The Canadian Journal of Higher Education
La revue canadienne d'enseignement supérieur
Volume XXXI, No. 2, 2001 pages 167–182

Special Feature

Stanley Fish's Case for Speech Regulation: A Critique*

PHIL RYAN
Carleton University

ABSTRACT

This article critiques Stanley Fish's argument for speech regulation. Fish errs in reducing free speech to a mere means, viewing free speech as a "conceptual impossibility," and making the limited speech rights of the modern workplace a standard for assessing speech rights in general.

RÉSUMÉ

Cet article critique l'argument de Stanley Fish en faveur de la régulation de la parole. Fish se trompe:(1) en n'accordant à la liberté de parole qu'une valeur instrumentale; (2) en voyant dans la parole libre une "impossibilitié conceptuelle;" (3) en faisant des droits limités existant dans le lieu de travail moderne un critère pour l'évaluation des droits en général.

Stanley Fish (1994) offers one of the best-known defenses of speech regulation against free speech "purists." Fish argues that some limits on freedom of speech are defensible, a modest thesis to which this author has no objection. But he grounds this thesis upon a quite dangerous foundation, one that leaves it unclear why one should care about freedom at all. I will examine three arguments advanced by Fish: (1) free speech is a mere means to other ends, hence the defense of free speech is a disguised defense of some "substantive" agenda; (2) formal speech regulation does not limit free speech, since speech is always regulated; (3) a university is just another workplace, and workplace speech is always controlled. Following Fish, I will focus on campus speech issues, though many issues raised here are relevant to society in general.

FISH'S ARGUMENT

Free speech is a mere means

The defense of free speech, Fish argues, requires that one adopt the "nonconsequentialist" position that free speech is "asserted and honored simply for itself," rather than as a means to some other end (p. 14). But "no one can maintain" this stance, Fish holds: Ronald Dworkin, for example, tries do to so, yet accepts limits on the speech rights of "the young and the incompetent." But this can only be because:

> the young and the incompetent are not capable of making good use of the speech that freely comes their way; but that means that free speech is envisioned as having a point external to itself — something like the furthering of rational deliberation — and that, it hardly seems necessary to say, is a consequentialist position (p. 14).

Hence, free speech "is not a prime but a subordinate value" (p. 14). Free speech "is just the name we give to verbal behavior that serves the substantive agendas we wish to advance" (p. 102).[1] Thus, "it makes perfect sense to desire the silencing of beliefs inimical to yours, because if you do not so desire, it would be an indication that you did not believe in your beliefs" (p. 118). Any Catholic who does not wish to muzzle Protestants, it appears, is a less-than-devoted follower of Rome.[2] If one

supports racial equality, one will support controls on any speech that appears to question the goal, or even that questions certain possible means towards the goal, such as affirmative action. Conversely, if one resists such speech controls, it is probably because one does not share the "substantive agenda" of racial equality. Free speech is among the "ideologically charged constructions of a decidedly political agenda," the agenda of neoconservatism (p. 19).

Fish's argument depends upon two false assumptions. The first is that the world can be neatly divided between means and ends: one might support free speech as a good-in-itself or as a means to some other end, but not as both. To Glaucon's question "Is there a kind [of good] we like both for its own sake and for what comes out of it, such as thinking and seeing and being healthy?" (Plato, trans. 1968, para. 357b), Fish clearly answers in the negative. But why? If I pin my son's arms to his sides, he resists: not necessarily because he wants to do anything in particular with his arms at that moment, but just because. My son does not yet know the word for freedom, but he recognizes freedom's absence, and he does not like it. On the other hand, it is obvious that the free movement of his arms is also a means to a wide variety of ends (many of which are not entirely shared by his parents). Likewise, if we are forcibly silenced, we will resent this not merely because it prevents us from attaining some particular objective through speech, but because we treasure the right to speak as something valuable in itself.

One might respond here that, if we perceive restrictions upon our speech as an affront to our autonomy and dignity, then free speech is a mere means to autonomy and dignity. But then we must add that speech is also a means to sociability, romance, poetic self-expression, meeting our physical needs, and so on. But a means to such a wide variety of ends does not stand in relation to any particular end as a mere means to which it is entirely subordinate.

