REVIEW ESSAY

The Unbearable Lightness of Being Stanley Fish

Kathryn Abrams*

THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO. By Stanley Fish.† New York: Oxford University Press. 1994. 332 pp. $25.

In this review essay, Kathryn Abrams examines Stanley Fish's There's No Such Thing as Free Speech and it's a Good Thing, Too, *a compilation of essays in which Fish exposes all forms of interpretive practice, be they legal, literary, or historical, as undeniably rhetorical: that is, without foundation in any transcendent, universal norms. Professor Abrams explores Fish's use of antifoundationalism in a range of academic arenas to attack misleadingly valorizing terms such as "objectivity," "tradition," and "merit"; such terms, Fish reveals, have always been contingent on time and place, and thus are always contestable. While she shares Fish's antifoundationalist insight, Professor Abrams disputes his ultimate conclusion, that there is absolutely no normative value to be derived from this insight. To the contrary, Professor Abrams identifies a variety of contexts (the reasonable woman standard in sexual harassment claims, for example) in which prescriptive programs are indeed rooted in an antifoundationalist insight. Moreover, Professor Abrams argues that by intervening in debates to expose the rhetoric of opponents of multiculturalism and affirmative action, Fish himself is engaging in a practice inspired by the very theory he describes as devoid of normative content.*

You don't have to be a lawyer to like Stanley Fish, but it helps. Having made his literary fortunes as an interpreter of Milton and as an originator of the "reader response" school, Fish came to law a decade ago in search of new grist for his theoretical mill. His pugnacity, his commitment to rhetoric (as both a theoretical strategy and a personal style), and his willingness to take on all argumentative comers has led many legal scholars to call him one of their own. This acceptance has come about despite the fact that Fish's exposure of law's "rhetoricity"—its lack of animating substantive foundations—unsettles the

* Professor of Law; Associate Professor of Ethics & Public Life, Cornell University. I am grateful to Adeno Addis, Greg Alexander, and participants in a 1994 faculty workshop at Tulane University Law School, who commented on an earlier draft of this paper. I would also like to thank Bob Hillman for useful conversations on the subject of contract doctrine.

† Arts and Sciences Professor of English and Professor of Law, Duke University.

Right, and his refusal to draw normative guidance from this antifoundationalism consternates the Left.

For those who appreciate Fish's familiar provocation, *There's No Such Thing as Free Speech and it's a Good Thing, Too* offers the expected pleasures and frustrations. Fish's newest work collects seventeen essays, along with a wonderfully synthetic introduction, on topics ranging from campus "culture wars" to Richard Posner's jurisprudence to the trend toward interdisciplinary scholarship. Though its content is more persistently legal than Fish's previous work, this book reflects Fish's characteristic brio and his pairing of substantive insight with rhetorical flourish, a talent known to pump adrenaline into the veins of his opponents.[1] The essays communicate familiar themes: the contested character of putatively foundational terms like "tradition," "interpretivist," or "speech"; the inevitability of one's embeddedness in a particular interpretive community; the paradox of a prescriptive program gleaned from antifoundationalist insights.[2]

While much can be said about these familiar features of Fish's work, the book's most distinctive contribution is the picture it paints of Fish as an academic at work. *There's No Such Thing as Free Speech* culls work from the many venues of Fish's professional life: book introductions, debates with Dinesh D'Souza, review essays, and speeches given at awards ceremonies and professional meetings. The picture they present of Fish actually engaged in various interpretive practices is one that undercuts, complicates, and illuminates his now-familiar theoretical message. They suggest an academic citizen—one might even say activist—whose frequent interjections into a range of practical debates belie his claim that "nothing follows" from his antifoundationalist insight.

I. LIGHTNESS: THE RHETORICITY OF INTERPRETIVE PRACTICE

In entertainment industry lingo, *There's No Such Thing As Free Speech* could be described as a "high concept" effort. Two central arguments shape the book's far-flung and consistently erudite contents.[3] First, all interpretive practice is "rhetorical"—grounded on terms which are contestable, and whose content and authority are created through interpretive argument, rather than existing prior to it. Second, nothing, theoretically speaking, follows from this revelation; it is contradictory and futile to build a prescriptive program on antifoundationalist insight. Fish, happily self-aware,[4] evinces neither boredom

1. My favorite critical description comes from John Ayer, who characterizes Fish's approach as "tr[ying] to nail the other guy's butt to the wall in a rhetorical half nelson." *See* John O. Ayer, *Aliens are Coming! Drain the Pool,* 88 MICH. L. REV. 1584, 1591 (1990).

2. *See, e.g.,* p. 307 ("[T]he point is that there *is* no point, no yield of a positive programmatic kind to be carried away from these analyses.").

3. Fish's essays replicate the distinction between abstract theory and quotidian practice that I discuss in Part II.B. He ultimately mobilizes his finely honed and contextualized interpretations to support his large theoretical (or, in his terms, "metacritical") conclusions; few arguments ever lie between these two apparently disparate poles.

4. One essay, for example, begins: "In a career marked by what some may describe as a succession of acts of hubris, let me remain in character . . . ." P. 267.

nor embarrassment as he chases these issues from one discipline to the next. The book is divided into two parts, labeled simply I and II, which correspond to the two oddly related halves of this argument.

Part I of the book consists of six essays taken from a series of debates with Dinesh D'Souza on campus multiculturalism, two tightly argued doctrinal essays on the First Amendment, and a brief coda on liberalism. All reiterate one basic point: Legal or policy arguments that appear to flow from some set of determinate, identifiable principles in fact have no such foundation. Rather, the authority invoked in law, campus debates, and political theory is rhetorical; it is derived from terms whose very meanings are always contestable. The relation between those terms and a particular course of action is never clear, but must always be argued for—constructed of the available materials as the interpreter goes along. To say that these essays may be readily summarized, however, does not diminish the variety of their subject matter or the range of their insights. The debates with D'Souza demonstrate particular virtuosity: I only wish I had been there to see the fireworks.

