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LEGAL CLASSICS: AFTER DECONSTRUCTING THE LEGAL CANON*

FRANCIS J. MOOTZ III**

The debate over the canon has gripped the University in recent years. Defenders of the canon argue that canonical texts embody timeless and universal themes, but critics argue that the process of canonization subordinates certain people and viewpoints within society in order to assert the existence of a univocal tradition. Originating primarily in the field of literary criticism, the canon debate recently has emerged in legal theory.

*Professor Francis J. Mootz argues that the issues raised by the canon debate are relevant to legal scholarship, teaching and practice. After reviewing the extensive commentary on the literary canon, Professor Mootz criticizes the polemical structure of the debate and asserts that an appreciation of classical, as opposed to canonical, texts opens the way for a productive inquiry. He defines a classical text as one that both shapes contemporary concerns and also serves as a point of reference for revising these concerns. Classical texts enable critical perspectives rather than submitting to them, he continues, because they provide the arena for debates about issues of public concern. Using *Hadley v. Baxendale* as an example of a legal classic, Professor Mootz contends that the power of such a classical text is its ability to shape hotly contested legal debates.*

Our time . . . seems unpropitious for thinking about the question of the classic, for . . . it seems to be a simple either/or that requires merely a choosing of sides: for or against? back to the classics or away from them? Our time calls not for thinking but a vote. And it may well be too late for thinking about the classic in any case, for the vote is already in, and the nays have it.

. . . .

This is a world that has no place for the classics, only for texts, and all texts are created equal.

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....

If our time tends to celebrate plurality, diversity, and even conflict, the contrary impulse toward unity and unanimity cannot be long in reasserting itself. What philosophical hermeneutics reminds us, however, is that both extremes, homogeneity and heterogeneity alike, deaden mental activity. For understanding lives in the play of equivalence and difference.

—Joel Weinsheimer¹

The idea of a common language and a common vocabulary among legal academics, and indeed, a common canon of legal materials, has increasingly become a fiction.

—Sanford Levinson and J. M. Balkin²

INTRODUCTION: THE PAST AS PROLOGUE

The question of the canon has dominated talk within the University during the past decade. The emergence of the canon debate in legal scholarship, then, should come as no surprise. In recent years, trends in legal theory generally have followed the intellectual movements within English departments and have lagged even further behind the developments emerging from philosophy departments. Although legal theorists sometimes resemble pathological neophiliacs—rushing to embrace the latest Paris fashion without stopping to engage in careful, independent, and critical thinking—it would be incorrect to conclude that the interdisciplinary character of contemporary legal scholarship is entirely detrimental. Admittedly, legal theorists have, in the past, joined intractable debates that already had worn out their contestants in other disciplines, arriving too late to garner any intellectual energy.³ However, legal theorists have also brought new life to ongoing debates by culling the careful thinking and research that

1. JOEL WEINSHEIMER, *PHILOSOPHICAL HERMENEUTICS AND LITERARY THEORY* 124, 126, xiii (1991).

2. Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1653 (1991).

3. For example, it is questionable whether the sudden fixation on the jargon of postmodern theory sheds much light on jurisprudential issues. See Francis J. Mootz III, *Postmodern Constitutionalism As Materialism*, 91 MICH. L. REV. 515, 515-25 (1992). Political philosophers have been attempting to move beyond the dead ends created by over-exuberant extensions of deconstructive and postmodern approaches by returning to broader themes within the philosophical tradition. See, e.g., RICHARD J. BERNSTEIN, *THE NEW CONSTELLATION: THE ETHICAL-POLITICAL HORIZONS OF MODERNITY/POSTMODERNITY passim* (1991) (defending a pragmatic humanism grounded in reflective action). Bernstein writes:

[I]t is becoming increasingly evident that the terms "modern" and "postmodern" are not only vague, ambiguous and slippery, they have been used in conflicting and even contradictory ways. . . . My own conviction is that we have reached a stage of discussion where these labels (and their cognates) obscure more than they clarify—that it is better

precedes them in other disciplines and then advancing the debate within a new context.⁴ It would be as senseless as it is impossible to try to insulate legal theory from broader intellectual currents. Jurisprudence is not just an analytical tool for assessing the legal system; it is a critical gesture lodged within the concrete setting of legal practice that draws from and contributes to developments of our various political, ethical, epistemological, and ontological traditions. The important question is whether the canon debate will influence and be influenced by legal theory in a productive manner.

What is the canon debate that legal scholars inherit from the other side of campus? It is a contentious and politically charged effort to define our cultural tradition in the wake of decades of ideology critique. The debate currently centers on the content of the literary curriculum. In its crudest form, the debate amounts to a quarrel over whether students should continue to read the time-honored classics or whether they should read the emerging and previously neglected voices of women, people of color, and other oppressed members of society. Preemptive efforts by defenders of the canon to preserve "high culture" from the perceived wave of political correctness sweeping across America's campuses have received public notoriety and substantial attention in the media.⁵ In recent years, the *Chronicle of*

to drop these terms from our 'vocabularies,' and to try to sort out the relevant issues without reifying these labels.

Id. at 200.

In a similar vein, the relatively recent fixation by many legal scholars on the concept of republicanism, which was "revived" originally by historians of the revolutionary era, comes just at the time that the concept is "now thinning out in the atmosphere . . . as its ontological status grows fainter and more confused." Daniel T. Rogers, *Republicanism: The Career of a Concept*, J. AM. HIST., June 1992, at 11, 37. Rogers describes how legal theorists, self-admitted "natural scavengers," swept up the increasingly vacuous concept of republicanism as a cure-all for liberalism's ills. *Id.* at 33.

4. Feminist legal scholarship contributes both to feminist thinking generally and to legal theory, although it is certainly true that feminist legal scholars can become entangled in the conundrums of feminist theory to the point that they are unable to advance the relevant legal issues. Examples of feminist contributions within the context of legal scholarship are DRUCILLA CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW* (1991); ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988); and CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979). Eisenstein and Cornell both criticize MacKinnon's later philosophical efforts as remaining trapped within the unhelpful "sameness/difference" opposition that underwrites a substantial portion of feminist theory. CORNELL, *supra*, at 119-41; EISENSTEIN, *supra*, at 55-57.

5. See, e.g., ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987); DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991); ROGER KIMBALL, *TENURED RADICALS: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION* (1990); Roger Kimball, "Tenured Radicals": A Postscript, 9 *NEW CRITERION* 4 (1991). Bloom's book captured the popular imagination and received a great deal of press. It can be compared to the cannon fire over Fort Sumter for purposes of the debate. News accounts consistently referred to Bloom's book when reporting the battle over the core curriculum at Stanford University. See, e.g., *The Canons Under Fire*, TIME, April 11, 1988, at 66, 66-67; *Stanford's Core "Canon" Debate Ends in Compromise*, CHRISTIAN SCIENCE MONITOR, April 8, 1988, at 19, 19-20; George

Higher Education has become a primary forum for the "heated and far-reaching" debate within the teaching profession,⁶ but the debate spills over into the popular media as well.⁷ The discussion is often acrimonious, reflecting the political significance that the contestants place on the issues raised. One commentator concludes that the "controversy erupting over [the question of the canon] has produced a great volume of polemical writing, so much in fact that one must say that the controversy is one of the more important events in the history of twentieth-century [literary] criticism."⁸ This political battle manifests deeper intellectual currents that have swirled through the University for some time now, although popular fascination with the topic undoubtedly has stimulated continued scholarly attention.⁹

Will, *Stanford's Regression*, WASH. POST, May 1, 1988, at C7. Although Bloom is correctly characterized as a "conservative" in the sense of one who strives to conserve cultural traditions, it is a mistake to read Bloom as suggesting that there is a determinate core group of texts that must be mastered.

One needn't set up a canon of books to read. In fact, I think such lists are rather silly. The important thing is to find one book and follow where it leads. In that way a whole world can be constructed that moves from philosophy to literature, art and music. If you touch the heart with one book, it can transform a life.

Allan Bloom, *A Book Can Transform a Life*, U.S. NEWS & WORLD REP., Sept. 28, 1987, at 95, 95; cf. E. D. HIRSCH, JR., *CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW* *passim* (1987) (identifying the core knowledge required for a person to be culturally literate).

6. Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1513 n.3 (1991) (citing numerous articles in the *Chronicle of Higher Education* and other sources).

7. See, e.g., Irving Howe, *The Value of the Canon*, NEW REPUBLIC, Feb. 18, 1991, at 40, 40-53; John Searle, *The Storm Over the University*, N.Y. REV. BOOKS, Dec. 6, 1990, at 34, 34-42.

8. John Guillory, *Canon*, in *CRITICAL TERMS FOR LITERARY STUDY* 233-34 (Frank Lentricchia & Thomas McLaughlin eds., 1990); see also Peter Erickson, *The Question of the Canon: The Examples of Searle, Kimball and Kernan*, 6 TEXTUAL PRAC. 439, 439 (1992):

For both sides, symbolic effects [in the conduct of the debate] are believed to have political effects. [In contrast with political and economic changes], the prospect of cultural change symbolized by a reconstituted curriculum implies a threat at once more subtle and more difficult, if not impossible, to defend against.

9. The current canon debate came into its own with a symposium appearing in *Critical Inquiry* in 1983. *Canons*, 10 CRITICAL INQUIRY 1, 1-223, 321-47, 462-542 (1983) (featuring essays by leading scholars such as Barbara Herrnstein Smith, Jerome J. McGann, and Charles Altieri). These essays subsequently were published as a book. *CANONS* (Robert von Hallberg ed., 1984); see also *ENGLISH LITERATURE: OPENING UP THE CANON: SELECTED PAPERS FROM THE ENGLISH INSTITUTE* (Leslie A. Fiedler & Houston A. Baker, Jr. eds., 1981). In many respects, the subsequent literature has been devoted to working through the many issues raised in this highly regarded symposium. See, e.g., CHARLES ALTIERI, *CANONS AND CONSEQUENCES: REFLECTIONS ON THE ETHICAL FORCE OF IMAGINATIVE IDEALS* (1990); MARILYN BUTLER, *LITERATURE AS A HERITAGE, OR READING OTHER WAYS* (1987); ANTONY EASTHOPE, *LITERARY INTO CULTURAL STUDIES* (1991); *FEMINISMS: AN ANTHOLOGY OF LITERARY THEORY AND CRITICISM* 189-261 (Robyn R. Warhol & Diane Price Herndl eds., 1991); HENRY L. GATES, JR., *LOOSE CANONS: NOTES ON THE CULTURE WARS* (1992); GERALD GRAFF, *BEYOND THE CULTURE WARS: HOW TEACHING THE CONFLICTS CAN REVITALIZE AMERICAN EDUCATION* (1992); FRANK KERMODE, *POETRY, NARRATIVE, HISTORY* (1990) [hereinafter KERMODE, *POETRY*]; FRANK KERMODE, *HISTORY*

The canon debate translates to the idiom of legal scholarship quite easily. It is a foregone conclusion that some legal theorists will broaden the debate to include issues arising within legal practice, education, and scholarship. In a sense, the legal canon has been under heavy fire for some time now. On a general level, the canon debate is a concrete manifestation of the deeper destabilization wrought by critical, deconstructive, and postmodern approaches that already influence legal theory.¹⁰ The presupposition of a legal canon is difficult to justify after decades of relentless demystifying critiques by legal theorists. The traditional idea of a legal canon rests on the assumption that there is a rule-governed process for identifying authoritative texts, determining their meaning, and evaluating their worth. This assumption, in turn, appears to be grounded in the belief that law is a univocal, hierarchically ordered system. The canonical exemplar of this traditional view is Dean Langdell's now infamous contracts casebook, in which he purported "to select, classify and arrange" all the contracts cases that "had contributed in any important degree to the growth, development, or establishment" of the essential principles of contract doctrine.¹¹ Langdell's approach presumes that the cases are the law, that the cases are to be interpreted in a certain manner, and that, once interpreted, the cases may be classified as good or bad, important or irrelevant.

It is almost too easy to debunk this traditional account of the legal canon. The well-rehearsed (though diverse) critical moves by feminists,

AND VALUE (1988) [hereinafter KERMODE, HISTORY]; FRANK KERMODE, FORMS OF ATTENTION (1985); ARNOLD KRUPAT, ETHNOCITICISM: ETHNOGRAPHY, HISTORY, LITERATURE (1992); ARNOLD KRUPAT, THE VOICE IN THE MARGIN: NATIVE AMERICAN LITERATURE AND THE CANON (1989); VASSILIS LAMBROPOULOS, THE RISE OF EUROCENTRISM: ANATOMY OF INTERPRETATION (1993); PLAY, LITERATURE, RELIGION: ESSAYS IN CULTURAL INTERTEXTUALITY (Virgil Nemoianu & Robert Royal eds., 1992); REDRAWING THE BOUNDARIES: THE TRANSFORMATION OF ENGLISH AND AMERICAN LITERARY STUDIES (Stephen Greenblatt & Giles Gunn eds., 1992); ARTHUR SCHLESINGER, THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY (1991); BARBARA HERRNSTEIN SMITH, CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY (1988); PETER N. STEARNS, MEANING OVER MEMORY: RECASTING THE TEACHING OF CULTURE AND HISTORY (1993); Hazard Adams, *Canons: Literary Power/Power Criteria*, 14 CRITICAL INQUIRY 748 (1988); Frank Kermodé, *Institutional Control of Interpretation*, 43 SALMAGUNDI 72 (1979) [hereinafter Kermodé, *Institutional Control*]; Peter L. McLaren, *Culture or Canon? Critical Pedagogy and the Politics of Literacy*, 58 HARV. ED. REV. 213 (1988); Robert Scholes, *Aiming a Canon at the Curriculum*, 72 SALMAGUNDI 101 (1986); Cornell West, *Minority Discourse and the Pitfalls of Canon Formation*, 1 YALE J. CRITICISM 193 (1987).

10. George Allan has assessed the roots of the canon debate accurately. "The firestorms of decanonization sweep unabated through the sacred groves of academe. Philosophers who 'take time seriously,' who make Becoming instead of Being the base of their ontology, provide the metaphysical framework for this attack, although they are rarely credited with doing so." George Allan, *The Process and Reality of an Educational Canon*, 12 CONTEMP. PHIL. 3, 4 (1989).

11. C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS at ix (1879). In terms of the theory of the legal classic that is developed in this Article, Langdell's casebook is accurately described as a classic, even if it has fallen from canonical grace under the withering attacks by antiformalists and antifoundationalists.

critical race theorists, and the more esoteric deconstructionists immediately come to mind as challenges to the canon. For example, contemporary critics challenge Langdell's self-assurance to the extent that it persists in the production of modern contracts casebooks.¹² As legal theorists explicitly begin to debate the canon against this backdrop, the canon-bashers are likely to garner an immediate consensus judgment that they have won the debate. There is no sport more enjoyed among contemporary legal theorists than vilifying Langdell's legacy. The interesting question is whether anyone will have the temerity to defend vigorously the idea of a legal canon.¹³

Traditional scholars will consider talk of a legal system without a legal canon as virtually incoherent, regardless of the ascendancy of critical challenges to the canon. After all, *Webster's Dictionary* offers "law" as a synonym for "canon."¹⁴ A disciplining canon appears to be indispensable to rule-governed legal practice; it marks the difference between the rule of law and the exercise of arbitrary authority. From the traditional perspective, the fact that the legal system operates in a relatively predictable manner underscores the existence and operation of a legal canon. Attempts to do away with the legal canon amount to lawlessness, traditionalists will argue, because the law necessarily speaks through canonical texts that are read according to the accepted canons of interpretation. Rather than join in a debate that they will lose in the pages of the leading law reviews, however, many traditionalists undoubtedly will go about their doctrinal business, resting content with the knowledge that the attack on the canon is meaningless verbiage that will not disrupt the actual workings of the legal system.

In 1993, the Association of American Law Schools acknowledged the significance of the canon debate for legal education by announcing as the theme for its annual meeting: "Multiple Cultures and the Law: Do We Have a Legal Canon?" AALS President Emma Coleman Jordan elaborated as follows:

This AALS Annual Meeting coincides with a tension-filled moment in intellectual history. In every discipline, scholarly organizations are experiencing definitional debate over the central functions of the academy: pedagogy, research, and scholarship.

12. See, e.g., Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1020 n.70, 1060 n.240 (1985); Mary J. Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1065-70 (1985). With regard to the particular issues raised by curricular choices, legal educators regularly debate issues of fundamental curricular reform with the goal of escaping the canonical model fashioned by Langdell, even though most curricula remain disappointingly familiar.

13. Derrick A. Bell, *Introduction*, 43 J. LEGAL EDUC. 1, 2 (1993) ("What in other disciplines is called directly 'the canon debate' is present in legal education . . . it is hard to imagine that the law-as-doctrine defenders will be able to forestall the sweeping reforms now taking place in other areas of the academy.")

14. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 328 (unabridged ed. 1986).

The "canon debate," that is, argument over what constitutes this core of knowledge and methodology that we hope to transmit in the universities, has been particularly pronounced in fields such as literature and history. New ideas about how to read texts, and new definitions of history, have obvious implications for legal scholars. American law schools have begun a version of the "canon debate."¹⁵

Rather than arriving too late, legal theorists appear to have caught the wave of the canon debate. The nascent canon debate in legal academe promises to bring new focus and vitality to perennial jurisprudential questions. The debate need not degenerate into a battle between self-congratulatory articles exuding critical fervor and self-satisfied articles clinging to either a formalist or romantic ideal of law. The debate over the legal canon threatens to be a non-starter; properly pursued, however, it might provide the kind of practical focus that invigorates the theoretical discourse of the larger canon debate. Legal scholars must develop a new framework for discussing the idea of a legal canon if the discussion is to be worth pursuing. This Article outlines the grammar of a productive framework within which the promise of the canon debate can be realized.

