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What Makes Law? Dworkin, Fish, and Koskenniemi on the Rule of Law

DAVID LEFKOWITZ*

I. INTRODUCTION

WHAT MAKES LAW? So formulated, the question is an ambiguous one. On what I will call the micro-level, it asks for the successful conditions for an assertion of law, what justifies or provides the truth conditions for claims such as ‘I have a legal right to ϕ ’ or ‘you broke the law’. Much of the debate between Ronald Dworkin and Stanley Fish concerns this question; for example, the role that theory plays in actors’ identification of the law, or the constraints, if any, that legal materials themselves impose on what counts as an interpretation of them. At the macro-level, the question ‘what makes law?’ concerns the features that distinguish a genuinely *legal* political order from other types of political order. Or, in the somewhat archaic phrase, what makes it the case that a society is ruled by law and not by men? I will argue that Dworkin and Fish agree on the answer to this question, and so too does the contemporary international legal theorist Martti Koskenniemi. Specifically, each of them identifies law with a practice of government informed by fidelity to the ideal of the rule of law, or legality. All three theorists conceive of legality as an attitude, mindset, or approach to constructing the social world, one that is most fully developed in members of the legal profession, or what is the same, those who have been habituated into a culture devoted to the ideal of government in accordance with the rule of law. And all three develop their account of law as a practice of government informed by legality by contrasting it with an instrumental or managerial approach to government.

Why include a discussion of Koskenniemi’s remarks on the nature of law in a chapter of a volume devoted to the Fish-Dworkin debate? There are several reasons to do so. First, Koskenniemi’s characterisation of law in terms of both a culture of formalism and a constitutional mindset nicely bridges the apparent divide created by Fish’s focus on interpretive communities and the way in which

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individuals acquire a particular ‘cultural lens’ that informs their engagements with (some aspect of) the world, and Dworkin’s focus on the protestant attitude that defines law’s empire.¹ Second, neither Dworkin nor Fish have paid much attention to international law, or for that matter, to any (putative) legal order other than that of the US and England. The fact that a leading commentator on international law makes use of the same understanding of law to characterise (and critique) our existing practice of global government, and the political society it constitutes, provides some defence against an accusation of parochialism, though more is needed. Finally, though Koskenniemi regularly references (and endorses) Dworkin’s account of constructive interpretation, on the whole his scholarship bears a far greater resemblance to Fish’s. Indeed, their views are so much alike that an argument that one characterises law in terms of fidelity to legality provides a compelling reason to think that the other must (or should) as well.

My aim in this chapter is twofold. On the one hand, I offer readings of texts by Dworkin, Fish, and Koskenniemi to support the claim that they share an understanding of the nature of law; that is, of the features in virtue of which a practice of government counts as a legal one. My goal here is to provide insight into the views of particular theorists, and in the case of Dworkin and Fish, to emphasise a commonality in those views that may well exceed in its importance whatever differences may also characterise them.² On the other hand, I seek to clarify the concept of the rule of law by bringing together similar descriptions of it advanced by three prominent legal scholars. In doing so, I also aim to make a case for its superiority to other analyses of the rule of law, and for that matter, to other accounts of law. The argument is not so much an appeal to authority as it is an appeal to testimony. In their characterisation of a practice of government in accordance with the rule of law, Dworkin, Fish, and Koskenniemi help us to understand the life of the law as the experience of lawyers.

¹ R Dworkin, *Law’s Empire* (Cambridge, MA, Harvard University Press, 1986).

² In truth, if we look at what each author says on his own behalf, rather than what is attributed to him by the other, less divides Dworkin and Fish than it may appear. For example, Dworkin does not advocate for the use of theory, as Fish defines it, to identify what the law is. Nor does he maintain that a text itself (eg, legal materials) constrains eligible interpretations; rather, it is the point or purpose of a practice that does so. For reasons I detail later in the main text, that is why a constructive interpretation of legal materials must meet a threshold criterion of fit if it is to qualify as the identification of existing law, rather than an act of legislation. Furthermore, Dworkin does not maintain that a lawyer – a person genuinely devoted to the ideal of government in accordance with the rule of law – might choose to substitute his own judgment of appropriate conduct for that of the political community’s. Instead, Dworkin warns against the possibility, not infrequently realised, that a person who occupies a legal office – or better, a position in a government institution (a court, a police force, etc) – might fail to exhibit the virtue of a lawyer. Contra Dworkin’s assertion, and at least in his more Peircean moments, Fish does not deny the possibility of right answers or true beliefs. He only denies the possibility of a perspective from which we could know with certainty what they are. This last point does point us to a genuine disagreement, however. While both theorists are value pluralists, Dworkin maintains that they fit together to form a coherent whole – values compete, but do not conflict – whereas Fish denies the unity of value thesis.

