

2000

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Recommended Citation

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LIBERALISM LOST

THE TROUBLE WITH PRINCIPLE. By Stanley Fish.¹ Cambridge, Mass.: Harvard University Press. 1999. 328 pp. \$14.95.

*Daniel A. Farber*²

In his latest book, Stanley Fish attacks liberal political theory in general and First Amendment theory in particular.³ To read this book is not merely to encounter a critique of liberalism but to confront Fish himself, as a forceful polemical presence. In his earlier writings about literary theory, Fish observed that the reader actively participates in bringing a work to life.⁴ In that spirit, what follows is a reader's encounter with *The Trouble with Principle* and with the "author"—not the real human being whose picture appears on the back cover, but the author who emerges from the text itself.

Imagine then a room at twilight. A balding man with an intense look sits in a leather chair next to a reading lamp. From the shadows, a voice is heard. As the dialogue proceeds, the shadows gradually darken. (Italicized passages within the dialogue are quotations from The Trouble with Principle.)

Reader: Hello, Dean Fish. May I call you Stanley? I feel as if I know you, which I suppose in a sense I do, since you're the

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2. Henry J. Fletcher Professor and Associate Dean for Faculty and Research, University of Minnesota Law School. I would like to thank Jim Chen, Dianne Farber, David McGowan, Mike Paulsen, and Suzanna Sherry for helpful criticisms.

3. "Liberal" here, by the way, refers to philosophical liberalism, which includes everyone from Richard Epstein and Robert Nozick, to Frank Michelman and John Rawls.

4. The "reader response" theory is applied to Milton in Stanley Fish, *Surprised by Sin: The Reader in Paradise Lost* (Harvard U. Press, 1996), and developed more generally in Stanley Fish, *Is There A Text In This Class? The Authority of Interpretive Communities* 21-67 (Harvard U. Press, 1980).

authorial voice I've drawn from the text. There's a lot I agree with in your views: our need to act morally despite unresolvable uncertainties, your call for a pragmatic approach to the First Amendment, and your skepticism that political philosophy can provide much help in resolving hard questions. But I find your prose style a little off-putting—as if I had been cornered at a party by a very interesting person who is also very loud and unrelenting. There's also a lot of what you say that I find puzzling—which is partly Minnesotan for saying that I strongly disagree and partly a reflection of genuine puzzlement. I thought maybe we could start by discussing the relationship between theory and practice, which is one aspect of your thought that I honestly don't understand.

Stanley: I've always believed that theory had nothing to do with practice. Theory is just the professional practice of theorists, which has nothing to do with the rest of life. *The truth is that neither the benefits nor the troubles of professional practices come along with us when we leave their precincts and enter another.* (p. 302) So my years of work on Milton changed my Milton scholarship but otherwise were completely irrelevant to my life. True, I was a Milton scholar by profession, but that meant only that I had the *kind of understanding [that] qualifies one to be an authority on Milton. . . . [W]hen I did decide about what Milton believed, the decision led me not to live my life differently than I had before but to interpret Milton differently than I had before.* (p. 273)

Reader: You're speaking in the past tense. Did something change?

Stanley: Yes, not that long ago. *My own thoughts . . . coalesce around a moment in a Milton seminar I taught several years ago. The students were discoursing glibly (as my example had instructed them) about some matter or other—the intricacies of Milton's verse, or the import of his allusions to Virgil—and I without thinking burst out "No, no, he doesn't want your admiration; he wants your soul!" Was this a professional comment? . . . Had something happened to me of which I was only dimly aware? Was I in danger (or in hope) of no longer being an authority and becoming something else? God only knows.* (p. 275)

Reader: I found that a very dramatic, intriguing passage—I'm glad you included it in the book. I do wonder if you've worked through its implications completely. Have you noticed any changes in yourself since then?

Stanley: Yes, my speech patterns seem to have changed. As you know, I'm the world's leading Milton expert, but now I can't seem to stop quoting his poetry, even when the subject is something seemingly unrelated like contemporary First Amendment scholarship or liberal political theory.

Reader: As a layperson, I found the references interesting though sometimes difficult to follow. Sometimes, though, bringing in Milton worked wonderfully. For example, I loved it where you compared philosophical inquiry to "Milton's fallen angels who try to reason about fate, foreknowledge, and free will and find themselves 'in wandering mazes lost.'" (p. 63) Very nice!

