# 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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| The philosophy of law. |
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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 the publication on the arguments raised by Priban. My critique will be made from a legal positivist position, examining 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 general social systems theory and the similarities to that of Niklas Luhmann, and Gunther Teubner through a legal perspective in Social Theory of Law and Autopoiesis, 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 “The Force of Law” . And examine Priban’s conclusions of Fish and his 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.

My approach of Priban’s article will come from a positivist position also, however 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.

I would initially look towards H L A Hart’s book the “*The Concept of law”* to establish the legal positivist approach to law and legal philosophy in order to create two key mechanisms, the first being a ground from which Fish’s concept of legal anti-foundationalism can be examined and the second being the creation of a model of legal positivism to which Priban’s approach can be examined.

# Literature Survey.

In order to provide a comprehensive critique of Priban’s article it is relatively key to summarise some of the research and publications that have centred around this area.

# Chapter One.

## Positioning and History.

Priban Begins his article 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 though diverge, suggesting that such a 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.

The historical origins of Post-structuralism began in France during the 1960s as a movement in favor of the rejection of rigid legal morality and the deterministic nature of structuralism, a period of French political unrest, leading to vast student and workers riots in May 1968 was the catalyst for such rejection, and was connected to 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 development in direct response to developing and justifying such criticisms.

Foucault referred to such branches in *The Archeology of Knowledge* as “subjugated knowledge’s” those moved aside by the dominate forms of knowledge, emphasizing a more dynamic view is 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, it has the capacity to “good” in a multiplicity of different forms[[4]](#footnote-4) which are not all an exercise of cohesive power by the state. Foucault’s Book *The Archeology 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 a composition of signifiers, inflections enabling meaning to be determined by syntaxical or lexical rules, as illustrated in a structrualist perspective, Foucault proposes that a statement is an abstract creation allowing the connection of relations to objects and other statements forming 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 and the conditions in the discourse itself, allowing 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, the statement is amused to be in the correct context whenever it is proposed, consequently as the context changes so does the formation and with that new meanings can be adopted, and potentially challenge the dominate 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” is after such an examination possible to see, 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 on the analysis of that point in due course, 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 one such departure to an essentially new, post-structuralism identifiable in the heterogeneity in theory. As previously illustrated, the term “post-structuralist” directly refers to French and central European philosophical theories , 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.[[7]](#footnote-7)

Priban’s reflection of post-structuralism, includes reflection in connection to this point in his article, he makes reference to the theories of Jean- FrançoisLyotard and Richard Rorty multiple times, theorists and philosophers better known for their connection with post-modernism, that post-structuralism, yet Priban fails to make this distinction[[8]](#footnote-8). 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, to further illustrate the background of post-structuralism and it’s connection to post modernism, as it is an element Priban bases his reflection on, an 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 which consequently means that in order to compare the two bodies of thought, the commonalities and individual concepts must be drawn out and analyses.

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[[9]](#footnote-9), expanding it into other and opposing theories of truth in post-structuralism, with the view to drawing comparisons between Stanly 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, as Rorty proposes in his book *Objectivity, Relativism, and Truth*[[10]](#footnote-10)*,* truth is an intersubjective agreement between members of the community, in order to determine a common perception of reality.

Comparatively however, post-structuralist similarly deny the possibility of objective truth, and potentially any knowledge gained though objective scientific study, the perspective on claims, (typically from structuralists) attesting 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[[11]](#footnote-11), with the result then being that theoretical advancements could then be developed and adopted.

Jean- FrançoisLyotard’s concept of metanarratives, bears some similarity to Heidegger’s theory, suggesting that metanarratives as created by power structures and ignore the subjectivity of human experience[[12]](#footnote-12), with their removal allowing unconstrained theoretical concepts 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, yet retain equivalent differences. This similarity alone poses problems in attempting to identify and separate post-modernism and 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 when conducting further research.

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 Encyclopedia 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 of the background of Priban’s critique, to create the 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 has already been discussed previously above, and it’s necessity is only required when navigating references and propositions made in bodies of philosophical text that lack further clarification as to which general concepts they support or criticise.