The canon debate not only raises fundamental questions about effective and desirable forms of teaching and lawyering, it also implicates fundamental philosophical questions about how we understand, transmit, and participate in cultural traditions. Without denigrating the very important claims that multiculturalist critics of the canon continue to make against the traditional legal curriculum and standard conceptions of legal practice, this Article moves beyond these claims and describes the cultural forces that generate not only curricular biases, but also the prejudiced structure of social life. Using the mature work of literary theorists to initiate the debate over the legal canon—this Article will enable legal scholars to avoid some of the unproductive pejorative stances that have sidetracked the wider canon debate. Past debates regarding the literary canon serve as a prologue of rich resources for fashioning a pointed and challenging discussion of the philosophical questions raised by the idea of a legal canon. Addressing these questions from the perspective of the legal canon makes sense because legal practice, scholarship, and education bring these themes to bear within a more practical context than literary writing, criticism, and educa-

15. ASSOCIATION OF AMERICAN LAW SCHOOLS ANNUAL MEETING PROGRAM, MULTICULTURALISM AND THE LAW: DO WE HAVE A LEGAL CANON? 71 (San Francisco, January 5-9, 1993). Four of the papers presented at the Plenary Session are reprinted in the *Journal of Legal Education*. See Bell, *supra* note 13; Stanley Fish, *Not of an Age, But for All Time: Canons and Postmodernism*, 43 J. LEGAL EDUC. 11 (1993); Patricia N. Limerick, *The Canon Debate From a Historian's Perspective*, 43 J. LEGAL EDUC. 4 (1993); Cass R. Sunstein, *In Defense of Liberal Education*, 43 J. LEGAL EDUC. 22 (1993).

tion provide. A skeptic might (wrongly) regard the debate over the literary canon as grubby academic in-fighting clothed with mistaken romantic visions of the power of literature and the significance of literary criticism. In contrast, the power of the legal system is an undeniable and palpable feature of everyday life that elevates the importance of the debate over the legal canon.

Part I of this Article provides a sketch of the debate over the literary canon, a debate that often is marked by efforts to caricature an opponent's position.¹⁶ After reviewing several challenges to the legal canon, Part II compares these challenges to the canon debate in literature.¹⁷ In this way, the Article demonstrates that legal scholarship appears poised to follow the unhelpful stances that define much of the debate over the literary canon. Principally by assessing Charles Altieri's recent book, *Canons and Consequences*, Part III analyzes efforts by several literary theorists to adopt a more measured approach to the canon debate by describing the cognitive significance of the canon as a dynamic projection of public identity.¹⁸ Part IV then identifies limitations in Altieri's discussion and demonstrates that Hans-Georg Gadamer's philosophical explanation of how the classics bear truth for contemporary readers supplements Altieri's approach and establishes a viable framework for questioning the idea of a legal canon.¹⁹ Gadamer's analysis of classical texts plays a central role in his ontological inquiry into understanding, opening a fruitful line of inquiry that has been pursued in the context of literary criticism. Gadamer's discussion of classical texts forms the core of the suggested framework for approaching the debate over the legal canon. Part V explores the significance of these findings by discussing the English contracts case, *Hadley v. Baxendale*,²⁰ which is a common-law classic.²¹

The Article concludes by suggesting that deconstructing the idea of a legal canon, in itself, will not stimulate ongoing jurisprudential inquiry.²² The interesting question is what we will do after we have deconstructed the legal canon. The correct focus of this more engaging question is an analysis of the power of the legal classic. Construing the legal canon as a product of hegemonic cultural forces serving the interests of elite segments of society yields certain undeniable benefits. However, this critical attitude should not obscure the inevitable cognitive role played by the legal classic.

16. See *infra* notes 23-54 and accompanying text.

17. See *infra* notes 55-112 and accompanying text.

18. See *infra* notes 113-40 and accompanying text.

19. See *infra* notes 141-84 and accompanying text.

20. 156 Eng. Rep. 145 (Ex. Ch. 1854).

21. See *infra* notes 185-216 and accompanying text.

22. See *infra* notes 217-19 and accompanying text.

The legal classic is not the (conscious or unconscious) product of subjective self-interest, but rather is productive of selves and self-interests.

I. CANONICAL CARICATURES

Before discussing the canon debate, it is important to unpack the varied meanings called forth by the word "canon." The etymology of "canon" reveals its root in the Greek word *kanon* ("rod, measuring line"), which in Old English came to signify a "model [or] standard."²³ The first dictionary definition regards the theological usage in this sense, defining canon as "a decree, decision, regulation, code, or constitution made by ecclesiastical authority."²⁴ The secularized version of this sense of canon is expressed as "a norm, criterion, model, or standard for evaluating, judging, testing or criticizing."²⁵ The idea of a canon as a disciplining rule of evaluation plays an important role in the canon debate.

A "canon" is a rule, a set of instructions. It is what people in authority use to define what those under their jurisdiction are supposed to do. . . . What canons do to people is what cannons do to projectiles and canyons to rivers.

. . . .

"A general rule, fundamental principle, aphorism or axiom governing the systematic or scientific treatment of a subject": this second of the [*Oxford English Dictionary*] definitions is the properly educational sense of a canon.

. . . .

The role of any canon is to distinguish the essential from the accidental, a basic core from what is merely illustrative, of momentary interest and passing relevance.²⁶

Thus, in a very important sense, a canon is believed to be the means by which truth is separated from illusion and thereby preserved against heretical claims.

The canon more recently has come to signify the result achieved by the disciplining rule of evaluation—namely, an authoritative list of the central

23. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 14, at 328.

24. *Id.* Therefore, the modern idea that canonization reflects an acknowledgment that the text exhibits an objective, timeless quality of formal excellence is removed from the earliest uses of the word.

Hence the "canonizers" of early Christianity were not concerned with how beautiful texts were, nor with how universal their appeal might be. They acted with a very clear concept of how texts would "measure up" to the standards of their religious community, or conform to their "rule." They were concerned above all else with distinguishing the orthodox from the heretical.

Guillory, *supra* note 8, at 233.

25. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 14, at 328.

26. Allan, *supra* note 10, at 3.

texts within a culture. *Webster's Dictionary* articulates this second sense by also defining "canon" as "an accepted or sanctioned list of books."²⁷ In this sense, the literary canon is regarded as a cultural repertoire from which contemporary readers can recover and reanimate the best that the tradition has to offer. In a sophisticated development of this perspective, Charles Altieri argues that canons constitute "a normative archive sustaining those powers and states of being that offer the fullest possible education in a version of what the culture's history makes possible."²⁸ The canon does not necessarily represent an eternal list of texts, but at any given time it is presumed to constitute a relatively stable "archive" of the texts that define the culture.

These two uses of the term "canon" are closely related. A rule of evaluation that separates the sacred from the sacrilegious is known only in its use to demarcate the collection of sacred texts. Similarly, the roster of sacred texts can be identified only on the basis of the standard by which sacred is defined. This relationship between rule and result lies at the heart of the canon debate. On one hand, critics of the traditional canon are not troubled so much with the idea of literary anthologies as they are with the subterranean cultural prejudices that serve as the canonical standard of admission to this elite circle.²⁹ On the other hand, these critics bemoan cultural prejudices precisely because they effectively promote a self-sustaining cultural ideology of exclusion through the canonical collection of privileged texts.³⁰ The interplay and mutual dependencies of canonization and the resulting canon must be described and explained before the canon debate can produce real insight that will foster social change.

The idea of a canon, in the full (dual) sense of the word, immediately appears dubious to a generation that has celebrated critical theory, post-structuralism and, more recently, postmodernism. Establishing an authoritative standard to define canonical texts raises the specter of tyranny because any such rule might be grounded in ideology or defended through the use of force rather than being redeemed in rational and open discourse. A deeper critique questions whether it is ever possible for a given universal

27. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 14, at 328.

28. ALTIERI, *supra* note 9, at 16.

29. For example, Stanley Fish has no problem with the Norton Publishing Company's creating literary anthologies now that we acknowledge the need for multiple anthologies, each of which draws on a different canon within our pluralistic society that has cultural significance equal to that of competing canons. Stanley Fish, *Canon Busting: The Basic Issues*, NAT'L FORUM: PHI KAPPA PHI J., Summer 1989, at 13, 14.

30. Thus, Barbara Herrnstein Smith argues that including a work within an anthology does not simply acknowledge the work's value, it also serves in a very real sense to establish its value. Barbara Herrnstein Smith, *Contingencies of Value*, CRITICAL INQUIRY, Sept. 1983, at 1, 25. Despite multiple anthologies within society, the danger remains that society reinforces "establishment ideologies" through the process of anthologizing. *Id.* at 30.

rule to guide an evaluation of texts, since judgment is the practice of case-by-case decisionmaking and is never the mere logical subsumption of a particular case under a general concept.³¹ According to this view, lurking behind every publicly offered canonical rule are social practices that continually shape the judgments which fashion the canon. Regardless of which critical perspective informs the theorist, every invocation of the canon is problematic because it invites a critical appraisal to preclude dogmatism and oppression. Moreover, the belief that a small collection of texts, however chosen, can represent the cultural life of modern society seems romantically nostalgic at best and imperialistic at worst. The recent fixation on the politics of special interests appears to reflect a deep, fundamental heterogeneity within American culture. In short, both senses of the canon appear outdated when viewed through modern, critical eyes.

In response to these destabilizing conditions, the literary canon debate largely has emerged in polarized form, offering a grand "Either/Or." This polarization occurs because each side tends to caricature its opponent's position as dogmatic and unrealistic, and also because each side presents its own position in a pre-scripted, polemical form designed to stake out the perceived radical distance between the contestants in the debate. The stark Either/Or framework of the canon debate amounts to a battle between the idea that there is a universal essence of civilized humanity which must be nurtured by preserving the great achievements of high culture and the idea that our culture necessarily is a heteronomous admixture of incommensurable traditions which calls for a celebration of difference.

Traditionalists defending the canon do not regard the increasing fragmentation in society as something to be celebrated; rather, they view it as a failure of American cultural institutions—primarily the education system—to instill in all citizens an appreciation of universal human essences that Western culture nurtures.³² "Traditional appeals for a high canon have relied on hypotheses about some central core of human experience that pervades cultural change and enables us to test and preserve those works most fully expressive of that humanity."³³ Fragmentation is a symptom of the ongoing cultural decline that must be halted if we are to preserve cherished freedoms and sensibilities. "These defenders of a traditional canon propose the definition and transmission of a core of classic works as an antidote to

31. HANS-GEORG GADAMER, *TRUTH AND METHOD* 31 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1989) (originally published as *WARHEIT UND METHODE* in 1960). Gadamer extends Kant's premise that reflective judgment is not exercised in accordance with a priori concepts, but rather is the faculty of applying the concepts of understanding. See generally IMMANUEL KANT, *CRITIQUE OF JUDGMENT* (J.H. Bernard trans., 1951) (1790).

32. This idea is stated most forcefully by Allan Bloom. See BLOOM, *supra* note 5, at 336-82 (defending the civilizing mission of a liberal education).

33. ALTIERI, *supra* note 9, at 52.

this deterioration of American education."³⁴ Traditionalists point out that many multiculturalist advocates in fact impose an equally stringent bias in favor of liberal Western values by championing only works written by oppressed people who espouse progressive Western ideals such as feminism or religious toleration.³⁵

Although many traditionalists might acknowledge that cultural forces have unfairly shaped the anthologies of canonical literature, they will assert that the historical effects of parochialism and prejudice do not undermine the core tenets of Western civilization, so much as recommend the freer admission of all authors who meet the relevant criteria.³⁶ The traditional defense of the canon, then, valorizes *belonging* to a common culture marked by shared criteria of value.

Frank Kermode has defended the canon vigorously along these lines, although with a measure of sophistication.³⁷ Kermode argues that breaking

34. Ansley, *supra* note 6, at 1514; *see also* sources cited *supra* note 5.

35. Dinesh D'Souza makes this point when assessing Stanford's revised curriculum which includes works by minority and women authors and emphasizes themes of race and gender. D'SOUZA, *supra* note 5, at 59-93. D'Souza ridicules the "canonization" of Rigoberta Menchu as a projection by "left-wing" professors "of Marxist and feminist views onto South American Indian culture." *Id.* at 72. This critique does not undermine the multiculturalist attack on the canon, but instead questions the willingness of multiculturalists to adhere to their stated objectives and respect (the often) racist, sexist, or homophobic traditions of non-Western cultures. Of course, not all literature from the third world gains prominence simply by echoing Western progressive politics. *See, e.g.*, CHINUA ACHEBE, *THINGS FALL APART passim* (1959) (presenting a powerfully ambiguous portrayal of the clash of culture between Christianity/Colonialism and Ibo tribal life).

36. *See, e.g.*, Laurence Lerner, *Subverting the Canon*, 32 BRIT. J. AESTHETICS 347, 351-52 (1992). Lerner recuperates some overlooked female poets but denies that such an effort holds any revolutionary consequences because the same criteria defines good poems whether written by women or men.

This attempt to rehabilitate a couple of woman poets will not obviously make much difference to the canon of seventeenth—or eighteenth—century poetry, but that does not mean it is unimportant The gains have been obvious: some good poems, and a fresh perspective on love poetry. But when it comes to establishing alternative criteria of poetic merit, the success has been very limited. . . . Opening up discussion of the canon has led to recuperating individuals but has not yet offered the basis for an alternative canon.

Id. at 358. Lerner argues that the recuperation of individual authors previously overlooked "will not in principle differ from the rescue of a neglected middle class white male (there are plenty of those too)." *Id.* at 350; *cf.* Guillory, *supra* note 8, at 234-40 (contending that although canonization is not a crude exclusionary dogma, the force of the canonical resides in its institutionalized definition of *who* shall read and write at all).

37. Kermode effectively attacks "the imperialist position" advocated by T.S. Eliot, in which the classics are seen as definitive statements of an unfolding unitary history. FRANK KERMODE, *THE CLASSIC: LITERARY IMAGES OF PERMANENCE AND CHANGE* 20, 27-28, 38 (1975) (criticizing T.S. Eliot, *What is a Classic?*, reprinted in *ON POETRY AND POETS* 53-71 (1957)). Kermode argues that classics of relatively recent vintage, such as *Wuthering Heights*, "[u]nlike the old classic, which was expected to provide answers, [pose] a virtually infinite set of questions." *Id.* at 114. From the first reader, the task always is to respond "creatively to indeterminacies of meaning inherent in the text and possibly enlarged by the action of time." *Id.* at 134.

the authority of the canon is tantamount to destroying the community it serves.³⁸ The canon is an essential feature of any community, for "we have not found ways of ordering our thoughts about the history of literature and art without recourse to them."³⁹ The canon debate is not really about the desirability of the canon, but rather about who will exercise control over its definition.⁴⁰ Kermode explicitly links the canon to the regenerative power of the institutional context in which it arises, arguing that the canon represents the continuing ability of the institution to make use of its past.⁴¹

In sharp contrast, critics assert that the traditional canon does not represent a repository of universal and eternal values of civilization; rather, it is a contingent, historical representation of the values that reinforce the dominant position of certain members of society. Critics thus attack the canon for precisely the reasons that defenders come to its aid: The canon is linked to cultural and institutional power and stability. Stanley Fish asserts that the canon is "a historical, political, and social product, something that is fashioned by men and women in the name of certain interests, partisan concerns, and social and political agenda."⁴² Under this view, the function of a canon is "not to encourage thought, but to stop it"; therefore, the proper goal of critical theory is not to repair the traditional canon but to demote it to one canon among many in a pluralistic society without hierarchical cul-

Nevertheless, Kermode also reveals that his historical approach is far from thoroughgoing. He persists in the belief that "there is a substance that prevails, however powerful the agents of change," *id.*, and he rejects the idea "that all interpretation of the classic must be at the expense of the modern," *id.* at 6-7. Kermode concludes his book by playing down his attacks on the imperial model of the classic.

The implication remains that the classic is an essence available to us under our dispositions, in the aspect of time. So the image of the imperial classic, beyond time, beyond vernacular corruption and change, had perhaps, after all, a measure of authenticity; all we need do is bring it down to earth.

Id. at 141. When the canon debate intensified in the decade after the original publication of this book, Kermode's defense of the canon became more pronounced.

38. KERMODE, POETRY, *supra* note 9, at 75-76 (interview with Michael Payne).

39. KERMODE, HISTORY, *supra* note 9, at 117. Kermode argues that canons serve the same function as the periodization of history, namely by allowing us

to identify with the interests of our predecessors, to qualify their judgements without necessarily overthrowing them, to converse with them in a transhistorical dimension. Though inevitably tainted with privilege and injustice, that still seems a valuable inheritance; some catastrophe might conceivably destroy it, but the destruction should not be encouraged Some workable notion of canon, some examined idea of history [are] necessary even to the desired rehabilitation of the unfairly neglected. So the tradition of value, flawed as it is, remains valuable.

Id. at 126-27; see also *id.* at 145.

40. "The canon is what the insurgents mean to occupy as the reward of success in the struggle for power. In short, what we have here is not a plan to abolish the canon but one to capture it." *Id.* at 114.

41. KERMODE, POETRY, *supra* note 9, at 74-75; Kermode, *Institutional Control*, *supra* note 9, at 83-85.

42. Fish, *supra* note 29, at 13.

tural arrangements.⁴³ By forgoing the traditionalist pipe dream of a unified culture and embracing "a kind of ethnic carnival or festival of cultures or ways of life or customs,"⁴⁴ Fish champions a "commitment to exploring as many canonical traditions as we can make available to us, to learn from them what we are able to learn."⁴⁵ Although every canon is debilitating under this view, the interplay between a number of canons can limit their individual stultifying effects. Critics of the canon reject its unitary presumptions in favor of a recognition that our "irreducibly plural traditions" require us to view "the project of upsetting and reorganizing the canonical apple cart as intellectually valid and necessary."⁴⁶ The challenge to the canon, then, valorizes the power of *distanciating critique* from a point outside the canon, even if the theorist obtains this perspective only by embracing another, incommensurable canon.⁴⁷

The normative impetus behind the critics' pluralistic imperative is "the conscious bringing in of previously suppressed or ignored histories and narratives, in the interest of greater justice for the disempowered and a more effective education for all."⁴⁸ In its most vigorous form, the critique of the canon seeks to enhance education not only by listening to the voices of those previously silenced, but also by reading against every cultural text to discover the social forces at work *sub silentio* within it. The emerging "critical historicist" technique of literary criticism "[s]crupulously [locates] every aspect of the work in its historical setting," with the goal of disrupting

43. Fish, *supra* note 15, at 12. Of course, critical appraisals of canonical texts and their roles in cultural history form an important feature of this pluralistic approach. See, e.g., "BAD" SHAKESPEARE: REEVALUATIONS OF THE SHAKESPEARE CANON *passim* (Maurice Charney ed., 1988) (collection of essays reexamining many of Shakespeare's famous works and trying to answer the editor's questions: "Can any of Shakespeare be bad? 'Bad' in what sense?", *id.* at 9); GARY TAYLOR, REINVENTING SHAKESPEARE: A CULTURAL HISTORY FROM THE RESTORATION TO THE PRESENT *passim* (1989) (providing a cultural history of Shakespearean interpretation from the Restoration to the present); THE SHAKESPEARE MYTH *passim* (Graham Holderness ed., 1988) (collection of essays challenging the discursive fields and cultural practices associated with the Shakespearean myth).

