

Cambridge University Press

978-1-107-07474-3 - Stanley Fish on Philosophy, Politics, and Law: How Fish Works

Michael Robertson

Excerpt

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INTRODUCTION

Stanley Fish lists his areas of expertise as “the American academy, the nature and history of professionalism, the theory and history of disciplines, sixteenth- and seventeenth-century English Literature, Freud, literary theory, legal theory, philosophy of language, contract law, first amendment jurisprudence, affirmative action, the jurisprudence of church and state, [A]nglo-American liberalism, university administration, the teaching of composition, American television shows.”¹ This covers an impressive sweep of terrain, and he is not just a minor laborer in these disparate vineyards. He is a prominent authority on Milton, and he has made contributions to the other listed areas in a series of books and articles that have attracted much academic commentary. He has lectured in law schools as well as English departments. He has been a university administrator as well as a university professor. He has a blog in the digital edition of *The New York Times* and appears on television and the public lecture circuit. He was the model for the Morris Zapp character in three of David Lodge’s comic novels about academic life. In summary, he is a major contemporary thinker with an influence beyond the academy and beyond the shores of his homeland.

This book focuses on Fish’s work in philosophy, politics, and law and does not attempt to cover all of the territory that he does. This limited focus nevertheless deals with incendiary material that has produced an intense negative reaction in most of his readers. He is accused of being a relativist and a skeptic who denies that we can have access to objective reality. He is said to hold that texts have no fixed meanings and that the rule of law is illusory. He is charged with being a conservative who denies the possibility of progressive political change. His critics are outraged by his declarations that theory, interdisciplinarity, and multiculturalism do

¹ Stanley Fish, “One more time” in G. Olson and L. Worsham (eds.), *Postmodern sophistry: Stanley Fish and the critical enterprise* (Albany: State University of New York Press, 2004), 265–6.

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not exist. In response, Fish insists that his critics are outraged because they persistently misunderstood what his position is. “I keep saying the same thing and getting misunderstood in the same way,” he complains.² Again and again, he tries to show that nothing negative follows from his position once it is correctly understood, but the lesson never seems to take.

Why would there be such a consistent failure to understand what Fish is saying in the areas that this book covers? It is not because he writes in a dense and impenetrable style with a confusing technical vocabulary. Fish’s writing style is one of the reasons to read him. It is very clear and entertaining, with little technical terminology and a wealth of everyday (often humorous) examples to illustrate his points. The content of his writings, however, partially explains his readers’ difficulties. He contradicts orthodoxy not just here and there, but everywhere, and seems to delight in doing so. The titles of some of his essays display this polemical spirit: “Liberalism doesn’t exist,” “Truth but no consequences: Why philosophy doesn’t matter,” “There’s no such thing as free speech and it’s a good thing, too,” “You can only fight discrimination with discrimination,” “Boutique multiculturalism,” “Being interdisciplinary is so very hard to do,” “Why we can’t all just get along.” And it is not just any old piece of conventional wisdom that he rejects. He claims that some of the deepest hopes of Western culture are impossible dreams – the forum of neutral principle, the unity of knowledge, the brotherhood of man, achieving an open mind, transcending the limitations of the local to grasp the universal and the timeless, resolving disputes through reason alone, and similar matters. Given the overwhelming unorthodoxy of his positions, it is unsurprising that most of his readers have difficulty absorbing them.

A second factor that helps to explain his readers’ difficulties is structural. His output dealing with philosophy, politics, and law consists of many articles written over three decades. In these articles he works out different aspects of his position, but he has never consolidated all of this material together in a way that displays the underlying coherence and linkages. (The books that he has published in these areas mainly collect a number of his already published articles.) In these articles, he often relies on arguments that he has made previously but which he does not recapitulate. Nor does he typically separate out his philosophical, political, and legal analyses. Instead one article can touch upon each topic to varying degrees. Also he is typically writing in response to a particular author or position, and what he

² *The New Yorker* magazine profile, June 11, 2001, 71.

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calls the resulting “angle of lean”³ shapes the way his argument is presented more than the need to provide a coherent overview of his position. Consequently he presents us with a series of snapshots of bits of the edifice, but he does not provide us with a synoptic view of the whole. This fragmentation means that one has to read a lot of Fish, and connect a lot of dots, to appreciate what he is doing. Those who only sample a few of his articles will therefore find it difficult to understand him well.