Additionally, 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, with the additional benefit of allowing my illustration to 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[[13]](#footnote-13).

Consequently the direction of Priban’s critique involves to some extent examining a connection between the aforementioned concept of post-structuralism and jurisprudential theories relation 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”[[14]](#footnote-14).*

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, David Trubeck, describes the critical studies movement as an “*outgrowth of American legal realism”* [[15]](#footnote-15)

G. Edward White identifies that realism “ran into the sand”[[16]](#footnote-16) and essentially declined in influence because the result of its continuous rejection of theories ultimately led to “*moral relativism and nihilism*”[[17]](#footnote-17), and consequently within the context of the Second World War, endorsement for the positions of the realists vanished, as such radical stances were difficult to show popularity for and, as White supplements, potentially because “*the empirical research called for by the realists was either not done or resulted in trivial findings*”[[18]](#footnote-18).

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”[[19]](#footnote-19) legal education, which 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*”[[20]](#footnote-20).

Additionally the tenure of Legal professors who had studied outside the law and society movement at Harvard additionally resulted in the fragmentation of the movement, 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 theorist (previously discussed) under the banner of post-structuralism.

Consequently the link to American critical legal theory becomes apparent, and was in turn additionally fuelled by politics of the same nature that galvanised post-structuralism during the same period, such as, which White notes, “the influence of Fidel Castro’s Cuba and Mao Tse Tung’s China[[21]](#footnote-21)”. 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, potentially due to lecturers and professors being a part of the antiwar movement and moving into teaching during that particular time, and an interesting point that White raises is, the use of empirical data by the American government to purposefully present inaccurate and false information[[22]](#footnote-22) relating to the events of the Vietnam war, potentially led to theorist and academics to turn away from empiricism and positivist traditions, in favor 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 and 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 central themes were derived from a criticism of orthodox Marxism and structuralism. There are two key distinctions to make, critical legal studies and legal realism are movements of jurisprudence, whereas 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 labeled 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, majorly linked to the first is the largely similar criticism of dominate power structures, and the drive to embrace more dynamic theories relating to society in context along with a rejection of the natural sciences. Nigel Blake describes this as the “*reconnection to sociological and political philosophy…the reconstruction of liberalism*”[[23]](#footnote-23)

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 reject the existence or establishment of self-evident and fundamental concepts as a form of establishing consequently 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[[24]](#footnote-24), *“foundations are a local and temporal phenomena and are always vulnerable to challenges form other localities and other times”[[25]](#footnote-25)* 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 it is in the composition of the counter assertions 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 defense, 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”[[26]](#footnote-26)* 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 favor 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”[[27]](#footnote-27) 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*[[28]](#footnote-28)” and therefore conversely, theory fear is where an individual believes that theory will “*open the floodgates to anarchy*”[[29]](#footnote-29). Fish states that both these individuals would be wrong, as both believe theory to be foundational, to which fish argues it 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 analyzed and examined.

Priban initially identifies that his reflection (viewed through the pragmatist perspective) is likely to differ “*significantly*”[[30]](#footnote-30) 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”[[31]](#footnote-31), 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[[32]](#footnote-32). 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 behavioral norms. An element of contextual influence is consequently innate to any concept of truth proposed within post-structuralism and post-modernism, and demonstrate 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*” [[33]](#footnote-33) and the latter referring to a historical reinterpretation of interpretations of previous generations.

While 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 center of philosophical concern*”[[34]](#footnote-34) while the second “*takes science as one sector of culture, a sector which, like all the other sectors, only makes sense when viewed historically”[[35]](#footnote-35).* 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”[[36]](#footnote-36).

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’s 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 effecting 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”[[37]](#footnote-37)*  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*” *[[38]](#footnote-38)* that on re-interpretation that 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 favor of local interpretations as a core value of anti-foundationalism, and 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, it is representative of a disenchantment with dominating supreme objective theory and knowledge, and (drawing on the contextual background of the movement with theorist such as Foucault) such effects on political influence.

# Chapter Three.

## The Anti-Foundationalist Perspective.

Priban connects his discussion 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 regarding 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 previously touched on briefly) In his book, 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”[[39]](#footnote-39).* Language games are consequently 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”[[40]](#footnote-40)*.

