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Reenchanting Practice:
Stanley Fish and the Challenge of Virtue Ethics

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Introduction

In this chapter, we critique Stanley Fish's essay *Dennis Martinez and the Uses of Theory*,[1] a key contribution to the 'Fish-Dworkin debate'.[2] Our core argument is that Fish's central distinction between engaging in a practice and discoursing on that practice is too sharp, and that the two corollary claims that he makes – that practice is not generated by theory and that theory does not offer a genuine account of how practice unfolds – fail to convince.

Behind Fish's distinction is an attempt to reframe practice: to uncouple it from the sort of abstract theorising that takes place in a vacuum and to throw light on how practitioners actually carry out their activities. In what follows, we also seek to reframe practice, perhaps even to reenchant it, by drawing on the depth and richness of conceptions of practice available in the fields of virtue ethics and virtue jurisprudence.

In Part 1, we outline the central distinction, while in Part II we examine how Fish applies that distinction to the practice of judging. In Part III, we examine how well the distinction stands up against understandings of practice that emerge from the field of virtue ethics. In Parts IV and V, we critique Fish's two corollary claims by reference to insights from virtue ethics and virtue jurisprudence.

I. The 'Engaging in a Practice' v. 'Discoursing on a Practice' Distinction

In the 'Dennis Martinez' article, Fish draws a distinction between 'engaging in a practice' and 'discoursing on that practice'.[3] Playing baseball is not the same thing, he says, as explaining or analysing how baseball should be played, and 'in a strict sense … there is no relationship between them whatsoever'.[4] In fact, no matter what the practice, Fish maintains, there is an ineliminable difference between carrying out the activity in question and analysing or theorising that activity; in short, between the 'doing' and the 'talking about the doing'. This distinction is the essential point of his article,[5] and

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[1] S. Fish, 'Dennis Martinez and the Uses of Theory' (1987) 96(8) *The Yale Law Journal* 1773-1800.

[2] See generally, *M. Robertson, Stanley Fish on Philosophy, Politics and Law* (Cambridge: Cambridge University Press, 2014), Ch 9.

[3] Fish (n 1) pp 1777-1778.

[4] Ibid p 1775.

[5] This argument (or arguments of this sort) features not only in this article but also in other essays in which Fish engages with Dworkin's work. See, for example, S. Fish, 'Working on the Chain Gang: Interpretation in the Law and in Literary Criticism' (1982) 9 (1) *Critical Inquiry* 201-216; S. Fish, 'Wrong Again' (1983) 62 (2) *Texas Law*

Fish goes on to apply the distinction to the practice of judging. But having initially articulated this distinction, and before discussing its application in law, Fish makes two further claims. These claims are presented as corollaries of the distinction and therefore help to illuminate the perspective he has in making and articulating the distinction. The first of these, which we will call *the claim of atheoretical generation*, is that practice is not generated by theory, while the second, which we will call *the claim of inauthentic explanation*, is that theoretical discourse about a practice does not provide a genuine account of how that practice unfolds.

(a) The claim of atheoretical generation

Fish is keen to clarify that discoursing on practice 'does not stand in a relationship of superiority or governance to the practice that is its object',[6] underscoring that talking is not better than doing, and that talking does not regulate the doing of practice. In particular, Fish argues against an assumption that a good theory is the precursor to or the foundation for developing effective practice. His concern seems to be that we take analysing and theorising too seriously, attributing to them an importance and a power that they do not and should not have. He wants to focus on the actual doing of practice, rather than the talking or theorising about it, and to open our eyes to the ways in which practice stands on its own feet. We think that there is a lot to be said in favour of this effort to shift focus to the importance and power of practice, as will become apparent in the remainder of this chapter, although we dispute the practical feasibility and normative desirability of the claim of atheoretical generation. In Fish's view, theory *never* generates practice:

> 'Even if the practitioners happen to be in possession of a theory of the activity in which they are engaged, the shape of that activity is not the result of the application of that theory. They do not use their account of what they are doing (assuming that they have one) in order to do it. … [N]o one follows or consults his formal model of the skill he is exercising in order properly to exercise it.'[7]

It is worth noting that by defining theory as 'an abstract or algorithmic formulation that guides or governs practice from a position *outside any particular conception of practice*',[8] Fish is doubling down on the distinction between practice and discoursing on a practice. The basic point seems to be that Fish wants to make space to recognise practice as an immersive experience. Although practitioners may be aware of theory that exists outside the world of practice, it is nevertheless the case that within the world of practice, in his view, it is only the practice that governs:

> 'While it is certainly the case that the successful performance of a skill will sometimes require the invocation of theory – even of a theory of that particular skill – *it is never the case* that the theory thus invoked is acting as a blueprint or set of directions according to which the performance is unfolding.'[9]

Essentially, then, when Fish is articulating the distinction between engaging in a practice and discoursing on a practice, one of the things he wants to say is that practice is not constituted by theory: the claim of atheoretical generation.

(b) The claim of inauthentic explanation

Having distinguished between engaging in a practice and discoursing on that practice and having rehabilitated the notion of practice as something to be taken seriously in its own right, Fish then turns to the notion of theory. His definition of theory has placed theory 'outside any particular conception of practice' as noted, and throughout the article, Fish conflates the ideas of 'discoursing on a practice' and

Review 299-316; S. Fish, 'Still Wrong After All These Years' Law and Philosophy' (1987) 6 (3) *Law and Philosophy* 401-418; S. Fish, 'Almost Pragmatism: Richard Posner's Jurisprudence' (1990) 57 (4) *The University of Chicago Law Review* 1447-1475.

[6] Ibid p 1778.

[7] Ibid.

[8] Ibid p 1779. Emphasis added.

[9] Ibid. Emphasis added.

