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Intellectual Authority and Institutional Authority

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> The studies of philosophy and eloquence are congenial to a popular state, which encourages the freedom of inquiry, and submits only to the force of persuasion.
>
> —Edward Gibbon[1]

> [W]e act in these matters not by authority of our competence but by force of our commissions.
>
> —Justice Robert H. Jackson[2]

This is an essay about the power of ideas and the influence of institutions. What Gibbon termed the pure "force of persuasion," unaided and unhindered by institutional context, I refer to as "intellectual authority."[3] This has been defined as "the authority exerted by arguments that make their way

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1. 7 Edward Gibbon, The History of the Decline and Fall of the Roman Empire 131 (Edinburgh, 1829).
2. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943).
3. See Charles W. Collier, The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship, 41 Duke L.J. 191, 206-23 (1991); cf. Jürgen Habermas, Wahrheitstheorien, *in* Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns, 3d ed., 161 (Frankfurt am Main, 1989): "Der Ausgang eines Diskurses kann weder durch logischen noch durch empirischen Zwang allein entschieden werden, sondern durch die 'Kraft des besseren Argumentes.' Diese Kraft nennen wir *rationale Motivation.*"

simply by virtue of a superior rationality and do not depend for their impact on the lines of power and influence operating in an institution."[4] The contrastive notion of "institutional authority" refers to the nonintellectual influence exerted by social, political, cultural, historical, legal, literary, educational, religious, and other institutions. The nonintellectual influence of *intellectual* institutions is a particularly interesting and perplexing subcategory of institutional authority. Law and literature, for example, both aspire (or have aspired) to be institutions in which intellectual authority is the coin of the realm.

In literary theory the classic claims to intellectual authority were articulated by Matthew Arnold, who emphasized in an oft-cited essay that

> criticism, real criticism . . . obeys an instinct prompting it to try to know the best that is known and thought in the world, irrespectively of practice, politics, and everything of the kind; and to value knowledge and thought as they approach this best, without the intrusion of any other considerations whatever.
>
> . . . .
>
> . . . No other criticism will ever attain any real authority or make any real way towards its end,—the creating a current of true and fresh ideas.[5]

Arnold went on to give a stirring description of the pure power of compelling ideas (and here he is less frequently quoted):

> That is what I call living by ideas: when one side of a question has long had your earnest support, when all your feelings are engaged, when you hear all round you no language but one, when your party talks this language like a steam-engine and can imagine no other,—still to be able to think, still to be irresistibly carried, if so it be, by the current of thought to the opposite side of the question . . . .[6]

As intellectual history progresses, Robert Hutchins suggests, "the voices in the Great Conversation tend more and more to speak in the present tense, as if all the authors were contemporaneous with one another, responding directly to each other's thought."[7]

In law, a forceful statement of the claims of intellectual authority can be found in the recent U.S. Supreme Court "flag-burning" case, in which the Court's newest member declared in an agonized concurrence:

> I write . . . with a keen sense that this case, like others before us from time to time, exacts its personal toll. . . .

4. Stanley Fish, Fish v. Fiss, 36 Stan. L. Rev. 1325, 1342 (1984) (summarizing Fiss and Toulmin).
   In the interest of full disclosure it should perhaps be noted that my interpretation of this article by Fish—and indeed the article itself—may be influenced by my having edited it for the *Stanford Law Review* in 1984.

5. Matthew Arnold, The Function of Criticism at the Present Time, *in* 3 The Complete Prose Works of Matthew Arnold, ed. R. H. Super, 268, 271 (London, 1973); cf. *id.* at 261:
   > It is the business of the critical power . . . "in all branches of knowledge, theology, philosophy, history, art, science, to see the object as in itself it really is." Thus it tends, at last, to make an intellectual situation of which the creative power can profitably avail itself. It tends to establish an order of ideas, if not absolutely true, yet true by comparison with that which it displaces; to make the best ideas prevail.

6. *Id.* at 267.

7. Robert Hutchins, Great Books 21 (New York, 1954).

> The case before us illustrates better than most that the judicial power is often difficult in its exercise. . . .
>
> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result. . . . This is one of those rare cases.[8]

Justice Kennedy follows in venerable footsteps; in 1824 Chief Justice John Marshall essentially announced (not long after asserting the Court's awesome power to review and nullify state and federal legislation) that there is no such thing as institutional authority in law: "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing."[9]

In the intervening time, to be sure, these claims of intellectual authority were placed seriously in question by generations of legal realists and, more recently, critical legal scholars, who argued (in effect) that whatever authority judicial pronouncements have is primarily if not exclusively institutional in nature.[10] And no less than in law, the intellectual claims in literary and intellectual history have not gone unchallenged. According to one recent pronouncement of humanist scholars, "[t]he challenge to claims of intellectual authority . . . issues from almost all areas of modern thought—science, psychology, feminism, linguistics, semiotics, and anthropology."[11] Indeed, the problem of intellectual authority lies at the very heart of the current debates over the curriculum, freedom of expression, and "political correctness" in the contemporary academy. As a leader of the "postmodern" literary establishment notes,

8. Texas v. Johnson, 491 U.S. 397, 421 (1989) (Kennedy, J., concurring); cf. *id.* ("With all respect to [the dissenting] views, I do not believe the Constitution gives us the right to rule as the dissenting Members of the Court urge, however painful this judgment is to announce. . . . The case here today forces recognition of the costs to which [our] beliefs commit us.").

9. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824); cf. *id.*:

> When [courts] are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

See also The Federalist No. 78, at 519 (Alexander Hamilton), ed. Paul Leicester Ford (New York, 1898) (emphasis in italics added) ("The judiciary . . . has *no influence* over either the sword or the purse; *no direction* either of the strength or of the wealth of the society; and can take *no active resolution whatever.* It may truly be said to have neither FORCE nor WILL, but merely judgment. . . .").

10. See, e.g., Herman Oliphant, A Return to Stare Decisis, 14 A.B.A. J. 71, 159 (1928); Max Radin, The Theory of Judicial Decision: Or How Judges Think, 11 A.B.A. J. 357 (1925); Note, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 Harv. L. Rev. 1669 (1982); Jeffrey A. Standen, Note, Critical Legal Studies as an Anti-Positivist Phenomenon, 72 Va. L. Rev. 983 (1986).

11. George Levine, Peter Brooks, Jonathan Culler, Marjorie Garber, E. Ann Kaplan & Catharine R. Stimpson, Speaking for the Humanities, American Council of Learned Societies Occasional Paper, No. 7, at 13 (1989).

> [L]aments about loss of authority . . . probably offer the key to what the debate is most profoundly about. The notion that study of the humanities used to represent, be based on, transmit, intellectual (and perhaps moral) authority reminds us that the humanities were traditionally held to represent the place of values in education.[12]

These claims and challenges suggest the parameters of the issues I shall be concerned with in this essay. Part I takes up the discussion of intellectual authority that has been pursued in legal and literary theory and points out the inadequacies of that discussion in the light of a broader view of intellectual history. Part II considers empirical studies of the phenomenon of institutional authority. Finally, Part III offers a positive and reconstructive vision of intellectual authority based on attempts to eliminate the effects of institutional authority.[13]

I. Does Intellectual Authority Exist?

Perhaps the most direct way to criticize, question, or challenge the distinction between intellectual and institutional authority is to deny that intellectual authority even exists; and one way to explore the phenomenon of intellectual authority is to examine the arguments of those who have denied that it exists. Stanley Fish, for example, dismisses "the authority exerted by arguments that make their way simply by virtue of a superior rationality and do not depend for their impact on the lines of power and influence operating in an institution" and declares: "That kind of authority, I submit, does not exist."[14]

Intellectual authority is said by Fish not to exist because it is dependent on and inseparable from institutional authority:

> [I]nstitutional facts are not external to the issue of intellectual authority, because the very shape of intellectual authority—in the form of "powerful" arguments and "decisive" evidence and "compelling" reasons—has been established (not for all time, but for a season) by the same processes that have established these facts . . . .[15]

But this claim quickly breaks down, once a sufficiently broad historical perspective is taken. Fish's concept of intellectual authority is too narrow and

12. Peter Brooks, Western Civ at Bay, Times Literary Supp., Jan. 25, 1991, at 5 (book review); cf. Roger Kimball, Letter to the Editor, Times Literary Supp., Feb. 8, 1991, at 14; Norman F. Cantor, Letter to the Editor, Times Literary Supp., Apr. 5, 1991, at 15; John Searle, The Storm over the University, N.Y. Rev. Books, Dec. 6, 1990, at 34 (book review); 'The Storm over the University': An Exchange, N.Y. Rev. Books, Feb. 14, 1991, at 48; C. Vann Woodward, Freedom & the Universities, N.Y. Rev. Books, July 18, 1991, at 32 (book review).

13. In this relatively short essay it will be necessary to introduce certain simplifying assumptions and distinctions that concededly do not capture the full complexity of the issues involved and that may suggest a neglect of historical conditions and context. For example, I shall inquire whether intellectual authority "exists" or "does not exist," whether certain authors are "right" or "wrong," and whether scholarly works are accepted for publication on the basis of their "intellectual content" as opposed to extraneous "institutional factors." I make these simplifying assumptions and distinctions in the hope that they will help clear the ground for more detailed, nuanced, and contextual work, which may eventually qualify the conclusions I reach here. It will be sufficient for present purposes if my arguments are persuasive at the level of generality at which they are made.

14. Stanley Fish, Fish v. Fiss, 36 Stan. L. Rev. 1325, 1342 (1984).

15. *Id.* at 1342-43.

short-term (note his disclaimer, "not for all time, but for a season"); it does not guard against fads, frauds, and fashions, which may well hold sway "for a season."

Thus, one way of criticizing Fish is to note that he fails to differentiate between the long term and the short term. In the long term, it may well be true that "there are no goals and reasons that are not institutional, that do not follow from the already-in-place assumptions, stipulated definitions, and categories of understanding of a socially organized activity."[16] An alleged "musical genius" who has *never*—i.e., over the course of centuries—gained the respect and recognition of other (institutionally) acknowledged musical geniuses is probably not a true musical genius. But "goals and reasons" that are in harmony with an institution's long-term "assumptions, stipulated definitions, and categories of understanding" may well conflict with the currently prevailing institutional consensus. The long run and the short run may diverge. In other words, the institutional imprimatur is no guarantee of intellectual authority (at least not in the short term); and true intellectual authority does not always promptly bring in its wake the institutional imprimatur.

Simply equating truth with institutional consensus would be, as Richard Posner rightly observes,

> a big mistake. It is not misusing the word "true" to say that "everyone except me believes the proposition *p*, but *p* is not true." Indeed, it would stifle inquiry to suppose that when consensus was achieved, truth had been found. The challenging of settled beliefs is an essential spur to intellectual progress. And this implies that settled beliefs are often false, as of course they are.[17]

The "intergenerational" consensus fortifies (or dispels) the momentary consensus of one generation; it varies the conditions and adds more perspectives and informed opinions, much as broader statistical sampling eventually confirms (or dilutes) the "interesting" pattern or tendency discerned in a small sample. This has sometimes been referred to as "the test of time."[18]

In discussing standards of intellectual merit and worth, Fish says that "it is only with reference to the articulation and hierarchies of a professional bureaucracy that a sense of the self and its worth—its merit—emerges and becomes measurable."[19] This is obviously problematic for the short term, and it is just as obvious that Fish has the short term in mind: "[T]he very shape of intellectual authority . . . has been established (not for all time, but for a season) by institutional processes . . . ."[20] Nothing, however, is more common in intellectual history than temporarily unrecognized worth, merit, or even greatness.

16. Stanley Fish, Anti-Professionalism, 7 Cardozo L. Rev. 645, 673-74 (1986).

17. Richard A. Posner, The Problems of Jurisprudence 113 (Cambridge, Mass., 1990).

18. See *id.* at 112-23 ("Submitting to the Test of Time").

19. Fish, *supra* note 16, at 675. For an ingenious Hegelian critique of Fish's article, see David Luban, *Fish v. Fish* or, Some Realism About Idealism, 7 Cardozo L. Rev. 693 (1986); see also Alessandra Lippucci, Surprised by Fish, 63 U. Colo. L. Rev. 1 (1992) (defending Fish by arguing that he should not be taken literally).

