

CRITIQUE AND COMMENT

WHO'S AFRAID OF THE BIG BAD FISH? RETHINKING WHAT THE LAW WISHES TO HAVE

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[This article aims to re-evaluate the contribution of Stanley Fish to legal studies. In 'The Law Wishes to Have a Formal Existence', Fish accused the law of maintaining a formal, positivistic self-image as principled; an activity that rises above processes of interpretation and of moral judgement. For this 'anti-formalist' Fish there is thus a false sense of self-sufficient closure to the law's discourse. More recently, however, in discussing the practice of another profession (namely literary criticism) Fish demonstrates that the basis of professional activity per se is internal intelligibility — that is, intelligibility within a defined community. These apparent inconsistencies are explored. Re-reading 'The Law Wishes to Have a Formal Existence', one can discern errors in Fish's account of a key case and one can also find support for the professionalism position that he subsequently articulates. It is therefore argued that Fish's account of the general characteristics of professional practice, including legal practice, are of value. The implications of his account of professionalism in the law are, however, incompatible with the usual understanding of his more combative statements about the role of formal language and principle-based argument in the law.]

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I INTRODUCTION

Stanley Fish is a controversial figure in legal studies.¹ With both staunch supporters and uncompromisingly hostile detractors, Fish's writings have had, according to Veeseer, a 'shattering impact on legal studies'.² But what is Fish really telling us about law? This article aims to re-evaluate Fish's contribution to

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¹ Michael Robertson, 'Picking Positivism Apart: Stanley Fish on Epistemology and Law' (1999) 8 *Southern California Interdisciplinary Law Journal* 401; Michael Robertson, 'The Limits of Liberal Rights: Stanley Fish on Freedom of Religion' (2002) 10 *Otago Law Review* 251; Richard Delgado, 'Where Is My Body? Stanley Fish's Long Goodbye to Law' (2001) 99 *Michigan Law Review* 1370; Richard Mullender, 'Review of *The Trouble with Principle*' (2001) 28 *Journal of Law and Society* 618.

² H Aram Veeseer, 'Introduction' in H Aram Veeseer (ed), *The Stanley Fish Reader* (1999) 1, 7.

legal studies, including his best-known piece ‘The Law Wishes to Have a Formal Existence’.³

After discussing various dimensions of the Fish corpus, an attempt is made to re-read (and in some respects to rehabilitate) that particular intervention, which has been imperfectly understood by those on both sides of the debate. Some nuancing, at least, is required in respect of the Fish position as known from that piece: there may be a need to save Stanley Fish from his supporters as much as from his detractors. There may even be a need to save Fish from himself. The Stanley Fish best known in legal studies, especially from ‘The Law Wishes to Have a Formal Existence’, is a trenchant critic of the law’s self-presentation in its writings. This Fish accuses the law (especially as manifested in the written legal judgment) of displaying a false image of itself as a principled activity, one that rises above processes of interpretation and of moral judgement. For Fish, then, there is a false sense of self-sufficient closure to the law’s discourse. It has an *ex cathedra* style, as if to say: ‘this is the way things are; this is what emerges when the proper principles are applied to the given facts’ — in a manner perhaps analogous to the style of a geometrical proof.⁴

Fish claims that contrary to this idealised image, legal reasoning actually involves interpretive (and moral) processes ‘all the way down’⁵ so that a legal statement is only stable and coherent (to the extent it does possess these properties) by virtue of extra-legal processes of interpretation. A comparison may be drawn with a social-constructionist perspective on human agency. From such a perspective, the individual feels him or herself to be, and portrays him or herself as, a self-contained, agentic entity as against a social world — whereas ‘in actuality’ he or she is entirely constituted by that social world.⁶ Similarly, in Fish’s ‘anti-formalist’ critique, the law conceals the reliance of its intelligibility and effectiveness on processes outside itself.

The law, as thus portrayed, is terrified of admitting its connectedness to such unreliable (and even ‘contaminated’) processes as morality, social policy, common sense and so on, just as the law denies the mundane bodily character of its human officers by archaic uniforms, impersonal manners of speech and other alienating practices. Fish charges the law with sustaining a formal and positivistic self-image, which conceals its actually value-soaked processes. On this description, Fish’s approach appears close to that of the Critical Legal Studies movement.⁷

³ Stanley Fish, ‘The Law Wishes to Have a Formal Existence’ in Stanley Fish (ed), *There’s No Such Thing as Free Speech and It’s a Good Thing, Too* (1994) 141.

⁴ Stanley Fish, ‘Anti-Professionalism’ in Stanley Fish (ed), *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 215, 219.

⁵ The phrase is Fish’s: Stanley Fish, ‘Politics All the Way Down’ in Stanley Fish (ed), *The Trouble with Principle* (1999) 17.

⁶ See John Morss, *Growing Critical: Alternatives to Developmental Psychology* (1996) 56.

⁷ The Critical Legal Studies movement describes the law, and lawyers, as unwittingly serving ideological purposes and hence obscuring the truth about human needs: Robert Gordon, ‘New Developments in Legal Theory’ in David Kairys (ed), *The Politics of Law: A Progressive Critique* (1982) 413. The relationship between Fish’s work and the Critical Legal Studies approach is discussed in Hamish Stewart, ‘Is Judgment Inscrutable?’ (1998) 11 *Canadian Journal of Law and Jurisprudence* 417, 423–4.

However, Fish actually criticises and distances himself from the Critical Legal Studies movement (in ‘The Law Wishes to Have a Formal Existence’ as elsewhere). This is an indication that the above summary is at best incomplete as a representation of Fish’s contribution. I return to this point below.⁸ Yet even if this Fishian critique of the law is exaggerated, it would seem to leave naked and defenceless any claim by law that its writings are self-sufficient, achieving validity through some kind of internal consistency.

However, in discussing the practice of another profession — literary criticism — Fish demonstrates that the basis of professional activity is, precisely, internal intelligibility.⁹ Moreover, Fish explicitly states that this is a characteristic not of literary criticism (or literary production) specifically, but of professions in general.¹⁰ This apparent paradox will be explained below. The conclusion will be that Fish is indeed now telling us some interesting and significant things about the way law operates.¹¹ In particular, Fish’s account of the general characteristics of professional practice, based on his understanding of his own profession, seems valuable. The implications of his account of professionalism in the law may not, however, be entirely compatible with the traditional understanding of his more combative statements about the role of formal language and principle-based argument in the law.