'talking' about a practice and 'theory', and regularly refers to these activities as being undertaken self-consciously and strategically. In one passage, for example, he describes theorising as 'the self-conscious recourse to a theoretical mode of talk, [which] no more generates the shape of [practice] than it generates the shape of what the talk is about'.[10] So when Fish is articulating the distinction between engaging in a practice and discoursing on a practice, the other thing he wants to say is that theorising or discourse on a practice cannot and should not be understood as offering a genuine account of how the practice is unfolding.

On one side, the claim of atheoretical generation asserts that practice is not constituted by theory. On the other side, the claim of inauthentic explanation holds that theory does not truly account for how practice unfolds. Taken together, they sharpen the distinction between engaging in a practice and discoursing on a practice, and they make clearer that Fish wants to reenchant our understanding of the importance of practice and undermine the dominant understanding regarding the contribution of theory. And, of course, Fish has developed these general points about practice and theory in order to tee up some arguments that he wants to make about the practice of judging.[11]

II. The Distinction as Applied to Judging: thinking within a practice and thinking with a practice

Not only Dworkin but 'almost everyone in the legal academy', Fish believes, takes the position that there is overlap between the practice of judging and reflection or theorising on that practice.[12] Fish, however, wants to maintain that judging is like every other practice: there is a sharp distinction to be maintained here, too, between the doing of the practice – that is, the process of reaching a conclusion in a legal dispute – and the talking about the doing – that is, the process of explaining that conclusion in a written judgment.

> '[W]hat I want to say is that judging or doing judging is one thing and giving accounts or theories of judging is another, and that as practices they are independent, even though the successful performance of the first will often involve engaging with the second. That is, as a practice judging is one of those that includes as a part of its repertoire self-conscious reflection on itself, and therefore it seems counterintuitive to say that such self-reflection – such theorising – is not to some extent at least constitutive of what it is reflecting on; but that is just what I will be asserting, and asserting in direct [**1780**] opposition to what is assumed by almost everyone in the legal academy'.[13]

The nuance of this position must be noted: Fish concedes that successful engagement with the practice of judging often entails invocation of theory and he acknowledges that the practice of judging necessarily includes theorising about judging. But it would appear that, for Fish, such use of theory is merely part of a judge's rhetorical repertoire when seeking to persuade others that her decision is the correct one. Fundamentally, Fish wants to maintain the underlying distinction between engaging in the practice and discoursing or theorising about the practice. Moreover, at this point in the article, the nomenclature of the distinction changes. Fish now contrasts thinking 'within a practice' and thinking 'with a practice': thinking within a practice maps on to the idea of engaging in a practice while thinking with a practice becomes co-extensive with discoursing about a practice or theorising. Judges who think within the practice of adjudication are the baseball players, while judges who think with a practice are the baseball analysts. Fish explains the new distinction in the following key passage:

> 'To think *within* a practice is to have one's very perception and sense of possible and appropriate action issue "naturally" – without further reflection – from one's position as a deeply situated agent. Someone who looks with practice-informed eyes sees a field already organized in terms of perspicuous obligations,

[10] Ibid p 1778.
[11] Ibid pp 1779 ff.
[12] Ibid p 1780.
[13] Ibid pp 1779-80

> self-evidently authorized procedures, and obviously relevant pieces of evidence. To think *with* a practice – by self-consciously wielding some extrapolated model of its working – is to be ever calculating just what one's obligations are, what procedures are "really" legitimate, what evidence is in fact evidence, and so on. It is to be a theoretician.'[14]

Tying the various strands together, we can say that judges think within a practice when they are deciding how to rule in any given legal dispute, and they are thinking with a practice when they are discoursing on how they rule in any given legal dispute. Alongside making the distinction between thinking within and thinking with a practice, Fish also re-affirms the claims of atheoretical generation and inauthentic explanation, if anything, even more stridently in the context of the practice of judging, as explained below.

(a) The claim of atheoretical generation in judging

Judges who *think within the practice* of adjudication are so deeply situated in the world of practice that they perform their tasks in an almost automatic way. Such a judge is a 'deeply situated agent' who looks through 'practice-informed eyes', and who is faced with 'perspicuous obligations, self-evidently authorised procedures, and obviously relevant pieces of evidence'.[15] Fish borrows Dworkin's analogy of the chain novel to show how each judge, being a link in the chain, becomes a source of the purposes and values and goals of the law:

> 'It would follow then that an agent so embedded would not need anything external to what he already carried with him as a stimulus or guide to right – that is, responsible – action; in short, he would not need a theory'.[16]

Fish's reading of Dworkin's chain novel analogy is that, rather than explaining the place of theory, it actually confirms his own 'enriched notion of practice', a notion in which practice, rather than being in need of the guidance theory might claim to provide, is itself sufficient, is, in fact, self-sufficient, and in need of nothing additional'.[17] For Fish, the chain novel analogy demonstrates, that theories of judging do not shape the practice of judging.[18] Even the judge's own self-conscious reflection on her practice does not help to constitute her practice, because practice is a fully immersive experience. A judge reaches her decisions naturally and automatically by engaging in the practice of judging unselfconsciously without needing to have recourse to any external blueprint or benchmark or standards against which they measure their practice. Their practice is their whole world. Nothing else is necessary. Thus, the claim of atheoretical generation – that practice is not governed or generated by theory, or even by self-conscious reflection – holds, as far as Fish is concerned, for the practice of judging.

(b) The claim of inauthentic explanation in judging

If theories and self-reflections do not constitute part of the practice of judging, then why is judging so full of 'theory talk'?[19] Fish's answer is that some judges, knowing 'perfectly well what they are doing',[20] engage in *thinking with the practice* of judging. By this, Fish means that they are instrumentalising theories and self-reflections, and therefore

> 'engaging in the practice of self-presentation, that is, the practice of offering a persuasive account of why they have done what they have done – decide the case this way rather than that – which is not the same thing (why on earth should it be?) as offering an account of how they actually did it.' [21]

[14] Ibid p 1788.
[15] Ibid p 1788.
[16] Ibid.
[17] Ibid p 1787.
[18] Ibid.
[19] Ibid p 1791.
[20] Ibid p 1790.
[21] Ibid.