20. Fish, *supra* note 14, at 1342-43.

Schopenhauer made an important distinction in his *Aphorisms on Life's Wisdom* between "fame" and "that through which one earns it."[21] Clearly, the two do not always coincide. As Lessing observed, "Some people are famous, and others deserve to be"—*but are not.*[22] What does it mean to say that someone can "deserve" to be famous without actually being famous? It means that desert, merit, value, and intellectual authority can exist and be assessed *independently* of the prevailing institutional context. Fish repeatedly denies this—for him, "[t]hat kind of authority . . . does not exist"[23]—but history clearly shows otherwise. In fact, many of the most obvious discrepancies between intellectual and institutional authority have been corrected only gradually and grudgingly, over long—often desolate—historical expanses.[24]

Plato had Socrates say at his trial, after being condemned to death: "Well, gentlemen, for the sake of a very small gain in time you are going to earn the reputation—and the blame from those who wish to disparage our city—of having put Socrates to death, 'that wise man'—because they will say I am wise even if I am not, these people who want to find fault with you."[25] Bruno was burned alive at the stake in 1600 for various scientific heresies, yet "his conception is so powerful and so prophetic, so reasonable and so poetic that . . . we cannot but assign to Bruno a very important place in the history of the human mind."[26] Shakespeare's dramas "had, immediately after his death, to give place to those of Ben Jonson, Massinger, Beaumont and Fletcher, and to yield the supremacy for a hundred years."[27] During his lifetime,

> Bacon got no help from any public or private person for his instauration of the sciences. . . . A generation was to elapse before scientists, at home and abroad, hailing Bacon as a "new Aristotle" and "nature's secretary," undertook at his bidding and according to his directions the collecting of myriad natural histories.[28]

Descartes was "[t]ormented and slandered by foreigners, and rather poorly received by his compatriots. [He] went to die in Sweden, doubtless far from

21. 4 Arthur Schopenhauer, Sämtliche Werke, ed. Wolfgang von Lohneysen, 474 (Stuttgart, 1960); cf. *id.* at 477 ("The worth of fame lies in earning it, and this is its own reward.").

22. *Quoted in id.* at 474.

23. Fish, *supra* note 14, at 1342.

24. See Charles Collier, History, Culture, and Communication, 20 Hist. & Theory 150, 164-67 (1981).

25. The Collected Dialogues of Plato, Socrates' Defense (Apology), eds. Edith Hamilton & Huntington Cairns, 38c (Princeton, 1969). For an interesting discussion of legal issues raised by the trial of Socrates, see Bayly Turlington, Socrates's Courtroom Ethics, 59 A.B.A. J. 505 (1973).

26. Alexandre Koyré, From the Closed World to the Infinite Universe 54 (Baltimore, 1957).

27. Arthur Schopenhauer, The Art of Literature, *in* Complete Essays of Schopenhauer, trans. T. Bailey Saunders, 67 (London, 1942).

28. Fulton H. Anderson, Editor's Introduction, *in* Francis Bacon, The New Organon, ed. Fulton H. Anderson, at xxviii-xxix (Indianapolis, 1960); cf. Jean Le Rond d'Alembert, Preliminary Discourse to the Encyclopedia of Diderot, trans. Richard N. Schwab, 76 (Indianapolis, 1963) ("[A]pparently circumstances are not such that a philosopher who is content to say to men: 'Here is the little that you have learned, there is what remains for you to find,' is destined to cause much stir among his contemporaries.").

anticipating the brilliant success that his opinions would one day have."[29] Although Newton lived for almost forty years after the appearance of the *Principia*, "his teaching was, when he died, only to some extent accepted in his own country, whilst outside England he counted scarcely twenty adherents."[30] Leibniz "felt keenly the neglect in which his last years were passed," and "[n]either at Berlin, in the academy which he had founded, nor in London, whither his sovereign had gone to rule, was any notice taken of his death."[31] Mozart was buried in an unmarked common grave, and "no one, for years, cared to find out where Mozart was buried: as a result, we know only the approximate section of the cemetery under which, somewhere, music's greatest genius lies."[32]

Fish wants to claim, in effect, that "truth claims" are indexed to very small or short units of time. Earlier (in acknowledging that such claims are indeed indexed to time, but only in the long run) I stated that an "alleged 'musical genius' who has *never*—i.e., over the course of centuries—gained the respect and recognition of other (institutionally) acknowledged musical geniuses is probably not a true musical genius." Fish might respond that the identification of the proper unit of time is itself institutionally rather than intellectually driven. What, indeed, makes centuries a privileged unit of time? Why not use, say, millennia? From the perspective of future millennia, the entire past few centuries of musical history might seem as short and unrepresentative as Mozart's life-span seems to us.

One answer is that if we had millennia we could use millennia. (Indeed, in the case of literature or philosophy, that might be the better perspective.) But the very idea of "music," as we know and recognize it, has a definite, finite history. It is possible that later ages will consider our "music" to be nothing more than a quaint relic or historical curiosity. In the meantime, though, there is still an important difference between saying "During his lifetime, Mozart was not appreciated, but in the centuries since then he has come to be recognized as one of music's greatest geniuses," and saying "Mozart has been

29. D'Alembert, *supra* note 28, at 78; cf. *id.* at 77 (Descartes "experienced even in his own life what ordinarily happens to any man who has too marked an ascendancy over others. He had few enthusiasts and many enemies.").

30. Schopenhauer, *supra* note 27, at 68; cf. Giacomo Leopardi, Parini's Discourse on Glory, *in* Essays and Dialogues, trans. Giovanni Cecchetti, 245 (Berkeley, 1982) ("Descartes, who marvelously broadened the field of geometry by applying algebra to it and by other means, was understood by only a few of his contemporaries. The same was the case with Newton.").

31. 13 Encyclopaedia Britannica 886, 885 (Chicago, 1956).

32. H. Robbins Landon, 1791: Mozart's Last Year 170 (London, 1988); cf. Wolfgang Hildesheimer, Mozart, trans. Marion Faber, 366 (New York, 1982):

> [H]is world, which, to the end, consisted only of his city, the scene of his futile efforts . . . had scorned what he offered, quashed his aspirations, and rejected his applications. . . . Here and there the city remembered him, but then again failed to appreciate him; it favored inferior musicians, who surpassed him.

See also Norbert Elias, Mozart: Zur Soziologie eines Genies (Frankfurt am Main, 1991); Erich Leinsdorf, Mostly Miraculous, N.Y. Times Book Rev., Feb. 25, 1990, at 7, col. 2 (book review) ("[E]ven Theodor Adorno claimed that the world let Mozart starve so it could elevate him to Olympus after his death."); but see also Volkmar Braunbehrens, Mozart in Vienna: 1781-1791, trans. Timothy Bell, 413-24 (New York, 1990).

considered a musical genius for the last few centuries, but there is no telling what future millennia will think." The latter perspective makes all discussion (of Mozart at least) pointless, and no competent scholar of Mozart would adopt it. What is needed is a perspective "of the middle range," a perspective from which one can say that Mozart's contemporaries were mistaken or misguided, without worrying about the perspective of God. (These issues are discussed in more detail toward the end of Part III.)

In law, the conceptual analogue to "the test of time" is the doctrine of precedent, according to which the mere fact that a judge has decided a case a certain way (and *a fortiori* if subsequent judges have followed that decision) is itself a reason for deciding later cases the same way.[33] At first glance, this practice appears to reflect no more than the exercise of pure institutional authority, which perhaps explains Oliver Wendell Holmes's famous protest that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[34] In a very real sense the conflict between intellectual authority and institutional authority is played out in the reconsideration and overruling of legal decisions.

What does it mean to say that a judicial decision has not withstood the test of time? It might mean (as Chief Justice Rehnquist suggests) that it was "badly reasoned,"[35] or even (as Justice Souter writes) that the case was simply "wrongly decided."[36] These would be claims that the validity of judicial decision making indeed rests on what I have termed intellectual authority: "badly reasoned" or "wrongly decided" cases get no help from the doctrine of precedent; they stand or fall strictly on their intellectual merits. Yet an alternative and perhaps deeper gloss has always seen in the precipitate overruling of recent decisions a distinctly anti-intellectual, willful, unabashedly "political" force at work, and it is easy to multiply examples to which this reading convincingly applies.[37] Claims of reasonable reliance and the need for stability and predictability in legal doctrine clearly must be recognized too, though the policy discussion of those issues ranges too far afield to be discussed adequately here.[38] Suffice it to say, however, that Justice Brandeis went to the institutional extreme in maintaining that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[39]

33. For discussions of these issues, see Posner, *supra* note 17, at 90 n.35, 116-23; Collier, *supra* note 3, at 206-23.

34. O. W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

35. Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991).

36. *Id.* at 2614 (Souter, J., concurring).

37. See, e.g., *id.* at 2608 ("We are now of the view that . . . ."); Walton v. Arizona, 497 U.S. 639 (1990); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); National League of Cities v. Usery, 426 U.S. 833 (1976); cf. Jerold H. Israel, *Gideon v. Wainwright:* The "Art" of Overruling, 1963 Sup. Ct. Rev. 211; Collier, *supra* note 3, at 223-44.

38. See Charles W. Collier, Precedent and Legal Authority: A Critical History, 1988 Wis. L. Rev. 771.

39. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

An intermediate position between these untenable extremes would reserve reasoned overruling for those relatively infrequent occasions when social or economic changes of a substantial and long-term nature have put earlier legal decisions demonstrably beyond the pale. Decisions condoning, for example, racial segregation (e.g., *Plessy v. Ferguson*), gender discrimination (e.g., *Bradwell v. Illinois*), and the prohibition of labor legislation (e.g., *Lochner v. New York*) belong to this genre; they are the discarded detritus left behind by "the evolving standards of decency that mark the progress of a maturing society."[40] This intermediate position grants to judicial precedents a certain presumption of institutional inertia, subject only to critical reexamination and an intellectual check in the long run, if and as relevant conditions change.

In addition to "precedential authority" there is another, more direct form of authority wielded in the law: the machinery of a court that backs up judicial decrees and secures compliance with them. According to Fish, influential scholars have this kind of authority too:

> They can influence decisions about tenure, promotion, publications, grants, leaves, appointments, prizes, teaching assignments, etc. Although the "compliance" secured by these and other means is more diffuse and less direct than the compliance secured by a judge, it is rooted in authority nevertheless, and this authority, like that wielded in the law, is *at once* intellectual and institutional.[41]

Fish's discussion seems to suggest that intellectual authority may sometimes be accompanied by institutional authority, which is not surprising. But that does not mean that there is no such thing as intellectual authority (which Fish says "does not exist"). Owen Fiss is also on shaky ground in claiming that "the claim of authoritativeness, whether it be predicated on virtue or power . . . is sufficient to distinguish the judge from the literary critic or moral philosopher *who must rely on intellectual authority alone.*"[42] Unlike law, which has institutional authority even if it lacks intellectual authority (e.g., *Plessy v. Ferguson*), in the humanities one can have intellectual authority without institutional authority (e.g., Socrates), or one can have both (Fish's point).[43] So, Fiss errs in suggesting that institutional and intellectual authority can never be together; Fish errs in suggesting that they can never be apart.

Fish implies that the institutional authority of influential scholars is, so to speak, coextensive with their intellectual authority (or perhaps even contributes to it): the "weight" of their influence is "inseparable from the 'intellectual' decision to 'comply' with what they have said."[44] But this notion is absolutely suspect and even intellectually dangerous, as a long and venerable tradition of informed discussion demonstrates.

40. Trop v. Dulles, 356 U.S. 86, 101 (1958).

41. Fish, *supra* note 14, at 1343.

42. Owen M. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739, 757 (1982) (emphasis added).

43. See also Paul Brest, Interpretation and Interest, 34 Stan. L. Rev. 765, 770 (1982) (suggesting that intellectual authority may be accompanied by institutional authority).

44. Fish, *supra* note 14, at 1343.

The archetypal image of intellectual authority is that of the blindfolded woman holding scales and sword and administering justice "without fear or favor."[45] Self-imposed blindness is indeed a valued procedure for ensuring fairness and impartiality as well as a splendid metaphor for abstracting from irrelevant or biasing "institutional" factors. Well-known examples include Rawls's "veil of ignorance,"[46] the standard "double blind" experimental procedure,[47] the secret ballot, the use of anonymous examination numbers,[48] the numbered protocols used in professional wine tasting and judging, and "blind reviewing" of manuscripts by scholarly journals.[49] Other well-known ways of ensuring that decisions are made on the basis of intellectual merit are conflict-of-interest rules,[50] the ABA Model Code of Judicial Conduct,[51] and the AALS Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities.[52] Similarly motivated are the usual professional practices of disclosing one's relationship to an author or even to a manuscript when reviewing writings for purposes of appointment, promotion, and tenure; attempts of graduate and professional schools to encourage relatively objective and disinterested reference letters in support of applicants for admission (and to discount those that obviously are not); and the German policy against *Hausberufung* (appointment of internal candidates).[53] Many of

45. See Dennis E. Curtis & Judith Resnik, Images of Justice, 96 Yale L.J. 1727 (1987).

46. See John Rawls, A Theory of Justice 136-42 (Cambridge, Mass., 1971) (theoretical precondition of moral reasoning and debate).