44. Richard Bernstein, *Academia's Liberals Defend Their Carnival of Canons Against Bloom's "Killer B's,"* N.Y. TIMES, Sept. 25, 1988, § 4, at 26 (quoting Stanley Fish).

45. Fish, *supra* note 29, at 14.

46. Erickson, *supra* note 8, at 444-45.

47. Cf. PAUL RICOUER, HERMENEUTICS & THE HUMAN SCIENCES 90 (John B. Thompson trans., 1981) (describing critical efforts to emancipate the text by means of an "alienating distanciation"—*Verfremdung*—which commands the objectifying attitude of the human sciences"). Many critics of the canon reject the naive scientism evidenced in some ideology critique, but they continue to celebrate "alienating distanciation" as a key feature of their perspectival approach. See *infra* notes 48-52 and accompanying text.

48. Ansley, *supra* note 6, at 1514 (noting the sources cited in n.5); see, e.g., Edmund W. Gordon & Maitrayee Bhattacharyya, *Human Diversity, Cultural Hegemony, and the Integrity of the Academic Canon*, 61 J. NEGRO EDUC. 405, 409-14 (1992); Anthony M. Platt, *Defenders of the Canon: What's Behind the Attack on Multiculturalism*, SOCIAL JUSTICE, Summer 1992, at 122, 134-36.

the text's claim to truth by tying it "back into the nexus of historical pressures it sought to resolve and hence escape."⁴⁹ The reader using this technique attempts to elucidate the contingent values of the present by historicizing and demythologizing the cultural forms of the past that the text represents. Along these lines, Jerome McGann argues that readers must resist being controlled by the power of the text by recognizing that reading only "works through a structure of reciprocals," and that readers thereby are empowered to take charge of the text.⁵⁰ McGann promotes active reading that

49. ALTIERI, *supra* note 9, at 22 (criticizing Jerome J. McGann, *The Meaning of the Ancient Mariner*, 8 CRITICAL INQUIRY 35 (1981)). Altieri uses the term "critical historicism" to refer to the loosely affiliated movement generally known as "New Historicism," following Stephen Greenblatt's use of this term to describe the works collected in an early symposium. See Stephen J. Greenblatt, *Introduction to Symposium, The Forms of Power and the Power of Forms in the Renaissance*, 15 GENRE 3, 5-6 (1982). New historicist scholarship is featured in *Representations*, a journal that Greenblatt co-edits. Greenblatt's succinct definition of New Historicism underscores its anti-formalist tenor:

For me the study of the literary is the study of contingent, particular, intended, and historically embedded works; if theory inevitably involves the desire to escape from contingency into a higher realm, a realm in which signs are purified of the slime of history, then this paper is written *against* theory.

Stephen J. Greenblatt, *Shakespeare and the Exorcists*, in CONTEMPORARY LITERARY CRITICISM 428, 429 (Robert C. Davis & Ronald Schleifer eds., 2d ed. 1989). New Historicism is defined in opposition to traditional historicist demands "that the textual critic try to achieve as complete an imaginative recovery of his past author as was possible." JEROME J. MCGANN, A CRITIQUE OF MODERN TEXTUAL CRITICISM 117 (1983). McGann criticizes the overly narrow preoccupation with final authorial intentions as a specialized historical inquiry, arguing that intentions must in turn "be embedded in the broad cultural contexts which alone can explain and elucidate them." *Id.* at 123.

For varying examples or appraisals of this strategy of criticism, see STEPHEN J. GREENBLATT, LEARNING TO CURSE: ESSAYS IN EARLY MODERN CULTURE (1990); STEPHEN J. GREENBLATT, SHAKESPEAREAN NEGOTIATIONS: THE CIRCULATION OF SOCIAL ENERGY IN RENAISSANCE ENGLAND 94-129 (1988); KERMODE, POETRY, *supra* note 9, at 49-67; JEROME J. MCGANN, THE ROMANTIC IDEOLOGY: A CRITICAL INVESTIGATION 21-31 (1983); JEROME J. MCGANN, SOCIAL VALUES AND POETIC ACTS: THE HISTORICAL JUDGMENT OF LITERARY WORK 95-196 (1988); JEROME J. MCGANN, THE TEXTUAL CONDITION 68-128 (1991) [hereinafter MCGANN, TEXTUAL CONDITION]; JEROME J. MCGANN, TOWARDS A LITERATURE OF KNOWLEDGE *passim* (1989) [hereinafter MCGANN, LITERATURE OF KNOWLEDGE]; ROBERT SCHOLES, TEXTUAL POWER: LITERARY THEORY AND THE TEACHING OF ENGLISH 1-17 (1985); THE NEW HISTORICISM *passim* (Harold Aram Veaser ed., 1989); David Simpson, *Literary Criticism and the Return to "History"*, 14 CRITICAL INQUIRY 721, 721-25 (1988).

New Historicism literary criticism has some affinities with Marxist conceptions of history. ALTIERI, *supra* note 9, at 325 n.1 (citing TERRY EAGLETON, CRITICISM AND IDEOLOGY: A STUDY IN MARXIST LITERARY THEORY 430 (1976)); see also KERMODE, HISTORY, *supra* note 9, at 98-103 (discussing Marxist scholars Terry Eagleton and Frederic Jameson). Nevertheless, it is perhaps not accurate to describe New Historicism as Marxist. See Catherine Gallagher, *Marxism and the New Historicism*, in THE NEW HISTORICISM, *supra*, at 37 *passim*; Stephen J. Greenblatt, *Towards a Poetics of Culture*, in THE NEW HISTORICISM, *supra*, at 1 *passim*; Robert C. Davis & Ronald Schleifer, *Marxism and New Historicism*, in CONTEMPORARY LITERARY CRITICISM, *supra*, at 369 *passim*.

50. MCGANN, TEXTUAL CONDITION, *supra* note 49, at 119.

involves decoding one or more of the contexts that interpenetrate the scripted and physical text. It necessitates some kind of abstraction from what appears most immediately.

....

Even under the best of circumstances, messages and their senders are neither innocent nor completely reliable. This is why readers must be prepared to defend themselves against both the errors and the perversions of those who communicate with texts.⁵¹

Critical historicist scholars regard society as fragmented not only horizontally—between different subcultures—but also vertically—across time.

At its most basic level, the canon controversy is a debate between the faithful believers in belonging and the skeptical masters of distancing critique. Of course, no contestant adopts one of these caricatured positions entirely. Neither position, reduced to its pure theoretical essence, is a realistic portrayal of the experience of reading literature. To privilege belonging, one must demarcate the “we” who belong and presume that this “we” is shaped in an important way by the power of canonical literature. A critical inquiry into the effects of this power seems to flow inevitably from the presuppositions of committed defenses of belonging. Similarly, to privilege distancing critique, one must criticize something—which itself requires an admission that a hegemonic canon is a powerful force in society. Acknowledging that someone must belong before she is in a *position* to distance herself critically from that position seems unavoidable. As we might well expect, challenges to the canon often derive their rhetorical power from the very canon they place in question.⁵²

The canonical caricatures break down, as all caricatures do, when carefully analyzed. And yet, each caricature bears strong resemblance to a reasonable articulation of how we encounter texts. In a different context, the

51. *Id.* at 119, 128. Charles Altieri offers this characterization:

The past as essentially a record of ideological struggle, the present as a domain we liberate from that past by inaugurating disbelief and analyzing ideological overdeterminations, and the future as a conflict among the competing self-interests that determine critical stances—these are the stuff the dreams of contemporary theory are increasingly made on.

ALTIERI, *supra* note 9, at 24.

52. One commentator who attempts to avoid the grand Either/Or of the canon debate points out that position papers from the critics of the canon

are usually composed as if addressed to audiences steeped in the traditional canon. Even so hostile a witness as Maria Margaronis suggests that, “we have nothing to change but our minds,” assuming that her audience will respond to the twisting of Marx’s famous phrase, which is by now a part of the canon, if only as that reflex-born counter-canon.

R.T. Smith, *Canon Fodder, The Cultural Hustle, and the Minotaur Deep in the Maze*, 69 NAT’L FORUM: PHI KAPPA PHI J. 25, 27 (1989).

philosopher Paul Ricoeur eloquently described the competing, yet mutually dependent, images at work in this debate. Ricoeur noted that understanding embodies a double motivation:

willingness to suspect, willingness to listen; vow of rigor, vow of obedience. In our time we have not finished doing away with *idols* and we have barely begun to listen to *symbols*. It may be that this situation, in its apparent distress, is instructive: it may be that extreme iconoclasm belongs to the restoration of meaning.⁵³ My own interrogation proceeds from this observation. Would it not be appropriate to shift the initial locus of the hermeneutical question, to reformulate the question in such a way that a certain dialectic between the experience of belonging and alienating distancing becomes the mainspring, the key to the inner life, of hermeneutics?⁵⁴

Ricoeur's apt diagnosis suggests that it is necessary to erase the caricatures and approach the canon debate from a more nuanced, subtle perspective. Before discussing efforts to rehabilitate the idea of a literary classic along these lines, Part II describes the emerging debate over the legal canon that threatens to follow the caricatures established in literary criticism.

II. CHALLENGING THE LEGAL CANNON

A. *The Existence of a Legal Canon*

Traditional scholars might question whether the debate regarding the literary canon can or should hold any relevance for legal theorists. Comparing judgments of aesthetic worth that define the literary canon with judgments about the texts and interpretive strategies comprising the legal canon appears to confuse two fundamentally different enterprises. Traditionalists might agree that literary canons are constructed in accordance with the shifting tastes of a pluralistic, interpretive community while maintaining that the legal canon is defined simply as the law in force at any given time. There are no options for inclusion in the hierarchical legal canon, under this view, because a text either has the normative force of binding law or it does not. A decade ago, Owen Fiss stressed the limitations of the law and literature movement in similar terms.

Judges do not belong to an interpretive community as a result of shared views about particular issues or interpretations, but belong by virtue of a commitment to uphold and advance the rule of law itself. They belong by virtue of their office. There can be many schools of literary interpretation, but as Jordan Flyer put it, in

53. PAUL RICOEUR, *FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION* 27 (Denis Savage trans., 1970).

54. RICOEUR, *supra* note 47, at 90.

legal interpretation there is only one school and attendance is mandatory. . . . The presence of . . . procedures and a hierarchy of authority for resolving disputes that could potentially divide or destroy an interpretive community is one of the distinctive features of legal interpretation.⁵⁵

Using H.L.A. Hart's jurisprudential terminology, the legal canon is differentiated from the literary canon by virtue of a clearly stated rule of recognition that identifies authoritative texts and a clearly stated rule of adjudication that specifies the manner in which disputes over the interpretation of these texts shall be resolved.⁵⁶

Although the argument against extending the canon debate from literature to law has superficial appeal, a closer analysis uncovers the unwarranted assumptions girding this argument. First, it is question-begging to characterize the legal canon as a self-defining collection of all authoritative legal texts. This is the equivalent of defining the literary canon as the sum of all works of literature that have been published at any given time. This apparently clever move accomplishes little more than suggesting that we are able to demarcate the boundaries between legal and non-legal texts.⁵⁷ Moreover, the assertion that the legal canon is coincident with the entire body of texts having the normative force of binding law is demonstrably false. There are innumerable appellate court opinions that resolve the case at hand but do not have any impact on the development of the law; they recede into obscurity forever without gaining even the fleeting notoriety of inclusion in string citations for the first few years following their publication.⁵⁸ Additionally, subsequent judicial gloss quickly can eclipse the text of a statute or regulation to the point that courts rarely consult the text directly.⁵⁹ There are innumerable texts that, quite simply, play no role in

55. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746-47 (1982).

56. H.L.A. HART, *THE CONCEPT OF LAW* 92-96 (1961).

57. This should not be interpreted as minimizing the distinctions between law and literature, nor as suggesting that the relatively determinate rule of recognition operative in legal practice is insignificant. The questions raised by the canon debate remain pertinent, however, because they focus not on the relatively abstract question of defining law, but rather on the more practical questions of how law is or should be practiced, critically analyzed, and taught.

58. Even decisions of the United States Supreme Court reported with a full opinion can recede into obscurity without ever being cited. See, e.g., *Hallenbeck v. Leimert*, 295 U.S. 116 (1935) (reversing a decision of the Circuit Court of Appeals for the Seventh Circuit regarding the liability of an indorser on a negotiable instrument). Entering the search "Hallenbeck w/5 Leimert" in the LEXIS Mega Library on February 19, 1994 revealed no cases citing *Hallenbeck*. The irony of citing this case does not escape me, but it would be equally ironic to dredge up a citation to a novel that has never influenced writers, critics, or teachers.

59. See, e.g., 15 U.S.C. § 1 (1988) (providing that every contract, combination, or conspiracy in restraint of trade is illegal). Under the rubric of a "rule of reason," courts have ignored the unqualified language of the statute and have attempted instead to implement the underlying public policy of fostering competitive conditions in the national economy. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 687-88 (1978).

legal practice, scholarship, or education, even though they have the force of law, just as there are innumerable novels that play no role in the growth, development, or establishment of literary styles and themes. Equating the legal canon with all currently valid law, therefore, posits an overbroad definition.

Restricting the definition of the legal canon to authoritative statements of law is underinclusive as well. The law is not static, it is constantly changing.⁶⁰ A comprehensive legal canon would have to include those texts that inform changes in the law without themselves having the force of law. Repealed statutes and overruled court decisions can remain influential to the extent that they define and shape current positive law by negative implication. Secondary materials similarly can gain prominence as canonical texts that influence the development of law, as occurs with reports of legislative history, restatements of the law, treatises, and law review articles. Thus, there is no firm line circumscribing the list of canonical legal texts, because interpretive decisions are informed by texts outside the scope of binding legal pronouncements.⁶¹

Once we abandon the facile definition of the legal canon as all enforceable law, the fundamental similarities in the creation and operation of the legal and literary canons become apparent.⁶² Comparing the goals and methods of educating students in literature and in law reveals these similarities. If the legal canon were simply a collection of all authoritative rules within the legal system, one would expect course books to resemble detailed *Sum and Substance* outlines, and classroom pedagogy to resemble bar review "cram" courses. This, happily, is not the case in legal education for the same reason that reading *Cliff Notes* of literary masterpieces could never provide an adequate education into the literary canon. The goal of teaching students to "think like a lawyer" is closely analogous to the goal of instilling a critical capacity in students through the study of literature. Law professors routinely discriminate between good judicial opinions and bad

60. H.L.A. Hart acknowledged the need for a secondary rule of change. H.L.A. HART, *supra* note 56, at 93.

61. It would be curious, for example, to exclude Professors White and Summers's treatise on commercial law from the legal canon given that it is an extremely influential text for counselors, advocates, judges, and educators. See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* (3d ed. 1988). Entering the search "White w/10 Summers w/15 'Uniform Commercial Code'" in the LEXIS Mega Library on February 19, 1994 revealed 2,744 cases citing the treatise, including six United States Supreme Court opinions.

62. This Article argues that the law and literature movement in the 1970s and 1980s was entirely correct in its central theme that law is a form of literature in a very important sense. However, I have distinguished my approach from some of the approaches adopted by law and literature adherents. See Francis J. Mootz III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur*, 68 B.U. L. REV. 523, 556-65 (1988).

judicial opinions, as well as between good student arguments and bad student arguments. This practice reinforces an underlying assumption that the practice of law entails more than a mechanical application of authoritative general rules to particular factual circumstances. Legal practice demands that a lawyer exhibit good judgment when choosing strategies or arguments and that a lawyer employ effective rhetorical techniques to persuade others that her strategies or arguments should prevail. If we define the legal canon as the collection of texts and interpretive rules that serve as the resource for effective lawyering and good judging, rather than adopting a sterile syllogism by equating the legal canon with currently valid law, then the legal canon has strong affinities with the literary canon. Consequently, legal scholars are beginning to acknowledge that the debate over the literary canon has something important to say about the legal canon.⁶³

63. This does not suggest that writing and reading legal texts is no different from writing and reading literary texts, but rather that there is no *ontological* distinction that precludes comparison of these textual activities. In an important essay describing the hermeneutical significance of the text, Hans-Georg Gadamer characterizes legal texts as "a phase in the execution of the communicative event" that requires creative interpretation. Hans-Georg Gadamer, *Text and Interpretation*, in *DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER* 35 (Diane P. Michelfelder & Richard E. Palmer eds., Dennis J. Schmidt & Richard E. Palmer trans., 1990). In contrast, Gadamer states that literary texts do not "disappear in our act of understanding them but stand there confronting our understanding" as texts "in the highest degree." *Id.* at 41-42. Gadamer plainly is correct that legal texts are relatively more communicative while literary texts are relatively more persistently evocative, but he comes close to giving too conservative an account of legal interpretation—at least with respect to the contemporary American common law system in which adjudication plays a prominent role notwithstanding, and due in part, to the explosion of statutes and regulations.

The important point, for present purposes, is acknowledged by Gadamer when he convincingly rebuts any attempt to posit an ontological divide between legal understanding and aesthetic understanding.

The difference between a literary work of art and any other text is not so fundamental. . . . All written works [whether poetry or scientific prose] have a profound community in that language is what makes the contents meaningful. In this light, when texts are understood by, say, a historian, that is not so very different from their being experienced as art. And it is not mere chance that the concept of literature embraces not only works of literary art but everything passed down in writing

. . . .
The mode of being of a text has something unique and incomparable about it.

GADAMER, *supra* note 31, at 163. Compare *id.* at 101-69 ("Part I, ch. II: The Ontology of the Work of Art and Its Hermeneutical Significance") with *id.* at 324-41 ("Part II, ch. II(2)(c): The Recovery of the Fundamental Hermeneutic Problem—The Exemplary Significance of Legal Hermeneutics").

For a recent assessment and articulation of this aspect of the "law and literature" movement, see Lawrence Joseph, *Theories of Poetry, Theories of Law*, 46 VAND. L. REV. 1227 *passim* (1993). Joseph looks at "what poetry says about language" as a means to "disclose what one of our society's most vital languages, the language of law, means at this time." *Id.* at 1229. Joseph concludes that a "pragmatist realizes that adjudicative language must be brought closer to the realities of language itself." *Id.* at 1254.