Introducing himself as "a mistake made by central casting,"[5] Fish defends multiculturalism by exposing the rhetorical strategies of its opponents. First, Fish demonstrates that the polemic of multiculturalism's detractors acquires its force only by emptying the relevant terms of all historical content, so that affirmative action's race consciousness looks the same as that of Israeli hardliners, Klansmen, or Nazis.[6] Next, he traces this analytic framework to its origins in the bluntly racist nativism of the early twentieth century.[7] He also decries the use of verbal "codes," through which critics of multiculturalism assign invidious content to otherwise uncontroversial buzzwords; this tactic permits an untroubled public to evade its own complicity in perpetuating narrow-minded and bigoted meaning.[8]

In Fish's most dramatic move, however, he strips the argument against multiculturalism of much of its force by demonstrating that the claim of protecting the "common traditions" of Western civilization is merely rhetorical.[9] Fish's

---

Nor does Fish jest. This essay, *Milton, Thou Shouldst Be Living at This Hour,* was Fish's acceptance speech upon receiving the Milton Society's highest honor. It is built on the conceit that the occasion can be analogized to the American Film Institute's Lifetime Achievement Award. Fish muses about what might occur if the Milton Society used the same award format as the Film Institute: He wonders which literary luminaries, past and present, would offer tributes, which video clips from his classes would be offered to posterity. While the piece is enlivened by Fish's genuine appreciation of those who have toiled in these fields before him, and its comic thrust most likely derives from the juxtaposition of contexts and figures which I, as a non-Miltonist, cannot fully understand, the net result is that Fish is able to fête himself with a celebration even more grandiose than that proffered by the Milton Society—and to emulate what he describes as the strategy of Lifetime Achievement Award recipients, "the substitution for humility of wit." P. 267.

5. P. 53.

6. *See Reverse Racism, or, How the Pot Got to Call the Kettle Black,* pp. 60-69.

7. *See Bad Company,* pp. 80-88.

8. *See Speaking in Code, or, How to Turn Bigotry and Ignorance into Moral Principles,* pp. 89-101.

9. *See The Common Touch, or, One Size Fits All,* pp. 31-50; *see also Speaking in Code, or, How to Turn Bigotry and Ignorance into Moral Principles,* pp. 89-101; *You Can Only Fight Discrimination with Discrimination,* pp. 70-79.

attack focuses on commentators like D'Souza and Lynne Cheney, who claim that multicultural curricula destroy a common literary heritage and inject politics into a discussion that was once about literary values that transcended the contingencies of time and place.[10] Fish argues that "commonality" and transcendent "literary" merit do not inhere in the "great books" curricula. On the contrary, literary merit has always been contested; even the reputation of those works assumed to be beyond debate has varied wildly over time:

> Thirty years ago the cries of reactionary protest were directed at the introduction into the curriculum of what we now think of as the classic texts of American literature, and the reasons given were the same one hears today—first, that American literature is a political and not a properly aesthetic category; second, that its canon had not yet stood the test of time; and third, that a focus on these new works would mean that older, more established works would be neglected and forgotten: if we start teaching courses in Faulkner and Hemingway, it was said, we shall no longer teach Shakespeare and Milton. Now the dire prediction is, if we start teaching courses in Alice Walker and Toni Morrison, we shall no longer teach Hemingway and Faulkner.[11]

Because what is common is always subject to dispute, multiculturalists cannot be said to have imported politics into an "established" curriculum. Politics is always present, even in defining apparently enduring values.

But if "commonality" and literary "merit" are not characteristics that inhere in particular books, Fish concludes, the terms are nonetheless important to the debate over multiculturalism because they are rhetorical resources. The interpretive communities in which Fish argues that we function not only generate the background of norms and assumptions that make interpretation possible; they also establish rhetorical norms by which conflict is mediated, and through which one community distinguishes itself from others. Given certain assumptions of liberalism—the aspiration of liberal decisionmakers towards neutrality, the preference for individual as opposed to group-based claims or rights—"commonality" and "merit" are terms that valorize whatever specific course of action they are applied to. Understood in this way, the culture wars become a contest to apply these terms to the things you want to have read. It is a contest Fish believes that the Right is winning, not because of the merit of its position, but because it better understands the rhetorical stakes of the game and has displayed a greater ability (fueled in part by money and media connections) to make its descriptions stick. The best strategy for the Left, Fish argues, is to *change the rules* of the game. Expose the chosen terms as contingent and contestable, and the debate as already and inevitably political. Demand, accord-

---

10. *See* pp. 7-8.

11. P. 96. Fish also makes a similarly incisive point with respect to the "nontraditional" teaching of traditional texts:

> Reacting to the many different readings of *Hamlet*, D'Souza chortles that "according to this logic, *Hamlet* is not one play but many plays" . . . . What he doesn't seem to know is that *Hamlet is* many plays, since during Shakespeare's lifetime there was no one text of the play but a number of performance scripts, all different, and none of them uniquely authorized.

Pp. 96-97 (citation omitted).

ingly, that each side argue for its desired curriculum in terms that capture its distinctive qualities, rather than trade in rhetorically freighted pieties.

Not all of this, of course, is new. Justice Thurgood Marshall argued years ago that invocations of "color-blindness" or "merit" empty history and constitutional categories of concrete content.[12] And many of us have mumbled under our breath (or orated to our colleagues) that the positions of canon defenders are also political, only differently invested.[13] Yet Fish's arguments are so trenchantly made, and so concretely supported,[14] that even the familiar takes on new power. And the analytic reductionism that might otherwise rankle (does the indeterminacy of the "common" make all interpretations of "common" equally plausible, or equally political?) in this section gives Fish's argument a peculiar staying power. His deconstruction leapt comfortingly to mind as I skimmed Justice Scalia's recent complaint that those challenging gender-based peremptories were "vandalizing . . . our people's traditions."[15] What had first seemed a nervy appropriation of a broadly shared constitutional history was exposed as a losing rhetorical gambit: The only resource Scalia could mobilize in his defense had turned out to be less resonant, under the circumstances, than the majority's label, "gender-neutrality."

A single disturbing note mars Fish's otherwise forceful presentation: He appears to lose interest once he reframes the debate in antifoundationalist terms. Once the inherently political character of the debate is revealed and the inevitability of change in values is accepted, it makes no sense to ask, as D'Souza might, if values will " 'be subverted by the introduction of new materials and methodologies.' "[16] Rather, the relevant inquiry becomes "what is to be gained or lost in our everyday lives . . . by either welcoming or rejecting various new emphases and methodologies."[17] Indeed, this is a persistent question for many critical legal scholars. Once we acknowledge the indeterminacy, contingency, and inconclusiveness of the norms that have been our unexamined medium of exchange, what then? How do we speak across the differences that divide us when those differences are no longer rhetorically camouflaged by the invocation of universals? Surprisingly, this question marks the point at which Fish's attention wanes. After critiquing a series of new proposals—from "teaching the contradictions" to teaching "tolerance"[18]—that threaten to instantiate new verities, Fish returns to a proposed cost-benefit analysis:

12. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 551-54 (1989) (Marshall, J., dissenting).

13. The same may be said of Fish's argument that speech is not a category with transcendent, determinate content, but simply "the label . . . you want your favorites to wear," which we invoke to serve "the substantive agendas we wish to advance." P. 102.

14. In a vivid example, Fish contradicts the much-publicized speculation by a professor that *The Color Purple* was taught in more English classes than all of Shakespeare's plays combined. Contrary to the claims of these canon defenders, Fish observes, the ratio of students studying Shakespeare to Alice Walker in college classrooms is approximately 40 to 1. Pp. 94-95.

15. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1439 (1994) (Scalia, J., dissenting).

16. P. 50.

17. P. 50.

18. Pp. 36, 37.

> If we harken to those who speak in the name of diversity . . . the result will be more subject matter, more avenues of research, more attention to neglected and marginalized areas of our society, more opportunities to cross cultural, ethnic, and gender lines, more work, in short, for academics. If, on the other hand, we harken to those who would hold back the tide and defend the beachhead won thirty-five or fifty years ago, the result will be more rules, more exclusionary mechanisms, more hoops to jump through, more invidious distinctions, more opportunities to be demeaning and be demeaned, more bureaucracy, more control. I know what I like. In the words of the old song, how about you?[19]

This argument provides a variety of nontranscendent grounds on which to defend multiculturalism. But the strength of Fish's approach is also its weakness: There is no hint of why these grounds should appeal to academics who don't care about traversing the margins or crossing cultural lines, and who might not be assuaged by the promise of more work if it means work on texts they consider unworthy. Fish seems to know this; his insouciant tone at the end suggests that he means to be preaching to the choir. He offers nothing to those who hold different premises, nor shows much interest in exploring how we might change those premises.

Yet Fish's wit, in this instance, serves the same function as the rhetorical strategies he has so painstakingly revealed. It erects a facade of agreement over potentially schismatic differences in a world where attempts to instantiate such agreement lead inexorably to new foundations. This move catches Fish in a paradoxical position: He must remain committed to the rhetoricity he has just exposed because it is the only game in town.

II. The Unbearable Lightness of Being

Fish does not arrive at this paradoxical posture by accident; it is—if the term can be used—the essence of his position. In the second part of the book, he argues that antifoundationalism, contrary to the claims of a range of theorists, yields no prescriptive program. To have exposed the rhetoricity of any interpretive practice has no normative or programmatic implications for the future conduct of that practice—hence Fish's disinterest, one might conclude, in the terms of postrhetorical multiculturalism. For him, the future holds either an unintelligible babble of discordant voices, or a reassertion of rhetoricity.

Fish relies on three interrelated arguments to make the point that nothing follows from the antifoundationalist insight. First, he contends that the effort to draw normative conclusions from antifoundationalism conflates the largely separate realms of theory and practice. Second, he argues that the project of creating a "pragmatist program" from an antifoundationalist insight[20] entails a fatal

19. P. 50.

20. Fish uses the terms "pragmatist" and "antifoundationalist" interchangeably to characterize his insight that there are no transcendent, foundational principles that guide or explain the meaningmaking activities of human beings. At times, Fish's conviction that any provisional or contingently held principle will rigidify into a new foundation leads him to define "pragmatist" (and "antifoundationalist") even more idiosyncratically, as when he states that the first principle of pragmatism is "to have none." P. 209. It is worth noting that not all antifoundationalists are as wary about the unwitting reinstantiation of foundations as is Fish, although some note the possibility as a danger to be avoided rather than as an

contradiction: The very idea of a normative program ignores the rejection of principle Fish sees at the heart of pragmatism. Finally, Fish implies that any attempt to find prescriptive direction in antifoundationalism will fail to produce the change its proponents seek because the effort itself is premised on an erroneous, intentionalist vision of political change. Because I found this part of Fish's argument less satisfying than the first, I will examine its contributing strands in closer detail.

A. *Raw Fish: Antifoundationalism and Why Nothing Follows*

1. *Theory as distinct from practice.*

Fish makes his argument about the conflation of theory and practice in two essays about law. In *The Law Wishes to Have a Formal Existence*,[21] he surveys how legal doctrine seeks to establish the law's "perspicuous" autonomy.[22] Contract law, for example, claims to provide determinative ground for making decisions independent of any competing "structure of concern."[23] Dogged by morality on one side and by interpretation on the other, contract doctrine has sought to establish its autonomy through legal formalism.[24] Yet even formalism, as Fish demonstrates, is ultimately rhetorical. The formal terms contract law relies on do not determine the outcome of individual controversies. Decisionmakers fashion both their content and authority as they go along, drawing heavily on morality and interpretation.

---

inevitable consequence of any contingently held positions. *See, e.g.*, ELIZABETH SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 5 (1988) (discussing the danger of "re-depositing" essentializing tendencies). It is also important to observe that not all pragmatists would describe their position as synonymous with antifoundationalism, and few would describe their "first principle" as "to have none." Although Richard Rorty has characterized as "pragmatic" a philosophical position which critiques the notion of transcendent foundations, *see* RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY (1989); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979), other philosophers have characterized their pragmatism in different ways. Pragmatists such as Dewey and James viewed truth as a collection of contextual, concrete, provisional truths which were not found but made by human beings in the course of their experience. *See* JOHN DEWEY, EXPERIENCE AND NATURE 410 (2d ed. 1929); WILLIAM JAMES, PRAGMATISM 104 (1975). Just as the content of these truths depended on context-specific factors, such as the methods of inquiry or testing or the substantive commitments of the inquirer, their value depended on the effects they produced in the world—another question mediated by context. So not only do many pragmatists reflect a provisional or instrumental commitment to various principles or truths, a feature that distinguishes their thought from that of Fish, but many also believe that the role of experience and judgment in the generation of truth imposes on human beings a responsibility for the world that these judgments help create. *See* JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 96, 114-16, 163 (1948); ISRAEL SCHEFFLER, FOUR PRAGMATISTS: A CRITICAL INTRODUCTION TO PEIRCE, JAMES, MEAD AND DEWEY 20 (1974). Thus for some pragmatists the recognition that principles or truths are humanly made has a normative implication that Fish specifically denies.

21. Pp. 141-79.

22. P. 141.

23. P. 141.

24. Fish describes this formalism as the idea that "once a question has been posed as a *legal* question—has been put into the proper *form*—the answer to it will be generated by relations of entailment between that form and other forms in the system." P. 143. But only by equating "law" with this particular brand of legal formalism can Fish characterize "interpretation" as a distinct or competing body of concern. The relationship of interpretation to adjudication, particularly constitutional adjudication by an unelected, life-tenured court, has always been controversial. But the suggestion that interpretation is a practice *outside* the realm of law jangles oddly, at least to my legal ear.