Part of the reason for this dissonance may be that Fish has preferred to make discrete, robust interventions into legal discourse rather than build up a more systematic oeuvre in jurisprudence, thus ‘never putting the two arguments together’.¹² However, it is also possible that Fish may have — equally legitimately — shifted his theoretical emphasis over time. The situation may be clarified by pointing to some of the ways in which Fish’s theoretical approach (to literary criticism in the first instance) has changed over the three or more decades of his career. Indeed, it is submitted that the failure to contextualise Fish’s legal writings in this way is a serious flaw in the legal studies commentaries on those writings, for his excursions into legal studies remain secondary for Fish, in a logical as well as in a more contingent sense, to his literary work.

⁸ See below n 79 and accompanying text.

⁹ Stanley Fish, ‘Disciplinary Tasks and Political Intentions’ in Stanley Fish (ed), *Professional Correctness: Literary Studies and Political Change* (1995) 41, 41; Stanley Fish, ‘Yet Once More’ in Stanley Fish (ed), *Professional Correctness: Literary Studies and Political Change* (1995) 1.

¹⁰ Stanley Fish, ‘Distinctiveness: Its Achievement and Its Costs’ in Stanley Fish (ed), *Professional Correctness: Literary Studies and Political Change* (1995) 19, 23.

¹¹ Discussions of law as a profession may be found in Robert Nelson, David Trubek and Rayman Solomon (eds), *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* (1992). For discussions of professions generally, see Michael Burrage and Rolf Torstendahl (eds), *Professions in Theory and History: Rethinking the Study of the Professions* (1990). No attempt will be made in this article to engage with this more general literature.

¹² Stanley Fish, ‘Introduction, or how I Stopped Worrying and Learned to Love Interpretation’ in Stanley Fish (ed), *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) 1, 7.

II FISH AND THE VICISSITUDES OF LITERARY THEORY

The major change in Fish's approach is one that reflects broad changes in the field of literary theory. Four paradigms of literary criticism are particularly relevant, each reacting to, and to some extent displacing, the previous one over the course of the 20th century. A subjective and humanistic approach to texts was largely replaced by mid-century by the quasi-scientific, objectivist approach of the 'New Critics'.¹³ The pendulum swung back with the somewhat individualised and subjective 'reader-response' approach, centred around the reader's reception of a text, in the 1960s and 1970s. This approach, to which Fish was a major contributor, has been replaced in his own work by a collective, shared-intelligibility approach, centred on intersubjective interpretive practices.

For example, Fish's early work on Milton adopted the reader-response approach;¹⁴ it focused on the hermeneutical processes by which a reader comes to their own understanding of some material. As Fish himself candidly and helpfully describes, this reader-response approach was itself adopted in part as an anti-formalist strategy.¹⁵ That is to say, Fish was dissatisfied with the then pervasive objectivist treatment of text-items like poems, to which literary critics appeared to have turned. Concerned by the dangers of excessive intentionalism — reading a piece of literature as expressing an author's voluntary, personal and privileged meanings — the New Critics had developed a pure-text approach in which texts were treated as self-contained wholes independent of readers' or authors' meanings.

The reader-response approach (of Fish and others) was one that, in turn, addressed the inadequacies of this objectivist approach, while threatening, of course, to revive the very problems of subjectivism that the objectivist approach itself had been devised to counter. Issues of subjectivity and objectivity are not conterminous as between literature and law, but the reader of 'The Law Wishes to Have a Formal Existence' is undoubtedly being drawn into a debate that reflects Fish's longstanding literary concerns about the over-objectivising of texts. That reader would immediately recognise Fish's critical remarks written in the early 1970s about 'the assumption that there *is* a sense, that it is embedded or encoded in the [Miltonian] text, and that it can be taken in at a single glance.'¹⁶ Fish's progress on the anti-formalist road has been a long march.

Fish's later work (at least from the 1980 collection *Is There a Text in This Class? The Authority of Interpretive Communities* onwards) is typified by concerns of communal intelligibility — by the making of sense through shared practices and the taken for granted. Both approaches — reader-response and communal-intelligibility — centre on the making of sense, but with the latter giving a much higher profile to the interpersonal dimension. Highlighting

¹³ The New Critics included T S Eliot and F R Leavis: Bruce Robbins, *Secular Vocations: Intellectuals, Professionalism, Culture* (1993) 66.

¹⁴ Joan Bennett in a head note to Stanley Fish, 'Not So Much a Teaching as an Intangling' in H Aram Veeger (ed), *The Stanley Fish Reader* (1999) 10, 10.

¹⁵ Fish, 'Introduction', above n 12.

¹⁶ Stanley Fish, 'Interpreting the Variorum' in Stanley Fish (ed), *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) 147, 158 (emphasis in original).

communal processes in this way, however, does not necessarily entail an absolute abandonment of the individualism of the earlier position. Communal intelligibility can be seen as a revised means to the same, explanatory end of articulating the understanding achieved by individuals. It should be noted, however, that Fish sometimes imbues the position with a strongly collectivist or communitarian flavour. Thus, Fish has suggested that members of a community may be thought of not as sharing a point of view but as being shared *by* a (collective) point of view.¹⁷

Importantly, neither approach — reader-response or communal-intelligibility — is usefully termed ‘deconstructive’ (or ‘post-structuralist’ or ‘postmodern’). It may make sense to use the much more general term ‘social constructionist’ for the second, although the term ‘pragmatic’ might be equally applicable. The possible contribution of a deconstructivist approach to the Fishean project is discussed below, but at this point the important issue is a negative one. It only muddies the water to discuss Fish’s approach in terms that suggest a theoretical radicalism of this kind. This is not to deny that the implications of Fish’s work for law may well be radical. Nonetheless, the fact that Fish’s theoretical commitments may need to be explained to a legal audience does not necessarily mean that they are especially innovative or even sophisticated — merely unfamiliar.

This investigation will suggest that Fish has important things to say to the legal studies community even if he does not himself fully know what those things are, or has not yet clearly articulated them. Indeed, if Fish’s general comments on professional life are accurate, then it is unavoidable that the legal community must make its own appropriation of his remarks for itself, in accordance with its own internal intelligibility. Fish’s own, extramural comprehension of their impact can only be imperfect. More concretely, a re-reading of ‘The Law Wishes to Have a Formal Existence’ reveals many devices and lines of argument that Fish himself repudiates, or at least undermines, elsewhere. Seeking a consistent and non-mischievous Fish, it is helpful to bracket these components and ask what remains. Part of the agenda of the next two sections, therefore, is to establish some of the Fishean positions with which substantial aspects of that famed intervention will later be shown to be inconsistent.