Fish's second assumption is that if some good is an end-in-itself, it must be an absolute end, capable of trumping all others in all circumstances. Indeed, it would seem by his logic that there can only be one end in this world, though Fish does not tell us what he thinks it is. Therefore any limitation on a particular good indicates that it is not in

fact an end-in-itself, but a mere means.[3] This assumption is also untenable. The things we value for their own sake often come into conflict with one another, and the fact that one good gives way in a particular situation does not point to some immutable ranking of our goods.[4] Despite my son's preference for freedom of movement, if I hold him still to clip his finger nails, he generally acquiesces. We should not infer from this that he values clipped nails more than freedom.

Fish's position that free speech is not an end-in-itself is without merit, because he has misunderstood what it means for something to be valued for its own sake. Indeed, since for Fish an end would only exist if it could always trump all other goods, the social equality he apparently advocates would suffer the same fate as free speech if subjected to his own logic. Let us offer all North Americans absolute equality with one another, on the condition that all will live at the material level of a Liberia or a Bangladesh. How many will opt for equality? And if someone does not, are we to conclude that equality for that person is a "mere means" to some other end? And what precisely is that untrumpable end?

Speech is always regulated

Fish defends speech control on the grounds that "regulation of speech is constitutive of meaningful discourse" (p. 129). But his argument is built upon a dangerously multivocal concept of "regulation." In the first instance, individuals self-regulate, in the sense of using the rules of grammar, syntax, and relevance in order to produce meaningful speech. One cannot produce meaningful speech without "an in-built sense of what it would be meaningless to say" (p. 103): my son no longer babbles, but speaks.

Dialogue is also dependent upon, and therefore in a sense "regulated" by, some shared sense of the world, a "background understanding of the possible courses of physical or verbal actions and their possible consequences" (p. 115).[5] In addition, one is ordinarily "limited by the decorums you are required to internalize before entering" a specific situation (p. 129). In any community, "limitations on speech in relation to a defining and deeply assumed purpose are inseparable from community membership" (p. 108).

All of this should make us feel better about bureaucratically-administered speech controls: such controls do not restrain *free* speech, but simply add another form of regulation to speech that is already regulated. But Fish has collapsed a whole variety of "regulations" onto one level. The guiding assumption is that regulation is regulation, whether it be the self-regulation of the individual who makes creative use of the rules of syntax and semantics to produce intelligible speech, or the often informal and fluid self-regulation of the social group that sustains local norms of appropriateness, or bureaucratically-imposed speech codes. Regulation is the important thing: who is doing the regulating, or whether one submits to it voluntarily, is irrelevant. We are, then, always implicated in a profoundly restrictive situation. Given speech restriction by our inaccessible background assumptions and our norms of decorum, bureaucratic speech codes seem less problematic: they merely chip away a little at a freedom that in any case is illusory. "Freedom of speech is a conceptual impossibility" (p. 115).

A major component of Fish's argument is the reification of both "background understanding" and norms of social appropriateness, which are then endowed with all the coercive quality of bureaucratic regulation. Fish claims that the "background" we assume whenever we speak is inaccessible to consciousness (p. 115). Rather than seeing this taken-for-granted sense of things as part of what Michael Polanyi (1962) calls our "subsidiary awareness," a level of awareness that can in principle be made "focal," Fish lodges it in something approximating the Freudian unconscious.

But anyone who has ever engaged in a reflective dialogue knows how speech can turn upon many of its own assumptions, how the taken-for-granted of one moment can become the theme of discussion at the next. Fish simply ignores this lived experience, by assuming that the questioning of assumptions requires that one be freed of all background assumptions at once. Fish, who identifies background assumptions with ideology, holds that we cannot get "beyond or around ideology" (p. 115), because this operation would require a "cleared and ideology-free space" (p. 116). Similarly: "With what does one either transcend belief or loosen its hold? The answer can only be with a part of the mind that is

itself not already occupied by belief, some aspect of the self that stands to the side of commitments and affiliations" (p. 20).[6]

