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Fish's Five Theories

*Frederick Schauer**

The title of this Comment is tendentious. Or perhaps “annoying” would be the better word. And the reason that the title is tendentious or annoying is that Professor Fish has developed his substantial and well-deserved academic reputation partially on the basis of his squeamishness about, or downright hostility to, theory and theories. There are actions, habits, and, above all, practices, Fish insists, but there are not theories. Thus Fish proudly calls himself a “theory minimalist,”¹ and seems not to mind very much being linked with those who are simply “against theory,”² even if he might not put it exactly that way himself. For Fish, there is just what we do, and we don’t do what we do any better by theorizing about it, and we don’t understand practices any better by theorizing about them. Or at least so Fish has frequently insisted.³ And thus to accuse him of having five theories is both to deny much of the import of his own previous academic work and also to accuse him of being quintuply confused. To accuse Fish of having five theories is thus not an accusation to be hurled casually.

Yet despite Fish’s denial of being in the theory business, at least under his understanding of what theory is, his careful, thoughtful, persuasive, and substantially correct analysis of academic freedom is constructed on top of five different theories – a theory of jobs, a theory of university employment, a theory of free speech, a theory of rights, and a theory of the role of the judiciary. Each of these theories contains more than a germ of truth, but they are theories nonetheless, and in this brief paper my principal goal is to bring these buried theories to the surface so that they can be subjected to closer inspection.

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¹ Stanley Fish, *Theory Minimalism*, 37 SAN DIEGO L. REV. 761 (2000).

² E.g., Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723 (1982).

³ See, e.g., STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH, AND IT’S A GOOD THING, TOO (1994); STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1990); STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989).

I

Professor Fish claims to be the charter and perhaps even sole member of the “It’s just a job” school of academic freedom.⁴ And his perspective is refreshing. Fish and I each have more than forty years’ experience in listening to our fellow academics spew pretentious and sanctimonious statements about the vital importance of the academic enterprise, and too much listening to too much of this inflated claptrap – we don’t hear it from dentists, despite the fact that a world without dentists would be nasty, brutish, short, and very painful – should cause anyone of sound mind to search for a deflationary strategy.⁵ Fish has discovered it in the “It’s just a job” approach to academic freedom, and he should be applauded for its deflationary attitude, even if for nothing else.

In order to make the “It’s just a job” claim, however, one needs an account – that is, a theory – of just what a job is, and it is by no means clear that Fish’s understanding of the very nature of a job is beyond dispute. Indeed, after having announced that academic employment is “just a job,” Fish then proceeds to tell us what the job is. I will deal with the substance of that claim in the next section, but even before we get to that, we need to take note of the fact that Fish, the employee, is purporting to explain the nature of the job. But under another understanding of just what a job is, it is the employer and not the help who gets to define the nature of the job. If it really is just a job, then the definition of the job is entirely in the hands of the employer. The employees – the help⁶ – can refuse to take the job. We do have the Thirteenth Amendment, after all. But a seemingly common account of what a job is defines it as the performance of a task as set by the employer in exchange for wages or their equivalent. Take it or leave it.

I do not claim that foregoing account of the nature of a job is necessarily correct. I admit to thinking it has a certain kind of resonance, and I admit to being attracted by the fact that this account is rather more deflationary than even Fish’s. But once we see that this conception of a job – a conception in which the help do not get to define what a job is – stands as a plausible competitor to Fish’s conception, it becomes apparent that Fish’s conception of a job is heavily laden with a theory of just what a job is.

⁴ STANLEY FISH, VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION (forthcoming) (manuscript at 16) (on file with FIU Law Review).

⁵ And, as I have noted before, listening to academics trumpet the virtues of academic freedom is somewhat akin to listening to Saudis or Texans talk about the virtues of oil, or, for that matter, listening to journalists talk about the value of freedom of the press. Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907 (2006).

⁶ A term rather more deflationary than “employee,” and much more deflationary than “professional.”

