

“WHAT AM I DOING?” STANLEY FISH ON THE POSSIBILITY OF LEGAL THEORY

MICHAEL ROBERTSON*

Faculty of Law, University of Otago, New Zealand

I. INTRODUCTION

Stanley Fish says that theory does not exist, and because it does not exist, it has no consequences. This is doubly disturbing for someone who thinks of himself or herself as a legal theorist. While it is one thing to be dismissed as an impractical ivory tower type, out of touch with the real world of practice, it is quite another to be told that you do not exist at all. If legal theory does not exist, what have I been doing these past years? Indeed, what is it that Fish himself has been up to in his many books and articles devoted to jurisprudential issues?¹ Moreover, simply existing is not the limit of a legal theorist’s ambition. We want what we do to have significance, and Fish’s claim that theory has no consequences denies us that status.

Fish’s claims are especially galling for those legal theorists critical of the status quo who see theory as a tool for achieving progressive social change. Such legal theorists, often associated with Critical Legal Studies or feminist jurisprudence, see Fish’s work as denying the possibility of using critical reflection to become aware of the oppression of some groups in society and the role of ideology in concealing or justifying that oppression. They want to use critical theory to free us from unjust ways of thinking and acting that we have been socialized to accept as natural or inevitable. They see Fish’s denial of any role for theory as evidence that he is a conservative seeking to impede efforts to change society for the better.² I think that Fish’s positions

* My thanks to Andrew Geddis and Stanley Fish for commenting on earlier drafts of this paper.

1. Most of his law-related writings have been collected in Stanley Fish, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (Duke University Press, 1989); Stanley Fish, *THERE’S NO SUCH THING AS FREE SPEECH . . . AND IT’S A GOOD THING, TOO* (Oxford University Press, 1994); and Stanley Fish, *THE TROUBLE WITH PRINCIPLE* (Harvard University Press, 1999).

2. See, e.g., Andrew Goldsmith, *Is there Any Backbone in This Fish? Interpretive Communities, Social Criticism, and Transgressive Legal Practice*, 23 L. & SOC. INQUIRY 373 (1998); Daryl J. Levinson, *The Consequences of Fish on the Consequences of Theory*, 80 VA. L. REV. 1653 (1994); Steven L. Winter, *“Bull Durham” and the Uses of Theory*, 42 STAN. L. REV. 639 (1990); Christopher Norris, *Law, Deconstruction, and the Resistance to Theory*, 15 J.L. & SOC. 166 (1988); Drucilla Cornell, *Convention and Critique*, 7 CARDOZO L. REV. 679 (1986).

on politics and social change are much richer and more interesting than these critics suppose. In his books there are many insights into how communities change and the ways in which human action, including law, can contribute to those changes. The systematic collection and presentation of these insights remains to be done, but this essay is a first step in that larger project.

My more limited goal in this paper is to develop a clearer and more detailed account of Fish's position on theory and then to restate this position in a way less likely to be dismissed than the bald claim that theory does not exist. I will achieve this restatement by developing a taxonomy of theory types which I think is largely implicit in Fish's work. He certainly does not foreground this taxonomy, since he prefers the more startling and polemical way of making his point, but I argue that textual support for much of it is there. Other parts of the taxonomy I will fill in.

Having excavated this taxonomy from Fish's writings on theory, I then ask whether it does any useful work. I will put it to the test by considering Fish's own work on theory, and also liberal theory, which is one of his prime targets. The questions asked will be: Does the taxonomy give us greater conceptual clarity in understanding what theorists do? And, more important, does it allow us to give a better answer to the vexed question of the consequentiality of theory? This will address the issue raised by those critics who claim that Fish denies theory any power to effect social change.

While the bulk of the paper will be devoted to the excavation, fleshing out, and testing of this taxonomy, I will begin by explaining why Fish takes his unorthodox position on theory. This explanation will allow me to expose what I take to be the philosophical roots of all of Fish's work, not just his work on theory. Although I will describe these roots and show how Fish's work stems from them, I will not subject those roots to extensive critique. That would require a paper with a different focus.

II. FISH ON THEORY

Fish's efforts to dethrone theory in his latest book, *The Trouble with Principle*, build upon his earlier work in *Doing What Comes Naturally*.³ In essence, what he is objecting to is the following story: The natural, prereflective position for humans is to be embedded within some local context. This local context provides a point of view, a set of values, beliefs, goals, socialized practices, and so forth. But we cannot remain in the grip of the local once we begin to reflect upon our experience more deeply. For one thing, even those locally embedded will feel the pull of different imperatives in different concrete

3. See Fish, *Consequences*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 315. See also Stephen Knapp and Walter Benn Michaels, *Against Theory*, in *AGAINST THEORY. LITERARY STUDIES AND THE NEW PRAGMATISM*, (W.J.T Mitchell ed., University of Chicago Press, 1985), which Fish refers to approvingly in *Consequences*.

situations. How are these different sets of imperatives related? Are our lives merely a succession of unrelated, ad hoc responses, or is there some deeper coherence underneath? As well, we soon learn that different groups of people can be embedded differently. The members of another group can have values, goals, and practices that are so different from ours as to be incompatible with them. How can we deal with that potentially explosive incompatibility? Concerns such as these lead us away from the initial, embedded position in which we found ourselves and send us in search of higher-order principles that stand outside local practices.

Much Western philosophy since Plato has exhibited this goal of looking beyond the confusing surface detail of life to discern some enduring metaphysical realm or higher principles that are only imperfectly reflected or realized at the local level.⁴ This was the point of Plato's story of us seeing only the blurred shadows of the real on the wall of the cave. Platonist or religious metaphysics may no longer be popular candidates to fulfill this role, but the same impulse to transcend the purely local is present in much contemporary moral and political philosophy. For political liberals, the search is for higher principles that stand above the particular beliefs, goals, practices, and so forth of different local groups. Since these principles will be neutral as between the local matters on which these groups disagree, they can be accepted by all as regulating their joint lives.⁵ These neutral principles thus make it possible for these groups to be united in a peaceful and just society rather than engaging in constant warfare. Higher principles, such as maximizing happiness or respecting fundamental human rights, also explain and give coherence to the apparent flux and confusion of local practices. These practices can now be understood as the imperfect and inconsistent expressions of deeper background principles that are not themselves local products. It follows that the theory-project of discerning and systematizing these principles gives us an important tool to reform and guide those local practices from a position outside them.⁶

Fish sets his face against this long-standing project of escaping the local

4. "The idea, then, is that whatever the surface configurations of our actions, *at bottom* we are being guided by principles of the kind that philosophy takes as its special province. Thus it is to philosophy that we should look to get a perspective on those principles and on the actions we perform in everyday life." Fish, *Consequences*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 333.

5. "The claim is that abstractions like fairness, impartiality, mutual respect, and reasonableness can be defined in ways not hostage to any partisan agenda. The importance of this claim is that if it can be made good, these and other abstractions can serve as norms or benchmarks in relation to which policies favoring no one and respecting everyone can be identified and implemented." Fish, *Taking Sides*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 2–3. *See also* Fish, *Putting Theory in Its Place*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 285–286.

6. "Thus understood, theory can be seen as an effort to govern practice in two senses: (1) it is an attempt to *guide* practice from a position above or outside it, and (2) it is an attempt to *reform* practice by neutralizing interest, by substituting for the parochial perspective of some local or partisan point of view the perspective of a general rationality to which the individual subordinates his contextually conditioned opinions and beliefs." Fish, *Consequences*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 319.

and rising above it to a vantage point where other, more significant things come into view. His position, as we shall see, is that although we can abstract away from the local context to a degree, we can never escape it in the strong way desired. This impossible strong project goes under many different names. Sometimes it is called “theory,” sometimes “philosophy,” sometimes “liberalism,” but Fish says that these all name the same doomed attempt to transcend the grip of the local, biased, and partisan viewpoint for one free of such constraints.⁷ Consequently the liberal goal of seeking higher-order principles outside and above local practices, which can then be used to guide local practices (to achieve greater coherence, or peaceful coexistence, or social change, or tolerance, etc.) is impossible.⁸

Two questions naturally arise at this point: (1) What are Fish’s reasons for denying the very possibility of a project which has engaged the minds of our best thinkers across centuries? and (2) Has he proved theory to be impossible simply by adopting an unduly narrow and restricted definition of theory?

