

BOOK REVIEWS

Stanley Fish on Philosophy, Politics and Law: How Fish Works

(By Michael Robertson, Cambridge University Press, 2014)

Taking Fish Seriously

Michael Robertson is concerned that Stanley “Fish’s critics generally get him wrong and that consequently his original and valuable contribution to philosophy, politics, and law have been underappreciated”.¹ Given the “overwhelming unorthodoxy” of Fish’s positions,² and given that his work is presented as “a series of snapshots of bits of the edifice” without a “synoptic view of the whole”,³ Robertson’s exegesis of Fish’s work provides a much needed means to understand and appreciate Fish’s account of philosophy, politics and law. The stated goal of *How Fish Works* is to set out the work of Stanley Fish in a general form, to demonstrate its fields of application, and to render Fish’s positions more accessible.⁴ The book excels at this, all the while preserving the nuance and subtlety of Fish’s unorthodox positions.

For anyone interested in the work of Stanley Fish, and for anyone interested in drawing out the implications of an embedded conception of the self for political and legal theory, *How Fish Works* is an indispensable resource. Fish’s positions are developed through a carefully constructed cascade of chapters, with each central proposition building upon the previous one, which provides an overall structural clarity that is absent in the primary material. This crafted and methodical unfolding of each set of premises, each conclusion, and each set of implications, is one of the significant intellectual achievements of the work. Another is the clarity with which Robertson writes. Hence, if the aim of the book is to provide a clear exploration of underappreciated work, then *How Fish Works* is an unmitigated success.

Moreover, if the goal of the *How Fish Works* is to deliver a message that has so far been underappreciated, then this review should aim to shoot (or, in this case, praise) the messenger. But *How Fish Works* is presented as more than a *Cambridge Companion to Fish*. It presents a discussion that is located in the battleground of background beliefs, where Robertson ultimately hopes to persuade us of Fish’s variety of anti-foundationalism and accept the implications for political and legal theory that follow from his unorthodox epistemology. Whilst I have nothing but praise for the clarity of the message, I cannot resist the opportunity to engage

¹ Michael Robertson *Stanley Fish on Philosophy, Politics and Law: How Fish Works* (Cambridge University Press, Cambridge, 2014) at 4.

² At 2.

³ At 3.

⁴ At 3.

with some of its contents. In what follows I will provide a brief account of each chapter (but with a warning that the subtlety of *How Fish Works* may fall victim to brevity). I will then apply some critical pressure to Fish's contribution to legal philosophy in the final section.

1 Philosophy

Fundamental to Fish's philosophical work is an 'embedded' conception of the self. For Fish, the self is embedded in a particular "local context"⁵ that is "provided by communities or institutions" that "preserve and transmit the cluster of beliefs, values, and projects that constitute human selves and structure their thoughts and perceptions".⁶ The embedded self is in contrast to the 'rational will', which is able to separate itself from "any of the contingent attributes that a person exhibits".⁷ Chapter One explains how this separation is unachievable as "all of our local commitments cannot be made the object of rational thought".⁸ The local context provides the "structure and content to our consciousness and so simultaneously constrains and enables us".⁹ If you were to attempt to extract yourself from your local context, you would not render an essential and rational self uninhibited by your contingent attributes, "rather you end up with no self at all".¹⁰

If we were able to extract ourselves from the milieu of human beliefs, values and practices; then the 'rational will' would "achieve direct and unmediated perception of things" without the distortionary effects of the milieu.¹¹ Yet, since such extraction is not possible, this 'basis' or 'foundation' of our knowledge of things is unavailable. As Chapter Two explains, this does not mean that 'knowledge', 'truth' or 'facts' are unavailable to us, but rather the bases of such objects of inquiry "do not rest on extra-human foundations".¹² It is the local context that gives content and structure to our intellectual inquiries, and hence, the basis of our knowledge must be local and contextual. This basis of knowledge can nonetheless be stable and universal, but the means of inquiry through which we identify such knowledge cannot be uncontroversial through simple use of 'brute facts'.¹³ Robertson explains how this anti-foundationalist epistemology that Fish develops is both a negative reaction to the impossibility of 'foundationalist' knowledge (that requires the extracted, rational will) as well as a positive response to 'the background work' done by local commitments in enabling and structuring human perception, thought and action.