III THE PROFESSING OF LAW AS A COMMUNALLY INTELLIGIBLE ACTIVITY

[A]s a fully situated member of an interpretive community, be it literary or legal, you ‘naturally’ look at the object of the community’s concerns with eyes already informed by community imperatives, urgencies, and goals.¹⁸

¹⁷ Stanley Fish, ‘Change’ in Stanley Fish (ed), *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 141, 141. See also Andrew Goldsmith, ‘Is There Any Backbone in This Fish? Interpretive Communities, Social Criticism, and Transgressive Legal Practice’ (1998) 23 *Law and Social Inquiry* 373, 388.

¹⁸ Stanley Fish, ‘Don’t Know Much about the Middle Ages: Posner on Law and Literature’ in Stanley Fish (ed), *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 294, 303.

Fish, especially in his recent writings,¹⁹ emphasises aspects of the profession of literary criticism that seal it off from societal circumstances and demands. Fish insists that the intelligibility of his own professional practice — for example, discussing a line of Milton — is constituted by understandings shared with his professional community.²⁰ There is a circular or self-referential aspect to the discourse, so that one cannot attach the professional activity to an ‘outside’ purpose like a political or social goal. To do so would be to abdicate the profession and cleave to another.²¹ Against the grain of liberal and socialist criticism alike (not for the first time), Fish asserts the importance to a profession of ‘internal’ processes such as cohesion and intelligibility, and the adherence to local norms, that in a sense comprise a formality for the professional practice concerned. Simply and directly, practices are not altered or reformed from outside,²² although change — or at least debates about change — can be ‘triggered’ from the outside.²³ Fish is thus asserting the virtue, or at least the non-viciousness, of professionalism, tackling head-on the prejudice against professionalism that sees it as the enemy of the promotion of the true and valuable.²⁴ This point is a general one that also applies to law.²⁵

If only for its clarification of alternative explanatory possibilities, the account Fish gives of professional life in general is worthy of attention. It therefore becomes necessary to re-evaluate his specific comments on law, which seem inconsistent with that account. Those comments may turn out to be limited in validity if not substantially flawed. It may be that the reader’s response to those comments is to overemphasise certain features and processes in Fish’s own texts, despite more subtle nuances.

An important and relevant critique of Fish’s position on interpretive communities has been offered by Andrew Goldsmith.²⁶ Goldsmith is concerned by the implications for moral agency that he discerns in Fish’s account of legal professionalism in which the emphasis is on local practice insulated from whatever is outside. According to Goldsmith, Fish’s position manifests quiescence in its conventionalism and its antagonism toward political activity. Further, it shows Fish to be a ‘neo-formalist’ and ‘virtually positivist’ in his apparent rejection of the roles of context and criticism.²⁷ In a manner comparable to Rob Atkinson’s

¹⁹ See, eg, Stanley Fish (ed), *Professional Correctness: Literary Studies and Political Change* (1995).

²⁰ See above n 9 and accompanying text.

²¹ See Fish, ‘Distinctiveness: Its Achievements and Its Costs’, above n 10, 29–30.

²² Stanley Fish, ‘The Anti-Formalist Road’ in Stanley Fish (ed), *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 1, 14.

²³ Fish, ‘Distinctiveness: Its Achievement and Its Costs’, above n 10, 23.

²⁴ See Fish, ‘Anti-Professionalism’, above n 4. For an example of such criticism of professionalism, see Alan Sinfield, *Faultlines: Cultural Materialism and the Politics of Dissident Reading* (1992) 287.

²⁵ Fish, ‘Distinctiveness: Its Achievement and Its Costs’, above n 10, 22.

²⁶ Goldsmith, above n 17. Goldsmith’s work has been rare if not unique in its recognition of the significance of Fish’s notion of professional interpretive community for legal theory, and of the challenges that are posed by that notion. It is not possible to deal adequately with Goldsmith’s comprehensive critique of Fish within the limits of this article. To some extent I am acting here as counsel for Fish, attempting to optimise his case in the debate with Goldsmith.

²⁷ *Ibid* 422.

discussion of the lawyer-as-butler (likewise illuminated by Kazuo Ishiguro's novel *The Remains of the Day*),²⁸ Goldsmith considers Fish to be advocating a butler-like, servile acquiescence to the dominant power structures of society. Goldsmith holds that Fish's position on the ontology of the interpretive community is one of cultural determinism, leaving no room for individual volition or criticism.²⁹ Goldsmith's own position is closer to Critical Legal Studies, as indicated by his praise for Roberto Unger.³⁰ But his description of a Fishean interpretive community as a 'prison-house' and as 'Alcatraz' suggests an aversion to collectivist analysis more common in the liberal traditions.³¹

Against Fish, Goldsmith endorses Michael Walzer's definition of the critic as one who 'gives expression to his people's deepest sense of how they ought to live'³² — the prophet-like individual who is prepared to defy their local norms. This is indeed not a characterisation that one would find in Fish's account of the legal profession. According to Goldsmith, the professional's activity is for Fish characterised by aesthetic priorities³³ and by 'quiescence'.³⁴ For Goldsmith, Fish's 'aestheticism' is to be deplored: it denies the possibility of critical intervention or transgression, and in doing so, obstructs these desirable and progressive processes.³⁵ However, Fish's approach may not in fact be aestheticism or quietism; there are other modes by which personal effectiveness in the world is problematised, from the youthful melancholy of Hamlet to the aged, postcolonial melancholy of the embedded narrator Marlow in Joseph Conrad's *Youth*:

You fight, work, sweat, nearly kill yourself, sometimes do kill yourself, trying to accomplish something — and you can't. Not from any fault of yours. You simply can do nothing, neither great nor little — not a thing in the world.³⁶

Fish has roundly and consistently criticised anti-professional 'commitment', especially the 'programmist' approach of Terry Eagleton and others, with its attempt to develop a political programme directly out of a critical analysis.³⁷ Such an approach places a sacrosanct political analysis above the concerns of professional life. Likewise, Fish scorns the outraged romanticism of those Critical Legal Studies writers for whom social and historical conditions conceal

²⁸ Rob Atkinson, 'How the Butler Was Made to Do It: The Perverted Professionalism of *The Remains of the Day*' (1995) 105 *Yale Law Journal* 177.

²⁹ Goldsmith, above n 17, 388.

³⁰ *Ibid* 383 fn 19.

³¹ *Ibid* 388.

³² Michael Walzer, *The Company of Critics: Social Criticism and Political Commitment in the Twentieth Century* (1988) 232, cited in Goldsmith, above n 17, 385.

³³ Goldsmith, above n 17, 376.

³⁴ *Ibid* 422.