47. Neither researchers nor subjects know which subjects are receiving the tested substance and which are receiving a placebo.

48. This is a standard procedure in virtually all law schools.

49. Blind reviewing is discussed in more detail *infra* part III.

50. See Medical Researchers Fight Conflict-of-Interest Rules, L.A. Times, Nov. 24, 1989, at A4 (referring to "a set of proposed federal conflict-of-interest rules," i.e., "draft regulations . . . proposed by the National Institutes of Health and the Alcohol, Drug Abuse and Mental Health Administration"); U.S. Scraps Rules on Conflicts in Health Research, N.Y. Times, Dec. 30, 1989, at 26 (nat'l ed.); Is Science for Sale?, 135 Cong. Rec. D639 (daily ed. June 13, 1989) (noting hearings before Subcommittee on Human Resources and Intergovernmental Relations, House Committee on Government Operations, on "Is Science for Sale? Conflicts of Interest vs. The Public Interest").

51. Model Code of Judicial Conduct (ABA Final Draft, 1989); John T. Noonan, Jr., Judicial Impartiality and the Judiciary Act of 1789, 14 Nova L. Rev. 123 (1989); Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435 (1966); Peter David Blanck, Robert Rosenthal & La Doris Hazzard Cornell, Note, The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials, 38 Stan. L. Rev. 89 (1985).

> A 1974 law requires all Federal judges to disqualify themselves in any case in which their "impartiality might be reasonably questioned." This general duty is supplemented in the law by a long list of particular circumstances in which recusal is mandatory, including any financial interest in the case, personal knowledge of the dispute or a blood relationship with a lawyer representing any party.

Linda Greenhouse, Questions for a Reticent High Court, N.Y. Times, Nov. 22, 1989, at A22. See 28 U.S.C. § 455 (1988) ("Disqualification of justice, judge, or magistrate"); ABA Code of Judicial Conduct Canon 3(c); cf. John T. Noonan, Jr., Persons and Masks of the Law 173 (New York, 1976) (on "The Indispensability of Impersonality").

52. Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities, AALS Newsl., Feb. 1990, at 14.

53. On the "meritocratic" ideal, see Robert K. Merton, Social Theory and Social Structure, enl. ed., 607, 612-14 (New York, 1968) (elaborating values of universalism and disinterestedness).

these are standard practices or unwritten, unspoken rules; they are commonplaces of life as we know it.

It is almost as though Fish is simply ignorant of or (more likely) uninterested in the elementary rules of human psychology, such as the fact that people tend to favor their "home team" (no matter how bad it is) and to think less highly of "outsiders."[54] But instead of simply viewing Fish as incredibly naive, one may also view him as stubbornly challenging the whole theoretical basis of intellectual authority and of attempts to eliminate the "bias" of institutional authority. That sort of challenge would merit a considered response. Fortunately, these matters have been studied extensively and submitted to rigorous empirical and experimental scientific examination. The following sections analyze the results of that scientific work.

II. Social Science and the Empirical Study of Institutional Authority

A. Judgmental Heuristics or "Rules of Thumb"

Consider the case of Ann, who is trying to decide how to invest her money.[55] Late one night a friend presents her with what appears, potentially at least, to be an excellent investment opportunity. Unfortunately, however, the offer is a very complicated one, it must be decided on that very night, and Ann is very tired and sleepy. She tells her friend that she is too tired and sleepy to make a decision. He points out that not deciding is tantamount to deciding to reject the offer, which may be a very good one. Ann replies that she is not rejecting the offer on its merits but because she cannot trust her own judgment at the moment. Her friend responds that this is unreasonable because it violates the following principle of rational decision making: *One ought always, all things considered, to do whatever one ought to do on the balance of reasons.* Being tired, sleepy, and out of time do not bear on the merits of the investment proposition, but Ann insists that they are reasons—though not the sort recognized in her friend's principle of rational decision making—for not *considering* the merits of the offer, i.e., for not acting "on the balance of reasons." In a sense, she claims to be rationally justified in not acting completely "rationally."

Ann, we may say, is acting on a heuristic or "rule of thumb" (probably something like: "When you can't properly evaluate an investment offer, reject it").[56] These are time- and labor-saving devices that usually, though not always,

54. See, e.g., Robert K. Merton, Insiders and Outsiders: A Chapter in the Sociology of Knowledge, 78 Am. J. Soc. 9 (1972); Norbert Elias & John L. Scotson, Etablierte und Aussenseiter (Frankfurt am Main, 1990); T. W. Adorno, Else Frenkel-Brunswik, Daniel J. Levinson & R. Nevitt Sanford, The Authoritarian Personality (New York, 1950); Gordon W. Allport, The Nature of Prejudice (New York, 1954); Gunnar Myrdal, An American Dilemma (New York, 1944); Robert S. Lynd & Helen Merrell Lynd, Middletown (New York, 1929); Oxford English Dictionary, compact ed., 2023 (New York, 1971) (defining "outlandish" as "unfamiliar, strange; *hence,* odd, bizarre, uncouth" and "far removed from civilization (now usually in a derogatory sense)" [emphasis added]).

55. This example is taken from Joseph Raz, Practical Reason and Norms 36-38 (Princeton, 1990). I thank my friend Ann Woolhandler for the use of her name in this example.

56. See *id.* at 59-62; see generally Herbert Simon, Models of Man (New York, 1957).

help us avoid serious error. In any event, they spare us the trouble of reexamining every new situation afresh on its merits.[57] "Fact-finding and evaluating the different reasons for action consume time and effort and these are costs which even under conditions of infallibility will often outweigh the marginal benefits which in many cases ensue from engaging in a complete assessment of the situation on its merits."[58] Even under conditions of complete rationality and complete information, then, there would still be a need for heuristics or rules of thumb. Nevertheless, this does not mean that there are not better or worse rules of thumb, or that we cannot critically examine and improve them, or that we should not carefully avoid extending them beyond their range of valid application, or that there are only rules of thumb (Fish's position, in effect).

B. The Problem of Bias and the "Halo Effect"

The analysis of heuristics and rules of thumb is brought into somewhat sharper focus with the documentation of the *halo effect,* which has been studied extensively by social psychologists. With the halo effect, a positive overall impression is illegitimately extended to judgments of specific attributes, or one form of excellence or superiority is presumed to implicate others (even when it really does not, as can be determined by separate and independent measurement).

> The halo effect may be thought of as a special case of the phenomena which result from the *logical error*—the tendency to see different traits as "belonging together" when they logically do not . . . . When the halo effect occurs, the error consists of assuming the presence of many positive traits from the existence of one favorable characteristic.[59]

As early as 1920 Edward Thorndike found a "constant error toward suffusing ratings of special features with a halo belonging to the individual as a whole."[60] Even very conscientious army officers who were asked to rate their subordinates as to intelligence, physique, leadership, and character were "unable to analyze out these different aspects of the person's nature and achievement and rate each in independence of the others."[61] The correlations

57. See John Stuart Mill, A System of Logic, 9th ed., bk. 6, ch. 12, § 3, at 549 (London, 1875):
> By a wise practitioner . . . rules of conduct will only be considered as provisional. Being made for the most numerous cases, or for those of most ordinary occurrence, they point out the manner in which it will be least perilous to act, where time or means do not exist for analysing the actual circumstances of the case, or where we cannot trust our judgment in estimating them.

58. Raz, *supra* note 55, at 60; cf. Lola L. Lopes, The Rhetoric of Irrationality, 1 Theory & Psychol. 65, 68 (1991) ("In broad terms, heuristic methods are quick-and-not-too-dirty procedural tricks that usually yield acceptable solutions to problems at noticeably less cost than is required by alternative methods (called algorithms) that guarantee optimal solutions. In other words, heuristics are methods that achieve efficiency by risking failure.").

59. Teresa Amabile & Albert H. Hastorf, Person Perception, *in* Bernard Seidenberg & Alvin M. Snadowsky, Social Psychology 247 (New York, 1976).

60. Edward L. Thorndike, A Constant Error in Psychological Ratings, 4 J. Applied Psychol. 25 (1920).

61. *Id.* at 25.

reported were all much too high, as determined by separate and independent testing, and the correlations were much too even; intelligence, for example, was about evenly correlated with physique, leadership, and character, when in reality "Intelligence and Character or Intelligence and Leadership should give about three times as close a correlation as Intelligence and Physique."[62] Thorndike concluded that "[o]bviously a halo of general merit is extended to influence the rating for the special ability, or vice versa."[63]

In other studies of the halo effect, the general reputation of various countries' products has been shown to affect specific product evaluations; when consumers were not familiar with a certain brand, "country image" served as a halo under which they formed an attitude.[64] Another common finding is that physical attractiveness produces a halo that favorably influences impressions of talent, kindness, honesty, and intelligence.[65] An "institutional halo" has been shown to dominate the rankings of individual programs or departments of universities, and sometimes very prestigious universities have been highly rated for programs or departments that they do not even have![66] In one study, Harvard, Stanford, Columbia, Chicago, and Northwestern were named as having undergraduate business schools among the twelve best in the nation by senior personnel executives, who "unfortunately overlook[ed] the fact that none of these institutions even *has* an undergraduate school of business. . . . The ranking of five universities without business programs among schools with the best undergraduate business programs is powerful evidence that the halo effect influences rankings."[67] These are just a few of the many areas in which the halo effect has been observed and documented as a basic factor in human psychology.[68]

C. The Study of Obedience in Social Psychology

The study of obedience in social psychology brings the empirical study of institutional authority into even sharper focus. The classic studies are those conducted by Stanley Milgram.[69] In a series of truly disturbing experiments,

62. *Id.*

63. *Id.* at 27.

64. See S. Min Han, Country Image: Halo or Summary Construct? 26 J. Marketing Res. 222 (1989) (studying 116 consumers' evaluations of television sets and automobiles from the U.S., Japan, and Korea).

65. See, e.g., Robert B. Cialdini, Influence: Science and Practice, 2d ed., 161-63 (New York, 1988) (citing sources).

66. See James S. Fairweather, Reputational Quality of Academic Programs: The Institutional Halo, 28 Res. Higher Educ. 345 (1988); Lyle V. Jones, Gardner Lindzey & Porter E. Coggeshall, An Assessment of Research-Doctorate Programs in the United States: Engineering (Washington, 1982).

67. David S. Webster, Academic Quality Rankings of American Colleges and Universities 142-43 (Springfield, Ill., 1986); see J. David Hunger & Thomas L. Wheelen, A Performance Appraisal of Undergraduate Business Education, 19 Hum. Resource Mgmt. 24 (1980).

68. See generally William H. Cooper, Ubiquitous Halo, 90 Psychol. Bull. 218 (1981).

69. See Stanley Milgram, Obedience to Authority (New York, 1974); Some Conditions of Obedience and Disobedience to Authority, 18 Human Rel. 57 (1965); and Behavioral Study of Obedience, 67 J. Abnormal & Soc. Psychol. 371 (1963).

Milgram showed the remarkable extent to which the halo of "scientific authority" obscured and distorted human judgment on matters of life and death.[70]

Milgram recruited unsuspecting volunteers to assume the role of a "teacher" in a test of learning. The "teacher" was asked to pose a series of prepared questions to a "learner" and to administer an electrical shock to the learner if he answered incorrectly. Milgram presented the experiment to the teacher as a study of the effects of punishment, or "negative reinforcement," on memory and learning. Actually, Milgram was testing the teacher for his willingness to administer the electrical shocks. The "learner" was a trained actor and a member of the experimental team who did not actually receive any shocks, although almost all the teachers thought he did.[71]

Milgram's experiments demonstrate the important effects of institutional authority on judgment and obedience. The remarkable level of obedience—which was consistently higher, by degrees of magnitude, than what trained psychologists predicted beforehand—depended on the extent to which the subjects perceived their actions as subject to that authority.[72] Other rival

70. See Charles Collier, Note, The Improper Use of Presumptions in Recent Criminal Law Adjudication, 38 Stan. L. Rev. 423, 442-45 (1986).