A. Fish’s Reasons for the Claim that Theory Is Impossible

Fish’s denial that we can ever achieve the distance from our local contexts that is required by the theory-project I have just described follows in a strict logical fashion from philosophical commitments that have consistently informed all of his work. Indeed, I think that all of Fish’s work is best understood as tracing out the logical implications of a certain conception of the self, although commentators on Fish have tended not to appreciate this. It would require a separate article to evaluate the soundness or coherence of this account of the self, and such a work would not devote much

7. “With respect to this project (which is the project of theory or philosophy in general; liberalism is just one relatively recent name for it) my position is, first, that it is impossible. . . .” Fish, *Putting Theory in Its Place*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 286. “[P]hilosophy (at least in the analytic tradition) *is* theory, is the foundational project Rorty describes.” Fish, *Consequences*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 338. *See also id.* at 339 and 333–335. Of course, not *all* philosophy stems from the Platonist impulse to transcend the local. Fish is simply identifying and critiquing one important strand of Western philosophy. Another strand, which might be called therapeutic, tries to free us from the need to engage in Platonist philosophy. Wittgenstein was one such philosopher, and so is Fish. *See THE NEW WITTGENSTEIN* (Alice Crary and Rupert Read eds., Routledge 2000), which stresses the therapeutic nature of Wittgenstein’s philosophy. Alice Crary’s chapter, *Wittgenstein’s Philosophy in relation to Political Thought*, evaluates the same charge of political conservatism that has been directed at Fish (*see supra* note 2). She briefly discusses Fish’s approach to the possibility and efficacy of theory at 125–126. My thanks to one of the anonymous *LEGAL THEORY* referees for directing my attention to this book.

8. “Theory, as I define it, is a name for a set of principles or rules or procedures that is attached to (in the sense of being derived from) no particular field of activity, but is of sufficient generality to be thought of as a constraint on (and an explanation of) all fields of activity. Since there are no such principles—no constraints that are more than the content of a practice from which they are indistinguishable—there can be no such thing as theory.” Fish, *Introduction: Going Down the Anti-Formalist Road*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 14.

space to Fish, because others have devoted more effort to elaborating and justifying it.⁹ All I seek to do here is to describe this conception of the self and indicate how some of Fish's more familiar claims flow from it. This allows me to focus on what is unique about Fish, because although others have endorsed the same conception of the self, they have not seen the same implications of such a commitment.

1. Fish's Conception of the Self

Fish emphatically rejects the Kantian understanding of the self which has been so influential in Western philosophy. For Kant the key to understanding the nature of the self was to abstract away from any local and contingent features of people to find the common and enduring human nature underneath them. Different human individuals and groups will choose different values and ways of life at different times, but subsisting behind this welter of difference lies our common nature as autonomous, rational, choosing agents. That is the true essence of the self and is therefore what must be respected and protected. How particular autonomous agents exercise their free will at any particular time—that is, what they chose to do or value—is a secondary, less important matter. In this concept of the self, as Fish puts it, “you are defined . . . as the bearer of rights—the right to believe, the right to speak, the right to choose—and those capacities, rather than what you happen to believe, or happen to say, or happen to choose, are what is important and what must be protected.”¹⁰

According to Fish, Kant—and after him, John Rawls¹¹—is moving in exactly the wrong direction. The key to understanding the self is to focus on the enabling and constraining role of the local context. Rejecting the concrete and particular in favor of an abstract, contextless “self” is a fundamental error for two reasons. First, it fails to see that the fundamental beliefs, values, and so forth that differentiate people are not contingent and

9. The conception of the self that is central for Fish can also be found in the work of Charles Taylor, Alasdair MacIntyre, and Michael Sandel. It has been adopted by some communitarians, social constructionists, and even conservative thinkers.

10. Fish, *Sauce for the Goose*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 41. See also *id.* at 39 and at 36, where Kant is identified as the source of the view Fish is criticizing. Fish can also be found criticizing this Kantian “theory of personhood” in *Of an Age and Not for All Time*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 50; *Boutique Multiculturalism*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1 at 57–59; *Vicki Frost Objects*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 157–158; *A Wolf In Reason's Clothing*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 197–198. Fish does not always clearly identify Kant as the source of the position he opposes in these passages, but other theorists who directly critique Kant along lines similar to Fish's have made the connection explicit. See Michael Sandel, *DEMOCRACY'S DISCONTENT* (Harvard University Press, 1996) 11–17; and Margaret Radin, *CONTESTED COMMODITIES* (Cambridge University Press, 1996) 34–40 and ch. 5, *Personhood and the Dialectic of Contextuality*.

11. “By referring to these [matters hidden by the veil of ignorance in the original position] as restrictions on *information*, Rawls makes it clear that in his view the characteristics they remove from inspection are not essential to the person, who is what he is with or without these identifying marks of merely social relations: he is an agent with a capacity to imagine a condition of justice and a vision of the good; and it is this capacity, rather than any realization it happens to have, that defines him.” Fish, *Taking Sides*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 11.

accidental features of the true self (“opinions,” or “mere preferences”) but instead constitute that self. Second, it misdescribes these local commitments as being—at least ideally—“choices” of an autonomous agent. For Fish they are preconditions of having an agent in the first place and so cannot be later choices of such an agent.¹²

On Fish’s competing conception of the self, all human thinking, perception, and action are possible only because of the constraints provided by being embedded within local communities and absorbing the beliefs, values, categories of thought, practices, and so on of those communities. The constraints provided by being locally embedded thus simultaneously constitute, structure, and enable us. They provide the cognitive and perceptual tools humans use, but these tools will always bear the marks of their origin in some local (“partisan,” “biased,” “closed,” “constrained”) community and its fundamental beliefs, values, and practices.

Selves are constituted by the ways of thinking and seeing that inhere in social organizations. . . .¹³

[An interpretive community was] not so much a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, insofar as they were embedded in the community’s enterprise, community property.¹⁴

An action is only conceivable against a background of alternative paths, a background that is already a constraint in that by marking out some actions as possible it renders unavailable others that might emerge as possibilities against a different background. To imagine a world with no background in place, with no prearticulation of the directions one might take, is to imagine a world where there would be literally nowhere to go, where, since every path is the same path, the notion of doing this rather than that—of acting freely—would be empty.¹⁵

So, on Fish’s account, being embedded in local communities is a precondition for being a human self, and it is therefore impossible for humans ever to transcend the grip of the local in any strong way. What follows from this conception of the self? One logical consequence Fish draws is that many intellectual projects turn out to be impossible, because transcending the grip of the local in a strong way is just what they want to do. Conservatives want to be true to an enduring substantive conception of the good life that is not merely relative or dependent upon some local context. Postmod-

12. Fish, *Sauce for the Goose*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 41–42.

13. Fish, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 336 (Harvard University Press, 1980).

14. Fish, *Change*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 141.

15. Fish, *Critical Self-Consciousness, or, Can We Know What We’re Doing?*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 459.

ernists or multiculturalists want to enable people to detach themselves from their substantive local beliefs and commitments, realize their ideological or contingent nature, and hold them more lightly or tentatively. Liberals want to find neutral principles that regulate from outside the disputes between those with competing substantive conceptions of the good life. All of these intellectual projects would be instances of what Fish means by “theory” when he says that theory is impossible.

2. Fish’s Antifoundationalism

“Foundationalism” is a less familiar name for the same urge to achieve transcendence that goes under the names of “theory,” “philosophy,” or “liberalism,” according to Fish. Foundationalist projects also seek to escape from the constraints of the partisan, the contingent, and the local; their goal is to find something outside the merely local on which human knowledge and practices can rest. This external foundation might be God, or universal, timeless, moral principles, or brute empirical facts.