⁵ At 12.

⁶ At 13.

⁷ At 7.

⁸ At 10.

⁹ At 12.

¹⁰ At 9.

¹¹ At 16.

¹² At 23.

¹³ At 30.

Chapter Three then outlines Fish's "deflationary" account of the role of theory. If the basis of our knowledge of things is local and contextual – enabled by the 'background work' of the human practices – then an attempt to formulate an abstract theory or abstract inquiry away from all local context will result in an empty theory or an inquiry empty of any content. For Fish, theory is still possible; the contention is only that theory (along with all other human practices) "require[s] an already-in-place background".¹⁴ It follows that if each human practice, including each strand of intellectual inquiry, requires its own 'background', then "all practices are separate and autonomous".¹⁵ In particular, philosophy has its own unique focus (or 'job') and its own rules (or 'mode of reasoning'), meaning that "no non-philosophical practice need be affected by what goes on in the discipline of philosophy".¹⁶ Because of 'the autonomy of each discipline', interdisciplinary inquiries are not possible: they attempt to "step outside the narrow disciplinary tasks and enabling backgrounds of particular practices".¹⁷

This 'autonomy of practices' is explained in terms of "different institutions" having "distinct jobs or tasks".¹⁸ As Fish explains:¹⁹

[Y]ou can't make sense of – or evaluate – the arguments and actions of disciplinary agents unless you have identified and held fast to the institutional purpose in relation to which those arguments and actions have been produced ... The location of that distinctiveness is ... in the purposive context that allows a practitioner to know that he or she is doing this and not that ... and this distinctiveness obliges a critic to assess what the practitioner has done in relation to that context and not some other.

Beyond mere institutional membership, what appears to differentiate 'practices' are their individual factors; including their "purposes, categories, modes of reasoning [and] criteria for evaluation" that are engaged in each practice or inquiry.²⁰ As Fish explains above, the autonomy of practices requires the critic to assess a practice according to its own task, aim and mode of reasoning.

2 Politics

How Fish Works then turns to consider politics and starts in Chapter Four by taking aim at liberalism. As it is a search for universal and neutral principles and procedures "that every (rational) person will agree to",²¹ liberalism is described as a species of foundationalism. It follows from Fish's account of theory that the "abstract notion of 'neutrality' can

¹⁴ At 58.

¹⁵ At 59–60.

¹⁶ At 64.

¹⁷ At 73.

¹⁸ At 60.

¹⁹ Stanley Fish "Interpretation Is Not a Theoretical Issue" (1999) 11(2) *Yale JL & Human* 511 at 512 as cited in Michael Robertson, above n 1, at 60.

²⁰ Michael Robertson, above n 1, at 61.

²¹ At 82.

only be given content from *within* some locally embedded positions”.²² Either liberal principles and procedures represent a detached theory, which is empty of any content outside “the special context of philosophy seminars”,²³ or liberal principles and procedures are “inescapably a substantive political choice” about the outcomes that they create and maintain.²⁴

Fish is not, however, a critical theorist. The aim here is not to free ourselves (and others) of the ‘grip’ of liberal background commitments.²⁵ Although “lateral shifts” in background commitments are possible, no theory or intellectual inquiry can enable an even momentary suspension from our local embeddedness. As the chapter explains, Fish is keen to identify how “no consequences follow logically from anti-foundationalism” and how some fellow ‘anti-foundationalists’ have failed to properly appreciate the autonomy of the philosophical practice.²⁶

Although there is no necessary connection between anti-foundationalism and substantive political positions,²⁷ an anti-foundationalist does not forgo holding substantive political positions. Rather, such substantive political positions must have a basis in something other than the philosophical practice of anti-foundationalism. Chapter Five notes Fish’s own substantive political positions and then adjudicates his debate with those who have argued that anti-foundationalism forces only relativistic, crypto-liberal, or conservative, political commitments.

