# Ross Motabhoy.

# The Philosophy Of Law Dissertation.

(LW540).

A Critical Examination of Jiří Přibáň’s Article:

“Doing What Comes Naturally, Or A Walk on the Wild Side?: Remarks on Stanley Fish’s Anti-Foundationalist Concept of Law, it’s Closure and Force”

Law and Critique IX/II (1998).

Supervisor: Dr. Stephen Pethick

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| *A Critical Examination of Jiri Priban’s “Doing What Comes Naturally, Or A Walk on the Wild Side?: Remarks on Stanley Fish’s Anti-Foundationalist Concept of Law, it’s Closure and Force” Law and Critique IX/II (1998) Pages 249-270.The title of my dissertation will be as written above, and will concentrate on an critical examination of Juri Priban’s critique of Stanley Fish’s publication “Doing What Comes Naturally” which will be an essential element of my dissertation, and will include direct critique of Stanley Fish’s book and the arguments raised by Priban. My critique will be made from a neutral position, examining the persuasiveness of the anti-foundationalist, pragmatic concept of law, as framed by the Critical Legal Studies Movement, and the anti-theoretical comparative approach by Stanley Fish. I intend to further examine the similarities of Fish’s expansion beyond legal theory and into legal social systems theory as framed by Niklas Luhmann’s Autopoietic theory with regard to Fish’s understanding of law as a closed context of interpretative practices. Following Priban’s critique, my dissertation would explore the source of mutual inspiration between Stanley Fish and Jacques Derrida, with regard to Derrida’s deconstructionist concepts. And further examine Priban’s conclusions of Fish’s anti-foundationalist theoretical concept of law.* |

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# Introduction.

A Critical Examination of Jiri Priban’s Article “Doing What Comes Naturally, Or A Walk on the Wild Side?: Remarks on Stanley Fish’s Anti-Foundationalist Concept of Law, it’s Closure and Force[[1]](#footnote-1)” (hereinafter referred to as “A Walk on the Wild Side”) will undoubtedly involve the examination of Stanley Fish’s book; “Doing What Comes Naturally[[2]](#footnote-2)” in areas to further expand on Priban’s examination.

The area of examination in this essay, is initially the critique of Priban’s article however in order to legitimately form arguments on both Priban and Fish’s perspectives, I will be drawing on additional texts in order to fully consider and critique their approach and force regarding concepts of law.

I intend to look beyond Priban’s conclusions to the foundation of his arguments relating to his perspective of Fish’s anti-foundationalist concept of law, and perform a detailed examination of Fish’s anti-foundationalist concepts from a series of his books and publications which will be a key element to my dissertation.

The arguments raised by Priban, will be examined and analysed, and my critique will be made from a neutral position, examining the persuasiveness of Stanley Fish’s anti-foundationalist, and pragmatic concept of law, as contrasted against plurality of different movements.

I intend to further examine and illustrate the similarities between Fish’s expansion beyond legal theory and into legal social systems theory as framed by Niklas Luhmann, concentrating on Fish’s concepts of law as a closed context of interpretative practices.

Additionally following Priban’s critique, my dissertation would explore the philosophical and social connection between Stanley Fish and Jacques Derrida, with regard to Derrida’s deconstructionist concepts.

# Chapter One.

## History and The Journey.

Priban begins his critique by informing the reader that the initial stages of his article concentrate on the pragmatic reflection of Post-structuralism in contemporary American legal and political philosophy, and notes further that such a reflection differs significantly from other Poststructuralists like Derrida, Heidegger and Foucault, who take differing and essentially European perspectives. His discussion of Post-structuralism, is designed with the intention of illustrating where Post-structuralism and anti-foundationalist thought diverge, suggesting that the point of divergence occurs with Stanley Fish. “*the most consistent advocate of the anti-foundationalist nature of law and the poststructuralist rejection of the transcendental principle of law seems to be Stanley Fish*”[[3]](#footnote-3).

Initially however, it is important to provide some background to the concepts of Post Structuralism and Anti Foundationalism in order to analyse and critique Priban’s article effectively. The main body of this chapter will attempt to provide a general overview of post-structuralism, the connection to post-modernism and, the move from legal realism to critical legal studies. In order to illustrate some of the background to the philosophy that Priban initially refers, a brief outline of anti-foundationalism will then follow, with most of that area being illustrated alongside Priban’s critique, which will begin in Chapter Two – A Pragmatic Reflection of Post-Structuralism.

The historical origins of Post-structuralism began in France during the 1960s as a movement rejecting the rigid legal morality and the deterministic nature of structuralism. This was a period of French political unrest, leading to vast student and workers riots in May 1968, which was the catalyst for such popular rejection and widespread condemnation of the domineering policies of the USSR and the growing lack of support for orthodox Marxism. This major change in French and European academic attitudes led to increased interest in alternative radical philosophies, such as feminism, phenomenology, and nihilism, which all shared the commonality of being critical of western culture, however this commonality allowed branches of critical philosophy to develop in direct response to answering and justifying such criticisms.

Foucault referred to such branches in *The Archaeology of Knowledge* as “subjugated knowledge’s” meaning, those moved aside by the dominant forms of knowledge, emphasizing that a more dynamic view was required to criticise power and dominance. One such example of this would be Foucault’s concept of Power and Law, where he highlights that power is not simply a negative construction and that it does have the capacity to do “good” in a multiplicity of different forms[[4]](#footnote-4), which are not all exercises of cohesive power by the state. Foucault’s Book *The Archaeology of Knowledge* published in 1969 focuses on the concept of the “Statement” as the vehicle for expression, where any such statement or *enoncés* is not simply a composition of signifiers or inflections, which enable meaning to be determined by syntaxical or lexical rules, as illustrated in a structrualist perspective. Foucault proposed that a statement is an abstract creation, allowing the connection of relations to objects and other statements which form a discourse. The correct formation of a discursive statement under such rules, is deemed to be judged by the existence of repeatable relations. Consequently, the meaning of the discursive statement is not bound to the rule of grammar, its meaning is intrinsically bound[[5]](#footnote-5) to its connection to preceding and following statements. The conditions in the discourse itself allow the meaning of expression to be interpreted in a format that is consistent with a system of communication.

Giles Deleuze commented on Foucault’s radical approach when likened to structuralism “*Whereas structrualists search for homogeneity in a discursive entity, Foucault focuses on differences”*[[6]](#footnote-6) This can be seen in Foucault’s perspective of discursive formation, as the statement’s meaning is dependent on the rules of its formation that (in turn) characterize and determine the formation it belongs to. Therefore, the statement is assumed to be in the correct context whenever it is proposed, consequently as the context changes, so does the formation and hence new meanings can be adopted, and potentially challenge the dominant discourse.

Consequently, Foucault’s notion that discourses have a wider implication for society in the control of power relations, through the “construction of current truths”, after examination is possible to see. Therefore, control of discourses and statements can be equated with the control of power. This is an issue Priban refers to regarding the “contingency of truth” in his post structrualist reflection, I will return to this issue for further analysis in subsequent chapters. However, returning to the illustration of the background of post-structuralism, it is possible to witness from the development of Foucault’s challenge to structrualist theories, a departure to an essentially new concept of post-structuralism identifiable in the plurality of theory. As previously illustrated, the term “post-structuralist” directly refers to French and central European philosophical theories which were formed in a direct response to structuralism from the 1960s onwards. The key theorists being Michel Foucault, Giles Deleuze, Jacques Derrida and Martin Heidegger to mention a few. The actual term “post-structuralists”, was developed by American philosophers and academics to differentiate American post-modernism, as the two concepts share key similarities and timeline.

Priban’s reflection of post-structuralism, includes a reflection in connection to this point within his article. He makes reference to the theories of Jean- François Lyotard and Richard Rorty multiple times, theorists and philosophers better known for their connection with post-modernism, rather than post-structuralism, yet Priban fails to make this distinction[[7]](#footnote-7). Potential reasons as to why such a distinction is not mentioned, is addressed in the relevant section of this dissertation, however it is valid to raise this point in a preliminary way at this stage. This point further illustrates the background of post-structuralism and it’s connection to post modernism, as it is an element Priban bases his reflection on, and assumes the reader shares this background knowledge.

There is quite some difficulty in identifying concepts and philosophers as either post-structuralist or post-modern, as the two perspectives are not organized in a traditional sense into schools of thought. Additionally, Foucault denied he was a post-structuralist, and many other philosophers do not announce a connection to one sole body of thought, this consequently means that in order to compare the two bodies of thought, the commonalities and individual concepts must be drawn out and analysed.

A concept relatively central to post-structuralism is the proposal of theories which examine the possibility of philosophical truth, or more specifically, examine methods regarding how statements can be acknowledged as true. Priban begins his reflection of post-structuralism with Rorty’s epistemological theory of truth in relation to knowledge[[8]](#footnote-8), expanding it into opposing theories of truth in post-structuralism, with the view to drawing comparisons between Stanley Fish and his concept of anti-foundationalism.