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*”[[41]](#footnote-41).

It is here that Fish states that there can be no independent structure in the text, only a series of contextual interpretations, and in defense 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*”[[42]](#footnote-42) but meaning is derived from sentence construction, which “*is always in the situation”[[43]](#footnote-43).* 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 there are “*no inherent constraints on the meanings a sentence may have*” *[[44]](#footnote-44) .*

It is difficult to ascertain what exactly it is, that renders such a proposition “invalid”[[45]](#footnote-45) 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 and the Concept of Law.

It is within Fish’s book “*There’s No Such Thing As free Speech, and it’s a Good Thing, too”[[46]](#footnote-46)* that the picture of the anti-foundationalist concept of law becomes clearer, Priban’s critique begins with an extract in a 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”[[47]](#footnote-47)* a chapter, where Fish explores and criticises the jurisprudential theories of Posner, Dworkin and Rorty on the basis of concepts and ideas regarding his vision of law, that he sets out in earlier chapters. However it is concepts for these earlier chapters which Priban explores later in his critique, and contrasts to the Autopoietic social 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 to reader towards, as an end goal. However it can alternatively lead to some minor confusion, as the reader receives the concepts conclusions first, but the initial requisite 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.

Consequently I will depart from following Priban’s critique directly, and initially set out some of the elements of Fish’s anti-foundational concept of law, in order to better present some of the key concepts Priban returns to in his critical comparison.

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”[[48]](#footnote-48)*

Fish goes on to state that it is these inconsistent decisions, that essentially form 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*”[[49]](#footnote-49).

Such a statement, aids and supports a general understanding of the CLS perspective of law- i.e. that the law is a tool of power, and that tool in the construction of society needs to be consistent and correct, and that the operators of the tool, judges must not exceed their power, where doing so would risk damaging society, and consequently de-valuing the word of law.

Fish, in proposing his anti-foundationalist concept of law, examines aspects of the law and the CLS perspective, it is his agreement with the concepts of some theorists and philosophers, and the rationales for his disagreement with others, that help illustrate the concept of law both Fish and Priban seeks to describe.

The example of consideration in contract law is one of the areas Fish utilizes to 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*”[[50]](#footnote-50) 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 interpretation as a vital tool for understanding the change in perceptions of cultural constructs in the past, as a means of understanding the nature of the concept in the present[[51]](#footnote-51).

Consequently, Fish believes the law should not abandon its historical connections to the meaning of its concept, and additionally, legal meaning failing to be altered by time, is a criticism of the law reminiscent to many philosophical and jurisprudential perspectives. Priban also draws this out of Fish’s writing, “*Fish’s position suggests that no legal rules can be understood as fundamental”[[52]](#footnote-52),* he withholds his judgment on that specific point, but later when mentioning methods of Fish’s legal interpretation as opposed to Goodrich, he chooses to decline to mention what these actually are. One such method is Fish’s proposition of historical contextual interpretation, he elaborates further in the 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 additionally identifies that consideration in contract must be a concept that time cannot alter as “*it has no content”[[53]](#footnote-53)* 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”[[54]](#footnote-54).*

The conflation of morality with the law is a greater 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 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.”[[55]](#footnote-55)*  “*the law must define its self against…moral traditions*”[[56]](#footnote-56).

Consequently Fish’s interpretation for law directly opposes a natural legal theory based approach, but he 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*”[[57]](#footnote-57). 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 of law, to identify that “ *the inconsistency of doctrine is what enables law to work”[[58]](#footnote-58)* 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 that if it can be identified that the law is rhetorical, then it essentially could be improved, “*we will be better able to listen, deliberate and justify action”[[59]](#footnote-59).* However, Fish argues that knowledge of the laws rhetoricity would only change things if “*we were insulated against that rhetoricity*”[[60]](#footnote-60), 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 already present, has no effect on understanding, as it was already there and essentially changes noting.

Priban’s critique of Fish and his philosophical concepts, with regard to law, essentially begins 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*”[[61]](#footnote-61)

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, encompassing the dual meaning of pragmatic to further his concept of the law.