³⁵ *Ibid* 376.

³⁶ Joseph Conrad, *Youth* (1920) 10. See also Robbins, above n 13, 118 on Marlow's comments on professionalism in Conrad's novel *Heart of Darkness* (1902).

³⁷ See, eg, Fish, 'Anti-Professionalism', above n 4; Stanley Fish, 'Rhetoric' in Stanley Fish (ed), *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 471, 495–6; Fish, 'The Law Wishes to Have a Formal Existence', above n 3, 176. For an example of Eagleton's programmist approach, see Terry Eagleton, 'Local and Global' in Obrad Savić (ed), *The Politics of Human Rights* (1999) 258.

those true, basic human needs of which we will become aware when ideology and mystification are stripped away. For Fish, this is intellectually dishonest; as Veesper puts it, '[w]hile Eagleton trenches in at St Catherine's College, Oxford to await the long revolution ... Fish is on the front lines'.³⁸ The latter claim might itself be somewhat over-inflated, but one need not accept Fish's account in its entirety to concede that professionalism justifies the kind of robust advocacy that Fish offers.

Certainly Fish needs to explain more about diversity, conflict and change within interpretive communities — '[d]oing what comes naturally'³⁹ is not an adequate summary of the complexities involved — but Fish acknowledges this shortcoming himself.⁴⁰ The interpretive community is not a fixed object but a 'moving project or bundle of interests'.⁴¹ Every discipline's borders are constantly threatened by 'skirmishes' and 'large-scale territorial disputes' and are always subject to redefinition.⁴² To treat Fish's claims about the profession as merely empirical issues of socialization (that is, what attitudes new lawyers learn) would arguably be to miss the point.⁴³ Intelligibility within a community has been found to be a central focus for explanatory frameworks throughout the social sciences.⁴⁴ At least in order to contextualise and re-evaluate his more strident remarks about law's practices, Fish's extended and rather careful study of the realities of professionalism deserve to be taken seriously.

IV INTERPRETATION AND OTHER ONTOLOGICAL MATTERS

Whether or not Goldsmith is correct in calling Fish a 'neo-formalist', it might be said that the interest in law as a matter of communal intelligibility is a concern for form rather than for content. With respect to the content of legal discourse, Fish has emphasised the significance of interpretation. Interpretation is, for Fish, at the heart of law's activity, but this central role is, he suggests, unacknowledged or even actively concealed.⁴⁵ It is law's understanding and articulation of the role of interpretation in its work that Fish finds wanting.⁴⁶ Fish's general approach to interpretation is, therefore, only indirectly relevant to his legal studies concerns, but some examination of these background commitments will assist the present inquiry.

³⁸ Veesper, above n 2, 2.

³⁹ See Stanley Fish, 'Preface' in Stanley Fish (ed), *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) ix, ix.

⁴⁰ Fish, 'The Anti-Formalist Road', above n 22, 30–3. See also Fish, 'Distinctiveness: Its Achievement and Its Costs', above n 10, 19.

⁴¹ Fish, 'Change', above n 17, 150, cited in Goldsmith, above n 17, 389.

⁴² Fish, 'Distinctiveness: Its Achievements and Its Costs', above n 10, 19.

⁴³ See Goldsmith, above n 17, 397, 413.

⁴⁴ See, eg, Kenneth Gergen, 'The Social Constructionist Movement in Modern Psychology' (1985) *40 American Psychologist* 266, 273.

⁴⁵ Fish, 'The Law Wishes to Have a Formal Existence', above n 3, 141–3.

⁴⁶ *Ibid* 142.

In the series of four essays commencing with ‘Is There a Text in This Class?’,⁴⁷ Fish emphasises that ‘meanings are the property neither of fixed and stable texts nor of free and independent readers but of interpretive communities’.⁴⁸ Further, ‘the fact of agreement, rather than being a proof of the stability of objects, is a testimony to the power of an interpretive community to constitute the objects upon which its members ... can then agree.’⁴⁹ More concretely, a Shakespearean scholar, Stephen Booth, is taken to task by Fish for announcing that he is disavowing interpretation (of the sonnets in this case) and returning to ‘the text itself’ — a text that he will merely describe and not seek to explain.⁵⁰ Fish argues persuasively that Booth is deceiving himself in thinking that interpretation can be left behind in this voluntary manner, with the text being somehow enabled (by means of the critic’s self-effacing work) to ‘speak for itself’. The cry of ‘back-to-the-text’ is a rhetorical device because interpretation cannot be avoided — it is ‘the only game in town.’⁵¹ The disavowal of interpretation is intellectually dishonest in an interpretive practice, and the motivation of the disavowal must be scrutinised. Written some 10 years before ‘The Law Wishes to Have a Formal Existence’,⁵² these comments clearly foreshadow some important elements of Fish’s subsequent critique of legal discourse. They suggest that Fish may have come to his detailed study of the law with some well-defined expectations as to what he would find. Importantly, however, it is at this early point that an individual, or class of individuals, whose denial of interpretation is taken to task — not a whole profession’s.

In terms of legal studies, perhaps Fish’s most helpful account is in ‘Play of Surfaces: Theory and the Law’.⁵³ In responding to a collection of essays written by other commentators on hermeneutics and law, Fish defines interpretation as necessarily focused on intentions. Interpretation is the determination of what can be meant by something that is presumed to have been purposefully produced.⁵⁴ This does not mean, he insists, that an author’s own awareness of their intention is privileged in any way. But it does mean that merely ‘playing’ with theoretically possible senses for a text is not a proper interpretive technique. Neither an attitude nor a practice (if either were possible) of ‘anything goes’ can coexist with genuine interpretation.⁵⁵ The discipline required, Fish implies, is to explore meanings that are validated by the circumstances in which a text is produced and

⁴⁷ Stanley Fish, ‘Is There a Text in This Class?’ in Stanley Fish (ed), *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) 303.

⁴⁸ Stanley Fish, ‘How to Recognize a Poem when You See One’ in Stanley Fish (ed), *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) 322, 322.

⁴⁹ Stanley Fish, ‘What Makes an Interpretation Acceptable?’ in Stanley Fish (ed), *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) 338, 338.

⁵⁰ *Ibid* 353.

⁵¹ *Ibid*.

⁵² It was, however, approximately contemporaneous with Stanley Fish, ‘Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes without Saying, and Other Special Cases’ in Stanley Fish (ed), *Is There a Text in This Class? The Authority of Interpretive Communities* (1980) 268.

⁵³ Stanley Fish, ‘Play of Surfaces: Theory and the Law’ in Gregory Leyh (ed), *Legal Hermeneutics: History, Theory, and Practice* (1992) 297.

