

## REVIEW ESSAY

### ALMOST A PRAGMATIST

STANLEY FISH, *PROFESSIONAL CORRECTNESS: LITERARY STUDIES AND POLITICAL CHANGE*, Oxford University Press, New York (1995) (146 pages) (\$19.95 cloth)

STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO*, Oxford University Press, New York (1994) (332 pages) (\$25.00 cloth) (\$11.95 paper)

*Geoffrey W. Castello\**

Stanley Fish insists that he is not a pragmatist.<sup>1</sup> In fact, at times it seems that pragmatism is a dirty secret that Fish would like to keep in a closet, only pulling it out when he is alone, or when he lets his guard drop. After reading Fish's two latest books—*Professional Correctness: Literary Studies and Political Change*<sup>2</sup> and *There's No Such Thing as Free Speech and It's a Good Thing, Too*<sup>3</sup>—and Fish's earlier book, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies*,<sup>4</sup> the only conclusion that can be drawn about Fish is that he is the most pragmatic non-pragmatist in the world.

Although the bulk of this Essay is devoted to *There's No Such Thing as Free Speech*, Fish's most recent book is a continuation of the themes first visited there. It seems that Fish's hesitancy about either claiming the title of pragmatist (a title which has enjoyed a

---

\* Associate, Stryker, Tams & Dill, Newark, New Jersey; J.D., Seton Hall University School of Law, 1995; M.A., The University of Chicago, 1991; B.A., Eastern Nazarene College, 1985.

<sup>1</sup> Fish most recently repeated this familiar mantra at a conference titled "The Revival of Pragmatism" held at The Graduate School and University Center, The City University of New York, on November 4, 1995. Fish was the final speaker of a two-day conference and was asked to sum up all of the papers presented and to put that "Fish spin" on the conference. As usual, he had the last word.

<sup>2</sup> STANLEY FISH, *PROFESSIONAL CORRECTNESS, LITERARY STUDIES AND POLITICAL CHANGE* (1995) [hereinafter *PROFESSIONAL CORRECTNESS*].

<sup>3</sup> STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO* (1994) [hereinafter *THERE'S NO SUCH THING AS FREE SPEECH*].

<sup>4</sup> STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989) [hereinafter *DOING WHAT COMES NATURALLY*].

resurgence in the past five years) or having the title tagged on him stems from the fear that if he were so tagged, he would no longer be Stanley Fish. This would mean that he would not be able to do what he does best: take on everyone else, allies and opponents alike, on his own terms and without any qualifying labels. He accomplishes this task brilliantly in these latest books. The question still persists: Who is Stanley Fish? Fish says that:

[I]’m a localist, which is already almost a dangerous thing to say. By that I mean I don’t have an intellectual agenda in any strong sense, or to put it in deliberately provocative terms: I don’t have any principles. If I believe in anything, I believe in rules of thumb, in the sense that in any tradition there are certain kinds of aphorisms or axioms which encode that tradition’s values, purposes, and goals; and people who are deeply embedded in that tradition are in some sense, often below the threshold of self-consciousness, committed to those values, purposes, and goals which, however, can in the course of the history of a tradition or profession, change.<sup>5</sup>

This type of response is typical of Fish because it forces the reader to ask the next question (to himself or herself): “What does that mean?” When Fish makes this type of statement, he comes off sounding like a thorough-going pragmatist. What his critics on the right hear are the words of a left-wing academic and an apologist for the feminist-gay-deconstructionist-ethnic studies crowd or, as he has been labeled (a label which he fully embraces), a contemporary sophist.<sup>6</sup> Fish is also criticized from the left for his perceived complacency and lack of moral depth.<sup>7</sup> To the astonishment of his right-wing critics, Fish maintains that he is a conservative.<sup>8</sup> Once again, Fish confounds his detractors on his own terms.

In *There’s No Such Thing as Free Speech*, Fish continues his antifoundationalist project, which he traces back thirty years to the time when he was a young Milton scholar. The book is comprised of various essays ranging from the culture wars to pragmatic jurisprudence to Milton, Fish’s academic bread and butter. The first part of the book is a collection of essays which were rewritten based upon a series of debates between Dinesh D’Souza, who most re-

---

<sup>5</sup> *THERE’S NO SUCH THING AS FREE SPEECH*, *supra* note 3, at 298.

<sup>6</sup> ROGER KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION* 143-65 (1990).

<sup>7</sup> See CHRISTOPHER NORRIS, *UNCritical THEORY: POSTMODERNISM, INTELLECTUALS AND THE GULF WAR* 126-58 (1992).

<sup>8</sup> Adam Begley, *Souped-Up Scholar*, *THE NEW YORK TIMES MAGAZINE*, May 3, 1992, at 50.

cently wrote *The End of Racism: Principles for a Multiracial Society*,<sup>9</sup> and Fish. The first part of the book ends with two essays on free speech and the First Amendment and a short essay on liberalism. The second part of the book focuses more on contemporary debates within legal studies and literary studies. Both parts of the book give a dated<sup>10</sup> but illuminating glance at the ever-moving mind of one of the academy's most provocative characters.

### I. THE WAY FISH SEES IT

From the introduction on, Fish advances the view that there is no such thing as perspicuous truths. All so-called truths are based on particular perspectives, assumptions, and values that are trapped in time. In a word, anything that can be called a "Truth" is contingent. No matter what one does to insulate one's self from the fray of human existence, one's notion of truth (capital T) will never amount to anything more than a contingently held belief. This belief—that there is nothing more to truth than the language which we use to describe it—is common to Nietzsche's perspectivism. Nietzsche's perspectivism held that there are no principles or beliefs which are independent from, or prior to, interpretation.<sup>11</sup>

For both Nietzsche and Fish, there is no reality out there to tell us which culture, or which perspective, is superior. All accounts of reality are equally idiosyncratic and historically conditioned. That is not to say, however, that all cultures are equal or that all truth is the same. Fish follows the suggestion of the philosopher Donald Davidson, who says that all beliefs are true.

Fish develops this line of thinking when he addresses the use of the term "political correctness." The opponents of political correctness, according to Fish, attack the PC group because "[p]resumably, what is deficient about 'political correctness' is that its judgments of right and wrong are made from an angle, from a site of interest, from a position colored by partisan desires. Really correct correctness, on the other hand, would proceed from no angle, no interest, no partisan desire, but from the perspective of truth."<sup>12</sup> Such a position does not exist for Fish because "no human being sees truth directly, stands to the side of interest, sees

<sup>9</sup> DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1995).

<sup>10</sup> Most of the essays in the book were written from 1990 to 1992.

<sup>11</sup> For an excellent discussion of Nietzsche's perspectivism, see Alexander Nehemas's 1985 book on the philosopher. ALEXANDER NEHEMAS, *NIETZSCHE: LIFE AS LITERATURE* 42-73 (1985).

<sup>12</sup> THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 3, at 79.

by more than partisan lights."<sup>13</sup> When Davidson and Fish assert that all beliefs are true, they are saying that one believes one's own truths. However, as Fish sees it, those truths are always in dispute.

Fish merely wishes to point out that no matter what one says about a given subject, the individual ends up approaching it from a local perspective, which means a political perspective.<sup>14</sup> This point sets the tone for the entire book. No matter what one does to avoid it, every utterance out of one's mouth will be a mere belief or political truth (as opposed to being a capital "T" truth). Fish defines politics as "a synonym for what everyone inevitably does."<sup>15</sup> In this sense, politics is a synonym for belief. This follows the Jamebian notion that truth "is whatever proves itself to be good in the way of belief."<sup>16</sup>

In Fish's view, there is no such thing as nonpolitical existence. All of life is touched by politics, even the lives of those who claim to abhor this type of politics *qua* subjective belief. This means that the very people who rail against multiculturalism, claiming that it is a special interest, are actually arguing from the perspective of a special interest or the perspective of a political belief themselves. For the antimulticulturalists, this amounts to saying that all of the special interests (*i.e.*, feminism, speech codes, and multiculturalism, to name a few) are unguided by reason because they are, as Fish nicely says, tainted by "time, circumstance, and the accidents of class, race, and gender."<sup>17</sup> It is impossible, according to Fish, to remove one's self from time and circumstance to proffer the arguments such as those of the antimulticulturalists. Hope as they might, the antimulticulturalists are not arguing from the secure foundations that they think they are.

