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### Fish v. Zapp: The Case of the Relatively Autonomous Self

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# Fish v. Zapp: The Case of the Relatively Autonomous Self

PIERRE SCHLAG\*

*In these two essays, Professor Schlag explores the rhetorical structure and appeal of Professor Stanley Fish's arguments about interpretive communities. By demonstrating Professor Fish's rhetorical style, Schlag undertakes to show how Stanley Fish persuades. Both essays show how Fish's work can be made to reveal important lessons about our conception of self, the role of rhetoric, and the modernist predicament. In fairness to the reader (and to Stanley Fish) these lessons are not the ones commonly attributed to Fish, and some of these lessons, quite possibly, are not even the ones he wishes to impart.*

*In the first essay, which pits the fictional deconstructionist, Morris Zapp, against the "real" Stanley Fish, Schlag demonstrates how Fish's analytic method turns against itself and ultimately, against the self to which it is addressed. In the second essay, Schlag turns to Professor Fish's most recent article, Dennis Martinez and the Uses of Theory. By examining the nuts and bolts of Fish's arguments, Schlag shows how Stanley Fish's rhetoric tracks a number of philosophical, metaphorical, and linguistic commitments in a manner that is at once persuasive and insufficiently critical.*

*Professor Schlag assures us that all puns, doubles entendres, ambiguities, and equivocations that he knows about are intended. The rest is in the telling . . .*

—The Editors

At a conference of the University Teachers of English Language and Literature, the internationally renowned literary critic, Professor Morris Zapp, made the following comments:

To understand a message is to decode it. Language is a code. *But every decoding is another encoding.* If you say something to me I check that I have understood your message by saying it back to you in my own words, that is, different words from the ones you used, for if I repeat your own words exactly you will doubt whether I have really understood you. But if I use *my* words it follows that I have changed *your* meaning, however slightly . . . .

Reading, of course, is different from conversation. It is more passive in the sense that we can't interact with the text, we can't affect the develop-

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ment of the text by our own words, since the text's words are already given. That is what perhaps encourages the quest for interpretation. If the words are fixed once and for all, on the page, may not their meaning be fixed also? Not so, because the same axiom, *every decoding is another encoding*, applies to literary criticism even more stringently than it does to ordinary spoken discourse.<sup>1</sup>

If Zapp ventured outside of literary circles to address the legal academic community, he might say something like this:

To put the matter baldly, already-in-place interpretive constructs are a condition of consciousness. It may be . . . that the thinking that goes on within them is biased (which means no more than that it has direction) but without them (a pun seriously intended) there would be no thinking at all. It follows then that the one thing you can't do in relation to interpretive constructs is choose them, and it follows too that you can't be faulted either for not having chosen them or for having chosen the wrong ones; moreover, it follows that it makes no sense to condemn as "non-rational" the reasoning that proceeds within interpretive constructs because that's the only kind of rationality there is. Finally, by the same reasoning, if you can't choose your interpretive constructs, then neither can you know them (in the sense of holding them in your hand for inspection), and if you can't know them, you can hardly be expected to take them into account when you come to explain the process by which you reached your conclusions.<sup>2</sup>

These comments by Stanley Fish seem to be the sort of position that Morris Zapp might take. Nonetheless, there is room for doubt. Zapp's arguments are more vertiginous than those of Fish. At bottom when Fish is done deconstructing, he leaves us with "interpretive communities" as the comforting answer to our most taxing hermeneutical and epistemological problems. "Why is it that a constitutional provision cannot mean just anything at all?" Fish's answer is that we are "already and always" situated within "interpretive communities."<sup>3</sup> Zapp, by contrast, leaves us with . . . well, he leaves us with nothing at all (except, maybe, our jobs). Zapp is something of a nihilist and Fish is not.<sup>4</sup>

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1. D. LODGE, *SMALL WORLD* 29-30 (1984) (emphasis in original); see *infra* note 68 and accompanying text (for a more accurate description of Prof. Zapp).

2. Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1795-96 (1987) [hereinafter Fish, *Uses of Theory*] (footnote omitted).

3. S. FISH, *IS THERE A TEXT IN THIS CLASS?* 14 (1980) [hereinafter S. FISH, *TEXT IN THIS CLASS*]; Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1332 (1984) [hereinafter Fish, *Fish v. Fiss*].

4. Fish considers nihilism an untenable, impossible position steeped in bad metaphysics, see Fish, *Fish v. Fiss*, *supra* note 3, at 1346, and:

The person who looks about and sees, without reflection, a field already organized by problems, impending decisions, possible courses of action, goals consequences, desiderata, etc. is not free to choose or originate his own meanings, because a set of meanings has, in a sense, already chosen him and is working itself out in the actions of perception, interpreta-

The question of interest here is what allows Fish to escape Zapp's nihilistic projection of the infinite alternation of decoding and encoding. The answer is that Fish has privileged the *relatively autonomous self*. Now, between the question and the answer, there is that small matter of getting from here to there. So, let's consider Fish's arguments.

Fish systematically deconstructs any attempt to provide foundations or formulations for interpretive activities like law. It is not possible, he argues, to give any coherent account of rules (disciplining or not)<sup>5</sup> or theory (moral or not)<sup>6</sup> that could serve to constrain interpretation. These rules or theories would themselves be texts and require interpretation.<sup>7</sup> Accordingly, such daring theoretical efforts cannot (and could not) regulate the practices they ostensibly address. On the contrary, theoretical production is itself a certain type of practice (an academic one) and thus stands in no special privileged relation to the judicial or legislative practices it claims to describe or regulate.<sup>8</sup> Fish is an absolute master at this line of argument, so this brief summary can hardly do justice to his position. But for my purposes, it is sufficient to say that as soon as Fish recognizes an element of foundationalism, essentialism, or formalism in a legal theory, he is always already well on his way toward showing that the theory does any number of embarrassingly self-defeating things.

The first move is generally to characterize an opponent (say, Fiss, Kelman, Moore, or Dworkin) as saying something transcendent or privileged about law (or whatever practice he or she is talking about), something like: Theory does and should regulate practice (Dworkin).<sup>9</sup> Or: There really is an ultimate reality which we should get to know in a natural law sort of way—a way that is beyond the mere conventional understanding (Moore).<sup>10</sup> Or again: It is disquieting that we are not a way more self-conscious of our interpretive constructs (Kelman).<sup>11</sup> Or yet again: There are meta-rules,

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tion, judgment, etc. he is even now performing . . . . This amounts to no more, or less, than saying that the agent is always and already situated, and that to be situated is not to be looking about for constraints, or happily evading them (in the mode, supposedly, of nihilism), but to be constrained already.

*Id.* at 1333-34.

5. See Fish, *Fish v. Fiss*, *supra* note 3, at 1326-27 (attacking Fiss' notion that "disciplining rules" provide constraints).

6. See Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551, 564-65 (1982) (rejecting Dworkin's invocation of theory as constraint on interpretation); Fish, *Uses of Theory*, *supra* note 2, at 1781 (same).