Although Fish's assessment largely accords with that of many critical legal scholars, he ultimately dissents from their call for doctrinal reconstruction. This is because law's indeterminacy and rhetoricity do not dismay Fish. Rather, he appreciates law's "amazing trick"—its ability to "construct[ ] the (verbal) ground upon which [it] then confidently walk[s]."[25] Of this legal art Fish says:

> [I]t is hard to imagine doing without it. The alternatives would seem to be either the determinate rationality that every critical legal analysis shows to be impossible, or the continual exposure of the sleights of hand by means of which the "amazing trick" is performed. But if . . . every legal procedure turned into a debunking analysis of its enabling conditions, decisions would never be reached and the law's primary business would never get done.[26]

Fish rejects the critics' reconstructive stance because he sees a gap between metacritical analyses of law and the legal practice of lawyers and judges.[27] Fish identifies the *practice* of law as "irremediably local . . . rooted[ ] in particular disputes requiring particular, and timely, solutions."[28] It is neither philosophical challenge nor desire for social change that animates law; rather, people engage the law "with the intention either of winning or deciding."[29] Moreover, in the context of legal practice, acting on one's awareness of the law's rhetoricity serves no purpose. Or worse, it injects a paralyzing self-consciousness about normative questions that is alien to the situated practices of dispute resolution.[30] In fact, law's very concealment of its rhetoricity allows it to function as an important social institution. As Fish notes:

> [T]hat's the law's job, to stand between us and the contingency out of which its own structures are fashioned. In a world without foundational essences . . . there are always institutions (the family, the university, local and national governments) that are assigned the task of providing the spaces . . . in which we negotiate the differences that would, if they were given full sway, prevent us from living together in what we are pleased to call civilization.[31]

Fish amplifies this vision of legal theory and practice in *Play of Surfaces: Theory and the Law*, a review essay analyzing Gregory Leyh's collection *Legal Hermeneutics*.[32] In this dense and complicated essay, Fish examines a panoply of distinctions used by theorists to characterize legal interpretation, from originalist/nonoriginalist to determinate/indeterminate to autonomous/socially constructed. He argues that none of these distinctions accurately describes or predicts what judges and legal interpreters really do. Some distinctions—for

25. P. 170. Fish attributes the term "amazing trick" to Harry Scheiber. P. 170.
26. Pp. 170-71.
27. Pp. 173-74.
28. P. 173.
29. P. 173.
30. Among the ostensibly destabilizing normative proposals Fish surveys are James Boyd White's suggestion that legal decisionmakers consider the question of "what kind of culture we shall have," p. 173 (quoting White), and Peter Goodrich's injunction to "make visible the 'alternative meanings' that legal meanings ignore," p. 176.
31. P. 179.
32. Pp. 180-99; *see* LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE (Gregory Leyh ed., 1992).

example, intentionalist/nonintentionalist—represent false dichotomies.[33] Others may be theoretically coherent, but still make little sense at the level of legal practice. The distinction between historicism and ahistoricism is undermined in practice by the fact that the legal interpreter is always situated in a particular community or context. Because of this inevitable situatedness, even the historicist will be shaped by her "horizon-conditioned sense"[34] of what is salient in the past or how to mine the past for guidance. While theoretical distinctions may serve as rhetorical weapons that legal interpreters can use against each other, neither the distinctions themselves, nor the awareness of their rhetoricity, are likely to alter legal practice. Many terms cannot be cashed out at the level of practice: "One cannot . . . do[ ] indeterminacy or practice instability, because indeterminacy and instability are features of interpretation as viewed from the long range, and it is in the short range [with its 'situation-specific determinacy'] that interpretation is always experienced and practiced."[35] Even those distinctions that can be of practical use are not likely to influence courts. This is because judicial decisionmaking begins as a matter of intuition and only later acquires the legitimating elements of rhetorical persuasion. Rarely do judges draw guidance from theoretical abstractions about the nature of law. Fish quotes approvingly one judge who notes that "most of the time you reach the result that's fair and then build your thinking around it."[36]

2. *The contradiction of pragmatism.*

Fish lays out his second argument—that the notion of a "pragmatist program" is a contradiction in terms—in *Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin.*[37] To a certain point, Fish finds in Judge Posner and Rorty kindred, pragmatic spirits.[38] Yet Fish parts company with them when they try to extract guidance from the antifoundationalist insight. Judge Posner goes wrong, according to Fish, when he assumes that the answer to the inherent rhetoricity of interpretive practice is to place the practice on a new, nonrhetorical footing. Rorty missteps when he tries to draw out certain temperamental or imaginative norms from pragmatism. Beyond objecting to Judge Posner's and Rorty's specific conclusions,[39] Fish challenges their root assumption that the antifoundationalist insight can support

33. Fish argues,

> [T]here cannot be a distinction between interpreters who look to intention and interpreters who don't, only a distinction between the differing accounts of intention put forward by rival interpreters. . . . Bork's construal . . . assumes an agent (the framers) whose purpose is to confine future generations. . . . Other construers posit an agent whose purpose is to lay down general rules and standards . . . .

P. 183.

34. Pp. 187-88.

35. P. 191.

36. P. 198.

37. Pp. 200-30.

38. In fact, Fish's synopsis of Posner is so muscular and approving that Posner sounds less like Posner than like Fish. *See, e.g.*, pp. 208-09.

39. For example, Judge Posner promises either a new form of rhetoricity or an end to law as we know it, and Rorty contends that tolerance is a muscle that can be built through exercise. Pp. 212, 216.

their prescriptions without collapsing under the weight of contradiction. "A pragmatist *program* asks the question 'what follows from the pragmatist account?' and then gives an answer," Fish observes, "but by giving an answer pragmatism is unfaithful to its own first principle (which is to have none) and turns unwittingly into the foundationalism and essentialism it rejects."[40]

Even if a pragmatic program were not a conceptual contradiction, Fish doubts its prospects because it rests on the faulty notion that we can intentionally produce desired change through interpretive practices. By Fish's own account[41] change is a modification of the assumptions, self-understandings, or practices of an interpretive community. Such a modification comes about inevitably and often imperceptibly as a result of a community's contact with those "materials that history and chance put in its way."[42] Change occurs in this way because the norms that give an interpretive community its distinctive character are heterogeneous. Fish refers to these norms or beliefs as being "nested"[43]—intricate in their relation to one another and sensitive in their interaction with new events and interpretive materials. As Fish says of the law, it is "precisely because legal rules . . . are underdetermined in their content and scope [that] the very act of applying them—of using them to order a piece of the world—will result in their alteration."[44] Fish emphasizes that a change in community beliefs is not worked externally. It is the internal normative conditions of the community that make it receptive to external influence.[45] Even if one could conceptualize externally driven change, the result would not necessarily be the intended one. Individual members of a community change their minds unpredictably, and rarely in response to arguments or political pressure. Endorsing a view articulated by Judge Posner, Fish argues:

> Change can and does occur, not however by a process of "reasoned exposition" . . . but through conversions, defined nicely as "a sudden deeply emotional switch from one non-rational cluster of beliefs to another that is no more (often less) rational" . . . .
>
> And what brings that switch about? Almost anything and nothing in particular. That is, there is no sure route—no sequence of formalizable or even probabilizable steps . . . .
>
> . . . [C]ontingency can sometimes take hold, not however as the result of a plan or campaign, but as the result of notions or vocabularies that somehow get to be "in the air" and effect a "change of outlook" . . . .[46]

---

40. P. 209.

41. Fish develops his most extensive account of change in STANLEY FISH, DOING WHAT COMES NATURALLY 141-60 (1989).

42. P. 195.

43. FISH, *supra* note 41, at 146.

44. Pp. 194-95.

45. To take one of Fish's examples, Noam Chomsky's theory was intelligible to the community of psycholinguists only after their own internal norms permitted them to see it as a valuable departure. In other words, Chomsky had to be "in" the community before he became valuable as an "outside" influence. *See* FISH, *supra* note 41, at 147-48.