Stanley Fish, on the other hand, is a man without a foundation, and he is quite proud of that fact. Fish would ask: "What do foundations and theory have to do with legal practice anyhow?" Fish's reply is that they have nothing to do with the practice of law, and as such have no place in it. Without foundations, however, how is one expected to do legal work? The answer is simple, and

---

<sup>13</sup> *Id.*

<sup>14</sup> Fish contrasts the two meanings of "political" in his most recent book. There is the "general (and trivial)" use of the term "political," which means that "every action is rooted in a contestable point of origin," and the more "usual sense" of the term "political," which refers to "actions performed with the intention of winning elections or influencing legislators." *PROFESSIONAL CORRECTNESS*, *supra* note 2, at 50. Fish's writing, and this essay, focuses on the former use of the term.

<sup>15</sup> *Id.* at 18.

<sup>16</sup> WILLIAM JAMES, *PRAGMATISM* 37 (Bruce Kuklick ed., Hackett 1981) (1907).

<sup>17</sup> *THERE'S NO SUCH THING AS FREE SPEECH*, *supra* note 3, at 7.

Fish captures it in his introduction when he says that "[i]n a pragmatist world, what you say is what you get."<sup>18</sup> For Fish, and most contemporary pragmatists, language is the starting point and the ending point. Our beliefs only make sense in the context of a particular use of a particular language. Beliefs are not underwritten by anything larger than a local use of language. Once the notion that all truth comes from above is dropped, the philosopher and lawyer can become useful to his or her community.

The key to understanding Fish and contemporary pragmatism is language. Words and how they are interpreted are the beginning and the end for Fish. How words are used in sentences and exposing those uses are his passions. Fish is one of the foremost spokespersons for the interpretive school and, because of his antifoundationalism, he is a suspect of both the left and the right. Fish would not have it any other way. To understand Fish, one must understand the relationship between antifoundationalism and politics. Antifoundationalism is the belief that one is always interpreting a given text from within a context. That is, interpretation is bound to a particular time and place. For instance, the "right to free speech" is not metaphysically transcendent. It is contingent on the particular beliefs of the user of the phrase "the right to free speech." More importantly, what is free speech for one user may be the opposite for another. All uses of language are contingent and bound to a particular set of political, social, and historical influences. Language is manipulated within a certain vocabulary. Therefore, all uses of language or texts reflect the needs of the interpreter and not the "Truth" of the text.

In the essay *The Common Touch, or, One Size Fits All*, Fish argues that if the people who decry the advent of "special interests" such as multiculturalism, feminism, gender studies, and ethnic studies are deprived of the vocabularies that they employ to expose what they see as a grave danger to Western Civilization, then the urgency is taken out of their polemic. Fish's basic argument is that the "backlashers," as he calls them, are as enmeshed in politics as the "special interest groups" against which they are reacting. Once we dispose of words such as "common" and "general," it is easier to see that everyone is arguing from a perspective, a place in history.

Every individual is "embedded in local practices"; therefore, all interpretation is local rather than transcendent. No matter how hard we try to escape from the forces that have formed us as individuals, "no description of how things are from a God's-eye point

---

<sup>18</sup> *Id.* at 23.

of view, no skyhook provided by some contemporary or yet-to-be-developed science, is going to free us from the contingency of having been acculturated as we were."<sup>19</sup> For Fish, this means that the backlashers are as guilty of being guided by a political agenda as are the special interest groups. Guilty, however, is the wrong word to use because no matter what an individual does to distance herself from where she is, she will always be there.

This is what makes the idea of a "common ground" impossible for Fish. He says that "[t]he common, in short, is a contested category; its content will vary with the varying perspectives of those who assert it."<sup>20</sup> To put it another way, Fish says that difference makes the hope for commonality simply wishful thinking, because difference goes all the way down. In this sense, Fish is substituting the concept of the political or ideological for the concept of difference. Fish is quick to caution those who would use difference as a substitute for the common. Difference *qua* common is as equally anathema to Fish as the concept of the common alone. The common for one group will always be different for another. Try as one might, neither group can escape from "the grasp of the political" and move to the higher ground, which is to say no ground at all.

This obviously opens up those who agree with Fish to the charge of cultural relativism. This charge asserts that moral decision-making is impossible if all normative claims to truth are exposed as being merely local, not universal. Fish is quick to point out that the poststructuralist take on this phenomenon is to show that ethical judgments are inevitable, not impossible.<sup>21</sup> "Antifoundationalist thought, properly understood, is not an assault on ethics but an account of the conditions—textual and revisable, to be sure—within which moments of ethical choice are always and *genuinely* emerging."<sup>22</sup> This means that when an individual holds a common ethical position (which is to say a belief), she will be making ethical decisions based on that belief. For Fish, there is no general viewpoint, only local beliefs. The debate for Fish is not split between the good guys (the neoconservative reactionaries)

---

<sup>19</sup> RICHARD RORTY, *OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS, VOLUME 1*, 13 (1991). The only possible skyhook is change, what Rorty calls "toeholds for new initiatives." See also *DOING WHAT COMES NATURALLY*, *supra* note 4, at 141-60. Both Fish and Rorty start with the belief that we all live within interpretive communities, which are based on the sheer contingency of our birth. As such, we all take with us the baggage that we pick up from that starting point. The prospect for change, however, is always open.

<sup>20</sup> *THERE'S NO SUCH THING AS FREE SPEECH*, *supra* note 3, at 36.

<sup>21</sup> *Id.* at 39.

<sup>22</sup> *Id.*

and the bad guys (the leftist poststructuralist radicals), but between two competing political agendas, each of which is thoroughly informed by local concerns.<sup>23</sup> As Fish sees it, the triumph of either side over the other will have little, if any, effect.

The debates between Fish and D'Souza during their five-campus tour focused on D'Souza's vehemence for the multiculturalist movement and Fish's love for getting under people's skin by employing an arsenal of rhetorical weapons. Although the reader does not have the benefit of D'Souza's responses to Fish's papers, anyone familiar with Fish's writing or public speaking and D'Souza's anti-affirmative action/no special treatment position can imagine what the response and ensuing debate were.

The five essays that emanated from the debates with D'Souza all follow Fish's common theme that all vocabularies are political. These essays are Fish at his rhetorical best. Fish will embrace any opportunity that he can to wax rhetorical, and the whole political correctness/culture wars debate, which has largely subsided by now, gave Fish plenty of ammunition. Although these essays are not as useful for the reader who is interested in the practical application of Fish's thought to the practice and theory of law, they provide a good glimpse of Fish at work.

In *The Empire Strikes Back*, Fish points out that the very attack on political correctness—which the attackers claim is based on transcendental truths—is, in fact, nothing more than politics. The only difference between the two divergent political agendas is the difference itself and the way that the two groups utilize language to further their agendas. Language has taken a front seat in recent intellectual history. Interpretation comes before that which is being interpreted. For Fish, this means that the vocabulary that a particular person uses “precedes his or her entrance into the practice and constitutes its prism—limits, and by limiting shapes what can be seen.”<sup>24</sup> This is a crucial point in Fish's approach to any text. The interpretive activity is central and foremost. Nothing is a given for Fish; everything is constructed. The reason why Fish is seen as a danger to the agenda set forward by Cheney, Bennet, and Kimbell is that he refuses to accept notions of “traditional” thinking. Fish claims that

notions of objectivity, accuracy, verisimilitude no longer provide the comfort and guidance they once did, for they are now not absolute judgments, but judgments relative to differing and

---

<sup>23</sup> *Id.* at 49.

<sup>24</sup> *Id.* at 57.

competing vocabularies or paradigms; and a whole host of distinctions—between fact and value, norm and deviation, reason and rhetoric, center and periphery, truth and politics—become, if not untenable, at least *disputable* in any of their proffered forms.<sup>25</sup>

Even though the “soldiers of the new and old right” are working within these paradigms, Fish’s point is that they refuse to admit so. Instead of acknowledging that they are using a particular vocabulary to further a particular agenda, the adherers to the right, as Fish sees it, are attempting to turn back a revolution that they are very much a part of. It is unlikely, however, that the right, or the left for that matter—a group which Fish sees as falling into the same trap—will ever admit as much. Fish’s simple point is that no matter what one does, one will always be trapped within a particular language game. And although acknowledging this is a difficult pill to swallow, it is better to start the debate off with this as a point of agreement, rather than pretend that one is not using a vocabulary informed by perspective at all, but rather by truth.