Similarly, post-modernism as a body of knowledge, proposes that there is no absolute truth, due to the wholly subjective way in which individuals perceive the world. Rorty proposes in his book *Objectivity, Relativism, and Truth*[[9]](#footnote-9)*,* truth is an intersubjective agreement between members of the community, in order to determine a common perception of reality.

Comparatively however, post-structuralists similarly deny the possibility of an objective truth, and potentially any knowledge gained though objective scientific study. The post-structuralist perspective on claims, typically from structuralists, which attest to notions of truth, are deemed to be founded on circular reasoning and logical paradoxes. Martin Heidegger proposed that such concepts of truth, were *Unverbrogenheit* or unhidden, with the circular and paradoxical nature exposed, the veil of objectivity could then be lifted[[10]](#footnote-10). Consequently theoretical advancements could then be developed and adopted.

Jean- François Lyotard’s concept of metanarratives bears some similarity to Heidegger’s theory, implying that metanarratives which are created by power structures, ignore the subjectivity of human experience[[11]](#footnote-11), and thus with their removal, allowing unconstrained theoretical concepts to be based on local context.

Consequently, the two perceptions of understanding questions of truth in these fields of study, are connected by the criticism of objective and universal rules. This similarity alone poses problems in attempting to identify and separate post-modernism from post-structuralism.

The implication this has regarding Priban’s article is, his reflection of post-structuralism fails to make any reference to post-modernism, and yet he relies and extracts theories from both post-structuralists and post-modernists under the umbrella of post-structuralism. This consequently means that his reflection can at times be misleading and that Priban potentially conflates the terms post-structuralism and post-modernism without distinction.

While Priban’s reference to philosophers such as Rorty as post-structuralist is not devastatingly false, it is largely incorrect. Disentangling post-structuralism and post-modernism is moderately difficult as each body of thought is not a philosophical movement in itself, however the Stanford Encyclopaedia of Philosophy labels post-structuralism as an essentially European branch of post-modernism, which is a predominantly American philosophical perspective. International viewpoint aside, post-structuralism does commonly fall under the more general term of post-modernism, and that Priban’s use of post-structuralism as a potentially interchangeable term for post-modernism lessens the force of his arguments. In terms of a background examination of the concept of post-structuralism that Priban refers, it is clear to see that the lines between post-structuralism and post-modernism are blurred in terms of philosophical thought. This line of enquiry leads to the greater purpose of this introductory illustration to the background of Priban’s critique, which is to create a potentially global view of this area of philosophy and the particular place post-structuralism has in the location of Critical Legal Thought.

The difficulties in establishing a clear and ideal “map” of philosophical thought as already discussed previously above. However, tracing the origins of particular concepts and perspectives has great value in terms of analysis and criticism, consequently I intend for the remainder of this chapter to work back from the creation of post-structuralism and illustrate the connection to American pragmatism and critical legal studies. This will provide a better illustration from Priban’s perspective, regarding his critique of Stanley Fish and the legal concepts of anti-foundationalism.

Priban directly refers in his opening paragraph of his article, that his second objective after his reflection of post structuralism in American legal philosophy, is among other aim’s the illustration and criticism of Fish’s polemics against theoretical strategies within critical jurisprudence[[12]](#footnote-12).

Consequently, the direction of Priban’s critique involves to some extent examining a connection between the aforementioned concept of post-structuralism and jurisprudential theories relating to Critical Legal Studies and anti-foundationalism.

## The Road to Post Modernity.

The concept of legal realism can be traced back to Oliver Wendell Holmes Jr., and his theories of an essentially new form of legal philosophy at Harvard as a co-founder of the Metaphysical Club, along with notable theorists such as William James and Charles Sanders Peirce. James and Pierce together directly developed the branch of philosophy known as American pragmatism in the late 19th century, with Holmes adopting a slightly different view, one less entrenched in logic, with a greater emphasis on jurisprudential concepts reflecting the dynamic and changing nature of modern society, as outlined in his first book “*The Common Law”- “the life of law has not been logic it has been experience”[[13]](#footnote-13).*

Holmes theories and perspective on legal concepts as an alternative and criticism to formalistic legal thought became the foundation for legal realism, and was perpetuated by lawyers and legal theorist such as Jerome Frank and Robert Lee Hale.

The development of legal realism to critical legal studies, as described David Trubeck as an “*outgrowth of American legal realism”*[[14]](#footnote-14)*.*

G. Edward White identifies that realism “ran into the sand”[[15]](#footnote-15)and essentially declined in influence because the result of its continuous rejection of theories which ultimately led to charges of “*moral relativism and nihilism*”[[16]](#footnote-16). Consequently within the context of the Second World War, endorsement for the position of the realists vanished and as such, radical stances were difficult to show popularity for during this turbulent time. White further highlights that this was because “*the empirical research called for by the realists was either not done or resulted in trivial findings*”[[17]](#footnote-17).

White’s analysis of the shift from realism to CLS, identifies the effect of the Second World War on the justification and attitude of politics, establishing that the post war era in America was an opportunity for scholars to “re-tool”[[18]](#footnote-18) legal education. This led to a legal movement known as Law and Society formed from an alliance between Sociology and Law professors at Berkley attempting to refine the more successful concepts of legal realism.

White further documents that “*the association of objective empiricism with positivism was the most explosive… of all the issues that were to demarcate critical legal studies from the law and society movement*”[[19]](#footnote-19).

Additionally, the tenure of legal professors at Harvard who had studied outside of the law and society movement, resulted in the fragmentation of the school of thought. However, White carefully notes that it was the decision to commit to positivist empirical research, that resulted in the major split within the law and society movement, with the critical legal branch of the movement opting to be unsympathetic to positivist influence and, align with the “critical marxist scholarship” of the continental theorists (as discussed earlier) under the banner of post-structuralism.

Consequently, the link to American critical legal theory becomes evident and was additionally fuelled by politics of the same nature. This galvanised post-structuralism during the same period, events such as, “the influence of Fidel Castro’s Cuba and Mao Tse Tung’s China[[20]](#footnote-20)” White noted. This suggests that the emergence of new left politics and the geopolitical events of the 1950s and 60s can be said to have had a major effect on western philosophy and jurisprudence. This correlates with American lecturers and professors being a part of the Vietnam anti-war movement, who influenced teaching during that particular time. An interesting point that White raises further, is the use of empirical data by the American government to purposefully present inaccurate and false information[[21]](#footnote-21) relating to the events of the Vietnam war. This potentially led to theorists and academics to turn away from empiricism and positivist traditions, in favour of more leftist and liberal beliefs.

Before I move on to briefly illustrate anti-foundationalism within this chapter, it is necessary to bring the narrative and background of this area of philosophy to a conclusion. Placing the various elements discussed into chronological order, the development of pragmatism by William James and Charles Sanders Peirce, was potentially the beginning of the American shift from Formalism to the development of alternate bodies of theory, including the creation of legal realism by Oliver Wendell Holmes Jr. Concepts of legal realism received a resurgence in the 1960s after being refined under the law and society movement, which fragmented several years later to form a separate entity known as critical legal studies. CLS identified itself with the post-structuralist movement based in France and central Europe, whose core themes were derived from a criticism of orthodox Marxism and structuralism. There are two key distinctions to make, firstly critical legal studies and legal realism are movements of jurisprudence, and secondly post-structuralism, pragmatism and post modernism are general philosophical theories with individual concepts of law, potentially explaining why post-structuralism can be incorporated under the broad umbrella of post-modernism. Yet it is important to stress, that these theories and concepts are not formally defined, which can lead to ambiguity when such terms are interchanged without important explanatory illustration, a fault found in the construction of Priban’s critique, although this is not without some degree of understanding, as categorizing philosophers into schools of thought (mentioned previously) is relatively difficult, Richard Rorty is a good example of this, as he categorized himself as a follower of American pragmatism, yet his turn away from analytical philosophy led him to be labelled as a post-structuralist and post-modern philosopher. It is my aim to illustrate effectively here, that attempting to chart the development of post-modern philosophy has difficulties and constraints, however despite these, it is possible to chart a number of commonalties to this area of philosophy.

The first commonality is the era of development for these shifts in thinking, the term “1960’s and 70s” is common to all descriptions Critical Legal Studies, Post-Structuralism and Post-Modernism, and as alluded to previously, it was a dramatic period which served as a catalyst for change in philosophical and jurisprudential thinking. The second commonality, heavily dependent upon the first, is the largely similar criticism of dominant power structures, and the drive to embrace more dynamic theories relating to society in context, coupled with a rejection of the natural sciences. Nigel Blake describes this as the “*reconnection to sociological and political philosophy…the reconstruction of liberalism*”[[22]](#footnote-22)

Anti-foundationalism as a series of concepts is central to Priban’s critique and thus central to this dissertation, the areas discussed above are connected to anti-foundationalism, with Foucault and Rorty, along with Fish being a number of the key driving forces behind such theories and concepts, evidencing the benefit to background illustration.

