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# Fish

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## Fish

*Richard A. Posner\**

I have not kept up with Professor Fish's writings in recent years. When last I tuned in he was writing about interpretation, including interpretation of statutes, judicial opinions, and other legal texts. I don't find interpretation an interesting topic. It seems to me a natural human activity that is not improved by being systematized, as attempted most recently by Justice Scalia and Bryan Garner in their book *Reading Law: The Interpretation of Legal Texts*,<sup>1</sup> which I reviewed critically in *The New Republic*.<sup>2</sup> I do think it's important to know something about the institutions that produce the legal texts that require interpretation, notably legislatures and courts; and I do think it important for the interpreter to have experience with interpreting complex texts, from which he or she will learn that interpretation of such texts has a creative element—it involves imparting as well as discerning meaning. I majored in English at Yale College in the 1950s, in the heyday of the New Criticism, which emphasized close reading of complex literary texts, mainly poems, from which one learns that interpretation can be a good deal more than a merely mechanical extraction of meaning from text.

But now, after years of ignoring Fish's work, I have read his forthcoming book on academic freedom. I like it very much. Fish has always been an excellent writer, but I think his writing style has actually improved with age; it used to have a slightly bumptious, sing-song character, and that is absent from the new book. The tone does remain somewhat superior and dismissive, but I think it is earned, because the literature on academic freedom that he criticizes deserves harsh criticism.

I agree entirely with his preferred conception of academic employment as "it's just a job." And the job is advancing knowledge rather than promoting political or moral or economic progress, though such things are sometimes by-products of academic teaching and research; if they are the aim, however, the academic is not doing his job. (It's okay if they're the motivation.) Of course it's typical of people in any profession to ascribe

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<sup>1</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

<sup>2</sup> Richard A. Posner, *The Incoherence of Antonin Scalia*, *NEW REPUBLIC* (Aug. 24, 2012), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>.

political and moral significance to their work, rather than being content to say that they're just doing a job.

So I agree that academic freedom is the freedom to do the proper job of the academic without inappropriate interference. The qualification "inappropriate" is important, however, for there has to be regulation of academic activity—regulation, for example, of experiments by biologists on people and animals.

I think a distinction worth emphasizing, which I didn't notice in Fish's book but may simply have missed as it's completely obvious, is the distinction between academic freedom as the freedom of academics and academic freedom as the freedom of academic institutions. Almost the whole emphasis, by the "defenders" of academic freedom, falls on the former. They want academics to be insulated from control by their employers—to be free to teach outrageous things, to be protected by tenure from being fired for incompetence, to be eligible for tenure after a specified number of years, to be entitled to bring discrimination suits against their employer, to join unions, and so forth. None of these things is essential to the academic's being able to perform the work that his job calls for, and some of them may impede that performance. Academics are employees but act as if they own the place, and waving the banner of academic freedom, they often get away with it. Their freedoms undermine the autonomy of academic institutions, fearful of being sued by their academic employees.