The decision reached by a judge is arrived at without the input of theory (the claim of atheoretical generation), but judges subsequently and strategically use 'theory talk' in the form of written judgments to provide highly curated, rhetorical *ex post facto* justification for that decision. According to Fish, judges engage in this process for the following reason:

> '[N]ot in order to provide an accurate description of the process by which they came upon their invention, but in order better to dress the product of that process in a garb appropriate to a situation in which their goal – and therefore the ground rules – had changed. Their goal is now persuasion, and they cast around for appropriate means with which to effect it (this is, of course, the traditional Aristotelian definition of rhetoric) and find them, or at least a portion of them, in the rhetorical practice of talking theory'.[22]

Any use of 'theory talk' in a judgment is simply window dressing.[23] Fish asserts that Dworkin's extensive writings on the practice of adjudication do not uncover the methodology that judges actually use to arrive at their decisions but reveal only 'the complex of rhetorical gestures to which one has recourse when a decision, already made, must be put into presentable form'.[24] In this light, according to Fish, Dworkin should be understood as 'a rhetorician.'[25] Thus, the inauthentic explanation claim – that theorising or discoursing on a practice does not provide a genuine account of how practice unfolds – also holds, on Fish's account, for the practice of judging.

Having given an exposition of the distinction between engaging in a practice and discoursing on a practice, and having discussed how Fish applies this distinction to the practice of judging, and how he sharpens the distinction by adding the claims of atheoretical generation and inauthentic explanation, we now want to analyse the merits of these arguments. We believe that the most serious challenge to any attempt to sharply delineate theory and practice comes from virtue ethics and virtue jurisprudence, because of how these schools of thought conceive of the notion of practice and because of how they understand the relationship between practitioner and practice. The scholars whose work we draw on in the succeeding sections will allow us both to dispute the practical feasibility and normative desirability of Fish's distinction (Part III) and the two corollary claims that he makes (Parts IV and V).

III. The Virtue Ethics Challenge to Fish's Distinction

The first thing to interrogate is the distinction itself. Fish assumes that one can draw a clear line between engaging in a practice and discoursing on a practice: the doing of the practice is entirely unselfconscious and unreflective, the discoursing on the practice is all talk and has no meaningful bearing on action. His aim, as noted above, is to reframe our conceptions of practice, and, as also noted, we support this mission. However, Fish adopts a very thin theory of practice, one that presents practice as quite mechanical and automatic, exclusive of and unresponsive to conscious self-reflection. We believe that a better way to reframe practice or perhaps even to reenchant it is to adopt a deeper, richer and more descriptively accurate definition of practice, such as the one offered by virtue ethics.

Virtue ethics articulates a much thicker understanding of practice that better captures its complexities. Alasdair MacIntyre, for example, defines practice as:

> 'any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human

[22] Ibid p 1791.
[23] Cf. Hart's discussion of 'window dressing' in the context of rule scepticism: HLA Hart, *The Concept of Law* (2nd edn, Oxford: Oxford University Press, 1994) p 140.
[24] Fish (n 1) p 1790.
[25] Ibid.

> powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended'.[26]

For MacIntyre, then, practice is anything but automatic. It is deeply important, hugely ambitious, and necessarily complex for its careful interweaving of activity, conceptualisation and refinement. What is more, self-reflection is a core component of practice, as MacIntyre further explains:

> 'A practice involves standards of excellence and obedience to rules as well as the achievement of goods. To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them. It is to subject my own attitudes, choices, preferences and tastes to the standards which currently and partially define the practice.' [27]

If we adapt MacIntyre's understanding of practice to the context of judging, it would be that justice is achieved in individual cases as judges pursue the kinds of professional excellences that are appropriate to and partly definitive of the practice of judging, with the result that the judges' capacity for professional excellence and ability to achieve justice in individual cases as well as conceptions of what justice means become continually more refined and sophisticated. Moreover, self-reflection – thinking about what it means to be a good judge in light of the standards of excellence and assessing how, as an individual judge, one measures up to those standards – is an essential part of the practice of judging.

On this richer understanding of practice, practice and reflection are bound up together and mutually generating. As we engage in the particular activity, we realise our goals by striving towards standards of excellence that define the activity (meaning that our engagement is shaped by theory and self-reflection). In addition, as we strive for those kinds of excellences, our capacity to achieve them is increased and our understanding of what they mean is refined (meaning that our theory and self-reflection is refined by our practice). Within this perspective, it is not practically possible to separate practice from theory. The doing cannot be done without the reflection. If MacIntyre is correct that standards of excellence partially define a practice, then it surely follows that if practitioners do not attempt to meet those standards of excellence in a systematic way, a point may be reached where the very character of the practice is altered so that it becomes something else, another activity that cannot meaningfully be understood as the practice it purports to be. Moreover, it is not normatively desirable to separate practice from theory, because it is the combination of the two that makes the practice so effective and makes the goods internal to that practice achievable. Adapting this to the context of judging, it is necessarily the case that the practice of adjudication requires that judges are self-reflective, striving towards the standards of excellence that define the practice of judging, and that if there is systematic failure to do this, then the practice that unfolds will not be recognisable as the practice of adjudication.[28]

While MacIntyre's theory offers a counterpoint to Fish's distinction between engaging in a practice and discoursing on that practice, by offering a much richer conception of practice at the macro level, Julia Annas, in her work articulating a compelling account of virtue-as-skill, offers a deeper understanding of practice at the micro level. By conceiving virtue as a skill, she believes that we can better understand how virtues are developed and refined over time, and thus distinguish them more clearly from routines which tend to become ossified over time. In Annas's account, as will be explicated in detail below, this