Anti-foundationalism, is essentially a term applied to philosophical and theoretical concepts, that rejects the existence or establishment of self-evident and fundamental concepts as a form of establishing foundational knowledge of facts. As a body of thought, anti-foundationalism primarily rejects the use of metaphysical methods to resolve propositions or theories, advocating the use of logical and genealogical inquiry.

Fish suggests in Doing What Comes Naturally[[23]](#footnote-23), *“foundations are a local and temporal phenomena and are always vulnerable to challenges from other localities and other times”[[24]](#footnote-24)* demonstrating a similar view to Foucault in contextually driven critical interpretation. Fish mentions additionally, that the same criticism can be extended to anti-foundationalism also in addition to criticisms of moral relativism. However, the counter assertion is that anti-foundationalism can include it’s self under its own scope, until such an argument can disprove it’s truth without contingency. In addition to this defence, anti-foundationalist’s propose differing forms of morality which do not require the presence of a foundational theory, this concept is supported by Zygmunt Bauman “*there exists no a priori foundations of post-modern morality on which ethical codes can be built”[[25]](#footnote-25)*this reflection defines the anti-foundationalist’s rejection of an absolute theory, highlighting how the concept of contingency is innately connected to the rationalization of such concepts. Consequently, it could be argued that anti-foundationalist’s such as Fish take a neopragmatic stance, rejecting any overall theory of knowledge in favour of a proven and tested array of contextually applicable practices. In addition to the concept of contingency, another key anti-foundationalist theory that Priban refers to in his critique, is Fish’s Theory Hope and Theory Fear. Theory hope, is what Fish dubs, “the promise that theory seems to offer”[[26]](#footnote-26) where an individual who believes in theory hope is essentially assuming (or hoping) that theory will “*carry them forwards to utopia or backwards to Eden*[[27]](#footnote-27)” and therefore conversely, theory fear is where an individual believes that theory will “*open the floodgates to anarchy*”[[28]](#footnote-28). Fish states that both these individuals would be wrong, as both believe theory to be foundational, to which Fish argues, is purely based on a series of individual perspectives.

A more detailed analysis of these theories will be addressed as the dissertation progresses through Priban’s critique in the following chapters.

# Chapter Two.

## A Pragmatic Reflection of Post-Structuralism.

I will begin my close analysis with Priban’s pragmatist reflection of post-structuralism. The background illustration of the previous chapter forms a large foundation from which Priban’s reflections can be categorized, and consequently it is here where Priban’s direct critique will be analysed and examined.

Priban initially identifies that his reflection (viewed through the pragmatist perspective), is likely to differ “*significantly*”[[29]](#footnote-29) from that of Derrida’s and other post-structuralist legal social or political notions and concepts, the line of his reflection primarily follows that of Rorty in “Consequences of Pragmatism”[[30]](#footnote-30), in developing a critique of post-structural concepts from an American pragmatist position.

He begins by referring to Hilary Putnam’s rejection of a philosophical search for a “*god’s eye view*” (as a criticism of metaphysical realism), a view incorporated by pragmatic post structuralists such as Rorty and Fish who have been illustrated to take a neopragmatic stance in regard to epistemological theory.

The God’s eye view argument refers to a transcendental concept of morality and truth, a single concept that Priban argues can only be known by God, and with man not being God, such a concept is useless in human life and thinking[[31]](#footnote-31). Consequently, if a transcendental concept cannot be embraced, the only other option for man is that truth must be, at least to some extent, contingent.

A *prima facie* standard of evidence for this assertion can be seen in differing language and legal systems, what “we” accept to be “true” is to some extent based on our own perceptions of the reality around us and the acceptability of behavioural norms. An element of contextual influence is consequently innate to any concept of truth proposed within post-structuralism and post-modernism, and demonstrates that a transcendental concept of truth cannot exist as it cannot be universally applicable. Priban cites Rorty in *Consequences of Pragmatism* and defines his citation as Rorty’s determination of man’s epistemological condition, where the search for truth can be vertical or horizontal, with one such method referring to the “*relationship between representations and what is represented*”[[32]](#footnote-32) and the latter referring to a historical reinterpretation of interpretations of previous generations.

Whilst Priban frames this extract as Rorty’s stance on his reflection of a post-structuralists epistemological determination, Rorty goes on to limit and refine the two methods, proposing that the first, “*takes scientific truth to the centre of philosophical concern*”[[33]](#footnote-33) while the second “*takes science as one sector of culture, a sector which, like all the other sectors, only makes sense when viewed historically”[[34]](#footnote-34).* In reality, Rorty is simply refining his position on the latter, stating that concepts such as beauty and truth require reinterpretation to be true in a modern context, Rorty’s concepts regarding the conditions that determine our epistemological condition are closer to an understanding of representation“… it is at the heart of philosophy”[[35]](#footnote-35).

Priban additionally refers to Rorty’s establishment of the liberal ‘ironist’ perspective, where the contingency of vocabulary forms understanding regarding metaphysical questions, Priban states that Rorty accepts Derrida’s critique of (Heidegger’s) metaphysics of presence, is an attempt to articulate the fact or feeling of the contingency of human existence.

Rorty’s propositions of the liberal ironist does support such an assertion, with the concept of contingent vocabularies affecting the ability to derive absolute meaning. Rorty does seem to suggest a Stanley Fish-like notion, in that there is nothing but the text; “*writing always leads to more writing, and more, and still more-just as history does not lead to Absolute Knowledge or the Final Struggle, but to more history…and still more”[[36]](#footnote-36)*suggesting that attempts to affix meaning to words for the initial stages simply can lead itself to a plurality of interpretations through the production of more text. However, Rorty suggests it is regarding the initial concepts as artefacts “*whose fundamental design we often have to alter*”*[[37]](#footnote-37)*that on re-interpretation will lead to the *right* interpretation.

Priban continues to refer to the contingency of truth as a means of reflecting on the work of post-structuralism, and developing his approach to anti-foundationalism. In examining Foucault’s theories of the destruction of the universal intellectual, he draws parallels to the rejection of totalizing theories in favour of local interpretations as a core value of anti-foundationalism. He furthermore suggests such destruction rests with the difficulty in recognizing contingency within contemporary culture.

Priban ends his pragmatist reflection by suggesting that anti-foundationalism, by rejecting totalizing and universal aspirations of theoretical knowledge, is forced to supplant the plurality of language interpretations(“games”) in its place, potentially resulting in all argument’s concluding on a recognition of their own contingency. While this is true, such a problem is framed in the notion that philosophical theory is intended to result in one singular (universal) truth, a stance that anti-foundationalism refutes from the outset, as its core theories recognize circular contingency, but do not see it as a weakness. Such perspectives are representative of a disenchantment with the supreme objective theory and knowledge, and (drawing on the contextual background of the movement with theorists such as Foucault) the manner in which it effects political influence.

# Chapter Three.

## The Anti-Foundationalist Perspective.

Priban links his pragmatist reflection of post-structuralism and the plurality of language games to the central elements of his critique of Fish. The first, being an examination of the anti-foundationalist concept of law, and the second being the nature of law and forgetting with regard to contingency and doctrinal inconsistency. For Priban, if anti-foundationalist perspectives are “correct”, and the world is defined by a plurality of language games and their incommensurability, then there are two key elements to the anti-foundationalist concept of law that require further clarification; What shall we understand by the linguistic or rhetorical nature of law? And what is the context of such law?.

Jean-Francois Lyotard’s “*The Postmodern Condition: A Report on Knowledge*” refines Ludwig Wittgenstein’s initial concept of language games within the dimension of identifying an end to metanarratives. (a concept touched on briefly in the previous chapter) It is In Lyotard’s book that the term post-modernism makes its debut in the field of philosophy, and is proposed by Lyotard as*—* “*I define post-modernism as incredulity towards metanarratives”[[38]](#footnote-38).* Language games are consequently in Lyotard’s perspective, the method of reducing such metanarratives and totalizing principles, through the re-interpretative notion as suggested by Rorty, which Lyotard’s method supports: “*each of the various categories of utterance* (performative and prescriptive for example) *can be defined in terms of rules specifying their properties and the uses to which they can be put”[[39]](#footnote-39)*.

Consequently Lyotard’s method establishes an initial stance for the anti-foundationalist approach to language, a stance that Fish takes up and refines further in his, somewhat infamous book “*Is There a Text in This Class?: The Authority of Interpretative Communities*”[[40]](#footnote-40).