71. See Milgram, Obedience to Authority, *supra* note 69, at 171-74. The "shocks" were given in a sequence running from 15 to 450 volts in 15-volt intervals. *Id.* at 20. The voltage levels were clearly displayed on the experimental apparatus used by the teacher, as were verbal designations ranging from "slight shock" (15-60 volts) to "danger: severe shock" (375-420 volts). *Id.* at 20, 29. For every wrong answer, the next highest shock in the series was to be administered. *Id.* at 20-21.

    The most important version of the experiment was one in which the teacher could hear the learner's verbal protests from an adjoining room. The learner's protests began at 120 volts with complaints, followed by demands to be released from the experiment (150 volts), agonized shouts (270 volts), refusal to answer further questions (300 volts), violent, vehement, and prolonged screams (315 volts), followed by dead silence thereafter (330 volts). *Id.* at 23.

    In these circumstances, the average level of highest shock administered was 368 volts, and 25 out of 40 subjects proceeded all the way up to the maximum level of 450 volts. *Id.* at 35. Some continued to administer shocks on the assumption that the "learner" was by then dead. See *id.* at 76, 87.

    The experimental supervisor was an "impassive" and "somewhat stern" man dressed in a grey technician's coat. *Id.* at 16. If the subjects hesitated before administering a shock, the supervisor would calmly advise them that they were required to continue, and that the shocks, though painful, would cause "no permanent tissue damage." *Id.* at 19, 21. Further, when the subjects hesitated, the supervisor would respond with a carefully tailored oral "prod," ranging from "Please continue," to "You have no other choice, you *must* go on." The supervisor maintained at all times a professional, "scientific" manner and always spoke in an even, unemotional tone of voice. *Id.* at 21.

72. See *id.* at 153-64; *id.* at 27-31 (in separate surveys, psychiatrists, college students, and middle-class adults predicted, on average, that the maximum shock level they themselves would administer in the experiment would be about 120-35 volts; when asked to predict how other people would perform, "[t]hey predict that virtually all subjects will refuse to obey the experimenter; only a pathological fringe, not exceeding one or two per cent, was expected to proceed to the end of the shockboard."); Lee Ross & Craig A. Anderson, Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments, *in* Judgment Under Uncertainty: Heuristics and Biases, eds. Daniel Kahneman, Paul Slovic & Amos Tversky, 136-37 & fig. 1 (Cambridge, England, 1982) (providing direct evidence that observers ignore or underestimate the situational forces that compelled obedience in Milgram's experiments).

explanations for the results—e.g., the view that people are naturally cruel or sadistic—were disproved by careful variations of the basic experiment in which the subjects were able to choose whatever level of punishment they deemed appropriate.[73] "With numbing regularity," observed Milgram, ordinary, decent, and responsible citizens were "seduced by the trappings of authority," by the control of their perceptions, and by their "uncritical acceptance of the experimenter's definition of the situation" into performing harsh and punitive acts they otherwise would never have performed.[74] Milgram induced in his subjects the impression that their actions were "mandated" by authority when, in fact, their participation in the experiment was wholly voluntary and could be terminated by them at any time.[75]

Milgram's experiments were conducted in a modern scientific laboratory by trained technicians who presided over a formidable array of scientific equipment. Undoubtedly, this environment enhanced the "halo" of authority and contributed to the results. The "teachers'" expectations in these circumstances must have been that the "authorities" exercised rightful control and legitimate power. These expectations were reinforced for the subjects by the apparently logical connection between the actions they were being asked to perform and the scientific goal of increasing knowledge about the nature of memory and learning.[76] In short, "Milgram found that a sufficiently 'institu-

73. These versions served as a crucial control on the experimental findings. Milgram, Obedience to Authority, *supra* note 69, at 70-72. In the "control" situation "the great majority of subjects delivered the very lowest shocks to the victim when the choice was left up to them." *Id.* at 72.

74. *Id.* at 123.

75. *Id.* at 40-41:

> The over-all level of obedience, across all four experimental variations, requires comment. Subjects have learned from childhood that it is a fundamental breach of moral conduct to hurt another person against his will. Yet, almost half the subjects abandon this tenet in following the instructions of an authority who has no special powers to enforce his commands. To disobey would bring no material loss or punishment.

See also *id.* at 51.

In perhaps the most pitiful and telling reaction to this false sense of obligation, many of Milgram's subjects offered to return the $4.50 they had already been paid for participating, if only they could discontinue shocking what they thought was a dying man. When the offers were refused, they continued their grim task. *Id.* at 47.

76. Although particular instructions of the authorities might be questioned in this context, in some sense they all seem at least "rationally related" to the general goal of scientific progress. Cf. *id.* at 141, 176, 187, 208 n.14. Residual, "background" authority is supplied in turn by such intangibles as a general ideological climate favorable to science as well as the "broad institutional accord" that permits such activities to go on at all (e.g., the social approval implied in the very fact that the experiment was being conducted and tolerated in a civilized country). See *id.* at 142-43.

Milgram's experiments have been replicated many times by researchers in different countries, often with results indicating even higher levels of obedience than Milgram found. See David Rosenhan, Some Origins of Concern for Others, *in* Trends and Issues in Developmental Psychology, eds. Paul Mussen, Jonas Langer & Martin Covington, 134 (New York, 1969); David Mark Mantell, The Potential for Violence in Germany, 27 J. Soc. Issues, no. 4, at 101 (1971); Leonardo Ancona & Rosetta Pareyson, Contributo allo studio della aggressione: La dinamica della obbedienza distruttiva, 29 Archivio di psicologia neurologia e psichiatria 340 (1968); Wesley Kilham & Leon Mann, Level of Destructive Obedience as a Function of Transmittor and Executant Roles in the Milgram Obedience Paradigm, 29 J. Personality & Soc. Psychol. 696 (1974).

tional' setting can induce appallingly compliant behavior from many apparently normal people."[77]

Milgram's experiments were also conducted in an atmosphere of great pressure, both temporal and psychological. The experiments were very smoothly run, highly engineered, "slick" productions. They took place over a thirty-minute time period, in a confined and narrow context that afforded no time for thought, no opportunity for exploration or reflection.[78] It may be that Milgram's results are strictly limited to these conditions; under these conditions, and perhaps only under these conditions, subjects rely on institutional authority to the extent documented by Milgram.

Yet this is not as great a limitation as it might at first seem. As explained above, the reliance on heuristics and "rules of thumb" would be totally unjustified only "when one has all the time in the world on hand, can call on the advice of the best experts, and when using up time, and the time of experts, has no other undesirable results."[79] Needless to say, such conditions rarely if ever obtain. Even under relatively normal circumstances, the claims of institutional authority carry at least provisional justification. Following the advice of better informed and more experienced "authorities" (who cannot or will not share their information and experience with us) spares us the time and trouble of reexamining every decision on the merits *au fond.* Further, coordinating the actions of many people may be possible only if they delegate some authority of decision and surrender some rights to assess the soundness of various courses of action and to determine for themselves what to do.[80] Under these relatively normal conditions, the fact that a superior has issued a command or order is a reason, though not necessarily an overriding reason, for obeying it; and it is a reason that does not go to the merits of the decision in the sense of rationally justifying it "on the balance of reasons."

In other words, yielding to the advice or commands of authorities is another practical heuristic or "rule of thumb." Even under normal conditions we are often justified (in this sense) in following institutional authority. The pressure, temporal as well as psychological, generated in the Milgram experiments is not an ancillary or incidental but rather an integral and exemplary feature of our relationship to authority. Milgram's experiments simply show what happens in the extreme case, and they demonstrate the extreme danger inherent in the complete and uncritical reliance on institutional authority.[81]

77. Daniel Dennett, Elbow Room: The Varieties of Free Will Worth Wanting 13 n.5 (Cambridge, Mass., 1984).

78. Letter from David Rosenhan (Oct. 24, 1990); see also Milgram, Behavioral Study of Obedience, *supra* note 69, at 378.

79. Raz, *supra* note 55, at 59.

80. See *id.* at 62-65; Joseph Raz, The Morality of Freedom 75 (Oxford, 1986); Thomas Hobbes, The Elements of Law, ed. Ferdinand Tönnies, pt. 1, ch. 19 & pt. 2, ch. 1, 2d ed. (New York, 1969), and Leviathan ch. 17, ed. Herbert W. Schneider (Indianapolis, 1958); John Locke, The Second Treatise of Government, ed. J. W. Gough, chs. 7-8 (Oxford, 1952).

81. See generally Herbert C. Kelman & V. Lee Hamilton, Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility (New Haven, 1989).

In an earlier study I explored the legal implications of Milgram's experiments and showed how the halo of *judicial* authority influences jury decision making in a closely analogous way.[82] The "darker side" of scientific authority documented by Milgram is indeed merely a special case of what I have termed "institutional authority." The biasing halo of institutional science's "trappings of authority" operates very much like that of the judiciary to secure a form and degree of compliance that cannot be justified on intellectual grounds and does not stand up to even the most rudimentary intellectual scrutiny. In another previous study I documented in some detail my suggestion that the authority of *adjudication* is largely, if not exclusively, "institutional" in nature.[83] But these conclusions are already intimated in the social scientific documentation of the "halo effect"; and Milgram's studies provide final and deeply disturbing demonstrations of the vulnerability and frailty of human intellectual judgment in the face of a powerful show of institutional authority. Thus, far from being unproblematic or even benign, institutional authority poses enduring and perplexing problems in a number of important contexts.[84]

III. The "Veil of Ignorance" as a Test of Intellectual Authority

I turn now from the pervasive influence of institutional authority, as documented by empirical social science, to some attempts to *eliminate* the bias of institutional authority. One of the most famous (and most general) attempts to isolate and eliminate bias, interests, and other forms of institutional authority from the process of intellectual deliberation is to be found in John Rawls's *A Theory of Justice*.[85] In that work Rawls elaborates, as a key methodological assumption, the notion of a "veil of ignorance" that will surround participants in a hypothetical debate over the optimal polity. Rawls's aim is to "generalize and carr[y] to a higher level of abstraction" traditional theories of the social contract. To do this, "we are not to think of the original contract as one to enter a particular society or to set up a particular form of government." Rather, the objects of the original agreement are the principles of justice "that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association."[86] Rawls notes further that "[t]his original position is not, of

82. See Collier, *supra* note 70, at 445-46, 452-54.

83. See Collier, *supra* note 3, at 223-44.

84. For examples from other contexts, see Salman Rushdie, Haroun and the Sea of Stories (London, 1990); Ari L. Goldman, O'Connor Warns Politicians Risk Excommunication over Abortion, N.Y. Times, June 15, 1990, at A1, B2 (nat'l ed.); Alan Abelson, Dear Donald: Please Don't Sue Us—Admiral Trump Sinks an Analyst, Barron's, Apr. 2, 1990, at 1; Analyst Who Criticized Trump Casino Is Ousted, N.Y. Times, Mar. 27, 1990, at C2 (nat'l ed.) (quoting characterization of Mr. Trump's threats as "pure financial power exerted to silence a critic—that is the crudest and most distasteful aspect of it"); Risks for the Analysts Who Dare to Say Sell, N.Y. Times, May 15, 1990, at C1; Ellen E. Schultz, Wall Street Grows Treacherous for Analysts Who Speak Out, Wall St. J., Apr. 5, 1990, at C1 (a tally of Wall Street recommendations on 1,500 companies shows that 44.6% are "buys" or "strong buys," 45.6% are "holds," and only 9.7% are "sells" or "strong sells."); Vow on Clerks by Illinois Justice Upsets the Academic Community, Nat'l L.J., May 28, 1990, at 4.

85. John Rawls, A Theory of Justice (Cambridge, Mass., 1971).

86. *Id.* at 11.

course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice."[87] In this original position, the principles of justice are chosen behind a "veil of ignorance" so that those choosing them will not be swayed or influenced by "the outcome of natural chance or the contingency of social circumstances."[88] In Rawls's scheme, the parties to this deliberation on justice do not know their place in society, their natural assets and abilities, or even their conceptions of the good or their own psychological propensities.

Rawls makes abundantly clear that his self-imposed "veil of ignorance" is a hypothetical construct unavailable in the real world.[89] But his methods have important, real applications, and one of the most obvious of these is the practice of "blind reviewing," the practice of evaluating manuscripts without knowing the identity of the author. The practice of blind reviewing is endorsed by numerous professional associations and leading scholarly journals and publishers; it is a prime example of the evidently felt need to combat the biasing effect or "taint" of scholarly institutional authority.[90] Blind reviewing is undertaken and endorsed in the conviction that considerations of institutional authority are wholly extraneous to intellectual merit. Clearly, this is an issue of the first importance, because the editorial practices and assumptions determining what will be published serve, in effect, as preconditions for the dissemination of ideas, scholarship, and ultimately knowledge itself.

