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by Stanley Fish*

I am going to talk about a topic that I have been writing on recently—legal autonomy, or more generally, disciplinary autonomy. Is it the case that we can talk coherently about something like the discipline of law or the discipline of literary criticism? And when we do talk about a discipline as having some sense of autonomy, of distinctiveness, what do we mean? What kind of distinctiveness is it? What is its source? Is it a distinctiveness that is historically achieved or does it have a more exalted origin in divinity or in "the nature of things"? These are the questions I would like to raise, and I want to start by quoting a sentence from Robert Bork's *The Tempting of America*.[1] It comes in two parts. The first part of the sentence is, "Constitutional philosophies always have political results . . . ."[2] The second part of the sentence reads "they should never have political intentions . . . ."[3] Now, first of all let me say that I think that the sentence in its two parts is absolutely on the mark and will reward analysis.

What does Judge Bork mean when he says that constitutional philosophies always have political results? Well, I think he means something like the following: when as a judge or a lawyer you argue a case or craft an opinion the resources you think to employ will include a set of definitions, a number of basic distinctions, and a sense of the general point of the particular branch of law you are working in. I do not mean that these are resources you reach for; rather, they are presupposed by you and they must be in place before you begin, for in the absence of their having been presupposed, beginning would not even be possible. Bork's point, as I understand it, is that not all legal actors will begin with the same presuppositions. It is always possible for some other lawyer or judge as well

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1. ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

2. *Id.* at 177.

3. *Id.*

credentialed as you are to have decided the questions that must be decided before you begin differently. And that difference will tell in the outcome: take two judges, set before them the same case and, with the help of equally legitimate legal materials, notions and distinctions, they will produce differing and, in some cases, opposing opinions. The results of their deliberations will vary with the assumptions within which they move; and since those assumptions are disputable, the results of their deliberations will be political. That is what "political" means: a course of action that follows from a point of origin not everyone will have chosen, where choice is necessary because no god has spoken. Since no god has pronounced on matters of constitutional philosophy, constitutional philosophies will always have political results.

Nevertheless, as Bork goes on to say, they should never have political intentions. That is, while two or more judges faced with a legal question may in good conscience answer it differently, it will be a *legal* question they attempt to answer, not a political one. As they go about their business, they will be asking what disposition of this case will best satisfy the requirements of justice, and not what disposition of this case will best further the agenda of the Republican party or best advance the cause of labor unions or the cause of corporations. The difference between reaching political conclusions and beginning with political intentions is that if you are doing the second, you are not really doing a job of legal work. Instead, you are *pretending* to do a job of legal work. You are using legal materials, resources, assumptions, distinctions as a mask for a project you are hiding, and that, Judge Bork says, is wrong. It is wrong because you are being insincere and hypocritical, which are, of course, moral judgements and surely relevant; but for me the more relevant judgement is that you are not being appropriately professional, not doing your job, not acting as a good faith member of the community.

Now, pretending to be acting as a lawyer or judge while really pursuing a political intention is a fairly difficult thing to do and, indeed the better you do it, the better you translate your political intentions, point by point, into an appropriate legal vocabulary, the less likely is your political intention to be overseeing your professional performance, because after a while your focus will be more on the translation than on the instrumentality it supposedly serves. Once you fall in with the *spirit* of a disciplinary performance and attune yourself to the discipline's constituitive aspiration (in this case the aspiration to be just or equitable), extraneous motives will simply be crowded out, for you will be wholly occupied (in the territorial sense) by the motives appropriate to the "home" enterprise.

It is in this sense that the discipline of the law can be said to be autonomous, not because it exhibits a purity that insulates it from political pressure and from change, but because the changes it may undergo will

always leave intact (even when redefined) a sense of basic purpose, of what it means to do a legal job of work as opposed to doing a political job of work or a literary job of work. That is why one can say that the law is *both* political and autonomous. The law is political in the sense that its outcomes follow from contestable assumptions concerning what is basic to its operation. The law is autonomous in the sense that two persons whose conclusions differed in this admittedly political way would still be joined by the fact that they were both attempting to determine what is legally relevant.

As an example, consider two jurists who are approaching a First Amendment problem and disagree as to whether it would be appropriate to perform a categorical analysis or a balancing analysis. Categorical analysis is analysis which asks a taxonomic question like, "is it speech?" and if the answer is yes, the case is over. Balancing analysis takes one additional step. Rather than stopping with the identification of the action as speech, you take into account the harms this speech can be shown to cause and you balance the cost of those harms against the cost of regulation. Although a categorizer and a balancer may end up in the same place, it is more than likely that their conclusions will diverge. Nevertheless even at the moment of divergence the two will be joined by a determination to be faithful to the First Amendment, and because of that shared determination they will be innocent of political intentions even though they are producing political conclusions.