But *the* answer to Fish's query suggests itself the moment one stops speaking of belief in the singular, as if it were a monolithic, non-contradictory thing. Just as a deep sea diver uses water as the medium to move beyond water (Teilhard de Chardin, 1957/1964, p. 107), discussants use some background assumptions as part of the medium through which other assumptions are called into question. Fish might argue that "behind" the assumptions that we can question there is another entirely inaccessible layer of assumptions. How might he prove this assertion? He cannot actually name any particular inaccessible assumption, for to name it is to gain "access" to it. Fish might answer that we can identify such inaccessible assumptions retrospectively, after they have lost our hold on us. But we should not simply suppose that assumptions that *were not* articulated *could not* be articulated, a variant of the "retrospective fallacy" (Mandelbaum, 1971, p. 134).[7] At best we can say that one cannot rule out a realm of inaccessible assumptions, much as Kant held that we cannot rule out the realm of noumena. But this does not permit one to consign the bulk of our beliefs to such a realm and endow them with coercive power, as Fish does.

Fish attempts a similar operation with social norms. These norms are grounded in the "deeply assumed purpose" that defines the community. Whence comes this "deeply assumed purpose"? Is it consciously assumed by all members of a community? Can it be made the object of reflection and critique? Fish never suggests this possibility, and his argument must assume the opposite: if group purposes are subject to critique, any speech limitations grounded upon them are merely provisional, subject to the ongoing negotiation of the group, and the qualitative difference between such limitations and bureaucratic speech control is highlighted. For Fish, then, all of these social purposes and rules of decorum, like our background assumptions, are simply given, and inaccessible to critique through speech itself.

But we must bear in mind that we use norms of appropriateness as much as we submit to them.[8] They provide a necessary medium of communication, we signal membership through them. As Fish well knows,

we may even make ironic use of them, flouting them as part of a personal performance, or to draw particular attention to an utterance, or to call into question those norms themselves. In short, they are as much a medium through which we act as a restraint upon action. We can often turn upon these norms, analyze them, and transform them. Is this the case for bureaucratically imposed regulation? Such regulation can certainly be challenged and transformed. But while Fish's "decorums" can only be sustained through their continual enactment by agents themselves, bureaucratic regulation is quite a bit more solid.

This does not mean that one should always shun bureaucratic regulation and embrace groups' informal self-regulation. If a group's norms, for example, uphold sexism or racism, and if those norms serve to exclude from the group those who would have the most interest in challenging the norms, then a case exists for bureaucratic regulation of the group. The argument is rather that "background assumptions," group norms, and bureaucratic rules are entirely different forms of social regulation, and Fish cannot defend one form by pointing to the existence of another.

Even if one rejected the above argument, and held that one form of regulation is every bit as solid and coercive as another, one would still need to show why one form ought to be *supplemented* by the other. The argument, after all, could run in the exact opposite direction. We can draw upon an analogy with the Marxian argument around false consciousness. Our consciousness is always "false" to some degree: we never fully grasp the conditions under which we live, nor even our own aspirations and needs. Unfortunately, history is full of examples of those who invoke this more or less false consciousness as the ground for authoritarianism. But the insight that we are a mystery to ourselves can lead us instead to recognize our need for a free dialogue in order to elucidate our situation and hopes. Analogously, while Fish invokes the invisible limits upon our freedom to justify quite visible additional limits, one could as easily argue that the constraints of our background assumptions and social norms, to the extent that they are coercive constraints, can only be attenuated through free dialogue.

Shipyards don't have free speech, why should universities?

Fish argues that we err in seeing the university as a "free-speech forum." He would prefer that we view it as "a workplace where people have contractual obligations, assigned duties, pedagogical and administrative responsibilities, and so on" (p. 128). Having eliminated from his conception of the university everything that makes it a university, Fish can proceed to apply norms arising from a court case involving a Florida shipyard: "the workplace, the court stated, is for working, and therefore an "'employer may lawfully withhold its consent for employees to engage in expressive activities'" that might cause "special harms" (p. 128). As with any other workplace, the scope for free speech "will vary with the underlying purpose for which some social space has been organized" (p. 129).