Some of those commenting on Fish’s work have noted these problems. A reviewer of *The trouble with principle* observed that “Fish’s prose style is clean and lucid. But his argument is so intricate, demanding, and, at times, counterintuitive that many readers may fail to grasp its full sweep.”⁴ Another commentator complained that “Professor Fish has never provided an organized, coherent summary of his position on these issues; rather, like a sniper, he must be placed by tracing back the trajectory of his many shots aimed at adversaries (or those of his anti-foundationalist allies who occasionally slip up).”⁵ A reviewer of *Doing what comes naturally* lamented that “[o]ne might wish for an essence of Fish: a short book that would set forth the argument in its general form, then demonstrate the kind of application it has to the different fields under consideration.”⁶ My goal is to provide a book that will meet such concerns and render Fish’s position more accessible. My project will involve ranging over the body of his work and assembling, like a giant intellectual jigsaw puzzle, the pieces in a way that reveals the underlying structure, and how the various pieces support each other. I will separate out his philosophical, political, and legal arguments for separate treatments and then show their interconnections. I will move beyond the polemical titles of his articles to a close reading that seeks to make plain each step in his argument and that dispels the initial sense that his position is too unorthodox to be plausible. While this will present Fish’s position in a way foreign to him, and which lacks his stylistic flair, it has the merit of making clear the underlying architecture of his position. This is why I have subtitled the book *How Fish works*, cheekily adapting the title of one of Fish’s own books, *How Milton works*.

³ *Doing*, 32.

⁴ Richard Delgado, “Where’s my body? Stanley Fish’s long goodbye to law” 99 *Michigan Law Review* (2001) 1381.

⁵ Daryl Levinson, “The consequences of Fish on the consequences of theory” 80 *Virginia Law Review* (1994) 1653.

⁶ Peter Brooks, “Bouillabaisse” 99 *Yale Law Journal* (1990) 1147.

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My project thus has a positive thrust, rather than a negative one. I have tried to advance an interpretation that makes the best of Fish's texts, rather than one that pounces upon and emphasizes problems. When problems have arisen, I have tried to find solutions that fit within the framework of Fish's position. Fish mentions the injunction of St. Augustine to engage in "diligent scrutiny until an interpretation contributing to the reign of charity is produced,"⁷ and I have tried to be such a charitable reader. However, in a few instances I have identified problems with Fish's position that have resisted my charitable efforts, and I have highlighted these.

Because the main focus of the book is getting clear about what Fish's arguments are, other philosophers, political theorists, and legal theorists will only play subordinate roles, even if their contribution to the topic under discussion is more important than Fish's.⁸ Fish is aware of these other writers, as evidenced by occasional footnotes, but he does not make extensive references to them, and it is unclear whether he has been greatly influenced by them. In fact, Fish notes that "many of the people whom I now regularly cite in essays are people that I read *after* most of the views that found my work were already formed."⁹

Ultimately, my conclusion will be that Fish's critics generally get him wrong and that consequently his original and valuable contributions to philosophy, politics, and law have been underappreciated, even as they garner notoriety. I want to make his important contributions more accessible and more clearly understood, so that even if the reader is not convinced, at least he or she will have a correct version of Fish's arguments against which to direct a critique.

One of the central themes of this book is that Fish's work in philosophy, politics, and law is strongly interrelated. His critiques of various political theories shape his jurisprudence, and both his jurisprudence and his political work flow logically from his philosophical commitments. Consequently Part I is the foundation of the book and should not be skipped, even if the reader is more interested in politics or law. Indeed, I would argue that the philosophical matters dealt with in Part I are the key to understanding Fish's work in all of the many fields noted at the beginning of this introduction.

⁷ *Trouble*, 265.

⁸ For a sustained effort to place Fish's work in the context of other relevant authors, see Peter Schanck, "Understanding postmodern thought and its implications for statutory interpretation" 65 *Southern California Law Review* (1991) 2505.

⁹ *No free speech*, 292.