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[26] A. MacIntyre, *After Virtue* (3rd edn, London: Bloomsbury, 2007), p 218.
[27] Ibid, p 221.
[28] In the field of jurisprudence more generally, this argument bears similarities to Fuller's understanding of the eight principles of legality as a 'morality of aspiration' or 'kinds of legal excellence toward which a system of rules may strive'. L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964) p 41. Should a government fail in 'any one of these eight directions', Fuller insists that the result is not just 'a bad system of law', rather we are left with 'something that is not properly called a legal system at all…' (ibid, p 39). On the idea of the character of a practice changing so that it becomes something else, consider also Hart's analogy of the role of the 'official scorer' in a game (Hart (n23) pp 142-145. Occasional incorrect decisions on the part of the scorer can be tolerated but if these 'aberrations' become too frequent, 'there must come a point when either the players no longer accept the scorer's aberrant rulings or, if they do, the game has changed' (ibid, p 144).

distinction between skill and routine turns on the extent to which the actor must engage her intelligence in order to accomplish the activity, and in this way, like MacIntyre, her work can be used to contest the feasibility of Fish's central distinction which separates doing from reflecting.

First, though, we should understand that Annas' definition of virtue acknowledges that it is 'persisting, reliable and characteristic' of a person.[29] A virtue is persisting because it is 'a lasting feature of a person, a tendency for a person to be a certain way', which persists through challenges and is strengthened by its exercise.[30] A virtue is reliable in that one can count on it as a feature of a person: it is not an accident that she behaves courageously, and we would be surprised if she did not. A virtue is a characteristic when it is 'a *deep* feature of the person' – something which is central to her nature.[31] In being persistent, reliable and characteristic of a person, and for the fact that they can become engrained and reinforced over time, virtues can intelligibly be described as habits. But even if we use the language of habit (and like Annas, we prefer the language of skill), we must be careful not to diminish the level of mental engagement involved. If I am persistently, reliably and characteristically courageous, that is not the same as my being persistently, reliably and characteristically a coffee-drinker.

In order to explicate this distinction between routine and skill, Annas lingers on the contrasting examples of driving to work and playing the piano. It is worth quoting Annas at length on this point:

> 'Here is an example of habit becoming routine. I drive to my university job every day, following the same route to the parking garage. At first, I have to think consciously about the best way to do this, avoiding traffic without going too far from the most direct way, modifying the route at different times of day and so on. Gradually I become used to driving on this route, and it becomes habit with me. I no longer have to think about which way to turn at every corner, where to slow down and the like. My driving has become routine. This does not make it mindless: I am still at some level aware of where I am going, since I stop at red lights, drive at the right speed, and behave cautiously around dangerous drivers. But driving has become detached from my conscious thinking, and my conscious and deliberate thoughts may fail to be properly integrated with it. I may find myself at the garage when I started out intending to go somewhere else en route, or find myself at the usual entrance even when I know it is closed for construction. A decision to act differently from usual has not penetrated the patterns of routine, which carry on unaffected. A change to routine has to be conscious, explicit, and sometimes repeated if it is to have appropriate impact.'[32]

Routine is practice that has become so familiar that it no longer requires the kind of fully conscious engagement on the part of the practitioner that virtue must involve. To evoke this aspect of virtue, Annas uses the analogy of playing the piano. The beginner must consciously engage with all the detail of the music, thinking carefully about which notes should be played, in which order and at which speed, but the skilled piano player can play fluidly, without needing to think so much about each individual note. Is the pianist like the commuter, then?

> 'When we see the speed with which a skilled pianist produces the notes, we might be tempted to think that constant repetition and habit have transformed the original experience, which required conscious thought, into mere routine. But this is completely wrong. The expert pianist plays in a way not dependent on conscious input, but the result is not mindless routine but rather playing infused with and expressing the pianist's **[14]** thoughts about the piece. Further, the pianist continues to improve her playing. The way she plays exhibits not only increased technical mastery but increased intelligence – better ways of dealing with transitions between loud and soft, more subtle interpretations of the music, and so on. Rather

[29] J. Annas, *Intelligent Virtue* (Oxford: Oxford University Press, 2011) p 8.
[30] Ibid p 9.
[31] Ibid.
[32] Ibid p 13.

> than the rest of the mind being shut off from patterns of routine and proceeding independently, the ability, though a habituated one, is constantly informed by the way the person is thinking.'[33]

The skilled pianist could play a piece as a matter of routine, with significantly reduced conscious engagement, failing to attend too carefully to the tempo or the precision of the notes, and disconnecting from the dynamics and emotional resonance of the piece, but, Annas argues, we would class as a failure, rather than a manifestation, of skill.[34] The difference between routine and skill is in the level of intelligence employed. Virtues are like skills in that their practical mastery is accomplished over time through active intelligent engagement. Thus, from her perspective, Annas's position aligns with MacIntyre's when he posits that it is not practically feasible to distinguish sharply between practice and reflection.