In *Reverse Racism, or, How the Pot Got to Call the Kettle Black*, Fish argues that a “forgetting of history” has given some people a platform to claim that affirmative action is reverse racism. Fish’s argument centers around his belief that the original racism which led to the need for affirmative action programs is not the same as the racism, if it can be called that, which is in response to it.<sup>26</sup> The one is a “virus,” the other a “remedy.”

According to Fish, if one were to pay attention to the so-called reverse racism practiced in America today outside of the context of American racial practices, one would agree with the claims of people like D’Souza who say that “it’s not fair.” Once you look at the historical context within which American racial practices have left us, however, it is clear to Fish that the only way to tilt the playing field back in the other direction is to correct the past racism by putting certain affirmative action programs into place. More important, however, for Fish is to show that any vocabulary “emptied of its historical content” and any attempt to call the victims of racism racist must be rejected.<sup>27</sup>

Fish continues his examination of the anti-affirmative action position in *You Can Only Fight Discrimination with Discrimination*. Discrimination can only be remedied through discrimination be-

---

<sup>25</sup> *Id.*

<sup>26</sup> THERE’S NO SUCH THING AS FREE SPEECH, *supra* note 3, at 61.

<sup>27</sup> *Id.* at 68.



cause the calls for nondiscriminatory practices are illusory. So-called nondiscriminatory concepts such as merit and fairness are contestable and are "differently defined depending on what assumptions inform those who brandish" them.<sup>28</sup> The idea that there are policies free of assigned values is equally illusory. Concepts such as fairness and merit are infected with bias because those who advocate their use have written the rules of the game. More importantly, as Fish sees it, they are the only ones who have the rule book. Regardless of your motives or beliefs about affirmative action, whether for or against, Fish says that you are being faithful to your convictions. Thus, instead of the title "politically correct," Fish prefers "faithfully correct." This would be a title applied to all people, equally.

In the essay *Bad Company*, Fish attempts to debunk the misguided belief that "leftover sixties revolutionaries who have traded in their beards and beads for tweed jackets and tenured positions in the universities"<sup>29</sup> are responsible for destabilizing the Western Anglo-Saxon tradition through a blend of deconstructionist theory and multiculturalism. What Fish sees is a direct link between the anti-immigration proponents of the nineteenth century and the antimulticulturalists of today. Although the nineteenth century was more overtly racist, both vocabularies seek to do the same job. That is, they both seek to promote a political agenda which leads to the "disadvantaging of certain groups."<sup>30</sup>

This political agenda is aided by the use of what Fish refers to as code words ("Common values," "national unity," "American character," "one people," a "single nation"). Although the use of these words may be benign enough, Fish cautions the user to "consider the source."<sup>31</sup> Even words that seem to be unable to do any harm must be viewed as politically charged because, for Fish, the assumption that "ideas exist in some eternal realm or depoliticized marketplace of ideas" is wrong.<sup>32</sup>

Fish goes on to say that "[t]he ideas that are the stock-in-trade of the argument against multiculturalism originated in bad purposes and have traditionally done bad work, and to those who find them congenial today, I say will make bad company."<sup>33</sup> Fish's detractors no doubt would like to inform Fish that he has simply

---

<sup>28</sup> *Id.* at 73.

<sup>29</sup> *Id.* at 80.

<sup>30</sup> *Id.* at 86.

<sup>31</sup> *Id.* at 87.

<sup>32</sup> *Id.*

<sup>33</sup> THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 3, at 87.

fallen into the same trap into which he accuses them of falling. Fish sees any attempt to utilize a vocabulary of code words which is dressed up in a language of objectivity guided by Reason as simply wrong. In turn, his detractors will counter that he is using an equally politicized vocabulary to further his agenda. The difference between Fish and his detractors is that Fish would probably agree with them on this point.

Words like "merit" or "fairness" are code words for Fish. In *Speaking in Code, or, How to Turn Bigotry and Ignorance into Moral Principles*, Fish analyzes these code words and others that he believes are used to further agendas that seek to do anything but endeavor to actually realize a society where such concepts are put into practice. Code words are "being employed in the service of racism."<sup>34</sup> To make his point, Fish quotes the following statement from David Duke: "What we want in this country is equal opportunity for everyone, not affirmative action for a few." Fish's point is that Duke wants anything but equality for everyone, and that these type of coded messages are "so transparent that for all intents and purposes it is *literal*."<sup>35</sup> These coded messages are the offspring of ignorance and bad faith. The problem with the use of code words and coded messages, as Fish sees it, is that they allow the enemies of Fish's version of political correctness to utilize a vocabulary by which they can decry results of a racist society, while at the same time they can perpetuate it.

Fish summarizes his distaste for liberalism, of which he claims "he never tires,"<sup>36</sup> in the essay *Liberalism Doesn't Exist*. Tolerance, the *raison d'être* of liberalism, is impossible, according to Fish. In order for the liberal agenda to be successful, an agenda born of the belief that Reason can guide an individual or society to more tolerance, the particular beliefs of the individual or society would have to be denied. As one can imagine by now, Fish thinks that this will never happen. And he is right. No individual will ever be able to give up her belief system in the service of the greater liberal good, which is tolerance, or any greater good for that matter. This is a cardinal precept of the antifoundationalist/pragmatist vocabulary. She may, however, add new beliefs in order to accomodate her desire to further a perceived greater good.

On the other hand, a legitimate question that the liberal might ask Fish is: "What should we do to make sure that everyone

---

<sup>34</sup> *Id.* at 89.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 296.

is treated with the same amount of tolerance, or at least some tolerance?" I am not sure what Fish's exact response to such a question would be, but it would probably be something along the lines of: "Do whatever you want, use whatever vocabulary you want, just don't dress it up in the uniform of Reason." This is because reason itself is a contingently-held belief; that is, it comes from "the realm of particular (angled, partisan, biased) assumptions and agendas."<sup>37</sup> As such, the person or group who gets to define reason wins. One problem with Fish is that he will never let you know what you can do after he has pulled the foundations out from under you.

Fish's common theme that no vocabulary is free from the baggage that the user of the vocabulary brings with him or her is continued in his two essays on free speech. Fish tips his hand in the introduction when he says that if one has an answer to the question, "What is free speech?," then one is already certain that certain types of speech should not be free. That is to say, even the vocabulary of free speech is guided by the constraints of the person who is going to answer the question. In the essay *There's No Such Thing as Free Speech, and It's a Good Thing, Too*, Fish states that the concept of freedom of speech "is a conceptual impossibility because the condition of speech's being free in the first place is unrealizable."<sup>38</sup> The concept of "free speech" is unrealizable for Fish because free speech is whatever serves one's particular purpose. That is to say, free speech, like all speech for Fish, is political.

He makes this point when he says that "[w]hen the First Amendment is successfully invoked, the result is not a victory for free speech in the face of a challenge from politics but a *political victory* won by the party that has managed to wrap its agenda in the mantle of free speech."<sup>39</sup> This time, Fish's target is the liberal left, who he says has yet to understand, or acknowledge, that this is the case. Fish views the liberal left as holding onto the belief that free speech must be guarded, that it must be kept free, at any cost, through the use of value-neutral vocabularies and appeals to reason, something which he believes is impossible.

Fish is not attempting to say that First Amendment principles are bad, or that we should do away with free speech. What he is attempting to say, however, is that all speech should not be free, because some speech is so harmful that its effects outweigh so-

---

<sup>37</sup> *Id.* at 135.

<sup>38</sup> *Id.* at 115.

<sup>39</sup> *Id.* at 110.

called concerns about the need for free speech. Fish anticipates an attack from "hard-core First Amendment advocates" in protest to his statements regarding free speech. His point is that even these hardliners regulate speech—that is, free speech that does not fit into their vocabulary. This is done by stating that the speech that is being regulated is not speech at all. Basically, whoever gets to define speech, even when it is not speech at all, gets to regulate it.