Indeed, the point becomes stronger once we notice that Fish glides smoothly from his “It’s just a job” view to the idea that those who hold the job are also members of a *profession*. But there are also professional housekeepers, professional butlers, professional soldiers, and professional exterminators. Embedded in Fish’s understanding of a professional is the view that professionals have a responsibility to their profession and not just to their immediate employers, in a way that “mere” employees do not.⁷ Again, this account of what it is to be a professional seems right, but now the “It’s just a job” view is exposed not merely as theory-laden, but potentially simply false. To say that it is *just* a job is to say that there are no employer-independent responsibilities to the profession or to professional norms, but precisely the existence of such independent or external (to the employment relationship) responsibilities is what Fish wants to maintain. Yes, professionals like lawyers, doctors, and rocket scientists have jobs, but the very fact that they have commitments to professional standards and norms and practices apart from their commitments to their employers means that they exist in a world different from the world of those employees whose responsibilities are exhausted by the requirements imposed by their employer. Academics, like rocket scientists, do have such employer-independent responsibilities, but the very fact that they do means that their employment is more than, and not simply coextensive with, their job in the narrower sense. If the employees are professionals, then their employment is more than just a job, unless we have a theory of a job – as Fish seems to have – that is substantially thicker than the notion of a job held by millions of people who have jobs and the millions who employ them.

II

Even if we accept that academics are plausibly professionals – and thus that being an academic is to have a job but not *just* a job – there is then the question of just what it is to be an academic. Or, for that matter, what it is to be a *professional* academic, or to be a member of the academic *profession*. Thus the question is transformed into one of attempting to determine just what kind of job the job of being an academic is. Even if the contours and nature of the job are not just the requirements and specifications set by the employer, as both Fish and I agree, then how should we understand the job of the academic?

Here, Fish and I again are substantially in agreement, except insofar as Fish might deny that there is a real question here and so might deny that something most accurately called a “theory” is embedded in the choice of

⁷ FISH, *supra* note 4, at 37.

one conception of academic employment rather than some number of others. For Fish, to be an academic is to have a certain mindset, a mindset or attitude or vocation of seeking understanding, or knowledge, or enlightenment, or even (Fish would almost certainly not use the word, except with scare quotes) truth. To be an academic is for Fish *not* to be a political activist, and not to be an actor in an ideological theatrical performance, and not to be a crusader for an ideological or social goal, even though one might be a crusader for one's view of the truth, academically defined.

This is an attractive vision of the vocation of the academic, but, once again, it is not the only vision. Indeed, the very fact that Fish chooses to distinguish between the academic and the teacher is revealing. After all, he, like most of us in his line of work, has probably had the experience on multiple occasions of being trapped in an airline seat next to someone who inquires into what we do, and, upon being informed that we are university professors of some stripe, is delighted to inform us that they have a cousin, niece, nephew, neighbor, or whomever who is a fourth grade arithmetic teacher, thus thinking (and supposing that we think) that there is some similarity between being a professor of English literature at a research university and being a fourth grade arithmetic teacher.

The previous paragraph is not intended to be at all condescending. Arithmetic teachers are simply more important than professors of literature, and immeasurably more important than professors of law. Indeed, in a better world we would have a lot more of them and a lot fewer of us, and in that better world they would be paid much more than we are. But regardless of the comparative worth of the two professions, it is clear to most university professors and most elementary school teachers that the two professions are very different. But it is also clear, as the questions from our airline companions make clear, that a widespread view understands university professors as teachers pure and simple, with the goal of imparting knowledge and skills to a classroom of students.

Under this view – the academic as teacher – it is hardly clear that scholarship in Fish's sense is part of the job at all, nor even clear that the degree of pedagogical independence that Fish (and I) and many others associate with university professors is a necessary component of the university teacher's responsibilities. Fourth grade arithmetic teachers, after all, typically teach to a lesson plan substantially set by their supervisors, and are given little leeway in modifying it. And under this conception of a university professor – teacher of older children, to be sure, but primarily teacher – most conceptions of academic freedom are simply not on the table at all.

Understanding the university professor as teacher, and as someone

who has little choice about what to teach, is not an understanding of the profession that I find attractive. But it is hardly an irrational one, and hardly one that does not resonate with what actual professors do in actual courses in many actual universities. And thus, once again Fish is exposed as having a theory, a theory of the academic job, a theory of the academic profession, and a theory of the goals and values of academic inquiry, whether in the classroom or in scholarship. His theory is a good one, and I wish more people subscribed to it. But the account that Fish and I share does not follow inexorably from the “It’s just a job” conception of academic employment. “It’s just a job” is, once again, delightfully deflationary, but all of the work is done by the choice among competing plausible conceptions of just what the job is. And without an account – or theory, if you will – of why Fish’s conception is superior to the others we are at a loss to see the payoff from the “It’s just a job” conception of just what an academic is and does.