Fish has insisted on such a sharp distinction, and it is instructive here to remember how he described judges as deeply situated agents, who are so immersed in practice that they can perform their tasks almost automatically, deciding naturally and unreflectively by looking through 'practice-informed eyes' at rules and facts without needing to engage in reflection. In his final exchange with Fish, Dworkin reflected on 'Fish's crucial assumption that an interpretive practice cannot be self-conscious and reflexive',[35] which 'leaves actual interpretive practice flat and passive, robbed of the reflective, introspective, argumentative tone that is, in fact, essential to its character'.[36] Read this way, Fish's vision of judging resonates more with Annas's description of driving a car than her account of playing the piano, because of his insistence that judging is done unselfconsciously and unreflectively and her insistence that virtues are exemplified only when there is a significant degree of intellectual engagement. And yet, in other places, Fish underscores that his judges are deeply immersed in practice, so much so that their being becomes shaped by the practice, which resonates with Annas's understanding of how a virtue becomes a persistent, reliable and deep characteristic of a person. Once, in distinguishing his position from Dworkin's, Fish explained that while Dworkin concluded that a judge 'will develop, in the course of his training and experience, a fairly individualised working conception of law on which he will rely, perhaps unthinkingly', Fish's own view is that '[a]ny judge will develop into a working conception of law'.[37] At another point, when discussing Dworkin's vision of law as a 'chain enterprise' and how this actually supports Fish's understanding of practice, Fish noted that a judge becomes a 'repository' of, among other things, the 'values' of that enterprise.[38] All of this resonates with Annas's understanding of how virtues seep into the bones of a person, as it were, so that generosity or courage or wisdom become part of who she is and we can now more accurately explain her behaviour by saying that she is a generous person than by saying that she has done a generous act. In both accounts, the practice is so immersive that it shapes the identity of the practitioner and in both accounts, this is a process of development that takes place over time. But Fish does not explain the detail of how this development operates. Annas does, by explaining that virtues are learned through exposure to others who are engaged in the same practices and developed through a long process of careful self-reflection on that practice, until at a certain point, all the reflections that have been previously undertaken will 'have left their effect in the person's disposition',[39] and therefore the virtue really will have become a persisting, reliable and deep characteristic of that person.[40] At that point, it is no longer necessary that an agent pore over the options as she would have needed to in the past. At that point, she can reliably act instinctively, because her instincts have been conditioned by the previous

[33] Ibid pp 13-14.
[34] Ibid p 14.
[35] R. Dworkin, 'Pragmatism, Right Answers, and True Banality' in M. Brint & W. Weaver (eds) *Pragmatism in Law and Society* (Boulder, CO: Westview Press, 1991) p 380.
[36] Ibid.
[37] Fish (n 1) p 1789.
[38] Ibid pp 1787-1788.
[39] Annas (n29) p 30
[40] Ibid p 8.

periods of careful reflections. At that point, to use Fish's language, her 'sense of possible and appropriate action [will] issue 'naturally' – without further reflection'.

All this is to say that Annas's account of the development of virtues can, in fact, explain how a judge could become one of Fish's 'deeply situated agents', by showing the power of self-reflection to embed virtues in a person over time. Fish's description of judges deciding naturally and unreflectively by looking through practice informed eyes aligns with Annas's account of persons who exercise virtue effortlessly having allowed that virtue to become part of them over time. Based on the evidence, though, we have to assume that Fish would reject Annas's account of the development process. Fish does not allow that self-reflection could be part of the practice and there are some passages that indicate that he is not enamoured with the discourse of striving for excellence in general.[41] Moreover, Annas's account assumes a richer conception of practice, one which denies a strict separation between practice and theory, and one that marshalls the power of self-reflection to explain the development process. Perhaps Fish will offer his own explanation of the development process, in a way that would be compatible with the strict separation between practice and theory to which he is committed, but for now it seems to us that her account of the development process is another reason why Annas's approach – and by extension the virtue ethics approach to the relationship between practice and theory – is more practically feasible and normatively desirable.

Together, MacIntyre and Annas dispute not only the practical feasibility of Fish's position that it is possible to separate practice from reflection and theorising on that practice, but also its normative appeal. They hold, to the contrary, that our practice is shaped by our reflections on and theoretical understandings of what that practice should be and that, in turn, our theory is refined by our experience of practice, in the process by which we become more and more skilled at doing whatever it is that our practice entails. Fish's claims of atheoretical generation and inauthentic explanation followed from his strict separation of practice and theory and relied on that distinction holding up. Under a reenchanted conception of practice which denies the sharp distinction between practice and theory, these two claims are deeply contestable.

IV. Contesting the Claim of Atheoretical Generation

The claim of atheoretical generation holds that, across the board, theory does not generate practice. In the 'Dennis Martinez' article we have been referencing, Fish engages with the work of Michael Moore, Ronald Dworkin and Roberto Unger, arguing that the theories of adjudication that they propose actually do not 'and could not be used to do what [they] want it to do, generate and/or guide practice'.[42] Leaving aside the details and merits of this dispute, we want to argue that a more rigorous test of Fish's arguments would be to consider the claim of atheoretical generation in the light of the theories of adjudication produced by virtue jurisprudence.

Most people, we conject, would prefer to have judges who were intelligent, wise, courageous, fair-minded, empathetic, temperate, perceptive, conscientious, patient, and so on, rather than judges who display the opposite traits. Part of the work of virtue jurisprudence is reflecting on which virtues are especially important for the practice of judging. Different theorists have different lists, and they emphasise different things within those lists. Iris van Domselaar, for example, presents a six-pack of judicial virtues which include: judicial perception; judicial courage; judicial temperance; judicial

[41] For example: 'That is why Dworkin's repeated injunction to arrive at the 'best' judgments we possibly can and be the best judges we can possibly be sounds so strange. … 'Be the best you can be' finally means nothing more than 'act in the way your understanding of your role in the institution tells you to act' … Those who are playing the game learn nothing from someone who tells them to be the best they can be. They are the recipients of the verbal equivalent of a pat on the back, and if Dworkin's claim is to be giving direction to judicial decisionmaking, the claim fails, and the best Dworkin can be is a cheerleader. (C'mon fellows, do your best.)' (Fish (n 1) p 1793).
[42] Ibid p 1781

justice; judicial impartiality; and judicial independency,[43] and she writes particularly compellingly on the importance of perception.[44] Lawrence Solum initially focused on judicial intelligence, judicial integrity and judicial wisdom,[45] but later presented a longer list which includes: judicial temperance; judicial courage; judicial temperament; judicial intelligence; and judicial wisdom.[46] But the theories of adjudication that emerge from the field of virtue jurisprudence are not more wordy articulations of the instinct that most of us have that virtues fall into the category of nice-to-have.[47] They are much less tame than that.