In *Jerry Falwell's Mother, or, What's the Harm?*, Fish states that one must ask the question:

"Does this speech contribute to the healthy flourishing of the relevant values, or is it positively dangerous to their continued existence?" If you don't ask this question, or some version of it, but just say that speech is speech and that's it, you are *mystifying*—presenting as an arbitrary and untheorized fiat—a policy that will seem whimsical or worse to those whose interests it harms or dismisses.<sup>40</sup>

The act of wrapping language up in mystical garb is completely contrary to the pragmatist's creed. When inquiring whether or not particular speech is harmful, Fish applies what he calls a "pragmatic (anti)principle," rather than a general principle of free speech.<sup>41</sup> This antiprinciple holds that general principles about whether speech should be regulated or not must give way to local considerations of what type of speech is best for a given situation. The pragmatist assumes that speech is governed by political considerations and works from that assumption.

For the pragmatist, "speech is never *just* speech," and language is not created in a vacuum. Therefore, the pragmatist's contention regarding speech is that it is a social construct which is meant to serve a given community. Fish suggests dropping terms such as "freedom of speech" or the "right to individual expression" every time the debate about speech arises, which he claims make for bad argument because these terms are infused with politics. Fish's pragmatic contention is that the First Amendment has a purpose only if the interpreter of the First Amendment gives it a purpose. It does not, to be sure, have a purpose which stands apart from its use. Therefore, any attempt to appeal to general principles to further free speech is impossible because speech, free or otherwise, can never be free of the politics of the interpreter.

In adopting such a position, Fish once again exposes his pragmatic tendencies. The pragmatist is not concerned with searching

---

<sup>40</sup> THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 3, at 123.

<sup>41</sup> *Id.* at 111

for an overarching principle outside of history, which informs him or her what speech should be protected. The pragmatist is only concerned with finding a way to get his or her point across that this type of speech, rather than that type of speech, should be protected. The pragmatist starts with his or her local position or context and moves forward from there. Fish's candidate for a theoretical, really an antitheoretical, approach to free speech analysis is "balancing," as opposed to categorical or principled analysis.<sup>42</sup> Whereas categorical analysis seeks to determine whether a particular use of language is free speech which should be protected, balancing seeks only to determine how the use of the language affects all of the concerned parties. The inquiry should focus on the effect of the speech. Fish correctly observes that this approach will be categorized as *ad hoc* and unprincipled, unworthy of serious consideration. This is, however, the same reaction that pragmatists have encountered for a century. The pragmatist would merely point out that even if one does not acknowledge it, everyone is already employing an *ad hoc* approach to free speech, even those who subscribe to the categorical approach. The difference between the pragmatic approach and the foundationalist approach is that the pragmatist welcomes this fact, while the foundationalist runs from it.

Citing Judge Learned Hand's decision in *U.S. v. Dennis*,<sup>43</sup> Fish says that when balancing the rights of the two sides we must ask "whether the gravity of the 'evil' discounted by its improbability justifies such an invasion of free speech as is necessary to avoid the danger."<sup>44</sup> What is the greater harm, the regulation of the speech or the injury that the speech is likely to cause? The answer to this question depends on the context in which it is asked. The regulation of speech is context dependent. Fish makes his point again that he does not intend to regulate all speech in all spaces. Instead, Fish's balancing model would regulate speech depending on the amount of harm that it may potentially cause in a given situation. When is the regulation of speech necessary for Fish? Fish's pragmatic reply, albeit one which "defies philosophical neatness," as most pragmatic assertions do, is that "it depends."<sup>45</sup> Fish qualifies this by saying that he would not propose to regulate speech unless it was necessary. To his objectors, Fish would respond that

---

<sup>42</sup> *Id.* at 126.

<sup>43</sup> 183 F.2d 201 (2d Cir. 1950).

<sup>44</sup> *Id.* at 212.

<sup>45</sup> THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 3, at 130.

any alternative that contemporary First Amendment theorists would propose is as *ad hoc* and "context sensitive" as the one he proposes.

## II. THE PROBLEM WITH BEING INTERDISCIPLINARY

Fish's most recent book, *Professional Correctness*, is made up of the 1993 Clarendon Lectures which Fish gave at Oxford University. For the most part, these lectures carry on the discussion of interdisciplinarity which Fish started in *Doing What Comes Naturally*,<sup>46</sup> and followed up in *Being Interdisciplinary Is So Very Hard To Do* (hereinafter *Being Interdisciplinary*), an essay which appears in *There's No Such Thing As Free Speech*. Fish straddles both sides of the fence between interdisciplinary studies and professionalism. At the same time that he wants to ensure the continued success of the narrow pursuits of professionalism (*i.e.*, Fish the Miltonist), he also wants to promote the view that all disciplines are merely social constructions, of which the blurring of disciplines is a by-product (Fish the interdisciplinarian).

In an antifoundationalist mode, Fish is quick to point out that even "if *everything* is socially constructed, the fact of a particular thing being socially constructed is not a fact you can do anything with."<sup>47</sup> Fish wants to make sure that if one were to acknowledge the fact that all disciplines are socially constructed, or informed by a particular local politics, that such a fact does not become a general theory. It is equally as important that a particular discipline understand the questions which make it a distinct discipline, whether that be tort law in legal studies or a poem by Yeats in literary studies. The legal theorist must first understand the relevant questions about tort law as it is handed down before she attempts to answer them in terms of economic analysis. Referring back to the accepted criteria of one's profession must give way when those criteria no longer get the job done. At that point, the profession will stretch its categories "so as to bring within them concerns and materials previously thought to be outside their sphere of competence."<sup>48</sup> In other words, when new beliefs enter the scene, old beliefs must either accommodate them or move to the side if they no longer get the job done.

Fish's concern is that the profession does not lose its distinc-

---

<sup>46</sup> See *DOING WHAT COMES NATURALLY*, *supra* note 4, at 163-311 (examining the antiprofessionalism v. professionalism debate).

<sup>47</sup> *PROFESSIONAL CORRECTNESS*, *supra* note 2, at ix.

<sup>48</sup> *Id.* at 24.

tiveness at the expense of opening its doors to every new belief or by purposefully taking on a political mission. This can be accomplished only if one engages in "a disciplinary performance without thinking of [one's self] as performing in *that* way and not in some other."<sup>49</sup> That is, the literary critic must set out to practice literary criticism and not politics when he reads Emerson. In *Being Interdisciplinary*, Fish states that "disciplines are not natural kinds; they emerge in the wake of a political construction of a field of knowledge."<sup>50</sup> That political construction is the local context out of which the field of knowledge emanates.

Fish welcomes interdisciplinary dialogue which would permit legal studies to borrow from the vocabularies of the philosophy department. Fish himself uses legal texts (Fish takes great pleasure in analyzing the body of contract law) as grist for his interpretivist mill. In this sense, interdisciplinary studies are common to Rorty's idea of the ironist who is always on the lookout for vocabularies which better describe the world than the one she is currently using.<sup>51</sup> What Fish wants to stay on guard against is any interdisciplinary attempt to give answers to all of society's ills. Fish also wants to maintain his ties to his profession, which is why he says that he is "professionally correct" in that he believes that there is a "structure of a fully articulated profession."<sup>52</sup> It seems odd to hear Fish the maverick come out on the side of tradition. And yet, that is exactly what he is doing. There are no hidden agendas here. Fish is simply abiding by the rules of his profession. Although this may seem like a novel situation to someone in the humanities, lawyers have been following the rules of their profession since its inception. Change does occur, to be sure, but it occurs slowly.

For Fish, interdisciplinary study simply means expanding one's discipline by listening to others. It does not mean engaging in wholesale cultural criticism through the use of any one discipline, or the mixing of many. He has done this extraordinarily well in the area of legal studies. In turn, legal studies has the benefit of listening to an outsider explain exactly why a certain contract case makes no sense, or why a particular rule of law simply serves a polit-

---

<sup>49</sup> *Id.* at 50.

<sup>50</sup> THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 3, at 240.

<sup>51</sup> For Rorty, the ironists are those who are "never quite able to take themselves seriously because always aware that the terms in which they describe themselves are subject to change, always aware of the contingency and fragility of their final vocabularies, and thus of their selves." RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 73-74 (1989).