7. Fish, *Fish v. Fiss*, *supra* note 3, at 1326.

8. Fish argues that the consequences of theory are not discernibly different from the consequences of other practices. Fish, *Consequences*, in AGAINST THEORY 106, 124-25 (W.J.T. Mitchell ed. 1985) [hereinafter Fish, *Consequences*].

9. Fish, *Uses of Theory*, *supra* note 2, at 1785-90.

10. *Id.* at 1781-83.

11. *Id.* at 1794-95.

called "disciplining rules," that constrain the interpretation of ordinary doctrinal rules (Fiss).<sup>12</sup>

From here, Fish can show that despite what the theorist claims to provide for the practice under discussion (e.g., adjudication), his or her contribution is really no different from—certainly, no better than—the practice he or she is talking about.<sup>13</sup> Thus, when Fiss tried to fend off nihilism by attempting to constrain the interpretation of legal rules (with more and better "disciplining rules"), Fish pulled out the infinite regress.<sup>14</sup> A "disciplining rule" is still a rule. And thus Fiss' "disciplining rules" have all the same problems as the ordinary low level legal rules.<sup>15</sup> (If all texts are indeterminate, then it's a pretty good bet (if you believe in Gödel) that they can't be shown to be determinate with more text.)<sup>16</sup>

But there are other moves that Fish can use. One move, for instance, is to show that being and thinking-about-being are two different activities and that the latter is irrelevant to the first. (It's not as if you can ever leave or put ontology to the side to do "pure epistemology.")<sup>17</sup> Thus, when Moore, as a natural law theorist, claims there is an ultimate reality out there, it's not as if he could ever step out of his being or its conventional modes of expression to talk about what that reality looks like. So when Moore suggests that death is a natural event and that, therefore, we should interpret statutory references to death in terms of the best scientific theory possible,<sup>18</sup> Fish notes that this is a cannibalistic stance.<sup>19</sup> Science, after all, is simply one conventionalist discourse among others—no more, no less.<sup>20</sup>

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12. Fish, *Fish v. Fiss*, *supra* note 3, at 1326. You'll notice that this first move is not exactly a taxing exercise for Fish given the institutional criteria by which academic scholarship is judged (i.e., novelty, originality, sweep, etc.). Legal academics do not routinely go out of their way to point out (much less reflect) the view that their theories are historically situated. So ironically, and *seemingly* to bolster Fish's point, we are always already prepared to accept Fish's characterization of legal theory as self-announcedly privileged. We expect as much.

13. See *infra* notes 84-92 and accompanying text (elaborating on inside/outside distinction).

14. For a discussion of the infinite regress, see Schlag, *Cannibal Moves: The Metamorphoses of the Legal Distinction* (forthcoming in *Stanford Law Review*).

15. Fish, *Fish v. Fiss*, *supra* note 3, at 1326.

16. Cf. D. HOFSTADTER, GÖDEL, ESCHER AND BACH 17-18 (1979) (exploring Gödel's Theorem, which suggests that "all consistent axiomatic formulations of number theory include undecidable propositions").

For metaphorical analogues of the Theorem in the legal context, see Kennedy, *The Turn to Interpretation*, 58 S. CAL. L. REV. 251, 257 (1985) (modern legal thought masks conflict through indeterminacy); Schlag, *supra* note 14 (legal distinctions become self-destructive); Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (conventional ways of understanding rules vs. standards debate only replicate this dispute).

17. No one, but no one, ever gets their office that clean. If they did, they wouldn't have anything to say.

18. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 322-28 (1985).

19. Schlag, *supra* note 14 (noting state of the art legal analytic methods which consume reason).

20. Fish, *Uses of Theory*, *supra* note 2, at 1782.

If, like Dworkin, our theoretical claims are more modest, we're still vulnerable. Suppose, as Dworkin does, that it would be nice (or elegant or best) for judges to make their understanding of the institutional history articulate and theoretically consistent.<sup>21</sup> Well, that's all fine and well, but as Fish points out, it's entirely superfluous to deciding cases. Indeed, Fish confirms what we already know—the judge (by the very fact that he or she is a judge) has already internalized that institutional history and already has the know-how to decide cases. So, as with Moore's natural law theory, it is impossible for Dworkin's theory to guide adjudication in the way he claims. Furthermore, such a theory is also quite unnecessary. If someone is already a professional (say, a judge), the last thing she needs is a theory to tell her how to think like a professional.<sup>22</sup>

No one seems to escape the reach of Fish's deconstruction—not even a fellow antifoundationalist like Kelman. When Kelman argues, for instance, that it is disquieting to see that interpretive constructs (like broad and narrow time frames) play a significant role in the nonrational construction of the legal world,<sup>23</sup> Fish answers by pointing out that it couldn't be any other way. It is unthinkable that thinking could ever get started (much less get anywhere) if it wasn't already embedded in a situational context of interpretive constructs. Self-consciousness is fine, but the one thing it cannot do is put its interpretive constructs aside in order to choose which ones to adopt.<sup>24</sup>

As deconstructive moves go, Zapp would approve.<sup>25</sup> When Fish is done, all that remains is a bunch of self-consuming theories. (These particular theories don't get any better until the next essay, so if you want to look there now, this would be as good a time as any.)

Indeed, by the time Fish finishes with the theorists, they are left in rather vexing predicaments. Fiss, for instance, ends up replicating the problems he started out to resolve (indeterminacy).<sup>26</sup> Moore ends up appealing to that which he wants to get beyond (conventional understandings).<sup>27</sup> Dworkin ends up with a theory of adjudication that cannot be used and is not necessary for his audience to do what he would like them to (render law pure and consistent).<sup>28</sup> Kelman's theory is irrelevant; our minds cannot achieve the

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21. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 87-88 (1977).

22. Fish, *Uses of Theory*, *supra* note 2, at 1787-94.

23. *Id.* at 1795.

24. *Id.* at 1795-96.

25. Fish would conclude that this just proves his point that we are always already within interpretive communities. As for Zapp, he would probably conclude that Fish is one hell of a good rhetorician.

26. Fish, *Fish v. Fiss*, *supra* note 3, at 1326.

27. Fish, *Uses of Theory*, *supra* note 2, at 1783-85.

28. *Id.* at 1793-94.

impossible (transparent self-understanding).<sup>29</sup>

In a sense, though, the moves that Fish pulls on these theorists are one and the same. In each case, Fish has always already shown that all of these theories depend on *theoretical unmentionables* that go by the names of "interpretive communities,"<sup>30</sup> "interpretive assumptions and procedures,"<sup>31</sup> or "interpretive constructs."<sup>32</sup>

These artifacts are "theoretical unmentionables" in the sense that Fish has to (and to a large extent does) keep them relatively empty and unstructured. The more Fish says about the structure, content, or scope of these theoretical unmentionables, the more he looks like he's offering a positive theory of the generation of meaning—something he denies is possible.<sup>33</sup> Indeed, it is a tribute to his rhetorical acuity that he can get away with saying as much as he does about the structure and content of these "interpretive communities," for as soon as Fish begins to describe them he produces a text (maybe even the worst kind of text: a theory).<sup>34</sup> And at that point, his own arguments tell us that he's just gotten it wrong: interpretive communities cannot be reduced to a text—not Fiss' text, not Dworkin's text, not even Fish's text.