In post-Enlightenment times, foundationalism has often taken a positivistic form that favors empirical facts as the external foundation for knowledge. According to this positivist variant of the foundationalist story, different groups might have different interpretations of reality, but at bottom the world is the way it is independently of human hopes or perceptions or beliefs. Ascertaining the true nature of the empirical world makes possible the achievement of objective, common knowledge that is not the mere product of local perspectives or biases. Such knowledge may be difficult to achieve, but through the application of reason and scientific method we can arrive at it.

But Fish’s conception of the self leads him to conclude that this search for external foundations is unrealizable.¹⁶ His position is that we can never move outside the world given to us by our forms of local embeddedness. Whatever is pointed to as existing outside the local and human will be given to us (i.e., be able to be perceived or thought about) only because of the structures of perception and thought provided to us by that particular local embeddedness. Because it is local embeddedness that provides the “lenses through which and with which the world is processed and configured,”¹⁷ any purported external foundations will not transcend local beliefs, assumptions, practices, points of view, and so on but will instead depend upon them being firmly in place. Thus the bare, brute facts that positivistic foundationalists seek are unobtainable. As Fish puts it in *Doing What Comes Naturally*: “[T]here are no unmediated facts nor any neutral perception, and . . . everything we know and see is known and seen under a description or as a function of some paradigm.”¹⁸ The same point is made in *The Trouble*

16. What follows is a compressed statement of a position that is dealt with in more detail in Michael Robertson, *Picking Positivism Apart: Stanley Fish on Epistemology and Law* 8 S. CAL. INTERDISC. L.J. 401 at 403–428 (1999).

17. Fish, *Vicki Frost Objects*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 157.

18. Fish, *Consequences*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 326. *See also* 320, 321.

with *Principle*: “[T]here is no specification of the facts of a matter independent of some or other comprehensive background already assumed and in place. Indeed, independently of any comprehensive doctrine there is neither perception or judgment. . . .”¹⁹

This, of course, does not mean that there are no such things as facts or that the world is the way you believe it is. What it means is that the positivist account of how we experience facts must be replaced by an antifoundationalist account. On this antifoundationalist account, your interpretive community’s deep beliefs form “a lattice or web whose component parts are mutually constitutive”²⁰ and that determine what will be compelling facts for members of that community and what they will see as compelling reasons.²¹ So for the members of any interpretive community, facts and reasons come in compelling forms, forms that may dash some of their established beliefs and expectations and force them to change their minds about some things. Members of any interpretive community will always have at hand the tools to do the work of distinguishing fact from error and false beliefs from true beliefs, but the (historically contingent) shape of these tools will be a function of the background beliefs of the community.²² Since such a deep layer of beliefs and so forth is necessary for us to see facts at all, we can never apprehend “facts as they are independently of all human beliefs.” Thus we can never find positivist foundations upon which to base human knowledge that are not already contaminated by human beliefs. As Fish quotes William James as saying, “the trail of the human serpent is . . . over everything.”²³

In essence, both Fish’s critique of foundationalism and his critique of the Kantian picture of the self make the same claim: It is a precondition of being human to be embedded within some local, particular (and therefore “constraining,” “partisan,” and “biased”) community context. Such embeddedness simultaneously enables and limits human beings. For us, the

19. Fish, *Putting Theory in its Place*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 286. “[T]here are no facts without a framework, and any framework you have will have *you*, in the sense of limiting in advance what you can see and think.” Fish, *Vicki Frost Objects*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 159.

20. Fish, *Beliefs About Belief*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 280.

21. “There is no such thing as reason apart from its appearance in historical circumstances, an appearance that will always take the form of *reasons*, that is, of arguments already inflected and infected by some prechosen partisan vision or angle.” Fish, *Putting Theory in its Place*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 287. In *THE TROUBLE WITH PRINCIPLE*, Fish uses the example of conservative Christians to give a concrete example of the way in which deep beliefs come before, and enable and structure, the perception of facts and reasons. For more detail, see Michael Robertson, *The Limits of Liberal Rights: Stanley Fish on Freedom of Religion*, 10 OTAGO L. REV. 251 at 260–265 (2002).

22. “This is not to say that in an anti-foundationalist world one lacks mechanisms for confirming or disconfirming beliefs, or hunches; it is just that such mechanisms (authoritative documents, the pronouncements of revered authorities, standards of measurement, and so on) do not stand apart from the structure of one’s beliefs *but are items within it*.” Fish, *Truth and Toilets*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 306.

23. *Id.* at 305.

grip of the local can never be transcended in the strong way that the theory-project (or Platonist philosophy, or liberalism) requires.

B. Is Fish's Definition of Theory Too Narrow?

Even if one accepts that Fish's conception of the self and his antifoundationalism are correct, why does that entail the conclusion that theory does not exist? It may well follow that a strong theory-project which aims at transcending any local embeddedness is impossible, but why should we accept that this is the only way to understand "theory"? Fish himself is aware that there exist understandings of "theory" other than the one he stipulates.

I should acknowledge here that what I intend by "theory" may seem to some to be excessively narrow. I reserve that word for an abstract or algorithmic formulation that guides or governs practice from a position outside any particular conception of practice. . . . When I assert the lack of a relationship between theory and practice I refer to the kind of relationship (of precedence and priority) implied by the strongest notion of theory. . . .²⁴

Surely it is consistent with Fish's position to assert that types of theory other than this "strongest notion" can exist and have consequences? Indeed, this is what I want to assert, but there is an obstacle in my way. In a couple of places Fish disapproves of any move to understand "theory" in a way other than the strong sense that he declares does not exist. For example, in *Doing What Comes Naturally* he urges that theory in the strong sense is the only interesting sense. It names a significant project that has been and continues to be attempted by major thinkers in the Western tradition. If you widen the definition of theory to cover other kinds of projects, such as texts on Milton's poetry or books on tort law, he says, you would be turning nearly everything into theory, which would render the theory-project trivial and uninteresting.

[T]he effect of such a liberal definition would be to blur the distinction between theory and everything that is not theory, so that, for example, essays on the functions of prefaces in Renaissance drama would be theory, and books on the pastoral would be theory, and studies of Renaissance self-fashioning or self-consuming artifacts would be theory. . . . If we like, we can always call such [works] "theory," but nothing whatsoever will have been gained, and we will have lost any sense that theory is special. After all, it is only if theory is special that the question of its consequences is in any way urgent. In other words, the consequentiality of theory goes without saying and is, therefore, totally uninteresting if *everything* is theory.²⁵

24. Fish, *Dennis Martinez and the Uses of Theory*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 378.

25. Fish, *Consequences*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 325–326. *See also* Fish, *Dennis Martinez and the Uses of Theory*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 378; Fish, *Mission Impossible: Settling the Just Bounds Between Church and State* 97 *COLUM. L. REV.* 2255 at 2257 (1997).

I think that Fish is wrong about this and that there is something to be gained both by turning our attention to the types of intellectual work that fall outside the category of strong theory and by calling many examples of this work “theory.” Such an investigation does not turn the category of theory into a shapeless sack into which anything can be shoved, as Fish fears in this passage. As we shall soon see, this investigation produces a taxonomy of theory that excludes some forms of intellectual work and that distinguishes between distinct types of theory-projects which have hitherto been lumped together under the one category of “theory.” In this respect, the exercise resembles Hohfeld’s project of exposing the different concepts which had been lumped together under the one category of “legal right.”²⁶ But the taxonomy of theory will have a payoff beyond simple conceptual clarification. It will allow us to give a more adequate answer to the question of theory’s political consequences.