⁵⁴ *Ibid* 300.

⁵⁵ Fish, ‘Don’t Know Much about the Middle Ages’, above n 18.

disseminated. As Fish observes elsewhere (in a Dworkinian moment), interpretation is always a matter of finding, not merely assigning, a meaning.⁵⁶

Fish stresses that despite these constraints, interpretation does not presuppose the kind of stability asserted by literalists. At a general level, language and interpretation are radically indeterminate and foundationless; but for Fish, the implications of this ‘theoretical’ situation have been misunderstood. In local contexts, which are the arenas for life as it is lived, interpretation is governed by local contingencies and temporarily constituted stabilities.⁵⁷ Similarly, the recognition that law is ‘socially constructed’ tells us nothing about what to do next. All the work (whether conceptual or practical) remains to be done.⁵⁸ This important point is the same as that made in Fish’s criticism of Critical Legal Studies: its theoretical analysis of the overall situation may well be correct in many respects, but its programmatic deductions are a different matter. For Fish, then, an awareness of contextual constraints (historical contingency, for example) does not give rise to any relaxing of those constraints.⁵⁹

Fish’s ontological position is therefore one that foregrounds social practice in communities — texts, institutions and ‘principles’ are constituted by the practice, not the other way around. This point relates to the significance, for a discussion in legal studies, of Fish’s position on general ontological and epistemological issues such as ‘foundationalism’ and ‘positivism’ (in a social science sense).⁶⁰ It is true that Fish has directly targeted the former idea, and has occasionally used the latter term (for example, the ‘positivist-formalist project’).⁶¹ It would seem unlikely, however, that the significance of Fish for the law would be limited by his position on such general questions. Many other commentators have discussed the implications for law of these issues, and over an extended period of time.⁶² It is to do a disservice to Fish to identify him too closely with such general positions in the social sciences as the critique of positivism. Fish’s position with respect to liberalism seems more directly relevant to the legal discussion — partly because it is an express concern for Fish himself. Again, however, to put too much emphasis on the critique of liberalism as such would be to divert attention from those ideas in Fish’s work that are particularly challenging for law. As for postmodernism (from which Fish has differentiated himself),⁶³ there seems no good reason to associate Fish with this collection of ideas at all. Defining postmodernism as a humanist movement does not seem to clarify

⁵⁶ Ibid 296.

⁵⁷ Stanley Fish, ‘Why Literary Criticism Is Like Virtue’ in Stanley Fish (ed), *Professional Correctness: Literary Studies and Political Change* (1995) 93, 113.

⁵⁸ Fish, ‘Play of Surfaces’, above n 53, 316. See also Stanley Fish, ‘Preface’ in Stanley Fish (ed), *Professional Correctness: Literary Studies and Political Change* (1995) vii, ix–x; Stanley Fish, ‘Force’ in Stanley Fish (ed), *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 503, 523–4.

⁵⁹ Fish, ‘Play of Surfaces’, above n 53, 314.

⁶⁰ Robertson, ‘Picking Positivism Apart’, above n 1, 416.

⁶¹ Fish, ‘Interpreting the Variorum’, above n 16, 159.

⁶² See, eg, Dennis Patterson, *Law and Truth* (1996) 151–79; Gary Minda, *Postmodern Legal Movements* (1995) 163.

⁶³ Fish, ‘Preface’ in *Professional Correctness*, above n 58, x.

matters.⁶⁴ Social constructionism is itself a broad church, some of whose sects perhaps cross over into the postmodern, but an emphasis on collective meaning-making within cultural communities does not seem to qualify.⁶⁵

Slightly more needs to be said about ‘deconstruction’. Fish uses the term on occasion in relation to his own work or that of others. For example, the term is applied to Robert Gordon’s Critical Legal Studies project.⁶⁶ One can agree with Necati Polat that there are some general similarities between Fish and Jacques Derrida (as well as between Fish and Ludwig Wittgenstein),⁶⁷ other critics have categorised Fish with Derrida and Harold Bloom,⁶⁸ or classified Fish’s work negatively as ‘deconstruction’.⁶⁹ It should be admitted that Fish’s ‘quietism’ in relation to overtly programmatic positions would fit well with deconstruction in many ways, there being a similar distrust of political enthusiasm as an intellectual resource. But the similarities are limited; tellingly, Fish’s piece on Derrida ‘With the Compliments of the Author: Reflections on Austin and Derrida’,⁷⁰ is somewhat unsatisfactory. This is not to say that the term ‘anything goes’ — expressly repudiated by Fish⁷¹ — applies with any more accuracy to deconstruction than it does to Fish’s own approach. Among the competing paradigms of literary criticism, it is the New Critics’ objectivist approach, itself challenged first by the reader-response and then by the communal-intelligibility approach, that converges with a Derridean deconstructionism. Similarly, it is the law’s mistakenly formalistic attitude to texts (as Fish sees it) that most closely resembles deconstruction in action, in its claim that there is ‘nothing outside of the text’.⁷² A Derridean jurisprudence would differ significantly from Fish’s approaches, both earlier and later in his career, for deconstruction is not a form of hermeneutics.⁷³

To summarise, Fish stresses that interpretation must, to remain legitimate, always respect the constraints of intention. Meanings are to be found, not merely attributed. Alternative readings must be genuine, not irresponsible or speculative, for reading — the achieving of an interpretation — is performed by people working within cultures of communal intelligibility, not by transcendental and disinterested ‘critics’. Moreover, professionalisation overrides the quasi-universals of any ‘theoretical’ investigation, such as any claims about interpretation ‘in general’. Even if Fish came to legal studies by assimilating it

⁶⁴ Alessandra Lippucci, ‘Surprised by Fish’ (1992) 63 *University of Colorado Law Review* 1.

⁶⁵ Morss, above n 6, 44.

⁶⁶ Fish, ‘Anti-Professionalism’, above n 4, 226. See Gordon, above n 7.

⁶⁷ Necati Polat, ‘The Real and the Formal: Legal Realism Revisited’ (1999) 8 *Social and Legal Studies* 47.

⁶⁸ Fish, ‘Is There a Text in This Class?’, above n 47, 305.

⁶⁹ Goldsmith, above n 17, 418 fn 66.

⁷⁰ Stanley Fish, ‘With the Compliments of the Author: Reflections on Austin and Derrida’ in Stanley Fish (ed), *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 37.

⁷¹ Stanley Fish, ‘Truth and Toilets’ in Stanley Fish (ed), *The Trouble with Principle* (1999) 293, 307.