Now Fish is no doubt aware of this potential difficulty because he's extraordinarily elliptical in describing these "interpretive communities." Still, it must be hard to resist giving these things some content and structure (for otherwise who would believe that "interpretive communities" is the answer to a meaningful question?). And so, at various times, Fish's arguments can readily be taken to mean that interpretive communities or interpretive strategies really are the seat of meaning.<sup>35</sup> Of course, such a reading of Fish can

29. *Id.* at 1797.

30. S. FISH, TEXT IN THIS CLASS, *supra* note 3, at 14.

31. Fish, *Fish v. Fiss*, *supra* note 3, at 1327.

32. Fish, *Uses of Theory*, *supra* note 2, at 1797. Fish presents different conceptions of the unmentionables. In his book, Fish speaks of interpretive communities, which means groups of people who share bundles of interests, goals, and interpretive strategies. S. FISH, TEXT IN THIS CLASS, *supra* note 3, at 14. In a recent article, Fish subordinates the concept of interpretive communities to talk of conventions and institutions as the source of meaning. Luban, *Fish v. Fish or Some Realism About Idealism*, 7 CARDOZO L. REV. 693, 693-96 (1986) (commenting on Fish, *Anti-Professionalism*, 7 CARDOZO L. REV. 645 (1986)). In a still more recent article, Fish shows that the major thrust of his argument can be maintained regardless of what one calls the inarticulable shared source of meaning. Fish, *Uses of Theory*, *supra* note 2, at 1799-1800. For an early complaint that Fish has left his concept of "interpretive communities" rather vague and undetermined, see Scholes, *Who Cares About the Text?*, in 17 NOVEL: A FORUM ON FICTION 171, 173-75 (Winter 1984).

33. Fish, *Consequences*, *supra* note 8, at 111-12.

34. The fact that Fish says as much as he does about the structure and content of interpretive communities (not that he says all that much) presents some problems for his position. See *infra* text accompanying notes 62-63 (the more content Fish gives "interpretive communities," the more they become deconstructible texts).

35. And not unreasonably, Fish has been interpreted in just this way. McCormick, *Swimming Upstream With Stanley Fish*, 44 J. AESTHETICS & ART CRITICISM 67, 72-73 (1985). Accordingly, Fish has been attacked for proposing precisely that which he says is not possible: a theory of



seem disturbing. It seems to eclipse the "self" entirely, leaving it at best an empty vehicle for the reiteration of the meanings generated by interpretive communities.<sup>36</sup> And not surprisingly, Fish has been criticized for annihilating the self as subject.<sup>37</sup> Indeed, it would be easy to go further and suggest that Fish's concept of interpretive communities has totalitarian implications in that it overwhelms both reason and the self by *appearing* to locate meaning in the collectivity.<sup>38</sup>

But Zapp would undoubtedly point out that totalitarian implications will not flow from the interpretive communities concept.<sup>39</sup> Zapp, I'm quite sure, would insist upon decoding the concept of "interpretive communities." In fact Zapp (who is immensely fond of flips and reversals himself) might say that Fish's approach is not totalitarian in the least because its *rhetorical* appeal presumes and depends upon something antitotalitarian: the privileging of the self.<sup>40</sup>

Indeed, it is the self (e.g., you, I, etc.) that knows in some no-nonsense

interpretation. Knapp & Michaels, *Against Theory*, in *AGAINST THEORY*, *supra* note 8, at 11, 28-30. At other times, however, Fish seems to use the term "interpretive communities" merely as a code name for that which we cannot make articulate, but which surely must exist if there is (and if there is to be) some stability, some regularity in the way in which we describe the world. Fish, *Fish v. Fiss*, *supra* note 3, at 1327-28.

36. See *supra* note 4.

37. Cornell, "Convention" and Critique, 7 *CARDOZO L. REV.* 679, 689-91 (1986).

38. As Fish states:

[I]t is interpretive communities, rather than either the text or the reader, that produce meanings . . . . Interpretive communities are made up of those who share interpretive strategies not for reading but for writing texts, for constituting their properties. In other words these strategies exist prior to the act of reading and therefore determine the shape of what is read rather than, as is usually assumed, the other way around.

Even this formulation is not quite correct. The phrase "those who share interpretive strategies" suggests that individuals stand apart from the communities to which they now and then belong. In later essays I will make the point that since the thoughts an individual can think and the mental operations he can perform have their source in some or other interpretive community, he is as much a product of that community (acting as an extension of it) as the meanings it enables him to produce.

5. FISH, TEXT IN THIS CLASS, *supra* note 3, at 14. Fish's thesis has been criticized on the grounds that its totalitarian thrust deprives the individual interpreter of freedom and power and fails to account for intracommunity disagreements, Scholes, *supra* note 32, at 171-73.

39. And just so that there is no misunderstanding, I would agree with Zapp on this point. There is nothing particularly totalitarian in the interpretive community thesis—given that the jurisdiction of interpretive communities is undetermined and their content empty. But, at the same time, the concept is obviously amenable (even easily so) to totalitarian uses. And the thought that a proto-totalitarian self might find the concept enchanting is equally self-evident.

40. As one commentator has noted:

[A]lthough communal conventions circumscribe the available options for interpretive practice, Fish leaves it to individuals to decide on the actual pattern (or chaos) of choices. Far from burying individuals, Fish has reinstated them in their role as the prime and privileged makers of meaning and history. Posing as a radical determinist, he stands revealed as a closet humanist.

daily-life way that Fish is right and all the Fish-bashers are wrong. What's more, the self (yours, mine, etc.) knows this against the rules of construction, against theory, and against reason itself. The self knows that there is something irreducible about the act of interpretation that simply cannot be made articulate and that in any case could not be captured by anything so systematic, so universal, or so univocal as a theory. The self knows that interpretation is a social practice and that there will always be something about practice that cannot be reduced to rules, theory, or reason.<sup>41</sup>

Of course, it is not just any self that knows this. It is not the biblical self—if it were, Fish would be talking about God rather than interpretive communities. Nor is it the Hegelian self—if it were, Fish would be talking about the dialectics of the self-conscious subject in history.<sup>42</sup> Nor is it the Kantian self—for if it were, Fish would not be talking about interpretive communities at all.<sup>43</sup> No—this is a situated self—a relatively autonomous twentieth century self which readily accepts the influence of social context and social convention in the construction and interpretation of daily life. This is a self that has survived the onslaughts of Freud, Marx, and all the other moderns.<sup>44</sup>

One might think that this is an impoverished embattled self—constantly retreating in the face of advances by modernist theory and positivist social science.<sup>45</sup> But actually, it is a rather clever, imperious self. While it concedes that it is only *relatively* autonomous, cunningly it makes this concession cut against the claims of reason and theory—even history. Social science may have its uses and modern theory its moments, but, at bottom, it is the self that understands (and can be trusted to understand) what is really going on. Accordingly, the relatively autonomous self (yours, mine, etc.) maintains full rights to determine the scope and boundaries of its own autonomy.