When discussing challenges to the legal canon, it is important to acknowledge that there is no single, determinate, and acontextual legal canon, just as there is no single, determinate, and acontextual literary canon. Literary criticism and legal scholarship are practices in their own right, albeit second-order practices, and these critical practices have their own canonical exemplars. Additionally, the materials selected to teach both literature and law students constitute curricular canons of pedagogically appropriate materials. Finally, the texts that define and develop the principles of law underlying legal practice constitute the legal analogue to the "great" works of literature that define and develop the literary tradition. Although it is quite appropriate to distinguish between these different canons as a conceptual matter, as a practical matter each of these venues of canonization within the law relate to the others in a fundamental way. For example, it makes little sense to talk about a curricular canon that in fact is distinct in any important sense from the scholarly canon and the canon of important legal materials. A curricular canon, although conceptually distinct, invariably must include important cases and statutes, as well as important critical perspectives for assessing the cases and statutes.⁶⁴

The parallels between literary and legal canons regarding curricular choices and critical commentary seem uncontroversial. However, many theorists might argue that it is inappropriate to draw a comparison between the canon that informs legal practice and the canon of great works of literature that shape literary creation. It might appear that the legal canon is determinant and constraining, whereas the literary canon is fluid and suggestive. It is true that the normative force of a law is inherent in its status as law, while the normative force of literature is earned in its exemplificative power. A legal text having the force of law is much more a performative text than an evocative text. Nevertheless, no lawyer approaches the comprehensive collection of authoritative legal texts as a pre-given, uncontroversial, and self-explanatory fact. Lawyers and judges *work* within the law, teasing out the ambiguities and inconsistencies that provide the space for a creative interpretation that will alter the law. Hence, lawyers speak of "discovering" a law that has long been on the books, a process which might signal the first steps toward canonization.

In contrast, a practitioner of literature—a writer or poet as opposed to a literary critic—is never freed from the preceding tradition and delivered

64. For instance, the canon of important legal texts influences the decision whether to spend three class days, one class day, or none at all discussing the doctrine of unconscionability in a first-year contracts course. In addition, the canon of important critical perspectives will influence the decision whether to include material that analyzes the impact of unconscionability litigation according to the value of efficient commerce, the value of fostering appropriate consideration of the interests of women and minorities, or neither.

unto a realm of pure aesthetic creativity, even though the preceding works of the tradition do not bind the artist in precisely the same manner that legal precedent binds lawyers and judges. A writer who sits down at a table with pen in hand is constrained by a pre-reflective conception of what a *good* novel looks like no less than a lawyer who sits in the law library with pen in hand is constrained by a pre-reflective conception of what a *good* legal argument looks like. The legal and literary canons each constitute a traditional force that shapes the creative practices of writing and lawyering. Although artists have bemoaned the weight of the tradition, astute critics have recognized what lawyers well know: working within a tradition is productive of knowledge and creativity, not destructive or oppressive.⁶⁵

B. Critiquing the Legal Canon

Legal scholars appear poised to deconstruct the legal canon along the lines already sketched by literary theorists, with all of the attendant polemics and bitterness. Jerome Culp presages this tumultuous event in a recent article in which he attacks the idea of a legal canon from the developing perspective of critical race theory. Noting that legal scholars already "have begun to discuss what the legal canon should look like even if they do not do so in terms of canons," Culp contends that dreams of a univocal legal canon are fantasy.⁶⁶ He argues that dropping the now-discredited pretense of universality and neutrality leaves room for the expression of anger in

65. W. Jackson Bate argues that the "accumulating anxiety" among poets, triggered by the fear that there is nothing left to do in the wake of the "rich and intimidating legacy of the past," is misplaced. W. JACKSON BATE, *THE BURDEN OF THE PAST AND THE ENGLISH POET* 3-4 (1970). Bate contends that eighteenth century poets "lift[ed] the burden of the past" by elevating the concept of originality to the highest ideal, and eventually, as a consequence of Enlightenment ideology, as a necessary ideal for artistic merit. *Id.* at 106-10. Bate argues against this hopeless fixation on originality and, while agreeing that the artist is circumscribed, he asserts that this condition makes art possible in the first instance.

None of us, as Goethe said, is really very "original" anyway; one gets most of what he attains in his short life from others. The boldness desired [in artistic creation] involves directly facing up to what we admire and then trying to be like it. . . . [Defying the Enlightenment taboo of returning to the past in fact celebrates] the freedom of man (that freedom so indispensable to achievement) to follow openly and directly what he most values. . . . [This reorientation provides clues as to how to confront] the greatest single cultural problem we face, assuming that we physically survive: that is, how to use a heritage, when we know and admire so much about it, how to grow by means of it, how to acquire our own "identities," how to be ourselves.

Id. at 132-34; see also HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* 148 (1973) (arguing that "the covert subject of most poetry for the last three centuries has been the anxiety of influence, each poet's fear that no proper work remains for him to perform," resulting in the poet's willful misinterpretation of her predecessors as a mistaken means of asserting her originality); David Cole, *Agon at the Agora: Creative Misreadings in the First Amendment Tradition*, 95 *YALE L.J.* 857, 858 (1986) (extending Bloom's thesis to the work of judges).

66. Jerome M. Culp, Jr., *Firing Legal Canons and Shooting Blanks: Finding a Neutral Way in the Law*, 10 *ST. LOUIS U. PUB. L. REV.* 185, 186 (1991). Culp argues that the ascendancy of the

minority scholarship since "there is much to be angry about."⁶⁷ Targets of this anger include even those scholars who are sympathetic to the themes of critical race theory, but who have not completely allied themselves against the canon defenders. Culp agrees that many of his white male colleagues

are innocent of any suppression of ideas by people of color and women. However, they often give aid and comfort to those who cannot permit changing the legal canon. It is that aid and comfort that is both dangerous and inconsistent with a canon that represents the result of a useful debate about its creation.⁶⁸

The allusion to assisting the enemy in wartime is not too far-fetched if legal theorists replicate the polemical debate over the literary canon. Culp's apparent goal is not just the reception of minority scholarship by mainstream scholars, but also the identification and isolation of its critics.⁶⁹

Legal theorists only now have begun to acknowledge the significance of the canon debate for framing disputes over the value of different genres of legal scholarship, the value of certain curricular choices, and the more general disputes about the effect of canons on the practice of law. This Article draws parallels between this emerging scholarship and the issues raised in the debate over the literary canon. Even in its earliest stage, the debate over the legal canon is generating some of the same conundrums that emerged in the challenge to the literary canon. These similarities especially are manifested in a part of the canon debate that recently has attracted a great deal of attention: questioning whether legal scholarship remains coherent, given the ever-increasing number of highly specialized scholarly

"nonrealist" paradigm in the natural and social sciences precludes the establishment of a unitary canon. *Id.* at 190.

67. *Id.* at 195; *see also id.* at 191-95.

68. *Id.* at 194.

69. In a later article criticizing Richard Posner's denigration of black legal scholarship, Culp emphasizes that his criticisms, including characterizing Judge Posner as a racist, are not meant to silence white scholars. Instead, he simply demands "answers and participation" regarding issues of race. Jerome M. Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 *DUKE L.J.* 1095, 1112 (1992). Nevertheless, it seems apparent that, from Culp's perspective, there is an enemy camp that will inevitably give the wrong answers even if they deign to participate in dialogue.

Culp's claim that anger is an important aspect of his scholarship may be interpreted more charitably as a claim that a first-person narrative description of the effects of oppression on the author can serve an edifying role in legal scholarship. *Cf.* PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 47-48 (1991) (recounting her now-famous Benetton story and the refusal by law review editors to publish her account with its original expression of anger). There is an important difference between telling a story and describing one's reaction to the recounted events as part of an effort to foster a more productive exchange, as opposed to expressing anger at those with whom one is speaking on account of their wrongheaded commitments. The former generates light as well as heat.

genres that appear to have developed their own separate canons.⁷⁰ Because this topic strikes at the heart of academic practice, it has drawn varied and spirited commentary.

Allan Hutchinson contends that increasing minority representation on law faculties will have a desirable effect on legal scholarship.⁷¹ Hutchinson argues that postmodern attention to the socio-political contexts of power counteracts deconstructive excesses that appear to suggest that all texts are equal, and he emphasizes that minority writers are more likely, though not guaranteed, to stimulate fresh views on important political issues that implicate social power.⁷² Hutchinson explicitly ties this political invigoration to the literary canon debate, arguing that the legal canon of scholarly perspectives similarly serves as a form of cultural imperialism practiced against minorities:

All circumstances of the literary canon's selection, production and dissemination are culturally-situated. Not only do they bolster the prestige of certain largely local and contingent preoccupations, but they exclude and devalue the experiences and interests of those with other world views: absence is a very telling form of presence. Presented as a tribute to and celebration of a common humanity, it is a troubling exercise in cultural imperialism.

. . . .

In championing the case for a keener and more serious treatment of modern literature, the intention is not to devalue entirely the literary work that comprises the traditional canon: that would be the flip-side of the same canonical coin. The aim must be to re-value it by situating it within a less reverential and more rooted method of reading and instruction. Shakespeare and other hallowed artists must be read and understood as products of their own particular socio-cultural context . . . Apart from their historical interest, such literary offerings will continue to merit and repay continued study as long as and to the extent that they have something to say to a culturally diverse and pluralistically tolerant society.⁷³

70. See Levinson & Balkin, *supra* note 2, at 1652 (describing the erosion of faith in the idea of a single model of good legal reasoning by the development of genres like feminist theory and law and economics that are "highly specialized with separate canons; they have very different intellectual approaches and scholarly goals that may, in some instances, be mutually critical of each other").

71. Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 *NEW ENG. L. REV.* 1173, 1173 (1992).

72. Hutchinson states that "[i]f deconstruction relieves authors of the burden of authority, postmodernism reminds readers of the weight of context." *Id.* at 1188. Black authors bring a new context to scholarship and lawyering, *see id.* at 1189, 1197-98, 1214, as exemplified in the career of Justice Thurgood Marshall, *see id.* at 1207.

73. *Id.* at 1200-01, 1205.

Perhaps unwittingly, Hutchinson subscribes to the critical historicist credo and endorses increased minority scholarship as a likely means for fostering the necessary critical distance and reappraisal.⁷⁴

The burgeoning scholarship characterized as critical race theory has given pause to many theorists concerned with articulating the criteria of good scholarship.⁷⁵ Edward Rubin has argued that legal scholarship is inveterately normative, and that successful legal scholarship supports clearly elucidated normative premises with rigorous argumentation rooted in empirical data.⁷⁶ Rubin is wary, though, of normative biases clouding the evaluation of scholarship critical race theorists have produced, so he offers a theory of evaluation that enables the evaluator to rise above simple (prejudiced) intuition.⁷⁷ He further argues that the minimal criteria of rational discourse—normative clarity and persuasiveness—must be supplemented by the criteria of good performance—significance within the tradition and applicability to contemporary concerns.⁷⁸ The criteria of good performance require an evaluator to hold his preconceptions in abeyance and allow legal scholarship from a different genre to raise questions for his own views. “One way to deal with a divergent work is to use the doubts and anxieties that such a work generates as a means of tempering one’s judgment.”⁷⁹

Rubin’s theory of evaluation promotes receptivity and self-effacement in an effort not to foreclose recognition of new approaches such as critical race theory. Critics charge that Rubin’s “friendly call for standards” is mis-

74. There has been a spirited debate over the merits and significance of critical race theory, viewed as a particular genre of legal scholarship written predominantly by minority authors. See Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1787-1819 (1989) (questioning the claims to significance made by critical race theorists); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 715-16 (criticizing Randall Kennedy by arguing that increasing minority faculty members has the “possibility of (dramatically) improving legal scholarship” and “knock[ing] our socks off”); Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1161 (criticizing Duncan Kennedy’s “false and sentimental faith [and] lack of realism” that minority professors will provide distinctive contributions to legal scholarship on account of their race); Culp, *supra* note 67, at 1104-05 (chiding Posner for ignoring black scholarship but then proceeding to criticize it).

75. For an annotation of critical race theory, see Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 464-516 (1993); see also Symposium, *Issues in Critical Race Theory*, 82 CAL. L. REV. (forthcoming May 1994).

76. “To the extent that scholars can persuade policy-oriented decision-makers, they will do so only by presenting empirical arguments, connected to clearly stated normative positions. . . . The entire point of standard legal scholarship is to explore and contrast the pragmatic implications of conflicting normative positions.” Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1887, 1893 (1988).

77. See Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 890-91 (1992).

78. *Id.* at 912-40.

79. *Id.* at 962.

placed, however.⁸⁰ Richard Delgado argues that the evaluator can never escape from her normative biases, and that different traditions within legal scholarship are incommensurable.⁸¹ Delgado reinscribes the grand Either/Or in the manner in which he describes the incommensurability problem. "Evaluation . . . means developing a yardstick, submitting scholarship to some form of measure. It has overtones of formalism, the notion that law can be precise—a science—and that every legal question has one right answer."⁸² In analogous fashion, Pierre Schlag trenchantly rejects Rubin's belief that an evaluator can discipline herself to read diverse scholarship with an open mind, arguing that there is a much deeper disintegration of legal scholarship that renders this belief untenable.⁸³ Delgado and Schlag agree that the struggle to preserve the canon of legal scholarship, even the tolerant and capacious canon envisioned by Rubin, is whistling in the dark night of irreducible pluralism. The result is a replay of the unhelpful, caricatural standoff that marks the debate over the literary canon.

Frances Lee Ansley has written a detailed and challenging article in which she takes up the question of the legal canon in the context of advocating changes in the teaching of the law school core curriculum.⁸⁴ Ansley notes that feminist and critical race theorists have substantially undermined the idea of a neutral canon, but her thesis takes an unexpected tack.⁸⁵ Rather than criticizing traditional formulations of the legal canon and suggesting alternative canons, Ansley contends that issues of race are virtually ubiquitous in American law, and that the core curriculum can reflect this fact without overturning the traditional canon.⁸⁶ Defenders of the literary

80. Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 747-48, 757-58 (1993).

81. *Id.* at 762-64 (describing the incommensurability problem and the empathetic fallacy); *id.* at 766 (arguing that any imposition of standards amounts to a demand that critical race theory assimilate to the mainstream practice which it is opposing).

82. *Id.* at 763.

83. Once one recognizes the importance of pre-figuration to evaluation, the integrity, conceptual security, and transcendence that conventional legal thought typically accords to prescription, normative discourse, and evaluative criteria dissolve. Prescription, normative discourse, and evaluative criteria are just as susceptible to the practice of bias, intolerance, authoritarianism—even cruelty, if you want—as any other kind of human discourse.

. . . [T]his focus on evaluation will relieve legal thinkers from recognizing a much more serious and pervasive problem—the unraveling of the conventional paradigm, the decomposition of normative legal thought.

Pierre Schlag, *Pre-figuration and Evaluation*, 80 CAL. L. REV. 965, 970, 977 (1992).

84. Ansley, *supra* note 6, at 1511.

85. *Id.* at 1518.

86. "Race is and should be recognized as central to the Constitution, which is, of course central to the law school curriculum." *Id.* at 1526. Ansley argues that race is a relevant topic in all courses, *id.* at 1526 n.35, and discusses the importance of slavery and Native American land claims in the development of property law, *id.* at 1521-26. Cf. Sanford Levinson, *Slavery in the*

canon argue that the qualified pool of race-related texts is too small and that university resources would be stretched too thin to adopt alternate canons. By asserting that the legal "canon is already an integrated one and should be consciously taught as such," Ansley sidesteps such maneuvering.⁸⁷ She states that if the Constitution is granted "canonical primacy in the American legal world, then you might [accept] the paradoxical point that the marginalized are already at the core of our law, awaiting our recognition."⁸⁸ Even traditionalists must agree that race is a central issue addressed by the Constitution, Ansley believes, and so legal scholars can then bypass the unproductive canon debate and deal with the systemic racial questions raised by the traditional canon.⁸⁹

Ansley's article stands as a powerful model of the committed, effective teaching that law schools aspire to foster. However, her treatment of the legal canon and her attempt to elide the problems raised by the debate over the literary canon are unconvincing. Ansley admits that her thesis is not only paradoxical, but contradictory. If legal scholars in fact agreed on the centrality of race as an element of core legal knowledge under the traditional canon, "then surely [this understanding of the canon] already would be in place and functioning. Such is not the case."⁹⁰ Ansley then identifies practical impediments that prevent full recognition and thematization of race within the core curriculum, factors that are reminiscent of claims defenders of the literary canon have made.⁹¹ The most important factor undercutting her approach is that the significance, and even the existence, of issues of race embedded in the traditional canon are subject to interpretation:

If our notions of equality, liberty, due process, and federalism were all forged in important ways in the heat of struggles over slavery, what we make of that legacy and heritage is still open to contest. The continued instability, even incoherence, of affirmative action doctrine is only one indication of how unsettled is national legal opinion about this central issue of race and the

Canon of Constitutional Law, 68 CHI. KENT L. REV. 1087 *passim* (1993) (arguing that slavery cases should form a part of the constitutional curricular canon, as reflected by extensive coverage in casebooks and substantial assigned reading in course syllabi, but bemoaning the fact that this is not the case).

87. Ansley, *supra* note 6, at 1520.

88. *Id.* at 1538 n.64.

89. "[E]ven across a fairly wide range of perspectives, we in legal education should be able to agree that, in American law schools and in American legal doctrine, race is a central matter. It is at the core of our received tradition." *Id.* at 1597.

90. *Id.* at 1586.

91. *Id.* at 1586-93 (describing, among other factors, the divisiveness of openly discussing race in the classroom and the assertion of professorial autonomy by those fearful of having a multicultural canon imposed on them).

Constitution. Should we interpret our core constitutional values concerning race as centering on and deriving their deepest inspiration from a historical, contextual rejection of actual and deeply rooted white supremacy, or as creating a color-blind affirmation of timeless, universal human equality, or as some dialectical relation between these two visions? This is not an easy question.⁹²

Even the apparently obvious claim that race is central to the Constitution requires a careful reconstruction of constitutional history and an interpretive recovery of this often suppressed subtext.⁹³

Ansley's attempt to bypass the canon debate fails, and she provides an accurate diagnosis of the failure. Her strategy depends on defining the legal canon as a collection of the key legal texts in our culture, but this strategy ignores the sense in which the term "canon" also designates a disciplining rule of interpretation and evaluation. Ansley's article demonstrates the futility of regarding the canon solely as a group of texts; it represents the flip side of attempts by traditional scholars to define the canon as the entire collection of texts having the normative force of binding law. There is no means for avoiding the more complex issues raised when considering the legal canon in its full sense as both a rule of interpretation and a demarcation of key legal texts.

