

The Life of International Law Is Not Logic but Experience

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Abstract

Justice Oliver Wendell Holmes Jr. famously maintained that “the life of the law has not been logic: it has been experience.” Holmes statement suggests an antecedent question: what is the life of the law? This essay construes this question ontologically. What gives law life? What animates it, and in so doing warrants the claim that law contributes to the production of social order in a particular community? The answer, I contend, is that law lives, or exists, only in those societies where law rules, and law rules only when the exercise of political power is conducted under the supervision of lawyers, agents for whom realizing the rule of law is a calling or vocation. Perhaps surprisingly, I contend that the most prominent proponent of this account of law in the field of international law and legal theory is Martti Koskenniemi. While he generally eschews talk of government in accordance with the rule of law in favor of “a culture of formalism” and “constitutionalism as a mindset,” I demonstrate that Koskenniemi defends the same conception of law that Lon Fuller and Ronald Dworkin do. This conception identifies law not with rules or institutions but with a particular approach to the exercise of political power, one premised on actors reciprocal regard for one another as autonomous and responsible agents.

Keywords

Culture of Formalism; Dworkin; Fuller; Koskenniemi; Legality; Rule of Law

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1. Introduction

Justice Oliver Wendell Holmes Jr. famously maintained that “the life of the law has not been logic: it has been experience.”¹ Like many legal theorists, I propose to take this felicitous phrase as an inspirational point of departure for reflection on the nature of law, and international law in particular, without too much concern for how well it fits with Holmes’ jurisprudence. Yet as will become clear, there is at least a certain affinity between the view I advance here and Holmes’ conception of law, insofar as both emphasize the centrality of lawyers, not rules or doctrine, to a proper understanding of the distinctive social practice of government in accordance with the rule of law.

Holmes statement suggests an antecedent question: what is the life of the law? While there are several ways to construe this question, I focus here on the ontological interpretation.² What gives law life? What animates it, and in so doing warrants the claim that law contributes to the production of social order in a particular community, or indeed, that law constitutes certain actors as members of a particular, concrete, political community? The answer, I contend, is that law lives – it exists – in a society when, or to the extent that, both those who govern and those who are governed exhibit fidelity to the ideal of the rule of law. This ideal is a complex one that encompasses both institutional requirements – rules that constitute offices and that structure the interactions between those who occupy them – and a specific *ethos* that is itself a complex phenomenon constituted by the intertwining of a professional culture and individual virtue. This *ethos*, I suggest, is most fully realized among lawyers, by which I mean not simply, or

¹ Oliver Wendell Holmes, Jr., *The Common Law* (Mark de Wolf Howe ed, Little Brown and Company 1963 (1st ed 1881) 5.

² Other interpretations include the biological (How does law live? How does it contribute to the production of social order? How does it evolve over time?) and the pedagogical (How should an individual go about cultivating knowledge of the law?).

necessarily, those who hold the job or the title ‘lawyer,’ but those for whom realizing the rule of law is a calling, a value they profess by performing the specific duties that constitute their role.

Law exists, then, only in those societies where law rules, and law rules only when the exercise of political power is conducted under the supervision of lawyers. Though something like this view has been defended by a number of different theorists, in this essay I contend that among its most prominent advocates in the field of international law and international legal theory is none other than Martti Koskenniemi. Of course, Koskenniemi generally eschews talk of government in accordance with the rule of law, and instead develops an account of the nature of (international) law premised on “a culture of formalism” and “constitutionalism as a mindset.” Labels aside, however, I contend that Koskenniemi defends the same conception of law as theorists such as Lon Fuller and Ronald Dworkin, one that identifies law not with rules or institutions but with a particular approach to the exercise of political power, one premised on legal actors reciprocal regard for one another as autonomous and responsible agents.

The argument proceeds as follows. In section 2, I briefly characterize Fuller’s and Dworkin’s conception of law, and the rule of law. A description of Koskenniemi’s culture of formalism follows in section 3, while section 4 brings the arguments of the preceding sections together to support the claim that all three of the aforementioned theorists share the same understanding of the life of the law. In section 5, I demonstrate that Koskenniemi’s criticisms of (a certain conception of) the rule of law do not conflict with the assertion that a culture of formalism is simply another name for the ideal of government in accordance with the rule of law. Finally, in section 6 I respond to David Dyzenhaus’s reading of Koskenniemi’s culture of formalism as an example of Schmittian Realism that is antithetical to the rule of law. Though I think this construal mistaken, I argue that Dyzenhaus’s critique highlights the need for both

greater clarity in the depiction of a culture of formalism and a greater emphasis on international law's status as a moral enterprise or vocation.

2. Fuller and Dworkin on the Ideal of the Rule of Law

What is law? Answers to this question often focus on rules and institutions.³ Here I consider an alternative response: law is a vocation. A vocation is a practice of service or devotion to something that is intrinsically valuable. For members of the legal profession, that intrinsically valuable thing is the rule of law; this is the value they “profess” when they engage in the activities that constitute the practice of law. This characterization of law raises two obvious questions. First, what is the rule of law? And second, what makes it intrinsically valuable? In this section, I present Lon Fuller's and Ronald Dworkin's answers to these questions, and in the following one, those advanced by Martti Koskenniemi. My goal is twofold. The first is to elaborate a conception of law as a vocation that renders intelligible, and perhaps also justifiable, the claim that law exists only in those societies where law rules, and that law rules only when the exercise of political power is conducted under the supervision of lawyers. The second is to demonstrate that despite his frequently expressed antipathy to the rule of law, Martti Koskenniemi shares with Fuller and Dworkin the same conception of law, or legal practice, as an essentially moral undertaking; that is, a vocation.

A. Fuller

Lon Fuller maintains that “the meaning of the word ‘law’ is ‘the lifework of the lawyer.’”⁴ That work consists in the “enterprise of subjecting human conduct to rules,” or “the task of reducing human conduct to a reasoned harmony.”⁵ But what does that mean? Note, first, that on Fuller's

³ See, e.g., H.L.A. Hart, *The Concept of Law*, 3rd Edition (Oxford University Press 2012); Hans Kelsen, *General Theory of Law and State*, translated by W. H. Kraus (Russell and Russell 1961).

⁴ Lon L. Fuller, *The Law in Quest of itself*, (Beacon Press 1966) 3.

⁵ Lon L. Fuller, *The Morality of Law* (Yale University Press 1973) 106.

account law is an *activity* that has as its aim the production of social order. While rules, including those that constitute institutions, figure centrally in that activity, it is a mistake to identify law with them, rather than with the *enterprise* or *task* of organizing human interactions so that they realize a “reasoned harmony.” Second, while to some talk of “subjecting human conduct to rules” may suggest the activity of ruling or commanding, that is not what Fuller intends. Rather, what he has in mind is facilitating a form of social order in which agents interact with one another on the basis of common or shared rules; that is, by using those rules to hold one another, and themselves, accountable for their conduct. This is the sort of social order that obtains when, or to the extent that, agents interact on the basis of a shared understanding of their rights and duties.⁶

Fuller juxtaposes the specifically legal form of social organization with other frameworks for producing social order, including what he calls rule by terror and managerial direction. All three frameworks treat human beings as capable of acting for reasons. Rule by terror differs from the other two in its disregard for people’s capacity to act on the basis of rules or norms, and its reliance instead on threats (and sometimes rewards). Furthermore, stoking uncertainty is an essential feature of rule by terror, since this contributes to its constitutive aim of paralyzing subjects, and thereby preventing them from engaging in any form of resistance to those who rule. Indeed, activities that count as defects from both the standpoint of the rule of law and managerial direction, such as the enactment of secret or retroactive “laws” or “interpretations” of statutes that effectively render them useless for identifying permissible conduct, will be viewed as

⁶ Of course, the rules may confer a right to rule on some agents and a duty to obey on others; indeed, that may be an essential feature of public law. But it is not an essential feature of law, and therefore neither is it an essential feature of the lawyer’s lifework or vocation. Rather, the lawyer’s fidelity is to the ideal of the rule of law, to crafting and sustaining relationships premised on reciprocal respect for the (rules that confer the) parties’ right and duties.

features given a commitment to rule by terror. Fuller's discussion of Nazi rule aptly demonstrates this point.⁷

Managerial direction treats a person as capable of acting on the basis of rules or norms, or as Fuller puts it, as "a responsible agent, capable of understanding and following rules, and answerable for his [or her] defaults."⁸ However, it conceives of those subject to direction as mere tools to be used by those who direct them to advance whatever goals the latter may have. Rules serve to communicate to subordinates the goals their superior instructs them to pursue, and the means by which they ought to do so. Managerial direction is a unidirectional exercise of authority; while the superior has the authority to hold subordinates accountable to the rules, the converse is not true. Moreover, managerial rulers employ rules to govern only to the extent that doing so is the most efficient or effective means for achieving their aims. Where it is not, they readily abandon congruity between the rules on the books and the rules in action.

In contrast, Fuller maintains that the rule of law is not "like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another."⁹ Unlike in the case of managerial rule, when individuals are governed by the rule of law they are treated as creatures capable of setting their own goals or ends, as well as choosing the means to them. Where the rule of law obtains, "the law does not tell a man what he should do to accomplish specific ends set by the lawgiver; [instead] it furnishes him with baselines

⁷ Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," (1958) 71 *Harv. L. Review* 630, 648-57.