Of course, one might wonder why this self should be enthralled by Fish's concept of interpretive communities? After all, the concept of interpretive communities is the linchpin in an approach that deconstructs the myth of

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Hutchinson, *Part of an Essay on Power and Interpretation (With Suggestions on How to Make Bouillabaise)*, 60 N.Y.U. L. REV. 850, 870 (1985).

41. That is because social practice is traversed by interpretation.

42. See Cornell, *supra* note 37, at 688-91 (discussing Hegel's reconciliation of individual with community).

43. He would be talking about various faculties. See generally I. KANT, *CRITIQUE OF PURE REASON* (1965); I. KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS* (1949).

44. It would be difficult, putting it mildly, to characterize Marx or Freud as intellectual champions of the self. On the contrary, both present the self as the plaything of alien forces—deeply split and badly deluded. See generally K. MARX, *THE ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844*, at 106-19 (Int'l Publishers 1971); S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* (J. Strachey trans. & ed., Norton & Co. 1961).

45. Positivist social science also undermines the self by limiting its operative domain through the articulation of mechanical laws.

radical subjectivism. And what could be more flattering to the self than a radical subjectivism? Well . . . actually . . . lots of things. Radical subjectivism (like radical objectivism) is too threatening to the relatively autonomous self. The former places far too much responsibility (moral and otherwise) on the self and leaves it far too contingent.<sup>46</sup> Radical objectivism, on the other hand, leaves the self too constrained and rather hollow.<sup>47</sup>

But Fish is just right. For the relatively autonomous self, Fish offers the best of all possible worlds. What's more, Fish allows the self to claim that it is right when it insists on acting or deciding in an intuitionistic pragmatic sort of way. The self can say, "Yes, I know your theory of [ . . . ]<sup>48</sup> requires that I should do such and such, but you see I am not a theorist; I am a self and I know things in an intuitionistic non-theoretical practical way which your theory could not possibly understand. So go away—go do your theory (which is just a form of practice anyway) and let me get on with my business." The concept of interpretive communities is attractive for the simple reason that it leaves the self as the final adjudicator of its own acts without responsibility for the choice. The self cannot choose its interpretive constructs. It is always already within them. But at the same time (and quite conveniently) very little can be known about these interpretive constructs so the self need not feel closeted by an overly determined objectivity. The concept of interpretive communities offers the self a *formal closure* against the claims of theory, reason, and history. But at the same time, the concept is *substantively empty*, so that the self can project into "interpretive communities" just about anything it wants.

This is an incredibly flattering picture for the relatively autonomous self—and Fish is the first to point it out:

According to the position presented here, no one can claim privilege for the point of view he holds and therefore everyone is obliged to practice the art of persuasion. This includes me, and persuasion is the art that I have been trying to practice here. . . . In general, people resist what you have to say when it seems to them to have undesirable or even disastrous consequences. . . . In short, I have been trying to persuade you to believe what I believe because it is in your own best interests as *you* understand them.<sup>49</sup>

46. Sartre presents a frighteningly subjectivist account of consciousness and saddles it with an intolerable freedom and an insuperable responsibility. See generally J.-P. SARTRE, BEING AND NOTHINGNESS (H. Barnes trans. 1966).

47. Skinner presents a barrenly deterministic account of human life. See generally B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971).

48. judicial review . . .  
     constitutional interpretation . . .  
     history . . .  
     liberal legalism . . .  
     literary criticism . . .

49. S. FISH, TEXT IN THIS CLASS, *supra* note 3, at 368-69 (emphasis in original).

In short my message . . . is finally not challenging, but consoling—not to worry.<sup>50</sup>

My fiction is liberating. It relieves me of the obligation to be right (a standard that simply drops out) and demands only that I be interesting (a standard that can be met without any reference at all to an illusory objectivity). Rather than restoring or recovering texts, I am in the business of making texts and of teaching others to make them by adding to their repertoire of strategies.<sup>51</sup>

Of course, the mere fact that the rhetorical appeal of Fish's approach is addressed to the relatively autonomous self hardly means that Fish's work depends on that self. Still, absent a privileging of the relatively autonomous self, it is hard to see why Fish's account would be so compelling. To be sure, his arguments against foundationalism, essentialism, and formalism are well taken. But what makes the concept of interpretive communities or institutional communities or interpretive constructs so appealing? Why should we believe in interpretive communities any more than we should believe in authorial intent, the text, God, or little space people from Mars? In other words, why doesn't the infinite regress and the other arguments Fish launches against foundationalism and essentialism and formalism go on and on and on . . . right through the floor of interpretive communities?<sup>52</sup> After so much gleeful smashing of such heavy duty hitters as Fiss, Dworkin, Kelman, and Moore it comes as some surprise to see Fish leave any text intact. And yet in his own text, Fish leaves some rather major dichotomies still standing:

rules/context<sup>53</sup>

theory/practice<sup>54</sup>

50. *Id.* at 321.

51. *Id.* at 180.

52. Fish comes close to considering this possibility and provides an answer. "Another way to put this is to say that the fact that I am subject to the same challenge I have put to my predecessors is not a weakness in my position but a restatement of it." *Id.* at 369. Thus, Fish is suggesting that any attempt to use Fish-moves against Fish would merely confirm the existence of interpretive communities. And that's obviously true, if one happens to believe in interpretive communities. The question remains, however, why should one believe in interpretive communities in the first place?

Part of the answer is that a belief in interpretive communities is a whole lot more sensible than believing in little space people from Mars. But part of the problem with the answer is that in order to remain convincing, the concept of "interpretive communities" has to remain relatively empty of structure and content. And the problem is that the relatively autonomous self (a rather imperious and ambitious creature) can't seem to want to stop talking about and (in some cases) reforming the structure and content of its interpretive communities. So despite the fact that Fish can't really say too much about the content or structure of interpretive communities, we will continue to (and want to) talk about their content and structure. This is all by way of saying that Fish is right when he says that nothing turns on his account. *Id.* at 370; Fish, *Fish v. Fiss*, *supra* note 3, at 1347.

53. Fish, *Fish v. Fiss*, *supra* note 3, at 1332.

54. Fish, *Consequences*, *supra* note 8, at 111-12.

thinking/being<sup>55</sup>  
or in short,

text/interpretive community.<sup>56</sup>

For Fish the left-hand terms of the dichotomies can never get it right.<sup>57</sup> They can never overcome the boundary (the “/”) to control or inform the right-hand terms. And that is because the left-hand terms are always already embedded in the right-hand terms. If Fish’s account is right (pun intended), then context can never be reduced to a set of rules (Fiss’ problem); practice can never be subservient to theory (Dworkin’s difficulty); and epistemology will always already be outdone by being (Kelman and Moore’s shortfall). The short of it is: Interpretive communities simply cannot be read like a text. Now, this is rather determinate stuff for an antiformalist like Fish and thus it prompts the question: “Why stop the deconstruction here?”