46. P. 207 (quoting RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 149-50 (1990)) (citations omitted).

Thus even well-grounded efforts to change attitudes cannot be expected to bear fruit. Furthermore, any effort to produce practical change inspired by antifoundationalism is internally contradictory and doomed to failure.

B. *Fishy Conclusions: A Critique of Fish's Antifoundationalism*

One cannot read these essays without admiring Fish's stunning analytic virtuosity. He weaves together nearly two dozen works from a variety of disciplines to create a rich tapestry in which his central argument peeks out from all corners. However, the unique combination of intellectual suppleness and conceptual doggedness by which Fish forces one trope to fit all imposes certain costs on his enterprise.

1. *Negotiating the theory and practice of law.*

One obvious cost is the impoverished vision of theory and practice that emerges from Fish's account. Fish achieves his Manichaean distinction between these activities by presenting a strained and partial account of each. This problem may inhere in his discussion of literary theory and literary interpretive practice (offered in *The Young and the Restless*[47]), but it should be particularly apparent to legal scholars in his discussion of law. Fish portrays legal theory as consisting largely of arid propositions about law's "historicity" or "indeterminacy" or "interpretivism," coupled with normative proposals that are so general as to be almost unintelligible. In contrast, he reduces legal practice to resolution of the most quotidian disputes: people resorting to legal practice to clarify commercial relations with little awareness of its consequences for future parties or society as a whole. Yet this account obscures a rich ground of intermediate forms and mutual influence: Theory often reflects on legal decisionmaking as a means of revising legal concepts or doctrines, while practitioners often work to further a social vision.

In my own field, Susan Estrich's work provides an example of a synthesis of theory and practice. By revealing the implicit partiality of prevailing notions of "force" and "consent" in rape law,[48] Estrich offers an abstract theoretical insight: the unrecognized failure of objectivity in legal decisionmaking. Yet she also makes a more concrete theoretical observation about the way males' privileged position as decisionmakers permits them to make their experiences of force and resistance the norm. In addition, Estrich uses a theoretical observation—that our legal system should recognize that an experiential basis for judgment must be plural—to recommend specific reforms. She argues, for example, that a more plural experiential base will affect the way we choose and interpret statutory language (why do we demand physical resistance to prove nonconsent?) and the way we instruct juries (who were traditionally instructed

47. Pp. 243-56.
48. Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986).

that rape was easy to allege but difficult to prove[49]). This intermediate ground between theory and practice, while of particular concern to feminist legal scholars, is not their exclusive domain. It is, in fact, a place where many law professors have carved out an existence that, if not autonomous, is at least nonnominal. Our professional familiarity with the world of practice and our relative leisure to consider theoretical implications of particular doctrinal choices enable us to make recommendations which may change doctrine or encourage practitioners to look beyond specific cases to the broader implications of their work.[50]

One wonders, in fact, if Fish does not prove his thesis of inevitable situatedness, by viewing the relation between legal theory and practice as a *literary* theorist might. There is something disorienting about Fish's description of law, be it legal theory, legal practice, or law's broader social role. It is never quite the law as this legal theorist, at least, has come to recognize it. At times, he seems to miss what many legal scholars view as a distinctive feature of the law: the fact that its practice aims at creating something well beyond its technical limits—a normative structure for shaping and organizing human interactions.[51] At other times, Fish treats law not as a distinctive enterprise, but as a proxy for any practice which employs rhetoricity to master the flux and contingency of a world without transcendent, unifying foundations. When Fish describes law, for example, as helping us "negotiate the differences that would, if they were given full sway, prevent us from living together in what we are pleased to call civilization,"[52] I first want to object to the legal profession being recruited as the front-line infantry—to do the dirty, dangerous work that is necessary to protect what Fish is pleased to call civilization.[53] Yet I then observe that the demands made on law are hardly unique. Law is not the only institution that

49. *Id.* at 1140 (citing the more moderate but still biased instruction in MODEL PENAL CODE § 213.6(3) (1980)); *see also id.* at 1094-95 (citing 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1778)).

50. This view of legal academia has been the subject of controversy in recent years. *Compare* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession,* 91 MICH. L. REV. 34 (1992) (arguing that law schools spend too much time teaching theory and should focus on doctrine and ethics) *with* Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship,* 91 MICH. L. REV. 1921 (1993) (pointing out that a broadened range of legal scholarship has provided many practical and theoretical insights) *and* Derrick Bell & Erin Edmonds, *Students as Teachers, Teachers as Learners,* 91 MICH. L. REV. 2025 (1993) (noting that many areas of scholarship deemed overly theoretical by Judge Edwards, such as feminist jurisprudence and critical race theory, have had very important practical applications).

51. On the other hand, this image of legal practice may not be shared by all legal scholars, but instead may be an image all politically conscious practitioners have of their respective disciplines. Henry Louis Gates, Jr., recently remarked that students who once turned to law or politics to advance an agenda of social change are now turning to literary criticism. Henry Louis Gates, Jr., Comments at the Plenary Session of Annual Meeting of the American Council of Learned Societies (Apr. 23, 1993). Fish sees a similar agenda among literary critics known as New Historicists, although he criticizes it as being antithetical to the appropriate forms of textual analysis. *See* pp. 25-27, pp. 243-56. It is not clear whether Fish simply does not see a similar mission among lawyers, or whether he fails to acknowledge such a mission because he views it as no better grounded than the work of the New Historicists.

52. See note 31 *supra* and accompanying text.

53. It is the didactic, uncompromising character of Fish's antifoundationalism, his unwillingness to consider even the contextualized, contingent sharing of consciously directive norms that make this kind of institutional "sacrifice" necessary in the first place.

functions rhetorically to rescue us from normative chaos. In the same paragraph, he alludes to the family, the university, local and national governments; and in the book as a whole he makes similar statements about literature and philosophy.[54] A portrait of law has blurred into a larger statement about life in an antifoundationalist world.