<sup>52</sup> PROFESSIONAL CORRECTNESS, *supra* note 2, at 44.

ical purpose. What Fish quite correctly refuses to do is say that interdisciplinary study necessarily leads to overt political action. Fish's point is that one does not engage in literary or cultural studies to become a politician. Therefore, as Fish sees it, the goal of the New Historicists to change society through changes internal to the professions of literary or cultural criticism is not likely to be fruitful.<sup>53</sup>

Unlike academics who specialize in the humanities, legal academics do have the possibility of directly effecting national political debates. Fish takes as an example Richard Epstein, a Professor of Law at The University of Chicago. Epstein has written widely in the area of the economic underpinnings of negligence law and most recently in eminent domain cases and employment discrimination cases.<sup>54</sup> Fish is correct that law professors probably do have a more immediate connection with legislators and lobbyists (however, Fish's contention that the fact that two of Epstein's colleagues at Chicago are federal judges gives him a "leg up" is naive). The relationship between legal academics and local and national political concerns is easier to understand than that of humanities professors and those same political concerns. However, Fish has overstated his case when he all but shuts the latter out of the debate. Fish's overriding fear that the "nothing follows from this" line will not be heeded is most prevalent in statements such as this.

Fish is also concerned that cultural studies and interdisciplinarity not become the one discipline which is prior to all other disciplines. Just as literary studies follow certain rules of the profession, so must interdisciplinary studies. If this were not the case, Fish states in the Fourth Clarendon Lecture, interdisciplinary studies "would not proceed from a perspective—a 'here not there'—but from everywhere and therefore from nowhere."<sup>55</sup> As every good pragmatist knows, any claims to views from nowhere must be rebuffed. Fish sees the interdisciplinary agenda as attempting to conduct an inquiry into the time-bound and contingent socially constructed nature of individual disciplines (i.e., legal studies and literary studies) from the vantage point of the noncontingent. This was formerly the role of philosophy. This simply is not possible for Fish. He acknowledges, like any pragmatist, that the legal and literary investigations which he conducts are contingent and bound to

---

<sup>53</sup> *Id.* at 55.

<sup>54</sup> See RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); *THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

<sup>55</sup> PROFESSIONAL CORRECTNESS, *supra* note 2, at 81.



those disciplines and his own beliefs and desires. His point is that even disciplines with "grandiose new name[s] like cultural studies"<sup>56</sup> are similarly contingent. No matter what work one does, that work is done within one's particular discipline, by that discipline's rules, and with results which only that discipline cares about. What purveyors of a particular discipline cannot do *qua* literary critics, philosophers, or historians is explain how to get warring factions to start peace talks or explain why we need a balanced budget. They can explain, however, what a poem means or what Kant meant by the noumenal. Is this all that Fish the literary critic can do? For some, the disappointing answer is yes.

In the Fifth Clarendon lecture, entitled *Why Literary Criticism is Like Virtue*, Fish offers nothing more than the simple view that what he does is explicate the prose of Milton, a job that he likes.<sup>57</sup> Fish, however, is disingenuous here because he does much more than explain whether the real hero of *Paradise Lost* is Satan. He continually engages in politics. He simply will not say so for fear that if he admits that he is involved in politics (as a literary critic and law professor), he will encourage others to do the same.

Even when Fish says in the essay *Public Justification, Public Intellectuals* that academics cannot be public intellectuals,<sup>58</sup> one seems to get the feeling that Fish would like nothing better than to be the host of a late-night talk show; that, in fact, he enjoys being a public intellectual. Fish is right when he asserts that cultural studies, or any academic discipline for that matter, cannot train someone to become involved in politics. He is wrong when he says that academics as such cannot influence political change. One does not cease being an academic simply because one is doing political work. Academics can influence politics as much as nonacademics. Although his point that their status as academics does not uniquely qualify them for this task is well taken,<sup>59</sup> at times that status may count for something. Once the academic abdicates her right to speak about social or political issues (not as a cultural critic, but as a literary critic who happens to be interested in a certain social or political issue) simply because she is an academic, the only ones left to speak will be the same loudmouths that have the ear of America now.

---

<sup>56</sup> *Id.* at 86.

<sup>57</sup> *Id.* at 112.

<sup>58</sup> *Id.* at 118.

<sup>59</sup> Fish states that "if you want to do political work, in the 'real world' sense, there are (or should be) better tools in your kit than readings of poems or cultural texts or even cultures." PROFESSIONAL CORRECTNESS, *supra* note 2, at 133.

Fish is not saying that interpretive practices cannot inform politics. They can and, presumably, they do. Fish's point is that "you cannot do interpretive work (at least not in the humanities) with the intention of doing political work,"<sup>60</sup> because once one starts out with the intention of doing political work, one will have to follow a different set of rules other than those of a particular humanistic discipline. Fish closes the lecture/essay *Public Justification, Public Intellectuals*, with the suggestion that instead of training cultural critics to address the various political problems of the time, that various departments within a university simply hire lobbyists, lobbyists who will "let no opportunity go begging and allows no accusation to go unanswered."<sup>61</sup> Fish would be perfect for the job.

### III. GOING DOWN FISH'S ROAD

It is during the second part of *There's No Such Thing as Free Speech* that Fish is at his most antifoundationalist, and for that reason it is the section on which I intend to focus. In the essay *The Law Wishes to Have a Formal Existence*, Fish argues that legal theory is constantly arguing against itself by constructing a vocabulary that it never intends to use. Using contract law as his example, Fish states that the law has "perceived many threats to its autonomy, but two seem perennial: morality and interpretation."<sup>62</sup> Morality is an agenda of the particular perspective and is peculiar to how a particular person grew up, what DNA they received from their parents, and in what socio-economic environment they were raised. Morality is idiosyncratic and, in this sense, akin to politics. Interpretation is the attempt to read that particular perspective into any given situation. The goal of the law, as Fish sees it, is to offer a community a perspectiveless vocabulary whereby private disputes can be resolved by appealing to that which is beyond perspective. Fish doubts that the law can possibly achieve this goal.

Formalism is the law's answer to this problem. Fish defines formalism as the

thesis that it is possible to put down marks so self-sufficiently perspicuous that they repel interpretation; it is the thesis that one can write sentences of such precision and simplicity that their meanings leap off the page in a way no one—no matter what his or her situation or point of view—can ignore; it is the

---

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 126.

<sup>62</sup> *THERE'S NO SUCH THING AS FREE SPEECH*, *supra* note 3, at 141.

thesis that one can devise procedures that are self-executing in the sense that their unfolding is independent of the differences between the agents who might set them in motion.<sup>63</sup>

It is clear that for the formalist, whatever formalism is, it is not a morality and it is not given to interpretation because formalism allows for only a literal meaning. This is very distasteful to Fish because interpretation is central in the Fish scheme.

In *Doing What Comes Naturally*, Fish states that "there is no such thing as literal meaning, if by literal meaning one means a meaning that is perspicuous no matter what the context and no matter what is in the speaker's or hearer's mind, a meaning that because it is prior to interpretation can serve as a constraint on interpretation."<sup>64</sup> If one goes down the antiformalist road, she will find that there is nothing prior to interpretation.<sup>65</sup> Or, as Nietzsche said, there are no facts, just interpretation.<sup>66</sup> Therefore, in order to get the most play for one's interpretive acts, the individual will have to rely on persuasion when he is speaking to those outside of his interpretive community.

Fish's take on formalism is that both parties to a dispute will always refer to "a formal linguistic fact" as the reason why they should prevail. Legal advocates have been doing this for centuries. In so doing, formalism is achieved, but not in the manner that its creators had imagined. For Fish, this is an "amazing kind of success" and one he seems interested in condoning and promoting.<sup>67</sup> Try as it might to be formal, the law, for Fish, is interpretation through and through. Fish is simply saying that even when the law attempts to speak in such a manner that interpretation would be unnecessary, the interpretive task has already been completed.

We read the law as we read any other text: As a particular person, reading within a particular perspective. This means that we bring our beliefs and desires with us when we read the law and, not surprisingly, we find in the law that for which we are looking. The trick is to read your own beliefs about morality or politics into the law persuasively, thereby forcing all others behind you to begin

---

<sup>63</sup> *Id.* at 142.

<sup>64</sup> *DOING WHAT COMES NATURALLY*, *supra* note 4, at 4.