It may sound surprising, given the passage just quoted, but I believe that the groundwork for this taxonomy of theory has largely been performed by Fish himself. Because the main focus of his work on theory has been to undermine the pretensions of strong theory, it is understandable that he sometimes expresses his conclusion by saying that theory does not exist (meaning strong theory). It would dilute the force of making his point this way if Fish talked about other types of theory existing, so in passages like the one quoted he declines to do so. But in other places he violates his own strictures. In these other passages, which my development of the taxonomy will collect, he both talks of other types of theory as existing, and says insightful things about them. I do not read these passages as inconsistencies or slips. Instead I read them as implicit acknowledgments that it is possible to make Fish’s point in a way that gives theory, properly understood, a continued life. Fish himself does not foreground this second way of making his point because he prefers the more polemical and startling approach, but I hope to convince you that it is both consistent with his wider argument and is already present in his work on theory.

III. A FISH-BASED TAXONOMY OF THEORY

A. Strong Theory

As explained earlier, this is Fish’s main target and is the type of theory he means when he says that theory does not exist. Strong theory seeks to escape the grip of any local context and the beliefs, values, assumptions, and practices that come with that context. It seeks to arrive at knowledge or principles that are not the product of mere local and partisan concerns but

26. Wesley Hohfeld, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (Yale University Press 1964, originally published 1923).

that are instead universal, objective, and based on secure foundations that will not shift with changes in the character of the perceiving human or community of humans.

But Fish claims that our human consciousness and perception are both produced and structured by being embedded in a local context, so we can never rise above or escape from the condition of being particularly situated or angled. Since strong theory is not possible, it cannot have consequences. In particular, it cannot be used to guide practices from a privileged position above all practices and contexts.

B. Sham Theory

Sham theory is what people who purport to be engaged in strong theory are typically doing. They present themselves as having risen above the contest of local imperatives, but really they are advancing the position of one of those competing agendas. Since strong theory is impossible, anything that wears the mantle of strong theory and purports to give concrete guidance can only be a disguised form of rhetoric seeking to advance a partisan position, according to Fish.

When a theoretical vocabulary does seem to be effective and to generate outcomes, it is because it has become a rhetorical vocabulary, a vocabulary already freighted with the assumptions of some or other agenda, although the work it does will almost always be presented as proceeding from no agenda whatsoever, but from the high plain of general truth or higher order impartiality. Theory, therefore, has no consequences except those that emerge from a political deployment of its terms, a deployment that can always be undone if another party seizes the same terms and moulds them to its purposes.²⁷

Here I think we see Fish calling an abstract intellectual activity theory, notwithstanding its partisan nature.²⁸ Fish also admits here that this type of theory can have significant consequences. However, any consequences are political/rhetorical (the advancement of a partisan point of view), not the consequences claimed for strong theory (neutrality, achieving a position above the partisan fray.)

Arguments for the impossibility of strong theory, and the exposure of sham theory passing itself off as strong theory, form the bulk of Fish's work on theory. As we shall see in the final section of this paper, Fish takes

27. Fish, *Putting Theory in its Place*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 289. See also *id.* at 287; Fish, *Playing Not to Win*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 227–228; Fish, *Taking Sides*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 2–3.

28. See also Fish, *Consequences*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 330–331. Sometimes Fish distinguishes between “theory” and “theory-talk,” which is the same as my distinction between strong theory and sham theory. See Fish, *Introduction: Going Down the Anti-Formalist Road*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 14–15.

liberalism as the prime example of sham theory in *The Trouble with Principle*. He seeks again and again to show how it really pushes a contestable partisan position under the guise of neutrality and disinterested reason, even in the cases of freedom of speech and freedom of religion.

C. Local Theory

Strong theory and sham theory both claim to transcend the local context and reach a viewpoint beyond the grip of biased partisan beliefs. But what about intellectual work that makes no such claim, that is, intellectual work by people who are embedded within a context and who do not purport to rise above that context and its currently in-place background of deep beliefs, goals, values, taxonomies, and so forth? From the inside, as it were, they seek to describe in more general terms the way a practice currently works, or to generate arguments, using the resources and reasoning recognized by those practitioners, to take the enterprise in a different direction. Here I am thinking of practicing judges or practicing novelists who engage in a more abstract and general consideration of the practices of judging²⁹ or novel-writing.³⁰ While this intellectual work involves abstraction and generalization, there is no claim that it ever escapes the gravitational pull of some local practice. Rather than escaping local practice, this intellectual work explicitly presupposes and rests upon that local practice.

I will call this type of theory-project local theory. Local theory can have consequences, but it need not. It is not guaranteed any consequences, because the underlying practices do not rely upon such theorizing to exist or function. The practitioners actually writing novels or deciding cases can ignore their more theoretical brethren, and the job will still get done.³¹ However, a powerful instance of local theory is sometimes one of the many things that can significantly change the way practitioners conduct themselves or even the way they conceive of their shared enterprise.

The impulse to reexamine the principles underlying one's practice can be provoked, moreover, by something that is not even within the field of practice: by turning forty, or by a dramatic alteration in one's economic situation, by a marriage, or by a divorce. Of course, it can also be provoked by theory—but not necessarily. . . . Once again, we reach the conclusion that there is no sense in which the theory is special: it cannot provide us with a perspective independent of our beliefs, and the perspective it can occasionally (but not

29. For example, Richard Posner, *THE PROBLEMS OF JURISPRUDENCE* (Harvard University Press, 1990).

30. For example, E.M. Forster, *ASPECTS OF THE NOVEL* (E. Arnold, 1927).

31. For an expansion of Fish's position that the embedded practitioner does not need to wait for a theory to tell him what to do, see Fish, *Dennis Martinez and the Uses of Theory*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 372.

necessarily) provide on some of our beliefs relative to others can be provided by much that is not theory.³²

I think that local theory can also be performed by someone who is not a practitioner but who has made a full-time job of studying practitioners. This would cover academics who seek to describe or reform the contemporary practices of, for instance, law or literature. On this understanding, works of jurisprudence such as Honoré's analysis of the concept of ownership or Hohfeld's analysis of the concept of legal right would be instances of local theory.³³ So would the examples Fish gave earlier—essays on the functions of prefaces in Renaissance drama, books on the pastoral, and studies of Renaissance self-fashioning or self-consuming artifacts. Each such study abstracts from the conduct of dramatists, poets, or lawyers but remains closely tied to the local context that informs the practices of such groups. (If the academic enterprise becomes too separated from that local context, it becomes another form of theory that I will consider next.)

Fish is certainly aware that such intellectual work exists, but because his main focus is on strong and sham theory, he does not devote much time to considering it. When he does, he denies its claim to have any special importance, as we have just seen, and is often disinclined to call it theory at all, precisely because it forgoes any claim to transcendence of the local.

I am aware that "theory" is often used in a broader sense to cover large generalizations, heuristic questions (what if we rewrite history from the point of view of women?), policy recommendations, and "big" beliefs (as in "I believe in God" or "I don't"). I do not refer to any of these as theory *because they all proceed from a strong angle of conviction*, whereas it is theory's project—at least in the writings of those I critique—to proceed from no angle, or from an angle so wide that it takes in everyone, no matter what his or her religion, political affiliation, ethnic identification, etc.³⁴

As indicated earlier, I think that there are two ways to make Fish's point that the local context is a precondition of the self and so cannot be transcended. One is to say that the transcendence project is called "theory," and so theory is impossible and has no consequences. Another is to say that the transcendence project is an impossible theory-project but other theory-projects are possible. The task then is to identify what these other theory-projects are and evaluate their possible consequences. Fish generally favors the first way of making his point, but I think that the second is more useful and that he

32. Fish, *Consequences*, in *DOING WHAT COMES NATURALLY*, *supra* note 1 at 332-333. *See also id.* at 339; Fish, *Change*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 156.