II. DWORKIN ON THE RULE OF LAW

As I read him, Dworkin maintains that a system of coercive government counts as a genuinely legal one if and only if it exhibits fidelity to a conception of the rule of law as valuable for the constitutive contribution it makes to the treatment of all its (individual human) subjects with equal concern and respect. This requires both a particular type of institutional structure, one that includes inter alia government through law and recourse to (relatively) impartial dispute resolution procedures, and a particular political culture or *ethos* on the part of both rulers and ruled that Dworkin labels law as integrity.³ In a political community that governs itself through law properly so-called, this *ethos* regulates the community's use of coercion to uphold its members' political rights and duties. It does so by informing members' attempts to identify terms for just interaction, ie, attempts to specify those legal rights and duties members of the community should or already do enjoy, and to engage with one another on those terms. For example, judges identify those rights and duties enforceable upon demand without any further legislative action by constructively interpreting the political community's past practice of government according to the rule of law as an attempt to realise concretely a fundamental moral commitment to treating all of its members with equal concern and respect. Legal subjects instantiate such treatment by guiding their conduct according to findings of law simply because it is the law; that is, because they take the exercise of governmental power in accordance with law as integrity to be legitimate. In sum, for Dworkin, legal reasoning has a specific form; the product of such reasoning, law properly so-called, necessarily provides a moral justification for the exercise of governmental power; and legitimate government simply is government according to the rule of law informed by a proper understanding of what makes the rule of law valuable.⁴

I focus my remarks here on Dworkin's identification of law with government in accordance with the rule of law. In *Law's Empire*, he writes:

our discussions about law by and large assume, I suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how beneficial or noble the ends in view, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified. The law of a community on this account is the scheme of rights

³For discussion of the institutional elements of the rule of law, see D Lefkowitz, *Philosophy and International Law: A Critical Introduction* (Cambridge, Cambridge University Press, 2020) 73–83.

⁴Dworkin presents his most complete statement and defence of these claims in Dworkin (n 1), but many are also the subject of essays collected in R Dworkin, *A Matter of Principle* (Cambridge, MA, Harvard University Press, 1985) and R Dworkin, *Justice in Robes* (Cambridge, MA, Harvard University Press, 2006).

and responsibilities that meet that complex standard ... This characterization of the concept of law sets out, in suitably airy form, what is sometimes called the 'rule' of law.⁵

We might quibble with Dworkin's assumption that the rule of law concerns the *coercive* enforcement of rights and responsibilities, on the grounds that law enforcement sometimes takes the form of denying members of the political community benefits to which they would otherwise be entitled.⁶ Likewise, Dworkin's claim that law concerns *individual* rights and responsibilities may be too narrow, insofar as the agents that law constitutes as bearers of rights and responsibilities may be collective ones, such as corporations and states.⁷ Finally, insofar as it suggests that the rule of law concerns only the conduct of legal officials (judges, prosecutors, police officers, etc), and not that of legal subjects, this description offers an incomplete purview of government in accordance with the rule of law.⁸ Nevertheless, Dworkin's claim captures two of legality's key features: it offers a regulative ideal for the exercise of political power premised on the treatment of legal subjects as bearers of rights and responsibilities, and it locates the content of those rights and responsibilities in (a constructive interpretation of) the political community's practice of holding accountable.⁹

Dworkin contrasts legality with a pragmatist approach to government, which he characterises as 'a skeptical conception of law', one that 'rejects[s] the idea of law and legal right deployed in my account of the concept of law'.¹⁰ A pragmatist 'denies that past political decisions in themselves provide any justification for either using or withholding the state's coercive power'.¹¹ Consequently, she takes a strategic approach to identifying (the content of) legal subjects' rights. Rather than construing legal rights as forms of treatment to which actors are entitled even if that would be worse for the community, the pragmatist treats

⁵Dworkin (n 1) 93.

⁶See, eg, OA Hathaway and SJ Shapiro, 'Outcasting: Enforcement in Domestic and International Law' (2011) 121 *Yale Law Journal* 252.

⁷Note that the attribution of legal rights to collective agents is consistent with value-individualism, 'the view that only the lives of individual human beings have ultimate value and collective entities derive their value solely from their contributions to the lives of individual human beings' (CH Wellman, *Liberal Rights and Responsibilities* (Oxford, Oxford University Press, 2013) 5).

⁸That Dworkin does take fidelity to the rule of law to be a character trait that both rulers and ruled must possess if a political society is to have law comes through clearly in both his discussion of political obligation and his summative description of law as 'a protestant attitude that makes each citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances'. Dworkin (n 1) 413.

⁹Legality, then, is only one element of a comprehensive political philosophy, or moral theory of government. It does not address questions such as 'who should exercise legislative authority, and how should they do so?' or 'what should the content of that legislation be?' Answers to those questions require normative accounts of democracy (or aristocracy, or monarchy) and of justice. Yet the concept of the person legality presupposes likely has implications for who should have the power to legislate, and what sort of laws a political community ought to have.

¹⁰Dworkin (n 1) 95, 160.