Even if one can’t find a good philosophical answer to this question (and Fish would be the first to say that one can’t) there is, nonetheless, a damned good rhetorical answer. The answer is that the relatively autonomous self is more than happy to stop the deconstructive ride and the interpretive community thesis is a better place to get off than most.

The concept of interpretive communities is alluring precisely because it describes what the relatively autonomous self intuitively discovers when it is thinking about its own condition. The self realizes that it is always already operating within a context of interpretive practice that it has not chosen and cannot fully articulate. What’s more, it realizes that there seems to be a certain regularity to practices such as baseball or constitutional interpretation, but one which cannot be described in a way that captures the thing itself. It realizes, in short, that it is relatively autonomous. But apart from these insights (courtesy of the relatively autonomous self) Fish has given us no reason to believe in interpretive communities or institutional communities or interpretive constructs. Of course, that’s precisely his point—if he had given us an ultimate reason to believe in interpretive communities, he would have failed (by his own account). Why then do we believe Fish when he tells us that it all hinges on “interpretive communities?” For the relatively autonomous self, the answer is easy: one always already does.

It is at this point, I think, that Zapp’s approach would break decisively with that of Fish. If “every decoding is another encoding,” then surely Zapp would insist upon decoding this concept of the relatively autonomous self. After all, if the seemingly totalitarian concept of interpretive communities can lead to the relatively autonomous self in less than twelve pages, one must wonder about the integrity of that self.

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55. Fish, *Uses of Theory*, *supra* note 2, at 1788-90.

56. S. FISH, *TEXT IN THIS CLASS*, *supra* note 3, at 170-73.

57. See *supra* notes 5-24 and accompanying text.

When the relatively autonomous self buys into the concept of interpretive communities, it seems to be cutting a pretty good deal: one that enshrines the self as the ultimate adjudicator of the nature of reality and one which relieves it of responsibility for the choice. "It's not me," the self can say, "I am always already situated in an interpretive community and I do not choose my interpretive constructs." And very quietly, the relatively autonomous self whispers to itself, "Yes, that's right—I do not choose my interpretive constructs and neither does history or reason or anything else that could displace me."

Of course, the relatively autonomous self (as its name indicates) is not entirely stable. Being only *relatively* autonomous, it is constantly called upon to adjudicate the boundaries of its own autonomy. Indeed, it is constantly being seduced or bullied into accepting some insuperable subjectivism or some intolerable objectivism. This constant struggle against such philosophical and rhetorical threats can lead the relatively autonomous self to ask itself some strange questions. It can ask, for instance, how it knows what it is doing? The answer is that the self doesn't really know what it is doing, because it is embedded in interpretive constructs that it cannot know about. It just sort of groks<sup>58</sup> its way through life. If the self did know what it was doing, it wouldn't be relatively autonomous anymore: it wouldn't be autonomous at all, but instead subject to some rule or theory (which it could know).

Having admitted that it cannot know what it is doing, the relatively autonomous self might begin to wonder just what it is that keeps it together as a unified, more or less stable, and generally continuous entity throughout the day. The answer is that the relatively autonomous self is kept whole by a meaning structure which, of course, is always already embedded in interpretive communities.<sup>59</sup> You see—nothing to worry about. Of course, the relatively autonomous self might ask how it can be sure that indeed, the interpretive communities are not God (or something else) forbid, self-destructive—perhaps cannibalistic?<sup>60</sup> And the answer, of course, is that the self

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58. The earliest use of the term "grok" I have found is in R. HEINLEIN, *STRANGER IN A STRANGE LAND* (1961).

59. Or, as Fish, puts it:

[I]f the self is conceived of not as an independent entity but as a social construct whose operations are delimited by the systems of intelligibility that inform it, then the meanings it confers on texts are not its own but have their source in the interpretive community (or communities) of which it is a function. Moreover, these meanings will be neither subjective nor objective, at least in the terms assumed by those who argue within the traditional framework: they will not be objective because they will always have been the product of a point of view rather than having been simply "read off"; and they will not be subjective because that point of view will always be social or institutional.

S. FISH, *TEXT IN THIS CLASS*, *supra* note 3, at 335.

60. For a discussion of some cannibalistic moves of contemporary legal consciousness, see Schlag, *supra* note 14.

cannot be sure because, again, it is always already embedded in interpretive communities whose structure and contents cannot be known. It is these unknowable interpretive communities that keep the self stable and contented. The relatively autonomous self knows that these interpretive communities are benign and stable. They are stable, aren't they?

At this point, the relatively autonomous self may begin to feel insecure. For one thing, Fish's interpretive community thesis offers no reason to suppose that these interpretive communities are benign. For another, the relatively autonomous self is beginning to realize that whenever difficult questions about the status and structure of the self are raised, the relatively autonomous self always privileges itself: it always establishes itself as the prime adjudicator. Call it instinct, good judgment, or pragmatism—it doesn't matter: it is always the relatively autonomous self that comes out on top. After reading Fish, however, the relatively autonomous self realizes that this is a questionable, and ironically, foundationalist move. The relatively autonomous self realizes that if it believes in interpretive communities, there is no reason (other than solipsism) to privilege itself.<sup>61</sup> And if there is no reason for the relatively autonomous self to privilege itself, there is no reason to believe in "interpretive communities" or "interpretive strategies" or in any other version of the *theoretical unmentionables*.

The reason is simple: if they are *theoretical unmentionables*, then the one thing you can't do with them (absent a stunning display of bad faith) is talk about what they look like.<sup>62</sup> You can't talk about whether they are clans, or cabals, or democratic institutions, or efficient firms, or illegitimate hierarchies or . . . . This sort of constraint, exclusion, ground rule (whatever you want to call it) can really put a crimp in a conversation about the content and structure of social life. And at this point, I think this is one conversation the relatively autonomous self won't want to miss—if only to figure out who it really is and what in the world keeps it that way—if anything.<sup>63</sup>

Fish's interpretive community thesis *seems* to interrupt this conversation about the content and structure of social life. Yet, absent the bad faith of the relatively autonomous self, his thesis neither can nor should interrupt this

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61. Fish might say that the relatively autonomous self does not need a reason to privilege itself. It just does. Right again: it just does . . . until . . . of course, it doesn't.

62. You can talk as Fish does about what they don't look like. But you have to be so damned careful that in saying what they don't look like, you don't actually say something about what they do look like.

63. The point is that neither Fish nor anyone else can cut off conversation about what our "interpretive communities" look like. In order to cut off this conversation, one would have to say something about what they look like. Fish's own arguments show that he can't. And that only goes to show that the real debate in town is about whether these interpretive communities look like private clubs, cabals, democratic institutions, efficient firms, illegitimate hierarchies, and so on. So in this sense, Fish is wrong—but he has made significant contributions to the way in which legal scholars will carry on the debate.

conversation. Indeed, either the interpretive community thesis places no constraints on this conversation (in which case, according to Fish, the thesis is irrelevant) or it does contribute some constraints to this conversation (in which case, according to Fish, it must be wrong).<sup>64</sup> There are, of course, worse things than being wrong:<sup>65</sup> one of them is commitment to a belief that shuts down understanding when there is nothing necessary about that belief.