We must note, first, the impersonal formulation: the social space *has been* organized, and its "underlying purpose" is simply given. Neither the "space" nor its purpose are for Fish the subject of ongoing discussion. It is puzzling that Fish, for whom a text can have no inherent meaning prior to an act of interpretation (p. 300), believes that group purposes exist as things-in-themselves, and do not require any interpretation. This reification of organizational goals often serves the purpose of masking the imposition of someone's ends upon someone else.[9]

Fish declares that any "institution" has a "core rationale," and when this is threatened, "it will respond by declaring" that "of course" this or that subversive speech is not to be tolerated (p. 104). But when institutions are said to "respond," when they are endowed with speech, we are in the presence of ventriloquism, and clarity requires that we identify just who is making the dummy's lips move. It is clear from Fish's exposition that it is the employer who will speak for the institution, and who is vested with the right to "withhold its consent" to freedom in the name of this "underlying purpose."

Many objections can be raised here. The most general is whether we really want a world like this. The capitalist workplace — in which it is up to the employer to decide which limited freedoms the employees will enjoy— is certainly a fact of life. But do we wish to invoke that workplace as a norm? More specifically, why do we wish to mold the

university to the model of the capitalist workplace? Do we want freedoms within the university to be subject to an "underlying purpose" defined and protected by the administration? Does experience suggest that these actors are likely to be trustworthy guardians of the university's "underlying purpose"? Have they proven themselves to be stalwart as age-old trees, or are they weather vanes, twisting this way and that in the face of lawsuits, government pressure, or public relations concerns? No study of the history of the North American university can fill us with confidence in this regard.

IMPLICATIONS OF THE CRITIQUE

Nothing in the foregoing would support an absolute free speech position. In fact, the thesis of the plurality of ends rules out such a position as much as it does Fish's own. But are we not then engaged in a trivial debate with Fish over different ways of justifying a shared position? Not at all. One's approach to free speech issues is greatly affected by: (1) viewing free speech as both a means and an end-in-itself rather than as a mere means; (2) recognizing the specificity of bureaucratic regulation, rather than erasing the distinction between regulation, "background assumptions," and social norms; (3) recognizing how difficult it is to identify an appropriate agent of speech controls, rather than handing speech rights over to the "employer" and hoping for the best.

First, when we neatly chop the world into means and ends, the former are readily sacrificed to the latter: why not give up "a lot" of freedom in order to gain "a little" justice or equality? Instead, we may view free speech as one of various ends, ends that can conflict with one another in certain cases.[10] This perspective puts a clear onus on those who would limit a certain good to make a clear demonstration of the conflict between ends, and an argument concerning the concrete trade-off that must be made. In this approach, one cannot simply jump from the assertion that "speech-related injuries may be grievous and *deeply* wounding" (p. 109) to speech controls. One would both demand clear evidence of serious harm, and seek out remedies to this harm that minimize the impact on freedom. In particular, if one cherishes freedom, one

can begin by asking whether harms can be addressed by expanding the scope of freedom rather than limiting it, for example by balancing relations in the classroom so that students can respond more freely to professorial speech, offensive or otherwise.

Our second criticism of Fish concerns his failure to appreciate the specificity of bureaucratic regulation. Recognition of the special nature of formal regulations, of their heightened tendency, for example, to provoke "backlashes," must lessen the tendency to "see evil and think law" (Jacoby, 1994, p. 79), and encourage the search for alternative approaches to the conflict between free speech and other ends. Reluctance to impose bureaucratic regulation of speech does not require "that we endure whatever pain racist and hate speech inflicts for the sake of a future whose emergence we can only take on faith," as Fish would have it (p. 109). It merely requires that we *first* seek responses to such speech that do not strip adversaries of their own right of reply.

One such response involves the mobilization of informal norms of conduct. Informal norms, of course, have often been mobilized on campus to oppose speech deemed harmful. Ironically, however, the same identification of formal regulation and informal norms assumed by Fish has also served the "anti-PC" cause well. As Russell Jacoby (1994) notes, anti-PC writers such as Dinesh D'Souza demonstrate a "worrisome confusion," identifying verbal protests against speech deemed racist or sexist with "censorship" (p. 47). In the same way, self-restraint is equated with self-censorship and moral cowardice, and held to be even worse than censorship itself.[11] Thus we must assert the distinction between formal control and informal norms not only against Fish, but against his ostensible antagonists.

