish are hardly the only ones to invoke it.<sup>62</sup> So let me to try to motivate its abandonment by pointing to some examples of the sort of argument and analysis it has trouble making sense of. These

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<sup>61</sup> Fish, *Doing What Comes Naturally* 393.

<sup>62</sup> See generally Charles Barzun, 'Inside-Out: Beyond the Internal-External Distinction in Legal Scholarship' (2015) 101 Va L Rev 1203.

examples alone hardly settle the matter. Not only are they few in number, but some readers may draw the opposite inference, concluding that these sorts of arguments *should* be excluded from the domain of legal practice. Still, they at least offer a taste of a different way of conceptualizing the relationship between legal theory and practice. After presenting them, I raise two possible objections, from the perspective of Dworkin and Fish, respectively.

### **A. Talking about a Revolution (and Actually Experiencing One)**

Abandoning inside-outside talk makes room in legal practice “for puzzle [and] progress [and] controversy [and] revolution,” enabling us to “explain how lawyers can worry or disagree or change their mind about what the law is” in a deeper way than either Fish’s or Dworkin’s account does. Consider:

1. *Puzzle*. Rejecting the dichotomy allows us to explain deeper forms of puzzle and confusion. Take Jerome Frank’s famous attack on the legal profession’s desire for certainty in law and adjudication. Frank claimed that lawyers’ and judges’ insistence that the law is and ought to be certain and predictable manifests a psychological hunger. Drawing on the work of the child-psychologist Jean Piaget, Frank suggested that the “basic legal myth” that the law is certain reflects lawyers’ longing for a “father-figure” that can offer comfort and protection from a risky and unpredictable world.<sup>63</sup> For Frank, the key to improving adjudication was to free judges of this psychological longing, a goal which requires emotional introspection, not logical analysis. Once released from such psychological fixations, judges would be better equipped to their proper task—securing justice in individual cases.<sup>64</sup>

Now one could quarrel with various aspects of this argument, but I mention it only to illustrate two points. First, the kind of confusion or “puzzle” it potentially gives rise to is real

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<sup>63</sup> Jerome Frank, *Law & the Modern Mind* (1930) 19–23. See also ‘Jerome Frank and the Modern Mind’ (2010) 58 *Buffalo L Rev* 1127.

<sup>64</sup> Frank, *Law & the Modern Mind* 166.

and deep. A lawyer or judge who took the claim seriously would be forced to consider whether one of the central values to which she is professionally committed is a form of illusion from which she needs to be freed. The second point is that on Dworkin's and Fish's view, it is hardly intelligible. Frank is inquiring into the causes of judges' values and principles, thereby going beyond the scope of what "constructive interpretation" permits (Dworkin). And, at the time he wrote, Frank was unquestionably attempting to criticize legal practice by deploying the rhetoric of a very different "interpretive community," with its own values, assumptions, and ways of carving up the world (Fish). Again, perhaps when scrutinized, those differences reveal Frank's argument's to be defective in various respects. But the claim here is just that that conclusion should be a consequence of investigation, not an assumption made prior to it.

2. *Controversy*. Abandoning the dichotomy also opens up new forms of disagreement. In particular, it makes relevant to adjudication questions about the origins of traditional legal authorities. Consider the recent Supreme Court case, *Ramos v. LA*.<sup>65</sup> In that case, the Court declared unconstitutional statutes in Louisiana and Oregon that had authorized criminal convictions based on non-unanimous jury verdicts. Writing for the Court, Justice Gorsuch began his opinion by looking to the history of the non-unanimity requirements in both states. That history revealed that the initial adoption of both statutes was the product of white-supremacist ideology.<sup>66</sup> In dissent, Justice Alito acknowledged that the facts about the origins of the statutes the Court had revealed were "deplorable," but he considered them irrelevant to the constitutional question the Court faced. By relying on them, the Court was engaging in "ad hominem" rhetoric.<sup>67</sup>

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<sup>65</sup> *Ramos v. LA* (2020) (Slip Opinion)

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

Again, the point is not to endorse Justice’s Gorsuch’s argument but just to point out the inconsistency of its assumptions with the approach of Dworkin and Fish. Gorsuch is offering an historical explanation in order to undermine the authority of a legal source. Implicit in such an effort is the suggestion that the authority the statutes in question carry for us today is properly weakened by our discovery of the racist motives that led to it.<sup>68</sup> But, like Justice Alito, Dworkin treats such inquiries into motives as falling “outside” the domain of legal practice. So does Fish. Historical inquiry may produce some amazing stories, but such stories just reflect the assumptions, methods and values of an entirely different interpretive community—namely that of historians.<sup>69</sup>