⁸ Fuller (n 5) 162.

⁹ *Ibid* 210.

against which to organize his life with his fellows... [and] provides a framework with which to live his own life.”¹⁰

As David Luban observes, the choice to organize our interactions with others on the basis of law is a moral one.¹¹ Where actors submit to the rule of law, they necessarily engage with one another as autonomous and responsible agents. The first of these two features of a law-governed society is manifest in the constitution of legal subjects as bearers of rights and duties (and perhaps also powers and immunities). Legal actors are entitled to certain forms of treatment regardless of whether their being treated in those ways is useful or beneficial, either for them or for others. In Kant’s familiar terms, law constructs legal subjects as ends in themselves, rather than as mere means. In doing so, law renders actors juridical equals: though the specific forms of treatment to which they are entitled may vary, they all enjoy the same standing to demand certain conduct from others as a matter of right and not (simply) might. This distinguishes the rule of law from both rule by terror and managerial direction, forms of social organization that realize relationships of superiority and subordination, and that exist for the purpose of advancing the superior’s aims or interests.

The second feature of a law-governed society, its treatment of actors as responsible agents, manifests in its members use of a shared set of rules conferring rights, duties, powers, and immunities to hold one another, and themselves, accountable. This is the sense in which the rule of law contrasts with arbitrary rule, or the rule of man (or woman). The exercise of power is arbitrary, in the relevant sense, when the person who exercises it stands outside or above the law; that is, when the participants in the relationship or society in question do not recognize the actor

¹⁰ Lon L. Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth I. Winston (Durham, NC: Duke University Press, 1981): 234.

¹¹ David Luban, “Natural Law as Professional Ethics: A Reading of Fuller” (2000) 18 *Social Philosophy and Policy* 176, 187.

as subject to rules that determine what she may do, and on the basis of which she can be held accountable for her actions. Arbitrary action is not illegal but extra-legal. Rule by terror and managerial rule are both examples of arbitrary rule; either there are no rules that apply to the ruler, or those rules are so broad or vague that they effectively place no limit on what the ruler may do, or whatever the “law on the books” may say, both the ruler and the ruled know that the former will not be held accountable for failures to conform to it. The crucial point here is that in a law-governed relationship or society, agents recognize each other as entitled to a specific form of justification for their treatment, one that invokes the shared norms that constitute them as a community.

As this claim implies, and Fuller emphasizes, the success of law as a form of social organization depends on reciprocity, whether between equals, as in the case of parties to a contract (or a treaty), or between governors and the governed. In the latter case, the governed must trust that the governors will “act upon the citizens” only in those ways “previously declared as those to be followed by the citizen and as being determinative of his rights and duties.”¹² After all, “if the citizen knew in advance that in dealing with him government would pay no attention to its own declared rules, he would have little incentive to abide by them.”¹³ However, “the rule-maker will lack any incentive to accept for himself the restraints of the Rule of Law if he knows that his subjects have no disposition, or lack the capacity, to abide by his rules.”¹⁴ In short, the virtues of fidelity to the supremacy of law on the part of those who govern, and law-abidingness on the part of those who are governed, are mutually dependent and reinforcing. Or

¹² Fuller (n 5) 210.

¹³ Ibid 217.

¹⁴ Ibid 219.

as Fuller puts the point, “the functioning of a legal system depends upon a cooperative effort – an effective and responsible interaction – between lawgiver and subject.”¹⁵

The moral value of the rule of law lies in the particular form of human relationship or society it constitutes. Creating and sustaining this distinctive form of social order is the legal profession’s *raison d’être*; the object to which lawyers are, or at least ought to be, devoted, and the end that makes the practice of law a vocation. Lawyers (should) also aim to serve their clients’ interests, of course, but they do so via the medium of the law, and their fidelity to that distinctive form of social organization places certain constraints on how they may do so. Fuller’s eight principles of legality provide a useful starting point for understanding these constraints.¹⁶ The first seven – generality, publicity, prospectivity, coherence, clarity, stability, and practicability – concern the crafting of rules, while the eighth, congruity, concerns their administration. These are standards of success internal to the practice of subjecting human conduct to the governance of (specifically legal) rules – they are features of what it is to do a lawyer’s lifework well, or indeed, to do it at all.

Adherence to the principles of legality in lawmaking advances legal subjects’ autonomy by giving them a fair degree of certainty as to their own and others’ rights and obligations, as well as methods for altering them, and the limits of their ability to do so. It thereby enhances their ability to form and pursue projects, and more broadly, their life plans. Note, however, that law serves this purpose largely by enabling legal subjects to hold themselves and one another accountable; that is, by providing them with rules that they can, and generally do, use to guide their conduct by, e.g., identifying their duties to others, or asserting their rights against them.

¹⁵ Ibid.

¹⁶ Ibid, 33-94. For a theory of international law that draws deeply on Fuller’s account of law and centers his eight principles of legality, see Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010).

Indeed, one point on which H.L.A. Hart and Fuller agree is that the perspective of Holmes' "bad man" is marginal to any moderately well-functioning legal order.¹⁷ While the rules that satisfy the principles of legality do enable agents to predict the cost of engaging in certain types of conduct, the normal viewpoint in a law-governed society is that of a person who wishes to interact with others on terms that constitute their reciprocal respect for one another as autonomous and responsible agents.

Fuller may be too optimistic when he denies the possibility of grave injustice in a law-governed social order. Nevertheless, he is right to think that the rule of law provides the seed of justice. To treat others justly is to give them their due. As should be abundantly clear by now, what distinguishes law from other forms of social organization is its commitment to that ideal; that is, to actors' reciprocal regard for one another as autonomous and responsible agents entitled to certain forms of treatment. Yet the ideal of the rule of law, the reduction of human interaction to a reasoned harmony, says nothing about who is entitled to recognition as an autonomous and responsible agent, i.e., as a legal subject. Nor does it tell us much about the type of treatment a particular legal subject ought to enjoy. Finally, it says nothing about who is entitled to a say in answering these questions. However, it provides the essential framework within which agents may contest existing understandings of membership and members' substantive entitlements, including those that empower agents to exercise a voice in these very contests. Though the rule of law guarantees neither justice nor political legitimacy, in its absence the most we can hope for is beneficence.

¹⁷ See Hart (n 2) 40; Fuller (n 3) 92-95. Arguably, the "bad man" is also marginal to Holmes' jurisprudence, though not to his advice to budding lawyers.

B. Dworkin

As I read him, Dworkin maintains that a system of coercive government counts as a genuinely legal one if and only if it exhibits fidelity to a conception of the rule of law as valuable for the constitutive contribution it makes to the treatment of all its (individual human) subjects with equal concern and respect. This requires a particular political culture or *ethos* on the part of both rulers and ruled that Dworkin labels law as integrity. In a political community that governs itself through law properly so-called, this *ethos* regulates the community's use of coercion to uphold its members' political rights and duties. It does so by informing members' attempts to identify terms for just interaction, i.e., attempts to specify those legal rights and duties members of the community should or already do enjoy, and to engage with one another on those terms. For example, judges (in a liberal-egalitarian political community) identify those rights and duties enforceable upon demand without any further legislative action by constructively interpreting the political community's past practice of government according to the rule of law as an attempt to realize concretely a fundamental moral commitment to treating all of its members with equal concern and respect. Legal subjects instantiate such treatment by guiding their conduct according to findings of law simply because it is the law; that is, because they take the exercise of governmental power in accordance with law as integrity to be legitimate. In sum, for Dworkin legal reasoning has a specific form; the product of such reasoning, law properly so-called, necessarily provides a moral justification for the exercise of governmental power; and legitimate government simply is government according to the rule of law informed by a proper understanding of what makes the rule of law valuable.¹⁸

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

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

This characterization of the concept of law sets out, in suitably airy form, what is sometimes called the “rule” of law.”¹⁹

We might quibble with Dworkin’s assumption that the rule of law concerns the *coercive* enforcement of rights and responsibilities, on the grounds that law enforcement sometimes takes the form of denying members of the political community benefits to which they would otherwise be entitled.²⁰ Likewise, Dworkin’s claim that law concerns *individual* rights and responsibilities may be too narrow, insofar as the agents that law constitutes as bearers of rights and responsibilities may be collective ones, such as corporations and states.²¹ Finally, insofar as it suggests that the rule of law concerns only the conduct of legal officials (judges, prosecutors, police officers, etc.), and not that of legal subjects, this description offers an incomplete statement of Dworkin’s understanding of the rule of law. Nevertheless, Dworkin’s claim

¹⁸ Dworkin presents his most complete statement and defense of these claims in *Law’s Empire* (Harvard University Press 1986), but many are also the subject of essays collected in *A Matter of Principle* (Harvard University Press 1985) and *Justice in Robes* (Harvard University Press 2006).

¹⁹ Dworkin, *Law’s Empire* (Harvard University Press, 1986) 93.

²⁰ See, e.g., Oona A. Hathaway and Scott J. Shapiro, “Outcasting: Enforcement in Domestic and International Law,” (2011) 121 *Yale L. Journal* 252.