Ansley's project is also unsuccessful on a more fundamental level. After adopting the apparently uncontroversial assumption that all persons would acknowledge the Constitution as a canonical text, Ansley proceeds to demonstrate that issues of race are central to this text. Even if the canon is regarded only as a list of central texts, it is conceivable that the Constitution could be challenged as a canonical text precisely because it obscures the issues of race that it purportedly resolves.⁹⁴ By claiming that "*our canon*" is already integrated, Ansley reinscribes the hierarchical ideal that is the target of the most radical challenges to the canon.⁹⁵ She has not established a vocabulary to deal with the challenges describing the Constitution as a fundamentally flawed document—just as many literary critics have not es-

92. *Id.* at 1590. Ansley recognizes that the problem of legal interpretation is not easily demarcated and solved, but instead implicates broad questions of politics:

Both students and faculty in the legal academy will approach these matters in many different ways. In talking with some of my colleagues who do not count themselves as partisans in these debates, it has struck me recently that our disagreements probably rest less on what texts we wish to include on our reading lists, or even on our vision of the university, than on our understanding of the larger society in which we live.

Id. at 1596.

93. *Id.* at 1542-46.

94. See, e.g., Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 36-38 (1983) (rejecting the antebellum Garrisonian "move toward nomian insularity" that regarded the Constitution as an inherently racist, and therefore illegitimate, text).

95. Ansley, *supra* note 6, at 1520 (emphasis added).

tablished a vocabulary to deal with challenges that reject the Bible and Shakespeare as irredeemably sexist texts which hold no significance for the present, except as historical curiosities. Ansley's themes about race and the core curriculum are important, but to justify her claims, it is necessary to develop a more sophisticated understanding of the legal canon.

Cass Sunstein provocatively offers to defend (canonical) liberal education within law schools, but he carefully attempts to distinguish his approach from traditional arguments supporting the curricular canon.⁹⁶ He suggests that one can avoid the Either/Or discourse shared by traditionalists and postmodernists alike by reinvigorating and implementing the guiding ideal of liberal education: imparting "deep and wide understanding—to counteract ignorance, bias, and parochialism."⁹⁷ Unfortunately, his sketch degenerates all too quickly into a rather conventional viewpoint. "It doesn't matter much whether Kant and Milton got into the canon partly for some bad reasons; *they belong*. At the same time, there are undoubted biases in existing canons *and we should be alert to this fact*."⁹⁸ Sunstein replaces the timeless essence of the traditional canon with contemporary informed choice as to which works properly measure up to the standards of greatness. This choice is curtailed in connection with the self-defining legal canon, since "there are certain things that law students need to learn" given that law professors "have courts and employers to answer to."⁹⁹ Sunstein comes as close to defending the traditional legal canon as contemporary jurisprudential discourse would seem to permit.

In contrast to the explicit discussions of the curricular canon by Ansley and Sunstein, Sanford Levinson and J. M. Balkin only allude to the problem of the legal canon in their recent provocative essay comparing legal practice and musical performance.¹⁰⁰ Nevertheless, their article provides significant insight into how the debate over the legal canon might translate to the practice of law generally. In the article, Levinson and Balkin review a collection of essays debating the merits of the authentic performance movement as a methodology of musical interpretation.¹⁰¹ The authentic performance movement is characterized by a desire to recreate scrupulously the instruments and performance practices of the era in which the music was composed, thereby presenting the modern audience with a Beethoven symphony in precisely the manner that Beethoven's contemporaries would have heard it and, presumably, exactly as Beethoven intended the symphony to be

96. Sunstein, *supra* note 15.

97. *Id.* at 25. Needless to say, every person on either side of the canon debate would subscribe to this goal.

98. *Id.* at 24.

99. *Id.* at 25.

100. Levinson & Balkin, *supra* note 2.

101. AUTHENTICITY AND EARLY MUSIC (Nicholas Kenyon ed., 1988).

heard.¹⁰² Levinson and Balkin draw the obvious analogy to originalist jurisprudence and argue that recovering the original pristine character of the text or the symphony is a hopeless endeavor.¹⁰³ Their article is important to the canon debate, however, because they describe the underlying modernist anxiety that produces the recent turn to authenticity.¹⁰⁴

Levinson and Balkin define the culture of modernity as a period of accelerating change and increasing rupture that rend society from tradition, setting the stage for "those who, dismayed by present practice, preach return to the purity of the past."¹⁰⁵ The authentic performance movement is modernist because the reaction of seeking authenticity in the past would never occur to a participating member of a living tradition: In a return to the past, the adherent of authenticity signals the cultural divide that has been erected between past and current practices.¹⁰⁶ Levinson and Balkin contend that Oliver Wendell Holmes represents the unabashed modernist attitude of suspicion and aloof regard for the past rather than reverent preservation; Holmes thus exhibits within legal culture the same historicist cultural disposition that underlies the authentic performance movement.¹⁰⁷ Levinson and Balkin accurately note that modernity has resulted in the fragmentation of

102. Levinson & Balkin, *supra* note 2, at 1601.

103. *Id.* at 1608-09 (outlining their thesis that law, like music, involves the performance of a traditional text). The authors sardonically note that the emphasis on recreating the actual conditions of performance, finally, leads one to ask whether recordings proclaiming such "authenticity" should not include coughs, wheezing, and other sounds that were undoubtedly heard in Viennese drawing rooms and concert halls during the playing of the music. At some point one crosses the line that separates scrupulousness from absurdity, but unfortunately one's confidence in the ability to locate that line has been seriously undermined by [the authentic performance movement].

....

... The idea that if we wish to recapture the "authentic" experience of Bach or Beethoven all that is necessary is to pop [an authentic performance recording] into our car stereo as we speed down interstate 35 seems increasingly preposterous the more that one thinks about it.

Id. at 1620-22.

104. *Id.* at 1627-46.

105. *Id.* at 1628.

106. Levinson and Balkin argue that authenticity is paradoxical because it is symptomatic of a cultural milieu in which the past is alienated from present concerns:

The more one self-consciously tries to be authentic to a tradition, the less authentic one's practice becomes; conversely, true authenticity always emerges where one least expects it, and indeed, it emerges virtually without any effort on the part of the actors who are enmeshed in authentic practices.

....

... The unease of modernism, where "all that is solid melts into air," produces the emotional search for resonance, tranquility, solidity, and stability.

And yet the problem of modernity is precisely the self-consciousness that we have become partly alienated from the past.

Id. at 1632, 1637.

107. *Id.* at 1647-50.

legal scholarship into separate canons and the deconstruction of the ideal that there is a univocal form of legal reasoning common to all good legal practice and scholarship.¹⁰⁸ They imply that the canon debate might be yet another manifestation of the culture of modernity.

Levinson and Balkin equate musical scores with legal texts to the extent that both are created to be performed in the future. They describe their inquiry as an effort "to figure out how one meaningfully inhabits a practice of performance after innocence has been lost" in the modern era.¹⁰⁹ The legal canon is not problematic for a community immersed in the ongoing performances that both alter and continue the legal tradition. The canon debate is possible only when legal scholars stand apart from legal tradition and adopt what amounts to a critical historicist attitude: legal texts are extricated from present day performances and interred in a past era. This is not just the conscious project of critics of the canon; it is the underlying attitude that motivates defenders of the canon to attempt resuscitation of the fading truth of tradition. Levinson and Balkin conclude their article by praising the second Justice Harlan's virtuoso performances as a Supreme Court Justice who animated a living tradition, even as they remind the reader that performance is becoming increasingly difficult today as a result of historicist attitudes that distance lawyers and scholars from the past.¹¹⁰

Levinson and Balkin provide an excellent diagnosis of the pathology underlying the canon debate, but they fail to write the prescription that might avoid the unhelpful features of the debate. They remain silent as to how performance is possible if innocence has indeed been lost, and they describe the nascent postmodern ethos as a quiescent acceptance of our alienation from traditional cultural symbols.¹¹¹ Postmodern theory easily slides into embracing a multicultural pluralism in which different genres of legal thought and action make use of the conflicting relics of the past for their own purposes, without any anxiety about the rupture with the past or the incommensurability of the different genres. It is a world in which the legal canon becomes a "fiction."¹¹²

Even in its initial stages, the debate over the legal canon raises the same grand Either/Or that motivates the debate over the literary canon. Either legal scholarship, education, and lawyering practice are grounded in a shared collection of texts that embody universal, if not eternal, themes susceptible to consistent interpretation, or each practice mirrors an increasingly fragmented social system that embodies an irreducible pluralism. The

108. *Id.* at 1652-53.

109. *Id.* at 1658.

110. *Id.* at 1654-56.

111. *Id.* at 1639.

112. *Id.* at 1653.

stage is set for the triumph of the pluralist critics and the substitution of multiculturalist dogma for canonical dogma, but this triumph will be a hollow victory within the present format of the debate. It is beside the point to defend the traditional idea of the canon against these critics, but it is crucial to explore how both sides in the debate misunderstand the issues at stake. The terms of the debate must be shifted away from the traditionally stated problem of the canon. This requires that the function of a canon be reexamined.

III. RETHINKING THE FUNCTION OF A CANON

Literary theorists have struggled to move the canon debate to a more productive plane. Most theorists agree that the canon is not merely a transient effect of habitual choices motivated by present-day concerns—an unstable cultural expression that inevitably is dissolving into radical cultural pluralism with the breakdown of homogenizing social structures.¹¹³ Frank Kermode emphasizes that canons are not consciously adopted or abandoned, since they reflect a cultural self-definition that enables choice in the first place.¹¹⁴ But it is equally obvious that the canon is not a free-standing cultural code which must be preserved and faithfully transmitted. Recent scholarship has attempted to restructure the debate over the literary canon by acknowledging the important cognitive function served by certain canonical texts. From this perspective, multicultural themes do not under-

113. Using imagery that lends itself well to legal education, the poet R.T. Smith contends that most teachers are well aware of the rhetorical excesses of the canon debate:

To the teacher, perhaps the existence of these controversies should provide more optimism than frustration After all, our role now seems to be not so much curatorial as distributive.

. . . .

The two extremes under consideration in the canon scrimmage among vested interests, power-thirsty theorists, and the confused are equally execrable. On the one hand, we have those who believe that the goal of education is the perpetuation of a code which can be learned exclusive of any contact with application or question of immediate relevance. . . . At the other end of the scale lies a system of education-as-skills aimed at coping, education reduced to training, with the assumption that the well-trained individual will always be able to spin the straw of practical and concrete experience to gold. If either camp ever vanquishes the other, heaven help us, but I don't worry very much about that possibility for there are too many educators . . . who want less to pin information into a collection than to study it in motion They are not people who worship texts with the coroner's cold eye, but people who prefer dialogue, even dissent, to reverence

. . . .

"A body of knowledge" is what poor teachers "cover" in class like a cadaver on a slab, but a force is altogether different.

Smith, *supra* note 52, at 27-29.

114. KERMODE, *POETRY*, *supra* note 9, at 76 ("You can't suddenly say, let's have a new canon. That's not the way canons work. . . . That's not the way canons are formed. That's not the way they're broken.").

mine the "nation-building functions of education" once we accept the cognitive insight that knowledge is "fluid, dynamic, dialectical, evolving and temporal,"¹¹⁵ and recognize that the canon can foster learning through its flexibility.

A canon so conceived would be a living document, more protean than concrete, designed not so much to protect and conserve knowledge and technique as to enable learning and the development of intellect.

. . . .

. . . [E]ducators are beginning to realize that the teaching of dogma (either hegemonic or resistant) is no longer appropriate for the optimal development of learners. It is to teaching for the development of competence in critical analysis, critical interpretation, and critical understanding that modern pedagogy has turned. In the final analysis, the integrity of the academic canon may have to be judged by the extent it enables such teaching and learning.¹¹⁶

Articulating this idea of a nation-building, yet dialectically fluid canon has interested several scholars tired of the canon debate.

George Allan provides a useful example of this approach by drawing on Alfred North Whitehead's effort to elevate "process" to central importance without surrendering existence and knowledge to "a maelstrom of ontological fluidity."¹¹⁷ Whitehead argues that the flux of existence inevitably reveals patterns that provide a temporarily stable realm within which practical reason operates. The forms of life girded by practical reason inevitably are challenged by the full weight of reality, which is not entirely ordered by practical reason. As pressure intensifies, speculative reason critiques and moves beyond the temporary stability of a given practical order and establishes a new temporary resolution. Allan argues that Whitehead's philosophy provides insight for the canon debate by establishing a "middle way between dogmatic essences and pyrrhonic relativism, between an absolute canon and none at all."¹¹⁸

The hurly-burly formlessness of a canonless curriculum where anything goes is diffuse and therefore barren. A canon-in-process is one requiring the sort of creative interdependency that is educationally fruitful.

. . . .

115. Gordon & Bhattacharyya, *supra* note 48, at 416, 412.

116. *Id.* at 414, 417.

117. Allan, *supra* note 10, at 5.

118. *Id.* at 8.

Canons of acceptability are needed . . . [but] such canons must be constantly challenged by tracing the losses accompanying each gain

. . . .

An educational canon is a perch, a place to which a community comes. It sums up a struggle to bring something stable out of the noise and bustle of a prior contentiousness . . . [, it] allows a community to orient itself within the world, to take stock of its purposes, its ways of doing things, to get a grip on what it thinks important[, but] eventually the perch will no longer suffice, and it will be time to take flight again into some new cacophony of social disputation, seeking a new vantage point from which to order things.¹¹⁹

Allan gives an accurate overview of the canon as a canon-in-process—a force that is beyond the political assertions which both sides of the canon debate appear to emphasize. Yet Allan does not provide a description of how this canon-in-process provides contemporary readers with the provocation and the resources to contribute to, and benefit from, the social process of canon-building. The literary critic, Charles Altieri, offers just this detail in defending the idea of a canon from both its supporters and its critics. Because Altieri's description of the cognitive function of the canon serves as the basis for developing a framework for approaching the legal canon, it merits detailed explanation.

Altieri wants to preserve the ennobling function of the canon to establish the rhetorical space in which an idealized community is posited, tested, and revised. The ascendancy of critical historicist scholarship troubles Altieri not because it rejects the idea of a canon, but because it disempowers the canon by distancing the reader from its force. Altieri opposes the critical historicist tenet that current conflict between competing self-interests is assisted by assiduously demystifying the past to eliminate its ideological

119. *Id.* at 7, 8. John Dewey draws the same analogy in the course of his discussion of the interrelationship of aesthetic creation and aesthetic appreciation, but he does so in a manner that more clearly states the cognitive significance that this Article shall attach to the process:

William James aptly compared the course of a conscious experience to the alternate flights and perchings of a bird. The flights and perchings are intimately connected with one another; they are not so many unrelated lightings succeeded by a number of equally unrelated happenings. Each resting place in experience is an undergoing in which is absorbed and taken home the consequences of prior doing, and, unless the doing is that of utter caprice or sheer routine, each doing carries in itself meaning that has been extracted and conserved. As with the advance of an army, all gains from what has been already effected are periodically consolidated, and always with a view to what is to be done next. If we move too rapidly, we get away from the base of supplies—of accrued meanings—and the experience is flustered, thin and confused. If we dawdle too long after having extracted a net value, experience perishes of inanition.

JOHN DEWEY, *ART AS EXPERIENCE* 56 (Capricorn Books 1958) (1934).

hold. Instead, he describes the necessary positive resource that is provided by a living canon.

I want to argue that the past that canons preserve is best understood as an enduring theater helping us to shape and judge personal and social values, that our self-interest in the present consists primarily in establishing ways of employing that theater to gain distance from ideological commitments, and that the most plausible hope for the influence of literary study in the future lies in our ability to transmit the past as a set of challenges and models.¹²⁰

....

[With a vital canon,] the past becomes a provocation rather than a trap. It provides intensities that challenge our contemporary habits; it demands that we measure ourselves against the processes of questioning, projecting identifications, and struggling with precursors that we find in the relations among authors preserved by the canon; and it affords specific imaginative configurations that often show us what is at stake in the most radical contemporary experiments, in psychology as well as in art.¹²¹

....

[I will] demonstrate the value of opposing the historicist, deconstructive model of reading *against* texts with a model that emphasizes reading *through* texts in order to adapt their purposive intelligence to contemporary concerns.¹²²

The narrow analytical contribution of critical historicist scholarship overshadows the vital role that the canon, as an imaginative backdrop, plays in the projection of possible worlds.¹²³

Although crafted as a response to critical historicism, Altieri's recent work offers strong affirmative support for the value of the canon despite the

120. ALTIERI, *supra* note 9, at 24.

121. *Id.* at 10.

122. *Id.* at 16. Altieri explicitly contrasts the negative and empty stance of critical historicism with his positive account of literature.

Superb at describing how political conditions impose themselves on writers, the new demystifiers prove much less able to show how literature provides means for responding creatively to those conditions.

....

Here, then, is the most important stake in the current controversy: not whether there is some exclusionary dogma (the canon stopped having that kind of authority a long time ago), but what languages we will have for talking about human actions and what selves that vocabulary will encourage our pursuing.

Id. at 4, 78-79.

123. *Id.* at 47. Altieri states that "it is a mistake to read cultural history only as a tawdry melodrama of interests pursued and ideologies produced," but his emphasis seems to be on the word "only." *Id.* at 21. Altieri readily agrees that literary criticism should expose the delusions of overly "reverential stances." *Id.* at 6.

obvious inadequacies of traditional defenses.¹²⁴ The canon is not the repository for core human values that traditional defenders have posited, but it does represent the site where individual commitments are relaxed sufficiently to permit negotiation of the bonds of community in a world defined by radical otherness. To some degree, Altieri accepts the postmodern account of contemporary social life; however, he argues that the irreducible differences among members of a community do not forestall, but rather necessitate, the operation of a canon.¹²⁵ In a provocative chapter, Altieri posits that John Rawls can teach Jean-Francois Lyotard a thing or two about postmodern politics because Rawls begins by accepting the existence of irreconcilable differences that can be mediated, although never entirely, only in the idealized political drama occasioned by Rawls's use of a hypothesized veil of ignorance.¹²⁶

124. Altieri summarizes his revision of the traditional claims for the function of a canon as follows:

[C]juratorial regard for a high canon institutionalizes idealization as a force shaping our sense of what communities we wish to identify with and what selves to pursue; the normative force of that canon challenges individuals and new movements within the arts to meet certain communal criteria for self-representation; and the canon's imaginative scope helps focus discussions about the ends of politics that are very difficult to develop if one's major interests lie in demystifying prevailing beliefs and resisting all cultural positivities.

Id. at 50.

125. [We] must supplement poststructural theory by showing how singular agents become articulate and responsible members of communities by accepting certain principles of judgment and by learning to negotiate competing interests . . . we can find considerable incentives to seek within history—the only ground we have—images and principles clarifying those powers individual agents have for reconciling the singular and the collective.

Id. at 222-23.

126. *Id.* at 255-89 ("Chapter Nine—Judgment and Justice Under Postmodern Conditions: Or How Lyotard Helps Us Read Rawls as a Postmodern Thinker"). Altieri accepts that Rawls's project is irredeemably flawed as a liberal effort to escape the politics of interest, but argues, from a postmodern reading, that Rawls accurately describes the crucial gesture of postmodern politics.