It is here that Fish states that there can be no independent structure in the text, only a series of contextual interpretations, and in defence to propositions from critics (such as Eve Clarke) who state that such a lack of structure would cause chaos to meaning, Fish states that “*a sentence could mean anything at all in the abstract*”[[41]](#footnote-41). In Fish’s concept, meaning is derived from sentence construction which “*is always in the situation”[[42]](#footnote-42).* Fish further identifies with regard to law, that such constraints to language in order to be valid must be identifiable “*once and for all*”. Thus anchoring objective language to “*the letter of the law*” is an invalid proposition, as a central concept in Fish’s theory is that there are “*no inherent constraints on the meanings a sentence may have*”*[[43]](#footnote-43) .*

It is difficult to ascertain what exactly it is, that renders such a proposition “invalid”[[44]](#footnote-44) under Fish’s interpretation of language and the law, however it is this concept,(of language and interpretation) that leads into the beginning of Fish’s identification of the anti-foundationalist concept of law, and consequently the concept of law to which Priban seeks to critique.

## 

## Stanley Fish’s Anti-Foundationalist Concept of Law.

It is within Fish’s book “*There’s No Such Thing As free Speech, and it’s a Good Thing, too”[[45]](#footnote-45)* that the picture of the anti-foundationalist concept of law becomes clearer. Priban’s critique begins with an extract in one of the latter chapter of Fish’s book: “*the law will take what it needs and “what it needs” will be determined by its informing rationale and not the rationale of philosophy, or literary criticism, or psychology or economics”[[46]](#footnote-46)* a chapter, where Fish contrasts and criticises the jurisprudential theories of Posner, Dworkin and Rorty in order to compare and illustrate the concepts and theories of his own vision of law, that he sets out in earlier chapters.

Priban however does not write his critique in this order, exploring and illustrating Fish’s concept of law in two segments beginning with Fish’s conclusion and ending with Fish’s introductory illustration, separating the two with his contrast of Fish to the Autopoietic systems theories of Niklas Luhmann.

Introducing a *conclusion* Fish makes, at the *beginning* of the critique is not without value, as it can establish the position the writer wishes to guide the reader towards as an end goal. However it can alternatively lead to minor confusion, as the reader receives the conclusions of the concept first, but the initial (and often required) foundations are presented further on in the text, without any introductory illustration, or effective connection between the two. It is likely that Priban does not structure his critique in this fashion without purpose, potentially holding back on some of the central elements of Fish’s anti-foundationalist concept of law, to present a more compelling comparison with Luhmann later on, or to do as suggested above, and guide readers to a conclusion initially illustrated.

Consequently, I will depart from following Priban’s critique directly, and will analysis and critique Fish’s anti-foundational concept of law, (as a whole) in order to better present some of the key concepts and Priban’s critical comparison most effectively.

In Fish’s book *“There’s No Such Thing As free Speech”* the anti-foundationalist concept of law begins to take shape. Fish initially presents his concept of law through an analysis of (American) contract law, specifically the notion of consideration and the parole evidence rule as an example of legal inconsistencies. And it is these inconsistencies that illustrate Fish’s argument that “*the law is continuously creating and recreating itself out of the very material and forces it is obliged, by the very desire to be law”[[47]](#footnote-47).*

Fish, goes on to state that it is these inconsistent decisions, that essentially portray a conflicted personality to the law, which creates a spectacle that*—* “*could be described (as members of the critical studies movement tend to do)…as a farce*”[[48]](#footnote-48).

Such a statement, aids a general understanding of the critical legal studies (CLS) perspective of law, and suggests that (in my own imagery), the law is a tool with considerable power used in the construction of society, which needs to be utilised correctly and consistently. However the operators of the tool, essentially judges, must not exceed their power as doing so would risk damaging society, and consequently de-valuing the word of law. Fish, in illustrating his anti-foundationalist concept of law examines aspects of the CLS perspective. His comparison of this perspective, is key in illustrating elements of Fish’s anti-foundationalist concept of law, that both Fish and Priban seek to describe.

Fish, utilizes the example of consideration in contract law in order to further illustrate his perspective. “*Consideration is thus, a part of the law’s general effort to disengage it’s self from history and assume… a shape time cannot alter*”[[49]](#footnote-49). The argument Fish seeks to make here, is key to the concept of anti-foundationalism, and was alluded to in the initial chapters above. Both anti-foundationalist’s and post-structuralists incorporate historical interpretations, as a means of understanding the change in society’s perceptions of cultural constructs in the past, as a means of understanding the nature of the concept in the present[[50]](#footnote-50).

Consequently, Fish believes the law should not abandon the historical connections to its meaning, and the context of its concept. However, a common criticism in CLS jurisprudence is the failure of legal meaning to be altered by time, and the upholding of traditional and archaic law’s, that have no realistic place in a contemporary society. This criticism of the law is reminiscent to many philosophical perspectives, Priban also focuses on the criticism of Fish’s writing: “*Fish’s position suggests that no legal rules can be understood as fundamental”[[51]](#footnote-51).* (Priban withholds his judgment on that specific point, despite being quite suggestive. And additionally when later mentioning methods of Fish’s legal interpretation as opposed to Goodrich, he chooses to decline to mention what these methods actually are.)

One such method, that can be identified however, is Fish’s proposition of historical contextual interpretation. He elaborates further in his example of consideration*—* “*to enquire into the adequacy [of consideration]…would be to reintroduce the very issues of equity…of morality that consideration is designed to bracket*”

Fish identifies, that history is a valid aid to understanding concepts in current society, as a method of critique. However Fish additionally identifies, that consideration in contract must be a concept that time cannot alter as “*it has no content”[[52]](#footnote-52)*and “*by inquiring into the conditions of the contract the court would pass from being an instrument of the law into an instrument of a morality”[[53]](#footnote-53).*

The conflation of morality with the law is a problematic issue for Fish, and has grave implications for the legal system, a notion that is no stranger to jurisprudence and the philosophy of law.

One key aspect of this difficult and “dangerous” relationship Fish seeks to illustrate, is that inconsistent interpretation and morality are not separate, dual threats to law, they are the same threat, as “*interpretation is the name for the activity by which a particular moral vision makes its hegemonic way into places from which it has been formally barred.”[[54]](#footnote-54)* “*the law must define its self against…moral traditions*”[[55]](#footnote-55).

Fish’s interpretation of law, therefore directly opposes any approach based in natural legal theory. Yet, Fish suggests that there cannot be an outright rejection of law connected to morals, “*the requirement for procedures that are neutral between contending moral agendas cannot be met because, in order to even take form, procedures must promote some rationales for an action and turn a blind eye towards others*”[[56]](#footnote-56). Here Fish makes several key acknowledgements, the most important being that the law, despite being an imperfect system, is a functioning system nonetheless. However there are several grounds in which Fish distinguishes his narrative of the law from the popular conception of his critical legal counterparts. The first being that Fish moves beyond the identification of inconsistencies in law, to identify that “ *the inconsistency of doctrine is what enables law to work”[[57]](#footnote-57)* as inconsistency is, in Fish’s opinion, fatal to law only if law is viewed as a philosophy, but since the law is pragmatic, it is it’s inconsistency which allows the law to function.

The second element of the CLS concept of law that Fish disagrees and alters for his own concept, is the theory that law is rhetorical. Steven Burton pushes forward the critical perspective which is, if it is possible to identify that the law is rhetorical, then it essentially could be improved*—* “*we will be better able to listen, deliberate and justify action”[[58]](#footnote-58).* However, Fish argues that knowledge of the laws rhetoricity would only change things if “*we were insulated against that rhetoricity*”[[59]](#footnote-59), and that the pressures that cause the law to act as a system of reasons for action, will still be contextually local reasons, and will not change once they are identified.

Fish labels this notion and belief of Burton’s as “anti-foundationalist theory hope” (a concept previously discussed in the preceding chapters).

Fish’s concept in relation to Burton begins with his identification and new awareness of the rhetoricity of the foundations of the law, a perspective that didn’t previously exist can consequently be developed. Such a new development according to Fish, falsely fuels the hope that, by embracing and identifying the contingency of such a claim, the local problematic situation can be ignored and therefore escaping it will provide some glimpse of a master principle.

Consequently, In Fish’s opinion there is no master principle, it doesn’t exist and identifying an element that was, and had always been present, has no effect on understanding as it was already there, and essentially changes nothing.

Priban’s critique of Fish and his philosophical concepts, with regard to law, essentially begin with a comparison of Peter Goodrich’s critical perspective, who according to Priban embraces the inconsistency of law for the “*richness of its images and differences in their various forms*”[[60]](#footnote-60).

His, unexpressed, suggestion therefore is that Fish does not see the law for its richness of images, or celebrate the differences in its various forms, I have already highlighted Fish’s views on this point*—* that the law is a pragmatic system. And what Fish essentially means by that is, the system is based on the processes that enable it to work, and that he believes the law should function on the linguistic context of the legal discourse, and encompass the additional dimension of pragmatism to further his concept of the law.

And, therein lies the difference between the two contrasting interpretations to the concept of law by Fish and Goodrich. As Goodrich believes, the law is not and should not be autonomous, and it is in fact so deeply intertwined within the combination of “*historical development and… political practice”[[61]](#footnote-61)*that it cannot be separated and made autonomous anyway, as evidenced by the law’s alleged bias towards the wealthy and powerful.