As it happens, I have had an opportunity to observe the law review article selection process at first hand. As an article editor of the *Stanford Law Review* I proposed in early 1984 that the *Review* adopt the practice of blind reviewing. The proposal was not adopted, because it was felt that "we don't have enough time." At that time, the *Review* received approximately 750 submissions each year, out of which only a dozen or so could be accepted for publication. As a short cut, about *half* of the submitted articles were rejected unread on the basis of inappropriate methodology or subject matter or even title.[91] (The

87. *Id.* at 12.

88. *Id.*

89. *Id.*; see also *id.* at 118-50.

90. See William D. Schaefer, Anonymous Review: A Report from the Executive Director, MLA Newsl., Summer 1978, at 4; see also Anonymous Review: The Debate Continues, MLA Newsl., Fall 1978, at 4 (letters to the editor); Call for Scholarly Papers for the 1992 Annual Meeting, AALS Newsl., Feb. 1991, at 5 ("Submitted papers will be reviewed, with the author's identities [sic] concealed, by a committee of established scholars. . . . The manuscript, including footnotes, must not contain any reference to your school nor any personally identifiable references."); Erik M. Jensen, The Law Review Manuscript Glut: The Need for Guidelines, 39 J. Legal Educ. 383 (1989); Jordan H. Leibman & James P. White, How the Student-Edited Law Journals Make Their Publication Decisions, 39 J. Legal Educ. 387, 395 & n.39, 404-05, 420-21 (1989).

91. See Stanford Law Review Handbook 12 (1984):

> When an article reaches the *Review,* it is "prescreened" by an article editor. This is a 15-20 minute review to determine the article's scope, sophistication, and interest to our readers. About half of the articles submitted to the *Review* pass the prescreen and are then read by one or two editors—the first and second "reads"—who then report on the article in the weekly department meeting. Less than 10% of all the articles submitted survive to a "third read" by all the article editors and the president, and of these, only 10-12 are selected annually.

following examples are taken almost at random from my advance sheets: "The Emergence of Regional Landfills in Mississippi," "The Swan Song of a Dishonest Duck: A Prototype for Analyzing Coverage Under the Bankers Blanket Bond," "Securities Litigation in Alabama: Open Shirts, Gold Chains and Pinkie Rings—A Guide for Widows and Orphans," "The Minnesota Key Person Discount Rule: A Useful Tool for Missouri Divorce Cases Involving Closely Held Businesses," "Uninsured Motorist Coverage Exclusions: A Chronicle of the Alabama Decisions," "Who Pays When a Pedestrian Trips and Falls on a Defective City Sidewalk? An Overview of Arizona Case Law.") Articles by well-known authors, however, or from authors at well-known, prestigious institutions—such as Harvard, Yale, and Michigan—were automatically given a full first reading.[92] And articles by Stanford law professors came to us with such a heavy presumption in their favor that they were almost never rejected, regardless of their quality.[93] Obviously, none of these short cuts would be possible in

92. This experience coincides neatly with the results reported by Peters and Ceci, documenting the biasing effect of institutional affiliation; see Douglas P. Peters & Stephen J. Ceci, Peer-Review Practices of Psychological Journals: The Fate of Published Articles, Submitted Again, 5 Behav. & Brain Sci. 187 (1982), discussed *infra* at notes 106-16 and accompanying text.

93. In the volume of the *Stanford Law Review* I edited, for example, this meant that Stanford law professors, who amount to less than 1% of all law professors, accounted for about 33% of the *Review*'s articles. See Title Index of Contributed Articles and Comments, 37 Stan. L. Rev. at iv (1984-85).

To take another random example, I happen to have in my possession, as of this writing (in Germany), one issue of the *Harvard Law Review:* the June 1989 issue (102 Harv. L. Rev. no. 8 (1989)). The issue consists of three short memorials, two lengthy articles, seven student notes, and a book review. Two of the memorials are written by Harvard law professors and the third is by a former Harvard law professor; they are writing in memory of a former Harvard law professor who was previously president of the *Harvard Law Review.* The two lead articles are both written by Harvard law professors. (In perhaps the ultimate exercise of institutional privilege, the author of the first article spends the last 10 of his 75 pages publicly pondering whether he should even publish his *Harvard Law Review* article at all, considering that he has been advised not to; in the end he decides to "tak[e] the risk that some of my ideas will be misappropriated." *Id.* at 1812.) The author of the book review is a former book review editor of the *Harvard Law Review* who is reviewing a book (published by Harvard University Press) written by a former president of the *Harvard Law Review.* At the front of the issue appears the following notice, under the heading "Information for Contributors": "The Review invites the submission of unsolicited manuscripts. Please confine author's name and biographical information to a removable title page." *Id.* at ii.

One does not have to be a particularly astute student of human psychology to understand why the pages of the leading law reviews are so disproportionately filled by professors at those very same institutions. One need only have been a student. (Purely statistically, the odds of placing three successive articles in the same leading law review would be the proverbial "one in a million," assuming a 1% acceptance rate; amazingly, these staggering odds are routinely defied at the leading law schools and law reviews.)

A full explanation, however, must go beyond the obvious power (real and imagined) that professors wield over their students. The situation is, more precisely, one of implicit mutual admiration, dependency, and usefulness—of "one hand washing the other." The real losers are, of course, the law reviews (which end up publishing inferior work) and the "outsiders" (whose work ends up systematically underplaced).

We need a new canon of professional and ethical responsibility to address this problem. I have in mind something like the following: "Submitting a manuscript for consideration by a law review or other journal at one's own institution is a *prima facie* violation of professional responsibility and an inherently unethical practice."

a regime of blind reviewing.[94]

These experiences were evidently not unrepresentative. A leading study of law review publishing practices has concluded that "the major law reviews publish the work of their own faculty disproportionately often."[95] The study found that the leading law reviews consistently devoted 20 percent, 30 percent, even 40 percent of their scarce space to the work of "in-house" authors.[96] When viewed as a percentage of faculty publishing, the in-house data are even more staggering; authors at the leading law schools routinely published 60

94. It might be objected that the first "short cut"—rejecting articles unread on the basis of inappropriate title, etc.—would still be possible even if the identities and institutions of the authors were unknown. However, even that aspect of the review process would be significantly altered in a regime of blind reviewing. The important "confirmation" that an outlandishly titled article was indeed the work of an unknown at Slippery Rock State Technical Community College, for example, would no longer be available. That, in turn, might necessitate further examination of the piece on its merits.

95. Ira Mark Ellman, A Comparison of Law Faculty Production in Leading Law Reviews, 33 J. Legal Educ. 681, 692 (1983); cf. *id.* at 681 ("in-house publishing is common and sometimes dominant among leading schools"); *id.* at 688-89 ("because of the prevalence of in-house publishing," the determination of the most productive faculties "is heavily influenced by the initial selection of journals"). The study surveyed the leading 23 law reviews, as measured by citation frequency, between 1979 and 1982. See *id.* at 681-82 for a discussion of the methodology.

96. See *id.* at 685, Table 2:

In-house Pages per Journal

Journal		Percentage In-house
1.	Va. L. Rev.	47
2.	Stan. L. Rev.	35
3.	Harv. L. Rev.	33
4.	U. Chi. L. Rev.	29
5.	Nw. U. L. Rev.	28
6.	UCLA L. Rev.	27
7.	Cornell L. Rev.	25
8.	U. Pa. L. Rev.	25
9.	Tex. L. Rev.	23
10.	Cal. L. Rev.	23
11.	S. Cal. L. Rev.	22
12.	Mich. L. Rev.	22

(over 20% only).

percent, 70 percent, even 80 percent of their work in their own law reviews![97] On the basis of these and related data, the study identified two sources of "potential bias" in the article selection process:

> First, most law journals, unlike the professional journals in many other fields, do not review articles anonymously. For that reason, authors affiliated with the most established institutions may well have their pieces reviewed with more care. Second, faculty at schools with journals sampled in this study may have an advantage in placing their pieces in their home journal. Many of these journals devote a high proportion of their pages to their own faculty. This potential bias favors faculty at the nineteen schools that publish the journals surveyed in this study; these schools also tend to be established.[98]

These forms of reliance on "institutional authority" are to be expected when the volume of submitted manuscripts effectively precludes in-depth evaluation: "With serious substantive review impossible, authors' credentials have assumed greater importance than they should in the evaluation process."[99]

97. See *id.* at 687, Table 3:

Total Pages, All Journals

Law Faculty		Percentage In-house
1.	Cornell	87
2.	Columbia	76
3.	Michigan	70
4.	Virginia	69
5.	Stanford	64
6.	Minnesota	62
7.	U.S.C.	60
8.	Texas	59
9.	Chicago	56
10.	Pennsylvania	56
11.	Duke	53
12.	Harvard	52

(over 50% only, rearranged by Percentage In-house); see also *id.* at 692, Table 6 ("This table illustrates generally how common in-house publishing is; with in-house publishing excluded, the average pages per professor declines from 24.2 to 10.8.").

98. *Id.* at 686; cf. Leibman & White, *supra* note 90, at 396 n.39 ("The editors at high-impact journals conceded that the authors' credentials played a significant role in article selection."); *id.* at 405-06 ("When authors are resident faculty members, . . . the pressures on students to say yes do exist, and most of the editors acknowledged them. . . . [T]here can be little doubt that the relationship has at least the potential to distort the manuscript review process."); *id.* at 405 (footnote omitted):

> The "graduate school model" for scholarly publication . . . generally mandates blind reviews by professional referees. The underlying rationale, of course, is that knowledge of authorship can seriously bias the review process. If manuscript quality is all that is at issue, the reviewer's knowledge of the author's publications, rank, and affiliations can only be irrelevant and prejudicial. It is ironic that the publication mode for law should ignore this basic principle of evidence. . . . [T]he lack of blind review seriously compromises the credibility of the manuscript review process.

99. Jensen, *supra* note 90, at 383; see also *id.* at 385:

> The legal publication system is, to put it bluntly, absurd. . . . [U]nder the circumstances, student editors' overreliance on authors' credentials is quite reasonable. To get the stack of manuscripts to a manageable level, editors need some winnowing criterion; credentials, which bear some relationship to the quality of authors' past work, serve that function.

And if, as a former president of the Association of American Law Schools has suggested, "[t]he claim that student editors can recognize whether scholarly articles make an original contribution throughout the domain of the law is now viewed by legal scholars as indefensible,"[100] the reliance on indicia of institutional authority is only to be expected. In summary, three specific circumstances of student-edited law reviews (lack of time, lack of expertise, lack of independence) dictate reliance on three specific—and often overlapping—forms of institutional authority (well-known authors, authors affiliated with well-known institutions, in-house authors).[101]

Now, it would be truly remarkable if there were absolutely no relationship between the academic reputation and prestige of an institution and the quality of articles written by professors at that institution. But it would be perhaps even more remarkable if the correlation were perfect.[102] The problem of bias arises when an intuitively reasonable approximation (a heuristic or "rule of thumb") is relied on beyond the scope of its validity.[103] The reason that we must often act on unsubstantiated claims of authority, for example (or reject investment offers presented late at night), is the same reason that the *Stanford Law Review* article editors consciously relied on the halo effect: "We don't have enough time." When modern life produces too many stimuli and too much information for us to process at once, it may be adaptive to adopt simplifying rules or stereotypes.[104] "Because of limited information-processing abilities . . . humans have to construct simplified models of the world. Heuris-

100. Roger C. Cramton, "The Most Remarkable Institution": The American Law Review, 36 J. Legal Educ. 1, 7-8 (1986); cf. *id.* at 7:

> Probably it was never true that a second-year law student, on the basis of high intelligence and a year's training in the parsing of cases, could deal with any problem of traditional doctrinal scholarship. But this myth of omnicompetence clearly has no validity today, when the most experienced and able faculty members do not claim competence over the entire realm of legal scholarship. Law today is too complex and specialized; and legal scholarship is too theoretical and interdisciplinary.