Perhaps it is an unnecessary feature of Rawls's model to insist on a Kantian suspension of all interests when we assume the veil of ignorance. Perhaps the important thing is how even making the gesture demonstrates that we can suspend some interests and can for argument's sake understand interests that are not our own. And perhaps it is precisely because we cannot fully distance ourselves from our own interests that the veil of ignorance proves so important, for it requires our casting the effort to suspend interests in a way that exposes to clear view what we in fact fail to suspend . . . In fact, it is because self-interests lead individuals to distort the veil of ignorance that we need the kind of dramatic method that may make those distortions visible and negotiable.

Id. at 280-81. Rawls's importance lies in his recognition that "the diversity of language games opens up the possibility that agents can participate in a shared rhetorical theater for making and testing binding claims about justice." *Id.* at 285; cf. JOHN RAWLS, *POLITICAL LIBERALISM* 27 (1993). Rawls argues that when we

simulate being in the original position, our reasoning no more commits us to a particular metaphysical doctrine about the nature of the self than our acting a part in a play, say of Macbeth or Lady Macbeth, commits us to thinking that we are really a king or a queen

How does Altieri propose that the literary canon can assist with such fundamentally important political activity? Altieri urges us to relinquish the narrow egocentric designs that contemporary interpreters bring to texts by accepting, only provisionally, the authority of canonical texts by reading *through* them rather than *against* them.¹²⁷ Readers should not purport to sit in removed judgment of the canon, because judgments are made possible only by virtue of the canon. A canonical text is not a command from the past as much as a convincing exemplar of how we can move beyond individual interests by fashioning idealized forms of community.

There is almost no danger of identification solely with [the canon's] terms because there is such historical distance and because there is so much contradiction within the canon that it serves more as grammar than as code of values, more as an example of possible intensities and modes of self-representation than as vehicle imposing a particular model of behavior.¹²⁸

The dramatic space of the canon fosters an intersubjective representation of idealized selves through a shared language and thus discounts the supposed radical heterogeneity of postmodernism without positing a homogenous cultural code.¹²⁹ Altieri emphasizes that this grammar speaks in the rich

engaged in a desperate struggle for political power. Much the same holds for role playing generally.

Id.

127. Altieri, *supra* note 9, at 21, 45, 55-56.

128. *Id.* at 76.

129. *Id.* at 191, 223. Altieri demonstrates his thesis in his discussions of Plato, Wordsworth, and Joyce in *Part Two: Canonical Exemplars and Contemporary Values*. *Id.* at 109-88; see also CHARLES ALTIERI, *PAINTERLY ABSTRACTION IN MODERNIST POETRY: THE CONTEMPORANEITY OF MODERNISM* 8 (1989) (resisting new historicist readings of Modernist poetry by concentrating "on how the stances that the artists elaborate have plausible claims on our contemporary values").

I read Altieri's description of the canonical theater of dramatic projection quite literally. My three-year-old daughter, Catherine, provides a daily reminder to me of the power and importance of dramatic projection for learning how to be a social being in the particular culture in which one is born. Adults commonly discount this activity as a "stage" in development typified by "overactive" imagination, but by truncating this mode of being and knowing we in fact impair our ability to learn. Altieri seems correct in identifying the act of reading literature as one example of this decentering way of knowing that at least some adults regularly experience. Under the pressures of Enlightenment rationalism, adults by and large restrict their definition of knowledge to the learning that occurs in what William Poteat has called the "theater of solitude," namely conscious reflection. See William Poteat, *For Whom is the Real Existence of Values a Problem: Or, An Attempt to Show that the Obvious is Plausible*, reprinted in *MIND, VALUE AND CULTURE: ESSAYS IN HONOR OF E. M. ADAMS* 147, 154 (David Weissbord ed., 1989).

Calvin Schrag recently has argued against the radical particularity evident in the new historicism of postmodern theory from a philosophical, rather than strictly literary, perspective. He does so in a manner that sounds many of Altieri's themes. CALVIN O. SCHRAG, *THE RESOURCES OF RATIONALITY: A RESPONSE TO THE POSTMODERN CHALLENGE* (1992). The postmodern attack on ahistorical conceptions of reason, Schrag contends, does not undermine the activity of reasoning within a tradition-bound context. Schrag embraces the idea of a "communicative rationality that offers its own resources of critique, articulation, and disclosure, no longer requiring the epistemo-

overlapping configurations of first-, second-, and third-person representations that link expression, intimacy, and public projection.¹³⁰

Radical feminist criticism represents one prominent threat to the intersubjective space of the canon, Altieri contends, by composing an alternate canon of "woman as victim . . . whose primary traits involve withdrawal from all public space."¹³¹ Feminist historian Elizabeth Fox-Genovese articulates this concern more carefully, astutely noting that the necessity of broadening the traditional (male-constructed) canon arises for the very reason that postmodern feminists' efforts to destroy the canon are problematic.¹³² Women have been denied a role in public life in part, she argues, through the power of the canon to deny women a role in the idealized drama of community-building.¹³³ Destroying the canon, therefore, exacerbates the historical denial of public participation by women.

One of the main functions of the canon has been to provide a bridge between the personal role [of subjectivity] and public identity [expressed as collective goals and norms]. . . . The claims of feminism are just and practical, but the exaggeration of those claims threatens to undermine the canon, and to replace any notion of the public self with capitulation to the private. . . . [I]f the canon faces a bleak and arid future without feminism, feminism faces trivialization without the context that only a reinvigorated canon can provide.¹³⁴

Altieri similarly argues that the feminist preoccupation with oppression cannot be effective without invoking the rich terms the canon provides "for

logical guarantees of universality and necessity issuing from a vertical grounding." *Id.* at 165. By stressing hermeneutical understanding, narration, and rhetoric as constitutive features of communicative rationality, Schrag argues that the ongoing social drama of reaching tentative agreements about political-ethical issues operates at the level of intersubjective relations and can never be reduced to a pure, particularized desire on the part of an individual. *Id.*

130. ALTIERI, *supra* note 9, at 291-317 ("Chapter Ten—Life After Difference: The Positions of the Interpreter and the Positionings of the Interpreted"). Altieri is using the term "grammar" in a broad sense, distinguishing his approach from the more narrow construction of grammar by those who note the importance of canonical literature to establish and reinforce "the King's English," or, more recently, "Standard English," as the mode of speaking correctly. GUILLORY, *supra* note 8, at 241-43.

131. ALTIERI, *supra* note 9, at 65.

132. Elizabeth Fox-Genovese, *The Feminist Challenge to the Canon*, NAT'L FORUM: PHI KAPPA PHI J., Summer 1989, at 32, 32 [hereinafter Fox-Genovese, *Feminist Challenge*]; see also Elizabeth Fox-Genovese, *The Claims of a Common Culture: Gender, Race, Class and the Canon*, 72 SALMAGUNDI 131, 141-42 (1986) (arguing that the canon must be enlarged to include those who traditionally were "excluded from membership in the republic of letters").

133. Fox-Genovese persuasively claims that even oppressed men within Western society can identify with the universal claims of the traditional canon in a manner that women at all levels of society could never hope to do. Fox-Genovese, *Feminist Challenge*, *supra* note 132, at 34.

134. *Id.* at 34.

describing the full dynamics of oppression, as well as what becomes available as we manage to overcome that dynamics."¹³⁵

Altieri grounds his description of the cognitive significance of the canon in Kant's analysis of aesthetic judgment, which responds to the problem of linking the universal grammar of the third-person to the concrete concerns expressed in the first-person. Just as Kant expunged aesthetic judgment from his account of theoretical reason in which the particular is subordinated to the universal, Altieri describes the development of ethical judgment as a response to the normative force of canonical exemplars that is not subsumed under the specific historical values which these texts represent.¹³⁶ Kant's approach problematizes a universal, rationally based ethics because "the very claim of rational universality gives us no way to understand how empirical agents can possibly see the ethical life as continuous with their concrete situations and commitments."¹³⁷ By regarding ethical action as an expressive performance carried out without recourse to self-grounding, rigid, and universal principles, Altieri hopes

to bring the account of the ethical subject closer to Kant's description of aesthetic judgment. For while our ethics then loses the authority of rationality, we gain more pragmatic criteria for ethical behavior that still can be sharply opposed to simple preferences.¹³⁸

The canon is the projective field that ethical agents enter in crafting a practical rationality that girds social life, even in the increasingly fragmented cultures of the late-capitalist democracies.

The off-putting and apparently abstract jargon Altieri employs should not obscure what is a very pragmatic account of reading literature that deeply resonates with common sense. The reading of literary masterpieces commonly is encouraged for its cathartic value. Catharsis often is viewed as a kind of subjective reaction, deeply personal and idiosyncratic, although it generally plays out in similar ways among members of a culture. Altieri refines these intuitions by emphasizing the intersubjective dramatic world that the reader enters when experiencing catharsis. The literary text provides exemplars of a range of attitudes, emotions, and attachments that the reader adopts in the act of reading—literally by playing out these potentialities.¹³⁹ This experience of reading is not defined by a pure or abstract aesthetic response, but by a participation in a public realm of values that is much wider than the reader's horizon. The reader might be horrified or

135. ALTIERI, *supra* note 9, at 65.

136. *Id.* at 248; *see also supra* note 31.

137. ALTIERI, *supra* note 9, at 225.

138. *Id.* at 227.

139. For example, more than a few adults likely will recall vividly the adolescent dramatic performance played out in their reading of William Golding's *Lord of the Flies*.

ennobled by the various roles he adopts during reading, and these second-order critical responses to the drama also thrust the reader into the sphere of publically redeemed ethical knowledge.

At this point, it is helpful to express Altieri's approach in terms of the two senses of the word "canon." The canon does not provide a universal rule of evaluation that determines in advance which texts are meritorious, but instead constitutes a bounded cultural arena within which an evolving process of case-by-case judgment occurs. The canon does not constitute a list of timeless masterpieces that we occasionally supplement, but rather a shifting repertoire of normative exemplars that we find necessary to the ongoing maintenance of public life. Altieri redefines the canon—both as a rule of evaluation and a collection of texts—in a manner that responds to the anti-foundationalist themes of postmodern thought. He also attends to the concrete contexts that define persons as individuals and members of a community.¹⁴⁰ And yet, Altieri's identification of the dramatic function of the canon does not hold at bay the critic's charge that contemporary social pressures demand and require experimental theater crafted by new playwrights. A sophisticated understanding of the function of the canon does not avoid the contentious political battles of the canon debate, and in fact may only raise the stakes. Before discussing the legal canon, it is necessary to explore why members of a community read through certain texts in the manner Altieri describes, but do not read through other available texts in the same way. This question leads to an inquiry into the power of the classic.

IV. THE POWER OF CLASSICAL TEXTS

A. *The Nature of a Classic*

The German philosopher Hans-Georg Gadamer has spent much of his long and prolific career explaining how understanding occurs, developing what he terms a "philosophical hermeneutics."¹⁴¹ At the crucial juncture of his philosophical magnum opus, Gadamer explores our continuing fascina-

140. Altieri properly notes that the deconstructive decentering of the subject cannot and does not eradicate the subject so much as highlight the interaction between self and other.

Subjectivity is inseparable from intersubjectivity, less because the subject must be socially constituted than because the field of its actions takes on significant force only in and through the parameters brought to bear by the ear of the other.

....

... [W]e need not be as wary of all categorization as [Jacques] Derrida and [Roland] Barthes are, just as we need not reject the significance of self-reflection even though that process cannot be self-grounding.

ALTIERI, *supra* note 9, at 215, 221-22.

141. Gadamer's principal works include GADAMER, *supra* note 31; PHILOSOPHICAL HERMENEUTICS (David E. Linge trans. and ed., 1976) [hereinafter GADAMER, PHILOSOPHICAL HERMENEUTICS]; and DIALOGUE AND DIALECTIC: EIGHT HERMENEUTICAL STUDIES ON PLATO (P. Christopher Smith trans., 1980) [hereinafter GADAMER, DIALOGUE].

tion with the classical texts of antiquity as sources of truth.¹⁴² Gadamer anticipates the contemporary canon debate by some twenty years, but his discussion of the force of the classical provides an excellent supplement to Altieri's recent efforts to redefine the function of the literary canon. Altieri focuses exclusively on the public projection the canon affords without critically assessing whether it is accurate to suppose that we choose the vehicles of our projection. Gadamer explains that the classics choose us before we choose them, and that this circumstance defines the essence of their classical status. Gadamer's approach is quite compatible with Altieri's. Gadamer stresses that our situation of understanding involves a dramatic performance that fuses the world of the classical and that of the reader, but Gadamer's philosophical investigations place Altieri's insights in perspective.¹⁴³

Joel Weinsheimer, a literary critic and Gadamer scholar, argues that adopting Gadamer's terminology of the classical immediately challenges traditional views of the canon.¹⁴⁴ Weinsheimer points out that "canon" is a collective noun which represents a body of works, and therefore is "plural but determinate."¹⁴⁵ In contrast, "classic" is a singular noun that can be pluralized, and therefore is "singular but indeterminate."¹⁴⁶ This difference manifests itself in our presumption that there is a process of canonization

142. GADAMER, *supra* note 31, at 277-307 ("Part II, ch. II(b): Prejudices as Conditions of Understanding"). This Article continues and refines my larger project of describing the ontology of legal understanding, drawing primarily from Gadamer's philosophical hermeneutics. See Francis J. Mootz III, *The New Legal Hermeneutics*, 47 VAND. L. REV. 115 *passim* (1994); Mootz, *supra* note 62 *passim*; Mootz, *supra* note 3 *passim*; Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?* 68 WASH. L. REV. 249, 253 (1993); Francis J. Mootz III, *Rethinking the Rule of Law: A Demonstration That the Obvious is Plausible*, 61 TENN. L. REV. ___ (1993). My criticism of the canon debate reinforces my general theme that critique is a feature of a given practice rather than a privileged perspective on that practice. I do not doubt that many aspects of the "critique of the legal canon" will be healthy for legal practice, teaching and scholarship, but this Article argues that critics must abandon naive ontological assumptions about the power of critique. In future articles, I shall move forward from my ontological account to sketch my vision of legal critique.

143. Altieri refers to Gadamer's work only in passing, and always in negative terms. ALTIERI, *supra* note 9, at 46, 81, 104. In each instance he mischaracterizes Gadamer's position. As expressed in the text accompanying this note, to the extent that Altieri and Gadamer diverge, Gadamer puts Altieri in proper perspective. Of course, Altieri's work informs my reading of Gadamer's work, and so it undoubtedly is incorrect to superordinate Gadamer as if his efforts represent an unimpeachable standard against which other thinkers must be measured. Instead, I claim only that after the confrontation between Gadamer and Altieri, Gadamer's work is the better vehicle for exploring the increased understanding occasioned by the confrontation.

144. WEINSHEIMER, *supra* note 1, at 129-35 ("The Classical as Challenge to the Canonical"); see also Fred Dallmayr, *Self and Other: Gadamer and the Hermeneutics of Difference*, 5 YALE J.L. & HUMAN. 507, 527 (1993) (suggesting that Gadamer's philosophy provides important insight into the canon debate).

145. WEINSHEIMER, *supra* note 1, at 130.

146. *Id.* at 131.

which confers canonical status, but that the classic is defined by some "inherent quality, worth, [or] value" which is beyond the conscious choices made within an interpretive community.¹⁴⁷ It is not flip or nitpicking to suggest that Gadamer would ridicule efforts to defend the canon as it traditionally is defined, but that he also would argue vehemently that the experience of reading classical texts reveals how understanding occurs. One can rework the conundrums of the canon debate by following Gadamer's exposition of the important status of classical texts.

Gadamer's philosophical project represents a sustained effort to overcome the grand Either/Or that animates a significant portion of modern philosophy, as well as the canon debate. The modern philosophical era largely is defined by oscillations between the ideologies of Enlightenment and Romanticism, which involve a contest between the assertions of secular, critical reason and the claims of the ineffable myths of tradition.¹⁴⁸ The Enlightenment critique of religious dogmatism was cast in terms that rejected the value of tradition in favor of ahistorical reason as the only legitimate authority. The Romantic reversal of this schema has served only to perpetuate the same wrongheaded and "abstract contrast between myth and reason."¹⁴⁹ This centuries-old dynamic has sharpened in the "swiftly changing age" of the current century: historical discontinuities are "exaggerated because they forget what persists unseen," provoking the reactive invocation of "the eternal orders of nature and appealing to human nature to legitimize the idea of natural law."¹⁵⁰ Gadamer rejects this polarization and argues that thinking within tradition is rational, even though it occurs outside the presumed ahistorical and empirical domain of the sciences.¹⁵¹ At a very general level, then, Gadamer questions the critic's effort to adopt a rigorously critical perspective of the tradition that is bequeathed to and animates him.

Gadamer's project speaks directly to the central issues raised in the canon debate. He endeavors to rehabilitate the authority of tradition without hypostatizing essential human nature or invariable values. Tradition embodies authority, Gadamer argues, not because it locks us in a coercive ideological vise or because we choose to follow its dictates, but because we

147. *Id.*

148. GADAMER, *supra* note 31, at 273.

149. *Id.*

150. *Id.* at xxiv.

151. Gadamer's project bears a strong resemblance to the description of the traditions of ethical reasoning expressed in ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* *passim* (1988). For a Gadamerian critique of MacIntyre's approach, however, see P. CHRISTOPHER SMITH, *HERMENEUTICS AND HUMAN FINITUDE* *passim* (1991).

acknowledge its force in the way we conduct our lives.¹⁵² “True authority does not have to be authoritarian,” he declares, because authority also is constituted in the ego-decentering, unforced acknowledgment that “the other is superior to oneself in judgment and insight.”¹⁵³ Gadamer would regard the attempt to deconstruct the literary canon in its entirety as an amusing, hubristic attempt to stand outside the authority of tradition in the spirit of Enlightenment critique, but he also would regard the effort to defend the canon, represented as a determinate cultural artifact, as equally misguided. The authority—or truth—of tradition derives from its continuing critical appropriation, in which we distinguish the “legitimate prejudices” of tradition that enable understanding from the unproductive prejudices that warp understanding.¹⁵⁴

Gadamer regards classical texts as embodiments of the authority of tradition. This simple statement is problematic because it raises the full breadth of issues in the canon debate, and thus merits a careful explication.¹⁵⁵ The authority of tradition is not a self-contained power that is transmitted through a textual vessel and then passively absorbed by the reader; instead, the authority of tradition is reconstituted with each reading of the text.¹⁵⁶

We are likely to think of “tradition” as what lies merely behind us or as what we take over more or less automatically. On the contrary, for Gadamer “tradition” or “what is handed down from the past” confronts us as a *task*, as an effort of understanding we feel ourselves required to make because we recognize our limitations, even though no one compels us to do so. It precludes complacency, passivity, and self-satisfaction with what we securely possess; instead it requires active questioning and self-questioning.¹⁵⁷

Readers always approach the classical text with a fore-structure of understanding that motivates their encounter with the text, but the classical text can “break the spell of our own fore-meanings” (without ever eliminating them) by pulling us up short and initiating further questioning and under-

152. GADAMER, *supra* note 31, at 277-85 (“Part II, ch. II(b)(i): The Rehabilitation of Authority and Tradition”).

153. *Id.* at 280 n.206, 279.