The same analysis holds for the world of literary studies. Any road I go down in the course of an interpretation of *Paradise Lost*[4] could be challenged by a critic who believes, and could back up his or her belief with reasons, that the road he or she wanted to go down was the better one. Each of us would be taking a contestable and hence political path in our reading of *Paradise Lost* and yet each of us would be taking that path with the same desire, i.e., to get at the truth about *Paradise Lost*. In short, while both the methodologies we employed and the result we reached would be political in the sense that they rested on contestable assumptions and definitions, neither of us would be proceeding within a political intention because we would still be committed to the same disciplinary goal. Indeed, we could only be doing our jobs if in the act of prosecuting our politically conceived projects, with the help of politically identified materials, we nevertheless scrupulously avoided political intentions. If we did not, we would become politicians and no longer be literary critics.

We would no longer be literary critics, for example, if instead of asking "what is the truth about *Paradise Lost*?" we asked, "which interpretation

4. JOHN MILTON, PARADISE LOST (1667).

of *Paradise Lost* will best serve to rouse my troops on the eve of battle or to advance my candidacy for office?" Those are possible questions and up through the nineteenth century *Paradise Lost* was often used by generals and politicians in just that way. I have no quarrel with such appropriations of literary materials so long as one understands that once the act of appropriation occurs, the materials are no longer literary and the agent deploying them is not engaging in literary criticism. You can only be engaged in literary criticism if your efforts (varied and contestable though they may be) follow from a literary intention, the intention to get at the truth about some poem or novel or play. A departure from that intention transforms the nature of the activity even when its physical features remain the same. A critic who decides in the middle of his performance to prosecute a political rather than a literary intention would be like a batter who decided to strike out because he knew that the pitcher was in danger of losing his job. The criticism properly directed at him would not be that he was playing the game badly, but that he was not playing the game at all.

Now that we have established that the distinctiveness of a discipline inheres in the core sense of purpose to which its members are faithful even when they disagree about almost everything, the question still remains: what is the status of that distinctiveness, that autonomy? In general there are two answers to that question. The first answer is that the distinctiveness is essential; that is to say, the law or literary criticism as a practice matches up to some ideal template or model whose true home is the mind of God, or a realm of Platonic ideas. This answer has the consequence (and advantage) of assuring that the practice itself can never perish, because, if the ideal form of law or literary criticism exists in some abstract or theological world, the fact that mere practitioners have fallen away from the ideal is a judgement on them and not on the ideal; and even if the path has been lost in one generation it can be found again in the next.

Just this position has been argued by Ernest Weinrib of the University of Toronto, in an essay in the *Yale Law Journal*.[5] Weinrib points out that tort law is basically about tortfeasors and sufferers and turns on the relationship between them as encoded in the vocabulary of cause and effect, liability, restitution, fault, etc. He acknowledges that there are other ways of conceptualizing tort law, including calculating damages according to some external formula (need, social utility) or doing away with fault entirely and substituting for it a scheme of universal insurance. But in his view any such scheme would be a "conceptual monstrosity" for it would

5. Ernest Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

be employing the language of tort law while eviscerating the core sense of purpose which gives that language its intelligibility.[6] For Weinrib tort law is what it is and has been from the beginning of time and the infidelity of some present practitioners, while regrettable, does not in any way impair its abstract and categorical reality.

There is, however, a second possible answer to the question, "what is the status of disciplinary autonomy?" One could say that it is *diacritical*, a fancy term that is not so fancy once you unpack it. What it means is something like this: a discipline achieves its distinctiveness when it manages to carve out for itself a place at the table of disciplines, not by matching up to something in the sky or in the mind of God but by elaborating a vocabulary which produces the need it then fulfills. Rather than it being the case that there is an antecedent model or template prior to actual practices, there are, in this view, *only* actual practices, which maintain their share of the franchise by ceaseless acts of self-promotion that are also and chiefly acts of self-creation. It follows that a diacritically achieved autonomy is an autonomy that can be lost. A practice that ceases to elaborate and defend its internal machinery can perish, can be crowded out at the table of practices either because it allows its vocabulary to be overwhelmed by the vocabulary of a rival or because it seeks to discard its vocabulary on the grounds that it tends to obscure the reality in whose service practitioners labor. (This was the "project" of Legal Realism). But if the reality authorizing a practice is *constituted* by that practice and comes into view only in the light of its *special* labors, the last thing you want to do is get rid of the vocabulary that gives those labors purpose and point. If the distinctiveness and autonomy of a discipline is an earned achievement, that achievement is secure only so long as you hold onto the discipline's jargon and make it as inaccessible to outsiders as possible.

This then is the choice: an account of disciplinary autonomy which, like Weinrib's, insulates it from historical process, or an account which identifies historical process as the source of autonomy and also as the threat to its survival. The choice in short is between Realism and Conventionalism, a choice as old as the literally endless controversies it has spawned. Let's discuss it.

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6. *Id.* at 969-70.