<sup>65</sup> At the recent conference at City University of New York, Fish did warn that two things to take into account once you do go down the anti-formalist road: (1) you must remain a contextualist; and (2) once you get to the end of the anti-formalist road you will find formalism (or a type of formalism), which is nothing but your particular interpretive community.

<sup>66</sup> For Nietzsche, interpretation, rather than the search for truth, was central. See generally Friedrich Nietzsche, *THE WILL TO POWER* 261-381 (Vintage 1968) (1901).

<sup>67</sup> *THERE'S NO SUCH THING AS FREE SPEECH*, *supra* note 3, at 156.

where you left off, with your conception of morality. This is a brilliant rhetorical coup.<sup>68</sup> The trick is to construct a formal system of law free from what appears to be local moralities or needs. At the same time that you claim that the law is free of all moralities, however, the proponent of the formalist conception of law must ensure that the law looks like something other than a collection of private beliefs.

Fish believes that the "so-called formal view of legal obligation was never really formal at all, but was the extension of a social vision from which it was detached at the moment of that vision's triumph."<sup>69</sup> This simply means that as soon as an individual is able to get her beliefs into the law, she must cover her tracks to make it look as though the law of contracts as we know it now was handed down from on high. A quick reading of Fish on this point will make him sound like a conspiracy theorist who believes that a Star Chamber is responsible for creating this law and then sits back to watch it do its diabolical work. In fact, Fish believes the opposite. The state of contract law as we know it today is derived, to be sure, from a particular perspective of morality. That perspective, however, could just as easily given way to a different perspective. It just so happens that, historically, it was this perspective that won out. The important point for Fish is that the process of making a formal law is what matters, not the formal law itself. For after the formal law is in place, two divergent sides to a dispute will take that formal law and do whatever they need to make it suit their needs. In this sense, the legal interpreter "asks neither the author nor the text about their intentions but simply beats the text into a shape which will serve his own purpose. He makes the text refer to whatever is relevant to that purpose."<sup>70</sup>

"Law, however, is not philosophical . . . but pragmatic, and from the pragmatic standpoint, the inconsistency of doctrine is what enables law to work."<sup>71</sup> For Fish, this is the law's "amazing trick," one that the law cannot do without. Law creates the authorities that it has pledged to serve. It is rhetorical and, for Fish, that is good. The law should not be concerned with timeless questions that can only be answered by appeals to a "God's-eye view," to borrow Hillary Putnam's phrase, but rather by looking at the current, local problem and creating local solutions.

---

<sup>68</sup> *Id.* at 159.

<sup>69</sup> *Id.* at 163.

<sup>70</sup> RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 151 (1982).

<sup>71</sup> THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 3, at 169.

Fish puts on the brakes at this point in his essay. His biggest fear is that someone will take his "law as rhetoric" approach and go the extra step of actually trying to do something with it. Fish wants to stop at the point of rhetoric. Once he has exposed the rhetorical nature of the law, even formalist law, the job of the rhetorician is done. Fish does not want to allow his rhetorical approach to lead to "antifoundationalist theory hope" where the newly-acquired knowledge of law *qua* rhetoric becomes the springboard for a "nonrhetorical perspective."<sup>72</sup> The question to Fish seems to be: "What should we do then?" He would answer that we should do nothing differently then we already do.

In the essay *Play of Surfaces: Theory and the Law*, which is adapted from a review of *Legal Hermeneutics: History, Theory and Practice*, edited by Gregory Leyh, Fish continues the argument set forth in the previous essay. Throughout this essay, Fish attacks various distinctions in legal theory, such as originalism versus nonoriginalism, determinacy versus indeterminacy, interpretivism versus noninterpretivism, and historical versus ahistorical interpretation. Fish points out that these distinctions matter little. Fish states:

A pragmatic (or radically historical) practice would be one that proceeded on the basis of no principles whatsoever, flying by the seat of its pants; but it is impossible even to conceive of a practice that was not the extension of some notion of what the world is and should be—in short, of some principle. It follows then that foundationalism and pragmatism (or historicism) cannot be the names of alternative modes of being in the world, and it follows further that identifying oneself as one or the other will not, in and of itself, determine one's practice.<sup>73</sup>

Fish does go on to acknowledge, as he should, that although theory does not matter, it may matter how one identifies oneself depending on the "conditions currently prevailing in one's practical world."<sup>74</sup> This means that if one would be better off claiming one title over the other simply to get where one needs to be, or to beat the text in a certain way, one should do so. For Fish, context matters. The fact that the law is a play of surfaces is important only to the extent that one acknowledges that nothing will flow from this. The only thing that the play of surfaces offers is the fact that law is in constant revision, requiring constant interpretation.<sup>75</sup>

---

<sup>72</sup> *Id.* at 172.

<sup>73</sup> *Id.* at 198.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 193.

In the essay *Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin*, Fish raises doubts about applying a pragmatic program to the realm of legal theory. In the first part of the essay, Fish reviews Judge Posner's book, *The Problems of Jurisprudence*. Fish states that he agrees with Posner "on almost every point"; however, as one would expect, Fish goes on to state that he does have "some quibbles" with the book. Prior to unleashing his quibbles, Fish does a nice job summarizing Posner's book, in which Posner comes out (as Fish should) to announce that after all of these years, he is a pragmatist.

Quoting Posner, Fish agrees that Posner's "practical reason" is a "'grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory'" and experience, to name a few.<sup>76</sup> Fish goes on to state that the "list is too long, because its components are not all of a kind and are sometimes not discrete; but it is also too short because some entries can be divided and subdivided."<sup>77</sup> The fact that such a list cannot easily be divided is the whole point of pragmatism or, as it is called here, practical reason. Commenting on the impossibility of categorizing the components of Posner's grab bag of practical reason, Fish argues that practical reason is not "mechanical calculation," but "an ever changing collection of rules of thumb, doctrines, proverbs, precedents, folk-tales, prejudices, aspirations, goals, fears, and, above all, beliefs."<sup>78</sup> For the pragmatist, central.

Both Fish and Posner agree that the only way to view the world is through individual perspectives. For both, adjudication is necessarily political in the sense that difference (Fish's term) is the rule. Difference means that different people hold different beliefs, visions, and desires. No matter what we do to distance ourselves from the particular perspective of our beliefs, those beliefs follow us and inform us. What does this do to the law? How can anything as important as the law be controlled by the whim and fancy of any individual? Both Fish and Posner would answer that this has everything to do with the law and that this is how laws are made and cases are decided—on the basis of particular beliefs. The only way to build consensus is through a change in belief where one party is persuaded to switch from "one non-rational cluster of beliefs to

---

<sup>76</sup> *Id.* at 203 (quoting RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 73 (1990)).

<sup>77</sup> THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 3, at 203.

<sup>78</sup> *Id.*

another."<sup>79</sup>

Fish openly acknowledges that he sees little difference between his account of the law and Posner's. However, as mentioned earlier, Fish without an opportunity to be Fish is hard to imagine. Therefore, when Fish says that he has some quibbles, the reader had better sit down. Fish's real problem with Posner (and, later, Rorty) is the difference between a pragmatist account of the law and a pragmatist program of the law. Fish states the difference in the following way:

[A] pragmatist account of the law speaks to the question of how the law works and gives what I think to be the right answer: the law works not by identifying and then hewing to some overarching principles, or logical calculus, or authoritative revelation, but by deploying a set of ramshackle and heterogeneous resources in an effort to reach political resolutions or disputes that must be framed (this is law's requirements and the public's desire) in apolitical and abstract terms (fairness, equality, what justice requires).<sup>80</sup>

For the pragmatist, the law is a provisional and tentative attempt to solve problems with the various language tools that are at hand or that can be created to reach a solution to a particular problem. Problems, legal or otherwise, are not solved by appealing to something outside of history which undergirds the Truth.

For Fish, the value of this approach to the law is that it works; it has, as James would say, a practical cash value. It works because it is goal oriented. Instead of having to determine whether her solution corresponds to an external reality, the pragmatist asks only, "Does this work?" Fish contrasts the pragmatist account of the law with what he terms "the pragmatist program." The former is good for Fish, the latter is bad. Fish is right when he doubts that anything can follow from the pragmatist account of the law. He is wrong, however, to think that a pragmatist will not have a program. And because all that the pragmatist, much like the formalist, has to offer is rhetoric, pragmatist rhetoric works just as well as formalist rhetoric. In this sense, there is a definite program that Fish himself promotes.