3. *Revolutions*. Revolutions make more sense once one removes the barricade dividing sociology and law. A good example is Catharine MacKinnon’s argument in *Sexual Harassment of Working Women* that sexual harassment is a form of sex discrimination under the Civil Rights Act of 1964.<sup>70</sup> The doctrinal argument of that book is in some ways quite traditional and could be easily characterized as just the sort of constructive interpretation Dworkin endorses. But the persuasiveness of MacKinnon’s doctrinal analysis is precisely what proves its inadequacy at explaining the enormous impact of her book.<sup>71</sup> For at the time she wrote in 1979, very few courts had recognized sexual harassment as a form of sex discrimination. So, the question is, why hadn’t more courts done so?

As it turns out, MacKinnon herself answers that question in her book. She not only gathers a tremendous amount of empirical data showing how sex-segregated the workforce

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<sup>68</sup> Evidence of invidious discriminatory intent are relevant to the inquiry under equal-protection clause doctrine, but there was no suggestion that the statutes violated the equal protection clause.

<sup>69</sup> Fish, *Doing What Comes Naturally* 93.

<sup>70</sup> Catharine A. MacKinnon, *Sexual Harassment of Working Women* (Yale 1979).

<sup>71</sup> The Supreme Court unanimously ratified MacKinnon’s theory of sex discrimination in *Meritor Sav. Bank, FSB v. Vinson*, 106 S. Ct. 2399 (1986). Professor Reva Siegel describes MacKinnon’s book as “a stunningly brilliant synthesis of lawyering and legal theory” that “played a crucial role in th[e] process” of making sexual harassment illegal.” Reva B. Siegel, ‘Introduction: A Short History of Sexual Harassment’ in Catharine A. MacKinnon & Reva B. Siegel eds, *Directions in Sexual Harassment Law* (2004) 15.

was in the 1970s; she also argues that (mostly male) judges failed to see sexual harassment as a form of gender oppression because they were blind to the way in which gender itself entrenches forms of sex inequality.<sup>72</sup> In other words, MacKinnon's argument may have transformed the law of sexual harassment in part because she was able to reveal how traditional doctrinal categories had been interpreted in ways that served an oppressive social function (i.e., the maintenance of gender hierarchy).<sup>73</sup>

Once again, this kind of argument is not available if one holds fast to the inside/outside dichotomy because MacKinnon both uses legal doctrine *and* steps "outside" it in order to explain its interpretation as the consequence of forms of social domination to which judges had been blind. We can now see why it is no coincidence that Hercules and Martinez are both men. Neither understands what it means to have one's consciousness raised.<sup>74</sup>

4. *Progress.* The arguments just discussed are based on claims about psychology, history, and sociology, respectively. Once such arguments are seen as continuous with, rather than standing outside of, legal practice, we can better understand the concept of progress in the law. For they offer a way of giving that concept more meaning than a preference for our current arrangements over previous ones, relative to our own moral convictions. We can now consider explanatory accounts that might buttress our conclusion that our current regime is superior—for instance, by showing that the *process* that led to it was likely to produce a good outcome.

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<sup>72</sup> Ibid 88.

<sup>73</sup> See Charles Barzun, 'Catharine MacKinnon and the Common Law', available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3696540](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696540)

<sup>74</sup> Fish is quite explicit about this, insisting that claims of "raised" consciousness are really just forms of changed consciousness. Fish, *Doing What Comes Naturally* 461.

Of course, such explanatory accounts may do the opposite; they may give us reason to doubt a set of assumptions by exposing the social or psychological function those assumptions are serving. To illustrate, consider my own argument in this paper. I've been challenging Fish and Dworkin's interpretation of legal practice, arguing that an assumption on which they both rely—that we ought to distinguish between “internal” and “external” forms of argument and analysis—prevents them from understanding certain aspects of legal reasoning. I could also point out that, though ineffective for investigating legal practice, that distinction might be highly effective at protecting one's disciplinary turf because it makes participation in some practice a prerequisite for critiquing it.<sup>75</sup> If true, pointing to such a self-serving function makes my substantive analytical claims more plausible.