33. Hohfeld, *supra* note 26; Tony Honoré, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107 (A.G. Guest ed., Oxford University Press, 1961)

34. Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, *supra* note 25, at 2257 (my emphasis); *see also* Fish, *Consequences*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 325-326.

has adopted it with respect to some of the other possible theory-projects. So by incorporating local theory into the taxonomy, I am only expanding a general approach to theory that Fish has already endorsed. But I have to admit that this part of my taxonomy has the least direct support from Fish's own writing, since there are only a few passages where he talks about what I call local theory without denying that it is theory at all.³⁵

D. Detached Theory

A good way to introduce detached theory, and to show how it differs from local theory, is to consider Fish's discussion of the practices of historians in *The Trouble with Principle*.³⁶ He notes that people engaged in the practice of making sense of the past have available to them "alternative perspectives (economic, ecological, dynastic, top-down, bottom-up) from which one might make historical sense."³⁷ I would say that those historians who developed and articulated these different ways of making sense of the past were engaged in local theory. But Fish goes on to observe that as well as engaging in what I call historians' local theory, one also can engage in the very different intellectual project of "interrogating the assumptions within which history is written," that is, one can "question the basic components of historical work—facts, evidence, agency, cause and effect. . . ."³⁸

Fish is emphatic that this intellectual project is very different from what normal historians do, whether that be making sense of particular pieces of the past or devising general strategies best to achieve this. If someone seeks to engage in this new project, he or she "would not be a historian at all but a metahistorian, and he [*sic*] would be engaging in a practice with its own traditions, exemplary achievements, authoritative forebearers, and influential contemporaries."³⁹ Fish has applied the same analysis to lawyers who do not practice law, or produce descriptions of current practice, or unpack concepts like ownership, but who, influenced by critical theory or postmodern theory, question the most basic assumptions and categories within which law is carried on.⁴⁰ Such people are not engaged in history or law but rather in philosophy, a completely different intellectual project.

Basically, Fish's position is that philosophy is a form of theory that certainly exists, but that it is too abstracted from particular local practices to have any consequences for those practices. With regards to the project of the metahistorians, for example, he insists that it is a "mistake is to think

35. As well as the passage cited above at note 32, see Fish's discussion of "local hermeneutics" as opposed to "general hermeneutics" in Fish, *Consequences*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 316–317.

36. Fish, *Truth and Toilets*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 302–305.

37. *Id.* at 304.

38. *Id.* at 303.

39. *Id.*

40. See Fish, *The Law Wishes to Have a Formal Existence*, in *THERE'S NO SUCH THING AS FREE SPEECH . . . AND IT'S A GOOD THING, TOO*, *supra* note 1, at 173–176.

that the news from the one practice can either authorize or deauthorize the other, to think that if your metatheory puts into question the basic components of historical work—facts, evidence, agency, cause and effect—you would no longer be able to do [historical work]. . . .”⁴¹ This is one of the most contentious and difficult to digest of all Fish’s claims. Critics on both the left and the right unite in insisting that the ability to engage in philosophical reflection *must* have some larger consequences (either good or bad) in other contexts. Fish has consistently denied this.⁴² “Metatheory” and any other form of philosophy can have consequences only within the discipline of philosophy itself (changing the answers one gives to traditional philosophical questions, for example). It can have no consequences outside the philosophy seminar room because it has become so abstract that it has detached itself from the contexts and concerns of any local practice. For this reason I call this form of intellectual activity detached theory.

Now this doesn’t mean that there is nothing to the theory project; just that it doesn’t travel beyond the precincts it itself establishes. Those are the precincts of an academic discipline [philosophy], not of a natural kind. That discipline has been assigned, or has assigned itself, the task of asking and answering certain questions, questions like “What is the nature of justice?” “Are individuals autonomous?” “Is there one truth or are there many truths?” “Is the mind independent of the body?” “What is the relationship between belief and reason?” . . . [A]s a *general* form of inquiry, it proceeds (and this is especially true of the branch of moral philosophy that dominates political theory) by abstracting away from particular situations and stripping from them the specificity and detail the come along with situatedness. The promise is that once this process of abstraction has made everything clear, you will be able to use its answers to order the specific situations from which it moved so resolutely away. But the promise can never be redeemed because the answers so derived are empty of substantive content—substantive content is what the abstracting process flees—and therefore they have no purchase whatsoever on the real-life issues to which you would apply them.⁴³

Passages such as this clearly show Fish stepping outside his favored “theory does not exist” formulation and acknowledging the existence and (limited) consequentiality of a form of theory other than strong theory. But is his analysis plausible? Have philosophers not offered us profound advice on practical questions such as how to live and what to value? Fish’s position is that if philosophers are able to give concrete advice, then they are no longer

41. Fish, *Truth and Toilets*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 303.

42. *Id.* at 300–301. For similar denials in Fish’s earlier writings, see Fish, *Consequences*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 315; and Fish, *Dennis Martinez and the Uses of Theory*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 372.

43. Fish, *Putting Theory in its Place*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 286–287. See also *id.* at 289; Fish, *Taking Sides*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 4 (especially note 1 describing Matthew Kramer’s distinction between “metaphysical problems” and “mundane problems”).

engaged in detached theory and are instead engaged in what I have called sham or local theory. As long as the philosophical discussion of concepts such as liberty, equality, fraternity, autonomy, human rights, mutual respect, justice, fairness, and so forth genuinely abstracts away from any substantive content, then “it would be unhelpful because it would be empty (that, after all, is the requirement); invoking it would point you in no particular direction, would not tell you where to go or what to do.”⁴⁴ That is, it would be a form of detached theory with no consequences for life outside the seminar room. Philosophers can only offer advice that has real-life applications (i.e., consequences) by giving those abstract, empty concepts some concrete content, but any concrete content chosen will reflect a contentious choice among partisan positions, whether that is admitted by the theorist or not.

If, for example, I say, “Let’s be fair,” you won’t know what I mean unless I’ve specified the background conditions in relation to which fairness has an operational sense. Would it be fair to distribute goods equally irrespective of the accomplishments of those who receive them, or would it be fair to reward each according to his efforts? Is it fair to admit persons to college solely on the basis of test scores and grades, or is it fair to take into account the applicant’s history, including whatever history he or she may have of poverty and disadvantage? Such questions sit at the center of long-standing political, economic, and social debates, and these debates will not be furthered by the simple invocation of fairness, because at some level the debate is about what fairness (or neutrality or impartiality) really is.⁴⁵

There is another potential problem with Fish’s account of detached theory. Does not admitting the existence of detached theory undercut the argument against strong theory by allowing the radical abstraction from context that strong theory depends upon? It sounds as if it is possible in the philosophy seminar room to perform a radical abstraction away from all of the details of concrete contexts—in fact one can abstract to such an extent that any clear consequences for action are lost. But wasn’t strong theory held by Fish to be impossible because embedded creatures like us could never abstract in a sufficiently radical fashion from the contexts that come with embeddedness and that constitute us? How can such radical abstraction from context be allowed as a possibility in the seminar room but be denied to strong theory?

It is indeed a fundamental claim of Fish’s that no text can be meaningful, nor can a discussion (philosophical or otherwise) be carried on, in the absence of an in-place background of community-specific understandings, urgencies, values, training, and so on. From the vantage point of this insight, abstraction can never be radical and principles can never be pure. It follows that any act of abstraction in the philosophy seminar must always

44. Fish, *Taking Sides*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 4.

45. *Id.* at 3. See also *supra*, note 27.

presuppose a shared local context that is not currently being abstracted away from. But Fish acknowledges the existence of this background local context:

Both the manner of posing these [philosophical] questions and the acceptable ways of trying to answer them are functions of the history (again disciplinary) in the context of which they have been experienced as urgent. That kind of urgency—theoretical or philosophical urgency—is not what is felt by those persons confronting the real-life problems for which this general form of inquiry is supposed to provide solutions.⁴⁶

The background context, which is always presupposed and relied upon in the philosophy seminar, is the context provided by philosophy's concerns, projects, categories, modes of argument, hierarchies, heroes, and history. It is because these are in place that the participants, who are all members of the interpretive community of philosophers, are able to proceed with the seminar. Their detached theory can be detached from the situations in which people have to apply terms like "equality" and "fairness" in everyday life, but it cannot be detached from the local context of the discipline of philosophy itself.