What Fish fails to realize is that once the myth of objectivity is dismissed, the lawyer or judge must continue with her work. To do that, she must utilize a vocabulary, which may sound essentialist to Fish. The difference between the pragmatist and the formalist is

---

<sup>79</sup> *Id.* at 207.

<sup>80</sup> *Id.* at 209.

that the pragmatist knows that her vocabulary is not grounded in anything claiming to be objective truth, while the formalist does not.<sup>81</sup> The pragmatist is an ironist and the formalist is a consequentialist. The ironist does not believe that his or her account of the law is the last word on the subject. Conversely, the formalist believes that if we just read the law as it is given, we will have everything that we need. For the formalist, her reading is the last word on the subject. I agree with Fish when he faults Posner for wanting to force pragmatism to commit itself to a certain program. However, it is naive for Fish to believe that there is nothing more to being a pragmatist than "clearing away of the debris of faith-based systems."<sup>82</sup> Fish states that once the pragmatist has shown that the law is nothing but politics, the job of the pragmatist is done. Even if one takes "the antifoundationalism of pragmatism seriously," one's job as a judge or lawyer has just begun.

It is at this stage of the attack that Fish lets his readers know that he is not a pragmatist. This pronouncement is a bit disingenuous on his part. He should say that he is almost a pragmatist, being concerned, as he is, with proper pragmatist protocol. Fish ultimately blames Posner for falling back on a position that Posner attempts to discredit throughout the entire book—essentialism. Fish, however, seems to confuse an essentialist position with articulating a desire for a different political structure or belief system. It should not matter to Fish the rhetorician whether this is accomplished by using a pragmatist vocabulary or a formalist vocabulary. Yet it does. Fish's point is that as soon as pragmatism becomes a positive program, it "turns into the essentialism it challenges."<sup>83</sup> This is not necessarily the case.

The point of pragmatism is to clear the field, as Fish, Posner, and Rorty contend. Fish seems to want to say that the point of pragmatism is to show that even the use of grand metaphysical narratives is provisional and contingent upon a specific belief system. Therefore, according to Fish, everyone qualifies as a pragmatist, even the formalist, simply because she is employing rhetoric to make her point. Yet when the pragmatist attempts to employ a rhetoric, Fish charges her with being an essentialist.

Fish continues his "nothing follows from pragmatism" chant in his analysis of Richard Rorty's contributions to pragmatism. Rorty is credited with the revival of pragmatism. Fish's ultimate critique

---

<sup>81</sup> For a discussion of the ironist's role, see Rorty, *supra* note 51, at 73-95.

<sup>82</sup> THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 3, at 214.

<sup>83</sup> *Id.* at 215.



of Rorty's pragmatism is the same as his critique of Posner's: both believe that there is something more to pragmatism than just clearing the field. Fish explains that Rorty believes that pragmatism is capable of providing "a general nonspecific skill or ability," which permits the pragmatist to see clearly. This might come as a surprise to Rorty.<sup>84</sup>

Fish's comments regarding what you get from the pragmatic method, or what you do not get, echo those of James, who said that no particular results could be expected from the pragmatic method. Instead, all that the pragmatist can offer, according to James, is "an attitude or orientation," which is "[t]he attitude of looking away from first things, principles, 'categories,' supposed necessities; and of looking towards last things, fruits, consequences, facts."<sup>85</sup> Fish would certainly agree with the first part of James's statement. Fish's beliefs about pragmatism do not square with the latter part of the statement—that pragmatism looks to consequences. In fact, Fish does look to consequences, because at the end of the inquiry, Fish makes a choice like all good pragmatists do. Unlike the formalist, however, Fish and James do not feel the need to back their choices up with something big. It is true if it works.

Rather than appeal to this general skill, Fish prefers to take each problem as it comes and deal with it as a "contingent fact," which "takes." This pragmatic idea is exactly what Rorty is attempting to proffer himself. Fish says that Rorty thinks that an individual can train for the type of ability which allows one to feel solidarity for others. According to Fish, it sounds as if Rorty has extrapolated an entire vocabulary out of his pragmatism. For Fish, Rorty is wrong to think that a "utopian consequence" follows from his pragmatism. In fact, Rorty would probably agree with Fish that pragmatism does not lead anywhere. Rorty says as much.<sup>86</sup> That, however, does not let pragmatists off the hook.

Neither philosophy nor pragmatism provides one with a special ability to see things "as they really are." Instead of relying on philosophy to provide the answers, Rorty would rather employ a

---

<sup>84</sup> A typical statement by Rorty regarding the fruits of pragmatism is the following. "A further advantage of pragmatism is that, unlike deconstruction, pragmatism doesn't provide much of a jargon. So it is hard for devotees of pragmatism to hypnotize themselves into thinking that by reciting the jargon they are changing the world." Richard Rorty, *What Can You Expect From Anti-Foundationalist Philosophers?: A Reply to Lynn Baker*, 78 VA. L. REV. 719, 725 (1992).

<sup>85</sup> JAMES, *supra* note 16, at 29.

<sup>86</sup> RORTY, *supra* note 51, at 196.

*focus imaginarius*, which provides a way of looking at various social and political problems without employing "final vocabularies." For Rorty, the best service that philosophy can provide is as a technique for "reweaving our vocabulary of moral deliberation in order to accommodate new beliefs."<sup>87</sup> Or, as Rorty says elsewhere, philosophy is most useful when recontextualizing our existing vocabularies so that one may reweave new beliefs into our already existing web of beliefs and desires.<sup>88</sup> There is nothing to back up the hope that people will attempt to write more just laws; there is only the hope. Once you go down the antiformalist road with Rorty, you end up in the same place that Fish does—nowhere. It seems that Fish's biggest criticism of Rorty is that he does not want Rorty to live on the same street as him.

What is the use of pragmatism for the law in either Fish's or Rorty's scheme? Fish offers this vision of pragmatism's usefulness: Rather than living in a world of transcendent truth and leak-proof logic, pragmatism shows us that we "must make do with a ragtag bag of metaphors, analogies, rules of thumb, inspirational phrases, incantations, and jerry-built 'reasons' that keep the conversation going and bring it to temporary, and always revisable, conclusions."<sup>89</sup> This sounds as much like Rorty as it does Fish. Fish's answer to the question, "How does one go about practicing law?," is: "[B]y deploying all of the resources (doctrines, precedents, rules, magic metaphors, standard concepts) the legal culture offers."<sup>90</sup> This is similar to Nietzsche's concept of a "mobile army of metaphors." It does not matter what vocabulary is used, as long as it gets the job done; or, as Fish says, "you take your justifications where you can find them."<sup>91</sup>

What scares Fish away from the Posner-Rorty model is that Fish sees both of them as saying that "if you employ the pragmatist account as a method, a method that acknowledges that all we have to get the job done are contingent metaphors," then all one has done is to replace a transcendent truth with a contingent truth. Ironically, this replacement makes the contingent metaphor into an absolute. I do not read Rorty to be saying this, nor do I think that Posner would accept this characterization. I think both Rorty and Posner would be quite willing to say that it would be extremely

---

<sup>87</sup> *Id.*

<sup>88</sup> RORTY, *supra* note 19, at 93-110.

<sup>89</sup> THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 3, at 218.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 219.

unpragmatic to insist that the only way to get the job done would be to use a pragmatic vocabulary.

If Fish analyzes Posner's and Rorty's pragmatism as a relative fondly pointing out some minor family differences, his treatment of Ronald Dworkin must be seen as an all-out family feud. Fish and Dworkin have been trading punches for some time.<sup>92</sup> Dworkin criticizes pragmatism because it is not enough of a theoretical program, while Fish criticizes it because it is too much of a program.<sup>93</sup> The irreconcilable differences between Fish and Dworkin can be summed up as follows: Fish believes that for the lawyer there is only practice; Dworkin believes that the lawyer should only be concerned with theory. For Fish, lawyers are acculturated into the practice of law; for Dworkin, lawyers discover the nature of law. Dworkin, according to Fish, is too caught up with critical self-reflection and with questions such as "Why did I do that rather than something else?" This type of question makes no sense for Fish.