²¹ Note that the attribution of legal rights to collective agents is consistent with value-individualism, “the view that only the lives of individual human beings have ultimate value and collective entities derive their value solely from their contributions to the lives of individual human beings” (Christopher Heath Wellman, *Liberal Rights and Responsibilities* (Oxford University Press 2013) 5).

captures two of legality's key features: it offers a regulative ideal for the exercise of political power premised on the treatment of legal subjects as bearers of rights and responsibilities, and it locates the content of those rights and responsibilities in (a constructive interpretation of) the political community's practice of holding accountable.

Dworkin contrasts legality with what he labels a pragmatist approach to government, one he characterizes as "a skeptical conception of law" that "rejects[s] the idea of law and legal right deployed in my account of the concept of law."²² A pragmatist "denies that past political decisions in themselves provide any justification for either using or withholding the state's coercive power."²³ Consequently, she takes a strategic approach to identifying (the content of) legal subjects' rights. Rather than construing legal rights as forms of treatment to which actors are entitled even if that would be worse for them or for the community, the pragmatist treats legal rights as "only the servants of the best future: they are instruments we construct for that purpose and have no independent force or ground."²⁴

It might be thought that what distinguishes pragmatism from legality, on Dworkin's analysis, is that the former appeals solely to the production of socially beneficial outcomes to justify the exercise of political power, while the latter maintains that individual rights sometimes trump the pursuit of social welfare. While Dworkin does reject consequentialism, or at least Utilitarianism, his complaint against legal pragmatism goes deeper, and applies equally to judges (and all legal subjects) who subscribe to a deontological morality. Dworkin's fundamental objection to a judge who accords only strategic value to past political decisions is that she fails to

²² Dworkin (n 20) 95, 160. Dworkin's target here is Richard Posner, whose legal pragmatism differs in many ways from the philosophical pragmatism of Pierce, James, and Dewey. Both Fuller and Dworkin advance philosophically pragmatist approaches to theorizing law, a point I return to in section 5.

²³ Ibid 151.

²⁴ Ibid 160.

recognize the political community as a collective agent engaged in an ongoing effort to realize a fair and just political order. An agent devoted to legality conceives of government in accordance with the rule of law as an end in itself – the constitution of a political community premised on its members’ status as autonomous and responsible agents, and so bearers of genuine rights and responsibilities. In contrast, a pragmatist conceives of government as merely a means for advancing some exogenous and independently specifiable goal, such as human flourishing or human rights, construed as moral rights possessed by all agents or patients as such, independent of their membership in any particular, concrete, community. The former actor aims to identify *our* commitments, that is, the standards of right conduct the political community has identified as binding on its members as such, while the latter actor aims to give effect to *her own* judgment of the ends that government should serve, and how it should do so. Pragmatism “says that judges should follow whichever method of deciding cases will produce *what they believe* to be the best community for the future.”²⁵ The contrast with legality comes through clearly in F.A. Hayek’s characterization of it, which Dworkin quotes approvingly: “the conception of freedom under the law... rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man’s will and are therefore free.”²⁶ Or in Dworkin’s own words, the rule of law “is not just an instrument for economic achievement and social peace [or, one might add, honoring moral rights], but an emblem and mirror of the equal public regard that entitles us to claim community.”²⁷

²⁵ Ibid, italics added.

²⁶ F.A. Hayek, *The Constitution of Liberty* (Routledge 1960) 153. Quoted in Dworkin, *Justice in Robes* (Harvard University Press 2006) 177. Kant makes the same point when he asserts that actors enjoy external freedom, or freedom as non-domination, only when they are subject to a common juridical order, a system of norms that substitutes an omni-lateral will (the political community’s conception of right) for a unilateral will (each actor’s conception of right). For discussion, see Patrick Capps and Julian Rivers, “Kant’s Concept of Law” (2018) 63 *Am J Juris* 259.

²⁷ Dworkin (n 27) 74.

Though Dworkin identifies law with the concept of legality, he treats that concept as interpretive in two respects. First, the assertion that law is essentially a practice of government informed by fidelity to the ideal of legality is an interpretive claim. It is advanced from within the practice, one identified in terms of an existing (but always provisional) consensus on paradigms of law and legal reasoning. It purports to offer a statement of the central organizing concept of the practice that will enable its participants “to see their arguments as having a certain structure, as arguments over rival conceptions of that concept,” or what is the same, an “abstract description of the point of law most legal theorists accept so that [they can understand] their arguments [to] take place on the plateau it furnishes.”²⁸ The success of the claim that law just is a practice of government informed by the ideal of legality is a matter of how useful we find it as a way of making sense of the practices we “pre-interpretively” and provisionally identify as law.²⁹

Second, agents who share the concept of legality (or a commitment to the rule of law) may nonetheless disagree as to whether a particular act satisfies that standard, or what is the same, whether that act is legal. They will all concur with the claim that members of the political community as such presently enjoy all and only those rights, and are subject to all and only those duties, that “flow from past decisions of the right sort” or “standards established in the right way.” Yet as Dworkin observes, “it remains to be specified what kind of standards satisfy legality’s demands, and what counts as a standard’s having been established in the right way in advance [of any enforcement of a right or duty].”³⁰ *Conceptions* of legality offer answers to

²⁸ Dworkin (n 20) 92-3.

²⁹ Upon further investigation of both our concept of law and the specifics of a particular practice of coercive government, we may opt to revise our provisional judgment that the practice in question is a legal one. See Ronald Dworkin, “A New Philosophy for International Law” (2013) 41 *Philos Public Aff* 2, 12; David Lefkowitz, “A New Philosophy for International Legal Skepticism?” on file with author.

³⁰ *Ibid* (n 20) 169.

these questions. They are properly described as interpretations of the concept of legality because the identification of the standards of appropriate conduct to which the community has committed itself, as well as the content of those standards, depends on an exercise of judgment. The case for any particular conception of legality rests on a contestable normative claim regarding the value of government in accordance with the rule of law. The case for any particular assertion of law rests not only on a contestable conception of legality, but also contestable conceptions of procedural fairness and substantive justice, and contestable claims regarding the bearing those values have on the (type of) case at issue.³¹

As Dworkin observes in the concluding paragraph of *Law's Empire*, “law is not exhausted by any catalogue of rules or principles... nor by any roster of officials and their powers each over part of our lives [i.e., legal institutions].”³² Rather, law’s “empire” – the rule of law – is defined by a particular attitude or mindset, a distinctive normative framework that structures agents’ interactions with one another. This attitude is a protestant one “that makes each citizen responsible for imagining what their society’s public commitments to principle are, and what these commitments require in new circumstances.”³³ It is also constructive. The exercise of responsible agency is not a matter of following rules laid down by others; rather, it requires the exercise of moral judgment that is responsive to both procedural considerations of fairness and substantive considerations of distributive justice. Finally, fidelity to the ideal of the rule of law is a fraternal attitude, “an expression of how we are united in community though

³¹ That a claim is *contestable* does not mean that it is, or will be, *contested*. Yet the contestation of specific claims regarding what the law is, and what it ought to be, are pervasive. Dworkin aspires to offer an account of such contestation that shows at least some of it to be genuine disagreement, and not simply instances of agents with fundamentally different world views or ways of life talking past one another. That account requires that agents be members of a common community (or way of life) in virtue of which they can adopt a shared world view, even while disagreeing over some of its details.

³² Dworkin (n 20) 413.

³³ *Ibid.*

divided in project, interest, and conviction.”³⁴ Those who possess it view law as neither a mere tool for the exercise of power nor as a temporary *modus vivendi*, but instead as an on-going attempt to work out the details of a shared regulative ideal, the rights and responsibilities enjoyed by all members of the community as such.

3. Koskenniemi on a Culture of Formalism

Consider, now, Koskenniemi’s description of a culture of formalism. To say that law is formal is to say that it provides agents with a reason for action that does not depend on their particular interests or prudential goals, what (they believe) is good for them, or what (they believe) will make them happy.³⁵ To engage in a *legal* practice of government, then, is to employ general rules for action that apply unconditionally to hold oneself and other members of the relevant community or society responsible. So understood, law (or legal reasoning) contrasts with instrumentalism, which predicates reasons for action on agents’ interests or prudential goals. The reasons for action agents have depend on their particular interests, and the means available to them to advance or satisfy those interests. Whereas instrumentalism provides actors with strategic reasons for action, law provides them with rights and responsibilities. It does so by constituting them as members of a single, common, juridical community, as agents and subjects of law. As Koskenniemi writes, “the form of law constructs political adversaries as equals, entitled to express their subjectively felt injustices in terms of breaches of the rules of the community to which they belong no less than their adversaries – thus affirming both that inclusion and the principle that the conditions applying to the treatment of any one member of the community must apply to every other member as well.”³⁶

³⁴ Ibid.

³⁵ Martti Koskenniemi, “What is International Law For?” in M.D. Evans (ed), *International Law, 4th Edition* (2014) 40-1.

³⁶ Ibid, 41.