⁷² Jacques Derrida, *Of Grammatology* (Gayatri Spivak trans, 1976 ed) 158 [trans of: *De la Grammatologie*].

⁷³ Geoffrey Bennington, *Interrupting Derrida* (2000) 11.

into his (literature-based) anti-formalist crusade, he strongly asserts its autonomy; as he expressly states, '[l]iterary and legal interpretation are distinct'.⁷⁴ Thus far, based on his accounts of professionalism and of the processes of interpretation, the law would seem to have little to worry about from Fish.

V RETHINKING WHAT FISH WISHES THE LAW TO WISH

Stanley Fish has in recent times put forward an account of law that stresses its professionalised nature, as a consequence of which its practices — including its interpretive practices — are, to a certain extent, self-sufficient. Even stated in this somewhat bland fashion, the account is a challenging one, for if law welcomes a certain independence from societal pressures, it may not relish the isolation that Fish's model claims — it may still wish to see itself as contributing to the public good. As much as the profession of literary criticism, law depends upon the public purse. However, Fish is known for much more challenging allegations than these. The purpose of this section is to establish whether the piece of writing in which Fish made his most strident complaints about law should be entirely dismissed, or whether useful elements can be discerned within it.

Fish's accusations that law is both dishonestly formalist and literalist are especially familiar to legal studies through 'The Law Wishes to Have a Formal Existence'. An earlier account, dating from the late 1970s, is to be found in 'Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes without Saying, and Other Special Cases'.⁷⁵ The 'pattern that should by now be familiar'⁷⁶ — that is, familiar to the reader after a discussion of non-legal examples — is illustrated by Fish in a brief discussion of *Riggs v Palmer*.⁷⁷ Here the question arose of whether a murderer could inherit under the victim's will. According to Fish, the Court resolved the problem by novelly interpreting the intentions of the law-makers and thereby overriding what the Court saw as the plain meaning of the relevant statute. It is the role played by the supposed plain or literal meaning that Fish queries. It is, he claims, central to legal argument that a single literal meaning be presumed to lie in the relevant words of a statute or equivalent text — even though in this case that literal meaning was displaced. 'The truth of the matter', according to Fish, is that the Court in fact preferred one of two interpretations, neither of them 'literal'.⁷⁸ The law, he claims, lacks awareness of its interpretive (and other rhetorical) processes.

In re-examining some key aspects of 'The Law Wishes to Have a Formal Existence', some guidelines will be followed. These are intended to reduce the likelihood of merely catching Fish out in minor inconsistencies or changes of position and to make it more likely that a valid articulation of his overall

⁷⁴ Fish, 'Don't Know Much about the Middle Ages', above n 18, 294.

⁷⁵ Fish, 'Normal Circumstances', above n 52.

⁷⁶ *Ibid* 278.

⁷⁷ 22 NE 188 (NY Ct App, 1889).

⁷⁸ Fish, 'Normal Circumstances', above n 52, 279–80.

contribution will emerge. First, any of the claims entertained in ‘The Law Wishes to Have a Formal Existence’ that Fish elsewhere persuasively rejects will be bracketed. Such claims include: orthodox Critical Legal Studies critiques;⁷⁹ undisciplined or ‘anything goes’ approaches to interpretation;⁸⁰ critiques of law that accuse it of being isolated from outside forces and interests;⁸¹ and approaches to law that focus on conceptual definition rather than an examination of practices. Second, aspects that agree with the broad sweep of Fish’s other work, as indicated above, will be highlighted. Third, any straightforward errors will cautiously be identified. The resulting claims will then be given consideration as best representing Fish’s message to the law. The process of re-reading the paper in this way is undoubtedly a selective and an interpretive one, and one guided by hindsight.

In the first paragraph of ‘The Law Wishes to Have a Formal Existence’, the desired ‘formal existence’ is defined as disciplinary self-sufficiency — a desire not to rely on processes outside itself or ‘some supplementary discourse’.⁸² Law thus wishes to be a community of intelligibility — that is, a profession. Two perceived threats to this aspiration are described — interpretation and morality — both of which are defined by Fish as being (for law) in some sense ‘outside’ the law. In so far as interpretation is concerned, the aspiration ascribed to law is defined as being a wish for formalism — the thesis which holds that self-sufficiently perspicuous marks can set in motion procedures not dependent on differences between agents.⁸³

Next Fish outlines a radical critique of the formalistic approach as he has defined it. The formalistic approach is characterised by the repudiation of value, to which Fish responds that value is always already within law’s discussions.⁸⁴ As he acknowledges elsewhere, this argument is typical of the Critical Legal Studies movement up to this point.⁸⁵ However, Fish diverges from Critical Legal Studies in claiming that this value-ladenness does not equate to failure of the enterprise. From its own point of view, says Fish, law *succeeds* in achieving its desired formal purity — the formalism is forcefully maintained. This, however, he says, comes at a cost — the success is ‘bitter to the formalist taste’⁸⁶ as if formalism is secretly aware of, and ashamed of, its ‘dark side’. Fish’s new claim here, therefore, seems to be that law is predicated on a series of rhetorical contradictions and dissonances.

However, such a dialectical analysis seems to be ruled out by Fish’s practice-focused approach. It would seem to fall foul of Fish’s strictures concerning

⁷⁹ Fish, ‘The Law Wishes to Have a Formal Existence’, above n 3, 168.

⁸⁰ See above n 71 and accompanying text.

⁸¹ Fish, ‘Play of Surfaces’, above n 53, 314.

⁸² Fish, ‘The Law Wishes to Have a Formal Existence’, above n 3, 141.

⁸³ *Ibid* 142–3.

⁸⁴ See, eg, Stanley Fish, ‘Anti-Foundationalism, Theory, Hope and the Teaching of Composition’ in Stanley Fish (ed), *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 342, 348.

⁸⁵ Stanley Fish, ‘Introduction: “That’s Not Fair”’ in Stanley Fish (ed), *There’s No Such Thing as Free Speech and It’s a Good Thing, Too* (1994) 3, 21.