2. *Overstating deconstructivè conclusions.*

A second flaw in Fish's argument is the rigidity of his antifoundationalism. He overstates the effects of his deconstructions—describing as indistinguishable views that are less than intransigently distinct, or pronouncing as unrelated effects with imperfect causal links.[55] This exaggeration of incomplete distinctions, of incompletely reliable causal connections, helps to generate the unfathomable contingency that forms the basis for his claims to the inevitability of rhetoricity and the inability to predicate any programmatic action on its recognition.

Fish's tendency to overstate his deconstructive conclusions riddles nearly every level of his analysis. A small example is his deconstruction of the difference between historicism and ahistoricism,[56] terms meant to distinguish interpretive efforts grounded in local context from those that appeal to universals. Fish concludes that the distinction is a false one because even those who lay claim to some universal, external structure still perceive it through their own local framework of understanding. Yet our inescapable situatedness and the particular angle of vision it gives us only complicate the distinction; they do not cause it to disappear. While our local context shapes our view of everything (including our local context), it does not render indistinguishable all objects it brings into view. Taking our bearings from an external source most likely gives a different cast to our interpretive or political choices, even if that source is viewed through an inevitably local lens. Noting a limited similarity between ostensible opposites does not mean, in the memorable words of Cynthia Ozick, that the Holocaust and a corncob are the same.[57]

---

54. P. 179.

55. Henry Louis Gates, Jr. has made this point in relation to Fish's essay *There's No Such Thing as Free Speech and it's a Good Thing, Too,* pp. 102-19, which claims that all those who defend 1st Amendment principles in deontological terms are actually consequentialist, because they allow some exceptions, however small, which are justified in consequentialist terms. Pp. 103-04. Critiquing this point, Gates argues,

> I am less demanding than [Fish]. I would allow that rights needn't be infinitely stringent, for they may conflict with other rights, and so in practice the whole affair will, as Fish does not miss, have an air of the ad hoc about it. But that doesn't mean that our principles and rules do not work, that they are merely subterfuges. Maybe there's a useful sense in which we are not all [consequentialists].

Henry Louis Gates, Jr., Truth or Consequences: Putting Limits on Limits, American Council of Learned Societies Occasional Paper No. 22, at 25 (1993).

56. Pp. 197-99.

57. CYNTHIA OZICK, *Innovation and Redemption: What Literature Means, in* ART AND ARDOR: ESSAYS 238, 244 (1983) (repeating a remark overheard at a party regarding the possible sources of artistic inspiration). I first came across this quote in an excellent article by Angela P. Harris, *Race and Essentialism in Feminist Legal Theory,* 42 STAN. L. REV. 581, 586 (1990) ("Avoiding gender essentialism need not mean that the Holocaust and a corncob are the same.").

This same tendency toward exaggeration troubles two central arguments in the second half of the book. The first major argument is Fish's claim that theoretical concerns, including the antifoundationalist insight, do not shape practice. He is indeed correct that one cannot simply "do indeterminacy." A nuanced transition must be made between the descriptive terms of theory and the imperatives of practice. Moreover, theoretically informed imperatives must not undermine the ability of practitioners to function in their professional community. But there is a great distance between these considerations, aptly framed as caveats, and Fish's conclusion that "you cannot . . . simultaneously stand within a practice and reflectively survey the supports you stand on."[58] Fish ignores many kinds of practice-related directives that emerge from theoretical insights, which neither transform the rules of the game to such an extent that playing becomes impossible, nor are so contextualized as to lose their connection to the larger theoretical insight. It is true that as directives are contextualized, their relation to theory becomes one of application rather than identity. A relation of application, however, does not imply complete attenuation from the initial theoretical insight unless one lives in a world of reductios and extremes.

Examples of possibilities for theoretically informed practice emerge from the work of feminist lawyers on the critique of objectivity. This critique qualifies as an antifoundational insight and can be stated at the level of generality that Fish ascribes to theoretical insights: There is no God's-eye vantage point from which to view a personal interaction or a legal controversy, but only a series of differing vantage points constituted by one's experience or situatedness (the epistemological version).[59] Or, the ability to claim that one's view represents a God's eye or objective vantage point is a reflection of one's power to make one's partial vantage point the norm, in a society that values objectivity as an attribute of a decision or a decisionmaker's position (the political version).[60] Or, distancing oneself from the circumstances and perspectives of others is an attempt to insulate oneself from the foregoing insights, rather than a means of achieving impartiality (the version of the antifoundationalist critique directed to the judiciary).[61] Of course it is possible to implement the theoretical critique of objectivity at a level of generality that would destroy legal decisionmaking: A judge could become paralyzed by the conflict between her inevitably partial perspective and her obligation to decide disputes impartially. Yet feminist lawyers have not applied the critique of objectivity at this level of

58. P. 255. Fish also suggests that you either engage in a form of "destabilization that is not specific to particular practices" or in a more context-specific form of change which "will be internal to [your] practice and will only impinge on larger structures in an indirect and etiolated way." Pp. 254-55.

59. *See, e.g.*, Sandra Harding, *Conclusion: Epistemological Questions, in* FEMINISM AND METHODOLOGY 181, 183-85 (Sandra Harding ed., 1987) (arguing that human experience inevitably shapes and limits human understanding).

60. *See, e.g.*, Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered,* 101 HARV. L. REV. 10, 75-76 (1987) (contending that those who claim a God's-eye vantage point "are untruthful, trying to exercise power to cut off conversation and debate").

61. *See, e.g.*, Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges,* 61 S. CAL. L. REV. 1877, 1903-05 (1988) (questioning whether the refusal to take the perspective of others into account meets the test of impartiality).

generality, and judges have not become paralyzed by the effort to implement their proposals.

Feminist lawyers and legal scholars have drawn many imperatives from the theoretical critique of objectivity; two strategies are particularly useful illustrations. First, feminists have embodied the critique in legal standards that challenge the universality of a judge's viewpoint.[62] The "reasonable woman" standard in sexual harassment law rejects the notion of a universal, gender-neutral perspective on sexual harassment. It discourages judges from relying on their own unexamined intuition in evaluating the persuasiveness of harassment claims.[63] In this instance, the feminist critique of objectivity has not produced the paralysis Fish predicts. The application of the reasonable woman standard by some appellate courts has not only altered outcomes,[64] it has changed the dialogue about how to adjudicate such cases. Most decisionmakers no longer argue about whether there is a universally shared, intuitively obvious perspective from which one can evaluate sexual harassment; they argue about the particular nonintuitive features that characterize the vantage points from which such cases should be viewed.[65]

Second, the feminist critique has encouraged judges to seek out a vantage point, other than the traditional, reflexive distance, from the circumstances of those before them. Martha Minow, for example, has organized study groups in which judges discuss works of literature raising issues similar to those they see in their courtrooms.[66] Judge Shirley Abrahamson encourages her colleagues to go in street dress into other judges' courtrooms, to see how proceedings and court personnel appear to laypeople.[67] The goal of these efforts is not, as Fish

62. This critique is evident in Judith Resnik's proposal that federal courts stop requiring litigants to bring disqualification motions before the very same judge being asked to recuse herself. *Id.* at 1934. In a motion for disqualification, Resnik argues, "the judge is asked to rule upon the self as if the judge could be an other." *Id.* Having another judge hear the disqualification motion acknowledges the limits of judicial disengagement. It also has the added virtue of making the challenged judge a mere witness, "a supplicant before another individual who has assumed the mantle of power." *Id.* at 1935. This added benefit relates to the second strategy derived from the theoretical critique of objectivity discussed in the text accompanying notes 66-70 *infra.*

63. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (applying the reasonable woman standard); *see also* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1202-15 (1989) (explaining and justifying the use of a "reasonable woman" standard in adjudicating sexual harassment claims).