As a “social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it,” a culture of formalism constitutes “a culture of resistance to power.”³⁷ In any political society where such a culture flourishes, might cannot make right. Or put another way, where fidelity to legality is a basic assumption that structures how its members conceive of their relations to one another, both as fellow citizens and as rulers and subjects, it will not be possible to justify one’s conduct to oneself or to others in purely instrumental terms, that is, in terms of power and interest. Rather, every public act will need to be justified in *legal* terms, by reference to a general rule that applies unconditionally to members of the political community as such, and therefore agents will be able to demand treatment that is theirs by right, even where they lack the power to give others a prudential reason to treat them that way.³⁸ Hence the description of a culture of formalism as a social practice of accountability and (juridical) equality. Moreover, by framing the enterprise of government in terms of rights and duties, justice and fairness, and respect for human dignity – in short, by invoking norms that presuppose a conception of political subjects as autonomous and responsible agents – a culture of formalism provides resources that agents can use to resist oppression or domination. In Koskenniemi’s words, “notions such as ‘peace,’ ‘justice,’ or ‘human rights’ ... give voice to individuals and groups struggling for spiritual or material well-being, fighting against oppression, and seeking to express their claims in the language of something greater than their merely personal interests.”³⁹

³⁷ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2001) 500.

³⁸ Of course, the content of jurisdictional concepts such as ‘public act,’ ‘legal official,’ and ‘citizen’ are also open to contestation, and indeed, specific examples of their contestation often figure centrally in both emancipatory and reactionary narratives of a political community’s historical quest to realize the rule of law.

³⁹ Koskenniemi (n 36) 44.

A culture of formalism is “open” in two respects. First, it “keeps open the possibility of universal community, as mediated by formalism.”⁴⁰ In this regard it differs from both Political Realism and Moral Imperialism. The former denies the possibility of any universal community, and maintains that international law can only reflect disparate local communities’ pursuit of their particular aims in light of their relative power. The latter claims that a moral community already exists in virtue of the fact that all human beings are bound by certain moral norms simply in virtue of their rationality.⁴¹ Moreover, it is possible to identify these universally binding norms simply through the exercise of reason; normative claims are not empirical hypotheses to be tested in an actual practice of challenge and response, but fundamental truths that can be known with certainty via rigorous reflection, conceptual analysis, or logical deduction.

A culture of formalism steers a path between these two positions. Contra Political Realism, it does not dismiss the possibility of a universal community, a social order constituted by norms accepted as legitimate by all those subject to them, and that encompasses all humanity. Yet it also rejects the Moral Imperialist’s claim to be able to identify universally-binding moral truths through the exercise of reason alone. There is no objective vantage point we can occupy, and from which we can discern the norms that apply to all rational agents.⁴² Universal community is not a fact written into the cosmos or a dictate of pure reason but a social condition we pursue by cultivating and deepening our commitment to a culture formalism, or what I maintain is the same, to a practice of government in accordance with the rule of law. This is the sense in which a culture of formalism makes a claim for universality: it is a regulative ideal that

⁴⁰ Koskenniemi (n 38) 501.

⁴¹ Koskenniemi describes this as “the peculiar universality of those norms that results from their having been derived through a purely formal system of reasoning, or perhaps more accurately, from our ability to reason about them, or from reason *tout court*. Because reason (in contrast to preference) is universal, these commands enjoy universal validity (ibid 490).

⁴² Ibid 490. See also Ronald Dworkin, “Objectivity and Truth: You’d Better Believe It” (1996) 25 *Philos Public Aff* 87.

orients the conduct of those who seek a political community premised solely on right, not might.⁴³ The important task for a culture of formalism, Koskenniemi writes, is to “resist the pull towards [moral] imperialism” – treating a partial, subjective, historically-conditioned, and political conception of justice or the good as if it were a dictate of universal reason – “while at the same time continuing the search for something beyond particular interests and identity politics, or the irreducibility of difference.”⁴⁴

How should (or do) participants in a culture of formalism carry out this search? An initial answer to this question can be found in Koskenniemi’s explanation of why a culture of formalism has “a rather obsessive-looking interest in the procedural conditions imposed on the debate” regarding the legality of some conduct. Procedures – due process of law – “distance the protagonists from their preferences and teach them openness to what others have to say.”⁴⁵ Formalists’ “obsessive-looking interest” in procedures reflects a commitment to subjecting international relations to the government of general rules, or perhaps better, to rules that are doubly-universal, in that they express the community’s judgment of appropriate conduct, and do so in a manner that treats all members of the community as juridical equals, as entitled to certain forms of treatment simply in virtue of their status as members of the community constituted by law. The fact that I judge that an act will be good for me, or for you – that it will advance my or your particular interest – is excluded from a practice of justification and critique that proceeds on these terms. Instead, I must demonstrate that we – the members of the relevant community – are committed to the legality or illegality of some conduct. But unlike in the case of my judgment of

⁴³ The description of a universal community constituted by formal law as an ideal, or as Koskenniemi writes elsewhere, as a *horizon* of possibility, indicates that it is one that human beings cannot fully achieve. Hence Koskenniemi’s embrace of a hermeneutics of suspicion, and his constant warnings against law’s enchanting power. The challenge is to remain humble, eschewing moral imperialism or self-righteousness, without becoming cynical, concerned only with the advancement of one’s particular interests.

⁴⁴ Koskenniemi (n 38) 500.

⁴⁵ Ibid 501.

what is good (for me, for you, for everyone) or just, I have no claim to a privileged vantage point. Instead, I must take seriously other community members' claims regarding our norms and what they entail for the case at hand. That is, I must be open to what others have to say. This is the second respect in which a culture of formalism constitutes a practice of openness.

The two senses in which a culture of formalism is open are intimately linked. When, or to the extent that, such a culture flourishes, international law provides both a forum and a means whereby certain agents can challenge hegemonic conceptions of justice. They do so by articulating their complaints in terms of a denial of equal treatment under the law; that is, by arguing that existing legal doctrine can only be justified on the grounds that it serves the interests of the powerful, or what is the same, that it does not exhibit the double-universality required for law, or for government in accordance with the rule of law. Through an iterated practice of challenge and response, a legal practice animated by a culture of formalism “searches for something beyond particular interests.”⁴⁶ In so doing, it may make progress toward the goal of universal community. It does so, however, not by bringing the law into alignment with an independently established vision of justice, but instead by responding to assertions that, in some respect or another, it is unjust, a tool for the powerful rather than a practice that constitutes actors as juridical equals. As Koskenniemi observes, a culture of formalism provides a forum in which actors may articulate their sense of a “lack, ... the absence of what a particular feels it should possess in order to be fully itself,” in universal terms: “its alleged right to self-determination, a fair distribution of resources, etc.”⁴⁷

In short, the openness of a culture of formalism reflects a commitment to a fallibilist epistemology of the sort associated with philosophical pragmatism. It treats legal practice as a

⁴⁶ Ibid.

⁴⁷ Ibid 506.

form of inquiry that has as its aim the realization of a social order premised entirely on right not might, on a conception of law as legitimate and not a tool of domination, oppression, and exploitation. In the possibility of universal community, it presupposes right answers to the questions “how should we live together” or “what do we owe to one another.” However, it makes no presumptions about what those answers are; for instance, whether they demand the elimination or the accommodation (and, perhaps, celebration) of difference. Instead, it adopts a humble attitude toward existing answers – that is, to the currently dominant understanding of international law – fully cognizant that every finding of law is “a *hegemonic* act in the precise sense that though it is partial and subjective, it claims to be universal and objective.”⁴⁸

Any human judgment of what “we” take to be required as a matter of right (an assertion of a general and impartial norm) will inevitably be partial, in two senses of that term. First, the experience it reflects will always be a limited one that comprehends neither all the possible circumstances in which human beings must determine “how to go on,” nor all the value-laden perspectives from which human beings engage with the natural and social world. Second, judgments of what is required as a matter of right are inevitably colored by judgments of what is good, for me, for mine, or for all humanity. The “distortion” this introduces owes not simply to human beings’ inevitably limited experience of what is good for (creatures like) them, but to the germ of instrumentalism, of strategic or means-end reasoning, it implants in an enterprise that purports to offer an alternative to instrumentalism.⁴⁹ Even government in accordance with the rule of law will favor certain conceptions of justice and fairness over others, and which one triumphs (*vis-à-vis* a particular exercise of political power, at a particular point in a political community’s history) will inevitably be shaped by officials’ and subjects’ conceptions of the

⁴⁸ Koskenniemi (n 36) 43.

⁴⁹ Koskenniemi (n 36) 41.

good life.⁵⁰ The doubly-partial nature of moral judgment accounts not only for disagreement over what the law is (or should be), but also the tendency of those whose view is not realized in the practice of government to describe the triumphant view pejoratively as *political*, the exercise of power to advance a private conception of the good at the expense of fidelity to public right.⁵¹

A culture of formalism requires that government be exercised in accordance with general rules that apply unconditionally. As Kant, Kelsen, and others have recognized, however, rules do not spell out the conditions of their own application.⁵² Rather, “every rule needs, for its application, an *auctoritatis interposition* that determines what the rule should mean in a particular case and whether, all things considered, applying the rule might be better than resorting to the exception.”⁵³ It is not the presence of rules (including those constitutive of institutions such as courts) that determine whether a society is governed in accordance with legality, but the “mindset” of those who administer them; that is, those who interpret the rules, or what is the same, who judge what the rules entail in a particular case. Legality obtains when, or to the degree that, authoritative determinations of what the law is are made by lawyers. Like

⁵⁰ “[T]he culture of formalism accepts that the translation of every voice to the professional idiolect so as to give a fair hearing may not always succeed” (n 38 (502)).