Stanley: Yes, but my Milton-mania may be a bit out of control. Here's an example. I discuss a First Amendment scholar named Rod Smolla and comment that some of his phrases don't seem to fit the logic of the First Amendment but instead seem to represent meaningless fragments of a different morality. Of course that reminds me of a passage from Milton. Smolla calls to mind a fallen angel. Particularly, *the inability of the fallen angels . . . to produce sentences that do not fall apart in their mouths. Having severed their connection with the only source of value in the universe, they are reduced to saying things like we are "Surer to prosper than prosperity / Could have assur'd us . . ."* (p. 78) Smolla is just as incoherent. *It would be as hard put to assign a meaning to "sure" or "prosperity" in Satan's utterance as we are to assign meaning . . . [to] Smolla's.* (p. 78)

Reader: Apart from the fact that you're drawing on Milton, I notice that you seem to verge on demonizing the opposition there. At least indirectly, you seem to be comparing traditional First Amendment scholars and their utterances to Satan. (When I write this up, I wonder if I can work in a reference to Rushdie's *Satanic Verses* here.) Is the theological comparison apt?

Stanley: The similarity runs very deep, as you can see from *Paradise Lost*. The First Amendment demands disinterested judgment about the permissibility of speech, but truly disinterested judgment is an impossibility: *judgment without partiality—judgment delivered from nowhere and everywhere—is not an option for human beings and is available only to Gods and machines. The strong First Amendment promise is the promise that Satan made to Adam and Eve, that we shall be as Gods. . . .* (p. 113)

Reader: But even if they're wrong, don't you think that First Amendment scholars might have a reasonable point of view?

Stanley: "Listen to both sides" — what an empty platitude. *I know that a lot of people think that the very existence of opponents who are as well-educated and (in most things) as sensible as oneself is a reason for relaxing the aggressiveness of one's polemical assertions—the logic is "Maybe they know something I don't know" or "Maybe God knows something neither of us knows"—but if it is a reason for anything, it is a reason for wonder at the persistence of error, even on the part of those who have had all the educational advantages. That there is resistance by well-credentialed persons to your own views is a (regrettable) political fact from which no moral or normative conclusions follows, unless of course among the resisters are some whose words and writings you regard as holy writ.* (p. 290)

Reader: Wow, I wish I were that self-confident! Your view of the First Amendment seems to mirror your attitude toward academic debate in an interesting way. I don't know whether to think that you're projecting your own adversarial personality on the world at large or whether you're being admirably coherent in unifying your own scholarly style, your personality, and your general theories. But I'm also not sure how serious you are about this "talking as warfare" thing. You really don't think you might be able to learn something from a dialogue with those on the other side?

Stanley: The idea of learning something from the other side is one of the fallacies I've tried to expose. *[N]arrow partialities . . . will always inform the activities of human actors. And by the same reasoning, communication is not a vehicle for harmonizing those partialities—not, as Habermas would have it be, a cooperative venture. Rather, it is a competitive one, and the prize in the competition is the (temporary) right to label your way of talking "undistorting," a label you can claim only until some other way of talking, some other vocabulary elaborated with a superior force, takes it away from you.* (p. 306) By the way, have I mentioned how much I detest Habermas? *As far as I am concerned, any positive reference to Habermas in the course of an argument is enough to invalidate it.* (p. 122)

Reader: I guess I'll let Habermas defend himself. Don't go away, though, I promise not to include any positive references to him in this dialogue. You seem to view communication as ad-

versarial. It's understandable, given your view of communication, that you don't believe in the marketplace of ideas.

Stanley: The marketplace of ideas is an abomination. It leaves decisions up to everyone and therefore no one. *[B]ecause none of us is a god some of us must decide, lest the imperatives of the moral life be given over to forces—called the marketplace of ideas—that are accountable to no one and bound to no vision except the antivision of chance and random fate.* (p. 92)

Reader: But shouldn't people be willing to put their ideas forward to be criticized and assessed? That kind of free debate is what is captured by the marketplace metaphor.