Chapter Six then considers Fish’s descriptive account of the necessary features of ‘political practice’. That is, ‘politics’ in a particular and narrow sense: “the things done in the hurly-burly of public life by partisans of different conceptions of the good when they contest for control of ... powerful institutions”.²⁸ This discussion covers how “theory-talk” can be used “as a resource to be quarried if it will work in the context at hand”.²⁹ Because theory plays only this rhetorical role in political success, defective philosophical arguments can be legitimately used for political purposes. It also follows from the earlier account of liberalism that in political practice there is always a political contest as to what partisan substance neutral principles really contain and “political paralysis” can be produced by a false belief in such neutral principles.³⁰

3 Law

When *How Fish Works* turns to consider the law, it starts in Chapter Seven by taking aim at ‘legal positivism’ as it did with ‘liberalism’ in

²² At 89.

²³ At 91.

²⁴ At 94.

²⁵ At 111.

²⁶ At 108.

²⁷ At 139.

²⁸ At 155.

²⁹ At 159.

³⁰ At 171.

Chapter Four. On occasion, the analysis of legal positivism in *How Fish Works* equivocates between broad and narrow characterisations of the doctrine. For now, let us consider the broad characterisation. According to Robertson, “Legal positivism seeks to preserve the neutrality of the law by stressing that law and morality are separate things, each of which can exist independently of each other.”³¹ This distinction reflects the liberal principle that law “should reflect only neutral principles that are made available to us by disinterested reason”.³²

Fish’s philosophy of law is able to negate (this broad characterisation of) legal positivism. Any legal actor, who has had “their consciousness shaped and enabled by their legal training”, will find themselves in local context which “will always reflect a partisan and contestable viewpoint”.³³ This refutes the blunt separation of law and morality by identifying how “moral and political commitments are present in the background that structures the surface (or foreground) of law and enables the perception of legal texts and legally relevant facts”.³⁴ Law and morality cannot therefore maintain a separate existence since legal texts and legally relevant facts are dependent upon a set of background moral commitments. This then licenses Fish to make his claims that sticking “rigidly to requirements of contract’s consideration doctrine” cannot escape “the realm of substantive moral judgments”³⁵ and that the principle of free speech “is essentially connected with” anti-liberal qualities of constraint, partisan bias and non-neutrality.³⁶

Fish is also concerned with a particular subspecies of legal formalism. That is, the textualist claim that:³⁷

... if you understand the grammar of the language the text is written in and the conventionally accepted meanings in that language of the words making up the text that is all you need in order to understand the objective meaning of the text itself.

For Fish, the existence of ‘the legal rule or text’ is foreground that is made possible only by virtue of a background set of moral and political commitments. As Chapter Eight explains, where there is consensus as to the meaning of a text, this is not provided by the text itself, but rather the meaning is determined or ‘constrained’ by the “shared background of the members of an interpretive community”.³⁸ Equally, where the understanding of a text is contested, the background of the interpretive community is what is producing the disagreement “that has a particular ... ‘discipline-specific’ shape”.³⁹

31 At 177.

32 At 177–178.

33 At 180.

34 At 185.

35 At 188.

36 At 193.

37 At 208.

38 At 220.

39 At 220.

This account of interpretation disrupts the formalist picture of legal reasoning to the extent that legal formalism cannot preserve the objectivity of the law by limiting the material available to somebody wanting to understand and apply a legal rule. This is because the moral and political background is a resource that necessarily must be relied upon to understand the content of a legal text.⁴⁰ The law may nonetheless have a stable and determinative existence. The interpretative community may have a homogenous and shared moral and political background that then renders clear and incontestable interpretations of legal text. However, the law cannot have a 'formal' existence since it is not the text and textual conventions that render the clear meaning.