⁵¹ This reading of Koskenniemi contrasts with the Jutta Brunnée and Stephen Toope’s depiction of Koskenniemi as a Realist who maintains that international law simply reflects power and interest. See “The Rule of Law in an Agnostic World: The Prohibition on the Use of Force and Humanitarian Exceptions,” in Wouter Werner, Marieke de Hoon, and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017) 138, 142-43. To the contrary, Koskenniemi should be understood as hovering between commitment and cynicism in two related respects. First, at present the culture of formalism has only a tenuous grip on the practice of international politics, with the pursuit of interest in light of relative power constantly threatening to transform the international lawyer’s commitment to the rule of law into a cynical dismissal of that ideal. Second, Koskenniemi thinks that a political order premised solely on legitimacy is an unattainable ideal (a “horizon of possibility”). The ability of any actual practice of holding accountable to produce social order will owe to some mix of power and legitimacy, might and right. While it is possible to shift the balance in the direction of right over might, we must remain open to the possibility that we judge the law to be legitimate and/or just only because of our limited experience of the world, and/or because our view of right is colored by our view of the good.

⁵² Koskenniemi, “Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization” (2007) 8 *Theoretical Inquiries in Law* 9, 9-11.

⁵³ *Ibid* 10.

Fuller and Dworkin, Koskenniemi uses the term ‘lawyer’ to refer to members of a profession whose primary allegiance is to the ideal of government in accordance with the rule of law.

The idea of a universal law needs servants that define themselves [as] administrators (instead of inventors) of universal standards – the class of lawyers. The traditions and practices of this class are [morally!] significant only to the extent they remain attached to the ‘flat, substance-less surface’ of the law;” that is, to general rules that apply unconditionally.⁵⁴

The culture of formalism is comprised of the “sensibilities, traditions and frameworks, [and] sets of rituals and self-understandings among institutional actors” that together define the legal profession as a vocation, a calling to serve the ideal of government in accordance with the rule of law.

Individuals become lawyers via habituation, by learning to think or reason the way that lawyers do. This involves becoming proficient (at least) in the use of various professional techniques lawyers employ to defend or criticize legal claims, assertions of rights and responsibilities that members of the political community are entitled to have enforced on demand. Yet as Koskenniemi observes, “while the culture of formalism is a necessary though often misunderstood aspect of the legal craft, as a historical matter, it has often provided a recipe for indifference and needs to be accompanied by a live sense of its political justification.”⁵⁵ Skill in specifically legal forms of speech, what Koskenniemi describes as a competent grasp of the grammar of international law, without a sound understanding of legality’s point or purpose can easily lead to a form of rule worship, or a “bureaucratic spirit.”⁵⁶ Thus, if lawyers and the larger

⁵⁴ Koskenniemi (n 36) 42.

⁵⁵ Ibid 45.

⁵⁶ Ibid.

political society to which they belong wish to retain and strengthen its practice of government in accordance with the rule of law, it is imperative that they learn to properly appreciate its nature and value. Where the rubber of general norms hits the road of specific cases, government in accordance with the rule of law requires not merely *techne* but *phronesis*.

4. The Rule of Law and a Culture of Formalism: Two Names for the Same Thing

Time now to make good on the two claims regarding the life of the law that I advanced at the beginning of this essay. Taken in the reverse of their original order, the first is that Koskenniemi shares with Fuller and Dworkin the same conception of law as an essentially moral enterprise, in virtue of which legal practice – the lifework of the lawyer – is properly characterized as a vocation. The careful reader will have noted already many similarities between Fuller’s and Dworkin’s depiction of a political society whose members exhibit fidelity to the ideal of the rule of law, and Koskenniemi’s account of a political society whose members exhibit fidelity to the ideal of a culture of formalism. Nevertheless, it may be helpful to list here the core attributes that characterize the form of political order these three theorists valorize.

- Participants in such a normative order, or practice of holding accountable, are committed to interacting with one another on the basis of reciprocal regard for each other’s status as autonomous and responsible agents.
- This commitment functions as a regulative ideal, an abstract standard the participants in the practice aspire to realize in their interactions with one another, even if their actual attempts to do so sometimes fall short, and even if they disagree in some cases over what counts as fidelity to that ideal.
- Participants in a practice premised on fidelity to the rule of law, or to a culture of formalism, manifest their commitment to that ideal by treating one another as bearers of rights and

responsibilities, as agents entitled to certain forms of treatment as a matter of right. Put another way, they treat the norms that confer rights or duties on participants in the practice as categorical, not hypothetical, imperatives.

- In virtue of their treatment of one another as bearers of rights and responsibilities, participants in such a practice constitute a community of principle, one whose members enjoy juridical equality.
- Considered as an ideal type, a rule of law society, or one animated by a culture of formalism, can be usefully contrasted with other forms of social order, such as a managerial order, in which rules serve only as a means by which some agents direct the conduct others, or an economic order, in which rules of thumb facilitate efficient exchange among actors seeking to advance their own interests.
- In the latter two types of order, norms, and the practices they constitute, are valuable only as a means to the attainment of some end that is distinct from the practice itself. In contrast, in a rule of law social order, or what is the same, a legal practice animated by a culture of formalism, fidelity to the norms that constitute the practice is (also) constitutive of the end to be achieved, namely interaction premised on participants' reciprocal regard for one another as autonomous and responsible agents.

In addition to helping us answer the questions “what is the rule of law?” and “what makes it intrinsically valuable?” these attributes also explain why law exists only in those societies where law rules. A society is ruled by law if and only if (most of) its members display a commitment to the ideal of the rule of law (or the ideal of a culture of formalism) in their interactions with one another. They do so by holding themselves and one another accountable for conformity to norms

that confer various rights and duties on them, norms they treat as categorical imperatives. This is the distinctive activity that constitutes the life of the law.

This brings us to the role of the lawyer, and the claim that law rules only when the exercise of political power is conducted under the supervision of lawyers. Lawyers' essential function is to provide legal counsel, to facilitate their clients' pursuit of their interests or preferences within the confines set by fidelity to the ideal of the rule of law. Reflection on this role highlights additional overlaps in Fuller's and Dworkin's description of the rule of law, and Koskenniemi's characterization of a culture of formalism.

- Norms do not apply themselves; rather, their application to particular cases requires the exercise of judgment. Lawyers' comparative advantage lies partly in their cultivation of that faculty, their skill at identifying what the law is. To fully grasp law, or the law of any particular society, we must look beyond a static description of legal rules or doctrine to the dynamic activity of using those rules to hold agents to account, an activity in which lawyers figure centrally (at least in any moderately complex society). Or as Koskenniemi puts it, "there is no access to legal rules or the legal meaning of international behavior that is independent from the way competent lawyers see those things."⁵⁷
- The type of judgment lawyers exercise when advancing or contesting "findings of law" elides the distinction between fact and value, or law and politics. In Dworkinian terms, findings of law are the product of a constructive interpretation of the relevant community's past political practices in light of one or more regulative ideals attributed to that practice. Thus, legal practice is essentially a political or moral undertaking.

⁵⁷ Martti Koskenniemi, *From Apology to Utopia* (Cambridge University Press 2005) 568-569.

- Lawyers also enjoy a comparative advantage in the drafting of laws, or more broadly, in the activity of intentionally designing (and redesigning) the norms that constitute specific relationships so that the agents who participate in them are able to advance their specific aims in a manner consistent with a commitment to the ideal of the rule of law. To perform this task well, lawyers must exhibit fidelity to principles of legality, such as clarity, consistency, publicity, practicability, and generality. The justificatory basis for fidelity to these ideals is not an instrumental one premised on the effective communication of direction from superiors to subordinates, however. Rather, it is the aim of enabling agents to interact with one another on terms that constitute reciprocal regard for their status as responsible and autonomous agents.
- The virtuous lawyer is devoted to realizing a particular *form* of human relationship – indeed, the ideal of the rule of law might be described as a principle of formal justice, and the way of life premised on a commitment to that ideal as a culture of formalism. This ideal says little about the specific rights and responsibilities members of a particular community ought to enjoy, including those that speak to the question of who should have a voice in answering that question.⁵⁸ Put another way, the ideal of the rule of law is distinct from ideals of substantive justice and political legitimacy. Nevertheless, in its constitutive commitment to the status of legal subjects as autonomous and responsible agents, the ideal of the rule of law contains the seed of both justice and legitimacy. Moreover, legal practice – interaction premised on a commitment to that ideal – provides fertile soil in which the pursuit of egalitarian ideals of substantive justice and political legitimacy can take root.

⁵⁸ Little, but perhaps not nothing: for an argument that any relationship premised on the ideal of the rule of law requires that the participants enjoy at least those rights constitutive of what Hart labeled the minimum content of natural law, see David Dyzenhaus, *The Long Arc of Legality* (Cambridge University Press 2022).

- Finally, because of their special role in facilitating other agents fidelity to the rule of law, lawyers must take responsibility for sustaining or advancing that moral ideal. There are two especially prominent ways in which they may fail to do so. The first, as Holmes famously argued, is if they (purport to) identify the law on the basis of social facts (doctrine and precedent) alone, and (purport to) draw conclusions regarding the legality of particular acts solely on the basis of “logic,” without recourse to normative (moral) judgment. The second is if lawyers conceive of their role as entirely a matter of working to advance their client’s interests. This is the image of lawyers as “hired guns” who will assert as law whatever finding they calculate has the highest probability of enabling their clients to achieve their ends. Each of these stances constitutes an abdication of the lawyer’s vocation, and their adoption a kind of cancer that threatens the life of the law from within.