¹¹*ibid* 151.

them as ‘only the servants of the best future: they are instruments we construct for that purpose and have no independent force or ground’.¹²

It might be thought that what distinguishes pragmatism from legality, on Dworkin’s analysis, is that the former appeals solely to the production of socially beneficial outcomes to justify the exercise of political power, while the latter maintains that individual rights sometimes trump the pursuit of social welfare. While Dworkin does reject consequentialism, or at least Utilitarianism, his complaint against legal pragmatism goes deeper, and applies equally to judges (and all legal subjects) who subscribe to a deontological morality. Dworkin’s fundamental objection to a judge who accords only strategic value to past political decisions is that she fails to recognise the political community as a collective agent engaged in an ongoing effort to realise a fair and just political order. An agent devoted to legality conceives of government in accordance with the rule of law as an end in itself – the constitution of a political community premised on its members status as autonomous and responsible agents, and so bearers of genuine rights and responsibilities. In contrast, a pragmatist conceives of government as merely a means for advancing some exogenous and independently specifiable goal, such as human flourishing or human rights, construed as moral rights possessed by all agents or patients as such, independent of their membership in any particular, concrete, community. The former actor aims to identify *our* commitments, that is, the standards of right conduct the political community has identified as binding on its members as such, while the latter actor aims to give effect to *her own* judgment of the ends that government should serve, and how it should do so. Pragmatism ‘says that judges should follow whichever method of deciding cases will produce *what they believe* to be the best community for the future’.¹³ The contrast with legality comes through clearly in F.A. Hayek’s characterisation of it, which Dworkin quotes approvingly: ‘the conception of freedom under the law ... rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man’s will and are therefore free’.¹⁴ Or in Dworkin’s own words, the rule of law ‘is not just an instrument for economic achievement and social peace [or, one might add, honouring moral rights], but an emblem and mirror of the equal public regard that entitles us to claim community’.¹⁵

¹² *ibid* 160.

¹³ *ibid* emphasis added.

¹⁴ FA Hayek, *The Constitution of Liberty* (London, Routledge, 1960) 153, quoted in Dworkin, *Justice in Robes* (n 3) 177. Kant makes the same point when he asserts that actors enjoy external freedom, or freedom as non-domination, only when they are subject to a common juridical order, a system of norms that substitutes an omni-lateral will (the political community’s conception of right) for a unilateral will (each actor’s conception of right). For discussion, see P Capps and J Rivers, ‘Kant’s Concept of Law’ (2018) 63 *American Journal of Jurisprudence* 259.

¹⁵ Dworkin, *Justice in Robes* (n 4) 74.

Though Dworkin identifies law with the concept of legality, he treats that concept as interpretive in two respects. First, agents who share the concept of legality may nonetheless disagree as to whether a particular act satisfies that standard, or what is the same, whether that act is legal. They will all concur with the claim that members of the political community as such presently enjoy all and only those rights, and are subject to all and only those duties, that ‘flow from past decisions of the right sort’ or ‘standards established in the right way’. Yet as Dworkin observes, ‘it remains to be specified what kind of standards satisfy legality’s demands, and what counts as a standard’s having been established in the right way in advance [of any enforcement of a right or duty]’.¹⁶ *Conceptions* of legality offer answers to these questions. They are properly described as interpretations of the concept of legality because the identification of the standards of appropriate conduct to which the community has committed itself, as well as the content of those standards, depends on an exercise of judgment. The case for any particular conception of legality rests on a contestable normative claim regarding the value of government in accordance with the rule of law. The case for any particular assertion of law rests not only on a contestable conception of legality, but also contestable conceptions of procedural fairness and substantive justice, and contestable claims regarding the bearing those values have on the (type of) case at issue.¹⁷

Second, the assertion that law is essentially a practice of government informed by fidelity to the ideal of legality is also an interpretive claim. It is advanced from within the practice, one identified in terms of an existing (but always provisional) consensus on paradigms of law and legal reasoning. It purports to offer a statement of the central concept of the practice that will enable its participants ‘to see their arguments as having a certain structure, as arguments over rival conceptions of that concept’, or what is the same, an ‘abstract description of the point of law most legal theorists accept so that [they can understand] their arguments [to] take place on the plateau it furnishes’.¹⁸ The success of the claim that law just is a practice of government informed by the ideal of legality is a matter of how useful we find it as a way of making sense of the practice we ‘pre-interpretively’ and provisionally identify as law. There is, then, nothing objectionably ‘metaphysical’ in Dworkin’s depiction of law as, essentially, a practice of coercive government informed by fidelity to the ideal of legality.

¹⁶ *ibid* 169.

¹⁷ That a claim is *contestable* does not mean that it is, or will be, *contested*. Yet the contestation of specific claims regarding what the law is, and what it ought to be, are pervasive. Dworkin aspires to offer an account of such contestation that shows at least some of it to be genuine disagreement, and not simply instances of agents with fundamentally different world views or ways of life talking past one another. That account requires that agents be members of a common community (or way of life) in virtue of which they can adopt a shared world view, even while disagreeing over some of its details.

¹⁸ Dworkin (n 1) 92–3.