In Chapter Eight, Robertson also provides a detailed account of Fish's 'intentionalism', which provides that "for a meaningful text to exist the reader must be assuming that it was produced by an author and that the author intended it to mean something".⁴¹ Robertson then responds to "a genuine although uncharacteristic inconsistency" in Fish's work as he attempts to square intentionalism with the remainder of his theory of interpretation.⁴²

Fish's account of interpretation triggered heated exchanges with Ronald Dworkin. The differences between the two are subtle, and Robertson takes great care in unpicking the debate in Chapter Nine. The crude contours of the disagreement can be understood as follows: for Dworkin, a legal actor must always consult moral and political principles when engaging with the law, the combination of which constrains the legal actor to interpret and apply the law in a particular way in any given circumstance. These Dworkinian principles provide the moral and political background to the legal foreground. However, Dworkin's moral and political principles are background to the law but not background to the legal actor. According to the Dworkinian picture, an unconstrained, rational, legal actor *becomes* constrained by the interpretative task that is informed by these principles. For Fish, the embedded legal actor *is already* constrained by an in place background of political and moral commitments, and "there is no need to impose upon legal actors any constraints in addition to those that already enable their thinking and acting".⁴³ Hence, when Hercules interprets a text, he shares (with the rest of the interpretative community) a set of background assumptions. Consensus about the text, or disagreement about the text, is attributable to converging or diverging background assumptions. And if such background assumptions change, so will Hercules' understanding of the text. Critically, Fish would argue that even Hercules, with his limitless intellect, is nonetheless constrained by these background assumptions that provide an external limit on his understanding and interpretation of the text.

⁴⁰ At 213.

⁴¹ At 221.

⁴² At 249.

⁴³ At 254.

Fish's already-in-place background does not constrain Hercules in an argumentative straitjacket, preventing the necessary elbow room for interpretation. However, under the Dworkinian picture, Hercules is subject to institutional pressures that close off any room for disagreement. Allow me to explain this contrast with reference to a particularly revealing exchange between Fish and Dworkin. In response to Fish's rejection of unconstrained legal actors, Dworkin asks us to imagine a judge who decides cases on a purely act-utilitarian basis. Such a judge, according to Fish's account, is doubly 'constrained' (and enabled) by his or her legal training (as 'a constrained legal actor') and by his or her background moral commitments (as 'a non-law constrained actor'). According to this account, in deciding a case a judge would: ⁴⁴

... seek to advance the goals and values that animate their ... utilitarian practice but do so by making public reference only to legal authorities and by employing only legal modes of reasoning.

According to the Dworkinian account, this is improper; "the judge should not be 'inventing' an account of the legal institutional history" but rather should be "coming up with the account of the legal institutional history that makes the most sense of it", as if "the institutional history has some pre-interpretative shape" that can be discovered.⁴⁵

In contrast, Fish would say that is:⁴⁶

... the utilitarian ... practitioner occupying the institutional position of judge was successful in translating his moral reasons into legal reasons, and was successful in persuading other members of the legal interpretative community that these legal reasons justified the outcome, then this rhetorical success is not improper.

This passage is telling. Although this 'rhetorical success' in legal adjudication must still manoeuvre within the confines of the law by "using only law-specific categories, histories, authorities, goals, principles, values,⁴⁷ it is still only rhetorical success. Fish relies upon rhetorical success (with sole use of law-specific tools) as the criterion for institutional appropriateness. Given that (for Fish) there is no 'pre-interpretative shape' to legal reasoning, perhaps this is all that a theory of legal reasoning can provide: an account of how institutionally constrained rhetorical manoeuvres that can induce shifts in background commitments about the meaning of a legal text.

In Chapter 10, Robertson constructs Fish's positive account of the law. Fish's claim is that the law is able to perform two incompatible 'jobs': "the rule of law job" that is responsible for "law's wish 'to have a formal existence'" and the "substantive justice job" which "is more focused on resolving disputes in a way that respects community standards of

⁴⁴ At 279.

⁴⁵ At 279.

⁴⁶ At 279.