5. A Merely Apparent Objection: Koskenneimi’s Criticisms of the Rule of Law

Despite the foregoing arguments, the claim that Koskenneimi is a proponent of the rule of law may seem obviously false. After all, in *From Apology to Utopia* he argues for the impossibility of fidelity to that ideal, while also critiquing as paradoxical the liberal theory of politics in which he locates it. In more recent work, Koskenneimi associates the rule of law with a political program he emphatically rejects, namely the pursuit of a libertarian or neo-liberal world economic order. Finally, and most problematically for my thesis, in *The Gentle Civilizer of Nations* Koskenneimi explicitly denies the equation of a culture of formalism with the ideal of the rule of law. Yet words can deceive, especially in the case of a phrase with as long a history as “the rule of law.” As I will now demonstrate, none of Koskenneimi’s criticisms of the rule of law target Fuller’s or Dworkin’s understanding of that ideal, and therefore none of them provide a reason to deny that Koskenneimi’s culture of formalism is simply another name for a

conception of law as a vocation, a moral practice premised on fidelity to the ideal of the rule of law.

In *From Apology to Utopia*, Koskenniemi describes government in accordance with the rule of law as dependent on the availability of neutral and objectively verifiable rules.⁵⁹ Such rules serve to constrain the exercise of political power, ensuring that those who rule pursue publicly agreed upon ends (through the exercise of publicly agreed upon means), rather than their own private agendas. Hence, writes Koskenniemi, “the production of written codes of law with the attempt to create complete and logically organized wholes accessible to [empirical] verification by judges and the consequent emphasis on the autonomy of the judicial function.”⁶⁰ Neither the meaning of many rules nor their implication for particular case are objectively verifiable, however. In part, that is due to the ambiguity that attaches to words such as ‘self-defense,’ ‘war,’ and ‘combatant,’ or the inclusion in legal norms of evaluative (moral) standards such as ‘inhuman and degrading treatment’ or ‘fair and equitable treatment’ whose meaning is contestable, and often contested. Even more so, however, it owes to systemic features of law – e.g., that legal rules are often paired with exceptions, or that individual rules are often applied in the context of other rules that partly determine their meaning or implications.⁶¹ Thus, to draw a determinate conclusion regarding what the law requires, forbids, or permits, agents must appeal to some extra-legal moral principles; Koskenniemi gives the example of the harm principle.⁶² The result, however, is not a neutral rule, but instead one that reflects the agent’s moral beliefs or commitments. There is no hope of distinguishing neutral and objective law from partisan and subjective politics.

⁵⁹ Koskenniemi (n 55) 88.

⁶⁰ Ibid.

⁶¹ Ibid 590-95.

⁶² Ibid 88.

While Koskenniemi's criticism may succeed against one conception of the rule of law – call it the rule of law as a law of rules conception – it leaves unscathed the conception of the rule of law that Fuller and Dworkin defend, and with which Koskenniemi's culture of formalism has many affinities. To reiterate, that conception does not oppose law with morality or politics. Rather, it characterizes the rule of law as a moral undertaking and contrasts it with other forms of social organization that differ in terms of the regulative ideals they presuppose. Moreover, far from precluding the exercise of moral judgment, the Fullerian and Dworkinian conception of the rule of law requires it. In using the law to regulate or organize their interactions with others, agents are expected to take responsibility not only for conforming to the law but also for determining what the law is. The rule of law inheres not in rules, but in the individual mindset and shared culture of agents who seek to interact on the basis of rules that constitute reciprocal regard for one another as autonomous and responsible agents.

Koskenniemi also maintains that the mainstream understanding of contemporary international law reflects a liberal theory of politics, a constellation of assumptions or concepts that include “self-determination, independence, consent, and most notably, the idea of the Rule of Law.”⁶³ The last theme is “most notable” because it is via the Rule of Law – a social order constituted by “formally neutral and objectively ascertainable rules, created in a process of popular legislation [i.e., via legal subjects' exercise of will]” – that the liberal theory of politics reconciles individual freedom with social order, or what is the same, the natural or pre-political independence of legal subjects with their subjugation to the political community's rule.⁶⁴ Koskenniemi maintains that this attempted reconciliation fails, and its failure condemns those who explicitly avow or implicitly assume it (including international lawyers) to oscillating

⁶³ Ibid 5.

⁶⁴ Ibid 71.

between apology (states are bound only by those norms to which they have freely or willingly consented) and utopia (states are bound by those norms that are necessary to realize the (equal) freedom of all international legal subjects). My interest here is not with the success of this argument but rather with the fact in making it Koskenniemi associates the rule of law with orthodox international legal positivism, or what he calls international legal liberalism: a conception of the international legal order that combines a Legal Positivist account of the nature of law with a voluntarist account of law's normativity.⁶⁵ Both Fuller and Dworkin, however, are outspoken critics of Legal Positivism, and reject voluntarist accounts of legal normativity.⁶⁶ Koskenniemi makes no attempt to argue that his criticism of the idea of the rule of law as it figures in the legal liberal's (or orthodox legal positivist's) conception of international law applies as well to theorists who reject that political philosophy. Therefore, I conclude that his criticisms of the rule of law in *From Apology to Utopia* provide no basis for objecting to the identification of a culture of formalism with Fuller's and Dworkin's alternative understanding of that ideal.

Koskenniemi rightly observes that proponents of a neo-liberal international (economic) order have deployed the rhetoric of the rule of law to advance their agenda.⁶⁷ Yet that observation provides no reason to reject the conclusion drawn in the previous section. That is because proponents of a neo-liberal world order employ a conception of the rule of law that is embedded in a managerial or economic form of social order. Law (or perhaps better, rules) serve

⁶⁵ See David Lefkowitz, "Sources in Legal Positivist Theories: Law as Necessarily Posited and the Challenge of Customary Law Formation," in Samantha Besson and Jean D'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017) 323-24, 327.

⁶⁶ See, e.g., Dworkin (n 20) 190-216; (n 29) 3-10; Fuller (n 5) 207-216; (n 7) 656.

⁶⁷ See, e.g., Martti Koskenniemi, "To Enable and Enchant – On the Power of Law," in Wouter Werner, Marieke de Hoon, and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017) 393, 394-396; Martti Koskenniemi, "Imagining the Rule of Law" Rereading the Groatian 'Tradition,' (2019) 30 EJIL 17, 27.

either as a means for superiors (e.g., technocratic elites) to direct subjects so as to achieve some independent end (e.g., economic growth), or as a means for facilitating efficient exchange between utility maximizing actors. This instrumental conception of the value of the rule of law contrasts with the non-instrumental conception Fuller and Dworkin defend. Nevertheless, in addition to unmasking the politics that lie behind it, Koskenniemi's criticisms of neo-liberals' invocation of the rule of law highlights two important features of that ideal as Fuller and Dworkin understand it. The first is that there is some degree of overlap in the principles of rulemaking and, to a lesser extent, of rule-application that "flow" from the regulative ideals that define the legal, managerial, and economic forms of social order.⁶⁸ That is because they all treat actors as responsible agents, as creatures capable of using rules to guide their behavior. A focus on principles of legality can blind us to critically important differences between these three forms of rule-guided social order, and in doing so deprive us of moral arguments we can deploy to challenge or justify the actual practices of holding accountable in which we are embedded. Second, even if a practice of holding accountable exhibits a fair degree of fidelity to the ideal of the rule of law, many of those who participate in it may still judge the practice to be deeply problematic. This may reflect their belief that the practice is premised on a mistaken conception of what it is for participants to flourish as such, or because they view the practice as premised on a mistaken conception of who should have a voice, and what kind of voice, in crafting the norms constitutive of the practice, and/or using them to hold agents accountable. Thus, the pursuit of a neo-liberal international economic order might be criticized both because it aims to realize a managerial or economic order in circumstances where we ought to pursue a legal order instead,

⁶⁸ Fuller (n 5) 208-9.

and because it presupposes regulative ideals of substantive (economic) justice and political voice that cannot be justified to many of those it governs.

Finally, what should we make of Koskenniemi's explicit denial in *The Gentle Civilizer of Nations* of the equation of a culture of formalism with the ideal of the rule of law? There he writes that while "the Rule of Law hopes to fix the universal in a particular positive space (a law, a moral or procedural principle, an institution) ... a culture of formalism resists such fixation."⁶⁹ Instead, a culture of formalism treats the practice of international law as a form of inquiry or reason-giving premised on "the possibility that the principle of legal community projected by international law [can] be articulated, reaffirmed, or perhaps redefined in the course of the debate," while remaining committed to the pursuit of "universality (and universal community) ... as an idea (or horizon), unattainable but still necessary."⁷⁰

A culture of formalism manifests a commitment to a pragmatist epistemology that contrasts with the rationalist or empiricist epistemologies Koskenniemi identifies with the Rule of Law. While their frequent association with the phrase "natural law" might suggest that Dworkin and Fuller subscribe to a rationalist epistemology, and that the purpose of their jurisprudence is to "fix the universal in a particular positive space," in fact both share Koskenniemi's commitment to philosophical pragmatism.⁷¹ A practice of holding accountable premised on a commitment to the rule of law facilitates precisely those forms of challenge and response that Koskenniemi identifies with a culture of formalism. The aim of such an enterprise is to identify terms for interaction that all accept as constitutive of reciprocal regard for one

⁶⁹ Koskenniemi (n 38) 507.