The two key figures who present theories of adjudication from the perspective of virtue jurisprudence, Lawrence Solum and Amalia Amaya, set up their own positions by contrasting them with Dworkin's. They want to reject the approach taken by theories of adjudication that focuses on the process of getting to the right answer, and then incidentally saying or implying that a good judge is the one who can arrive at this answer. Dworkin's theory is a good example of this approach, they think, because Dworkin first concentrates on what right answers should look like, by explaining considerations and fit and justification and by deploying the analogy of the chain novel, and so on, after which he posits the figure of Hercules as the superhuman judge who can arrive at the right answer.[48] The problem, for Solum and Amaya, is that these theories assume that the right answer is out there somewhere, antecedent to and existing independently of the virtue of the judge who must find it, and the mythical perfect judge is only a good judge because he finds this right answer.[49] Although Amaya concedes that Hercules can be 'an important heuristic device' to help judges get into the right frame of mind,[50] both Solum and Amaya reject this approach because it fails to appreciate how right answers are actually generated by the virtues practised by the judges. It is against this background that we believe their theories are a more rigorous test of Fish's claim that practice is not constituted by theory or self-reflection.

Instead of starting with the process for finding a right answer and then saying that the good or perfect judge is the one who (climbs up to the heavens, brings down and) presents to us the right answer, Solum and Amaya start with what makes a good judge and then say that the right answer is the one at which the virtuous judge arrives. Solum calls his theory 'a virtue-centred theory' because of the 'claim that judicial virtues are a necessary part of the best theory of judging and that judicial virtue plays a central explanatory and normative role'.[51] The right decisions are 'virtuous decisions', which are decisions that have been made by virtuous judges acting from judicial virtues in the circumstances relevant to the

[43] I. van Domselaar, 'Moral Quality in Adjudication: on Judicial Virtues and Civic Friendship' (2015) 1 *Netherlands Journal of Legal Philosophy* 24-46.
[44] I. van Domselaar, 'The Perceptive Judge' (2018) 9 (1) *Jurisprudence* 71-87.
[45] Lawrence Solum, 'The Virtues and Vices of Judge: An Aristotelian Guide to Judicial Selection' (1988) 61 *Southern California Law Review* 1735-1756, pp 1740-1754.
[46] L. Solum, 'Virtue Jurisprudence: A Virtue-centred Theory of Judging' (2003) 34 (1/2) *Metaphilosophy* 178-213.
[47] Amaya calls this approach one which recognises 'an auxiliary role' for virtues, while Solum terms it a theory of judicial character. A. Amaya, 'The Role of Virtue in Legal Justification' in A. Amaya & H. Hock Lai (eds) *Law, Virtue and Justice* (London: Bloomsbury, 2012) p 52; Solum, ibid, p 183.
[48] For readings of the 'right answer thesis' that challenge the conventional understandings of it, see D. Priel, 'Making Sense of Nonsense Jurisprudence', (September 21, 2020), *Osgoode Legal Studies Research Paper,* available at SSRN: https://ssrn.com/abstract=3696933 , pp 30-32; T. Bustamante
[49] Solum calls this 'a decision-centred theory of judging' ('Virtue Jurisprudence: A Virtue-Centred Theory of Judging' (n46) p 184) and Amaya refers to it as granting virtues 'an epistemic role' in legal justification ('The Role of Virtue in Legal Justification' (n47) p 52).
[50] Amaya, ibid.
[51] Solum, 'Virtue Jurisprudence: A Virtue-Centred Theory of Judging' (n46) p 198.

case.[52] Amaya similarly argues that virtue plays 'a constitutive role' in justifying legal decisions, which means that:

> 'virtue is not merely a *criterion* of justification, but rather a *condition* of justification. That is to say, it is not merely the case that what a virtuous judge would decide is the best criterion for determining what is right, but rather the claim is that the rightness of the decision itself depends on its being a decision that a virtuous judge might have taken.' [53]

Fish's claim of atheoretical generation had insisted that the shape of the practice is never the result of the application of a theory, that a theory never acts as a blueprint or set of directions according to which the practice unfolds, and that a judge's sense of the right decision issues naturally 'without further reflection' from their position. Solum's and Amaya's theories of adjudication are closer to a MacIntyrean-type conception of judicial practice, in which the activity of seeking to deliver justice is shaped by the virtues that judges pursue, those virtues themselves having been articulated by the practice of adjudication, in a process of mutual refinement. On this view, the claim of atheoretical generation is implausible because the practice of adjudication is informed and governed by the judge's theoretical conceptions of the virtues, which operate as a guide to aid their successful engagement with the practice of adjudication, albeit that they are also refined and re-articulated by the practice. These theories of adjudication emanating from virtue ethics contest Fish's claim of atheoretical contestation. At the same time, they reenchant our understanding of practice. This is because they understand practice as being co-constituted with conceptions of virtue rather than merely derivative of rules and routines, and those virtues exercise a greater influence on the agents, drawing them into a secure process of self-reflection which supports their progress in effectively engaging with the practice.