⁴⁷ At 280.

reasonableness and morality".⁴⁸ The conflict or incompatibility between these two jobs is resolved rhetorically, rather than logically, through "reshap[ing] the past, effac[ing] the evidence of that reshaping, and then declar[ing] itself compelled in the present case by the past it has just transformed".⁴⁹ Beyond being 'interpreted', Robertson argues that the law is 'rewritten', such rewriting is pervasive in the law, and the exercise of rewriting the law is needed so that the law "succeeds in performing both of its incompatible law jobs".⁵⁰

When a rhetorical manoeuvre induces a shift in the background assumptions about foreground material, the foreground material has been recontextualised. Robertson considers in Chapter 11 whether the ability for the law to be recontextualised implies indeterminacy in the law. According to Robertson, Fish's response to the allegation of indeterminacy is three-fold. First, just as anti-foundationalism does not imply relativism, the bare possibility that the in place interpretive background can change "does not give any logical or psychological grounds to doubt the objectivity of the meanings currently apprehended".⁵¹ Secondly, a stable and fixed meaning may be replaced by another stable and fixed meaning. Thirdly, "altering any currently in-place background that compels ... clear meanings for legal texts will be typically difficult to achieve".⁵² Such constraints on the recontextualisation in law, that are anchored by an institutional bias against change provided by the law's 'rule of law job', explain why the task of decontextualisation requires a particular set of rhetorical devices and skills.

One final task then remains: to explain how Fish's account of the law compares with what might appear to be sister schools of thought: legal realism and critical legal studies (CLS). This explanation is provided in Chapter 12. With regards to legal realism, Robertson anticipates that "Fish would not enter the legal realist vs. legal positivist dispute about which law job – substantive justice or the rule of law – was the genuine one".⁵³ Robertson would also anticipate that "Fish would reject the strong indeterminacy arguments of some of the legal realists".⁵⁴ Further, Robertson explains that Fish "would not agree with the realists that lawyers have recourse to moral and political commitments in the process of *choosing* how to describe or apply the law".⁵⁵

The comparison between Fish and CLS is subtler. According to Robertson, "While Fish and CLS agree on their account of the law, they start to come apart when the consequences of this account are drawn."⁵⁶

⁴⁸ At 290–291.

⁴⁹ At 299.

⁵⁰ At 303.

⁵¹ At 309.

⁵² At 310.

⁵³ At 326.

⁵⁴ At 326.

⁵⁵ At 326.

⁵⁶ At 329.

The most fundamental difference stems from how they apply their shared anti-foundationalist premise. For Fish, “realizing that reality is socially constructed will not enable you to see reality free of the distorting influence of socially constructed categories”⁵⁷ and hence “a practice like law is not enhanced by a greater focus on its enabling background”.⁵⁸ Fish therefore disagrees with the CLS writers who “strive constantly to become aware of the unnoticed enabling and structuring ideas in the legal background and then to question whether these ideas deserve to be retained”.⁵⁹

4 A Critical Comment

I have doubts as to whether Fish can grant himself the licence to be critical of other legal theories. Whilst he can urge us to abandon abstract and empty inquiries about the law, and induce a lateral shift of background ideas, anything beyond this would seem to be inconsistent with his own deflationary account of theory. Here, I will unpack this doubt. I will identify some methodological differences within Fish’s own work that demonstrate the autonomy of methodologically distinct inquiries. I will then contend that similar methodological differences explain why Fish’s work is unable to engage with (the narrow characterisation of) legal positivism and – despite appearances – why Fish’s work is unable to engage with Dworkin’s account of interpretation.

(a) *Theories, Practice, and Theories of Practice.*

To start, allow me to isolate an example of methodological difference within Fish’s work. Compare how Fish approaches ‘politics’ (explained in Chapter Six) with the way in which he approaches ‘political theory’ (explained in Chapter Four). ‘Politics’ concerned the “things done in the hurly burly of public life”⁶⁰ whereas ‘political theory’ concerned the logical implications and inferences between anti-foundationalism and other philosophical positions. These two chapters represent inquiries with ‘aims’, distinct ‘modes of reasoning’ and distinct ‘criteria for evaluation’. Logic and necessary connections were the ways in which we explored political theory, whereas ‘theory-talk’ and rhetorical success were the tools for understanding ‘politics’.

It follows from Fish’s “deflationary analysis that theory, *qua* theory, will not play any role in the practice of politics”.⁶¹ It would also seem to follow from Fish’s deflationary analysis that ‘political theory’, *qua* a methodologically confined inquiry, cannot play any role in a ‘theory of political practice’. Political theory, theories of political practice, and political practice itself are each their separate and autonomous practices; given their own distinct “background beliefs, values, purposes,

⁵⁷ At 332.