⁷⁰ Ibid.

⁷¹ For defenses of this claim, see, e.g., Hilary Nye, "Staying Busy While Doing Nothing? Dworkin's Complicated Relationship with Pragmatism" (2016) 29 *Can J. L. Juris* 71; Raff Donelson, "The Rorty-Dworkin Debate," in Giancarlo Marchetti (ed), *The Ethics, Epistemology, and Politics of Richard Rorty* (Routledge 2021); Kenneth Winston, "Good Order and Workable Arrangements: Lon Fuller's Critique of Legal Positivism" in Torben Spaack and Patricia Mindus (eds), *The Cambridge Companion to Legal Positivism* (CUP 2021).

another's status as autonomous and responsible agents, where that acceptance is manifest in agents' use of those norms (the "terms for interaction") to hold themselves and one another accountable. The association of various principles and institutions with the ideal of the rule of law, such as Fuller's principles for law-making, and norms of procedural or "natural" justice, owes to the (fallible!) belief that they facilitate inquiry that serves this aim.

Still, it may appear that in their accounts of the rule of law Fuller and Dworkin do fix one universal, insofar as the conception of legal subjects as autonomous and responsible agents is not open to revision in light of further experience. However, while a distinctly legal form of social order does require such a commitment, neither Fuller nor Dworkin exclude the possibility that dissatisfaction with a way of life premised on fidelity to the rule of law will lead to its supersession by some other form of social order. Of course, as good pragmatists they do not take the mere possibility of dissatisfaction with the rule of law as a reason to abandon it as an ideal; fallibilism is not skepticism. In short, Fuller's and Dworkin's account of the rule of law is fully consistent with the pragmatist commitments to the primacy of practice, inquiry, and fallibility that Koskenniemi attributes to a culture of formalism. Once again, then, Koskenniemi's criticism of the rule of law, or more precisely, the epistemologies he associates with it, provides no basis on which to object to the thesis that a culture of formalism is simply another name for the form of social order that Fuller and Dworkin identify with fidelity to the ideal of the rule of law.

6. What is the Life of the Law? Linguistic Competence and Moral Commitment

While I have argued that Koskenniemi shares Fuller's and Dworkin's conception of law – or better, of legal practice – in terms of fidelity to a moral ideal of the rule of law, David Dyzenhaus contends that Koskenniemi's critique of international law in *From Apology to Utopia* commits

him to a form of Schmittian Realism that is its polar opposite.⁷² Realists, in the relevant sense, deny that law can impose any constraint on the exercise of power because “the content of the law is [merely] the product of communities powerful enough to have their preferred meaning imposed as law.”⁷³ For the Realist, then, law is nothing more than a tool that the powerful – the victors in political contests – use to advance their moral and/or prudential preferences. This is a rather surprising claim, since as we have seen, Koskenniemi is an outspoken critic of instrumental approaches to organizing international relations. Dyzenhaus acknowledges this fact, and notes Koskenniemi’s advocacy of “a Kantian version of formalism.” Nevertheless, he maintains that in light of Koskenniemi’s defense of the indeterminacy thesis – the proposition that while international legal argument must follow strictly defined formal patterns it nevertheless allows, and even enables, the taking of any conceivable position regarding what the law is – he has no basis for rejecting the Realist’s account of law as a tool of the powerful.⁷⁴ If Dyzenhaus is right about this, then I have erred in associating Koskenniemi with Fuller and Dworkin as proponents of law as a vocation, a calling to serve the moral ideal of the rule of law.

Dyzenhaus observes that if law is to constrain the exercise of political power, there must be specifically legal criteria that distinguish better from worse answers to the question “is X legally permissible?” criteria that are distinct from those that speak to questions such as “is X just?” or “is X prudent?” Only then will it be possible for lawyers to respond to requests for

⁷² Dyzenhaus, “Formalism, Realism, and the Politics of Indeterminacy,” in Wouter Werner, Marieke de Hoon, and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017).

⁷³ Ibid 47.

⁷⁴ See also Brunnée and Toope (n 51) 143-145. On the indeterminacy thesis, see Koskenniemi (n 55) 563-64; 590-96. To be clear, the indeterminacy thesis is a claim about (international) law conceived of as a language premised on a particular grammar, i.e., rules for producing good legal arguments ((n 5,) 568). It neither presupposes nor entails the claim that international lawyers always experience international law as indeterminate; rather, it only entails that whatever determinacy lawyers do find in international law is not a property of the law itself, where ‘law’ refers to statements made by a competent speaker of international-law-as-language.

legal advice by saying “we can’t find a legal justification for X. So, you will have to decide whether you want to act lawfully or not,” or “we can find a legal justification, but it is so thin that to act on its basis would undermine our reputation as a nation committed to international law.”⁷⁵ If law is nothing more than a “language of justification” that agents can use “to articulate particular preferences or positions in a formal fashion, accessible to professional analysis,” then law itself contains no such criteria.⁷⁶ While some claims may be criticized as lacking proper legal form, and so those who advance them as lacking the lawyer’s professional competence, law itself provides no criteria for evaluating “findings of law,” for ranking claims with the proper legal form as better or worse, correct or incorrect, assertions of law. Yet even if legal discourse contains no such criteria, those who engage in it – international lawyers – may well do so on the basis of certain assumptions, a shared if often implicit political philosophy that includes, *inter alia*, a principle of fidelity to the rule of law. The legal theorist’s task is to make these assumptions explicit and subject them to critical evaluation. That is what Koskenniemi does in *From Apology to Utopia*, of course, as well as in his writings on the history of international law. But his rejection of “the liberal doctrine of politics” does not preclude Koskenniemi from offering a different account of international lawyers’ implicit political philosophy, including an ideal of the rule of law that provides distinctly legal criteria for evaluating putative findings of law. Construed as a language of justification, law may be radically indeterminate, but a culture of formalism serves to discipline the use of that language so that it serves the distinctively legal aim of constituting an international society whose members interact on the basis of formal (i.e., categorical) rules.

⁷⁵ Dyzenhaus (n 70) 51.

⁷⁶ Koskenniemi (n 55) 570.

What explains Dyzenhaus's dissatisfaction with this response? In part, it owes to his reading of a culture of formalism as requiring "only radical openness to argument, a quality that Koskenniemi deems democratic because no voices are excluded."⁷⁷ Were this a complete and accurate description of a culture of formalism, it would indeed fail as a response to the challenge of Realism. That is because it simply amounts to a plea to admit more agents to political struggle, to give a voice to those who currently have little or no say as to what the law is, while implicitly conceding that law is simply a means by which the victors in political struggle impose their preferences on the losers. However, as the discussion earlier in this essay illustrates, I do not think this accurately represents Koskenniemi's vision of a culture of formalism.

Nevertheless, Dyzenhaus does highlight certain respects in which Koskenniemi's critique of the (so-called) liberal theory of international law in *From Apology to Utopia* has hindered his development of an alternative to it. For example, while Koskenniemi rightly rejects the description of legal reasoning as a matter of identifying and "mechanically" applying neutral and objectively verifiable rules, Dyzenhaus maintains that he pays insufficient attention to the alternative account of legal reasoning defended by theorists such as Fuller, Dworkin, and among international legal theorists, Hersch Lauterpacht.⁷⁸ That account treats legal reasoning as a matter of demonstrating that a putative finding of law "is acceptable both as an interpretation of the relevant law and an exemplification of just those values that Koskenniemi alludes to as the political values of formalism," namely "the treatment of political adversaries as [juridical] equals," the expression of a "universalistic principle of inclusion," and a commitment to "the regulative ideal of a pluralistic international world."⁷⁹ Fidelity to the ideal of the rule of law

⁷⁷ Dyzenhaus (n 70) 52.

⁷⁸ See, e.g., Hersch Lauterpacht, *Recognition in International Law* (Oxford University Press, 1947); Patrick Capps, "Lauterpacht's Method," 82 *British Yearbook of International Law* 248.

⁷⁹ Dyzenhaus (n 70) 53, referencing Koskenniemi (n 36) 256-57.

requires that when states interpret the rules of the international legal system, they take themselves “to be bound by the text of the rules;” that is, that they approach the law not as an obstacle to be overcome or as a tool to advance their preferences, but as standards of right conduct obedience to which they owe to other members of the political community constituted by international law. Furthermore, they must offer “reasonable interpretations of what a rule requires in cases where it is controversial how it applies,” and take “into account for the sake of fairness the way in which the rule has been previously interpreted in analogous situations.”⁸⁰

In his more recent Kantian-inspired reflections on international law, Koskenniemi appears open to this suggestion. In the face of encroaching forms of instrumental or managerial rule – deformalization, fragmentation, and empire – international lawyers must bring their “constitutional” mindsets to bear on the challenges to social order posed by (the interplay between) new political, economic, social, environmental, and technological developments. They do so by engaging in a distinctively legal form of reasoning that “searches for “coherence” or “fit” between the novel case and the legal tradition,” accommodating “new phenomena in patterned, familiar understandings, seeking to balance reverence for the past with openness to the future.”⁸¹ Legal knowledge is not propositional, “about the facts of an external (textual or natural) reality.” Rather, legal knowledge is a skill, an understanding of how to apply the aforementioned “procedures of reasoning to the available materials” with the aim of drawing conclusions that have “the best chance of impartial, perhaps even universal, approval.”⁸²

What is not always clear, however, is whether Koskenniemi intends these remarks to supersede those he makes in *From Apology to Utopia* in the course of criticizing Dworkin’s and

⁸⁰ Dyzenhaus (n 70) 54.