154. *Id.* at 277, 298-99.

155. Gadamer begins his discussion of the classical by noting that it “requires hermeneutical reflection of some sophistication to discover how it is possible for a normative concept such as the classical to acquire or regain its scholarly legitimacy.” *Id.* at 285-86.

156. *Id.* at xxxvii (arguing that his critics fail to recognize that he never equates understanding with the naive appropriation of “customary opinions” or “what tradition has sanctified”).

157. Joel Weinsheimer & Donald G. Marshall, *Preface* to GADAMER, *TRUTH AND METHOD*, *supra* note 31, at xi, xvi.

standing.¹⁵⁸ The power of the classic resides in its exemplary ability to question the reader's horizon of experience and draw the reader into an event of understanding. Although there is always a "multiplicity of what can be thought" about a text, Gadamer stresses that "not everything is possible" if the classical text is permitted to "present itself in all its otherness and thus assert its own truth against one's own fore-meanings."¹⁵⁹

Translation—the conversion of something foreign into something meaningful—provides the model for all textual understanding, inasmuch as this activity reveals clearly the interplay of text and reader that lies behind every appropriation of written meaning. Gadamer contends that we should embrace our status as translators of traditionary texts, a status that never amounts to mere repetition but instead allows the text to prove itself in its own significance. Translation

allows the foreign to become one's own, not by destroying it critically or reproducing it uncritically, but by explicating it within one's own horizons with one's own concepts and thus giving it new validity. Translation allows what is foreign and what is one's own to merge in a new form by defending the point [of view] of the other even if it be opposed to one's own view . . . In this process of finite thought ever moving forward while allowing the other to have its way in opposition to oneself, the power of reason is demonstrated.¹⁶⁰

"It is enough to say that we understand in a *different way, if we understand at all.*"¹⁶¹ The significance of classical texts is that, in a more compelling manner than other texts, they draw contemporary readers into active dialogue in a way that facilitates the translation of tradition to the concerns of the present.

Gadamer regards conversational dialogue as the model of understanding, including textual understanding. The classical text does submit to effortless (and therefore pseudo) translation to the concerns of the contemporary reader; it presents a challenge to the reader. "The classic not only submits to questioning but turns to interrogate its inquisitors—if they

158. GADAMER, *supra* note 31, at 268. Charles Altieri inexplicably misses this central aspect of Gadamer's philosophy. See ALTIERI, *supra* note 9, at 46, 104.

159. GADAMER, *supra* note 31, at 269.

160. GADAMER, *PHILOSOPHICAL HERMENEUTICS*, *supra* note 141, at 94. Gadamer characterizes understanding as a "fusion of horizons" of text and reader, exemplified in the fusion that occurs in translation. GADAMER, *supra* note 31, at 306-07, 374-75, 384-89. It is important to emphasize, however, that Gadamer never regards this fusion as leading to a wholly coincident union of text and reader, which is why we constantly are repaid by attending to the classics. *Id.* at 304, 306.

161. GADAMER, *supra* note 31, at 297.

are willing to listen."¹⁶² Dialogue requires two parties, and Gadamer argues that the classical text serves as a dialogical partner with the reader to the extent that, through the force of its historical trajectory, it causes the reader to reassess her preunderstanding. The classic, then, becomes the locus of a critical reassessment by the reader.

It is impossible to make ourselves aware of a prejudice while it is constantly operating unnoticed, but only when it is, so to speak, provoked. The encounter with a traditionary text can provide this provocation [This event] has the logical structure of a *question*.

The essence of the *question* is to open up possibilities and keep them open. . . . In fact our own prejudice is properly brought into play by being put at risk.¹⁶³

The traditionary texts that regularly provoke readers in this way become classics.

The classical text transcends the caricatures of the canon debate. The concept of the classical does not simply signify "a historical style," but neither does it claim to represent "suprahistorical value."¹⁶⁴ The classical text is defined by a "historical process of preservation that, through constantly proving itself, allows something true to come into being."¹⁶⁵ According to Gadamer, the historicist assertion that there are no unbiased value judgments does not undermine the classic because the classic is a thoroughly historical experience that precedes the critic's historical reflection.¹⁶⁶ The classical text is not only a product of history, it produces the

162. WEINSHEIMER, *supra* note 1, at 129. Weinsheimer thus distinguishes a classic from a graffito without hypothesizing eternal, formal qualities. The "difference between a graffito and a classic is this: the graffito doesn't talk back." *Id.* at 128.

163. GADAMER, *supra* note 31, at 299. Thomas Pangle recently discussed the problem of the canon in a manner that is quite close to Gadamer's description of classical texts as dialogic partners for contemporary readers. THOMAS L. PANGLE, *THE ENNOBLING OF DEMOCRACY: THE CHALLENGE OF THE POSTMODERN ERA* 183-218 (1992) ("Chapter 10—Against Canons and Canonicity: Dialectic as the Heart of Higher Education"). Pangle, like Gadamer, regards Plato's Socratic dialogues as preeminent examples of learning that are embodied in the confrontation with classical texts. *Id.* at 195-200; *cf.* GADAMER, *DIALOGUE*, *supra* note 141, *passim* (arguing that Plato's dialogues reveal that understanding comes not from the pristine logic of argument, but rather from the give and take of conversation).

Pangle cautions against subjecting classical texts to the reader's egocentric concerns: "The point is not to learn *about* the books; the point is to learn *from* them." PANGLE, *supra*, at 201. Pangle argues that we read classic texts in search of a "true dialogue, in which the very meaning and purpose of our lives is at stake. We seek critics who challenge us to the core, compelling us to rethink our own foundations, and eliciting from us some genuine, if grudging, admiration for the alternative they represent or pose." *Id.* at 196. "A liberal education that is truly liberating in the Socratic sense is an education that brings us face to face with disturbing challenges to our deepest and apparently surest moral commitments." *Id.* at 195.

164. GADAMER, *supra* note 31, at 287.

165. *Id.* (parenthetical German terms omitted).

166. *Id.*

historical consciousness that embraces it. The reader's fore-structure or horizon of understanding is shaped indelibly by the history of effects of the classical texts before he takes up the task of translating the text to his situation.

The universe of the classic comprehends everything shared and common, everything that is intelligible without the need for explanation, everything that is assumed as apparent and indisputable, everything upon which further thought can be based. . . . Everyone can be—and to some degree, in fact, always is—classically literate without having read the classics at all. The classical legacy is a bequest the heirs cannot reject, for they have always already inherited the classics even before having read them.¹⁶⁷

The classical text appears to speak directly to the contemporary reader not because it is timeless, but because it is a productive historical force.¹⁶⁸ "*Understanding is to be thought of less as a subjective act than as partici-*

167. WEINSHEIMER, *supra* note 1, at 140. In response to an interviewer's question regarding the unique power of the texts of classical antiquity, Gadamer acknowledged that the question raised a "complicated matter," but argued that their power is probably rooted in the fact that "they have formed our understanding, our anticipations of what makes sense so profoundly, that they remain ultimate reference points for us." HANS-GEORG GADAMER ON EDUCATION, POETRY, AND HISTORY: APPLIED HERMENEUTICS 67 (Lawrence Schmidt & Monica Reuss trans., Dieter Misgeld & Graeme Nicholson eds., 1992) (drawing from interviews conducted in 1985 and 1986). Gadamer begins *Truth and Method* by rehabilitating key humanist terms, such as common sense and judgment, that speak to the traditional force that defines the historical effects of the classics. GADAMER, *supra* note 31, at 5-40.

168. [T]he classical epitomizes a general characteristic of historical being: preservation amid the ruins of time. . . . [I]t is not a statement about what is past—documentary evidence that still needs to be interpreted—rather, it says something to the present as if it were said specifically to it. What we call "classical" does not first require the overcoming of historical distance, for in its own constant mediation it overcomes this distance by itself. The classical, then, is certainly "timeless," but this timelessness is a mode of historical being.

GADAMER, *supra* note 31, at 289-90.

This point, emphasized by Gadamer, provides a useful example of how the canon debate often represents unproductive posturing, even in the hands of the most skilled commentators. Barbara Herrnstein Smith's highly influential argument that canonical values are historically contingent includes a rebuke of Gadamer for suggesting that classics are self-mediating. Smith, *supra* note 30, at 29. She counters that the classics appear timeless and self-mediating only because they have so thoroughly penetrated the culture enveloping the contemporary reader—precisely the point that Gadamer is making. *Id.* Joel Weinsheimer later criticizes Smith from a Gadamerian perspective, arguing that she insufficiently acknowledges that the classical produces the social dynamism defining the canon, which is the very point that Smith is making. WEINSHEIMER, *supra* note 1, at 134. The important distinction is one of emphasis: Weinsheimer regards this situation of historicity as unavoidable and productive of knowledge, while Smith regards it as fraught with bias hypostatized as truth. But this important exchange of views cannot take place when commentators fail to acknowledge their substantial common ground and to continue the discussion from that shared point of reference.

pating in an event of tradition, a process of transmission [translation] in which past and present are constantly mediated."¹⁶⁹

The classical text speaks directly to the reader as a dialogical partner, then, because it is distanced from the reader. The classical text is not easily put to the service of the reader's horizontal prejudices because it is removed from the pressing concerns of the moment. Gadamer agrees that this distance often is temporal in nature—thus the platitude that classical texts have passed the test of time—but he agrees that distance is not defined exclusively in temporal terms.¹⁷⁰ Although he does not explain non-temporal distance, it is fair conjecture to suggest that contemporary texts generated from distant cultures could become classics within a short time by virtue of their power to initiate dialogue that moves beyond the immediate circumstances surrounding the creation of the text. Although distance is necessary to allow the text to speak and provoke, the critical historicist attitude that turns distance into a yawning abyss, overcome only through the intellectual effort of the critic, serves to silence the text. "The text that is understood [only] historically is forced to abandon its claim to be saying something true [i.e., something] valid and intelligible for ourselves."¹⁷¹ The critical historicist scholar insulates her fore-conceptions from the questioning power of the classic and attempts to reduce the text to a historical phenomenon that makes no claim on her present situation.

Gadamer's philosophical hermeneutics grounds Altieri's conception of the function of a canon. Gadamer explains that classical texts promote understanding because they shape in advance our preconceptions, but that classical texts also challenge these preconceptions in the act of reading. Classical texts are freed of the specific historical contingencies surrounding their creation and appear to speak directly to the reader, and yet, the texts provoke dialogue by remaining irreducibly distinct from the reader's particular concerns. Gadamer's ontological description of the historicity of understanding complements Altieri's phenomenology of reading literature. Altieri demonstrates that dialogue with a classical text involves a dramatic play in which the narrow interests of the reader are suppressed in favor of a more general idealization of public forms of life. The compatibility of their approaches is underscored by each author's efforts to appropriate Kant's grudging concession of the independent status of aesthetic judgment by rehabilitating such judgment as knowledge.¹⁷²

169. GADAMER, *supra* note 31, at 290.

170. Gadamer "softened the original text" of *Truth and Method* by adding the qualifier "often" to underscore that it is distance, not just temporality, that allows the classical to critique the reader in dialogue. *Id.* at 298 n.228.

171. *Id.* at 303.

172. ALTIERI, *supra* note 9, at 225-53; GADAMER, *supra* note 31, at 42-100. Gadamer argues that Aristotle is an appropriate corrective to Kant's approach, inasmuch as Aristotle argues that

B. *Legal Classics and the Critique of the Legal Canon*

The framework suggested by this reading of Gadamer and Altieri permits a reconceptualization of the challenges to the legal canon discussed above. There are different canons under fire: the canon of legal scholarship, the canon of curricular materials, and the canon of legal practice. Gadamer and Altieri establish that these related canons are linked in a fundamental way. Classical texts subtend each of the various canons, not just as constitutive parts but as defining exemplars. Classical texts have cognitive significance for participants in legal scholarship, teaching, or practice; such texts embody historically defined standards of value. Legal classics cannot be discarded at the instigation of contemporary commentators, for it is through legal classics that commentators see the world. Challenges to the legal canon are counterproductive to the extent they seek to silence legal classics.

The fragmentation of legal scholarship poses a threat not because of the proliferation of new ideas, but because it signals the possibility that scholars will seek an insulating genre which abandons the public realm.¹⁷³ It is not a question of whether scholars invariably play their own pre-scripted tune, but whether they respond by listening only to their own melody, rather than by seeking to learn from others and attempting to join an improvisational harmony-in-progress.¹⁷⁴ Scholarship written from diverse viewpoints has a positive value because it already exhibits the distance that can foster understanding, but surely this diversification will be pointless if it promotes only hermetic solos. Although Professor Rubin's attempt to articulate standards of effective scholarship is open to question, his partial reliance on Gadamer leads him to identify important considerations for maintaining the public dramatic venue of legal scholarship. He does not seek to enforce criteria of scholarly value as much as to foster a scholarly practice that facilitates understanding. More importantly, Rubin helps to provoke thinking about why some legal scholarship achieves class-

"ethics is *logos* also," and that *phronesis* is the ability to find the right nuance without the benefit of precise dictates founded on a universal concept. *Id.* at 40 n.71, 312-24 ("The Hermeneutical Relevance of Aristotle"). Jerome McGann incorrectly characterizes Gadamer as culminating Kant's aesthetic theory. MCGANN, *LITERATURE OF KNOWLEDGE*, *supra* note 49, at viii. It is more accurate to read Gadamer as deconstructing what Kant has wrought by exposing the fault lines in Kant's thinking.

173. See *supra* notes 66-83 and accompanying text (discussing the work of Professors Culp, Hutchinson, Rubin, Schlag, and Delgado).

174. Cf. Allan, *supra* note 10, at 5 ("The desires of the moment should alter the timbre or tempo, and upon occasion the key, of the educational canon; but the theme, the melody and the harmonic ideas, must be what is determinative. A crowd of musicians each tooting their own horns is only noise.").

ical status by concentrating on the effects that classical texts hold for scholars.

Professor Ansley accurately identifies weaknesses in her attempt to canonize the question of race within the curriculum, but her approach is vindicated when canonical caricatures are avoided.¹⁷⁵ Ansley argues that the Constitution is a classical document within the polity that, now more than ever, speaks of the centrality of issues of race and provokes critical self-reflection. It is pointless to try to canonize a particular interpretation of the Constitution, but certainly it is essential to demonstrate the power of the document—as interpreted in intervening history—to challenge us again to confront the problems of political cohesion. Ansley's scholarly claims should more closely parallel her teaching method of allowing the Constitution to speak and motivating others to listen to what has already prefigured their apparently diverse outlooks. There is never a definitive exegesis, but Gadamer and Altieri demonstrate that this lack of finality is productive rather than destructive of public dialogue.¹⁷⁶

Professor Sunstein's traditional defense of a capacious curricular canon as the core of a liberal education does not engage the critiques of the canon.¹⁷⁷ It is all too easy to nod with approval when critics subject canonical texts to historicist interrogation but then to respond that historical contingencies do not preclude our critical assessment of the enduring worth of canonical texts. Gadamer argues that the proper inquiry is "what happens to us over and above our wanting and doing," challenging the self-assured effort to master one's prejudices.¹⁷⁸ The problem of the canon is not overcome by committing oneself to avoid bias, because it is the activity of commitment that is placed into question.

Finally, Professors Levinson and Balkin accurately identify the destructive effects that historicism holds for legal practice, but their analysis is supplemented profitably by Gadamer's very similar, yet deeper, assessment.¹⁷⁹ Gadamer argues that the hyper-historical attitude of the modern era cannot destroy our relation to tradition inasmuch as it too is predicated on this inescapable relation. Although the authentic music movement might signal the death of a formerly vibrant genre of music, Levinson and Balkin recognize, almost in passing, that the historicist attitude cannot undermine the entirety of musical tradition.

175. See *supra* notes 84-95 and accompanying text.

176. See *supra* notes 129-30, 160-61 and accompanying text.

177. See *supra* notes 96-99 and accompanying text.

178. GADAMER, *supra* note 31, at xxviii.

179. See *supra* notes 100-112 and accompanying text. Gadamer discusses historicism extensively in *Truth and Method*. See GADAMER, *supra* note 31, at 218-42 ("Part II, ch. I(2): Dilthey's Entanglement in the Aporias of Historicism"); *id.* at 505-41 ("Supp. I: Hermeneutics and Historicism").

For most of us, this notion of living tradition is most obvious in popular music. What makes Thelonious Monk's *Round Midnight* a true "classic" of jazz is most certainly *not* its ability to be endlessly re-presented in a single canonical note-for-note form, but rather its ability to serve as the basic setting for creations by other great musicians.¹⁸⁰

Gadamer makes precisely the same point as Levinson and Balkin about the effect of historicizing a particular artwork, but he is more careful to reaffirm the broader, unending movement of tradition.¹⁸¹ Gadamer too equates the emergence of historical consciousness with a loss of innocence, but he is adept at recovering the persistent performance that continues beneath the choppy seas of critical historicism.¹⁸² This is most pointedly revealed by contrasting Levinson and Balkin's hesitant and careful comparison of the performing arts of law and music with Gadamer's much broader claim that understanding is a performative fusion of horizons, such that even viewing a painting should be considered a performance.¹⁸³

The idea that classical texts demonstrate the historicity of knowledge and reveal the process of understanding as a dramatic projection resulting in a fusion of horizons will guide my analysis of legal classics. Before proceeding, it is prudent to recap this idea and reemphasize its complexity by

180. Levinson and Balkin, *supra* note 2, at 1623.

181. GADAMER, *supra* note 31, at 496 ("A performance that was 'historically faithful' would not be a genuine artistic performance—i.e., the work would not present itself to us . . . as a work of art; rather, it would be—insofar as such a thing is possible—a didactic product or merely material for historical research" (emphasis added)). Levinson and Balkin miss what Gadamer takes to be fundamental: the authentic music movement can *never* reduce Beethoven to a historical artifact because there always exists a performance, even under the stultifying conditions established by the movement's adherents.