101. I do not mean to suggest that these problems are confined to student-edited journals. *The Supreme Court Review*, for example, is a faculty-edited journal published at the University of Chicago Law School that solicits and assigns articles in advance. *The Supreme Court Review* prides itself on its "willingness to seek not only diversity, but to encourage young scholars" and even to publish "good work by obscure authors." Preface, 1989 Sup. Ct. Rev. at ix. In the same issue of the *Review* in which those statements appeared, however, eight out of the twelve articles were authored by current or former University of Chicago Law School professors. See *id.* at 53, 87, 261, 311, 333; The AALS Directory of Law Teachers 446, 450, 642 (1991-92).

102. See Peters & Ceci, *supra* note 92, discussed *infra* at notes 106-16 and accompanying text (suggesting little correlation); John W. Kronik, Editor's Note, 103 PMLA 733, 733 (1988) (after eight years of blind reviewing, the pages of PMLA "now house more women, more colleagues from the junior ranks, and authors from a greater variety of institutions").

103. See Cialdini, *supra* note 65, at 5-9.

104. See Sarah Lichtenstein, Baruch Fischhoff & Lawrence D. Phillips, Calibration of Probabilities: The State of the Art to 1980, *in* Kahneman, Slovic & Tversky, *supra* note 72, at 333.

tics are a product of these; they are short cuts that can produce efficient decisions."[105]

Fortunately, these problems have been submitted to direct empirical examination in the context of blind reviewing.[106] In the leading study, Peters and Ceci tested the "halo effect" of institutional authority on scholarly publishing in the field of psychology (where, if anywhere, it would presumably be detected).[107] Peters and Ceci randomly selected one leading article, published in the preceding 18-32 months, from each of twelve leading psychology journals that did not practice blind reviewing. The journals were all "solid, mainstream" journals that were "among the most prestigious journals in psychology," as measured by citation frequency studies, and the average acceptance rate for manuscripts submitted to them was about twenty percent.[108] The twelve articles were above average in citation frequency both for the journals they appeared in and for the social sciences generally.[109] "The only constraint on the selection was that . . . at least one of the original authors of each article had to have been affiliated with an institution with a high-ranking department of psychology in terms of prestige ratings, productivity, and faculty citations."[110] Peters and Ceci changed the names (but not the sex) and institutional affiliations of the authors, substituting for Harvard, Stanford, University of California, and the like, the names of fictitious institutions "without meaning or status in psychology," such as Tri-Valley Center for Human Potential, Tri-Valley Institute of Growth and Understanding, and Northern Plains Research Station.[111] Peters and Ceci then had the articles retyped and resubmitted to the same journals that had published them originally.

Peters and Ceci's results are nothing short of remarkable. All but one of the twelve articles were rejected by the same journals in which they had previously appeared, including eight of the nine articles that went through the review process undetected as resubmissions.[112] Sixteen of the eighteen referees (89 percent) recommended against publication, and the editors concurred with those recommendations in every case. Furthermore, the articles were rejected "primarily for reasons of methodology and statistical treatment, not because reviewers judged that the work was not new."[113] Various resubmitted articles were said by the journals' reviewers to have "serious methodological flaws"

105. Gerd Gigerenzer, How to Make Cognitive Illusions Disappear: Beyond "Heuristics and Biases," 2 European Rev. Soc. Psychol. 83, 101 (1991).

106. See, e.g., Rebecca M. Blank, The Effects of Double-Blind Versus Single-Blind Reviewing: Experimental Evidence from *The American Economic Review,* 81 Am. Econ. Rev. 1041 (1991).

107. See Peters & Ceci, *supra* note 92.

108. See *id.* at 188, 190-91.

109. See *id.* at 193.

110. *Id.* at 189.

111. *Id.* at 189, 195 nn.2-3.

112. See *id.* at 189.

113. *Id.* at 191.

that led the editors to "doubt that any revision would alter this decision."[114] These results are all the more remarkable when one considers that the resubmitted articles were the final, polished, published versions—which if anything should have made them better, not worse, than the versions the original reviewers saw.

But, of course, the real reason the resubmitted articles were "worse" is that two important variables were changed: the authors' names and institutional affiliations. Seen in that light, Peters and Ceci's results are not remarkable at all. Who would expect anything good—let alone brilliant—from an unknown at the "Northern Plains Research Station"? Who would expect important and original research, at the "cutting edge" of psychology, to emerge from so unlikely a place as the "Tri-Valley Center for Human Potential"? Is it any surprise that the second sets of reviewers were "in agreement that there were serious *flaws* in the articles—perhaps the stereotypic muddled thinking of authors associated with a Tri-Valley Institute of Growth and Understanding"?[115] Thus, Peters and Ceci suggest as an explanation for their results the "possibility . . . that systematic bias was operating to produce the discrepant reviews. The most obvious candidates as sources of bias in this case would be the authors' status and institutional affiliation."[116]

Interestingly, Stanley Fish has written an article against blind reviewing, entitled "No Bias, No Merit: The Case Against Blind Submission."[117] In it he comments tangentially on the Peters and Ceci study by quoting approvingly from a few critics of the study, one of whom remarks imperiously: "A reviewer may be justified in assuming at the outset that [well-known] people know what they are doing."[118] Fish is nothing if not consistent. Indeed, he may be criticized as "overly consistent," so to speak—as having over-generalized from a few favorite theories and applied them at a level of specificity they do not warrant.

114. *Id.* at 192, 195 n.4.

115. *Id.* at 192.

116. *Id.* For a description of a similar but less scientific experiment, see Cialdini, *supra* note 65, at 214:

> [A] popular writer . . . typed word-for-word Jerzy Kosinski's novel *Steps* and sent the manuscript to 28 literary agencies and publishing houses 10 years after the book had sold nearly a half million copies and had won the National Book Award. The manuscript, now carrying the name of an unknown, was rejected as inadequate by all 28 organizations including Random House, the novel's original publisher.

117. Stanley Fish, No Bias, No Merit: The Case Against Blind Submission, *in* Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies 163 (Durham, N.C., 1989). This 614-page collection of Fish's essays is published by the University Press at Duke (where Fish reigns, simultaneously, as "Arts and Sciences Professor of English, Professor of Law, and Chair of the Department of English," *id.* at 614) and is published in a series entitled "Post-Contemporary Interventions," of which Fish himself is one of the two "Series Editors." These facts may simply be meaningless coincidences; in any event, they are certainly consistent with Fish's view, expressed in the book, that "there is no such thing as intrinsic merit." *Id.* at 164.

118. *Id.* at 175.

To his credit, Fish candidly acknowledges at the outset his personal interest in opposing blind reviewing: "I am against blind submission because the fact that my name is attached to an article greatly increases its chances of getting accepted."[119] In other words, Fish's institutional authority makes up, to some degree, for weaknesses in the intellectual content of his work, thereby providing journals that would not otherwise publish his articles with an additional reason for doing so. (If institutional authority makes any difference—and Fish says it does—this is the difference it must make.) One infers that Fish's work is significantly overplaced on the merits, since attaching his name "greatly" increases its chances of getting accepted. In his defense, Fish elaborates that "I have paid my dues and earned the benefit of the doubt I now enjoy and don't see why others shouldn't labor in the vineyards as I did."[120]

The usual—and obvious—purpose offered in support of blind reviewing is "to ensure that in making their evaluations readers are not influenced by factors other than the intrinsic merits of the article."[121] In other words, the purpose is to ensure that papers are selected for publication on the strength of what I have termed their "intellectual authority" rather than on the "institutional authority" of such extraneous factors as title, position, and institution. Fish directly challenges these assumptions: "I want to argue, in short, that there is no such thing as intrinsic merit."[122]

Fish's argument is as follows. True intellectual authority ("intrinsic merit") would imply the existence of "a standard or set of standards that operates independently of the institutional circumstances that have been labeled extraneous."[123] Fish argues that there is no such standard and that, even if there were, we violate it all the time anyway. (The argument consists mainly of deducing the first claim from various considerations in support of the second.)

We violate the "standard," says Fish, when we expect (demand) that an author exhibit familiarity with the whole body of previous scholarship relevant to new work in the author's chosen field. The new work must be "situated" in relation to that body of scholarship; it has a history, an etiology, and a pedigree.[124] We are not interested in the author's purely personal, idiosyncratic views, but only in such views as advance the scholarly enterprise in

119. *Id.*

120. *Id.*

121. William D. Schaefer, Anonymous Review: A Report from the Executive Director, MLA Newsl., Summer 1978, at 4.

122. Fish, *supra* note 117, at 164.

123. *Id.*

124. Cf. Harold Bloom, A Map of Misreading 32 (New York, 1980):

> What happens if one tries to write, or to teach, or to think, or even to read without the sense of a tradition?
>
> Why, nothing at all happens, just nothing. You cannot write or teach or think or even read without imitation, and what you imitate is what another person has done, that person's writing or teaching or thinking or reading. Your relation to what informs that person *is* tradition, for tradition is influence that extends past one generation, a carrying-over of influence.

institutionally recognized ways. This is why (to use Fish's examples) articles entitled "What I Think about *Middlemarch*" or "*The Waste Land* and Me" would not be given a hearing—unless the author were already recognized as a leading authority (about which more later).

It appears that Fish may have confused a necessary condition with a sufficient one. It may well be necessary to invoke and advance the body of previous scholarship in order to get a hearing, but can one directly conclude, from this alone, that blind reviewing is useless (or "useless and worse than useless," as Langdell might have put it)? Fish's responses on this point are notably weak. He gives the example of a paper submitted for publication by the renowned Lord Rayleigh, from which the author's name had inadvertently been omitted; the paper was summarily rejected by the British Association as the work of "one of those curious persons called paradoxers."[125] But when Lord Rayleigh's name was subsequently restored, the paper was immediately accepted for publication "with profuse apologies."[126] Fish's analysis?

> [S]horn of its institutional lineage the paper presented itself as without direction, and whimsical; but once the reviewers were informed of its source they were able to see it as the continuation of work—of lines of direction, routes of inquiry—they already knew, *and all at once the paper made a different kind of sense* than it did when they were considering it "blindly."[127]

If anything, this explanation merely points up the obtuseness of the reviewers. As Fish concedes, "On its face this might seem to be a realization of the worst fears of those who argue for blind submission."[128] Indeed, Fish suggests no reason why it would make no "sense" for someone else to advance or continue Lord Rayleigh's work. And Fish also conspicuously fails to mention the original commentary on the episode, which is highly interesting in its own right: "However, when the authorship was discovered, the paper was found to have merits after all. It would seem that even in the late nineteenth century, and in spite of all that had been written by the apostles of free discussion, authority could prevail when argument had failed!"[129]

Fish also dwells heavily on the lesson of C. S. Lewis as an "authority" on Milton. Lewis's condemnation of the final books of *Paradise Lost*[130] was the reigning judgment for a generation, but eventually it succumbed to the rehabilitative efforts of subsequent scholars, such that in 1972 Raymond Waddington could pronounce it, in effect, dead: "Few of us today could risk echoing C. S. Lewis's condemnation of the concluding books of *Paradise Lost* as an 'untransmuted lump of futurity.'"[131] "What this means," says Fish, "is that

125. Robert John Strutt, 4th Baron Rayleigh, Life of John William Strutt, Third Baron Rayleigh 228 (Madison, 1968).

126. See Thomas S. Kuhn, The Structure of Scientific Revolutions, 2d ed. enl., 153 n.10 (Chicago, 1970).

127. Fish, *supra* note 117, at 176 (emphasis added).

128. *Id.*

129. Strutt, *supra* note 125, at 228.

130. C. S. Lewis, A Preface to Paradise Lost 125 (London, 1942).

131. Raymond B. Waddington, The Death of Adam: Vision and Voice in Books XI and XII of *Paradise Lost*, 70 Mod. Philology 9 (1972).

the kind of thing that one can now say about [the concluding books of *Paradise Lost*] is constrained in advance, for, given the present state of the art, the critic who is concerned with maintaining his or her professional credentials is obliged to say something that makes them better."[132] Fish does not have much advice to offer the misguided critic who is concerned simply to say something "true" about Milton, except to suggest a less risky line of business. Indeed, the unpleasantries awaiting one who ignores Fish's advice include "courting the risk [of] go[ing] against the professional grain, the risk of not being listened to, of remaining unpublished, of being unattended to, the risk of producing something that was by definition—a definition derived from prevailing institutional conditions—without merit."[133]

C. S. Lewis could say whatever he thought about Milton because "Lewis's status as an authority on Renaissance literature was such that he could offer readings without courting the risk facing others who might go against the professional grain."[134] That authority "was itself produced in no small part by the prior authority of *The Allegory of Love.*"[135] Fish does not say what produced the "prior authority" of *The Allegory of Love,* but presumably it was not the intrinsic merit of Lewis's ideas since, as previously noted, "there is no such thing as intrinsic merit."[136] One is left to surmise that, given the then-prevailing literary climate, Lewis played his institutional cards right for a while and somehow managed to say the right thing at the right time; thereafter he was an "authority" and could get away with saying whatever he liked. In this context, of course, "saying the right thing" in no way implies saying what is "true" or "inherently" right, but rather what is "authorized," so to speak, by "prevailing institutional conditions"—"the safest thing the critic can say."[137]

Fish's position is untenable as a reading of intellectual history, of the process of intellectual influence, and even of the professional developments he reports. Specifically, he offers a faulty dichotomy in his discussion of intellectual "standards" that informed criticism rejects. For Fish, the choice is between a standard made "in eternity by God or by Aristotle" and the "prevailing institutional conditions . . . by which our labors will, for a time, be judged."[138] Since the first standard is obviously too high, Fish essentially concludes that there is no standard of intellectual authority.[139]

132. Fish, *supra* note 117, at 166.

133. *Id.*

134. *Id.*

135. *Id.* at 167.