⁵⁸ At 333.

⁵⁹ At 333.

⁶⁰ At 155.

⁶¹ At 157.

categories, modes of reasoning [and] criteria for evaluation".⁶²

Fast forward to Chapter 10 ('Fish's positive account of law') and we encounter the same methodology as in Chapter Six ('Political practice'). That is, Fish appears to be interested in 'the things done in the hurly-burly of legal life by constrained legal actors when engaged in an institutionally defined practice'. Fish makes similar observations about the practice of law as he does about the practice of politics: there is always a moral-political contest as to what partisan substance posited laws really contain, extra-legal norms can be used as a resource to be quarried if this would work in the institution specific context at hand, and logically incompatible values and philosophically defective arguments can be rhetorically successful.

In the same way that Fish's account of political practice represents an inquiry that is distinct from his account of political theory, his 'positive theory of law' (hereafter 'theory of legal practice') represents an inquiry that has an aim distinct from the remainder of legal theory. At one point, Robertson makes this clear:⁶³

... Fish's central question is not: 'How can the law be made philosophically coherent?' nor is it: 'Is the law implicated in maintaining the dominance of one social group over another?' Instead, he asks: 'What are the jobs that a liberal society assigns to law, and how does law succeed in doing them?'

But if Fish's theory of legal practice represents an inquiry that is distinct in aim, purpose and mode of reasoning from other theoretical accounts of the law, it would follow that his theory of legal practice is separate and *autonomous from* other theoretical inquiries. As we have already seen, Fish himself makes clear:⁶⁴

[Y]ou can't make sense of – or evaluate – the arguments and actions of disciplinary agents unless you have identified and held fast to the institutional purpose in relation to which those arguments and actions have been produced

If what divides autonomous practices are their different "purposes, categories, modes of reasoning [and] criteria for evaluation",⁶⁵ then Fish's theory of legal practice, as its own inquiry, can only hope to induce lateral shifts in the background commitments of other, neighbouring, inquiries. And nothing beyond that.

Fish's analysis motivates a background shift away from 'abstract' and 'empty' inquiries and this reformulation of the focus of legal philosophy may be his contribution to legal philosophy. That is, since we are unable to step outside the enabling backgrounds of particular practices, perhaps we ought not be interested in law's posited character, nor be interested

⁶² At 61.

⁶³ At 330.

⁶⁴ Stanley Fish "Interpretation Is Not a Theoretical Issue" (1999) 11(2) Yale JL & Human 511 at 512 as cited in Michael Robertson, above n 1, at 60.

⁶⁵ Michael Robertson, above n 1, at 61.

in the structure of legal reasoning (beyond institution-specific rhetorical devices), nor be concerned by the incompatibility of values that the law claims to be advancing, nor concerned by hidden ideology within the law. Outside the particular context of Jurisprudence seminars, these may be 'abstracted' and 'empty' inquiries. But note that, according to Fish's deflationary account of theory, his account of legal practice cannot negate or preclude theories of law's posited character, the structure of legal reasoning or law's hidden ideology. At best, it can divert our glance away from such theories.

(b) *Guilt by Association*

Nothing said so far is likely to trouble Fish (or Robertson). The contention so far has been simply this: Fish's account of legal practice is 'autonomous' from other accounts of the law that adopt a distinct aim and mode of reasoning. However, I suggest that Fish errs in attempting to cross methodological divides when he is critical of other legal theories.

Recall that Fish's account of the constrained legal actor being able to negate a broad characterisation of legal positivism (as claiming that law and morality are separate things, each being able to exist independently of each other). Whilst Fish can criticise this broad characterisation of legal positivism, I am unsure whether any legal positivist would subscribe to such a broad thesis. Legal positivists do not deny the existence of connections between law and morality or even that such connections maybe necessary connections.⁶⁶ Rather, legal positivism is concerned with denying a connection between law and morality with respect to a particular feature of a legal system: the conditions of legal validity. Hence, more helpfully, Robertson also offers a "weaker", or narrower, version of legal positivism, which argues that "what makes the law a law is not its moral content but rather the institutional procedures that brought it into being".⁶⁷ This version of legal positivism is concerned with the particular task of identifying the conditions of legal validity. The validity of a law depends on 'institutional procedures' (the source of the law) and not its 'moral content' (the merit of the law).