III. FISH ON THE RULE OF LAW

Fish's recognition that law just is the enterprise of governing informed by fidelity to legality comes through most clearly in his response to Richard Posner's proposal that society adopt instead a social scientifically informed managerial approach to government.¹⁹ After noting that Posner's 'pragmatic program will succeed when legal concepts and terms have been replaced by economic ones', Fish observes that 'if the "intangibles" he [Posner] finds "too nebulous for progress" – justice, fairness, the promotion of dignity – are removed in favour of "concrete facts," the disciplinary map will have one less country, and where there was law there will now be social science'.²⁰ Relatedly, in response to Posner's criticism of judges who believe without, or even against, the evidence that the judiciary's effectiveness depends on a belief by the public that judges are finders rather than makers of law, Fish remarks that

this particular belief is itself founding, and constitutes a kind of contract between the legal institution and the public, each believing in the other's belief about itself, and thus creating a world in which expectations and a sense of mutual responsibility confirm one another without any external support.²¹

To find law, rather than to make it, is to exercise coercive government 'only in accordance with standards established in the right way before that exercise'.²² And as Fish rightly observes, the commitment to legality is a founding belief or structural assumption, one that serves to constitute members of the political community as creatures with dignity, in virtue of which they are entitled to fair and just treatment. Specifically, a practice of government in accordance with the rule of law presupposes that legal subjects are autonomous and responsible agents. To be an agent is to be capable of acting for reasons. A responsible agent is, in Lon Fuller's words, 'capable of understanding and following rules, and answerable for his [or her] defaults'.²³ Responsible agents can hold themselves accountable for conforming to standards of right conduct, and do the same for other actors they judge to be responsible agents. Autonomous agents are capable of acting as the authors of their own lives, of exercising some degree of control over both the ends they pursue and the means to achieving them that they adopt. In contrast, the practice of government Posner advocates presumes a conception of the person as a creature with desires or preferences in need of satisfaction.²⁴

¹⁹S Fish, 'Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin' in M Brint and W Weaver (eds), *Pragmatism in Law and Society* (Boulder, Westview Press, 1991) 47–82.

²⁰*ibid* 62, 71.

²¹*ibid* 62.

²²Dworkin, *Justice in Robes* (n 4) 169.

²³LL Fuller, *The Morality of Law*, rev. edn (New Haven, CT, Yale University Press, 1969) 162.

²⁴For an alternative reading of Fish, one that attributes to him a conception of the person closer to the one I ascribe to Posner, see T Bustamante, ch 14 in this volume.

That conception is fundamentally at odds with the one that provides the rule of law with its *raison d'être*, and that is why Fish rightly concludes that Posner's program amounts not to a proposal to reform law but to replace it.

Posner maintains that law's value rests on the contribution it makes to facilitating the efficient achievement of social goals. Many features of contemporary legal practice render it highly sub-optimal as a tool for maximising social welfare, which is a primary reason Posner advocates for its replacement by an empirically informed managerial approach to government. Fish counters that Posner misconstrues the desire to which law is a response. Law emerges not because it is an efficient tool for maximising social welfare, but 'because people desire predictability, stability, equal protection, the reign of justice, etc., and because they want to believe that it is possible to secure these things by instituting a set of impartial procedures'.²⁵ Law, Fish maintains,

is centrally about such things as conscience, guilt, personal responsibility, fairness, impartiality, and no analysis imported from some other disciplinary context 'proving' that these things do not exist will remove them from legal culture, unless of course society decides that a legal culture is a luxury it can afford to do without.²⁶

A practice of government in accordance with the rule of law presupposes that human beings are autonomous and responsible agents. As Fish observes, it is a 'belief' or 'assumption' that cannot be argued for from within the practice, because it provides the very condition for any arguments that can be successfully advanced within the practice. This claim regarding the nature of enterprises, interpretive communities, or as I prefer, practices of holding accountable, does not entail the impossibility of a human society in which government is not premised on a conception of people as autonomous and responsible agents. But as Posner observes and Fish concurs, the emergence of such a society from one with an (always imperfect) history of government in accordance with the rule of law will require many of its officials and subjects to undergo a 'come to Bentham' experience, a conversion that substitutes one 'foundational' conception of human beings and the point or purpose of government for another.²⁷ It is not quite right, then, to say that a society will *decide* that a legal culture is a luxury it can do without. Rather, should such a (mass) conversion occur, a legal culture – government in accordance with the rule of law – will simply be an activity whose value people cannot grasp, a way of life they cannot imagine themselves leading.

The attribution to Fish of an essentialist claim – that law just is the practice of government in accordance with legality – may appear hard to reconcile with his professed anti-foundationalism, and his criticism of Posner for straying from

²⁵ Fish (n 19) 61.

²⁶ *ibid* 62.

²⁷ *ibid* 54.

the Pragmatist fold by advancing a foundationalist and essentialist program.²⁸ The tension is merely apparent, however. Anti-foundationalism, as Fish understands it, requires only the rejection of a universal vantage point, a perspective that is simultaneously a view from nowhere (practice-independent) and from everywhere (comprehensive), from which one can form indubitable beliefs, or what is the same, know that a claim is true. Posner's error, Fish maintains, is to think that (a perfected or completed) economics, or social science more generally, offers such a perspective, and so the possibility of identifying with certainty the best law and policy. Crucially, the characterisation of an interpretive community or practice of holding accountable in essentialist terms requires no commitment to a foundationalist epistemology. To the contrary, it constitutes an anti-foundationalist epistemology, one in which our grasp of the (social) world is always-already structured by certain beliefs or assumptions presupposed by any competent participant in a particular (type of) interpretive community or practice of holding accountable.²⁹