Our third criticism of Fish concerns the problem of determining exactly who is to be trusted with the power to impose speech controls, and how exactly these guardians of campus harmony are themselves to be guarded. Fish is happy to turn the matter over to the "employer." He brushes aside the concern that controls will themselves get out of control: there is no "slippery slope" case to be made against speech controls, he asserts, because "somewhere along the route some asserted interest will stop the slide" (p. 130). But there is no reason to expect a particular

interest that has the power to assert its own speech rights to do much for the speech rights of those less well-placed.

Thus, even if one would endorse formal speech controls of a specific type, the problem of agency and the possibility that controls will evolve in unpredictable directions should give one pause. Fish would equate universities with shipyards: both have an "underlying purpose," and both should limit freedoms in keeping with their respective purposes. But the goal of the shipyard is no mystery: the owners seek to make money. And the goal of the university? Defenders of the university will articulate its goals in the loftiest of terms: the promotion of discovery, initiation of students into the culture of scholarship, redemption of human nature from convention and prejudice, pursuit of truth, introduction of students to the "best that has been thought and said."

Such exalted purposes demand respect for the freedoms of the university community. But the very loftiness of these goals entails that university decision-makers will tend not to take them into account in their day-to-day decision-making. Organizational theorist Herbert Simon notes that "high-level goals provide little guide for action because it is difficult to measure the degree of their attainment, and because it is difficult to measure the effects of concrete actions upon them." Rather, "decisions tend to be made... in terms of the highest-level goals that are operative — the most general goals to which action can be related in a fairly definite way, and that provide some basis for the assessment of accomplishment" (1965, p. xxxvi). For the university administrator, operative goals will include raising money, appeasing various constituencies, avoiding negative publicity, and so on. None of *these* goals requires much respect for free speech.

Thus, there exists an obvious "constituency" for controls within the university. The constituency for freedom, by contrast, may always be fragile. Freedom may not be an issue for a substantial proportion of professors or students who can meet their personal and professional objectives without ever having to say anything particularly controversial. Given this distribution of interests, university freedom has probably been sustained to this day only by the view that it is a valuable good, a view from which Fish wishes to free us. Serious reflection upon the long-term

implications of overcoming this view should generally lead us to seek out alternative means for addressing speech conflicts, means that do not involve bureaucratic regulation.

CONCLUSIONS

Given Fish's position, is there anything wrong in principle with a McCarthyite attack on the university, or any other attack on university freedom that the future may bring? "Someone is always going to be restricted next, and it is your job to make sure that the someone is not you" (p. 111). If you are suppressed, Fish tells us, stop whining: you have simply failed to do "your job." But the cynical assertion that "the strong do what they have power to do and the weak accept what they have to accept" has always been appealing... to the strong, to those who "thought that nothing could go wrong with them" (Thucydides, trans. 1954, para. 5.89, 4.65). It is hard to know why this cynicism should be so appealing to a university sector that is so evidently fragile.

Fish himself would scoff at speculation concerning the long-term implications of his views. He is a "localist," he proudly declares, without a care for the future: "I tend not to think about or worry about anything more in the future than two hours hence" (p. 298). His writings on free speech, like all his actions, are meant merely to address "the local moment." But the printed word cannot declare its own "Best before" date, or establish restrictions on its own usage. The "children of the mind," Tawney noted, resemble those of the body: "if their parents could foresee their future development, it would sometimes break their hearts" (1954, p. 81).

Notes

[1] Fish buttresses his position with an odd exclusionary tactic: when speech is not produced in the service of some truth or preferred agenda, it by definition "doesn't matter" (p. 129).

[2] Allan Bloom, one of Fish's ostensible nemeses in the "PC wars," is at one with Fish on this point: he writes of the times when "Catholics and Protestants were suspicious of and hated one another," and adds "but at least they were taking their beliefs seriously" (1987, p. 35). I have noted other points of agreement between writers such as Fish and the anti-PC movement in Ryan (1996b).