III

What is perhaps Fish’s most interesting gambit is the move he makes from the “It’s just a job” understanding of academic employment, or even of the academic profession, to the view that it is somehow inappropriate for courts to enforce academic independence in the name of the First Amendment. To reach this conclusion, however, Fish needs a theory of the First Amendment, a theory of rights, and a theory of judicial review. And so we must look at each of these in turn.

With respect to the First Amendment, Fish appears to believe that First Amendment rights are individual rights in some strong sense. For him, the right to free speech, if there is such a right at all, would be in the neighborhood of the right to the free exercise of religion – an individual right against majoritarian decision-making, and a right ultimately grounded not in policy, utilitarian, or even more broadly consequentialist considerations, but in the deontological foundations of the right itself. Just as the right against torture is based on the simple wrongness of torture, no matter how many good consequences an act of torture might produce, and the right to free exercise of religion is not defeated by a demonstration that the welfare or happiness of the majority would be enhanced by denying to the minority the right to exercise their religion, so too, according to a considerable number of commentators, is the right to free speech a species of the same genus, with an individual’s right to speak being a simple right of people by virtue of their humanity.⁸

⁸ See, e.g., C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992); Joseph

Fish, like myself,⁹ and like our fellow symposiast Larry Alexander,¹⁰ has little truck with such an account of the right to free speech, but he appears to believe that if free speech is not an individual right in this sense then it is not a right at all. But that is simply a mistake. As one of Fish's nemeses has argued,¹¹ free speech might be either a right in the just described sense or it might just be a good policy. Thus, free speech might simply be the policy determination that government excesses are best prevented if the press has certain rights against governmental or majority control,¹² or that consumers will make better choices if they have access to certain kinds of commercial information.¹³ Consequently, if – and it is a big if – it is determined that university education might be better with less political interference, or that research by university academics and others might be more effective if similarly immunized from majoritarian control, then the conclusion of this policy judgment will be recognition of one aspect of a right to free speech. It is not that free speech *generates* a right to academic freedom of a certain kind, but rather that the policy advantages of academic independence/freedom, if indeed they exist, generate one dimension of a right to free speech. Many constitutional rights simply reflect policy judgments, including the policy judgments about who should make the policy judgments,¹⁴ and there is no reason to believe that academic independence could not be subject to the same kind of policy calculation.

IV

The foregoing is not merely about constitutional rights. It is about rights in general. A common mistake is to think of legal rights as

Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303 (1991); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMM. 283 (2011); Susan H. Williams, *Free Speech and Autonomy: Thinkers, Storytellers, and a Systemic Approach to Speech*, 27 CONST. COMM. 399 (2011).

⁹ See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982); Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81; Frederick Schauer, *On the Relationship Between Chapters One and Two of John Stuart Mill's On Liberty*, 39 CAP. U. L. REV. 571 (2011); Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS 635 (1993).

¹⁰ LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* (2005).

¹¹ RONALD DWORKIN, *A MATTER OF PRINCIPLE* 373 (1985).

¹² See Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521 (1977).

¹³ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

¹⁴ See PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013); Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1746 (2007); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998).

necessarily embodying or protecting moral or political rights, rights that have a pre-legal existence. But although some legal rights do indeed have this status,¹⁵ many do not. After *MacPherson v. Buick*,¹⁶ for example, New Yorkers have a right to recover against the manufacturer of a defective automobile, just as residents of the United Kingdom, after *Donoghue v. Stevenson*,¹⁷ have a similar right to recover against bottlers of beverages who allow the remains of decomposed animals to remain in their products. Similarly, American landowners have rights against the owners of coal mines whose mines cause surface land to collapse, and under Article I, section 26 of the Florida Constitution, Florida residents have the right to keep 70% of the first \$250,000 of any recovery in a medical malpractice action and 90% of anything above that amount.