⁸⁶ Fish, ‘The Law Wishes to Have a Formal Existence’, above n 3, 144.

theoretical analysis. The claim that anything at all (of a practical nature) eventuates as a consequence of the supposed *theoretical* shortcomings of the profession seems as empty as the long-predicted downfall of world capitalism as a consequence of its supposed internal contradictions. What the law understands about its own practice — the extent of its insight into its true character — is, in Fish's account, an irrelevancy.⁸⁷ This might not be the case if law's position were unique in its repudiatory relationship to interpretation;⁸⁸ if the law were defined by its rejection of interpretation. Apparently, however, it is not. For Fish, every practice is 'insulated from a confrontation with the contingency of its foundations ... and depends for its emergence as a practice — as an activity distinct from other activities — on a certain ignorance of its debts and complicities.'⁸⁹

Seeking more solid ground for his analysis, Fish goes on to discuss *Trident Center v Connecticut General Life Insurance Co*,⁹⁰ a loan contract case. Trident Center voluntarily sought to make early settlement of a loan, with contingent penalty interest, in order (presumably) to refinance elsewhere — a facility blocked by the contract it had signed. Here Fish gives the impression that the disputed contract included two equally balanced alternatives — either two inconsistent clauses, or perhaps two clauses describing different sets of envisaged circumstances. This allows Fish to criticise Kozinski J's favouring of one of these interpretive options (in effect, for Fish, defining one as literal and the other as an interpretation). Kozinski J's preference is said to be motivated by extra-legal considerations, namely 'his [Honour's] antecedent determination to enforce contracts whenever he can.'⁹¹

However, Fish's summary of the facts in *Trident Center* is quite erroneous.⁹² In fact, there was a series of clauses in the contract referring to options on the part of the lender should default occur⁹³ — at least five, as well as the one reported by Fish — so that Kozinski J's statement that '[t]he contract language ... leaves no room for [Trident Center's] construction'⁹⁴ is entirely justified and very far from the prejudicial move that Fish in effect alleges.

Fish's own construction of the *Trident Center* contract, according to which penalty-interest prepayment will simply 'kick in'⁹⁵ at default, is simply wrong and little more than, in his own words, a 'trick'.⁹⁶ The trick is, it seems, to find an interpretation that suits one's aims; but for Fish, as we have seen, that would

⁸⁷ Ibid 176 (discussing Peter Goodrich).

⁸⁸ Stewart, above n 7.

⁸⁹ Fish, 'The Law Wishes to Have a Formal Existence', above n 3, 176.

⁹⁰ 847 F 2d 564 (9th Cir, 1988) (*Trident Center*).

⁹¹ Fish, 'The Law Wishes to Have a Formal Existence', above n 3, 145.

⁹² This sense of 'erroneous' is one that Fish recognises in terms of communal intelligibility within the practice; for instance, it would be erroneous to say that Mr Collins is the hero of Jane Austen's novel *Pride and Prejudice*: Fish, 'What Makes an Interpretation Acceptable?', above n 49, 347–9.

⁹³ *Trident Center*, 847 F 2d 564, 567 (9th Cir, 1988).

⁹⁴ Ibid.

⁹⁵ Fish, 'The Law Wishes to Have a Formal Existence', above n 3, 145.

⁹⁶ Ibid 170.

be an ‘anything goes’ exercise, unconstrained by relevant intentions, and therefore quite illegitimate.⁹⁷

A second part of the *Trident Center* case, which for Fish supports his claim concerning law’s attitude to extrinsic interpretation, relates to the parol evidence ‘rule’. It might be pointed out straightaway that Trident Center’s claims concerning parol evidence were submitted *in the alternative*,⁹⁸ which immediately says something quite sophisticated about legal reasoning. The practice of submitting in the alternative might even be said to disprove the accusation of formalism in the law at a stroke, for what is a claim in the alternative if not a proposition that the court should set aside an interpretation just advocated by the same party, in order to entertain an entirely different one? Less dramatically, the submission (as here in Trident Center’s first submission) that a text (such as a statute or a contract) is ambiguous itself requires the court to address the issue ‘is this text ambiguous?’ (as Kozinski J did in this case). This is a question that calls for focused attention on plausible alternative interpretations of the words concerned, contextualised in whatever way the court decides, and in an arena where every such decision can be challenged.

In *Trident Center*, a permissive anomaly in Californian case law on the exclusion of parol evidence — *Pacific Gas & Electric Co v G W Thomas Drayage & Rigging Co*⁹⁹ — left Kozinski J no alternative but to reverse and remand the case back to the District Court. In *Pacific Gas*, the State Supreme Court had determined that the meaning of a contract could not be established from the written form of words alone, since words ‘do not have absolute and constant referents’.¹⁰⁰ Whilst recognising the judgment’s status, Kozinski J makes a number of criticisms of it, thus taking a position that is pilloried by Fish. Kozinski J comments that it is the (common) law that is creating the problems here; his Honour points out the consequences of taking seriously, in a legal sense, the idea that words have no fixed reference. This is not Kozinski J taking a position on the truth or falsity of the general statement in a ‘philosophical’ sense. Fish, however, does not hesitate to take such an extra-legal position. His position is that *Pacific Gas* is correct in a general sense — that this judgment recognised the actual mutability of words and meanings, a mutability which applies in legal contexts just because it is a general fact about language and the world. For Fish, this welcome (albeit extraordinary) judicial recognition of the truth about language had overturned the (clearly ‘wrong’) parol evidence rule. Fish’s position is unashamedly and unselfconsciously transcendental. But as he has himself insisted, claims at a general and theoretical level, such as an anti-

⁹⁷ In another error, Fish cites Kozinski J as saying that ‘[f]ear of these repercussions [of a default] is strong medicine’ and comments, in a snide fashion, that the judge is administering that medicine: *ibid* 145. However, the ‘medicine’ referred to is the *commercial* not the judicial consequences of a default. See *Trident Center*, 847 F 2d 564, 568 (9th Cir, 1988).

⁹⁸ *Trident Center*, 847 F 2d 564, 568 (9th Cir, 1988).

⁹⁹ 442 P 2d 641 (1968) (*‘Pacific Gas’*).

¹⁰⁰ *Ibid* 644 (Traynor CJ).

foundationalist claim about language, cut no ice in the local arena.¹⁰¹ Kozinski J has grasped Fish's point better than Fish himself, with or without the benefit of reading Fish, and has focused on specifically local, legal matters.

Even more telling perhaps, and as Fish himself observes,¹⁰² Kozinski J is saying that he is 'reading' (not simply receiving) a rule. Kozinski J states that '[t]he normal rule of *construction*, of course, is that courts must *interpret* contracts, *if possible*, so as to avoid internal conflict'¹⁰³ — all of these terms and clauses foreground the imperfect, uncertain and extended (non-immediate) nature of the judicial process that is engendered by a contract dispute. What more could Fish ask for? It seems merely foolish to say that Kozinski J is here pretending not to perform an interpretive act, or that he in any substantive sense wishes the law to have a formal existence. As Fish points out in quoting Corbin, where 'a plain and definite meaning is achieved by the court', and that meaning is sanctioned by considerations of intention, a 'less convincing' meaning will not be substituted.¹⁰⁴ 'Achieved'; 'convincing': the prosecution rests.