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PART I

Philosophy

Stanley Fish's philosophical work focuses on the nature of the self, epistemology, and the role of theory. The chapter on the nature of the self is the shortest but possibly the most important because the positions that Fish develops in the following two chapters draw out the logical implications of his conception of the self. And since Fish's philosophical positions determine his political and legal analyses, his conception of the self can serve as the polestar guiding us safely through his work without foundering on the rocks of error and incomprehension.

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The nature of the self

Human beings at first sight appear to be very diverse. We see a profusion of ethnicities, cultures, religions, and languages. Physical attributes and diets and entertainments vary greatly, as do morals, political structures, and family arrangements. Some philosophers do not accept this diversity at face value, however, and seek an enduring self that is separate from the variable and contingent attributes that people exhibit in different times and places.

Kant's conception of the self

Some religious philosophers conceived of this enduring self as a spirit or soul, but the eighteenth-century Enlightenment philosopher Immanuel Kant is credited with originating the conception of the essential self as an autonomous rational will that is separate from any of the contingent attributes that a person exhibits.¹ These attributes are inessential because the underlying rational self is always able to stand apart from them, evaluate them, and choose to affirm or change them. If the choice is to change them, then this is like changing a suit of clothes. Only accidental attributes of the self change, leaving the essential self as it was. Human beings could thus differ greatly with respect to the secondary attributes that socialization or deliberate choice establish while at the same time they shared the same essential nature as autonomous rational wills.

Stanley Fish argues that this Kantian conception of the self remains the dominant one within the Western liberal tradition. As an example of this, he offers John Rawls's project in *A theory of justice*² of seeking to find principles for ordering society that all members can accept, even though

¹ See, for example, Michael Sandel, *Democracy's discontent* (Cambridge, MA: Belknap Press, 1996), 11–17 and Margaret Radin, *Contested commodities* (Cambridge University Press, 1996), 34–40 and ch. 5 (“Personhood and the dialectic of contextuality”).

² John Rawls, *A theory of justice* (Cambridge, MA: Belknap Press, 1971).

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they may have different partisan commitments or “comprehensive doctrines.” Rawls suggests the following thought experiment: Imagine an “original position” in which selves who know nothing about their contingent secondary attributes (they are behind “a veil of ignorance”) reason about what principles they should choose to order society. The results of this process will be neutral principles that cannot be biased in favor of any partisan viewpoint, and so these principles can without unfairness be applied to everybody, regardless of their local commitments. However, as Fish points out, Rawls’s procedure relies upon the Kantian conception of the self, because Rawls assumes that it is possible to abstract away all of the secondary attributes of a person and still have something left, namely a rational self capable of engaging in political discussion and freely choosing principles for ordering society:

The trick is to regard social, political, and institutional investments as cosmetic. One sees how it is done when Rawls describes reasoning in the original position as proceeding “in accordance with the enumerated restrictions on information.” The restrictions are the sum of what you are not allowed to know under the veil of ignorance – everything from name, rank, and serial number to matters of gender, class and race to memberships in churches and political parties to “various native endowments such as strength and intelligence.” By referring to these as restrictions on *information*, Rawls makes it clear that in his view the characteristics they remove from inspection are not essential to the person, who is what he is with or without these identifying marks of merely social relations: he is an agent with a capacity to imagine a condition of justice and a vision of the good; and it is this capacity, rather than any realization it happens to have, that defines him. Those who have this capacity, even if they realize it in different ways, are the same; and a person who realizes it differently at different times in his life is also the same.³

Similarly, Fish sees the Kantian conception of the self at work in the liberal principle mandating tolerance of cultural differences (described by Fish as “boutique multiculturalism”):

³ *Trouble*, 10–11. See also Michael Sandel, *Justice* (New York, NY: Farrar, Straus and Giroux, 2009), 214–5: “Kant’s idea of an autonomous will and Rawls’s idea of a hypothetical agreement behind a veil of ignorance have this in common: both conceive the moral agent as independent of his or her particular aims and attachments. When we will the moral law (Kant) or choose the principles of justice (Rawls), we do so without reference to the roles and identities that situate us in the world and make us the particular people we are.”