Fish contends that 'what makes a field a field ... is a steadfastness of purpose, a core sense of the enterprise, of what the field or discipline is *for*, of why society is willing (if not always eager) to see its particular job done'.³⁰ The purpose of government in accordance with the rule of law is the constitution of a political community that treats its members (legal subjects) as autonomous and responsible agents. This essentialist claim is fully consistent with the assertion that law is contingent in two respects. First, nothing in the essentialist characterisation of law entails that any human society be governed in accordance with legality. Indeed, history clearly illustrates that political societies can persist and, along some metrics, even flourish without law.³¹ Second, the regulative ideal that gives an enterprise its point or purpose is purely formal, in the sense that it is not possible to deduce any substantive claims from that ideal. So, one cannot logically derive from the ideal of government in accordance with the rule of law, or the concept of the person it presupposes, the specific forms of treatment that count as conduct exhibiting fidelity to that ideal. In part, that is due to the fact that practical reasoning consists in the exercise of judgment, a method for drawing conclusions that cannot be reduced to an algorithm (or theory, as Fish defines that term). More importantly, however, it owes to the fact that assertions of law

²⁸ *ibid* 57.

²⁹ Fish describes anti-foundationalism as an epistemology premised on 'the irreducibility of difference, ... a world in which persons are situated – occupying particular places with particular purposes pursued in relation to particular goals, visions, and hopes as they follow from holding (or being held by) particular beliefs – [and thus] no one will be in a situation that is universal or general (that is, no situation at all), and therefore no one's perspective (a word that gives the game away) can lay claim to privilege' (*ibid* 54).

³⁰ *ibid* 68.

³¹ Note that the claim here concerns a particular approach to governing, not the possibility that a society can persist or flourish without government, or without rules, including those that constitute institutions such as courts or the monarchy.

are claims regarding the political community's commitments at that point in time, its current judgment of what the treatment of all legal subjects as autonomous and responsible agents requires. The success of any such claim depends on its uptake by other members of the political community; roughly, their concurrence with the (sometimes implicit) claim that the law (ie, their law) condones or condemns a particular act. There is no universal or Archimedean standpoint outside any particular political community's practice of holding accountable from which we can identify what fidelity to the ideal of legality truly requires. Rather, the rule of law is worked out via a practice of challenge and response, one that encompasses not only assertions of legality or illegality, but also assertions that, in asserting the legality or illegality of a particular (type of) act, an agent has substituted her own judgment for that of the political community, or what is the same, has failed to exhibit fidelity to the ideal of government in accordance with the rule of law.

None of this is to deny that there are true or right answers to questions regarding the legality, or justice, of particular exercises of political power. To the contrary, the belief that there is may well be an unavoidable presupposition of inquiry and argument. Nor does it require that we equate truth with what we take ourselves to be justified in believing. Rather, the claim is that the pursuit of truth can only be carried out within particular disciplines or interpretive communities, enterprises constituted by norms that govern what counts as a justification for actions, beliefs, feelings, etc. As Dworkin states, legality is an interpretive concept; any attempt to characterise it is a normative undertaking that necessarily embroils one in the making of first-order normative claims, such as accusing government officials of having violated that ideal. Fish draws a similar conclusion. He holds that justice, fairness, and human dignity are rhetorical constructions; their content is worked out through practices of persuasion, especially those that constitute the law. That is why he asserts that

if we want to use notions of fairness and justice in order to move things in certain directions, we must retain disciplinary vocabularies, not despite the fact that they are incapable of independent justification, but *because* they are incapable of justification, except from the inside.³²

It will come as no surprise when an earnest moral philosopher such as Dworkin valorises government in accordance with the rule of law. But can the same really be true of Fish? After all, he is a critic, and so his contributions to our sometimes-self-conscious experience of law focus largely on unmasking how it works, rather than inspiring devotion to it. As noted above, Fish attributes the existence of law to human beings' mistaken belief that fairness and justice can be secured by instituting a set of impartial procedures. Expanding on this claim,

³² *ibid* 71.

Fish writes that were we to adopt Posner's managerial approach to government in place of a legal one,

we would no longer be able to say 'what justice requires' or 'what fairness dictates' and then fill in those phrases with the courses of action we prefer to take. That, after all, is the law's job – to give us ways of redescribing limited partisan programs so that they can be presented as the natural outcomes of abstract impersonal imperatives.³³

Passages like these have suggested to some readers that Fish conceives of law as 'merely rhetorical', in the pejorative sense that it functions as a tool that devious, or perhaps self-deceived, agents can use to manipulate others in the pursuit of their own ends. They also explain why Fish is sometime associated with the critical legal studies movement, whose members repeatedly attack the rule of law as a myth, a form of propaganda that serves to cloak practices of oppression and domination by the powerful. Yet while Fish adopts an ironic stance toward the rule of law, he is no cynic. The exercise of political power in accordance with the rule of law is not the application of practice-independent determinate standards of right conduct identifiable without the exercise of moral and political judgment. But neither is it necessarily 'mere rhetoric', the wolf of private interest and the will to power dressed in the sheep's clothing of principle.