Goodrich, goes on to assert that desiring the law to have a fully autonomous existence, is akin to legal science and formalism, the very traditions critical legal studies and its predecessors sought to identify themselves against.

Consequently, the difference between Fish and Goodrich on that particular issue alone, illustrates how Fish’s anti-foundationalist concept of law is so radically different to that of the critical legal studies movement, yet it shares some undeniable similarities, such as a rejection of formalism and the notion of power and control.

One of the further similarities between Goodrich and Fish, stem from an agreement on the concept of rhetoric in legal language, and the understanding that the “*context of any communicational practice”[[62]](#footnote-62)*is vital for understanding the nature of discourse in areas such as law. Yet as Priban illustrates, it is Goodrich’s notions of the “*fictions of law*”[[63]](#footnote-63) (which are accused of veiling the law’s real nature) and “*their main function [which] is to develop social and political strategies*”[[64]](#footnote-64), where Goodrich and Fish’s concepts of law, partially depart from each other.

The veiling effect that Goodrich refers to, is according to his theory, where the political and sociological aspects of law, shroud the “*unstable and contingent nature*”[[65]](#footnote-65) of the world, and portray a false, artificial veneer of stability. Goodrich’s argument is therefore, that the law cannot be autonomous, because it is influenced and connected on a foundational level to politics and social influences. Priban develops this point further, in suggesting that “*the task of critical jurisprudence is to unveil and criticise these fictions of law and their poiesis*”[[66]](#footnote-66).

However, a number of key criticisms that are important to mention on this point are, that while identifying political discourse in the law is potentially beneficial to ensuring it’s nature and the power it can wield is not being abused or misappropriated, interpreting the law through politics and society can pose an equal danger to the law’s neutrality and purity. Priban identifies that Goodrich’s perspective is potentially more radical in comparison to other CLS academics and theorists “*it seems that the law is for Goodrich… is always law with a capital “L”*”[[67]](#footnote-67)and correctly identifies Fish’s anti-foundationalist theory hope in Costas Douzinas and Ronnie Warrington’s similar perspectives to the critical legal studies concept of law, on similar charges as illustrated by Fish’s critique of Steven Burton (as mentioned previously).

Douzinas, Warrington and Goodrich, by believing that the deconstruction of the law’s relationship with politics and society will consequently unveil new theories regarding the law’s false autonomy and interpretation, and therefore reveal some “truth” or an insight into the hidden workings of the law, causes them to epitomize Fish’s notion of anti-foundationalist theory hope*—* “*his [Goodrich’s] mistake is to think that it could be so free, and he thinks that, because he believes in a general discourse that takes into account everything and excludes nothing*”[[68]](#footnote-68) . What it is that Fish refers to when he suggests “*to think that it could be so free*”, is Goodrich’s belief that in conducting a deconstructive analysis of the law, and thereby examining and cataloguing all that the law has “forgotten”, a better concept of law can be improved by (potentially historic) elements of the catalogue , and essentially “*bring into the foreground everything it laboured to occlude*”[[69]](#footnote-69).

As previously illustrated, Fish agrees on the use of historical accounts and narrative in order to better understand present philosophical concepts and arguments. However Fish criticises Goodrich’s account for failing to recognize the futility and irony of his propositions, which are inherent in his failure to essentially forget and disregard the theoretical effect of empiricist restriction of the law. “*Goodrich must himself forget the empirical conditions that give rise to law and constrain it’s operation…including the need for procedures to adjudicate disputes, and the pressure for prompt remedies and decisions”[[70]](#footnote-70).* Whereas, Goodrich and other critical legal theorists would be slow to disregard and remove empiricist measures from concepts, Fish like other post-structuralist will positively rally against its presence, typically because anti-foundationalism as a body of knowledge, draws a greater influence from the continental post-structuralists, than critical legal thought.

Greater divergences from Goodrich and others perspectives of legal theory, can potentially be identified further in Fish’s concept of law. Differences on the position of empiricism in theory is one, as is the role of the law and the context in which it should be interpreted is a second. These essentially illustrate, that Fish takes a, potentially, neopragmatic stance in his anti-foundationalist the concept of law.

Neopragmatism, is not a term Priban directly refers to, however he does identify with Fish’s “brand” of pragmatist reflections in his writing, even if it is to liken Fish to Niklas Luhmann’s social systems theory[[71]](#footnote-71).

Identifying Fish, and the elements that contribute to his theories, can be supported by exploring his arguments on a number of issues within his relatively elusive concept of law.

The area of legal interpretation is an additional point at which his anti-foundationalist theory is distinct from many other post-modernist concepts of law, including feminist and literary schools of thought. Taking into account Fish’s perspectives on the understanding of meaning and the context of text and discourse; *—* “*meaning cannot be formally calculated, derived from the shape of marks on a page; or to put it in the most direct way possible, there is no such thing as literal meaning*”[[72]](#footnote-72) it is unsurprising then that his opinion of legal interpretation is phrased as such- “*determinate rules perform as barriers or walls, on which is written “beyond this point interpretation cannot go*””[[73]](#footnote-73).

Thus, according to Fish, if there is no literal meaning, and meaning is therefore entirely context driven, how is it possible to distinguish what is legal outside of the context?. Fish’s answer would have to be, that you can’t, context is everything:-

“*the very ability to formulate a decision in term that would be recognizably legal depends on one’s having internalized the norms, categorical distinctions and evidentiary criteria that make up one’s understanding of what the law is*”[[74]](#footnote-74)

Consequently, without context, law isn’t law, and meaning isn’t meaning, such a conclusion is essentially as vague as the concept of law Fish illustrates, or rather creates gaps in the theories of others, from where the reader is prompted to imagine Fish’s tangibility lies.

Priban is correct when he suggests “*Fish’s position suggests that no legal rules can be understood as fundamental*”[[75]](#footnote-75) but in reality, it is less of a suggestion and more akin to a declaration. The size of such a short statement, does mask’s the weight in carries on a first reading (“*there is no such thing as literal meaning”*) which could cause such a central concept to Fish’s notion of anti-foundationalism to appear to some readers (like Priban)as a suggestion. Yet it is on a second and third reading, that the weight of Fish’s words fully resonate and the scale and nature of his, essentially anti-theory are fully appreciated.

## 

## The Law’s, Force and Violence

However, Fish’s concept does not finish there, a second aspect connected to his concept of law is the powerful relationship between the notion of force and the utilization of law ( as drawn from other theorists such as Hart).

Fish illustrates this in a number of ways, he initially states “*Interpretation is the force that resides within the law”[[76]](#footnote-76)*and that, *“Rorty is right when he categories interpretation as an operation in which the agent,— be he a judge or a literary critic—“simply beats the text into a shape which will serve his own purpose””[[77]](#footnote-77)* Here Fish illustrates that judicial interpretation in his perspective, is not an instrument for justice, it is essentially a means to control and retain power, and Fish leads this notion to a conclusion in “*the bottom line remains, the ascendency of one person—or one set of interests aggressively pursued—over another, and the dream of general rules “judicially applied”[[78]](#footnote-78) remains just that, a dream”[[79]](#footnote-79).*

Fish identifies that, it is a fear of the law’s role in society, that is a central concern and stimuli to key elements in legal philosophy (specifically that of post-modern and positivist perspectives), and that fear emanates from the knowledge that law is unable to prevent and protect the “*exercise of power and it’s victims[[80]](#footnote-80)*”. Clearly in an objective sense, Fish’s conclusion would be undeniably incorrect, on a recognition of the role of Criminal law and criminal courts in protecting the victims of crime. However Fish’s is referring to the greater issue*—* which is the abuse of the power within the structure of the law, as opposed to the distinction of legality on a personal level, and is more concerned with the wrongful acts committed by the state and its extensions, such as the courts.

And it is here where Fish’s concept of Rhetoric gains it’s anti-foundationalist identity, *—*“*rhetoric is another word for force*”[[81]](#footnote-81), and as Fish has already outlined, the judiciary’s constraining of rhetoric through modes of interpretation and its existence as a forceful presentation of argument, are the conduits through which neutrality and rationality are detracted from. This element is connected to Fish’s perspective on language and interpretation, and argues that legal rhetoric should be no different. And thus, by being unrestrained and having no literal or textual meaning, any communication and conclusion arrived at, will as a result be theoretically neutral and essentially free of coercion.

Fish, additionally illustrates that the persuasive and forceful nature of rhetoric, would render activities engaged in by the individual (outside of the judiciary) “*finally meaningless[[82]](#footnote-82)*” if that individual is perpetually bound to follow the most convincing and forceful means of persuasion. Therefore, if such an approach would be deemed untenable outside of the arena of law, it seems society must only oblige the law’s presence in its current position, (and without any modification closer to the image that Fish illustrates), because the law is required to remain pragmatic, (and accept that perfection is impossible) in order for it to function.

Priban effectively likens Fish’s anti-foundationalist concept of force to the Foucauldian concept of discursive meaning and power[[83]](#footnote-83) (previously illustrated to some extent in chapter one), and this closeness becomes more evident in Fish’s illustration of the futility at holding the force of law in check.