136. *Id.* at 164.

137. *Id.* at 166.

138. *Id.* at 166-67.

139. Cf. H. L. A. Hart, The Concept of Law 135 (Oxford, 1961):

> The rule-sceptic is sometimes a disappointed absolutist; he has found that rules are not all they would be in a formalist's heaven, or in a world where men were like gods and could anticipate all possible combinations of fact, so that open-texture was not a necessary feature of rules. The sceptic's conception of what it is for a rule to exist, may thus be an unattainable ideal, and when he discovers that it is not attained by what are called rules, he expresses his disappointment by the denial that there are, or can be, any rules.

I say that Fish offers no standard because "prevailing institutional conditions" are about as close to no standard as one can get. These conditions will prevail "for a time," says Fish, but that turns out to be an exceedingly short time. C. S. Lewis's authority "was sufficient to ensure that it would be over fifteen years before a group of scholars could begin" to discredit it; but Lewis was a "special case" in that he exerted "a general authority over the entire discipline."[140] Lesser authorities apparently have even more sharply circumscribed reigns. "[T]oday *the most influential and up-to-date voices,*" says Fish, "are those that proclaim exactly the reverse" of what was proclaimed less than a decade ago.[141] Fish notes in a postscript to his piece, originally written in 1979, that in 1988 "[i]t is of course now out-of-date, but its out-of-dateness can be seen as extension of my point, that it is the conditions currently obtaining in the profession rather than any set of independent and abiding criteria that determine what is significant and meritorious."[142] (After wrestling with the issue at some length, Fish finally concludes that there may be "some point" to reprinting his essay "even nine years later," because its argument is, inexplicably, "still being resisted."[143]) Indeed, Fish even suggests elsewhere that the half-life of "the most influential and up-to-date" literary theories may actually be measured in *weekends:* "In some places in the United States the appearance of a theoretical manifesto in *New Literary History, Diacritics,* or *Critical Inquiry* will be Monday-morning news to which one must respond . . . ."[144]

Thus, Fish has succeeded in proving that his own ideas are, if not already obsolete, soon destined to be. At the core of his rather substantial and disabling difficulties is the false dichotomy between an eternal standard set "by God or Aristotle" and no standard at all. What he needs is a theory "of the middle range," as Merton has termed it: "theories that lie between the minor but necessary working hypotheses that evolve in abundance during day-to-day research and the all-inclusive systematic efforts to develop a unified theory that will explain all the observed uniformities."[145]

In effect, Fish has over-generalized from a theory that, while perhaps defensible at the highest level of generality, is irrelevant at the lowest (where he applies it). The fact that one is a Kuhnian in philosophy of science, for example, or an adherent of Habermas in social theory, does not mean that

140. Fish, *supra* note 117, at 167.

141. *Id.* at 178 (emphasis added).

142. *Id.* at 177.

143. *Id.* at 179.

144. Fish, Consequences, *in* Doing What Comes Naturally, *supra* note 117, at 338.

145. Merton, *supra* note 53, at 39 (footnote omitted). The *Encyclopaedia Britannica* gives the following standard definition of "theory":

> In its best use, it signifies a systematic account of some field of study, derived from a set of general propositions. These propositions may be taken as postulates, as in pure mathematics (theory of functions, etc.), *or they may be principles more or less strongly confirmed by experience,* as in natural science (theory of heat, electromagnetic theory).

22 Encyclopaedia Britannica 67-68 (Chicago, 1956) (emphasis added).

one should abandon the double-blind scientific procedure, discontinue blind grading in the law schools, and give up on blind reviewing. In other words, the fact that science may never be absolutely, positively *wertfrei,* or that knowledge may ultimately remain inextricably entangled in human interests, does not mean that even the most rudimentary attempts to remove obvious prejudice and bias from the reviewing process are worse than nothing. Presumably Professor Fish does not reserve the highest grades in his courses for, say, "politically correct" students. But why not? On his premises, there is absolutely no reason not to, since bias probably cannot be *totally* eliminated from the grading process, and one bias is presumably as good as the next (because none of them go to the alleged "merits" anyway).[146] Perhaps Professor Fish will announce in his next article, or course syllabus:

> I have finally given up trying to be objective, because it is ultimately (that is, theoretically) impossible, and there is no such thing as "intrinsic merit" anyway; so, from now on, the highest grades in my courses will be reserved for "politically correct" students. This may sound totally biased—and of course it is—but biases are all we have to work with, and at least I am being consistent with my most fundamental theoretical principles (which is very important to me).[147]

It is comforting to note, however, that in Fish's own Department of English at Duke University, "[a]pplicants for admission" to the Ph.D. program "are considered without regard to their race, color, religion, national origin, political affiliation, sex, age, or physical handicaps. A committee of the Department decides upon admission on the basis of merit . . . ."[148]

As Harry Kalven has observed in a legal context,

> [B]oth sides in any ideological dispute about bringing social science empiricism to law tend to overshoot the mark. On the one hand, it is simplistic to urge that because law makes factual assumptions, there should be a one-to-one linking and testing of the underlying social facts, an endless dropping of empirical footnotes to points of law. On the other hand, it is nonsense to say that better documentation of fact cannot ever be relevant to law because the final business of law is not truth but political preference.[149]

And as Fish himself has observed (in a different context),

> In the case of either theorist [realist or conventionalist] the answer to the question "How is it that we know what we know?" cannot be translated into a recipe for knowing; you don't use your account of knowing in order to "do" knowing. . . . Realism and conventionalism are the names of philosophical positions on the question of how it is

146. Cf. Fish, *supra* note 16, at 660 ("in fact what will really happen is that one set of interested distinctions will be replaced by another").

147. Evidently, this problem is not merely hypothetical. See Steven C. Bahls, Political Correctness and the American Law School, 69 Wash. U. L.Q. 1041 (1991) (nationwide survey indicates that most law students do not feel free to disagree with professors' political views in class or on exams or papers).

148. Graduate Study in English 1989-90, Duke University, "Admission" (unpaginated pamphlet).

149. Harry Kalven, Jr., The Quest for the Middle Range: Empirical Inquiry and Legal Policy, *in* Law in a Changing America, ed. Geoffrey C. Hazard, Jr., 56, 67 (Englewood Cliffs, N.J., 1968).

> that we know what we know; they are not the names of epistemological programs that one could self-consciously put into action.[150]

Saying, with Gandhi, that "man is not capable of knowing the absolute truth and therefore is not competent to punish,"[151] is a little like saying that, since philosophers are still debating Descartes' epistemology, one need not take notice of traffic signals in the meantime (because they might not really exist). Fish acknowledges as much in quoting Moore with approval: "They are skeptics in their explicitly philosophical moments, and realists *when it counts* in daily living."[152] Thus, Fish's (re)considered view seems to be that detailed consistency with highly abstract philosophical theories is neither necessary nor indeed possible—for the judge or, for that matter, anyone else living in the empirical world—and with that I agree. Fish's dogged consistency simply turns out, on closer examination, to obscure a more fundamental inconsistency.

What is needed is a perspective of the middle range, a perspective from which one could say that C. S. Lewis was *wrong* in 1942 (despite his institutional authority) and *still wrong* in 1972; or, alternatively (depending on one's analysis), that he was *right* in 1942 and *still right* in 1972 (despite his lack of institutional authority). Fish offers no such perspective, and certainly no help, as we attempt to steer our way between "the Scylla of an absolute pursuit of knowledge and the Charybdis of Soviet or Maoist ideology (research in the service of whatever happens to be the current party line)."[153]

150. Stanley Fish, Dennis Martinez and the Uses of Theory, *in* Doing What Comes Naturally, *supra* note 117, at 372, 383-84 [hereinafter Fish, Dennis Martinez and the Uses of Theory]; see also John von Neumann & Oskar Morgenstern, Theory of Games and Economic Behavior, 3d ed., 2 (New York, 1967) ("It happens occasionally that a particular physical theory appears to provide the basis for a universal system, but . . . the everyday work of the research physicist is certainly not involved with such high aims, but rather is concerned with special problems which are 'mature.' There would probably be no progress at all in physics if a serious attempt were made to enforce that super-standard."); *id.* at 16 (a "classical preliminary device of scientific analysis" is to "divide the difficulties, i.e. to concentrate on one (the subject proper of the investigation in hand), and to reduce all others as far as reasonably possible, by simplifying and schematizing assumptions").

151. *Quoted in* Erik Erikson, Gandhi's Truth 241 (New York, 1969).

152. Fish, Dennis Martinez and the Uses of Theory, *supra* note 150, at 383.

153. J. P. Stern, Introduction, *in* Friedrich Nietzsche, Untimely Meditations, trans. R. J. Hollingdale, at xx (Cambridge, England, 1983).

These suggestions concerning the need for "theory of the middle range," brief though they are, connect up with important currents of contemporary thought. See, e.g., Robert E. Lipsey & Tony Lancaster, The General Theory of Second Best, 24 Rev. Econ. Stud. 11 (1957); Kenneth J. Arrow, Social Choice and Individual Values, 2d ed. (New York, 1963); David P. Gauthier, Morality and Advantage, *in* Practical Reasoning, ed. Joseph Raz, 185 (Oxford, 1978) (applying game theory and the Prisoner's Dilemma to moral reasoning); Donald Davidson, Toward a Unified Theory of Meaning and Action, 11 Grazer Philosophische Studien 1 (1980) (theory of meaning and Bayesian decision theory "are evidently made for each other"); Rationality in Action: Contemporary Approaches, ed. Paul K. Moser (Cambridge, England, 1990); Hart, *supra* note 139, at 144:

> Formalism and rule-scepticism are the Scylla and Charybdis of juristic theory; they are great exaggerations, salutary where they correct each other, and the truth lies between them. Much . . . needs to be done to characterize in informative detail this middle path, and to show the varied types of reasoning which courts characteristically use in exercising the creative function left to them by the open texture of law in statute or precedent.

In support of his view that intellectual authority "does not exist," Fish states at one point:

> In literary studies, for example, one possible reason for hearkening to an interpretation is the institutional position occupied by the man or woman who proposes it, the fact that he or she has a record of successfully made (that is, influential) arguments, or is known as the editor of a standard text, or is identified with an important "approach," or is highly placed in a professional organization (a department, a professional society), or all of the above. . . . When a Northrop Frye or a Jacques Derrida speaks, it is with all the considerable weight of past achievements, battles fought and won, constituencies created, agendas proposed and enacted . . . .[154]

These people are, Fish adds, "the E. F. Huttons of our profession" (presumably because "when they speak, people listen").[155]

For Fish, the short answer to my critique is that I simply have no business criticizing the "Arts and Sciences Professor of English, Professor of Law, and Chair of the Department of English at Duke University."[156] The longer (but only slightly longer) answer is that my critique threatens to disrupt what used to be called the "old-boy network" (with all its connotations of corruption), which for Fish seems to be the primary authoritative medium for the transmission of knowledge.[157] Apparently, Fish believes that once Jacques Derrida has won a sufficient number of "battles," and until the institutional structure of authority changes, the playing field will be tilted—*and should be tilted*—in his favor for subsequent contests (Fish's "benefit of the doubt"). But, quite apart from the inherent implausibility of this belief, one would need to know more specifically what those battles were fought over and how or why they were won, in order to generalize usefully to future contests. Battles are not always won fairly or on the merits (particularly when one side denies that "merit" even exists); the "good guys" do not always prevail. If Fish is talking about anything more than power (he says he is "not proposing anything as crude as 'might makes right'"[158]), then, if anything, the opposite presumption would seem more plausible. Nothing is more common than the declining bibliographical trajectory of the famous senior scholar who has become, in effect, spoiled by his own fame and whose later, more self-indulgent works pale in comparison with his earlier, more earnest efforts. Compare, for example, Heidegger's

154. Fish, *supra* note 14, at 1342-43.

155. *Id.* at 1343.