V. Contesting the Claim of Inauthentic Explanation

Law has long required that as judges strive to adjudicate in accordance with the requirements of justice. They are generally required to tell us, in written judgments, the reasons they believe that the outcome they have settled on is fair and just. (In lower courts, and in *in camera* hearings, it can be that reasons are not required.) The reasons given in those judgments are kept on record, to be reviewed by future judges, but also future lawyers and law students and legal academics and journalists and interested members of the public. In common law countries, in particular, a lot of work is done by these judgments, and they tend to be lengthy and detailed, because they are a crucial means by which the legal system is refined. The second corollary of Fish's sharp distinction between practice and theory was the claim of inauthentic explanation, which held that when judges hand down written judgments in support of their conclusions, they are not offering us a genuine account of the reasons which explain how they reached their decisions, but rather a highly curated *ex post facto* rationalisation which was written with the aim of persuading us, through rhetoric, that their decision is legitimate. Here again, Fish's deeper aim is to open our eyes so that we are less beguiled by theory and, once again, we believe that Fish is highlighting something important here. Curated, inauthentic reason-giving, and even the idea that 'reasons' might need to be parachuted in because practice cannot account for itself, fails to sufficiently respect the practice of adjudication. To the contrary, we believe that practice does explain practice, more than has been recognised, but only if we adopt the richer conception of practice offered by virtue ethicists.

[52] Solum (ibid) distinguishes between a virtuous decision (one reached by a virtuous judge) and a lawful decision (one that could have been reached by a virtuous judge even if the judge in question reached that outcome without exemplifying the virtues).

[53] Amaya, 'The Role of Virtue in Legal Justification' (n47) p 53. Emphasis in original. Amaya then distinguishes between a causal version of the constitutive theory, which would hold that 'a legal decision is justified if and only if it has been taken by a virtuous decision-maker' and a counterfactual version which holds that 'a legal decision is justified if and only if it is a decision that a virtuous legal decision-maker would have taken in like circumstances'. She defends the counterfactual version (ibid, p 56).

In order to explore this, we return to Annas's account of virtue-as-skill. As noted above, for Annas, virtues are like skills in that their practical mastery is accomplished over time through active intelligent engagement. When Annas says that virtues require intelligence, and even that virtues are intelligent, several things follow. One is that we can account for the fact that, faced with unexpected danger, the courageous response must be considered, rather than automatic or mechanical, a point reflected on in depth in Part IV.[54] A second is that we can explain why, faced with acute human need, the same virtue of generosity might be manifested in a variety of creative ways.[55] A third is most pertinent for our purposes. It is that the process of developing virtues is shot through with the need to understand and the need to explain; in other words, as the requirement of 'articulacy'.[56] The novice who wants to become generous needs a model to follow, but the novice will not become a master simply by (mindlessly) mimicking the teacher.[57] Suppose the teacher decides to offer €100 to support a friend in need. The novice cannot robotically replicate this action with every friend she has or every person she knows, or even every friend she has who is currently in need. The novice cannot consider the donation of €100 to be a perspicuous obligation, to use Fish's term. €100 will not be a generous response to the need of a friend who has become unexpectedly ill and needs to pay for expensive surgery, and €100 will be a reckless response to the need of a friend who has a gambling addiction. To acquire the virtue of generosity, the novice needs to reflect on and to *understand the reasons* why the teacher thought that it was a good decision to give €100 to the first person, and, having understood those reasons, to begin to self-consciously apply the same kind of reasoning to new situations. This understanding of the reasons is what will free the novice to be a self-directed seeker of virtue. Correspondingly, the teacher needs to be able to explain how she has read the situation and why she has chosen to respond in the way that she has. The teacher must be able to *offer reasons* that help the novice to understand the subtle ways in which the virtue should be manifested. And, over time, both the self-directed novice and the teacher can engage their drive to aspire for continual improvement by articulating, reflecting on, and refining their reasons in a process of self-conscious reflection. Thus, over time, reasons become constitutive of virtue. Reasons therefore play a critical role in Annas' theory of virtue, and virtues can only be accomplished within a context of articulacy. 'Virtue on the above conception is a disposition not just to act reliably in certain ways but to act reliably *for certain reasons*.'[58] These are interesting insights to take to the legal context, because they indicate that reason-giving is baked into the practice of adjudication, if that practice is understood in a richer sense. Fish has critiqued a position in which reasons are flown in from somewhere else to offer a rhetorical defence of a legal decision, but he has not acknowledged the extent to which thoughtful engagement with practice itself necessarily produces reasons which are persuasive. This, of course, is because his conception of practice does not admit of the possibility that practice includes thoughtful engagement with theory and self-reflection.

When it comes to the place of reasons in the process of adjudication, it is possible that written judgments are so much of a feature of our system that we perhaps take them for granted, failing to fully appreciate their value. Mathilde Cohen has tried to guard against this possibility by writing cogently on the relationship between reasons and the rule of law, disambiguating the different reasons why written judgments are beneficial in order to defend her thesis that the rule of law is, in the end, the rule of reasons. She focuses, first, on the fact that reason-giving is an essential component of the procedural aspect of the rule of law, promoting its consistency (by facilitating the ideal that like cases are decided in the same way), its knowability (by making clear how rules should be interpreted and understood, thereby enhancing the clarity and predictability of law) and its contestability (by making clear the grounds for the decision, thereby setting the parameters for future legal disputes). These arguments align with the general sense that written judgments support the rule of law at the most basic level

[54] Annas (n29) p 14.
[55] Ibid p 15.
[56] Ibid p 19.
[57] Cf. Fish on the 'Charlie Lau Objection': (n 1) p 1775, fn 3.
[58] Annas (n29) p 27. Emphasis added.

because they facilitate the ideal that like cases should be decided the same way. Having acknowledged all of this, Cohen moves on to focus on the value of reasons as essential to the substantive aspect of the rule of law. She points out that reason-giving has 'an epistemic value' in that it improves the quality of the decisions that are made. 'A full articulation of public officials' reasons for their decisions is more likely to lead them to sound decisions than the absence of it' because:[59]

> '[D]ecisions will be better thought through if decision-makers know that they must substantiate them with reasons. Requiring public officials to give reasons will presumably lead them to reflect on their choices and discuss them with their colleagues. In this process, the argument goes, they will be in a better position to recognise the reasons that should apply to the given instance they must decide upon. The demand for reasons forces decision-makers to revise indefensible claims and enables them to discern more easily weak arguments.'[60]

Neil MacCormick has made a similar case that it is the arguability of law that enhances the rule of law over time, because it creates the conditions which effectively corral judges into producing better and better justificatory reasons for the decisions that they make.[61] As lawyers present conflicting arguments before the court, and as the judge sifts through these arguments, she can reach an outcome which is universalizable and therefore produces a kind of certainty about the needs of justice in this situation, albeit that such certainty is always defeasible by a new argument which can be raised in a new case.