It should be obvious that the rights just noted are neither profound nor, one might suppose, morally mandated. They are simply the remedies that enforce policy determinations, and that implement of policy determinations – no more and no less.¹⁸ But much the same can be said about academic freedom. What we think of as academic freedom might simply be the consequentialist policy determination that better research will be done if research design and implementation is entrusted to university professors than if left to the elected members of a state legislature. Or academic freedom might instead, or in addition, be the product of a policy decision and an empirical assessment that university students will come to have a better appreciation or understanding of literature if the curriculum of the English department is set by English professors than if it is set by the attorney general or governor of a state, or even by a state's department of education. Thus, it is possible to understand academic employment, academic instruction at the university level, and academic research in similarly "It's just a job" terms, but still believe that the job might be done better if academics are given certain legal rights against interference by those who might be expected to be less competent or might be predicted to have different constituencies. That we (and, to be sure, the AAUP) choose to attach the label "academic freedom" to this policy determination should not be taken to suggest that anything deeply moral is going on, and thus the claim that nothing profoundly moral or extraordinarily important is at issue

¹⁵ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

¹⁶ 111 N.E. 1050 (N.Y. 1916).

¹⁷ [1932] A.C. 562 (H.L.).

¹⁸ Ronald Dworkin has famously maintained that courts both are and should be in the rights business and not, except insofar as they are interpreting policy-based statutes, in the policy business. RONALD DWORKIN, *LAW'S EMPIRE* 221-224, 243-244, 338-339 (1986); DWORKIN, *supra* note 11, at 33-103. But as a descriptive matter, Dworkin's claim is almost certainly false, for common law adjudication, and the rights that common law adjudication creates and recognizes, are soaked with policy considerations. See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* (1988).

does not entail the conclusion that academic freedom is an empty idea. “Academic freedom” is best understood as the legal term for a legal right, and for a legal right that emerges out of a policy judgment. And because so many rights are in fact premised on policy judgments, the fact that the right that gets labeled as “academic freedom” should be cause for neither alarm nor celebration.

V

Once we understand the notion of a right in these deflationary terms, we can understand as well that judicial enforcement of these rights is nothing more than a particular mechanism of institutional design. Just as we have the “It’s just a job” school of academic employment, so too might we have the “It’s just a job” school of judicial power.¹⁹ Some decisions are best made by workers and others by the foreman. Some decisions are best made by patients and others by the physician. And some decisions are best made by legislatures, or in collective bargaining, and others are best made by judges. Fish argues that the “It’s just a job” view of academic employment entails the conclusion that the rights and responsibilities of academics are better worked out in collective bargaining than in the courts, and as a contingent empirical and policy question of institutional design, that may at some times and in some places be so. But the conclusion only follows necessarily from the premise if we think courts are or should be exclusively in the business of enforcing rights in the deep sense. But the “It’s just a job” school of federal judging, a school to which I profess considerable allegiance, rejects such claims. There might be rights in the strongest and deepest and most moral sense that are best left to legislatures to protect,²⁰ and there might be roles that are given to judges that have little to do with rights.²¹ And if this is so, then the question whether the delineation of the nature of academic employment should be left to those whose job is to pound the table in the bargaining room or instead to those whose job is to put on a black robe and make a decision supported by written reasons is simply a second-order policy decision of institutional design. It appears, however, that Fish, who embraces the “It’s just a job” view of academic employment, has a rather grander view of judging, a view that leads him not to want judges to sully their exalted hands with the nitty-gritty business of the terms of academic work. But it is possible to believe that making such determinations might be something that judges would be

¹⁹ Ironically, perhaps, Fish seems resistant to thinking of judges and what they do in “It’s just a job” terms.

²⁰ See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000); JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999).

²¹ See note 18 and accompanying text, *supra*.

good at, and if we think, in some times and in some places and on some issues, that this is so, then it might be useful to have a label for the decision to empower judges in this way. And in fact we do. The label is “academic freedom.” But it is just a label.

VI

We should not fault Fish too much for being taken in by the First Amendment rhetoric that surrounds most discussions of academic freedom. What we have is simply another instantiation of the phenomenon of First Amendment opportunism.²² At least in the post-1960s United States, the First Amendment has a certain kind of cultural resonance and doctrinal power. As a result, good lawyers will try to frame their arguments in First Amendment terms, just as good politicians try to connect their policy ideas to the images of the founding fathers or Abraham Lincoln or the soldiers of the Second World War, just as manufacturers use endorsements to connect their products with popular and attractive celebrities, and just as denizens of my university try to frame all of their arguments about everything in terms of Thomas Jefferson’s supposed beliefs and imagined preferences. “Mark you this, Bassanio, even the devil can cite Scripture for his purpose,” remarked Antonio in *The Merchant of Venice*,²³ as a way of pointing out the ease with which people can find in the Bible something to add credibility to whatever their argument happens to be, and the First Amendment appears to operate in much the same way. Precisely because of the cultural salience and social attractiveness of the very idea of the First Amendment, good advocates, whether in court or in public debate, will try to find a First Amendment hook on which to hang all varieties of claims having little connection with what we might think of as the core goals of the ideas of freedom of speech and freedom of the press.