Fish would appear to endorse the narrow version of legal positivism.

⁶⁶ John Gardner "Legal Positivism: 5½ Myths" (2001) 46 Am J Juris 199 at 223 ("This thesis is absurd and no legal philosopher of note has ever endorsed it as it stands. After all, there is a necessary connection between law and morality if law and morality are necessarily *alike* in any way. And of course they are. If nothing else, they are necessarily alike in both necessarily comprising some valid norms. But there are many other necessary connections between law and morality on top of this rather insubstantial one, and legal positivists have often taken great pains to assert them. Hobbes, Bentham, Austin, Kelsen, Hart, Raz, and Coleman all rely on at least some more substantial necessary connections between law and morality in explaining various aspects of the nature of law (although they do not all rely on the same ones)").

⁶⁷ Michael Robertson, above n 1, at 178.

As Robertson explains:⁶⁸

Fish would agree with legal positivism that to ascertain whether something is valid law you do not need to determine that it is morally correct according to some religious institution. But this is consistent with holding that all valid laws rest upon some background moral commitments. Fish is just claiming that the moral commitments valid laws rest upon do not require validation from some non-legal source.

In terms of identifying the conditions of legal validity, Fish would appear to join the orthodoxy; although all laws rest upon – in some way – some background moral commitments, the validity of a legal norm depends on the source of the norm and not its merits. There are moral commitments in the law, and such moral commitments may be contestable, but the key (legal positivist) point is that such commitments *are in the law* by virtue of their legal source (and not their merit according to some non-legal source).

And yet Fish's legal philosophy appears to be more occupied with tarring legal positivism and political liberalism with the same brush. The doctrine of consideration is the manifestation of particular contestable moral and political commitments because of the various connections between morality and the nature of law. For the same reason, there may be no such thing as a principle of free speech that is neutral as to competing moral and political commitments. The liberal ideal of neutral principles governing contestable visions of what is right and good may be unworkable. But that does not negate legal positivism. At best, it makes legal positivism guilty by association. The concern of legal positivists is whether the task of identifying the doctrine of consideration or the principle of free speech can be performed with sole reference to 'institutional procedures' without concern for the merit or 'moral content' of such legal norms.

Fish appears to be disinterested in identifying the conditions of a legally valid norm. Whilst Fish may be right to imply that the legal positivist arguments are abstract and empty, such arguments may also be too separate and 'autonomous' for Fish to himself engage with or evaluate because he has not "identified ... the institutional purpose in relation to which those arguments and actions have been produced".⁶⁹ Such arguments have a distinct 'purposive context' and Fish (playing by his own rules) is 'obliged' to assess legal positivism in relation to that purposive context.

(c) *Rhetoric and Coercion*

Once again, this suggestion that Fish is unable to critically engage with a narrow construction of legal positivism may also fail to trouble him (or Robertson). However, by following the same lines of analysis, we

⁶⁸ At 186.

⁶⁹ Stanley Fish "Interpretation Is Not a Theoretical Issue" (1999) 11(2) Yale JL & Human 511 at 512 as cited in Michael Robertson, above n 1, at 60.

can consider a bolder contention: that Fish is also unable to critically engage with Dworkin. The crux of this further contention is that Fish's disagreement with Dworkin is likely to take a methodological turn, which is a turn that may be road blocked by Fish's own deflationary account of theory.

