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Nomos Without Narrative: A Reply to Talia Fisher

A Comment on: "Nomos Without Narrative" by Talia Fisher.

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Nomos Without Narrative: A Reply to Talia Fisher

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Let me start by summarizing the main points of Fisher's article.¹ According to Fisher, in the last decade or two, in liberal states, there has been a tendency toward a decentralization of law. This tendency, so she argues, is a result of two main factors: first the globalization process, which inclines toward a model of law that extends the geopolitical boundaries of states; and second, inter-state social crumbling, which has invited the formation of sub-communities with their own legal or quasi-legal systems. These two processes, from both within and without the state, have led to a reduction in the state's monopoly over the making and administration of law. In Fisher's view, this reduction is welcome and ought to be encouraged. In a separate paper, she develops at length a model of privatization, according to which each citizen will be able to choose freely the legal agency with which she wants to be affiliated just as she can choose the cellular phone company she prefers, the law school in which she'd like to enroll, and so on.² The purpose of her present article is to show that the privatization model is very different from the multicultural paradigm — the two represent "polar and conflictin conceptions of legal decentralization."³

The article is intriguing and thought-provoking, though I'm not sure I agree with the thesis it defends. Let me explain why.

At the heart of Fisher's article lies an assumed tension between multiculturalism and the privatization of law model. I find this conceptually confusing. While multiculturalism is a complex theory about the self, its connection to culture, the conditions required for it to flourish the nature of freedom and more, the privatization of law model is not a theory but rather, just as its name indicates, a *model* — namely, a proposal for organizing the legal institutions of society. According to this model, these institutions should be decentralized or privatized, in a way that would undermine the

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1 Talia Fisher, *Nomos without Narrative*, 9 THEORETICAL INQUIRIES L. 473 (2008).

2 Talia Fisher, *The Privatization of Law*, 30 TEL AVIV U. L. REV. (forthcoming 2008) (Hebrew).

3 Fisher. *supra* note 1, at 475.

role of the state as sole legislator and adjudicator. My point is that there is no reason to regard this model as committed *a priori* to some particular moral or political theory. Like many other legal-political proposals, the present proposal too might turn out to be compatible with any number of theories, even conflicting ones. Hence, as a matter of principle, it is misleading to set multiculturalism against the privatization of law model, as if these were two competing theories on the same plane — which they simply are not.

Interestingly enough, Fisher herself provides some evidence for this observation, because she points to two different rationales for the privatization model. One is the liberal-individualist rationale which I just mentioned, and which is developed at length in the present article. The other is the efficiency rationale. Fisher says:

Privatization of the legislative and judicial markets and the adaptation of the legal product to consumer demand will lead to a legal order that is more efficient and of a higher quality than state-produced law, for the same fundamental reasons that market competition leads to efficient results in general.⁴

This rationale is not committed to either liberalism or multiculturalism. One need not be a liberal or a communitarian of the kinds that Fisher outlines in her article in order to prefer a legal structure which is more efficient and of higher quality. In other words, the liberal and the efficiency rationales are two separate arguments to justify the privatization of law, arguments which are independent of each other. But if so, why not regard multiculturalism as yet another — a third — rationale for such privatization, instead of seeing it as antithetical to the privatization model? Like the other rationales, it would offer its own answer to the question of why the law should be decentralized. The liberal answer is: because decentralization expresses more respect for liberty and autonomy. The efficiency, or the consumer, answer is: because decentralization promises a more efficient and higher-quality legal system. And the multicultural answer would be: because decentralization helps minority groups sustain and develop their cultures in the face of constant threats to undermine them by the prevailing majority culture.

To be sure, the privatization model supported by the multicultural rationale would most likely be different from the model supported by the liberal rationale, but, by the same token, the latter would probably be different from the model supported by the consumer rationale. As in many other cases, different rationales for the same policy overlap to a significant

⁴ *Id.* at 476.

extent (otherwise they could not be said to support the same policy), but, nonetheless, they also differ to some extent. When they do, one has to decide which rationale is more convincing, or more important. Thus, if there is any tension here, it is not between multiculturalism and privatization of the law, but between multiculturalism and the two other rationales for such privatization, i.e., liberalism and efficiency.

Fisher might concede all this and, in response, simply reformulate the conflict that she refers to as being between multiculturalism and liberalism, instead of between multiculturalism and the privatization of law model. In this vein, she might argue that in making up our minds about such privatization, we must make a clear decision between the liberal and multicultural rationales. But this suggestion is incompatible with Fisher's own insistence that the distinction between these two views is one of degree, not a matter of black and white. Only a very fanatic individualist would deny the role of language and of community in constituting identity, and only a fanatic communitarian would conceive of individuals only as members of communities, with no lives and no rights except for those granted to and through their communities. Liberals need not be blind to the importance of communities for the autonomy and/or the identity of individuals, and communitarians need not deny the crucial importance of respecting the rights of each individual, qua individual, including her right of exit from the geographical and legal boundaries of her community. This means that the free market of legal agencies envisioned by Fisher might include agencies that express the norms of various religious or other cultural minorities, and I see no reason why the liberal should view this possibility negatively. Insofar as everybody would be free to join or leave all such agencies, the liberal should be happy that decentralization both fits fundamental liberal ideas and is sensitive to the collectivist, or situated, condition of human beings.

This brings me to a brief comment about the connection between the privatization model and choice. Fisher's emphasis on choice sometimes gives the impression that, in her view, choice in itself is valuable, namely, the richer the repertoire with regard to any given choice, the better, hence the desirability of a rich variety of legal agencies. I'm not entirely sure whether this is Fisher's view, but if it is, I believe it is wrong. There is a long philosophical story to tell here, but I'll limit myself to two points. First, as Kymlicka shows, this view leads to the absurd result that someone who makes twenty marriage choices leads a better life than someone who never had a reason to question her original choice. A valuable life, contends Kymlicka, is a life filled with commitments and relationships, not a life of

serial and unending choices to opt in and out of.⁵ Second, there is empirical evidence that "the culture of abundance robs us of satisfaction," to use the subtitle of Barry Schwartz's recent book, *The Paradox of Choice*,⁶ in which the author shows how the wide-ranging amount of choice in Western countries is often more of an obstacle to leading a meaningful and satisfying life than a condition for it. If, then, liberalism supports the privatization model of law, it is not merely because this model expands our repertoire of choice, but because of the options it opens — if indeed it does — for a more valuable life on the individual and/or collective levels.

To sum up, the privatization of law model and multiculturalism are not opposites, as Fisher seems to assume, because they are not on the same plane. The privatization model is a practical proposal which can be grounded in various rationales, including liberalism, multiculturalism and efficiency. Supporters of privatization can and should help themselves to all three rationales, and there is no need to make an existential once-and-for-all decision between them.

⁵ WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 209 (1990).

⁶ BARRY SCHWARTZ, *THE PARADOX OF CHOICE* (1990).