⁸¹ Koskenniemi (n 50) 22, with citations to Dworkin and Lauterpacht.

⁸² Ibid.

Lauterpacht's account of law. The difficulty is not with those criticisms per se. Indeed, it is not even clear that the challenges Koskenniemi raises are properly labeled criticisms of Dworkin and Lauterpacht, since they only demonstrate the inability of these theorists to justify a conception of the rule of law that both reject. That conception, again, is a Legal Positivist one that distinguishes law from politics, or fact from value. The point of law, on this conception, "is to lead society away from politics, understood as an effort to move from a state of contestation and conflict into one governed by rational rules, principles, and institutions."⁸³ Law can serve this end, however, only if its content can be identified using neutral and objective methods; that is, without the exercise of judgment that inevitably reflects an agent's partisan or subjective preferences or values. Koskenniemi rightly observes that Dworkin's account of law cannot provide the necessary objectivity, despite its commitment to the one right answer thesis, the claim that there is always a correct answer to the question of whether a particular act is legal. Tellingly, he quotes H.L.A. Hart's criticism of Dworkin, asking "what purpose is served 'by insisting that if a brother judge arrives after the same conscientious process at a different conclusion there is a unique right answer which would show which of the two judges, if either, is right, though this answer is laid up in a jurist's heaven and no one can demonstrate what it is?'"⁸⁴ As a possible response to that challenge, Koskenniemi considers the suggestion that members of the legal profession may share (an implicit and perhaps somewhat inchoate) "background theory," a comprehensive political philosophy on the basis of which they are able to (largely) agree on the right legal answer even in hard cases. He responds that "it is quite uncertain whether the reference group of international lawyers, for example, possesses the kind of

⁸³ Koskenniemi (n 55) 599.

⁸⁴ Ibid, 55, citing H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983) 139-140.

agreement about background values which this suggestion assumes.”⁸⁵ Moreover, Koskenniemi observes that “if indeterminacy expresses itself precisely by the existence of disagreement among lawyers, it is hardly possible to invoke any consensus within that group as a validator of the “most coherent” solution.”⁸⁶

So far, so good. Dworkin cannot distinguish law from politics, settled rules (what the law is) from contestable arguments (what the law ought to be), in the way that (orthodox international) legal positivism requires. But that is not a problem for Dworkin, he rejects the positivist’s separation of law (fact) from politics (value).⁸⁷ Nor will Dworkin be troubled by the fact, if it is one, that the international legal profession is not united in its commitment to some comprehensive political philosophy. That is so for two reasons. First, he concurs with Koskenniemi’s conclusion that we cannot appeal to a consensus among lawyers (or legal officials) to identify what the law is. Indeed, Dworkin treats disagreement about background values – what he labels theoretical legal disagreement – as a definitive rebuttal to legal positivism.⁸⁸ Second, Dworkin does not premise the existence of law on a shared “background theory,” a comprehensive political philosophy. Rather, he conceives of law as a semi-structured argumentative practice, a forum within which a community attempts to work out over time the principles to which it is committed. All this requires from participants in that practice is that (a) they conceive of themselves as members of a community of principle, subjects of a common juridical order constituted by their commitment to treating one another as autonomous and responsible agents, and (b) that they share a working, which is to say revisable, consensus on

⁸⁵ Ibid, 56.

⁸⁶ Ibid.

⁸⁷ See, e.g., Dworkin’s claim that “legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally. Law so conceived is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory” (Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 146).

⁸⁸ Dworkin (n 20) 31-44.

both the status of some norms as partly constitutive of their law, and on what counts as the proper use of those norms across some range of cases. Of course, Dworkin also has a particular view regarding the substantive (as opposed to formal) regulative ideal to which “we” members of (putatively) liberal political communities are committed.⁸⁹ Perhaps that view is mistaken. Regardless, the key point is that we should not confuse Dworkin’s conception of law as a mode of inquiry, a dynamic practice of justification premised on a commitment to the regulative ideal of the rule of law – with his claims regarding what the law is; that is, claims he asserts will prove to be immune to revision by members engaged in the inquiry that is a particular community’s legal practice.

There is no evidence in *From Apology to Utopia* that Koskenniemi is attuned to the crucial role that fidelity to the ideal of the rule of law plays in Dworkin’s legal philosophy. Nor do Koskenniemi’s “criticisms” of that philosophy conflict with his later embrace of something very like it under the guise of “a culture of formalism.” The difficulty for Koskenniemi comes from the remark he makes after denying a consensus among international lawyers on “background values,” namely that “the unity of this group [i.e., international lawyers] is constituted, not by reference to any substantive agreement about values but by its use of legal language the indeterminacy of which was the argument’s starting point.”⁹⁰ If “international law is what international lawyers make of it,” and what unites international lawyers, and indeed, constitutes them as such, is not devotion to any value but only competence in the use of legal language, or the grammar of international law, then Koskenniemi is indeed the Realist that Dyzenhaus accuses him of being.⁹¹

⁸⁹ Those communities include the U.S., England, and even, Dworkin claims, the political community constituted by international law.

⁹⁰ Koskenniemi (n 55) 56.

⁹¹ Koskenniemi (n 55) 615.

Here is another way to understand the challenge. Insofar as Koskenniemi remains committed to the view that what defines lawyers is only mastery of a certain grammar, he denies (the practice of) law the status of a vocation, and instead construes it as a trade. In light of the “desanctifying” of the world that took place in the 19th and 20th century, a vocation (or a profession) has come to be distinguished from a trade largely on the basis of the type of education required for its competent performance, together with a heavy dose of social and economic status-seeking. Originally, however, there was an additional and more fundamental quality that distinguished vocations or professions from trades, namely the value of the goods practitioners aimed to produce. Trades produce things that are of value for their utility. Those goods may still be vital, of course, but only because they are useful for achieving or realizing ends that are good in themselves. Vocations or professions, in contrast, produce (or at least pursue) intrinsically valuable things: salvation, health, truth, and, so Fuller and Dworkin argue, the rule of law. In order to realize the promise of a culture of formalism, Koskenniemi must more clearly acknowledge the distinctive morality of law as a constraint on what counts as a properly *legal* argument.

The two concluding paragraphs to the epilogue Koskenniemi wrote for the reissue of *From Apology to Utopia* provide a good example of the need for clarity in this respect.⁹² In the penultimate paragraph, he describes a culture of formalism as including ideals of accountability, equality, reciprocity and transparency, as well as a vocabulary of (formal) rights. Moreover, while a culture of formalism views law as substantively open-ended, a forum within which “conservatives and liberals, market theorists and socialist agitators” advance competing visions of a just society, it is “a distinct professional tradition” that is “biased” against instrumental

⁹² Koskenniemi (n 55) 616-617.

approaches to organizing international society (“moral vocabularies of imperial privilege and economic techniques underwriting privatized *de facto* relationships”). This looks like a resounding endorsement of an “inner morality of law,” and of international lawyers – the priests of a culture of formalism – as devoted to the ideal of government in accordance with the rule of law. And yet the final paragraph concludes with a description of international lawyers as possessing “a full mastery of the grammar [of international law] and a sensitivity to the uses to which it is put.” Technical skill and a sense of justice are critically important, of course, but the absence of any mention here of fidelity to the rule of law risks inviting precisely the criticism that Dyzenhaus advances.

7. Conclusion

In asserting that the life of the law is not logic but experience, Holmes rejected the description of law as a system of rules or doctrine, and of legal reasoning as a matter of deduction that did not require, and indeed excluded, any exercise of moral judgment. Though they part ways with Holmes on many other matters, Fuller, Dworkin, and Koskenniemi concur with his rejection of this account of law. While acknowledging the importance of rules and institutions to the existence of law, each of these theorists ultimately grounds law in a particular *ethos* constituted by the intertwining of a distinctive professional culture and individual virtue. In this essay I have sought to describe this *ethos*, and in particular, to demonstrate the commonalities in its depiction by Fuller, Dworkin, and Koskenniemi, despite their use of different labels to refer to it. With an account of what gives life to a distinctly legal form of social order in hand, we can begin to explore some of the other questions that might be posed by asking “what is the life of law?” such as how best to cultivate and preserve fidelity to the rule of law on the part of international legal

actors, and how to develop the norms and institutions of the international political order so that the practice they constitute better serves the realization of that ideal.⁹³

⁹³ For their comments on earlier versions of this essay, some of which remain incompletely addressed in this final version, I wish to thank Evan Criddle, Fleur Johns, Henrique Marcos, Steve Ratner, Jiewuh Song, Antonia Waltermann, and Pauline Westerman.