Consider another example of methodological differentiation: the familiar Hart–Dworkin debate. For Hart, *The Concept of Law* was aimed at providing a theory of what law is which is both “general and descriptive”.⁷⁰ As Dickson explains, it is ‘general’ “in the sense of seeking an account of the nature of law wherever and whenever it is found” and ‘descriptive’ in the sense of being “morally neutral” with no “justificatory aims”.⁷¹ However, Dworkin in *Law's Empire* provides a theory of law that is local and justificatory. That is, it is “addressed to a particular legal culture” and aims to explain how law can justify state coercion.⁷² Hence, following *The Postscript*, the Hart–Dworkin debate took a methodological turn. For instance, Dworkin's method suggests that a successful legal theorist must adopt the point of view of the “participants in legal practice offering interpretations of law that compete with those of other participants in the practice”.⁷³ However, for Hart, a successful legal theorist must adopt the point of view of those “who create, administer, and are subject to law” without evaluating the justificatory claims made by those who create, administer or follow the law.⁷⁴

Perhaps the same methodological divide can be located in the Fish–Dworkin debate. Fish is interested in embedded interpretation and the practice of interpretation. Dworkin is interested in interpretation as the means to which state coercion can be justified. Given these different aims, their points of view also differ. For Fish, I infer that we should adopt the viewpoint of the participants in legal practice who are attempting to achieve ‘rhetorical success’ whilst using law-specific tools. After all, that is the criterion of appropriateness. For Dworkin, in order explain how the coercive force of the law can be justified, theorists must look for something further than rhetorical success. Being able to persuade other members of the legal interpretative community cannot justify the coercive nature of the law. The fact of being constrained by already in place background assumptions cannot be used to perform a normative task. An interpreter becoming constrained by ‘fit’ and ‘integrity’ can, however, perform a normative task. Although the distinction is subtle, *Law's Empire and Doing What Comes Naturally* each have their own

⁷⁰ HLA Hart *The Concept of Law* (2nd ed, Clarendon Press, Oxford, 1994) at 239; Julie Dickson “Methodology in Jurisprudence: A Critical Survey” (2004) 10 *Legal Theory* 117 at 118–120.

⁷¹ Julie Dickson “Methodology in Jurisprudence: A Critical Survey” (2004) 10 *Legal Theory* 117 at 119.

⁷² Ronald Dworkin *Law's Empire* (Belknap Press, Cambridge (Mass), 1986) at 102.

⁷³ Julie Dickson, above n 70, at 120.

⁷⁴ Julie Dickson, above n 70, at 121.

distinctive projects, values and modes of reasoning.

Given this divide, a methodological debate between Fish and Dworkin naturally follows. That is, if we – as theorists in the same field of inquiry – adopt different purposes and evaluative criteria, we may want to try and convince each other that we are employing the most relevant purpose and the right evaluative criteria. And yet, Fish would appear to want to insulate theories from any methodological disagreement. According to the autonomy of practices, each practice has a ‘purposive context’, which requires critics to assess ‘what the practitioner has done in relation to that context and not some other’.

I therefore wonder whether Fish would be forced to accept that his account of interpretation as rhetorical success is ‘separate and autonomous’ from Dworkin’s account of interpretation as a means of justified coercion. As distinct projects, with their own aims and modes of reasoning, one has nothing to contribute to the other. According to the autonomy of practices, Fish and Dworkin drift apart on their own methodological orbits. But instead of respecting the autonomy of a methodologically distinct inquiry, and assessing what a theorist has done in relation to his or her own purposive context, Fish responded to Dworkin with essays, such as ‘Wrong Again’ and ‘Wrong After All These Years’.

Overall, it is hard (as a theorist) not to feel deflated by Fish’s deflationary account of theory. Feeling deflated, of course, is no reason not to accept this deflationary account. But it is also hard not to feel suspicious when a deflationary theorist, who collapses theories into themselves by highlighting their methodological distinctiveness, inflates his own theories large enough to cross the same methodological distinctions. That said, regardless of whether there is any merit at all to this suspicion, it is not possible to consider the extent to which Fish can criticise other theorists whilst remaining faithful to his own deflationary theory without a ‘synoptic view of the whole’ of Fish’s work. Moreover, it is difficult to appreciate Fish’s contribution to philosophy, politics and law, or critically engage with his work, whilst it is piecemeal and opaque. For this reason, at the very least, the architecture and clarity of Robertson’s *How Fish Works* is a very valuable contribution to legal philosophy.

**Dr Jesse Wall,
Faculty of Law,
University of Otago.**