IV. TESTING THE TAXONOMY

I have claimed that the taxonomy developed in the last section will allow us to get clearer about what people are doing when they engage in theory. The taxonomy exposes the fact that instead of them all engaging in the same activity, they will be engaging in a number of different activities which need to be distinguished. One of the reasons to make these distinctions is that it allows us to get clearer about the consequentiality of theory, because the different types of theory have different types of consequences. Now it is time to put these claims to the test by applying the taxonomy to the work of some real theorists.

A. Fish

Much of Fish's contribution to law should be categorized as detached theory. He is typically not engaged in the practitioner's task of understanding and applying particular legal texts or rules in concrete circumstances. Nor is he engaged in local theory-projects, such as discerning underlying patterns in this practice, urging changes to it, or performing conceptual analysis of important legal ideas. Instead Fish's work seeks to explore the legal implications of his concept of the self described earlier. His main goal is to show how the enabling but constant and *partisan* constraints of local embeddedness

46. Fish, *Putting Theory in its Place*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 286.

have not been acknowledged in the traditional jurisprudential accounts of matters such as how legal texts get their meanings; how judges decide cases and the scope of their discretion; the nature of human freedom and the rights that preserve it; the nature of legal theory, legal principles, legal reasoning, and fact-finding, and so on. He seeks to replace these defective accounts with others that take note of the preconditions and limits that are implied by our nature as embedded selves.

This work of Fish's is therefore a contribution to the philosophy seminars labeled "epistemology," "hermeneutics," "theories of the self," "meta-theory," and so forth. As we have seen, Fish acknowledges that such theoretical work can exist but denies that it has any concrete consequences outside the discipline of philosophy itself. He is rigidly consistent in applying the same analysis to his own contribution to detached theory. Again and again he insists that nothing follows from his work other than the answers that one would give to some traditional philosophical questions (and the major consequences here are ceasing to believe in the possibility of strong theory, foundationalism, and formalism).

Nothing I say in this chapter should be taken to endorse a particular outcome or make a particular recommendation. That is, no one should think that my position on such issues as hate-speech codes, the regulation of pornography, school prayer, soliciting funds in airports, or enhanced sentencing for race-motivated crimes could be predicted from what I have written here. My intention is not to push First Amendment law in this or that direction but to inquire into the mechanisms by means of which First Amendment law goes in whatever direction it takes.⁴⁷

What has been confusing, and to some distressing, is my repeated assertion that my belief about belief—or for that matter, your belief about belief—has no relationship to the beliefs I or you might have when the question at issue is something other than the nature of belief. . . . The only thing that changes when one passes from one account of belief to another is the answers you will give when someone asks you . . . to give an account of belief. Everything else will remain the same. . . .⁴⁸

As Fish notes, his denial that his work entails any substantive political or legal position has perplexed many of his readers, but the taxonomy adopted

47. Fish, *Fraught with Death*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 113–114. See also Fish, *Taking Sides*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 8; Fish, *The Dance of Theory*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 150.

48. Fish, *Beliefs About Belief*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 279–280. See also Fish, *Truth and Toilets*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 293–295, where he aligns his epistemological views with the philosophical tradition of pragmatism, but then cautions: "If you know that someone has a pragmatist account of belief, you know nothing about what he or she will do in a moment of crisis or decision. Indeed, this is true of all epistemological accounts, whether they be pragmatist or not. The way you are in the world of practices is independent of the account you might give of those practices, be it realist, rationalist, pragmatist, or whatever" (296).

here renders that position more explicable. It allows us to see that Fish is not saying that no theory has consequences; rather he is saying that any *detached theory*, including his own, has no consequences outside the local context of philosophy.

While the bulk of Fish's *theoretical* work in law is detached theory, not all of his law-related work should be categorized as theoretical. This point brings us up against the boundaries of my taxonomy, for it is limited to distinguishing between different types of theory. But it must be remembered that not everything essential to cognition, or all complex and difficult intellectual work, falls within one of the categories of theory. For example, Fish is emphatic that the deep beliefs, values, goals, and so on that come with embeddedness and that enable and structure our perception and cognition are not themselves theory of any sort.

A theory is a special achievement of consciousness; a belief is a prerequisite for being conscious at all. Beliefs are not what you think *about* but what you think *with*, and it is within the space provided by their articulations that mental activity—including the activity of theorizing—goes on. Theories are something you can have . . . beliefs have *you*, in the sense that there can be no distance between them and the acts they enable.⁴⁹

More importantly for our present purposes, there is the vexed distinction between theory and practice. I realize that it is difficult to draw clear, hard lines here, but it does seem to me that there is a conceptual distinction which must be noted. Consider again the earlier example of historians. I said there that historians would be engaged in local theory when they identified different strategies for making sense of the past—for instance, economic, ecological, dynastic, top-down, bottom-up. But when a historian exhibits one of these strategies in gathering evidence and describing a particular piece of the past, he is not engaged in theory, rather he is engaged in the practice of his discipline. Similarly, when Fish, as a Milton scholar, seeks to understand the meaning or purpose of particular texts of Milton, he is not theorizing but engaging in a practice he shares with other embedded members of the interpretive community of Milton scholars. He would be theorizing, however, if he directed his attention to rules of thumb or generally useful strategies for Miltonists to use to achieve such understandings.

Of course, this neat conceptual distinction is complicated in real life, where people do not always keep separate the engaging in concrete practices and the expounding of general theory. Here I am thinking of examples such as Iris Murdoch, who incorporates philosophical reflections (i.e.,

49. Fish, *Consequences*, in *DOING WHAT COMES NATURALLY*, *supra* note 1, at 326. See also Fish, *Beliefs About Beliefs*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 280, 284: "There is no relationship between us and our beliefs; rather, there is an identity. The operations of my consciousness and the shape of my beliefs are not two entities somehow 'relating' to one another but one entity called by different names. . . . It is because belief is at some level inaccessible to consciousness that it is so crucial to—indeed constitutive of—consciousness."

sham, local, or detached theory) into her novels. But I think that there are two lessons to be taken from these examples. First, the distinguishing marks of a practice are a focus on the particular and concrete, while theory involves a degree of generality and abstraction from practice. Second, not all complex intellectual work is theory-work; sometimes it is just the performance of a particular local practice.

This has relevance to Fish's work on law, because much of *The Trouble with Principle* shows Fish engaged in a practice rather than theory. Fish is certainly engaged in (detached) theory when he describes how, based on his concept of the self, strong theory is impossible and so anything purporting to be strong theory must really be sham theory which conceals a local, partisan bias. But this general, abstract point tells you nothing about the forms sham theory can take, or how to go about exposing its partisan content, or whether you should agree or disagree with that content.⁵⁰ The task of exposing particular, concrete examples of writing or speaking as sham theory is a practice—a complex, intellectually challenging, political/rhetorical practice—rather than theory of any kind, and Fish devotes many pages of *The Trouble with Principle* to it.

His targets are typically particular sham theorists who make claims with relevance to law—for example they assert the existence of neutral principles such as freedom of speech or freedom of religion. Fish engages in a fine-grained analysis of the texts of these writers and demonstrates the local and partisan commitments that lurk beneath the surface, notwithstanding fervent denials. In performing this task, Fish also sometimes offers advice to those who have been bamboozled by the piece of sham theory as to how they might counterattack and advance their agendas more effectively. But both the exposure of instances of sham theory and the rhetorical advice to those bamboozled by it are too particular and local and insufficiently general and abstract to be called theory. If we were to insist that they must be theory, we really would be contributing to the problem Fish noted earlier of packing so much into the “theory” category that it loses all shape.