When Fish speaks of 'limited partisan programs', I contend that he means nothing more than the conceptions of justice and fairness that particular actors bring to the task of identifying the law. Legal materials, or what is the same, the political community's past practice of identifying, applying, and enforcing standards of right conduct, do not themselves yield a determinate answer to the question of what is legally permitted, required, or forbidden in the case at hand. Rather, the answer to that question depends on the exercise of judgment, an interpretation of the legal materials that, in Dworkin's words, shows them in their best light. Such a judgment is premised on agents' (possibly implicit) conception of the point or purpose of government in accordance with the rule of law, one that is manifest in their ability to grasp what the law requires in the case at hand, and to present a reading of the legal materials that they take to demonstrate why this is the case.

Fish's account of law does suffer from certain infelicities, which may simply owe to a certain style of presentation (more invigorating than my own, but at a price), but may also or instead reflect an incomplete grasp of law, or the enterprise of government in accordance with legality. For example, the adoption of a managerial approach to government would not deprive us of the ability to present our own limited partisan programs as the natural outcomes of abstract impersonal imperatives. Rather, it would only compel us to present them in terms of what is good for human beings, instead of in terms of what persons

³³ *ibid.*

are entitled to as a matter of right. Put another way, it would substitute a perfectionist political order for a liberal or republican one. Fish correctly observes that members of a society without law would lack the ‘argumentative resources that abstractions such as justice, fairness, and human dignity now stand for’. It is not clear, however, whether he fully appreciates the implication that law necessarily presupposes or constructs legal subjects as autonomous and responsible agents, as bearers of rights and duties.

It is this presupposition that explains why people want to, and in fact must, believe that ‘the reign of justice’ can be secured by instituting a set of impartial procedures, and in fact, can *only* be secured in this way. Government in accordance with the rule of law is the promise of a political society organised according to principles of right, one in which actors hold one another accountable by invoking norms that bind generally and unconditionally, that is, independent of any actor’s interests or power. This notion of impartiality – again, one premised on a conception of legal subjects as autonomous and responsible agents – is integral to the ideal of government in accordance with the rule of law. Fish rightly criticises those who think impartial rule can be achieved without the exercise of political or moral judgment, as well as those who think it is possible to adopt a universal vantage point from which they can identify beyond any shadow of a doubt what counts as rightful conduct. But neither the necessity of moral judgment when applying the law nor a fallibilist conception of (moral) knowledge reveals the law’s promise of impartiality to be merely illusory.

In his description of the law’s job, Fish confuses the point or purpose of law with how law achieves that purpose. Or again, and borrowing Aristotle’s terminology, Fish conflates law’s formal cause, how law works, with law’s final cause, what law is for. Law’s job is to constitute legal subjects as members of a political society premised on a conception of legal subjects as autonomous and responsible agents. Government in accordance with the rule of law realises this goal when, or to the extent that, members of that society hold one another and themselves accountable for conformity to its existing standards of right conduct. Disputes over what those are – whether a given act is legal or illegal – are inevitable, since as Fish ably demonstrates, legal materials are indeterminate. Any assertion of law will therefore reflect the claimant’s construction of the community’s past political practices, yet she will advance it not in her own name but instead in the name of the community; that is, as a matter of the standards of right conduct to which *we* are already committed. This is the sense in which ‘a limited partisan program’ will be presented as ‘the natural outcome of an abstract impersonal imperative’.³⁴ It also explains why, as Fish puts it, all legal histories are invented in a ‘weak’ sense that contrasts with discovered, but no legal history is invented in a strong sense that ‘the urgency that led to

³⁴ Fish (n 19) 71.

its assembly was unrelated to any generally acknowledged legal concern'.³⁵ If, or as long as, an agent's assertion of law is accepted by other members of the political society, if they integrate it into the practice of holding accountable that constitutes them as a community, it will qualify as a successful example of doing law's job; that is, of constituting legal subjects as bearers of rights and duties.

IV. KOSKENNIEMI ON THE RULE OF LAW

Like Dworkin and Fish, Koskenniemi identifies law not with rules or institutions but with a particular approach to the exercise of political power, one premised on the treatment of legal subjects as autonomous and responsible agents. However, he adopts a somewhat ambivalent stance toward the phrase 'the rule of law'. At times he employs (a capitalised version of) it to refer to a genuinely *legal* approach to government that, as I will demonstrate, corresponds to the exercise of political power informed by a commitment to legality.³⁶ At other times Koskenniemi associates the phrase 'the rule of law' with the rule of rules, valuable solely for the contribution it makes to facilitating agents' rational planning by enabling them to predict when, where, and how officials will exercise political power.³⁷ He advances two critiques of the rule of law, so conceived. First, rules are indeterminate – they do not spell out the conditions for their application – so whatever certainty and stability a practice of government exhibits will owe not to the rules but to those who apply them.³⁸ This is the same point Dworkin and Fish press against those who think it is possible to identify what the law of a particular political community is without engaging in a value-laden interpretation of its past political practice. Second, Koskenniemi implies that predictability and the enabling of rational planning fails to get at the core of what makes government in accordance with the rule of law valuable.³⁹ His explanation in the passage where he makes this claim is not perspicuous, but if we look elsewhere in his corpus his reason becomes clear. While predictable government does treat subjects as agents, creatures capable of acting for reasons, it need not exhibit respect for their autonomy (their capacity to act as the authors of their own lives), nor for their sense of responsibility (their capacity to use the law to hold themselves accountable). Predictable rule is fully consistent with an instrumental approach to government, but that is precisely the form of

³⁵ S Fish, 'Working on the Chain Gang; Interpretation in Law and Literature' in S Fish (ed), *Doing What Comes Naturally* (Durham, NC, Duke University Press 1989) 94.