64. *See, e.g., Ellison*, 924 F.2d at 880 (explaining how embracing a reasonable woman or reasonable victim perspective requires reversing the district court's dismissal of the case).

65. *See generally* Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95 (1992) (surveying new issues arising from the application of the reasonable woman standard). Although the Supreme Court recently appeared to have endorsed a "reasonable person" standard over a "reasonable woman" standard in Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993), proposed EEOC regulations direct decisionmakers to take the sex of the victim into account when applying that standard. EEOC Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266, 51,267-68 (1993) (to be codified at 29 C.F.R. pt. 1609) (proposed Oct. 1, 1993).

66. Martha Minow, *Words and the Door to the Land of Change: Law, Language and Family Violence*, 43 VAND. L. REV. 1665, 1689-94 (1990). The rationale for these sessions is that "[r]eading literature can provide occasions for the moral act of taking the perspectives of others." *Id.* at 1694.

67. The purpose of this effort is "not only to understand the perspective of another, but to *be* an other (when possible), to experience the meaning of being a person in a courtroom who lacks the first name 'Judge.' " Resnik, *supra* note 61, at 1929.

might suggest,[68] to transcend one's own perspective in the embrace of some inclusive universal, but to problematize or broaden one's own perspective in order to produce a different understanding of the parties or controversies at the bar.[69] Whether judges are indeed able to incorporate these perspectives in the performance of their official duties still remains to be seen; but these strategies have certainly not paralyzed the judiciary. And some, like Judge Abrahamson, report that such insights have positively influenced their job performance.[70]

The second major argument marred by Fish's tendency toward overstatement is the claimed contradiction between the antifoundationalist insight and a pragmatist program. Fish insists that a pragmatist program is inherently contradictory because it "is unfaithful to its own first principle (which is to have none)."[71] Undeniably, Fish reveals a danger in any pragmatic prescription—the danger of subtly reinstating the notions of transcendent order that it presumably rejected. But whether this tension rises to the level of a disabling contradiction depends on many things. One is the nature of the initial pragmatist insight: Fish's articulation of pragmatism's first principle, "which is to have none," is rhetorically clever but substantively slippery. It conceals the fact that for at least some pragmatists, it is only the notion of transcendent, transcontextual principles—a normative unity to which everyone can subscribe—that is suspect. Pragmatists do not deny themselves all principles and rules: Even Fish himself resorts to linguistic principles when he speaks and writes. Moreover, many pragmatists recognize principles that are contingent or specific to a particular context; others accept or strive for normative agreement, acknowledging that it is only partial, transient, or strategic. Any contingent prescription might rigidify into foundational principle if one lost sight of its inherent contingency, but such a result is not inevitable. In fact, the "pragmatist contradiction" is not a contradiction at all unless, as with Fish, every tendency is a fait accompli.

The irony of Fish's argument is that it ultimately achieves its own oddly foundational character. As Fish draws the conclusion that "nothing follows" from a range of different theoretical settings, he loses the emphasis on contextuality that is the saving grace of much pragmatist normativity. As his accounts of various forms of theorizing and practice begin to merge into one, he misses the sense of variety, difference, and contingency that characterizes life in the antifoundationalist world. As Fish declares in the final sentences of the book:

> [T]he point is that there *is* no point, no yield of a positive programmatic kind to be carried away from these analyses. . . . [E]ither in the form of some finally successful identification of a foundational set of standards or some program by which we can move away from standards to ever-expanding liberation—it's

68. In *Being Interdisciplinary Is So Very Hard to Do,* Fish considers efforts to enlarge the boundaries of one's local vision as ill-disguised attempts to transcend boundaries altogether. Pp. 231-42. This argument is another example of Fish's reductio ad absurdum conclusion that any effort to move beyond the local is disingenuous and impossible. *See* text accompanying notes 56-57 *supra.*

69. *See* note 67 *supra.*

70. *See* Resnik, *supra* note 61, at 1928-29.

71. P. 209.

> the unavailability of such a yield that *is* my point . . . . People absolutely go bonkers when they hear that, but *that's the way it is.*[72]

One suspects that he has departed the antifoundationalist domain for the harsher climes of objectivism.

III. Will the Real Stanley Fish Please Stand up?

Even if Fish's argument were not marred by overstatement and contradiction, one might still question the goals that inform his effort. By the time the book concludes, Fish has spent more than 100 pages counseling normative inaction to his fellow theorists, decrying all efforts to undertake specific programs based on the theoretical insight that he shares. What kind of views or beliefs could animate such an effort? It seems possible that this crusade is a product of Fish's ill-concealed pique at the self-importance and political posturing of academics—a stance he derides with uncharacteristic ill humor in *The Unbearable Ugliness of Volvos.*[73] Yet one wonders whether he could actually believe that scholars should jettison all hope of drawing normative commitments from their theoretical investigations, and content themselves with simply interpreting their texts and "enjoy[ing] the fruits of their professional success" (a course he recommends to the politically angst-laden New Historicists in *The Young and Restless*[74]).

The ultimate question, as one finishes *There's No Such Thing as Free Speech,* is what Stanley Fish considers a good academic life. One is tempted to look at Fish's own example—not only because he's the author, but because he seems so thoroughly satisfied with his efforts. Here too, the book is a fruitful source of answers, as it provides a fascinating second text: not the substance of Fish's collected remarks, but the record of his interventions. Once the reader has assimilated the main point, she can look to the contexts in which Fish made it, and the smaller, more local, arguments he offered on the way to or from this point. This second text delivers its own message: one that offers a thought-provoking contrast, or complement, to his putative point.