1. “*there is the attempt to erect an external barrier—sometimes a determinate rule, or a plain case—but in every instance the barrier turns out to be indistinguishable from that which it would hold back; force is already inside the gate because force is the gate”[[84]](#footnote-84)*
2. “*there is the attempt to perform an internal housekeeping.. remove from the mind the tendencies that correspond to the forces appeal…but this turns out to be…self-defeating since a mind so cleansed it would have nothing inside it”[[85]](#footnote-85)*

These two examples, that Fish uses to illustrate the futility of resisting the force and rhetoric of law, are key to understanding his famous aphorism*—* “*there is always a gun at your head*”[[86]](#footnote-86), and subsequently “*the gun at your head, is your head*”[[87]](#footnote-87).

The former,*—* “there is always a gun at your head” is, according to Fish, an assertion, notion, fact or belief who’s power an individual has already internalised, which will always be “*a form of coercion*”[[88]](#footnote-88).

Consequently this is Fish’s expression of the external barrier referred to above, as it is the weight and futile nature of the gun at your head, that essentially prevents escape form the coercive effect of the force of law.

The latter expression*—*“the gun at your head, is your head*”* for Fish, is the simple notion that the coercive effect is only limited to the extent of, the notions existence within the inner self or the personality of the individual, illustrating that we are all self-compelled by internal constraints we cannot resist; which to some extent we require, otherwise “we” as individuals would be (as Fish eloquently refers to in the latter example) “*a mind so cleansed it would have nothing inside it*”[[89]](#footnote-89).

Priban, relates Fish’s aphorism back to politics and political institutions, suggesting Fish is simplifying diverse views of law, and presenting it purely as “*an instrument of power and violence*”[[90]](#footnote-90).

He additionally draws a valid criticism regarding Fish’s concept of force stating*—“what is real and stable in this contingent world?…is it not just the force and power of political discourses which…frame our being?”* Priban states that Fish would definitely answer yes to his question, but I have to disagree, as Priban neglected, and dismissed Fish’s aphorism, it’s quite evident that he has potentially failed to incorporate one key aspect of them into his question; the pre-existing notions that “*already live within you*”[[91]](#footnote-91), (in “the gun at your head is your head” principle) are in Fish’s perspective, the very elements that interact with the discourses and do effect the frame of our being. However they definitely do not formulate it, Fish qualifies his sentence with “*to the extent that*”[[92]](#footnote-92) and “*predisposed*”[[93]](#footnote-93)suggesting that personality combines with discourses to form action and thought, but Fish does not suggest that our entire conscious and sense of self is derived purely from discourses[[94]](#footnote-94).

Priban, in order to conclude his critique of Fish’s notions of force, contrasts such with those of Derrida, and suggests that Fish’s theories rejecting the supremacy of theoretical discourses are “deeply influenced” by Derrida’s concepts. This is to some extent, evident in the likeness of some concepts in both the philosophers writing.

For example, Fish’s concept of the existence of force in the nature of interpretation, bears a close similarity to the violence present in Derrida’s concept of language in logos ( the Greek meaning of the word for speech, reason or law)*—*“*the transcended violence we refer to is tied…to the possibility of language…it would then be embedded…before it had to be determined as rhetoric*”[[95]](#footnote-95) and Derrida’s potentially most famous quote, “*there is nothing outside the text”[[96]](#footnote-96)*equally bares resemblance to Fish’s proposition of meaning being derived within the text, and the absolute need for context to determine linguistic meaning.

Consequently in formulating his contrast, Priban makes a key distinction between Derrida and Fish’s concept’s, which illustrate that, while Fish and his concept of anti-foundationalism draw on post-structuralist and deconstructive elements where other’s (who could also be loosely defined as anti-foundationalist) such as Rorty do not, Fish still retains elements in his “brand” of neopragmatism. This can be seen on one central point at which Fish and Derrida depart, as I have illustrated on several occasions, Fish believes that interpretation and reading, allow the alteration of texts (and laws) to the intentions of the interpreter, which in turn forms constraining rules on future interpretation (and in the case of law), reinforcing and retaining power[[97]](#footnote-97).

Derrida’s concepts of deconstruction are significantly more radical, suggesting that all readings and interpretations originate from his concept of arche-writing, a form of “purer” writing that is the point of origin for subsequent expression. This point (according to Derrida) acts as a barrier between expression and identity, ensuring the two are separate, but the latter is repeatable in differing contexts[[98]](#footnote-98). The concept of arche-writing, is undoubtedly a complex one, phrased above is my description based on a number of differing interpretations, however despite similarities between Fish and Derrida, the anti-foundationalist concept of law as force, (as phrased by Fish) is significantly more rooted in the pragmatic.

Despite drawing on some deconstructionist elements, Fish’s concept retains a foundation of pragmatism, (or rather Fish’s own brand of neo-pragmatism) and the role of an eventual foundation in Fish’s concept, is as Priban notes, a notion Derrida would have to refuse absolution for[[99]](#footnote-99). Priban goes on to note that Fish’s “*concept is much more sociological*”[[100]](#footnote-100) and lists five characteristics he believes Fish’s perspective has*—“(a) Historical, (b) Restrictive and Dynamic, (c) Contingent and (d) Fundamental”[[101]](#footnote-101)*

The historical elements are most clear, to the point where Fish states them himself in the illustration of his concepts within his various books and papers.

To some extent, I would argue that it is a fair statement to additionally suggest, that contingency comes with the post-structuralist and post-modernist territory, as it is by its very nature, a means of illustrating an alternative explanation to answers in opposition to (as Fish describes)*—“a god’s eye view, a transcendent truth”[[102]](#footnote-102)*, advocated by other schools such as positivism and natural legal theory. However Fish has a unique way of examining contingency, seeing it’s recognition by some, as a way of avoiding contingency[[103]](#footnote-103) (a key notion of Fish’s anti-foundationalist theory hope, as detailed previously) “*knowledge of [contingency] does not transport you to a place where those convictions are no longer in force*”[[104]](#footnote-104).

Similarly, Priban states that the “*restrictive and dynamic characteristics are manifest…in the force of interpretation…which subsequently change the nature of beliefs*” [[105]](#footnote-105), these characteristics are, (like Fish’s account of History as an aid to understanding), obvious and evident in Fish’s literature.

With regard to Fish’s concept of force as a fundamental component, Priban is partially correct when he suggests the concept is immediately contradictory to the notion of omnipresent contingency, however Fish highlights how criticising such a notion identifies the individual as having hope for theory, and is consequently utilizing the notion of contingency to escape the conclusion, that “*theory goes nowhere*”[[106]](#footnote-106) Priban, is correct in his identification of force “as the foundation of all politics and law” and the fundamental perspective of Fish’s concept, in that, interpretation equals force, and force equates to control, these two elements are fundamental according to Fish, despite the contingency of their extensions.

# 

# Chapter Four.

## Stanley Fish and Niklas Luhmann.

Within this critique of Fish, Priban writes a short supplementary chapter, where he likens specific elements of Fish’s anti-foundationalist concepts to Niklas Luhmann’s autopoietic social theory, which is in fact Priban’s main research area, having published a multitude of articles throughout his career on Luhmann’s autopoietic theory and law.

In this chapter, I would like to explore some of these concepts to illustrate the unique nature of several of Fish’s anti-foundationalist perspectives, and additionally examine the connection between Luhmann and Derrida, through Gunther Teubner’s article entitled: Economics of Gift*—*Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann[[107]](#footnote-107).

Beginning with Priban’s examination; an element of Fish’s anti-foundationalist approach, (previously mentioned in only a small amount of detail), was the notion of forgetting, and the role it plays in Fish’s theory of legal practices.

Here, Fish states that once a legal discourse has been interpreted (and therefore its meaning constrained), the legal practice subsequently adjusts social interpretations to align or conform with that legal interpretation, and then simultaneously forget this adjustment. Fish states that this must happen within any given system, as it is not theoretical knowledge and rhetoric that determines the features of the law,- it is the complex relationship between societal system’s and legal practice which shape societal interpretation, to accept the legal and judicial interpretation that it has been given. And yet, while this complex shaping goes on, the adjustment is hidden and forgotten[[108]](#footnote-108).

The system and law, interact this way to ensure, as Priban states: “*reduce the variability of social action and define the system relevance of behaviour*”[[109]](#footnote-109). (or put in another way), This interaction takes place to ensure the behaviour and actions of society are refined, the pluralities are reduced, allowing the social system to streamline and control future outcomes, through the component of law. Additionally, Fish seems to expand this illustration to suggest that*—* “*the truth one would know has already receded behind the formulations it makes possible*”[[110]](#footnote-110) and that “*forgetting of the enabling conditions of knowledge, is constitutive of knowledge itself*”[[111]](#footnote-111).