Stanley: Free debate isn't necessarily a bad value, but it's a value like any other. There is no reason to expect everyone to share it. In fact, it's mostly a value held by people who don't have any strong substantive convictions and therefore don't care much about winning or losing. The world looks quite different to someone with powerful convictions, most notably to the true religious believer. *To put the matter baldly, a person of religious conviction should not want to enter the marketplace of ideas but to shut it down, at least insofar as it presumes to determine matters that he believes have been determined by God and faith. The religious person should not seek an accommodation with liberalism; he should seek to rout it from the field.* (p. 250) Religion can't really compete in the so-called marketplace with secular ideas because they are based on entirely different ways of looking at the world. *It is a tenet of liberal Enlightenment faith that belief and knowledge are distinct and separable and that even if you do not embrace a point of view, you can still understand it. This is the credo Satan announces in Paradise Regained . . .* (p. 247)

Reader (aside): I gather that one of his objections to free speech is that it's relativist. As Stanley says somewhere, saying all viewpoints are alike is akin to *the mentality that finds no difference between wearing rings on your finger and inserting rings into your penis.* (p. 28) But I wonder whether requiring a particular actor—the government—to remain neutral is really the same as moral relativism? . . . Enough of substance—back to style!

Reader: “[T]he credo Satan announces in Paradise Regained.” (p. 247) Old Scratch seems to come up quite a bit in your discussions. (Actually, I'm beginning to wonder whether your position is postmodern or pre-modern.) You were talking about the role of the truly religious, or I assume others with

strong substantive views. (Or do you consider religion to be a special case, as you seem to indicate on pages 296 to 297, where you say religion has the only vocabulary that resists pragmatist deconstruction?) Shouldn't the religious person be willing to live in a liberal society, where religion is not a matter of state mandate?

Stanley: That's the last thing that someone with true religious views would want. *He should want an end to the public/private split which, by fencing off the arena of political dispute from substantive determinations of value, assures the continual deferral and bracketing of value questions. He should want what Milton wants, a unified conception of life in which the pressure of first principles is felt and responded to twenty-four hours a day.* (p. 253)

Reader: "[W]hat Milton wants." Didn't you just use the present tense in reference to Milton's views?

Stanley: Yes, I guess I did. Slip of the tongue.

Reader: Very interesting. Milton does seem to be a real presence in this conversation, doesn't he? I'd bring him in on a three-way call, but I don't think I could pull it off. (And maybe I don't *need* to "bring him in" anyway.) Anyway, you were speaking about the public/private distinction. What's wrong with it?

Stanley: *What is not allowed religion under the private public distinction is the freedom to win, the freedom not to be separate from the state but to inform and shape its every action.* (p. 254)

Reader: Again, you don't seem very open to the idea of dialogue. I'm interested in your tendency to analyze the world in terms of transcendental battles between radically opposing forces. Isn't some kind of accommodation, rather than battle to the death, a possibility in social life? Even for those like the truly religious, who have powerful viewpoints of their own?

Stanley: Here is what truly religious people would demand: *not the inclusion of religious discourse in a debate no one is allowed to win but the triumph of religious discourse and the silencing of its atheistic opponents.* (p. 261) Religion can't compromise any more than God could compromise with Satan.

Reader: So while liberalism purports to be fair, it isn't because it rules out in advance the possibility of a victory by the other side?

Stanley: Fairness! [*F*]airness—the impartial treatment of all points of view no matter what their substantive content—is the liberal’s virtue; it is liberals who wish to push conflict off the public stage in favor of a polite and endless conversation in which everyone has his or her say in the confidence that not very much, and certainly not anything really disturbing, will come of it. (p. 221) But of course, liberals don’t have any real substantive values anyway. *Strong believers, however, have another goal. They aren’t concerned that the conversation continue and display the widest possible participation; they want the conversation to take a certain turn and stay there. They don’t want to be fair, they want to be victorious, and they won’t have a chance of victory if they spend their time fighting over title to their opponents’ vocabulary.* (p. 221)

Reader: I’m a little confused. Don’t religious believers want fair treatment?

Stanley: They only do if they fall into the trap of liberalism. *In the eyes of a democratically reasonable person, what is owed to the strong religious believer is fairness, but fairness is not what the strong religious believer wants; what he wants is a world ordered in accordance with the faith he lives by and would die for, and liberal democracy (or pragmatism) isn’t going to give him that, ever.* (p. 298) Fairness is a liberal canard, a philosophy for those whose beliefs are weak.