Ironically, it is Zapp's scholarship that will serve as the last example. It turns out that Zapp (like Fish) is not quite the deconstructionist he first appears to be. Indeed, Zapp would find no reason to believe in the interpretive community thesis offered by Fish, because no point on the infinite alternation of encoding and decoding is worth believing.<sup>66</sup> One commentator, who was quite distressed by the implications of this position, asked Zapp what the point of academic literary studies might be? Zapp responded:

The point, of course, is to uphold the institution of academic literary studies. We maintain our position in society by publicly performing a certain ritual, just like any other group of workers in the realm of discourse—lawyers, politicians, journalists. And as it looks as if we have done our duty for today, shall we all adjourn for a drink?<sup>67</sup>

Now, as welcome as Zapp's invitation may be to his audience, his position remains impossible, untenable, not to mention, unappealing.

### CONCLUSION

Fish is persuasive, extremely persuasive, way too much so. He's even right (except, of course, about interpretive communities and the like). Zapp is useful, but wrong (not to mention unreal).<sup>68</sup> And I'm not too sure about the relatively autonomous self.

That's it—except for a few concluding remarks:

(1) The relatively autonomous self is a relatively accurate description of

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64. Bad faith remains an option. For instance, you could simply surrender to whatever *you think* will get you ahead in your profession, career, etc. And if you ever get in a moral pinch or feel some theoretical heat, you are always already justified: just invoke the interpretive community thesis. It just might work. Of course, you would be wrong. And you would still be in bad faith.

65. In fact, I think "wrong" has been given a bum rap. It has its uses. See Schlag, *The Brilliant, the Curious and the Wrong*, 39 STAN. L. REV. 917, 923 n.18 (1987) (invalidity often not an objection, but requirement of theory).

66. And here I think Zapp would be, at least in part, wrong. Zapp offers a nihilism that is simply far too determinate and too confident given his own methodological commitments. There may not be any reason to believe in any particular point on the infinite cipher of decoding and encoding. But the suggestion that one should reject all points on the infinite cipher of decoding and encoding is both unintelligible and impossible.

67. D. LODGE, *supra* note 1, at 33.

68. Sure, every decoding is another encoding. But if one takes Zapp's axiom seriously, it turns out to be the other way around: every encoding is another decoding. And as for Zapp, he's a fictional character in David Lodge's wonderful satire of academic life, *Small World*.



the modern self.<sup>69</sup>

(2) The relatively autonomous self is a fiction. It has no solidity. Its only substance is contingent.

(3) You can read just about anything you want into the relatively autonomous self if you are one (and maybe even if you aren't)—except that . . . .

(4) Any claims you might make about the *real* meaning or *real* nature of the relatively autonomous self are always already off the mark because the structure and role of the relatively autonomous self doesn't allow you to make such claims. And that's because . . . .

(5) The relatively autonomous self is (among other things) a language game.

(6) It is a language game that has an uncanny similarity to Fish's interpretive community thesis. Indeed, the relatively autonomous self is a reflection in the mirror of the self of the formal configurations and the substantive emptiness of Fish's interpretive communities. Indeed, all the points above about the relatively autonomous self have some application to Fish's interpretive communities.

(7) There is no reason to believe in interpretive communities or in the relatively autonomous self. And as I've suggested, there are good reasons not to.

(8) The relatively autonomous self is unstable and structured to become something else. The question is what?

(9) To answer this question, it would be useful to historicize the character and structure of what Fish sometimes refers to as "interpretive communities." But that has become very difficult—not because of Fish's arguments per se, but rather because of the underlying character of the social practices that make his interpretive community thesis seem plausible (even appealing) to so many different kinds of people. I am referring to bureaucratic forms of life: increasingly, life and work experiences occur within this or that consumer or producer bureaucracy. Increasingly, the objects of work consist of servicing bureaucratically defined objectives, according to bureaucratically sanctioned procedures. The refinement, expansion, and increasing rationalization of the bureaucratic form is not socially (or intellectually) weightless:

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69. Oh sure, there are other available conceptions of self (but none so encompassing nor so modern). Other options include, for instance, the more ancient *fully autonomous self*—which knows no limits at all in its ability to adjudicate the nature of reality. This is the sort of self that not only believes in *but also knows* the absolute truth. In the modern world, you often find these kinds of selves serving as prophets (minor or major) in any of the available fundamentalist/foundationalist schools of thought. There is also the more recent *ironic self*. This is the sort of self that revels in the dissonance and inconsistencies of the modern world, insisting over and over again (very systematically) that the concept of the coherent self is vastly overrated. One could go on and on.

Over time, it yields the accelerating mutability of meaning,<sup>70</sup> the increased insularity and specialization of knowledges,<sup>71</sup> the heightened instrumentalization of cultural symbols and values,<sup>72</sup> the fetishism of instrumentalism,<sup>73</sup> and the proliferation of complexity and fragmentation.<sup>74</sup> In that sort of world, the interpretive community thesis can seem at once sensible and comforting. In fact, it is neither.

The final score is in the next essay.

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70. Hence, the current crisis of epistemology and interpretation in legal scholarship. Hence, also, the appeal and plausibility of deconstruction.

[Editor's note: this conclusion also appears in Schlag, *supra* note 14.]

71. Hence, the turn among academics toward theory and the turn of theory against itself.

72. Hence, the gradual erasure of substantive boundaries between law, philosophy, literature, economics, etc., as well as the erosion of stable meaning systems. The formal boundaries, however, seem to have major staying power. For instance, even though legal academics use economic or philosophic texts, nonetheless these are often used in distinctly legal ways (i.e., to serve as authority or to prescribe (rather incredibly) solutions to concrete legal problems).

At its most simple, the instrumentalization of cultural values and symbols means that these values and symbols are redefined and recombined in accordance with the instrumental needs of the institution or the enterprise. The result is a devaluation of the linguistic and cultural currency.

73. Hence, the dominance of prescriptive or normative modes of thought in legal scholarship.

74. Hence, the difficulty of saying anything true, appealing, useful, or good that is also general.

## Theory and the Uses of Dennis Martinez

Fish recently began a law review article with a story about Dennis Martinez, then a pitcher for the Baltimore Orioles. Ira Berkow, a reporter, saw Dennis Martinez talking to his manager, Earl Weaver, before a game. Sensing a story, Berkow approached Martinez and asked him “‘what words of wisdom had been imparted’” by Weaver. Dennis Martinez answered, “‘Throw strikes and keep ‘em off the bases’ and I said O.K. . . . What else could I say? What else could he say?’”<sup>75</sup>

Fish would like us to believe that it would have been inappropriate for Weaver to say anything else. And maybe that’s true. It’s hard to know: Stanley Fish is in some sense an outsider to baseball.<sup>76</sup> But he’s no outsider to theory. He knows how to craft a story—particularly a good philosophical story—one that resonates deeply in the culture. And given the sort of attacks Fish makes on Fiss, Dworkin, Kelman, and others, I don’t have any doubts about it: outsider or not, if Fish were manager of the Orioles, he would have had plenty to say to Dennis Martinez on the night of the game.