[3] This logical leap is not limited to Fish: Joseph Schumpeter wields a similar argument to suggest that democracy is "incapable of being an end in itself" (1976, p. 242).

[4] To use John Rawls's terminology, there is no necessary lexical ordering of the goods we pursue (1971, p. 42).

[5] While the view that dialogue relies upon background assumptions is commonplace, Fish adds some odd twists: the background constitutes an "unquestioned ideological vision," though Fish does not explain what it means for something to be ideological. Further, this background is inaccessible to the speaker's "critical self-consciousness": it "constitutes the field in which consciousness occurs," and is sharply distinguished from the "productions of consciousness" (p. 115).

[6] For Fish, the "productions of consciousness" will always be biased "in ways the speaker cannot know" (p. 116). If this be true, it is hard to see how one can ever confidently proclaim what "the answer can only be" to any particular problem. One is reminded here of the sort of intellectual chided in Marx's third Thesis on Feuerbach, who proclaims the determined nature of all thought yet imagines himself free of this determination.

[7] Fish might fall back upon a trivial argument here: in the realm of science, it seems that we can identify knowledge that was entirely beyond the reach of an earlier age. The theory of relativity, in this view, was once entirely inaccessible, and so one could argue that an entire world-view was grounded upon assumptions that could not be identified as such. But if this is what Fish means by background assumptions that limit "free speech," then his thesis should be rendered "There's no such thing as omniscient speech," a thesis not particularly relevant to the issue of bureaucratic speech codes.

[8] "From the fact that beliefs and social practices penetrate us from the outside, one cannot conclude that we receive them passively... Each of us makes, to a certain extent, *our own* morality, religion, technique" (Durkheim, 1950, p. xxii). See also Giddens (1984, p. 25).

[9] Clegg and Dunkerley note that the tendency to treat the organizational goal as a "thing- in-itself" helps generate "a vocabulary — seemingly neutral, scientific and purged of value — with which organizations can appear to be *administered as things* rather than be ruled and exploited as resources" (1980, p. 211).

[10] As noted above, the analysis is not affected by whether we assert that freedom is an end-in-itself or a means to a wide variety of ends.

[11] I have critiqued this position in Ryan (1996a).

References

Bloom, A. (1987). *The closing of the American mind.* New York, NY: Simon and Schuster.

Clegg, S., & Dunkerley, D. (1980). Organization, class and control. London: Routledge and Kegan Paul.

Durkheim, E. (1950). *Les régles de la méthode sociologique* [The rules of sociological method] (2nd ed.). Paris: Presses Universitaires de France.

Fish, S. (1994). *There's no such thing as free speech: And it's a good thing, too.* New York, NY: Oxford.

Giddens, A. (1984). *The constitution of society.* Berkeley, CA: University of California Press.

Jacoby, R. (1994). *Dogmatic wisdom.* New York, NY: Anchor Books.

Mandelbaum, M. (1971). *History, man and reason.* Baltimore, MD: Johns Hopkins Press.

Plato. (1968). *The republic* (A. Bloom, Trans.). New York, NY: Basic Books.

Polanyi, M. (1962). *Personal knowledge.* Chicago, IL: University of Chicago Press.

Rawls, J. (1971). *A theory of justice.* Cambridge, MA: Harvard University Press.

Ryan, P. (1996a). On political correctness: Comment on Loury. *Rationality and Society, 8,* 353–357.

Ryan, P. (1996b). Was Bloom PC? *Canadian Review of American Studies, 26,* 1–26.

Schumpeter, J. (1976). *Capitalism, socialism and democracy* (3rd ed.). New York, NY: Harper Torchbooks.

Simon, H. (1965). *Administrative behavior* (2nd ed.). New York, NY: The Free Press.

Tawney, R.H. (1954). *Religion and the rise of capitalism.* New York, NY: Mentor Books.

Teilhard de Chardin, P. (1964). *The divine milieu* (A. Dru, Trans.). London: Collins. (Original work published 1957)

Thucydides (1954). *The Peloponnesian war* (R. Warner, Trans.). Harmondsworth: Penguin.