156. Fish, *supra* note 117, at 614.

157. Cf. The Random House Dictionary of the English Language, 2d ed., 1348 (New York, 1987) (glossing *old-boy network* as "an exclusive network that links members of a profession, social class, or organization or the alumni of a particular school through which the individuals assist one another in business, politics, etc."). For the connotations of corruption, see Duden Oxford Grosswörterbuch Englisch 490 (Mannheim, 1990) (glossing *old-boy network* as a *"Filzokratie"*).

158. Fish, *supra* note 14, at 1341; but see Stanley Fish, Introduction: Going Down the Anti-Formalist Road, *in* Doing What Comes Naturally, *supra* note 117, at 10 ("Does might make right? In a sense the answer I must give is yes, since in the absence of a perspective independent of interpretation some interpretive perspective will always rule by virtue of having won out over its competitors.").

Being and Time with any of his later works,[159] or Sartre's *Being and Nothingness* with his *Critique de la raison dialectique*.[160] The eminent senior scholar is no longer forced to compete in the "marketplace of ideas"; his work is *invited*—in the proceedings of endless conferences, intimate "colloquia," published symposia, collections of essays (invariably edited by friends rather than enemies), special lectures, solicited book reviews, and the like[161]—and his ideas are deemed important *just because* they are his ideas.[162] He "walks" his articles down to his own prestigious law review, instead of submitting them on the open market.[163] In short, the academy has become a "network."[164]

Fish's view would encourage what might be termed "excellence by association," an escalating, cumulative, "presumption of authority" that builds on itself as a self-confirming, self-validating, "self-fulfilling prophecy."[165] There could be nothing more conducive to scholarly productivity (not to mention scholarly sloppiness, or the tendency to "recycle" old work) than the certain knowledge that one's work, once completed, will automatically be accepted

159. See Richard Rorty, Philosophy and the Mirror of Nature 369 (Princeton, 1983) (The later Heidegger is a great "edifying" philosopher. "Great edifying philosophers are reactive and offer satires, parodies, aphorisms. They know their work loses its point when the period they were reacting against is over. They are *intentionally* peripheral."); cf. Jutta Georg-Lauer, Alte Kampfgemeinschaft, Die Zeit, Apr. 26, 1991, Literatur sec., at 14 (book review) ("Der gigantische Anspruch Thomäs will kritisch 66 Jahre Heideggersche Textgeschichte genealogisch aufbereiten; von der Dissertation bis zum Spätwerk wird jede auch noch so drittklassige Textstelle herangezogen.").

160. See Hannah Arendt, On Violence, app. 2 (New York, 1970); Claude Lévi-Strauss, The Savage Mind 245-69 (New York, 1973). For a general assessment, see George Steiner, Sartre in Purgatory, Times Literary Supp., May 3, 1991, at 3 (book review).

161. See Leibman & White, *supra* note 90, at 420.

162. See *id.* at 405 ("what some authors had to say on a subject was of interest to readers simply because of who was saying it."); *id.* at 420 & n.101.

163. *Id.* at 395 & n.39 ("The bias against in-house publication does not apply to full professors."); *id.* at 404-05.

164. For a spectacular example, see Gregory Vlastos, Socrates: Ironist and Moral Philosopher 1-20 (Ithaca, N.Y., 1991) ("How this Book Came to Be"). I intend no disparagement of this distinguished scholar's efforts by this citation; my point has more to do with the sociology of knowledge in intellectual communities. Vlastos himself candidly, indeed poignantly, acknowledges the importance of institutional authority for his own career. In 1938 he arrived unannounced in Cambridge "while still uncertain of my future, still in search of a vocation . . . as a private scholar, unharnessed to any research project, unattached to any College, without standing in the University, my only tie to it a library card." *Id.* at 15. A meeting with Francis Cornford changed all that:

> In the course of our discussion I voiced objection to his view of the creation story in the *Timaeus*. He encouraged me to write up my position and when I did he said: "You still haven't convinced me. But we must get this into the *C.Q.* [*Classical Quarterly*]." There it appeared in due course to mark a new turn in my life—the end of my vocational doldrums, admission into the company of working scholars in the field of classical philosophy. It was the gift of the foremost Platonist of his day to a young unknown.

Id. at 16.

165. See Robert K. Merton, The Self-Fulfilling Prophecy, 8 Antioch Rev. 193 (1948); Merton, *supra* note 53, at 475-90; Robert Rosenthal, Experimenter Effects in Behavioral Research (New York, 1976).

for publication by the journal or press of one's choice.[166] Past credentials alone would be the basis for future credentials, to the point where the emperor's lack of clothes might be covered up forever.[167] "The carters have made a contract with one another and by restamping themselves as geniuses have decreed that genius is superfluous; probably a later age will see that their buildings are carted together, not constructed."[168]

In place of this corrupt and cozy scholarly world I offer the comparatively austere, critical prospect of true intellectual authority; in place of the paradigm of the "family" (with all its comforts) I offer that of the "market" (with all its discomforts).[169] A judicial image is fitting:

> The hand of the just man who is empowered to judge no longer trembles when it holds the scales; he sets weight upon weight with inexorable disregard of himself, his eye is unclouded as it sees the scales rise and fall, and his voice is neither harsh nor tearful when he pronounces the verdict.... [H]e is a human being and yet nonetheless tries to ascend from indulgent doubt to stern certainty, from tolerant mildness to the imperative 'you must', from the rare virtue of magnanimity to the rarest of all virtues, justice....[170]

Ultimately, it is *justice* that demands the strict separation of institutional authority from intellectual authority, for the scholar as well as the judge. The danger today is that Jacques Derrida's work will be overrated (because of his powerful institutional authority); the danger in ancient Athens was that Socrates would be unjustly condemned to death (because of his conspicuous lack of institutional authority). "It is one of the remarkable events of Western history that later generations saw in Socrates the Achilles of philosophy, while at the time of his death he appeared hardly more significant than an insect."[171]

As Plato portrayed him, Socrates derived no particular material benefits from his philosophical inquisitions; indeed, his occupation as intellectual gadfly worked to the distinct detriment of his personal and family affairs and

166. Sometimes this occurs sight unseen, on the basis of nothing more than a telephone call. Personal communication with Ernest J. Weinrib (Jan. 6, 1992). (The publisher involved was the estimable University of Chicago Press; Weinrib declined the precipitate offer.)

167. Cf. Gina Kolata, To Make the Big Time of Science, Better Take Your Show on the Road, N.Y. Times, Jan. 2, 1990, at C1:

> [Part of being well known in science is to be on the circuit,] the endless round of meetings and seminars in which competitive scientists receive publicity and establish their pecking order.... And much of being competitive in science involves being on the circuit, where a small club of the elite discuss the newest ideas and data long before they are published in journals. This gives the scientists a head start on research ideas and helps them win prizes, acclaim and grants....

168. Friedrich Nietzsche, On the Uses and Disadvantages of History for Life, *in* Untimely Meditations, *supra* note 153, at 99.

169. See Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497 (1983); Henry Sumner Maine, Ancient Law 128-74 (London, 1920) (detailing the progress from familial, status-based relations to public, legal ones).

170. Nietzsche, *supra* note 168, at 88.

171. Thomas G. West, Plato's *Apology of Socrates* 177 (Ithaca, N.Y., 1979).

left him chronically impoverished.[172] To ensure his intellectual and spiritual integrity Socrates found it necessary to distance himself from the world of politics, with the result that he was manifestly "unable to protect himself and other philosophers from the injustices of established political orders."[173] By incessantly interrogating "those who are reputed to be wise"—and showing that they were not—Socrates managed to incur, simultaneously, the wrath of the poets, the craftsmen, the politicians, and the orators.[174] In short, "all the leading citizens of the city were lined up against Socrates."[175]

Their opposition is understandable. When Socrates questioned a prominent statesman, for example,

> I was affected something like this: it seemed to me that this man seemed to be wise, both to many other human beings and most of all to himself, but that he was not. And then I tried to show him that he supposed he was wise, but was not. So from this I became hateful both to him and to many of those present.
>
> ....
>
> Out of this examination, men of Athens, many hatreds have arisen against me, and the kind which are harshest and gravest; as a result, many slanders have arisen from them, and I got this name of being "wise."[176]

Most of all, perhaps, Socrates' intellectually elitist political philosophy—his ideal of governance by "the one who knows"—was (as a preeminent intellectual gadfly of our time has spiritedly argued) fatally out of step with the democratic "ideology of the Periclean Athens in which Socrates grew up but to which he was never reconciled."[177] Today this obvious institutional hostility would undoubtedly give pause to all but the most resolute; for Socrates,

172. Apology 19e, 23b-c, 31b-c; see also *id.* at 30e-31a:

> [I]f you kill me, you will not easily discover another like me, who—even if it is rather ridiculous to say—has simply been set upon the city by the god, as though upon a great and well-bred horse who is rather sluggish because of his size and needs to be awakened by some gadfly. The god seems to me to have set me upon the city as someone of this sort: I awaken and persuade and reproach each one of you, and I do not stop settling down everywhere upon you the whole day.

173. West, *supra* note 171, at 191; cf. Apology at 31c-32e; Thomas C. Brickhouse & Nicholas D. Smith, Socrates on Trial 170-73 (Princeton, 1989) (Socrates is "profoundly pessimistic about the possibility of . . . surviving the attempt to engage in political activity").

174. See Apology 21c-24a; cf. *id.* at 22a ("those with the best reputations seemed to me nearly the most deficient, in my investigation in accordance with the god, while others with more paltry reputations seemed to be men more fit in regard to prudence"); Vlastos, *supra* note 164, at 297 (What made Socrates vulnerable to prosecution was "the aggressiveness of his public mission—the fact that he felt constrained to philosophize on the streets of Athens, . . . deploying his corrosive dialectic 'on everyone of you I happen to meet.'").

175. I. F. Stone, The Trial of Socrates 174 (Boston, 1989).

176. Apology 21c-d, 23a.

177. Stone, *supra* note 175, at 48; cf. *id.* at 78-83; but see also Crito 52c-53a (Socrates "strongly prefers" the laws of Athens to those of any other city on earth, "Greek or barbarian"); Phaedrus 230c6-d5; Richard Kraut, Socrates and the State 194-309 (Princeton, 1984) (Socrates' skepticism about the possibility of moral expertise led him to accept Athenian democracy by default); Gregory Vlastos, The Historical Socrates and Athenian Democracy, 11 Pol. Theory 495 (1983) (Socrates did not have a political "theory" but he had strong political sentiments, which were "demophilic" if not strictly democratic).

however, it constituted an important confirmation that, even as he was disturbing prominent citizens, he was also disturbing sensitive intellectual premises and prejudices that needed to be examined:

> [T]here are many of these accusers, and they have been accusing for a long time now. Moreover, they spoke to you at that age when you were most trusting, when some of you were children and youths, and they accused me in a case which simply went by default, for no one spoke in my defense.
>
> ....
>
> ... So since they are, I suppose, ambitious and vehement and many, and since they speak about me in a well-ordered and persuasive way, they have beaten it into your ears, slandering me vehemently for a long time.
>
> ... Therefore ... I would be amazed if I should be able to remove this prejudice of yours in such a short time, now that it has become so great. This is the truth for you, men of Athens; I am hiding nothing from you either great or small in my speech, nor am I holding anything back. And yet I all but know that I incur hatred by these very things; which is also a proof that I speak the truth, and that this is the prejudice against me, and that these are its causes.[178]

The "impartial scorn" of a Socrates was too much for even ancient Athens—"the school of Hellas," the intellectual center of antiquity—to tolerate.[179] Would our postmodern intellectual institutions acquit themselves with more grace and distinction? I doubt it.

178. Apology 18c-d, 23e-24b.

179. See Brickhouse & Smith, *supra* note 173, at 193-94:

> [Socrates] demonstrate[s] a point to which political partisans are too often blind: where two bitterly opposed factions exist, it does not follow that the critic of one is the friend of the other.
>
> . . . Socrates' equal opposition to the injustices and tyrannies of the democratic and the oligarchic factions show that he is not a partisan of either. He is precisely what he claims to be: a gadfly, a social critic, and a man who is convinced that he serves as the conscience of Athens.