³⁶ See, eg, M Koskenniemi, 'What is International Law For?' in MD Evans (ed), *International Law*, 4th edn (Oxford, Oxford University Press, 2014) 41.

³⁷ M Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9, 25.

³⁸ *ibid.*

³⁹ *ibid.*

government that Koskenniemi seeks to contrast with law, or a specifically *legal* practice of government. In light of this critique, Koskenniemi generally eschews talk of government in accordance with the rule of law, and instead develops an account of the nature of (international) law premised on ‘a culture of formalism’ and ‘constitutionalism as a mindset’. Labels aside, however, I contend that Koskenniemi shares the same understanding of law I have attributed to Dworkin and Fish.

Consider, first, Koskenniemi’s description of a culture of formalism.⁴⁰ To say that law is formal is to say that it provides agents with a reason for action that does not depend on their particular interests or prudential goals, what (they believe) is good for them, or what (they believe) will make them happy.⁴¹ To engage in a *legal* practice of government, then, is to employ general rules for action that apply unconditionally to hold oneself and other members of the relevant community or society responsible. So understood, law (or legal reasoning) contrasts with instrumentalism, which predicates reasons for action on agents’ interests or prudential goals. The reasons for action agents have depend on their particular interests, and the means available to them to advance or satisfy those interests. Whereas instrumentalism provides actors with strategic reasons for action, law provides them with rights and responsibilities. It does so by constituting them as members of a single, common, juridical community, as agents and subjects of law. As Koskenniemi writes,

the form of law constructs political adversaries as equals, entitled to express their subjectively felt injustices in terms of breaches of the rules of the community to which they belong no less than their adversaries – thus affirming both that inclusion and the principle that the conditions applying to the treatment of any one member of the community must apply to every other member as well.⁴²

As a ‘social practice of accountability, openness, and equality’, a culture of formalism constitutes ‘a culture of resistance to power’.⁴³ In any political society where such a culture flourishes, might cannot make right. Or put another way, where fidelity to legality is a basic belief or assumption that structures how its members conceive of their relations to one another, both as fellow citizens and as rulers and subjects, it will not be possible to justify one’s conduct to oneself or to others in purely instrumental terms, that is, in terms of power and interest. Rather, every public act will need to be justified in *legal* terms, by reference to a

⁴⁰ For a reading of Koskenniemi that contrasts a culture of formalism with a culture of legality, rather than treating the former as just another name for the latter, as I do, see J Brunnée and SJ Toope, ‘The Rule of Law in an Agonistic World: The Prohibition on the Use of Force and Humanitarian Exceptions’ in W Werner et al. (eds), *Koskenniemi and His Critics* (Cambridge, Cambridge University Press, 2015).

⁴¹ Koskenniemi (n 36) 40–1.

⁴² *ibid* 41.

⁴³ M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, Cambridge University Press, 2001) 500.

general rule that applies unconditionally to members of the political community as such, and therefore agents will be able to demand treatment that is theirs by right, even where they lack the power to give others a prudential reason to treat them that way.⁴⁴ Moreover, by framing the enterprise of government in terms of rights and duties, justice and fairness, and respect for human dignity – in short, by invoking norms that presuppose a conception of political subjects as autonomous and responsible agents – a culture of formalism or legality provides resources that agents can use to resist oppression or domination.

Notions such as ‘peace’, ‘justice’, or ‘human rights’ ... give voice to individuals and groups struggling for spiritual or material well-being, fighting against oppression, and seeking to express their claims in the language of something greater than their merely personal interests.⁴⁵

As Fish would say, law provides actors with rhetorical resources, a grammar that actors can use to contest their treatment. They do so by, in Dworkin’s terms, advancing a novel constructive interpretation of the political community’s past practice, or in Fish’s terms, presenting a rewriting of the community’s history, that shows the treatment in question to be inconsistent with the community’s other commitments.

That is not to say that power has no influence on what is treated as right. Government, including government in accordance with the rule of law, inevitably serves ‘to advance the values, interests, and preferences that those in dominant positions seek to realize in the world’.⁴⁶ Indeed, like Fish, Koskenniemi construes every finding of law as ‘a *hegemonic* act in the precise sense that though it is partial and subjective, it claims to be universal and objective’.⁴⁷ Necessarily, any human judgment of what ‘we’ take to be required as a matter of right (an assertion of a general and impartial norm) will be partial, in two senses of that term. First, the experience it reflects will always be a limited one that comprehends neither all the possible circumstances in which human beings must determine ‘how to go on’, nor all the value-laden perspectives from which human beings engage with the natural and social world. Put another way, no culture or practice of holding accountable is complete in the sense that those who participate in it possess a fully worked out conception of what follows from the regulative ideal that provides the culture or practice with its point or purpose. That Herculean task lies not only beyond the ability any individual human being but of any community of human beings, even one that extends across many generations (which is to say, one that is constituted by, and so realises, a tradition).