Thus, there is nothing exalted or inevitable in the fact that the First Amendment now protects the right of a liquor store to advertise its prices²⁴ or the right of a political candidate to claim to have won medals he has not

²² See Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 174 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002). See also Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 *HARV. L. REV.* 1765 (2004); Frederick Schauer, *The “Speech-ing” of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 347 (Catharine MacKinnon & Reva Siegel eds., 2004).

²³ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 1, sc. 3.

²⁴ See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). On the opportunistic use of the First Amendment and its “commercial advertising” dimension to make decisions whose aims have far more to do with economic libertarianism than freedom of speech, see Thomas Jackson & John Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 *VA. L. REV.* 1 (1979).

earned,²⁵ or the way in which it is now often argued that the First Amendment guarantees the right to harass one's fellow workers at the workplace,²⁶ or to steal someone else's computer program.²⁷ All of these instances, and there are countless others, are simply examples of lawyers and their clients doing what good lawyers do – seizing on what appears to be a good argument and then bending the core of the argument to suit their purposes. This, quite simply, is First Amendment opportunism, and it is all around us.

And so we should not be surprised to see academics and their lawyers doing very much the same thing. If, like most other people, academics would prefer to do their jobs with a minimum of external interference, and if they think they can secure this goal in the courts, then it is simply good strategy to try to clothe the arguments for professional independence in the mantle of the First Amendment. Given the cultural salience of the First Amendment, we should not be surprised or shocked when interest groups such as university professors adopt this strategy. And we should not be surprised when their lawyers help them do it, and pick the best forum for advancing these claims. What we see is nothing more or less than good political strategy and good lawyering. The good lawyer is using the language and the concept that will most likely secure the desired result. And so it goes, because being a good lawyer is very like being a good academic. In both cases, it's just a job.

VII

Thus, Fish's account of academic freedom is an account that is erected on a foundation of a theory of the job in which the employee has some say in delineating the nature of a job, a theory of academic employment that views it as a professional calling with a certain range of knowledge-seeking goals, a theory of the First Amendment that sees the First Amendment as largely a policy-independent individual right in the strong sense, a theory of rights that understands rights as necessarily being something other than the legal implementation of a policy decision, and a theory of judging that excludes judges from the kinds of policy decisions that are frequently worked out in legislatures or at the bargaining table.

Each of Fish's five theories is at least plausible, and some or all of them may even be sound. But they are theories nonetheless, unless one

²⁵ *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

²⁶ *See Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991) (rejecting the argument).

²⁷ The issue is explored, and with more sympathy than I would give it, in Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445 (2013). For the contrasting view, see Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1498 (2013).

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adopts a theory of theories (as Fish does, here and elsewhere) that essentially renders not only the idea of a theory, but the associated ideas of an account, an explanation, or a justification empty.²⁸ Yet once we see that each of Fish's theories is contestable, we can see as well that little is gained by denying their theoretical status. Indeed, much may be lost if we fail to do so. The most attractive part of Fish's "It's just a job" account of academic employment and academic freedom is its deflationary tone. But that tone is itself built on a theory of just what it is to be an academic, and a theory of just who should make what kinds of decisions in a college or university environment. We could say in response, "It's just a theory," but Fish's argument is more than that. He doesn't think that "It's just a theory." He believes it is the right theory. But to see whether it is in fact the right theory, we have to begin by recognizing that it is, after all, a theory.

²⁸ As he made clear in his oral comments at this Symposium, Fish embraces the idea of an "account," even a normative one, just as he rejects the idea or value of a "theory." Fish's theory of theories, therefore, seems to understand what a theory is in a way that distinguishes a theory from a causal explanation and from a generalized normative prescription. That he does so, however, highlights the way in which his theory of theories is non-standard, and quite different from the theory of theories implicit in this Comment.