Critical theorists of various stripes have long made arguments of this structure against happy stories of legal or social progress.<sup>76</sup> They purport to reveal the true social function that certain legal regimes serve. Such arguments are indeed threatening. Opening up the question of progress is a risky business, because the term only has meaning if it is possible that one's investigation turns up not progress but instead social stasis, cyclical patterns of injustice, or moral decay.

The law's concern with history and pedigree makes legal practice particularly hospitable to this holistic form of inquiry.<sup>77</sup> Consider the old adage that the common law “works itself pure” over time. The idea is that something about the process of case-by-case adjudication is likely to produce better rules and principles over time.<sup>78</sup> Unless one is content to leave that process as a complete mystery, trusting entirely our own moral intuitions that

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<sup>75</sup> See *ibid* 333 (observing that “philosophy is one thing, and literary criticism is another”).

<sup>76</sup> See, e.g., Morton Horowitz, *The Transformation of American Law, 1780-1860* (OUP 1992); Robert W. Gordon, ‘Historicism in Legal Scholarship’ (1981) 90 *Yale L J* 1017.

<sup>77</sup> I have developed this point at greater length elsewhere. See, e.g., Charles Barzun, ‘Justice Souter's Common Law’ (2018) 104 *Va L Rev* 655.

<sup>78</sup> See Lon Fuller, *Law in Quest of Itself* (Foundation 1940)

approve of the process's current outputs, taking the "working itself pure" idea seriously demands some judgment about *why* the particular process tends to produce better results—and is likely to continue to do so in the future. And that kind of inquiry requires making not only moral claims, but also explanatory ones, based on claims about human psychology, sociology, or history.<sup>79</sup>

The inability—or, perhaps, unwillingness—of either Dworkin or Fish to authorize such "external" inquiries is what leaves their accounts of progress so impoverished. So, for instance, although Dworkin gives lip service to the idea that the law "works itself pure," he can only give an account of why judges might *think* that the law works itself pure, not that it *actually does* so.<sup>80</sup> As we've seen, he treats as "external," and so irrelevant, all inquiry into causal explanation.

Meanwhile, Fish would again likely treat the adage as just a bit of legal mythmaking. It is just one of the many bedtime stories for lawyers. And it may well be exactly that. But the problem for Fish is that—as we have already seen—he has no resources to make *that* sort of skeptical claim since the interpretive community of law is insulated from other interpretive communities and so immune to their challenges.<sup>81</sup> Their theories have no consequences.

To restate what I said above, my point in offering these various examples is not to prove that legal practice is in fact an intellectual or philosophical one. I mean only to give

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<sup>79</sup> Or perhaps economics. See, e.g., George L. Priest, 'The Common Law Process and the Selection of Efficient Rules' (1977) 6 J Legal Stud 65.

<sup>80</sup> Dworkin, *Law's Empire* 400-01. The contrast with how Dworkin treats moral judgments is telling. For one could also say that Dworkin's argument is just about what moral convictions judges might have. In fact, though, Dworkin is quite comfortable making his own substantive moral claims. Yet he does not even attempt to offer any sort of explanation as to why it might be plausible to think that case-by-case adjudication would produce better rules and principles over time.

<sup>81</sup> See Fish, *Doing What Comes Naturally* 393. I take Professor Schlag to be making a similar point when he observes that Fish's view implies that "[y]ou can't talk about whether [interpretive communities] are clans, or cabals, or democratic institutions, or efficient firms, or illegitimate hierarchies . . . . This sort of constraint, exclusion, ground rule (whatever you want to call it) can really put a crimp in a conversation about the content and structure of social life." See Pierre Schlag, 'Fish v. Zapp: The Case of the Relatively Autonomous Self' (1987) 76 Geo L J 37, 49.

some sense of the kinds of arguments and analyses that become available once we abandon the methodological strictures both Dworkin and Fish impose on legal theory. Whether these examples ultimately count in favor of abandoning the inside/outside distinction or against it is ultimately for the reader to decide.