Reader (aside): This is actually beginning to make liberal theory sound a bit better to me. It sounds to me like, according to Fish, the religious have no real ground of complaint that they can raise *within* liberalism. In other words, they may have no basis for invoking liberal concepts such as constitutional rights. So the liberal could be right in saying that restricting socially dangerous religious practices doesn’t violate the constitutional rights of participants. In response, the participants can say that they are morally right to act nonetheless and the state is morally wrong to intercede. But what the participants can’t authentically say, while staying within their own worldview, is that their constitutional rights are being violated, because that is a concept that only makes sense within liberalism itself. So in fact, the liberal is right to reject their constitutional claim. But does Stanley really mean what he says about fairness? Let’s test this a little further.

Reader: So you don’t think much of fairness either? You seem to feel that it’s a trap devised by these liberal theorists

whom you are so worried about—a trap you have avoided somehow or another.

Stanley: *Fairness is the virtue that mitigates against winning* (p. 240) That's what's wrong with liberalism. *Immorality resides in the mantras of liberal theory—fairness, impartiality, and mutual respect—all devices for painting the world various shades of grey.* (p. 242)

Reader (aside): The reference to “winning” is interesting. Stanley mentions somewhere the idea that liberalism could have a Hobbesian justification, in a world where in fact no one has the power to “win” but everyone has the collective power to “lose” by reducing the world to constant warfare. (p. 109) This sounds to me like a kind of Prisoner's Dilemma game, in which the trick is to devise ways to maintain cooperative strategies. But I suppose it wouldn't be fair to ask an English professor, even one who has also been a sometime professor of law, to discuss game theory. I must make a note, though, to write up the idea of liberalism as a kind of “tit-for-tat” strategy. How rude of me, though, to keep Stanley waiting while I go off on these tangents.

Reader: Sorry, I was woolgathering. You just said that liberalism was immoral because it was a device for painting the world in shades of gray. I must say that you don't seem to be prone to fine gradations yourself.

Stanley: Seeing shades of gray merely weakens one for the struggle. *Shades of gray are never honored in the world of John Milton, where the only question is whether you stand in the light with God or in the dark with Satan.* (p. 243)

Reader: Milton, again. Sometimes it seems unclear whether it is our world or Milton's you are discussing. Are we talking about the 17th century or the dawn of the 21st? Am I talking to him or to you, I almost wonder. Or is it all the same? Anyway, you seem to favor Milton's view of religion over those of many religious people today. But aren't there contemporary religious views that are compatible with liberal democracy?

Stanley: You could call them religious, I suppose, in some watered-down sense or another. *To be sure, those religions that put “openness of mind” at the center of their faith—or rather at the center of their rejection of faith—will be welcomed into the political process and accorded a role in American public life, but only because in their stripped down and soft-edged form they are indistinguishable from other Enlightenment projects and are hardly religious at all.* (p. 189)

Reader (aside): Is it problematic that he's purporting to decide for other people what it means to be religious? This seems to make Khomeini the paradigm religious figure. In that case, it's no wonder that liberal society can't really accommodate such people.

Reader: You don't seem to think that liberalism is capable of tolerating true religion. But that's the whole point of liberalism, I would think. Isn't liberalism based on tolerance even of radically different views?

Stanley: Another canard. As I've said, liberal theory cannot tolerate real religion. *Religions are not tolerant; that's why they are religions and not philosophical systems. . . . Religious claims do not . . . respect any line between the private and the public. That is why liberalism cannot tolerate them; they violate its religion of tolerance. . . .* (p. 297)

Reader: If liberal theory cannot define the limits of tolerance, how is the line to be drawn? Who is to judge?

Stanley: *Who is to judge? How about the people whose job it is to judge—judges, administrators, mayors, governors, college presidents—all of those who by virtue of the positions they occupy have been assigned, and have accepted, the task of making decisions even when the lines are not perfectly clear and they are less than infallible.* (p. 91)

Reader: You yourself are one of those people, a college administrator. What do you think about campus speech codes?

Stanley: Liberals view hate speech as irrational and therefore a problem to be cured. This is wrong. *If you think of hate speech as evidence of moral or cognitive confusion, you will try to clean the confusion up by the application of good reasons; but if you think that hate speakers, rather than being confused, are simply wrong—they reason well enough but their reasons are anchored in beliefs . . . you abhor—you will not place your faith in argument but look for something stronger.* (p. 71)

Reader: So you don't think education or dialogue would help? These people are just "bad to the bone"?