At one level, this second text reveals "the contemporary sophist":[75] a scholar who exposes the contingency of ostensibly foundationalist discourses, only to return to rhetoricity;[76] a man who finds it more important to be right (that is, persuasive) than to be subtle; an interpreter who creates the sources of his authority as he goes along, using whatever materials he finds in his way. But the second text also reveals a scholar who infuses his more "local" efforts with demonstrably normative content. Fish's practice is normative in that it

---

72. P. 307 (second emphasis added).

73. Pp. 273-79.

74. P. 256.

75. This is taken from the title of an interview with Gary Olson, *Fish Tales: A Conversation with "The Contemporary Sophist."* Roger Kimball coined the label, according to Olson. P. 281.

76. It is unlikely, however, that those less committed to rhetoricity than Fish will find that the familiar rhetorical gambits of any interpretive practice have the same force once the incontrovertible foundations of their claims have been exposed as contingent. One might recall that the characters in *The Wizard of Oz* had a difficult time adhering to Oz's demand that they ignore "that man behind the curtain."

embodies a judgment of good or bad, rather than a statement of what is, and it reflects his efforts to intervene in particular political debates. Even more surprising than the fact that there is a normative strain to Fish's practice (which, in itself, reflects no tension with his theoretical observation that "nothing prescriptive follows") is the fact that the particular content of his practical contribution is in perceptible ways connected to his theoretical, antifoundationalist insight.

The best example of Fish's theory-inspired practice is his participation in the multiculturalism debates. While he loses interest in describing how the argument should proceed once he unmasks the debate as rhetorical, his decision to participate in these debates in order to expose their rhetoricity is an important normative intervention. This is one of those rare occasions when the simple iteration of the antifoundationalist insight—without more—will itself produce politically significant results.[77] At the very least it will decrease the likelihood that pundits like Dinesh D'Souza will get away with claiming uncontroversial ownership of terms like "tradition" and "common heritage." The antifoundationalist insight may also help advocates of multiculturalism to redefine the terms of a debate they have been losing. Moreover, Fish's tone in most of these essays suggests that the political significance of his participation is no accident. His proclamations are not those of a "mistake of central casting"; on the contrary, they reveal the fire of a true believer. For example, Fish's final lecture assails the complicity of many Americans in the appropriation by racists and other intolerants of the morally valorizing terms of equality, fairness, and opportunity:

> Bowing down to the letter at the expense of the spirit is the practice of those who come to us today as wolves in moralists' clothing, the practice of David Duke when he prattles on about equality, the practice of George Bush when he inveighs against nonexistent quotas in the name of fairness . . . the practice of those Alabama students whose passion for the law "forces" them to oppose funding for the gay/lesbian alliance . . . . All of these have become adept at encoding a virulent message in the most high sounding terms. . . . This is the package being sold to many who are only too eager to receive it because it enables them to hold up clean hands at the very moment they are sharing in dirty work. The only question is, are *you* buying?[78]

As an expert in rhetoric, Fish is predictably incensed by the unchallenged appropriation of valorizing terms. But Fish displays more than the usual irritation at such appropriation. The pitch of his outrage is distinctly moral and normative. He pointedly castigates specific actors for their blatant intolerance. That such outrage may have fueled his participation in one of the few settings where simply stating his antifoundationalist insight could make a difference suggests a strong connection between his theory and its practical deployment.

While it may be the most pointed, this example of a link between Fish's theoretical insight and normative practice is not isolated. Although in few

77. In the multiculturalism debate, this insight reveals that there is no shared, uncontroversial understanding of terms like "common" or "tradition," and that all interpretations, those of canon supporters and reformers alike, are subject to challenge.

78. Pp. 100-01.

other cases does simply pointing out the rhetoricity of an interpretive position change the debate, in several instances antifoundationalism leads Fish to positions critical or prescriptive of more local practices. In his critique of several exponents of New Historicism, his unremarkable claim that all interpretations are historicist, only differently so, leads him to the interesting critique that some New Historicists, by hewing to a narrower interpretation, fail to avail themselves of historical resources that would materially strengthen their theories.[79] In the First Amendment essays, meanwhile, Fish's observation about the rhetoricity of doctrine leads him to reject categorical analysis in favor of balancing.[80] These are not, I believe, proposals that affect only the arcana of practice: Few legal scholars would agree that acknowledging the fluidity of the boundary between "speech" and "conduct" bears only indirectly on legal theory. Fish's professional life reveals varied and mutually reinforcing relations between his theoretical insight and his practical, normative interventions.

I suspect that Fish would not dispute any of this. Carefully read, his theory doesn't preclude normativity; it simply says that it cannot be done usefully, or without contradiction, at the level of generality characteristic of (high) theory. Fish might even agree with my conclusion that he is more compelling in the careful, analytic mode characteristic of his practice.[81] What Fish would dispute, however, is my ultimate conclusion: that his juxtaposition of literally fruitless theorizing and richly normative but unremarked practice is a strange way to do business. It renders theory arid and unproductive, while making practice something widely done and relished but never talked about, like masturbation or anonymous philanthropy.

The greatest flaw in this approach is that it leaves those who have come to share Fish's antifoundationalist insight wondering what it means for the conduct of their professional lives. After all, we don't need more than one scholar devoting himself full time to disseminating the message that nothing follows from that insight. What seems more important is to explain the kind of local or practical—as opposed to metacritical—normative positions that might follow from it. This must be done by reference to particular contexts, which means that it shifts the discourse a little: In the context of Fish's work, it may exclude some readers of an essay that began at the metacritical level and moved to a more particularized disciplinary locale. But many of Fish's essays have this character anyway, and he is surely not the only scholar capable of engaging in both kinds of discourses in the context of a single essay or book. Why not explore the relations between the two domains, explaining that excursions into (normative) practice represent local, contingent applications of a general metacritical insight—with ample comment on the contextual limits of such

79. Pp. 264-65.

80. P. 126.

81. In one of the few poignant passages of *Milton, Thou Shouldst be Living At This Hour,* Fish relates his pleasure at being identified by a waitress at a local diner as "Stanley Fish, the Miltonist." P. 272. The modesty evident in his pleasure at this identification suggests Fish himself takes his greatest satisfaction from his more local interpretive practices rather than his controversial forays into high theory.

normativity? If Fish believes that simply naming a contingent connection between theory and practice transforms it into a transcontextual essence, then his fear of the slippery slope is even worse that it appears. I suspect, though, that this is not his only reservation. Attention to such particularized and variable connections would mar the glib symmetry of his argument; it would inject too much of the contingency he claims to celebrate into his own projects of scholarly persuasion. Yet it would certainly have its rewards: It would bring Stanley Fish—with all the infuriation and illumination his participation inevitably entails—into the world where the rest of us live.

Until Fish resolves to experiment with such promising connections, we are left with two apparently contrasting alternatives. There is the Fish who numbs his readers with the repetitive drumbeat of an unyielding and overstated metacritical theory. And there is the Fish who moves nimbly, if stealthily, from high theory to normative, theoretically informed practice. I know what I like, how about you?