B. Liberalism

The central insight of liberalism was that disagreement between people on matters of fundamental belief could not be eliminated. The religious wars in Europe in the sixteenth and seventeenth centuries taught that it was

50. “The fact that the game of neutral principles is really a political game—the object of which is to package your agenda in a vocabulary everyone, or almost everyone, honors—is itself neutral and tells you nothing about how the game will be played in a particular instance. The truth, as I take it to be, that neutral principles, insofar as they are anything, are the very opposite of neutral, and are filled with substance, won't tell you what substance they are filled with or whether you will like it. The fact that someone is invoking neutral principles will give you no clue as to where he is likely to come out until he actually arrives there and reveals his substantive position.” Fish, *Taking Sides*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 7–8.

futile to seek to make this disagreement disappear by imposing an orthodoxy.⁵¹ So the task of liberalism was to find a way to cope with this disagreement. Most liberals—and this is true of the most venerated liberal theorists such as Locke, Kant, Mill, and Rawls—cope with the disagreement by seeking neutral principles or decision procedures that all can agree on, regardless of the fundamental beliefs that come with particular partisan positions.⁵² These neutral principles or decision procedures can then be used to contain and regulate the disagreements between partisans of different positions and allow them all to live in peace.⁵³

For Fish, this liberal search for neutral principles in order to escape the endemic human problem of partisan disagreement is just a specific example of the general impossible yearning for strong theory:

[M]y target is never liberalism in the sense of a set of particular political positions on debated issues; rather my target is Liberalism with a capital L, that is, liberalism as an effort to bracket metaphysical or religious views—the sources of intractable endless disputes—so that public questions can be considered in terms that will be accessible to, and appear reasonable to, everyone, despite the evident plurality of what Rawls calls “comprehensive doctrines.” With respect to this project (which is the project of theory or philosophy in general; liberalism is just one relatively recent name for it) my position is first that it is impossible. . . .⁵⁴

But if liberalism as strong theory is impossible, and so does not exist or have consequences, what are political “theorists” such as Locke, Kant, Mill, and Rawls doing? The taxonomy of theory developed earlier allows us to gain greater clarity about the nature of the work performed by these writers. It allows us to see that they are engaged in three different types of theory-activity, not just one homogeneous one.

The theory-activity engaged in by liberals to which Fish devotes the greatest attention is sham theory. On his analysis, liberal theorists usually present themselves as describing principles and procedures that are above

51. Fish, *Fish Tales: A Conversation with “The Contemporary Sophist,”* in *THERE’S NO SUCH THING AS FREE SPEECH . . . AND IT’S A GOOD THING, TOO*, *supra* note 1, at 296.

52. For other liberal strategies for coping with this disagreement, see Fish, *Mission Impossible, in THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 168.

53. Fish argues that this move appeals to the existence of the very universal agreement that the liberal insight previously declared to be unavailable. If universal agreement on important principles and procedures by all people were possible, the problem of disagreement would not have been so intractable in human history. Put in Fish’s terms, liberalism first acknowledged that different people were differently embedded, but then sought to deal with this problem by finding neutral principles above or to the side of any particular form of embeddedness. See Fish, *Introduction: “That’s Not Fair,”* in *THERE’S NO SUCH THING AS FREE SPEECH . . . AND IT’S A GOOD THING, TOO*, *supra* note 1, at 16; Fish, *Fish Tales: A Conversation with “The Contemporary Sophist,”* in *THERE’S NO SUCH THING AS FREE SPEECH . . . AND IT’S A GOOD THING, TOO*, *supra* note 1, at 296–297; Fish, *Mission Impossible, in THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 178–186.

54. Fish, *Putting Theory in Its Place, in THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 285–286. See also Fish, *Taking Sides, in THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 2–3.

the partisan fray and to which all the combatants should therefore submit themselves. In truth, although they may be unaware of it, they are urging a position that is not above the fray but just one more contestant within the fray; a contestant that is gaining a rhetorical advantage by wrapping itself in the cloak of neutral principle. Fish stated this critique of liberal theory very clearly in *There's No Such Thing as Free Speech*:

It is my contention . . . that liberalism doesn't have the content it believes it has. That is, it does not have at its center an adjudicative mechanism that stands apart from any particular moral and political agenda. Rather it is a very particular moral agenda (privileging the individual over the community, the cognitive over the affective, the abstract over the particular) that has managed, by the very partisan means it claims to transcend, to grab the moral high ground, and to grab it from a discourse—the discourse of religion—that had held it for centuries.⁵⁵

In *The Trouble with Principle* the argument that much liberal theory is actually sham theory is a constant refrain in Fish's penetrating critiques of the standard liberal understandings of freedom of speech, freedom of religion, and toleration of differences. Each of these critiques demonstrates that beneath the claimed neutrality and openness, there can be found the constraint, exclusion, and intolerance of opponents that comes with the inescapable human commitment to some partisan position.⁵⁶

Each of these critiques requires an essay of its own, so for our present purposes, the sham theoretical aspect of liberalism is concisely demonstrated in Fish's critique of Thomas Nagel's response to Thomas Hobbes.⁵⁷ Nagel disdains Hobbes's approach to political order because it is pragmatic rather than principled. It depends upon people concluding that the peace established by a central power is worth more to them than the freedom to advance their fundamental beliefs by exercising power over others if they can. In other words, the Hobbesian arrangement will appeal only to those who believe that peace is the highest value and who will rank achieving peace above pursuing their other beliefs regarding the good. Nagel feels that this is too contingent and uncertain a basis for a liberal political order, since there is no reason to suppose that people will always give peace the highest value in this way. As a true liberal in search of a strong theory, he wants to find a higher order, neutral principle that will provide a regime of peace and tolerance with a secure foundation that will not shift with time and individual preferences.

Nagel's solution is that we should all subordinate the beliefs we happen

55. Fish, *Liberalism Doesn't Exist*, in *THERE'S NO SUCH THING AS FREE SPEECH . . . AND IT'S A GOOD THING, TOO*, *supra* note 1, at 137–138.

56. I have expanded on Fish's analysis of freedom of religion in *The Limits of Liberal Rights: Stanley Fish on Freedom of Religion*, *supra* note 21, and on his analysis of freedom of speech in *Principle, Pragmatism, and Paralysis: Stanley Fish on Freedom of Speech* (unpublished manuscript).

57. Fish, *Mission Impossible*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 181–186.

to hold to a “higher-order impartiality.” This higher-order impartiality is provided by the principle that “although we may believe a course of action to be true and good, we should not pursue it if others with different conceptions of the true and good reject it on the basis of arguments we understand, even if we are not persuaded by them.”⁵⁸ This principle is presented as standing above, and not participating in, the contest between beliefs as to what is true and good. Rather it regulates the contest from an umpire’s position outside the hurly-burly, just as strong theory is supposed to do. But Fish rejects this picture. Nagel’s higher-order impartiality is just another partisan belief about what it is true and good, dressed up as something finer:

It makes no sense to set aside some of your beliefs unless in doing so you are affirming another of your beliefs as higher. Deferring to a higher-order impartiality is not to constrain or bracket “your own beliefs” but to enact them; it is to testify to the truth, as you see it. The so-called higher-order impartiality is anything but impartial; for those (like Nagel) committed to it, it is not “a standpoint that is independent of who we are,” but a declaration of who we are or would be. . . . It is one thing to say that respect for the views of others even when you reject them is the highest morality, and quite another to say that respect for the views of others even when you reject them is a position above (or to the side of) any morality, including your own. Nagel is saying the first thing and thus opening himself up to a debate (about what is and is not the highest morality) that he forecloses by claiming to be saying the second.⁵⁹

So ultimately Hobbes and Nagel are urging the same thing, although Hobbes is doing it openly and Nagel covertly.⁶⁰ They are each urging that a particular contestable belief about what constitutes the highest good (peace, or toleration, or respect for the autonomy of others acting reasonably) be institutionalized, and this leaves no space for those who do not share that fundamental belief. Such dissenters, Fish says, will be coerced into complying in subtle and not-so-subtle ways, although this will not be conceived of as forcing them to accept a particular orthodoxy as to the highest good. For a liberal society, such a description would be unacceptable. Instead, those resolutely refusing to share the liberal values and beliefs will find themselves “written out of the program before the beginning.”⁶¹

58. *Id.* at 181–182.

59. *Id.* at 182–183.

60. *Id.* at 184.