And therefore lies the difference in the two interpretations to concepts 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”[[62]](#footnote-62)* that it cannot be separated and autonomous, evidenced by the law’s apparent 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 radically different to that of the critical legal studies movement, yet it is in some aspects similar.

One of the 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”[[63]](#footnote-63)* 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*”[[64]](#footnote-64) (which are accused of veiling the law’s real nature) and “*their main function [which] is to develop social and political strategies*”[[65]](#footnote-65), where Goodrich and Fish’s concepts of law 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*”[[66]](#footnote-66) of the world, and portray a false, artificial veneer of stability. Goodrich’s arguments therefore is 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*”[[67]](#footnote-67).

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 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… always law with a capital “L”*”[[68]](#footnote-68) 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 grounds as illustrated by Fish’s critique of Steven Burton.

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*”[[69]](#footnote-69) . 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 cataloging all that the law has “forgotten”, a better concept of law can be improved by (potentially historic) elements of the catalog , and essentially “*bring into the foreground everything it labored to occlude*”[[70]](#footnote-70).

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”[[71]](#footnote-71).* 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.

Greater divergences from Goodrich and others perspective of legal theory can potentially then be seen in Fish’s concept of law, differences on the empiricist position in theory is one, as is the role of the law and the context in which it should be interpreted is another, with Fish taking a potentially neopragmatic stance in an illustration of the concept to law.

Neopragmatismis not a term Priban 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[[72]](#footnote-72).

Identifying Fish and the elements that contribute to his theories can be supported by exploring his arguments on a number of issues within his 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 understanding and contextual meaning 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*”[[73]](#footnote-73) 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*””[[74]](#footnote-74).

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*”[[75]](#footnote-75)

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*”[[76]](#footnote-76), but it is less of a suggestion and more akin to a declaration, the size of such a declaration mask’s the weight in carries on a first reading (“*there is no such thing as literal meaning”*) which could causes 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 Force of Law.

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[[77]](#footnote-77)).

Fish illustrates this in a number of ways, he initially states “*Interpretation is the force that resides within the law”[[78]](#footnote-78)* 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””[[79]](#footnote-79)* 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”[[80]](#footnote-80) remains just that, a dream”[[81]](#footnote-81).*

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[[82]](#footnote-82)*” . 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*”[[83]](#footnote-83), 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, by being unrestrained and having no literal or textual meaning any communication and conclusion arrived at, as a result will theoretically be 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[[84]](#footnote-84)*” if that individual is perpetually bound to follow the most convincing and forceful means of persuasion, thus if such an approach would be untenable outside of the arena of law, it seems society only obliges the law’s presence in its current position, and without a 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 likens Fish’s anti-foundationalist concept of force to the Foucauldian concept of discursive meaning and power[[85]](#footnote-85) (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”[[86]](#footnote-86)*
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 would have nothing inside it”[[87]](#footnote-87)*

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*”[[88]](#footnote-88), and subsequently “*the gun at your head, is your head*”[[89]](#footnote-89).

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*”[[90]](#footnote-90)

Consequently this is Fish’s expression of the external barrier referred to above, as it is the weight and

Consequently, the force of law, and the danger it brings is the connecting element to Fish’s perspective

There is always a gun at your head

The gun at your head is your head pp.520

To some extent, Fish has a frustratingly vague way of illustrating his anti-foundationalist concept of law, a frustration also evident in Priban’s article, where he latches Goodrich’s concept of law to that of Fish and contrasts the result against perspectives of other members of the British critical studies movement in a loose and general way, utilizing central concepts (and avoiding specifics) to mask the fact that Fish’s anti-foundationalist concept of law is (in terms of detail) less than clear, and further detail in the critique, lacking.

What can be identified however, is that Fish’s concept has at least two central elements to it. The first, is Fish’s literary theory, which revolves around his perspective of language, interpretation and context. At the center 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*”[[91]](#footnote-91) which are partially influenced by the deconstructive theories of Derrida[[92]](#footnote-92) 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 reading and interpretation of law, both specifically (such as in contract) and generally in the discussion of law as a social system.