Cohen, however, pushes the point farther than MacCormick, by arguing also that 'reasons have a civilising effect', in the following way:

> 'This [civilising] effect results from the fact that actual reason giving forces decision-makers to articulate their views publicly, be it orally or in writing. The requirement to give reasons pressures decision-makers to find convincing arguments for their position and refrain from using self-interested and immoral arguments. Ideally, in this process, they will change their preferences for the better. You cannot say publicly or put on the record that you have made a given decision "because it's Monday". … [t]he requirement to give reasons, it is hoped, exerts psychological pressures on decision-makers toward self-censorship in anticipation of public disapproval and reproach in case they offer self-centred reasons. Because self-interested reasons carry no weight in the public setting, public officials are led to present other-regarding, rather than self-interested, reasons, to justify their decision.'[62]

Here Cohen is saying that the effort to give reasons can potentially change the internal disposition of the judge, making her more conscientious, reasonable, fair-minded and just. This echoes Annas's point that the requirement of articulacy helps to constitute the virtues being sought.[63] Applying Annas's concept of the requirement of articulacy to the practice of judging we contend that the benefit of a requirement of judicial articulacy goes beyond ensuring consistency in the legal system: it is that the giving of reasons genuinely accounts for the justice being achieved. This provides a context within which experienced judges are encouraged to articulate exactly what the contours of justice are, as well as a context within which novice judges, lawyers, legislators, law students and even members of the public are edified in their growing appreciation of those contours, while at the same time these new

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[59] M. Cohen, 'The Rule of Law as the Rule of Reasons' (2010) 96 (1) *ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy* 1-16, p 11.
[60] Ibid.
[61] Neil MacCormick, *Rhetoric and the Rule of Law*: *A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005).
[62] Cohen (n 59) p 13. Cohen's idea of the civilising effect is based on Kant writings. It also resonates with Dworkin's argument that 'political officials must make only such political decisions as they can justify within a political theory that also justifies the other decisions they propose to make.' R. Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth & Co Ltd, 1997) p 87.
[63] Although shortly after stating this, Cohen seems to pull back somewhat from this position (ibid, p 14): 'This picture of the civilising force of reason giving is attractive, of course, but it might prove too optimistic. It could be doubted that this portrayal is based on plausible factual and psychological assumptions about the potential for decision-makers to start believing reasons that they initially offered as a pure matter of strategy.'

conceptions seep into the bones of all the practitioners so that everybody becomes more just. This is, we think, the best way to challenge the claim of inauthentic explanation which assumes that any reference to theory or any attempt at self-reflection in judgments are only window dressing. But this kind of argument also poses an indirect challenge to the claim of atheoretical generation, because as judgments articulate justice more cogently, thereby teaching what justice requires, over time the judgments also become constitutive of the justice that is achieved in later cases. Here again, the distinction Fish articulated between engaging in a practice and discoursing on a practice is implausible, for lack of both practical feasibility and normative desirability.

In summary, Annas's idea of the requirement of articulacy and Cohen's defence of the importance of reason-giving in judgments offer the opportunity to look afresh at the value provided by written judgments and the ways in which articulacy is inextricable from the practice of adjudication. The position that we want to defend here is that reason-giving is important in judgments, not only as a way to sell the outcome, or as a record of the decision that has been made thereby enhancing the knowability of law, and not just because it ensures consistency in the legal system and thereby advances the rule of law. Rather, much more centrally, reason-giving articulates the justice being achieved, thereby allowing judges to reinforce and refine that virtue in themselves and to teach that virtue to those lawyers, legislators, law students, and members of the public who read their decisions. Fish's claim of inauthentic explanation held that theoretical discourse about practice does not provide a genuine account of that practice because the 'reasons' are floated in from outside the practice, but if we adopt the richer account of practice proposed by the virtue ethicists, reason-giving is an inextricable component of the practice of adjudication and the reasons offered in this context are authentic expressions of how the practice is unfolding.

VI. Conclusions

In the 'Dennis Martinez' essay, Fish stakes out a position that, in his words, is 'in direct opposition to what is assumed by almost everyone in the legal academy, irrespective of doctrinal or political affiliation'.[64] This position, as we have described it, is that one can strictly separate practice from theory with the resulting claims that theory is not generative of the practice of judging and that theory does not provide a genuine explanation of how judges arrive at their decisions.

While we think that his distinction is too sharp and dispute the accuracy of his corollary claims, we think that Fish's instinct that there is a need to reframe our conceptions of practice is exactly right. A theory that comes down from the clouds and is not responsive to the reality of practice is not helpful to anyone. A practice that is becomes a puppet of theory is similarly unappealing.

Turning to the conceptions of practice offered by MacIntyre and Annas helps us to not just reframe but also to reenchant our conceptions of practice. Although the fields of virtue ethics and virtue jurisprudence are still emerging, they already offer rich and deep conceptions of practice and therefore interesting ways to refine our understandings of the practice of adjudication, by telling a story of practice and theory as mutually refining and mutually enriching.

[64] Fish (n 1) pp 1779-1880.