### **B. A Dworkinian Objection: Get Over the Borderline**

I could imagine Dworkin making an objection along the following lines: “The above examples are best understood as arguments that we draw the borderlines of legal practice in different places, not that we abandon it altogether. Constructive interpretation requires only that participants in a practice offer interpretations of that practice that best fit and justify it. So if an interpretation of legal practice (or some subset of it) requires making explanatory claims about its historical origins or social function, then that’s fine, so long as it can beat out rival interpretations.<sup>82</sup> Indeed, the kind of reasoning described above, in which an explanation of a legal source purports to undermine its authority, *requires* some kind of internal/external distinction because its logic assumes that some reasons for a decision are legally legitimate and others are not.”<sup>83</sup>

There are two things to say about this objection. The first is that if Dworkin were to interpret his own theory this way, I would happily endorse it. My objection to the distinction is not that we ought never distinguish between “legal” and “non-legal” forms of argumentation. Indeed, as the objection correctly observes, some such distinction is required in order for debunking (or “bunking”) explanations of legal sources to have any rational force. My objection, rather, is to invoking such a distinction as a *methodological* criterion that excludes certain kinds of argument even from consideration on the basis that it adopts the

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<sup>82</sup> Dworkin even made occasional gestures in this direction, suggesting that even science might be a domain of constructive interpretation. See Dworkin, *Law’s Empire* 53. I thank David Plunkett and Daniel Priel for raising this objection with me in private conversation.

<sup>83</sup> I thank Thomas Bustamante for raising this point in a comment on this draft.

wrong “perspective” or “point of view.”<sup>84</sup> Doing so prevents us from arguing substantively over what forms of reasoning are properly legal ones and why.

The second point is that I doubt Dworkin would interpret his theory so capaciously. The reason for my doubt is that it would require acknowledging the interdependence between factual and evaluative judgments in a way that Dworkin explicitly rejected. One can see this rejection most clearly in Dworkin’s magnum opus, *Justice for Hedgehogs*, where he insists that “interpretation” is the proper method of inquiry over the entire domain of “value,” whereas “science” governs the domain of “fact.”<sup>85</sup> Dworkin’s moral and intellectual motivation for clinging to this dichotomy was to vindicate the rationality of evaluative judgments without having to question the natural or social sciences. In this way, Dworkin’s approach is *compatibilist* about free will, morality, law, and anything else in the “interpretive” domain.<sup>86</sup> In his view, science threatens nothing we hold dear, so all efforts to “reconcile” the two domains represent “bogus philosophical projects.”<sup>87</sup>

Interestingly, Dworkin himself seems to have recognized the sort of objection I’ve raised at the end of his 1982 article that Fish initially attacked:

Liberalism . . . which assigns great importance to autonomy, may depend upon a particular picture of the role that judgments of value play in people's lives; it may depend on the thesis that people's convictions about value are beliefs, open to argument and review, rather than simply the givens of personality, fixed by genetic and social causes.<sup>88</sup>

Having raised the possibility that his particular moral and political commitments might underlie his claims about moral psychology and meta-ethics, though, Dworkin failed to

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<sup>84</sup> See Barzun, ‘Inside Out’ 1237-42.

<sup>85</sup> Ronald Dworkin, *Justice for Hedgehogs* (Harvard 2011) 152.

<sup>86</sup> Ibid 12. Traditionally, compatibilism is understood more narrowly as a position on the philosophical debate over free will. Specifically, compatibilists interpret the requirement of free will in such a way as to maintain its “compatibility” with causal determinism. McKenna, Michael and D. Justin Coates, ‘Compatibilism,’ *The Stanford Encyclopedia of Philosophy* (Winter 2020 Edition), Edward N. Zalta (ed.), available at: <https://plato.stanford.edu/archives/win2020/entries/compatibilism>

<sup>87</sup> Ibid 9.

<sup>88</sup> Dworkin, ‘Law as Interpretation’ 550.

acknowledge just how threatening to his project that admission was. For his assumption that “convictions about value are beliefs, open to argument and review” and are not fixed by social and genetic causes underlies not just his own preferred theory of law, ‘law-as-integrity,’ but his overarching methodological commitment to the process of constructive interpretation in law, literature, and morality.

### C. A Fishy Objection: No Way Out (of Interpretive Communities)

Meanwhile, Fish might make a different sort of objection, though one with similar implications. He might argue thusly: “You seem to be suggesting that law can be revealed to be an intellectual practice by recognizing the way in which interpretive communities (including law) are not at all monolithic and instead inter-penetrate one another. The thought seems to be that attending to these conflicts and tensions among different disciplines forces reflection and perhaps even stimulates moral and intellectual progress. But that is impossible.” Indeed, in the introduction to *Doing What Comes Naturally*, Fish takes up something like my suggestion and rejects it explicitly:

However nuanced one's talk about constraint and belief and community may get to be, the nuances will never add up to a moment or a place where consciousness becomes transparent to itself and can at last act freely. Being embedded means just that, being embedded *always*, and one does not escape embeddedness by acknowledging, as I do, that it is itself a fractured, fissured, volatile condition.<sup>89</sup>

Under Fish's view, then, each of the arguments surveyed above has one of two fates. Either it becomes part of legal practice, in which case it just forms part of the set of rhetorical materials available to judges and lawyers, or it stays outside it, in which case it has no consequences for anything in legal practice. True, they may all participate in, or even help create, sub-communities within academic legal practice – perhaps ones with names like “Law and Society” or “Legal History” or “Law and Economics” – but the point is that whatever

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<sup>89</sup> Fish, *Doing What Comes Naturally* 31 (emphasis in original).

beliefs those communities end up propagating are just more beliefs. No point is ever reached where consciousness becomes “transparent” and so capable of genuinely free thought and action.

The first thing to say about this objection is that it is impossible to refute. Any effort to generate a theory, insight, or even a thought is going to be expressed in language and so is always vulnerable to the objection that it, too, is just making a move in some language game.<sup>90</sup> But it is also impossible to prove true—a fact that Fish forthrightly acknowledges.<sup>91</sup>

With those dialectical limitations in mind, let me just that Fish’s response strikes me as inconsistent with experience, or at least *my* experience (who else’s is there?). The reason is that, once again, Fish frames the issue in binary terms. *Either* we are “always embedded” in some or other practice *or* we are “a place where consciousness becomes transparent to itself.” But most of life takes place somewhere in between these poles.

I will not deny that those who purport to be open-minded about some things are often remarkably closed-minded about others. An allegedly cosmopolitan culture can be just as parochial in its attitudes as a provincial one. What passes as diversity on college campuses, for instance, often masks considerable homogeneity of thought. So the skeptical challenges to those who preach liberality and tolerance is a fair and important one.

But just as our thought experiment demonstrated, a skeptical challenge only has bite when an alternative is at least possible. Here, that alternative is the sometimes-mundane phenomenon of seeking second (or third or fourth) opinions. When ordinary people face important decisions, they typically seek out the views of others on the assumption that doing

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<sup>90</sup> Eagleton makes a related point when he observes that “[t]he felicitous upshot [of Fish’s approach] is that nobody can ever criticise Fish, since if their criticisms are intelligible to him, they belong to his cultural game and are thus not really criticisms at all; and if they are not intelligible, they belong to some other set of conventions entirely and are therefore irrelevant.” See Eagleton, ‘Estate Agent.’

<sup>91</sup> Fish, *Doing What Comes Naturally* 29.

so might help them do the right thing. If your doctor tells you need to undergo major surgery, you might seek out a second opinion. If you are having an argument with your spouse over your child's education, you may solicit the advice of friends and family members to get their take and to ensure that you are thinking clearly about the issues.<sup>92</sup>

Now Fish would likely say that such examples all take place “within” various practices and communities. That's why we seek out other experts in the same field. You don't get a second opinion about open-heart surgery from your accountant. But I don't think that's quite right. We seek another opinion from someone else in the field because (1) we think she may have had training or experiences different from those of the first expert (i.e., that she is constituted by a different configuration of sometimes-conflicting interpretive communities) and (2) that we benefit from hearing her perspective precisely *because of those differences*. The utterly banal assumption is that by soliciting multiple views on something—whether the price of a car or the value of a law-school education—we improve our judgments about it.

Of course, soliciting such views never enables one to become “transparent” to oneself. In the expert context, sometimes we may not be competent to properly evaluate and compare the opinions solicited.<sup>93</sup> Moreover, we all know that everyone's judgments—whether those of your close friends and family or of the people you crowdsource on Twitter—are shaped by different inborn handicaps and growing pains, different biases and agendas—none of which we can discern clearly. But we often seek out others' views anyway, and we do so because at least *sometimes* we think we can *learn* something as a result.

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<sup>92</sup> Of course, some friends may take your side merely *because* it is your side, and if that is why you ask them, you are not genuinely seeking a second opinion; you are seeking reassurance for emotional or strategic reasons. But arguably what it means to be a true friend is to offer honest feedback (if solicited) for just the reasons offered in the text.

<sup>93</sup> On the difficulty of adjudicating disputes between experts in the fact-finding context, see Scott Brewer, ‘Scientific Testimony and Intellectual Due Process’ (1988) 107 Yale L J 1535.