This somewhat complex theory, when carried over to Fish’s concept of law, becomes more coherent as Fish is essentially suggesting, that forgetting, is the mechanism “*for discriminating and isolating all facts that are irrelevant to legal practice*”[[112]](#footnote-112), which allows the law to develop better methods of “action” or practice solely from the legal context.

It is this aspect of Fish’s theory that Priban finds so strikingly similar to Luhmann’s autopoietic social systems theory; specifically the reduction of complexity as a means of identifying the “elementary condition of social behaviour”[[113]](#footnote-113) as in Luhmann’s theory, the social system has two parts, the interior and the exterior.

The interior of a social system, only withdraws a select amount of information from the exterior, in order to create a zone of reduced complexity within the system that contrasts against the “*chaotic and infinitely complex nature*”[[114]](#footnote-114) of the external.

It bears a close similarity to the model Fish presents for the refining of legal practice, by harnessing the power of forgetting, this unique development towards the area of sociology and sociology of law, marks Fish out against others such as Goodrich, whose theories of forgetting connect to rhetoric and logic, as opposed to systems interaction and development through communication.

Teubner in his article *Economics of Gift*, recognizes in a similar fashion to Fish, “*inconsistencies…paradoxes and even violence lie at the bottom of the most refined concepts of economic and legal action*”[[115]](#footnote-115) and illustrates the mutual point for Derrida and Luhmann to develop theories, which acknowledge the paradoxes of law, and consequently have an effect of “*destroying their legitimacy*”[[116]](#footnote-116) as systems.

Fish’s theories address this paradox to some extent, by acknowledging the impossibility of escaping the power of force*—“force is already inside the gate because force is the gate”[[117]](#footnote-117).* This paradoxical statement, of a somewhat closed nature resembles, as Priban recognises, “*the main characteristic feature of autopoietic systems*”[[118]](#footnote-118).

Fish and Derrida have in this paper, been previously contrasted on a number of issues, the concept of autopoietic systems is, to some extent, no different to the analysis conducted previously, as Derrida’s concepts bear some similarity to those of Fish, however they depart on a number of key elements, the most significant being that Derrida’s concepts of “*the indecipherable…distinction between justice…both mythical and divine violence…and positivity…which is in effect a delegation to an infinite responsibility*”[[119]](#footnote-119)is devoid of any foundation, and is entirely situated in abstract notions, as Teubner illustrates above in Derrida’s conclusion where legal practice has an infinite responsibility to quantify an unquantifiable notion of justice.

Concepts such as these, have led me to label Derrida, in previous comparisons as “more radical” that Fish, which is similarly, the key difference in Fish and Derrida’s concepts of social systems justice.

Fish forages into this area in “*Doing What Comes Naturally”* often under different headings, but nonetheless derives some inspiration from Luhmann and legal social theory, however he limits his notions to the realm of law and force, additionally abstract, but only to the extent that (in Fish’s concepts) the law is a pragmatic instrument, that requires an acceptance of certain elements in order to maintain the functioning of society, and thus has some foundation that can be quantified.

Priban develops the notion of autopoiesis in Fish’s anti-foundationalist concepts, by illustrating an additional similarity between Luhmann’s difficulty in translating a template of morality into legal conflict[[120]](#footnote-120) and Fish’s pragmatic rejection of morality in legal practice*—“preferred outcomes are to be achieved, not by changing the game but by playing it more effectively”*[[121]](#footnote-121) and as Teubner illustrates in Luhmann’s theory “*nor is justice.. [of] moral value”[[122]](#footnote-122).*

This similarity between Luhmann and Fish, illustrates how unique Fish’s concepts are in his anti-foundationalist approach to law, in opposition to other anti-foundationalist theorists such as Rorty and Derrida, however raising this point, leads to difficulties I have already outlined at some length; essentially the difficulty in designating a particular philosopher as “anti-foundationalist”, “post-structuralist” and similar titles, as bracketing the concepts and theories of any one of the notable theorist I have mentioned, to any single school of though is relatively impossible, and therefore illustrates that philosopher’s mentioned never intended to have their work constrained in such a way.

The implication of this regarding Fish’s concepts, theories and perspectives is that his incorporation of elements from many areas, such as autopoiesis and social systems theory has the effect of strengthening the force of his global concept, by persuasively illustrating a dynamic theory, that factors in a number of perspectives, satisfying and neutralizing a wide variety of readers, despite some weaknesses and limitations (which are addressed subsequently in the conclusion).

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# Chapter Five.

## Conclusion.

Priban, begins his conclusion by addressing a key criticism of Fish’s concept of force, suggesting that if Fish is correct and contingency is a core aspect of all law and theory, then surely Fish must have been able to develop his concept from a position that was exempt from contingency[[123]](#footnote-123). Priban to reinforce this point, quotes Fish’s remarks in “*Doing what Comes Naturally”—“the point is there is no point”,* however this remark raised by Priban is not only incorrect but also out of context. Fish raises Priban’s criticism himself, in his own book, and replies “*the thesis that theory goes nowhere is itself a thesis that can go nowhere*”[[124]](#footnote-124), and additionally clarifies “*the smallness of the point is what makes people who have hopes for theory unhappy”[[125]](#footnote-125).* Priban is definitely one of these people, as he has raised this criticism several times throughout his critique.

However, to some extent, it is a key criticism of Fish, as he delves into logical obscurity when questioned on any faults in the fundamental pillars his anti-foundational concept rests on. Yet Fish is correct when he states that it is a small point, and in a global way, its presence does little to discredit his theory as a whole.

Drawing the elements of Fish’s concept together, his neopragmatic perspective on the force of law, through constraining interpretation and rhetoric is formed in a highly persuasive manner, and in some places in a subtly ironic way, for example the notion of persuasiveness in rhetoric*—* “*nothing succeeds like success*”[[126]](#footnote-126).

Priban notes that the heterogeneity of “*the contemporary world and culture*”[[127]](#footnote-127)causes Fish to conclude that conflict and disputes are an integral part of politics and law, and consequently determine the integral elements of his pragmatic anti-principle “*of considering each situation as it emerges*”[[128]](#footnote-128). I don’t think Priban’s assessment is largely incorrect in this aspect, however it’s possible to say that Fish’s pragmatic stance encompasses a great deal more than the simplistic notion Priban offers, as it takes into account the futility of theory and the rational notion that “*Law will take what it needs”[[129]](#footnote-129)* in order for it to work, accepting the fact that law is required in society, and therefore it needs to be able to function, even if it’s very functioning is a formulation of force.

The concept of forgetting and the role it plays in Fish’s illustration of Force within the system is unique in anti-foundationalism, and encapsulates the human struggle that is central to this form of philosophy. And is well captured in the Orwellian statement Priban cites in an excerpt of Orwell’s well known novel *Nineteen Eighty-Four,- “whoever controls the past, controls the future, and whoever controls the present, controls the past”[[130]](#footnote-130).*

Lastly, Fish’s call for total autonomy of the law, is a direct opposition to the attitudes and concepts of critical jurisprudence, who stress it’s importance in understanding and influencing (as Priban phrases) “*political and ideological struggles”[[131]](#footnote-131)* through its involvement in a plurality of disciplines.This concept directly contrasts with Fish’s notion of law as a closed system, that has the capacity (potentially drawing parallels to autopoietic systems theory), to allow for a greater and more comprehensive analysis and understanding of the law*—* “*the differences between ways of thinking…are between structures that are differently closed”[[132]](#footnote-132).*Fish has an incredibly enjoyable and persuasive way of writing, and yet at times has a frustratingly vague way of illustrating concepts. His anti-foundationalist perspective of law, is one such example with elements of frustration also evident in Priban’s article, such as in paragraphs, where he latches several concepts together, and contrasts the result against perspectives of other philosophers in a loose and general way. Priban, does utilise general concepts, however he avoids specifics, which supports the fact that Fish’s anti-foundationalist concept of law is (in terms of detail) at times, less than clear, and as a result of Priban’s lack of perseverance, cause his critique to be lacking greater detail.

Fish, has been criticised and accused by a minority of opposing philosophers, (such as Terry Eagleton and Martha Nussbaum) for being nihilistic and a modern sophist. The meaning of nihilism, is essentially the accusation that Fish’s theories negate a number of meaningful aspects to life, and the concept of sophism is typically the use of logical fallacies to deceive. However, post-modern philosophers often attract accusations and charges of this kind due to the direction of the movement, in challenging foundationalist concepts and wider notions such as truth and meaning, with Derrida’s theories being the most criticised as nihilistic.

While the criticism is slightly harsh, Fish does have flaws in his theories, and does harness logical absurdities when questioned about a potential contingent free starting point for his theory. Additionally, Fish is occasionally less that clear in his illustration of his theories, which fails to help him, when criticised for being obscure and abstract.