Fish's examples of trade usage that involve surprising re-readings of contract terms (for example, 'June–Aug' as not including August)¹⁰⁵ are perfect examples of the communal intelligibility he elsewhere celebrates. Theatres still have 'matinees' in the afternoon: the usage is a conventional one. Fish's comment that (because of the trade usage flexibility) 'anything can mean anything' (in legal argument) only has the scandalous force he wishes it to have here if we forget the communal-intelligibility dimension. For us to think that such usages are scandalous, we would have to think that the words used possess some proper, literal meaning that floats above the understandings of the community. But this would be exactly the literalism that Fish elsewhere enjoys exposing. Thereafter, Fish painfully draws out the idea that law's arguments are, indeed, arguments — asserting certain readings over others by such means as redefining terms and re-ordering priorities and emphases.

VI CONCLUSIONS: THE REMAINS OF THE FISH

If Fish were an Atkinsonian butler,¹⁰⁶ he would, it appears, be more like the servile Mr Stevens (of *The Remains of the Day*) than one might expect. '[I]t is only by deploying its own terms confidently and without metacritical reservation that [law] can be practiced at all.'¹⁰⁷ More broadly, what Fish tells us about the law seems to be as follows. Law is a profession, in which intelligibility is a

¹⁰¹ Fish, 'Anti-Foundationalism' above n 84, 348; Stanley Fish, 'Critical Self-Consciousness, Or Can We Know What We're Doing?' in Stanley Fish (ed), *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989) 436, 466.

¹⁰² Fish, 'The Law Wishes to Have a Formal Existence', above n 3, 146.

¹⁰³ *Trident Center*, 847 F 2d 564, 566 (9th Cir, 1988) (emphasis added).

¹⁰⁴ Arthur Corbin, *Corbin on Contracts: One Volume Edition* (1952) 497, cited in Fish, 'The Law Wishes to Have a Formal Existence', above n 3, 177.

¹⁰⁵ Fish, 'The Law Wishes to Have a Formal Existence', above n 3, 148. See also *Warren's Kiddie Shoppe v Casual Slacks*, 171 SE 2d 643 (Ga Ct App, 1969).

¹⁰⁶ Atkinson, above n 28.

¹⁰⁷ Fish, 'The Law Wishes to Have a Formal Existence', above n 3, 177.

matter of ‘immanent understanding’¹⁰⁸ derived from its practitioners’ embeddedness in their practices. Texts that the law deals with, including those it treats as sources of authority, are themselves constituted by its professional activity. It is not texts but ‘conventional and obligatory routines’ that explain practices.¹⁰⁹ Much of the law’s activity involves interpretation, and all of it involves rhetoric. Finally, there are no good reasons for believing that ‘legal actors’ are unaware of the role rhetoric plays for them. Legal actors are not ‘living out a lie, asserting as absolute what they should acknowledge as fragile and transitory’.¹¹⁰ Indeed there is self-awareness of the rhetorical-persuasive mode, a point made by James Boyd White ‘more or less’ endorsed by Fish.¹¹¹

We thus go beyond ‘The Law Wishes to Have a Formal Existence’, leaving behind that which is special to it as hyperbole that has served its purpose. If anything, *Professional Correctness: Literary Studies and Political Change* replaces it as authority. When writing ‘The Law Wishes to Have a Formal Existence’, Fish certainly wished the law to wish for a formalist existence. For Fish, this wish fitted with his anti-formalist campaign. There is more than a hint that he perceived law as, if anything, lagging behind literary criticism in recognising the limitations of formalism and certainly more dominated by formalism than literature had ever been. Fish was fighting old battles when he took on the law in this way. In any event, it becomes clear from Fish’s wider writings that such a formalist desire on the part of law, even if demonstrable, could be little more than a pipe-dream. Even if we grant such a desire to law and/or to its officers, we are faced with the (Fishean) ‘so what?’ question. The supposed formalist vision — repudiating rhetoric and interpretation — has no substantive articulation within the functionings of the law. In contrast, law’s self-awareness of the centrality of persuasiveness and of the construction of credibility is patent to any law student.

As Fish remarks, ‘[t]hat leaves us with the law as it is’.¹¹² Again, ‘the law will resume the task of simultaneously declaring and fashioning the formal autonomy that constitutes its precarious, powerful being.’¹¹³ But this does not give the law grounds for complacency — quite the reverse. The sharpening of Fish’s argument reveals it as a challenging, and not merely a provocative or mischievous, one. The attack on liberalism in the law (‘the wash of a many-voiced pluralism’)¹¹⁴ is, with the discussion of professionalism, extended to political or moral agendas of any kind. Fish reveals himself as a powerful advocate of legal positivism, where that position is defined by its disjunction of law and moral-

¹⁰⁸ Fish, ‘Distinctiveness: Its Achievement and Its Costs’, above n 10, 21. See also Ernest Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’ (1988) 97 *Yale Law Journal* 949.

¹⁰⁹ Fish, ‘Disciplinary Tasks and Political Intentions’, above n 9, 41.

¹¹⁰ Fish, ‘Force’, above n 58, 523.

¹¹¹ Fish, ‘The Law Wishes to Have a Formal Existence’, above n 3, 172–3. See also James Boyd White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (1985) 33–4.

¹¹² Fish, ‘The Law Wishes to Have a Formal Existence’, above n 3, 179.

¹¹³ *Ibid* 177.

¹¹⁴ *Ibid* 174; further developed in Stanley Fish, ‘Boutique Multiculturalism’ in Stanley Fish (ed), *The Trouble with Principle* (1999) 56. Cf Leyh’s platitudes on law as ‘another voice’: Gregory Leyh, ‘Introduction’ in Gregory Leyh (ed), *Legal Hermeneutics: History, Theory and Practice* (1992) xi.

ity.¹¹⁵ His critique of law's desire to be relevant, and either conservatively or progressively useful, when its very professionalism militates against such possibilities, has yet to be taken on board. The awareness of that worrying conflict is the cost of re-reading what Stanley Fish has to tell legal studies, once the (always flakey) Fishean accusation — that the law does not know what it is doing — is removed. There's no such thing as free Fish — and it's a good thing, too.

¹¹⁵ Likewise, a confrontation with arguments advocating 'interdisciplinarity' becomes pressing once Fish's noisy critique of law's rhetoric is disposed of, since Fish's position on professionalism is inconsistent with the notion of interdisciplinarity: Goldsmith, above n 17, 417.