For instance, as Dennis Martinez’ manager, Fish could have said something like this: “O.K. Dennis, I’m, gonna make a lot of changes tonight: pinch hitters, substitutions, the whole ball of wax. But like I said last time, don’t start reading meaning into any of this. It’ll just mess you up. So if I’m screaming at the ump, that’s all I’m doing: screaming at the ump—nothing more, nothing less. So don’t go looking for signs about signs about signs. This game is about throwing strikes. You don’t need to be reading signs about signs in order to do that. You understand what I’m saying? Just go out there and do it, champ.” Now, Fish could say this. In fact, this is sort of what he told Fiss and Dworkin.<sup>77</sup> It’s also somewhat reminiscent of what Wittgenstein told us when he suggested that ultimately all rules, reasons, and theories are situated in a form of life.<sup>78</sup>

But Fish could have said other things. He could have said, for instance: “All right champ it’s going to be a long game—you know that and I know that. Now, I know that at various points you’ll be sitting in the dugout or

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75. Fish, *Uses of Theory*, *supra* note 2, at 1773-74 (quoting N.Y. Times, June 26, 1985, at B13, col. 1).

76. In a very limited ironic sense. But like Dennis Martinez, Fish also tries to throw strikes and keep ‘em off the bases. What else can he do?

77. See *supra* notes 13-16, 21-22 and accompanying text (Fish’s moves on Fiss and Dworkin, respectively).

78. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* I ¶ 241 (G. Anscombe trans. 3d. ed. 1958). For a comparison of Fish and Wittgenstein, see Cornell, *supra* note 37, at 684-91 (1986); Dasenbrock, *Accounting for the Changing Certainties of Interpretive Communities*, 101(5) M.L.N. 1022 (Dec. 1986). The account Fish offers is similar to Wittgenstein’s arguments, but only up to a point.

maybe standing on the mound, just waiting and thinking. You can think about the game all you want. In fact, I want you to. In fact, you know I want you to. But like I've told you before, don't think for one moment that you can ever step outside the game to think about it. If things go into a slump, don't get frazzled—it's just a bad moment. It's gonna be a long game—and the way it looks at any particular moment is not necessarily the way it will look at the end. Now, go out there and may Geist be with you." This speech has a certain similarity to what Fish told Moore, the natural law theorist.<sup>79</sup> And it bears at least some similarity to Hegel's message about the historical situatedness of consciousness.<sup>80</sup>

Not to be overlooked are all the Kantian possibilities:<sup>81</sup> "O.K. champ—this game is all psych. You know that and I know that. And you've got psych—it's written all over you . . . in an a priori sort of way. There's no way you could throw those fastballs and those curves if you didn't always already have psych. Hell, in your case it's a transcendental cinch that you've got it. And no amount of self-doubt or introspection can take that away from you. 'Cause you can never step out of your own psych. You're always within your own psych. So, don't worry about a thing—no matter how things are going, you've got the stuff that'll get us through." This is the sort of story that Fish pulls on Kelman—to keep him from asking for the impossible.<sup>82</sup>

Now, you may have noticed that these little speeches don't gain much in the way of authority from my explicit articulation of their philosophical origins. Fish knows this: he wouldn't go around mucking up his instructions to Dennis Martinez with citations to these philosophical heavies. It's neither useful nor necessary. Hell, it's even dangerous. Can you imagine Dennis Martinez saying, "Wow, did Hegel really say that? Does Wittgenstein agree?"<sup>83</sup>

So, while aspects of Fish's rhetoric at times seem to draw on various philosophers—traces of Kant, Hegel, or Wittgenstein—he doesn't really need these fellows. On the other hand (and this is the important part), that their basic moves and narrative lines are deeply ensconced in the culture certainly doesn't hurt Fish any. You might say that the audience is prepared—or in Fish's terms, we have always already heard it before (and in the oddest places). And just in case we haven't, Fish will tell a story or two beforehand

79. See *supra* notes 17-20 and accompanying text (Fish's moves on Moore).

80. See D. KOLB, *THE CRITIQUE OF PURE MODERNITY: HEGEL, HEIDEGGER AND THE AFTERMATH* 88-92 (1986). Again, Fish follows Hegel, but only part of the way.

81. See *supra* note 43. And similarly here, Fish only makes so much of Kant.

82. See *supra* notes 23-24 and accompanying text (Fish's moves on Kelman).

83. What's worse, if Fish actually used the philosophical heavies in his arguments, he would inherit their problems and difficulties. Hegel, after all, doesn't do Kant any favors. And as for Wittgenstein, he's just unspeakable.

to get us in the right frame of mind—for instance, stories about baseball, industrial research, or graduate students.<sup>84</sup> So by the time you read Fish's account of Kelman or Dworkin, or whoever, it *seems* like you always already know why they're wrong and it *feels* like you don't even need Fish to help you at all. But you do—and he has. Still, if Fish doesn't need philosophy to make his point, what does he need?

If you look closely at Fish's arguments, he needs something like the inside/outside distinction. Throwing strikes and keeping 'em off the bases is what Dennis Martinez is supposed to do. It's the *inner* game of baseball. Dennis Martinez doesn't need instructions to do that. Anything a news reporter might say to analyze Martinez' performance might well be interesting to sports fans, but it is always already *outside* the *inner* game.

The same is true of discourse about a practice and the practice itself. The theory of that practice is always already *outside* of that practice and *inside* its own practice. Dennis Martinez knows that. If you don't, and if, like Moore, you think you can figure out how Dennis Martinez pitches by thinking about the real Dennis Martinez, Fish will get you. There is no way of thinking or talking about the *real* Dennis Martinez other than the conventional ways furnished by history. There may be a "real" essence of Dennis Martinez, but you are always already going be *outside* of it because you will always be *within* your own conventional understanding. And if like Kelman, you think that you should choose the way you think (your interpretive constructs) more carefully so you don't miss what Dennis Martinez is really doing on the mound, Fish will get you again. You can't choose your interpretive constructs because you are always already *within* them. And if you were *without* them, you couldn't think about baseball or anything else. If all this still concerns you, and, like Dworkin, you think that it would be nice (or best, or most elegant) to make the way you think about baseball articulate and consistent . . . Fish will get you again. Articulating even the best theory of the institutional history of baseball is something that is always already *outside* that practice. And if what you're interested in is telling baseball players how to play, they don't need (and couldn't use) your theory.<sup>85</sup>

Indeed, no matter what you do (or what you think) Fish will get you every time—as long, of course, as you allow him that crucial move: the establishment of the inside/outside distinction. It's that sort of distinction and its

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84. This rhetorical procedure, of course, tracks the substance of what Fish has to say: we are always already operating in the tracks of the preconceptions and interpretive presumptions that Fish has constructed with his stories. S. FISH, TEXT IN THIS CLASS, *supra* note 3, at 305-09; Fish, *Uses of Theory*, *supra* note 2, at 1773-79.