What can be identified however, is that Fish’s concept has a number of central elements to it. The first, is Fish’s literary theory, which revolves around his perspective of language, interpretation and context. At the centre of this theory, are his notions of language games, and the proposition that there are “*no inherent constraints to the meanings a sentence may have*”[[133]](#footnote-133) which are partially influenced by the deconstructive theories of Derrida[[134]](#footnote-134) and altered slightly to form the first limb of Fish’s legal theory.

The second “limb” consequently connects Fish’s literacy theory of language to the interpretive force of law, both specifically (such as in contract) and generally in the discussion of law as a social system.

Linked to that theoretical aspect is the assertion that law in order to obtain a formal and unfettered existence needs to be an autonomous body.

Despite this, and several other elements placing Fish and his anti-foundational concepts a great distance from other movements such as critical legal studies, both share the similarity of understanding the integration of law and society, and a legal system that is defined by conflict and a seeks to exert power in governance.

Both movements enter the battlefield of law as separate players with separate strategies and tactics, Fish’s anti-foundationalist concept is both pragmatic and abstract in its construction with context and interpretation controlling most aspects of life. Whereas Goodrich and the player of the critical legal studies advocates the notion of a plurality of disciplines with each bringing additional dimensions to understand the working of the law. despite this, each irreconcilable side shares the common goal, of striving for a fairer and just notion of law.

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2. [↑](#footnote-ref-2)
3. J. Priban, Law and Critique Vol. IX no.2 [1998], pp. 252. [↑](#footnote-ref-3)
4. A. Hunt, G. Wickham, Foucault And The Law Towards a Sociology of Law as Governance, pp. 40 [1994] [↑](#footnote-ref-4)
5. Michel Foucault, The Archaeology of Knowledge [1969] [↑](#footnote-ref-5)
6. Deleuze, Gilles (1986). *Foucault*. London: Althone. p. 14 [↑](#footnote-ref-6)
7. Additionally, criticism of Priban and associated theories will be addressed at a further point. [↑](#footnote-ref-7)
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17. *Ibid.825* [↑](#footnote-ref-17)
18. *Ibid*, 826 [↑](#footnote-ref-18)
19. *Ibid.*  [↑](#footnote-ref-19)
20. *Ibid* post script 86 [↑](#footnote-ref-20)
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28. *Ibid*. [↑](#footnote-ref-28)
29. *Supra* no.3 pp.249 [↑](#footnote-ref-29)
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31. *Supra* no.3 pp.250 [↑](#footnote-ref-31)
32. *Supra* no.31 pp. 92 [↑](#footnote-ref-32)
33. *ibid*. [↑](#footnote-ref-33)
34. *Ibid.* [↑](#footnote-ref-34)
35. *Supra* no.31 pp.94 [↑](#footnote-ref-35)
36. Ibid [↑](#footnote-ref-36)
37. Ibid pp.92 [↑](#footnote-ref-37)
38. Lyotard, J. *The Postmodern Condition: A Report on Knowledge,* Introduction (xxiv) [1979] [↑](#footnote-ref-38)
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41. *Ibid* pp.291 [↑](#footnote-ref-41)
42. *Ibid.* [↑](#footnote-ref-42)
43. *Ibid 292.* [↑](#footnote-ref-43)
44. A question I will consequently attend to in the following chapter. [↑](#footnote-ref-44)
45. Fish, S. *There’s No Such Thing As free Speech, and it’s a Good Thing, too* [1994] [↑](#footnote-ref-45)
46. *Ibid* pp.221-222 [↑](#footnote-ref-46)
47. *Ibid* pp. 156 [↑](#footnote-ref-47)
48. *Ibid*. [↑](#footnote-ref-48)
49. *Supra* no.46 pp.157 [↑](#footnote-ref-49)
50. It is on that point, among several, that the concepts of post-structuralism and structuralism diverge, as structuralists hold the historical interpretation valid as understanding concepts relative to their own time, without drawing inferences across to the present. [↑](#footnote-ref-50)
51. *Supra* no.3 pp.256 [↑](#footnote-ref-51)
52. *Supra* no.46 pp.157 [↑](#footnote-ref-52)
53. *Ibid* pp.158 [↑](#footnote-ref-53)
54. *Ibid.* [↑](#footnote-ref-54)
55. *Ibid* pp. 159 [↑](#footnote-ref-55)
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63. P. Goodrich, *Law in the Courts of Love*. [1996] pp.135 [↑](#footnote-ref-63)
64. *Supra* no.3pp.254 [↑](#footnote-ref-64)
65. *Ibid*. [↑](#footnote-ref-65)
66. *Ibid.* Additionally, Fish notion of Autopoiesis and Social Systems can be found in chapter four. [↑](#footnote-ref-66)
67. *Ibid.* pp.255. [↑](#footnote-ref-67)
68. *Supra* no.46 pp.177. [↑](#footnote-ref-68)
69. *Ibid* pp. 176 [↑](#footnote-ref-69)
70. *Ibid.* pp.177 [↑](#footnote-ref-70)
71. This area is discussed further in the following chapter. [↑](#footnote-ref-71)
72. *Supra* no.24 pp.4 [↑](#footnote-ref-72)
73. *Ibid.* pp.505 [↑](#footnote-ref-73)
74. *Ibid*. pp.360 [↑](#footnote-ref-74)
75. *Supra* no.3 pp. 256 [↑](#footnote-ref-75)
76. *Supra* no.41 pp.512 [↑](#footnote-ref-76)
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78. H.L.A Hart, The Concept of Law. pp.202 [↑](#footnote-ref-78)
79. *Supra* no.41 pp.516. [↑](#footnote-ref-79)
80. *Ibid.*  [↑](#footnote-ref-80)
81. Ibid. pp.517 [↑](#footnote-ref-81)
82. *Ibid.* [↑](#footnote-ref-82)
83. *Supra* no.3 pp.261 [↑](#footnote-ref-83)
84. *Supra* no.24 pp.519 [↑](#footnote-ref-84)
85. *Ibid.* [↑](#footnote-ref-85)
86. *Ibid.* pp. 520 [↑](#footnote-ref-86)
87. *Ibid.* [↑](#footnote-ref-87)
88. *Ibid.* [↑](#footnote-ref-88)
89. *Supra* no.24 pp.519 [↑](#footnote-ref-89)
90. *Supra* no.3 pp.261 [↑](#footnote-ref-90)
91. *Supra* no.24 pp.520 [↑](#footnote-ref-91)
92. *Ibid.* [↑](#footnote-ref-92)
93. *Ibid.* [↑](#footnote-ref-93)
94. Fish’s foray into Freud and Psychoanalysis is present in the Chapter 22: Withholding The Missing Portion (pp.525-555), where Fish examines Freud’s theory as a form of literary analysis, omitted form this paper, to ensure all aspect of law were addressed, however some crossover is present in this area, with regard to existentialism and psychoanalysis. [↑](#footnote-ref-94)
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98. J, De Ville, *Jacques Derrida: Law as hospitalité absolue*pp.59*.* [↑](#footnote-ref-98)
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100. *Ibid* pp.265 [↑](#footnote-ref-100)
101. *Ibid.* [↑](#footnote-ref-101)
102. *Supra* no.24 pp.486 [↑](#footnote-ref-102)
103. *Ibid* pp.523-524. [↑](#footnote-ref-103)
104. *Ibid.* [↑](#footnote-ref-104)
105. *Supra* no.3pp.265 [↑](#footnote-ref-105)
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107. Teubner G. Economics of Gift*—*Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann [2001] As Republished in- Derrida And The Law, Legrand, P. (2009) [↑](#footnote-ref-107)
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110. *Ibid*. pp.236 [↑](#footnote-ref-110)
111. *Ibid*. [↑](#footnote-ref-111)
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113. *ibid* [↑](#footnote-ref-113)
114. Luhmann, N.A Sociological Theory of Law (*Rechtssozilogie*) [1985]. p29 [↑](#footnote-ref-114)
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116. *Ibid* pp.5 [↑](#footnote-ref-116)
117. *Supra*no.24 pp.519 [↑](#footnote-ref-117)
118. *Supra* no.3 pp.259 [↑](#footnote-ref-118)
119. *Supra* no.107 pp.6 [↑](#footnote-ref-119)
120. *Supra*no.3 pp.259 [↑](#footnote-ref-120)
121. *Supra* no.24 pp.178 [↑](#footnote-ref-121)
122. *Supra* no.107 pp.19 [↑](#footnote-ref-122)
123. *Supra* no.3 pp.266 [↑](#footnote-ref-123)
124. *Supra* no.25 pp.26 [↑](#footnote-ref-124)
125. *Ibid.* [↑](#footnote-ref-125)
126. *Ibid* pp.516 [↑](#footnote-ref-126)
127. *Supra* no.3 pp.267 [↑](#footnote-ref-127)
128. *Ibid.* [↑](#footnote-ref-128)
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131. *Supra* no.3 pp.269 [↑](#footnote-ref-131)
132. *Supra* no.24 pp.16 [↑](#footnote-ref-132)
133. *Ibid.* pp.242 [↑](#footnote-ref-133)
134. [↑](#footnote-ref-134)