### Conclusion: How Will I know?

Putting the matter this way allows us to summarize succinctly the problems with both Dworkin's and Fish's account of interpretation. At the end of the day, Fish's account makes renders genuine learning impossible, whereas Dworkin's merely construes it too narrowly.

Fish seems to follow Socrates's interlocutor, Meno, in concluding that learning impossible.<sup>94</sup> True, we can improve how we perform specific tasks or develop particular skills "within" some enterprise. But what it means to be "always embedded" in one or more practices is to be incapable of ever achieving a vantage point that offers even a marginally wider view or a deeper understanding of oneself or the world. It means we never see things more clearly as a result of experience—by observing, reading, listening, or talking with others. We just replace some beliefs with other ones and modify our vocabularies accordingly

Of course, the terms I just invoked – "wider," "deeper," and "clearly" – all trade on visual-spatial metaphors, too, and so have no claim of privilege over the "inside" and "outside" framing I've criticized throughout this essay. But abandoning them means giving up a lot. As one example, it requires jettisoning a core aspiration of what is known as "liberal education." The guiding thought is that one may gain some knowledge, perhaps even self-knowledge, by engaging with texts written by people at different times, in different circumstances and thus with different experiences of the world. As the philosopher Michael Oakeshott wrote, the business of a university is "the pursuit of learning," which takes the form of an ongoing conversation over time. The enterprise "has no predetermined course" or

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<sup>94</sup> The structural similarity between Meno's argument and Fish's is striking. According to Socrates, Meno's argument goes like this: "[A] man cannot enquire either about that which he knows, or about that which he does not know; for if he knows, he has no need to enquire; and if not, he cannot; for he does not know the very subject about which he is to enquire." Plato, *Meno* (Benjamin Jowett, trans. Kindle ed.) 23. Meanwhile, according to Fish, there is no difference between being genuinely persuaded by an argument and simply changing one's belief: "Will and deliberation are even more irrelevant to what happens on the other side, the side of the persuadee; you cannot direct yourself to be persuaded; you cannot command your mind to change without already having some idea of what steps you might take to effect that change; and if you have such an idea, you will already have taken them." Fish, *Doing What Comes Naturally* 462.

even particular goal.<sup>95</sup> Instead, liberal learning is a series of “adventures in human self-understanding.”<sup>96</sup> But there is no room for *understanding*, let alone *self*-understanding, let alone *adventures* in self-understanding in Fish’s account.<sup>97</sup>

Dworkin hits much closer to the mark. He concluded his 1982 article with these words: “I end simply by acknowledging my sense that politics, art, and law are united, somehow, in philosophy.”<sup>98</sup> Three cheers for that! If law is intrinsically connected to art, politics, and philosophy, then one can see how legal practice could indeed involve genuine learning—perhaps even “liberal learning” (to borrow Oakeshott’s phrase).

But because Dworkin insisted on keeping all of these interpretive practices, including law, out of the reach of the natural and social sciences, his understanding of interpretation, whether legal or literary, was oddly disconnected from actual human experience. Sure, on Dworkin’s view interpretation can involve learning, but only insofar as it means that people change their minds and become convinced of their new convictions. Any explanation as to *how* or *why* we our mind changed is irrelevant to our judgment that the change constitutes genuine *learning*, as opposed to, say, brainwashing.<sup>99</sup> It is perhaps telling, then, that over his nearly half-century of writing about law and adjudication, Dworkin devoted so little attention to the topic of legal education.

So I would put Dworkin’s concluding suggestion slightly differently. I would end simply by acknowledging my sense that politics, art, law, *and* philosophy are united, somehow, as members of what used to be called the *human sciences*.

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<sup>95</sup> Michael Oakeshott, *The Voice of Liberal Learning* (Yale 1989) 109-110.

<sup>96</sup> *Ibid* 15.

<sup>97</sup> It is therefore ironic (to put it extremely mildly) that Fish enlists Oakeshott in support of his argument that the humanities need no other defense than an insistence upon the value of studying them “for its own sake.” Stanley Fish, ‘Stop Trying to Sell the Humanities’ (June 17, 2018) *The Chronicle of Higher Education*.

<sup>98</sup> *Ibid*.

<sup>99</sup> “[W]e are entitled to no more confidence in our judgment of progress when we can offer [causal historical] explanations than when we can say only that earlier generations did not ‘see’ some moral truth that we do.” Dworkin, *Justice for Hedgehogs* 87.