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[A] boutique multiculturalist does not and cannot take seriously the core values of the cultures he tolerates. The reason he cannot is that he does not see these values as truly “core” but as overlays on a substratum of essential humanity. That is the true core, and the differences that mark us externally – differences in language, clothing, religious practices, race, gender, class, and so on – are for the boutique multiculturalist no more than what Milton calls in his *Areopagitica* “moderate varieties and brotherly dissimilitudes that are not vastly disproportional.” We may dress differently, speak differently, woo differently, worship or not worship differently, but underneath (or so the argument goes) there is something we all share (or that shares us) and that something constitutes the core of our identities. Those who follow the practices of their local culture to the point of failing to respect the practices of other cultures – by calling for the death of an author whose writings denigrate a religion or by seeking to suppress pornography because it is offensive to a gender – have simply mistaken who they are by identifying with what is finally only an accidental aspect of their beings.⁴

Fish’s critique of Kant’s conception of the self

Notwithstanding the importance and pervasiveness of the Kantian conception of the self in the liberal tradition, Fish rejects it as not simply flawed but impossible. His claim is that if you deprive a self of the material that comes from being embedded in particular local contexts, then you do not end up with an essential self, rather you end up with no self at all. “[W]e cannot possibly start with a clean slate and still be somebody capable of starting.”⁵ His argument for this claim is that such a stripped-down abstract self without values, beliefs, goals, organizing categories of thought, etc., would be empty of the very content it needs to exist and function. Rather than being completely autonomous and rational, it would be unable to think or choose anything at all. A being with all local content removed would no longer be a human being, who “must always be somewhere (in a context) in order to be something (a self); and if it is never anywhere, if it stands free of all confining hierarchies and roles, it is nothing.”⁶ Furthermore, Fish claims:

A mind so open that it was anchored by no assumptions, no convictions of the kind that order and stabilize perception, would be a mind without gestalt and therefore without the capacity of keeping anything in.

⁴ *Trouble*, 57.

⁵ Stanley Fish, “Intention is all there is: A critical analysis of Aharon Barak’s Purposive interpretation in law” 29 *Cardozo Law Review* (2008) 1135.

⁶ *Doing*, 428.

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A consciousness not shored up at one end by a belief (not always the same one) whose negation it could not think would be a sieve. In short, it would be empty.⁷

It is not only Rawls's project that is rendered impossible by this objection. Fish's objection also undermines any project that, in the name of freedom or open-mindedness or critical self-reflection, encourages the essential self to detach itself from all of its contingent local content and subject that content to rational scrutiny. The goal would be to identify which of our values and beliefs we should choose to retain and which we should reject as the mere products of ideology or socialization. But Fish argues that this project is impossible because a self separated from all of its values and beliefs would be unable to evaluate anything:

The problem with this strategy is simply that one cannot follow it; moreover, even if we could somehow follow it, the condition of being free from ideological control would be wholly disabling because there would be nothing either to be free *with* or *for*. There would be nothing to be free *with* because were every preconception, acquired belief, assumed point of view, opinion, bias, and prejudice removed from the mind, there would be nothing left with which to calculate, determine, and decide; and there is nothing left to be free *for*, because a mind divested of all direction – a mind not already orientated toward this or that purpose or plan or agenda – could not recognize any reason for going in one direction rather than another, or, for that matter, for going in any direction at all.⁸

In short, all of our local commitments cannot be made the object of rational thought and subject to an autonomous will, because some already-in-place and unquestioned local commitments are a *precondition* for any thought and judgment.⁹

Fish has another, more striking and polemical, way of making his objection to the Kantian conception of the self. As well as arguing that no human being would exist if everything that was the product of some local

⁷ *No free speech*, 117.

⁸ *Doing*, 518. See too 394: "The demand for self-consciousness is a demand for a state of consciousness in which nothing has yet been settled and choices can therefore be truly rational. But if all concepts or constructs remained to be chosen, there would be nothing—no criteria, no norms of measurement, no calibration of value—with which or within which the choosing could be done; indeed, there would be no chooser, for if the question of direction were totally open the mind (such as it is) would be incapable of going in any direction at all if only because it would be unable to recognize one. To put the matter baldly, already-in-place interpretive constructs are a condition of consciousness."

⁹ *Trouble*, 158.