Whether a lawyer or a jurist is able to explain theoretically what he or she is doing is different than just doing it. The lawyer or jurist who is involved in the practice of law is not equipped with a special capacity to be self-reflective. He or she is merely being "normally reflective" in response to a given situation. In Jamesian language, the question would be: "Of what practical cash value would this critical self-reflective act have on the problem at hand?" Or, the question could be phrased as: "Why be critically self-reflective at all?" Instead of being preoccupied with self-reflection, the lawyer, and the philosopher for that matter, should endeavor to solve particular problems which arise in particular situations. Speaking of the role of philosophers in this situation, Rorty says that

[t]heir job is to weave together old beliefs and new beliefs, so that these beliefs can cooperate rather than interfere with one another. Like the engineer and the lawyer, the philosopher is useful in solving particular problems that arise in particular situations—situations in which the language of the past is in conflict

---

<sup>92</sup> Fish presented a paper, from which this essay was adapted, at a conference at the University of Virginia titled *Pragmatism in Law & Society*. Fish says that he never intended to write about Dworkin. However, after Dworkin responded to Fish (even though Fish never mentioned Dworkin), Fish "became distressed" and felt the need to respond. For earlier Fish articles on the Fish-Dworkin battle see Fish's *Working on the Chain Gang: Interpretation in Law and Literature* and *Wrong Again in Doing What Comes Naturally*, and Dworkin's *Pragmatism, Right Answers, and True Banality in Pragmatism in Law & Society* (1991).

<sup>93</sup> THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 3, at 224.

with the needs of the future.<sup>94</sup>

The point for both Rorty and Fish is not to be critically self-reflective but, rather, to use language in such a way as to get the job done. The use of traditional legal principles such as "the law must be color-blind with respect to the safeguarding of rights" are useful "as pieces of verbal artillery whose effectiveness will be a function of the discursive moment."<sup>95</sup> The pragmatist uses language, whether legal or philosophical, as a tool. As long as a particular tool can be employed to solve problems, it remains in the tool bag. Once it has outlived its usefulness, however, it can be discarded. Sometimes, as Rorty says, "new tools will have to be invented on the spot."<sup>96</sup>

What the lawyer or the philosopher should not do, as Dworkin does, is to look into the deeper reasons of what she is doing or assert that the principles employed are more foundational than, or of greater philosophical importance, than others. For the pragmatist, language is a set of tools to be used. It is not a representation of a larger reality. The difference between Fish and Rorty, according to Fish, is that Fish says that nothing comes from pragmatism once the contingent nature of the law is exposed. Rorty says that what comes from pragmatism is whatever the pragmatist creates through whatever novel use of the legal vocabulary the lawyer chooses to utilize for a given problem. Fish and Rorty would both agree that it does not matter whether a legal practitioner is able to explain what he or she is doing.<sup>97</sup> The important thing, for Fish and Rorty, is that the job gets done. This is the heart of pragmatism, and yet Fish refuses to admit that he is a pragmatist, while Rorty heartily embraces the title. Although Fish attempts to dodge the pragmatist bullet, it is difficult to tell him apart from the pragmatist. If it looks like a pragmatist and sounds like a pragmatist, it must be a pragmatist.

In his final attempt to distance himself from the pragmatic camp, Fish states that "[w]hatever differences separate Posner, Rorty, and Dworkin, they are alike in thinking that they have something to recommend, something that will make the game better."<sup>98</sup> Of course, all that Fish has to offer is the game itself. One could

---

<sup>94</sup> Richard Rorty, *Philosophy and the Future*, in RORTY & PRAGMATISM: THE PHILOSOPHER RESPONDS TO HIS CRITICS 199 (Herman J. Saatkamp, Jr., ed., 1995).

<sup>95</sup> THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 3, at 227.

<sup>96</sup> RICHARD RORTY, *ESSAYS ON HEIDEGGER AND OTHERS: PHILOSOPHICAL PAPERS*, VOLUME 2, 9 (1991).

<sup>97</sup> THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 3, at 227.

<sup>98</sup> *Id.* at 230.

argue that Fish has fallen into the same trap which he accuses the others of falling into. His persistent theme that there is nothing at the end of the road has become Fish's foundation. When all the smoke clears, however, Fish would probably agree that we all need some rhetorical safe havens.

#### IV. WHERE DO WE GO FROM HERE?

Ultimately, Fish wants to say that "if you agree with what I have said here you must understand that there is nothing that you can do with it." Or, as he says: "All I have to offer is the game."<sup>99</sup> The very last paragraph of *There's No Such Thing As Free Speech* sums up what Fish hopes to be his message when he is asked, "What is the point of what your are doing?" Fish answers that:

[T]he point is that there is no point, no yield of a positive programmatic kind to be carried away from these analyses. Nevertheless, *that* point (that there is no point) is the point because it's the promise of such a yield—either 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 the unavailability of such a yield that is my point, and therefore it would be contradictory for me to have a point, and therefore it would be contradictory for me to have a point beyond *that* point. People absolutely go bonkers when they hear that, but that's the way it is.<sup>100</sup>

But Fish does offer more. In the end, even he cannot escape the fact that his "nothing follows from this" account becomes a program of sorts. As long as one approaches this ironically, one will still be going down the antiformalist road. Even though nothing follows from Fish's account, he intends to keep the project going. That is, he expects the law to continue the process of construction. This is the law's "amazing trick," which in itself is a positive program.

The problem with going all the way down the antifoundationalist road is that, at times, one comes away feeling rather empty. No doubt Fish would say that this is exactly his point, that no matter what you do, nothing can follow from his account. Or, he might say, "sit back and enjoy the ride." This is fine when all you are doing is reading a legal text in order to point out that there is

<sup>99</sup> Fish is not alone among legal pragmatists when he says that nothing will follow from his pragmatic account. See, e.g., Thomas C. Grey, *What Good is Legal Pragmatism*, in *PRAGMATISM IN LAW & SOCIETY* 9-27 (Michael Brint & William Weaver eds., 1991); Rorty, *supra* note 84, at 727.

<sup>100</sup> *THERE'S NO SUCH THING AS FREE SPEECH*, *supra* note 3, at 307.

nothing but the political, that there is no such thing as a contextless law. However, the judge or the legal practitioner rarely has an opportunity to travel down the antifoundationalist road merely for the sake of taking the ride alone. There are times when the pragmatist might have to eat her words and use a vocabulary that is not particularly appealing to the pragmatist palate just to get the job done.

Legal pragmatists recognize that it may be necessary to use the formalist or theoretical vocabularies that are already in place to analyze and solve concrete legal problems.<sup>101</sup> This is because concrete legal problems do arise and must be solved, or at least dealt with. Fish, more than most, recognizes that one must work within the rules of one's profession. At times, Fish lets down his armor and admits that he would be willing to use the vocabulary of formalism when he says that there are instances where choices or distinctions between competing positions may require him (Fish) to choose one over the other based on humane, institutional, or even pragmatic grounds.<sup>102</sup>

When Fish makes his appeal to the readers of *Reverse Racism, or, How the Pot Got to Call the Kettle Black*, to resist the temptation to use the vocabulary of the anti-affirmative action types, he does so pragmatically. When he makes statements such as this, he takes a stand and betrays his "nothing follows from this" posture. Fish would be much more useful if he dared to assert more of these types of statements, if he acknowledged that his rhetoric can be persuasive and useful. Instead, he has painted himself into a corner. Unfortunately, all that can be expected from him if he stays in his corner are more essays and books, which continue to repeat this now familiar and, at times, tiresome mantra. His mantra is useful to a point. He reminds us that we cannot appeal to grand theories which stand outside of history, something which would ground our beliefs. Instead, he says, it would be better if we did not appeal to such theories, that we should just accept the fact that your beliefs and desires are based on who you are and where you are. All work, legal or otherwise, should start from this premise. It seems to me that this is what most pragmatists are already saying. So maybe, after all, Fish is almost a pragmatist. At least he sounds like one.

---

<sup>101</sup> See generally Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988).

<sup>102</sup> THERE'S NO SUCH THING AS FREE SPEECH, *supra* note 3, at 37.