Stanley: The real question is strategic. Speech codes are a possible strategy. *You can ask if in this situation, at this time and in this place, it would be reasonable to deploy them in the service of your agenda (which, again, is not to eliminate racism but to harass and discomfort racists).* (pp. 71-72)

Reader: You seem inclined to personalize conflicts, with one side incorporating good and the other, to be fought to death, incorporating evil. It's not racism which is the enemy, but individual bad people. No wonder you are so angry at those who disagree with you. . . . Actually, I'm still puzzled by the degree of your passion about issues of legal theory. Didn't you say earlier that it was your view that theory doesn't matter, outside of the confines of theory itself?

Stanley: "Why am I so vehement about putting theory in its place?" *The answer I would give is a political, not a theoretical one. Although the vocabulary of liberal theory is incoherent and empty (unless filled by the substantive judgments it pushes away) and cannot do the work (of clarifying, ordering, illuminating) claimed for it, it can nevertheless do work; and sometimes that work is, according to my lights, bad.* (pp. 290-91)

Reader: Sorry, I'm not sure I get that. Just what is the bad work that liberalism is supposed to do, and which you are battling against?

Stanley: Liberalism frames issues in the wrong way. *[T]he point of the theoretical terms that make up strong liberalism—justice, fairness, impartiality, mutual respect, autonomy, and on and on—is to de-emphasize historical considerations in favor of the abstract moral considerations that should always apply, no matter what the configuration and hierarchies of social and political forces.* (p. 291) *The eye is deflected away from the whole—history, culture, habitats, society—and the parts, now freed from any stabilizing context, can be described in any way one likes.* (p. 312)

Reader (aside): I'm not sure what to make of this apparent demand for contextuality and pragmatism. It seems to fly in the face of the whole tone of the *The Trouble With Principle*, whose critique of liberalism is relentlessly abstract and ahistorical. Maybe inconsistency is a failing too common to be considered a major flaw. Yet his relentless anger at theory does seem at odds with his general belief in its irrelevance, something that is surely worth further probing.

Reader: So your view, then, is that liberalism is deceptive? It persuades people to look at current employment practices like affirmative action without remembering the history of race in this society. (pp. 6-7) Why is it successful in its deception?

Stanley: *But why is the sleight of hand successful?, you ask. Why don't more people see through it? Because it is performed*

with the vocabulary of America's civil religion—the vocabulary of equal opportunity, color-blindness, race neutrality, and, above all, individual rights. (p. 312)

Reader: It seems that you've taken quite a battle upon yourself, doesn't it—Stanley versus the whole of the American civic religion? Is it really possible to change such widespread beliefs through argument?

Stanley: Unclear. Sometimes I don't think so: *It is simply too late in the day to go back. . . .* As someone once said, "*We already had the Enlightenment and religion lost.*" *The loss is not simply a matter of historical fact; it is inscribed in the very consciousness of those who live in its wake. That is why we see the spectacle of men . . . who set out to restore the priority of the good over the right but find the protocols of the right—of liberal proceduralism—written in the fleshly tables of their hearts.* (p. 262) Even those who should be most at odds with the Enlightenment seem powerless to resist its spell.

Reader: That bit about "the fleshly tables of their hearts" is very neat, by the way. I'll bet if I were more erudite I would recognize it as a quotation, so it's doubly effective. Not only is it a great metaphor, but it puts the reader on the cultural defensive. The bottom line, though, is your rejection of autonomy. Apparently, you don't think people have much control over their beliefs, if you view those beliefs as inscribed in their very flesh.

Stanley: Autonomy, another liberal watchword, is a mirage. *If autonomy is compromised by the shaping force of culture, and if consciousness cannot exist without having a shape it did not choose, and if our exposure to shaping forces increases as we get older, then what adulthood and maturity bring is not more but less autonomy, and not less but more indoctrination.* (p. 160) Freedom of thought is a nice slogan, but it doesn't survive rigorous analysis.

Reader: There doesn't seem to be much room for freedom of any kind in your vision of the world. It's admirable that you're able to battle on with such a fundamentally grim perspective on life.

Stanley: *The bottom line conclusion is that freedom has always and already been lost.* (p. 159)

Reader: Already lost, eh? Just like paradise?

Stanley: Exactly.

The two fall silent. The reading light is turned out, and "Stanley" disappears into the same darkness as the "Reader."