85. See *supra* notes 17-24 and accompanying text (Fish's moves on Moore, Dworkin, and Kelman).

analogues (within/without, within/with, here/beyond, dependent/independent, and one thing/and another) that allow Fish to confound theory, rules, self-reflection, and ultimate truth (maybe even God) every time. The latter are always on the outs with Fish. They are always *outside* of what they are discussing or attempting to do because they are always *within* their own practice, being, context, etc. Indeed, Fish is the first to tell you this:

A theory, in short, is something a practitioner consults when he wishes to perform correctly, with the term "correctly" here understood as meaning independently of his preconceptions, biases, or personal preferences. . . .<sup>86</sup>

You may have noticed that this definition already places theory *outside* practice. But the definition does substantially more than that: it already places theory *outside* the realm of possibility. Indeed, the sentence cannibalizes itself: it is never the case (and indeed could not ever be the case) that a practitioner *wishes* to consult something (anything) *independently* of his preconceptions, biases, or personal preferences.

Thus, it's not so much theory in particular that is impossible, but anything that Fish wants to insert in that first sentence, "A —, in short, is something a practitioner consults when he wishes to perform correctly. . . ." Try it—everything turns out to be impossible: a coach, a counselor, a judge, a timetable, the Koran, art—whatever.<sup>87</sup> With this definition, Fish has set up a formal language game which theory (or anything else) must necessarily fail. It's thus a stunning display of intellectual modesty when Fish says of theory, "I reserve that word for an abstract or algorithmic formulation that guides or governs practice from a position outside any particular conception of practice."<sup>88</sup> Why pick just on abstract or algorithmic formulations?

If philosophy is mute on this issue (or if it says too many things at once) there is, nonetheless, a pretty good rhetorical answer. Theorists *seem* to claim that their enterprise is somehow entitled to greater authority than all the others. (And even when they don't, it's easy enough to make them look like they do.)<sup>89</sup> Fish argues that when legal theorists claim that they know the practice that they are discussing, their texts generally give the hint that the theories are somehow outside or beyond or above the practice being discussed. Fish's use of this inside/outside distinction is not all that difficult: the typical English sentence (the sort used by theorists) usually has a subject doing something (by way of a verb) to a direct object. Thus, in one sense, the subject is always *outside* the direct object. Now, if the subject is theory and the object is practice, there is a sense in which never the twain shall meet. It

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86. Fish, *Uses of Theory*, *supra* note 2, at 1779.

87. The only thing that might actually work in the sentence would be "God" or analogous terms—i.e., precisely those terms that signify something outside or beyond human experience.

88. Fish, *Uses of Theory*, *supra* note 2, at 1779.

89. See *supra* note 12 and accompanying text (discussing Fish's characterization of theorists).

is, thus, no surprise that theorists talk as though theory governs practice, or as if theory addresses an ultimate reality beyond practice. Or as if thought itself can trump being.

Now, I don't think this is theory *per se*. I think it's just bad theory (or simply a bad reading of theory).<sup>90</sup> But in either case, this image of theory enables Fish to come in (ironically from the outside) and (ironically like a theorist) to inscribe some troublesome inside/outside distinctions into the text of theory. Fish can turn just about any legal theorist on his or her head by simply showing that the theorist (despite what he or she says) rather self-defeatingly asserts that his or her:

theory is outside practice  
 rules are outside context  
 texts are outside interpretive communities  
 thinking is outside being.<sup>91</sup>

And we are accustomed to believing Fish when he makes this claim, because that's the way we usually think of legal theory and legal theorists.

In one sense this observation seems to corroborate Fish's point. If we are accustomed to looking at theory this way, and, more important, if theorists are apt to write theory this way, Fish's interpretive community thesis must be correct after all. Well . . . no. One can acknowledge that practice, context, interpretive communities, and being (on the one hand) have some (even a significant) relation to theory, rules, texts, and thinking (on the other) and yet avoid describing the relation of the two in terms of hard-edged images such as the inside/outside distinction. If one abandons this sort of hard-edged image, theory, rules, texts, and thinking again become relevant to the understanding and critique of practice (and all that other stuff).<sup>92</sup> Now, you'll notice that in the previous sentence I've just done what I said I didn't want to do. If you look at that sentence, it seems I've reinscribed a hard edge between theory on the one side and practice on the other. And that's one

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90. It might have been a good rhetorical move at one point to claim that theory has authority over all the other practices, but with Fish (and other antifoundationalists) throwing strikes and keeping 'em off the bases, it's increasingly bad form.

91. I've suggested that Fish uses the in/out distinction to accomplish this. As distinctions go, it's a pretty powerful one—a transparently spatial one. Fish could use others such as the (equally spatial) here/there or up/down distinctions or the temporal before/after distinction to make his point. For a brief discussion of the uses of the up/down distinction, see Schlag, *supra* note 14.

92. And Fish knows this: he tries mightily to avoid ever saying anything about the limits, jurisdiction, edge, contour, or perimeter of his "interpretive communities." And should you invest the term "interpretive community" with some actual concrete boundaries (e.g., Harvard Law School, the Supreme Court, legal academia, California)—well, that is something you will have done to Fish's text, something that he can always already disavow.

possible reading of the sentence. It is the sort of reading (and the sort of sentence) that Fish would seize upon to show my position is self-consuming. But despite the fact that Fish can always already read my sentence in this way, and even offer you very persuasive reasons to read it this way, there's one thing that he can't do, and that is *exclude* a more interesting more complex reading of the sentence—which is, I hope, what I have just done.

The point is that the hermeneutic and linguistic and Marxist arguments that theory is always already situated do not argue against the relevance, use, or need of theory. Rather, they are merely arguments about what theory is and should be. And they're pretty good ones: too good to be formalized under the rubric of "interpretive communities" and the *closure* it imposes.

Indeed, the "interpretive communities" thesis achieves closure too soon. In fact, Fish is the first to tell you so in his recent essay. Fish thinks there is a lesson in the interchange between Martinez and his manager, Weaver:

What they know is either inside them or (at least on this day) beyond them; and if they know it, they did not come to know it by submitting to a formalization; neither can any formalization capture what they know in such a way as to make it available to those who haven't come to know it in the same way.<sup>93</sup>

Now, this rendition of the "interpretive community" thesis is something of a *self-consuming* statement. If what Martinez and Weaver know is not subject to formalization, then it certainly isn't subject to the formalization that it isn't subject to formalization.

The score isn't in on theory (or law for that matter). As for that *other* game Fish talks about, Martinez, Weaver and the rest of the Orioles lost to the Yankees, five to four.<sup>94</sup>

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93. Fish, *Uses of Theory*, *supra* note 2, at 1774.

94. Berkow, *The Old and New Manager*, N.Y. Times, June 26, 1985, at B13, col. 1. Maybe Weaver was out of practice. But if so, that's just bad theory.