# Chapter Four.

## Stanley Fish and Niklas Luhmann.

Structuralism argued that human culture may be understood by means of a structure-—modeled on language (i.e., structural linguistics)—that is distinct both from the organizations of reality and the organization of ideas and imagination—a “third order”. The precise nature of the revision or critique of structuralism differs with each post-structuralist author, though common themes include the rejection of the self-sufficiency of the structures that structuralism posits and an interrogation of the binary oppositions that constitute those structures.

Some commentators have criticised post-structuralism for being radically relativistic or nihilistic; others have objected to its extremity and linguistic complexity. Still others see it as a threat to traditional values or professional scholarly standards. Most so-called “post-structuralist” writers rejected the label, and there is no manifesto

has its own internal rules, a

with legal fictions being based on seemingly technical rationality.

And it is these legal fictions that hide the true nature of the law for Goodrich and others such as Costas Douzinas and Ronnie Warrington, suggesting from a British perspective of critical legal studies that “fiction” is the Additionally, Fish offers a direct comparison and criticism of Goodrich in the latter pages of his chapter The Law Wishes to Have a Formal Existence, in his book There’s No Such Thing as free Speech.

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3. J. Priban, Law and Critique Vol. IX no.2 [1998], pp. 252. [↑](#footnote-ref-3)
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41. Fish, S. *Is There a Text in This Class?*: The Authority of Interpretative Communities [1980] [↑](#footnote-ref-41)
42. *Ibid* pp.291 [↑](#footnote-ref-42)
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44. *Ibid 292.* [↑](#footnote-ref-44)
45. A question I will consequently attend to in the following chapter. [↑](#footnote-ref-45)
46. Fish, S. *There’s No Such Thing As free Speech, and it’s a Good Thing, too* [1994] [↑](#footnote-ref-46)
47. *Ibid* pp.221-222 [↑](#footnote-ref-47)
48. *Ibid* pp. 156 [↑](#footnote-ref-48)
49. *Ibid*. [↑](#footnote-ref-49)
50. *Supra* no.46 pp.157 [↑](#footnote-ref-50)
51. 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-51)
52. *Supra* no.3 pp.256 [↑](#footnote-ref-52)
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68. *Ibid.* pp. 255. [↑](#footnote-ref-68)
69. *Supra* no.46 pp. 177. [↑](#footnote-ref-69)
70. *Ibid* pp. 176 [↑](#footnote-ref-70)
71. *Ibid.* pp.177 [↑](#footnote-ref-71)
72. This area is discussed further in the following chapter. [↑](#footnote-ref-72)
73. *Supra* no.24 pp.4 [↑](#footnote-ref-73)
74. *Ibid.* pp.505 [↑](#footnote-ref-74)
75. *Ibid*. pp.360 [↑](#footnote-ref-75)
76. *Supra* no.3 pp. 256 [↑](#footnote-ref-76)
77. Hartain and positivist perspectives are to be addressed in the conclusion. [↑](#footnote-ref-77)
78. *Supra* no.41 pp.512 [↑](#footnote-ref-78)
79. *Ibid.* pp.516 [↑](#footnote-ref-79)
80. H.L.A Hart, The Concept of Law. pp.202 [↑](#footnote-ref-80)
81. *Supra* no.41 pp.516. [↑](#footnote-ref-81)
82. *Ibid.*  [↑](#footnote-ref-82)
83. Ibid. pp.517 [↑](#footnote-ref-83)
84. *Ibid.* [↑](#footnote-ref-84)
85. *Supra* no.3 pp.261 [↑](#footnote-ref-85)
86. *Supra* no.24 pp.519 [↑](#footnote-ref-86)
87. *Ibid.* [↑](#footnote-ref-87)
88. *Ibid.* pp. 520 [↑](#footnote-ref-88)
89. *Ibid.* [↑](#footnote-ref-89)
90. *Ibid.* [↑](#footnote-ref-90)
91. *Ibid.* pp.242 [↑](#footnote-ref-91)
92. Derrida with regards to Fish and deconstructionism is addressed in further detail in the proceeding chapters. [↑](#footnote-ref-92)