61. “The difficulty with [liberalism] is that it assumes that structures of a kind that are neutral between competing agendas can in fact be fashioned. What I wish to say . . . is that *any* structure put in place is *necessarily* one that favors some agendas, usually by acts of recognition or nonrecognition, at the expense of others. That is, any organization that one sets up already is based on some implicit ordering of possible courses of action that have been identified or recognized as being within the pale. Then there are other kinds of actions that are simply not recognized and are therefore, as it were, written out of the program before the beginning. . . .

For example, they can be categorized as fanatics and zealots who refuse to conduct themselves according to the principles underlying any civilized and reasonable society and so have forgone the right to enjoy the freedoms of liberal society.

Fish thinks that there is much to be learned from a study of these stigmatized groups about how liberalism manages to advance and enforce its partisan bias while concealing this beneath a patina of neutral principle. This is why he concentrates so much on conservative Christians in *The Trouble with Principle*. He does so not because he wants to replace liberalism with a theocracy, but because exposing the ways in which the strong religious believer is marginalized shows liberalism operating as sham theory. His constant refrain is that liberalism is not a position that manages to rise above partisan belief and embeddedness; it is the expression of one particular embedded position.

But the taxonomy allows us to see that not all liberal theory is sham theory. There can also be local liberal theory, where the theorist gives up on any pretensions to strong theory and universality, and instead accepts that liberalism is just one partisan viewpoint among others. Such a liberal might still wish to engage in the project of improving the internal consistency and attractiveness of the admittedly partisan liberal viewpoint. This appears to be the project of Rawls's later work.⁶² Fish admits that this job is possible, but as we have already seen, such a modest theory-project has little interest for him and he is even disinclined to call it theory.

With this I have no quarrel, in part because it is so minimalist that there is nothing to quarrel *with*. If liberal theorists are busy shoring up liberalism on the inside and crafting arguments that will make it look good from the outside, they are not theorists but apologists, and my response to them would depend on whether or not I was sympathetic to the values and agendas they were hawking.⁶³

Liberals theorists who think they are engaging in strong theory (or even local theory) may instead be producing detached theory if they hold forth on liberal concepts such as justice, fairness, neutrality, toleration, and so on at such a high level of abstraction that their discussions and conclusions can give no guidance at all for any concrete situation.

The point has been well made by Matthew Kramer when he distinguishes between "metaphysical problems"—problems "fully detached from any spe-

So what liberalism does in the *guise* of devising structures that are neutral between competing agendas is to produce a structure that is far from neutral but then by virtue of a political success, has claimed the right to think of itself as neutral." Fish, *Fish Tales: A Conversation with "The Contemporary Sophist,"* in THERE'S NO SUCH THING AS FREE SPEECH . . . AND IT'S A GOOD THING, TOO, *supra* note 1, at 297.

62. Fish, *Putting Theory in its Place,* in THE TROUBLE WITH PRINCIPLE, *supra* note 1, at 291–292.

63. *Id.* at 292.

cific circumstances and contexts”—and “mundane problems”—problems posed in the context of some specific urgency (“How shall we go forward?” “What alternative should I choose?”). Metaphysical problems may have resolutions, but since those resolutions will have reference to entirely abstract hypotheticals (the context is kept vague and is never filled in), such resolutions will be of no help in solving mundane problems, problems of empirical and political fact. Indeed, the generality of these resolutions (matching the generality of the metaphysical problem) guarantees that they will neither mandate a particular outcome nor rule it out.⁶⁴

V. CONCLUSION

My claims for the taxonomy of theory types developed in this paper have been: (1) it is consistent with Fish’s position on theory and finds some textual support in his work; (2) the taxonomy distinguishes between possible and impossible theory-projects, and reveals the diversity of possible theory-projects; and (3) once this diversity is revealed, it becomes easier to discern the different consequences theory can have.

Because the bulk of Fish’s work on theory is devoted to arguing that strong theory cannot exist and exposing what purports to be strong theory as the concealed expression of some local (“partisan,” “biased”) position, it is understandable that he often likes to make his point by saying that theory does not exist. But in other places he does talk of theory existing, and my taxonomy is an attempt to develop this approach. The taxonomy remains true to Fish’s main point that strong theory does not exist because ultimately the local context cannot be transcended. Theory, no matter how abstract or general, is always linked to the expression of some partisan point of view, because being in the grip of some partisan point of view is the precondition of all human perception, cognition, and action. For all of their differences, detached theory, sham theory, and local theory are each linked to the point of view of some particular local interpretive community. For detached theory, the local interpretive community is made up of philosophers. For sham theory, the local interpretive community is whichever group shares the partisan beliefs and values masquerading as universal principles.

It is the question of the consequences of theory that most excites Fish’s critics, and another advantage of my taxonomy is that it clarifies this issue. Strong theory clearly has no consequences because it cannot exist. Detached theory can exist, but it has no consequences for practices outside the philosophy seminar room.⁶⁵ However, both local and sham theory can have consequences for such practices. Powerful instances of local theory

64. Fish, *Taking Sides*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 4, note 1. (The text of this note is at 313.)

65. Although detached theory has no consequences for one’s nonphilosophical beliefs or practices, taking a particular stand on a matter of detached theory can have other kinds of consequences. For example, identifying oneself as a postmodernist or critical legal scholar might have positive or negative career consequences within a particular law faculty.

can take a discipline in a new direction. It can forge connections between things hitherto seen as separate or urge new categorizations of familiar material. Similarly, local theory can take a political tradition in a new direction by working in an innovative way with the resources and modes of reasoning provided by that tradition.⁶⁶ Sham theory can also have powerful political consequences, as the partisan viewpoint hiding under the cloak of neutrality is advanced against its rivals. Fish gives examples of liberalism as sham theory working to bamboozle conservative Christians who do not share many important liberal premises,⁶⁷ and also examples of liberals being bamboozled by conservatives who manage to fill liberal principles with a content that advances nonliberal premises.⁶⁸ Exposure of examples of sham theory generated by your opponents can have political consequences too, even though such work is a form of political/rhetorical practice rather than theory. (This practice makes no claims to universality and neutrality, unlike sham theory itself, and is too focused on dissecting something particular to be theory of any other kind, which requires more generalization and abstraction.)

But Fish's position is not that one should constantly be seeking to expose or avoid sham theory. That would make sense only if you still believed in the dream of avoiding partisan bias in favor of principled neutrality. Instead his position on sham theory is more complex. You should be on the alert for opponents using your own theory talk against you by filling it with their objectionable partisan content.⁶⁹ You should expose sham theory when your opponents use it, if in the particular context that tactic will disconcert or disable them. But you should still use strong theory talk yourself in a context when it helps you advance your deepest commitments, regardless of its incoherence and its real status as sham theory.

A demonstration that the reasons usually given for engaging in and maintaining a practice will not hold up under certain kinds of analysis says nothing conclusive about the wisdom of continuing to employ those reasons, which may be valued because of their power (independent of their philosophical cogency) to induce behavior we think desirable.⁷⁰

Consciously using sham theory to advance your political position will probably seem unappealing to many, including those critics of Fish who want to use theory for progressive purposes. Such conduct seems unprincipled and

66. See, e.g., Michael Robertson, *Reconceiving Private Property*, 24 J. L. & SOC. 465 (1997).

67. See Fish, *Playing Not to Win*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 211.

68. See Fish, *Epilogue: How the Right Hijacked the Magic Words*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 309.

69. For a good contemporary example, see Thomas Frank, *ONE MARKET UNDER GOD* (Doubleday 2000). Frank describes how the "old populism" of the left in the 1890s and 1930s was given a more conservative content in the "backlash populism" of the 1970s and 1980s and the "market populism" of the 1990s.

70. Fish, *Fraught with Death*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 114. See also Fish, *Faith before Reason*, in *THE TROUBLE WITH PRINCIPLE*, *supra* note 1, at 273.

an abandonment of reasoned argument. But if Fish is right, he is not recommending anything, rather he is describing the way things always have been and always will be. I think he is right, but I realize that I will need to move on to a more detailed study of Fish on politics and social change in order to convince most readers.