⁴⁴Of course, the content of jurisdictional concepts such as ‘public act’, ‘legal official’, and ‘citizen’ are also open to contestation, and indeed, specific examples of their contestation often figure centrally in both emancipatory and reactionary narratives of a political community’s historical quest to realise the rule of law.

⁴⁵Koskenniemi (n 36) 44.

⁴⁶*ibid* 48.

⁴⁷*ibid* 43.

And human beings can and do create and sustain a plurality of practices of holding accountable premised on different regulative ideals, or on vastly different concrete understandings of what follows from a shared but highly abstract regulative ideal. Hence Koskenniemi's caution against, and denouncing of, 'false universals'.⁴⁸ Second, judgments of what is required as a matter of right are inevitably coloured by judgments of what is good, for me, for mine, or for all humanity. The 'distortion' this introduces owes not simply to human beings' inevitably limited experience of what is good for (creatures like) them, but to the germ of instrumentalism, of strategic or means-end reasoning, it implants in an enterprise that purports to offer an alternative to instrumentalism.⁴⁹ Even government in accordance with the rule of law will favour certain conceptions of justice and fairness over others, and which one triumphs (*vis-à-vis* a particular exercise of political power, at a particular point in a political community's history) will inevitably be shaped by officials' and subjects' conceptions of the good life. The doubly-partial nature of moral judgment accounts not only for disagreement over what the law is (or should be), but also the tendency of those whose view is not realised in the practice of government to describe the triumphant view pejoratively as *political*, the exercise of power to advance a private conception of the good at the expense of fidelity to public right.

Formalism requires that government be exercised in accordance with general rules that apply unconditionally. As Kant, Kelsen, and others have recognised, however, rules do not spell out the conditions of their own application.⁵⁰ Rather, 'every rule needs, for its application, an *auctoritatis interposition* that determines what the rule should mean in a particular case and whether, all things considered, applying the rule might be better than resorting to the exception'.⁵¹ It is not the presence of rules (including those constitutive of institutions such as courts) that determine whether a society is governed in accordance with legality, but the 'mindset' of those who administer them; that is, those who interpret the rules, or what is the same, who judge what the rules entail in a particular case. Legality obtains when, or to the degree that, authoritative determinations of what the law is are made by lawyers. Like Fuller, Dworkin, Fish and I maintain, Koskenniemi uses the term 'lawyer' to refer to members of a profession whose primary allegiance is to the ideal of government in accordance with the rule of law. 'The idea of a universal law needs servants that define themselves [as] administrators (instead of inventors) of universal standards – the class of lawyers. The traditions and practices of this class are significant only to the extent they remain attached to the "flat, substanceless surface" of the law'; that

⁴⁸ See, eg, M Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 *Cambridge Review of International Affairs* 197.

⁴⁹ Koskenniemi (n 36) 41.

⁵⁰ Koskenniemi (n 37) 9–11.

⁵¹ *ibid* 10.

is, to general rules that apply unconditionally.⁵² The culture of formalism is comprised of the ‘sensibilities, traditions and frameworks, [and] sets of rituals and self-understandings among institutional actors’ that together define the legal profession. That profession, like all enterprises, exists in virtue of its distinctive point or purpose, one that Fuller aptly describes as ‘the enterprise of subjecting human conduct to the governance of rules’ that do not ‘tell a man what he should do to accomplish specific ends set by the law giver, [but instead] furnish him with baselines against which to organize his life with his fellows ... [and provides] a framework with which to live his own life’.⁵³

Individuals become lawyers via habituation, by learning to think or reason the way that lawyers do. This involves becoming proficient (at least) in the use of various professional techniques lawyers employ to identify the law, those rights and responsibilities that members of the political community are entitled to have enforced on demand, without the need for any legislation. Yet as Koskenniemi observes, ‘while the culture of formalism is a necessary though often misunderstood aspect of the legal craft, as a historical matter, it has often provided a recipe for indifference and needs to be accompanied by a live sense of its political justification’.⁵⁴ The acquisition of specifically legal forms of reasoning (as opposed to, say, economic ones) without a sound grasp of legality’s point or purpose can easily lead to a form of rule worship, or a ‘bureaucratic spirit’.⁵⁵ Thus, if lawyers and the larger political society to which they belong wish to retain and strengthen its practice of government in accordance with the rule of law, it is imperative that they learn to properly appreciate its nature and value. Where the rubber of general norms hits the road of specific cases, government in accordance with the rule of law requires not merely *techné* but *phronesis*.

⁵² Koskenniemi (n 36) 42.

⁵³ Fuller (33) 106; LL Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, KI Winston (ed) (Durham, NC, Duke University Press 1981) 234.

⁵⁴ Koskenniemi (n 36) 45.

⁵⁵ *ibid.*