182. Gadamer describes the situation of modernity in terms strikingly similar to those later adopted by Levinson and Balkin.

Since [the emergence of historical consciousness], the continuity of the Western philosophical tradition has been effective only in a fragmentary way. We have lost that naive innocence with which traditional concepts were made to serve one's own thinking. Since that time, the attitude of science towards these concepts has become strangely detached, [obscuring] the hermeneutic experience.

Id. at xxiv.

183. *Id.* at 134-44 ("Part II, ch. II(2)(a): The Ontological Valence of the Picture"). Gadamer asserts that this performance is disrupted by the advent of the modern museum. *Id.* at 87; *cf.* DEWEY, *supra* note 119, at 8 (arguing that the relegation of classic artworks to a museum setting removes them from the performance of reconciling the origins of the artwork and the viewer's contemporary concerns, and thereby fosters a dead canon rather than an experiential encounter with a classic). Dewey joins Gadamer in rejecting the false choice between idealism or empiricism as an account of understanding, *id.* at 130-31, and he emphasizes the crucial function of performance when he succinctly states that a "work of art no matter how old and classic is actually, and not just potentially, a work of art only when it lives in some individualized experience," *id.* at 108.

quoting from Gadamer's Afterword to the third German edition of *Truth and Method*.

It was not defining some canon of content specific to the classic that encouraged me to designate the classical as the basic category of effective history. Rather, I was trying to indicate what distinguishes the work of art, and particularly the eminent text, from other traditional materials open to understanding and interpretation. The dialectic of question and answer that I elaborated is not invalidated here but modified: The original question to which a text must be understood as an answer has . . . an originary superiority to and freedom from its origins. This hardly means that the "classical work" is accessible only in a hopelessly conventional way or that it encourages a reassuringly harmonious conception of the "universally human." Rather, something "speaks" only when it speaks "originarily," that is, "as if it were saying something to me in particular." This hardly means that what speaks in this way is measured by a suprahistorical norm. Just the reverse is true: what speaks in this way sets the standard. And that is the problem. In such cases the original question that the text is understood as answering claims an identity of meaning which has always already mediated the distance between its origin and the present.¹⁸⁴

With this understanding, Part V now examines what remains after the deconstruction of the legal canon: the legal classic.

V. A COMMON-LAW CLASSIC

This Article first described the caricatural quality of much of the debate over the literary canon and revealed the initial tendencies of legal scholarship to mimic this unhelpful approach. Then, the Article suggested a productive framework of inquiry by combining themes from Altieri's literary criticism and Gadamer's philosophy. Against that background, this Part argues that legal classics are an inevitable feature of legal scholarship, education, and practice. In particular, this Part contends that *Hadley v. Baxendale*¹⁸⁵ is a common-law classic. By describing *Hadley* as a legal classic, the discussion shifts to a more concrete level, but this move should not be regarded as simply applying a delineated general theory to a particular setting. Thinking about *Hadley* and its place within contemporary legal practice helps to frame the larger theoretical issues discussed above.

Most lawyers readily will recall that *Hadley* is the casebook stalwart which established a foreseeability test as a default rule for determining when consequential damages are available in an action for breach of con-

184. GADAMER, *supra* note 31, at 577-78.

185. 156 Eng. Rep. 145 (Ex. Ch. 1854).

tract. The plaintiffs in *Hadley*, owners of a grist mill, delivered a broken crank shaft to the defendant common carrier and arranged for it to be transported to a manufacturer to serve as a model.¹⁸⁶ The mill owners sued on account of the carrier's delay, claiming that they had lost profits due to the extended down time at the mill.¹⁸⁷ The Exchequer Chamber held that the jury's exercise of unfettered discretion in setting damages was improper, remanded the case for a new trial, and stated that consequential damages for lost profits were unavailable on the facts of the case.¹⁸⁸ In the course of its opinion, the court formulated the general rule that the only compensable losses in an action for breach of contract are those losses arising naturally from the breach and those that might reasonably be supposed to have been in the contemplation of the parties at the time of contracting.¹⁸⁹ A great deal of subsequent energy on the part of contracts teachers, judges, and scholars has been expended to explain and assess the rule of *Hadley*.¹⁹⁰ The case provides an excellent example of a legal classic because it is widely known even though 140 years have passed since it was decided; that, of course, is the point.

Describing *Hadley* as a classic seems unreal, since virtually all lawyers would agree that *Hadley* is not read in the same way or for the same purposes that Virgil or Milton are read. It is highly unlikely that anyone settles into an easy chair with a glass of sherry and a dusty volume of the English Reports, eager to experience the sonorous timbre and melodic cadence of the opinion one more time. The *Hadley* opinion, after all, simply communicates the decision of an empowered civil authority and it is almost certainly always read with that context in mind. But *Hadley* is not so easily cabined into such a functional mode. *Hadley* is plainly not a *literary* classic, but it does serve the cognitive function of a *legal* classic. *Hadley* is a text, and as a text it inevitably rises above the immediate communicative context of a command and shares a fundamental identity with works of literature, de-

186. *Id.* at 146.

187. *Id.*

188. *Id.* at 151-52.

189. *Id.* at 152.

190. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 101-04, 108-18 (1989); Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 *passim* (1975); Melvin A. Eisenberg, *The Principle of Hadley v. Baxendale*, 80 CAL. L. REV. 563 *passim* (1992); Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105 *passim* (1989); Jason S. Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 *passim* (1990); Janet T. Landa, *Hadley v. Baxendale and the Expansion of the Middleman Economy*, 16 J. LEGAL STUD. 455 *passim* (1987); Jeffrey M. Perloff, *Breach of Contract and the Foreseeability Doctrine of Hadley v. Baxendale*, 10 J. LEGAL STUD. 39 *passim* (1981); Christopher T. Wonnell, *The Structure of a General Theory of Nondisclosure*, 41 CASE W. RES. L. REV. 329, 366-76 (1991).

spite the obvious and important differences between them.¹⁹¹ This situation is underscored by considering that *Hadley* is not binding law in this country. Instead, it has served as an influential text in the development of binding law.¹⁹² It is not so strange after all to characterize *Hadley* as a legal classic.

The description of *Hadley* as a classic requires a brief recapitulation. Texts invite performative readings. Understanding represents the fusion of the horizon of a reader motivated by a fore-structure of interests and the horizon formed by the history of effects of a text. A classic text both constitutes us and decenters us with constant questioning, and therefore regularly produces understanding. A classic legal text shapes the legal world of the contemporary practitioner and also serves as a point of reference in the constant negotiations concerning the future contours of the legal world. *Hadley's* classical status is evidenced in a number of superficial ways. First, treatise writers pay *Hadley* the respect owed a classical text.¹⁹³ Second, *Hadley* remains influential in legal practice, long after its publication in 1854.¹⁹⁴ Finally, law students uniformly must master the *Hadley* doctrine; even when casebook editors choose not to include *Hadley* in their damages chapter, the contemporary decisions included in the book invariably describe and then venerate or critique the *Hadley* rule.¹⁹⁵

The idea of the classic developed in this Article extends beyond the superficial achievement of prolonged and widespread popularity. Therefore, a more detailed explanation of why *Hadley* is a legal classic is neces-

191. See *supra* note 63. Joel Weinsheimer makes the point that every field has its classics because classics have cognitive significance. WEINSHEIMER, *supra* note 1, at 140. The important differences between aesthetic texts and legal texts do not override the similar cognitive function that literary and legal classics perform.

192. *Hadley* thus stands as another example of the idea expressed *supra* notes 58-59 and accompanying text.

193. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 14-5, at 593 (3d ed. 1987) ("It has won universal acceptance in the common law world and remains the leading case in the field."); ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1007, at 7 (1964) ("leading case"); E. ALLAN FARNSWORTH, CONTRACTS § 12.14, at 873 (1990) (a "fountainhead"); HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 7.03[3][b], at 7-12 (1986) ("read by every first year contracts student" and "cited in thousands of decisions"); WALTER H. E. JAEGER, WILLISTON ON CONTRACTS § 1356, at 289 (3d ed. 1968) ("leading case"); JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 120, at 685 (3d ed. 1990) ("It has been . . . universally accepted by our courts . . ."); JAMES J. WHITE AND ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 10-4, at 443-44 (3d ed. 1988) (knowledge of *Hadley* "has become a *sine qua non* to second-year standing in law school").

194. See, e.g., *Suburban Propane v. Proctor Gas, Inc.*, 953 F.2d 780, 786 (2d Cir. 1992) (describing *Hadley* as a "venerable holding" that "lives on" and whose rule is determinative of one of the issues on appeal). Entering the search "Hadley w/5 Baxendale" in the LEXIS Mega Library on February 14, 1994 revealed 752 cases citing *Hadley*, including 18 United States Supreme Court opinions.

195. See, e.g., MICHAEL L. CLOSEN ET AL., CONTRACTS: CONTEMPORARY CASES, COMMENTS, AND PROBLEMS 461-77 (1992).

sary. In his wonderful series of lectures on the demise of classical contract law, Grant Gilmore suggests that this is an extremely problematic question.¹⁹⁶

Since 1854 the starting point for all discussion of contract damage theory has been *Hadley v. Baxendale*—although why such an essentially uninteresting case, decided in a not very good opinion by a judge otherwise unknown to fame, should immediately have become celebrated on both sides of the Atlantic is one of the mysteries of legal history.¹⁹⁷

Although he does not take up this question in a systematic way, Gilmore's description of *Hadley's* place in the evolving common law of contracts sheds a great deal of light on the nature of the legal classic. Gilmore's broad thesis is that the self-contained, formalist approach evidenced in classical contract theory during the nineteenth century misrepresented the state of the law and produced untold difficulties for the development of the law, with many of these difficulties as yet unresolved. Gilmore discusses *Hadley* as a prime example of a case that was narrowly read against its grain to serve the ends of abstract theory—both by reading the case solely as a negative limitation on damages and by the later short-lived attempt to interpret *Hadley* as permitting consequential damages only upon a showing that they were tacitly agreed upon by the parties.¹⁹⁸

Gilmore argues that *Hadley* has survived these affronts and surmises that this survival evidences a certain staying power. "*Hadley v. Baxendale* is still, and presumably always will be, a fixed star in the jurisprudential firmament."¹⁹⁹ This staying power can be explained, he suggests, at least partly by the general wording of the opinion.

196. The formal system of contract law espoused by Dean Langdell, Samuel Williston, and others is commonly referred to as "classical contract law." In this usage, "classical" generally connotes both "paradigmatic" and "antiquated," but in any event does not refer to the use of "classical" outlined in this Article. For critical overviews of classical contract law, see P.S. ATTYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT passim* (1979); GRANT GILMORE, *THE DEATH OF CONTRACT passim* (1974).

197. GILMORE, *supra* note 196, at 49.

198. Gilmore argues that *Hadley* is read improperly as limiting damages, when in fact all other specific rules for measuring damages in existence at the time were far more narrow. *Id.* at 51-53, 83. Professor Farnsworth properly describes this reading as "unorthodox," inasmuch as most scholars contrast the general default rule of *Hadley* with what preceded it—unrestricted jury discretion—and conclude that it is a rule of limitation. FARNSWORTH, *supra* note 193, at 913 n.3. Gilmore also references Holmes's unsuccessful effort to paint the "tacit agreement" gloss on *Hadley*, an approach that has been firmly rejected in Article Two of the UNIFORM COMMERCIAL CODE, § 2-715 cmt. 2, and in the common law, RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. a (1979).

199. GILMORE, *supra* note 196, at 83.

In the hundred odd years since the case was decided, the compendious formula of *Hadley v. Baxendale* has meant all things to all men.

....

I observed in our earlier discussion of *Hadley* that the damage formula which Baron Alderson stated is, taken by itself, affirmative and that the limitations of foreseeability and communication are easily manipulable.²⁰⁰

Gilmore recognizes that *Hadley*, a centerpiece of the classical system of contract law, remains the focus even of decisions moving away from the classical model, and, hence, it is a "fixed star."²⁰¹ If Gilmore is correct in asserting that the law may evidence an unending undulation between classicism (systemic and logical development) and romanticism (formless and chaotic questioning), he fails to acknowledge the significant implication that *Hadley* appears to be a timeless classic which modulates this alternating rhythm within a particular context.²⁰² It is not surprising that critics invariably suggest a new interpretation of the *Hadley* foreseeability rule rather than suggesting that they are beginning anew as if *Hadley* had never been decided.²⁰³ Gilmore exposes *Hadley* as a legal classic, but he does not explore what this means.

Asserting that *Hadley* is a legal classic means just this: It is inconceivable that a contemporary participant in legal practice could think about the consequential damages available in the event of a breach of contract without thinking through the opinion, even if that person had never actually read the opinion. Efforts to discredit the opinion will be reactive, for the opinion does not stand as a historical fact so much as a historical force that cannot be ignored. This is not to say that *Hadley* is a legal classic because it exhibits certain formal characteristics or espouses certain universal ideals that transcend history. Such a traditional notion of the classical is rightly ridiculed. *Hadley* is a contingent historical occurrence that has survived on account of specific historical developments, but it is *Hadley's* very embeddedness in history that generates its power as a classic. Contemporary practitioners also are embedded in history and do not have access to a timeless critical view; as such, they are shaped by the history of effects that *Hadley*

200. *Id.* at 50, 83.

201. *Id.* at 83 (discussing *Koufos v. C. Czarnikow, Ltd.* [The Heron II], 3 All E.R. 686 (H.L. 1967)).

202. GILMORE, *supra* note 196, at 102-03; cf. Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WM. & MARY L. REV. 329, 347 (1993) (arguing that Gilmore's description of the alternating rhythms of the law can be radicalized by employing chaos theory).

203. See, e.g., Eisenberg, *supra* note 190, at 598-604 (arguing that economic changes suggest that the *Hadley* foreseeability requirement, increasingly read in the case law as requiring only reasonable foreseeability, should be relaxed further to require only proximate cause, but also conceding that a foreseeability requirement, as opposed to strict absolute liability, is appropriate).

has spawned in the form of countless decisions and commentary.²⁰⁴ Put concretely, it is difficult to talk about appropriate consequential damages for breach of contract without justifying one's approach according to its impact on someone standing in Mr. Hadley's shoes and without reference to the points of consideration raised in the *Hadley* analysis.

The model of the legal classic drawn from the work of Professors Al-tieri and Gadamer in this Article acknowledges historical contingencies not as sources of error or conditions that can be placed before the critical seat of reason, but instead as the unavoidable conditions of understanding that frame the intersubjective dramatic arena which enables knowledge. In her influential article, *Contingencies of Value*, Barbara Herrnstein Smith chronicles "the history of taste" as exhibited in literary evaluation, arguing that "all value is radically contingent, being neither an inherent property of objects nor an arbitrary projection of subjects but, rather, the product of the dynamics of an economic system."²⁰⁵ Smith acknowledges that the canonical literary work which survives its original historical context "begins increasingly not merely to survive within but to shape and create the culture in which its value is produced and transmitted," but she finds this process troubling because the text inevitably will "reinforce establishment ideolo-

204. Stanley Fish comes close to adopting this theme by emphasizing that postmodern attacks on the traditional conception of canons will, in the end, have little effect on the actual operation of canons within their socio-cultural contexts. Fish, *supra* note 15, at 18. Fish argues that postmodernism's lesson will not cut deeply if the discourse to which it is directed is constitutionally incapable of hearing it.

.....

The (perhaps counterintuitive and certainly anticlimactic) conclusion is that none of the answers one might give to the key question of the canon debate—where do canons come from?—would have any appreciable effect on canons, which will be just as constraining (and/or vulnerable to challenge) as they were before we put the question. Whether canons have their pedigree in divinity or in the labors of men and women like you and me, they will continue to shape the background conditions within which we go about our business, including the business of interrogating canons.

Id. at 19-20. It is plain, however, that Fish adopts a complex set of attitudes that are antithetical to the themes developed in this Article: a preoccupation with the cognitive impairment rather than enablement represented by classical texts; a thoroughgoing bifurcation of theory and practice; and a resolute defense of the insularity of interpretive communities composed of what Pierre Schlag adroitly has termed "relatively autonomous selves." See Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 *Geo. L.J.* 37, 39 (1987).

205. Smith, *supra* note 30, at 10-11. Smith, of course, is using the phrase "economic system" in a very broad sense to refer to the reciprocal relationship of an individual's needs, the community's needs, and the resources of the text. *Id.* at 11-19 ("The Economics of Literary and Aesthetic Value"). Martha Nussbaum recently noted that the convergence of left-wing literary theory and right-wing economic theory in Smith's work—creating, in effect, an "all-American, Chicago-school, economic deconstructionism"—is not surprising, given the fact that both of the seemingly opposed traditions are grounded in an attack on the rationality of normative commitment. Martha Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 *HARV. L. REV.* 714, 731 (1994). Nussbaum's Aristotelian antidote closely resembles my Gadamerian critique of Smith in this Article.

gies."²⁰⁶ Although her diagnosis is marred, Smith's description is accurate. The classic text provides the venue for raising claims against "establishment ideologies" precisely because it holds the importance for the cultural reproduction that Smith describes. The contingency of value should not inspire a resolutely suspicious questioning of these contingencies so much as an engagement with historically defined values.²⁰⁷

Richard Danzig's provocative commentary on *Hadley* is a useful example of misunderstanding the legal classic as a contingent historical fact subject to a thoroughgoing critical appraisal. Danzig begins his interrogation by quoting Gilmore's description of *Hadley* as a "fixed star." He argues that it is important to uncover the historical bases of the decision in assessing whether the case continues to be useful for resolving modern legal problems.²⁰⁸ Danzig urges caution against accepting "fixed stars," and suggests that we continually should question the past to avoid being obeisant to an outmoded rule.²⁰⁹ In Holmesian fashion, Danzig concludes that *Hadley* should be irrelevant to modern legal practice because it emerges from a world of commerce strikingly different from the modern world. He voices the fear that *Hadley* "retains its place [as a classic simply] because it seems as though it has always held this place."²¹⁰ Danzig contends that *Hadley* is a "fixed star" for contingent historical reasons having nothing to do with its contemporary usefulness for adjudicating commercial disputes arising in an advanced capitalist economy.²¹¹

Danzig's critical effort presumes that the historical distance between the contemporary reader and the text is sufficient to permit the reader to assess the text as something foreign.

The opinion in *Hadley v. Baxendale* is written in general terms and has had a broad impact on the law of contracts for 120 years. But at the time of its conception it was probably seen and shaped by its authors in the context of uncertainties about the law of agency and conflicts about the shape of the law of liability—particularly common carriers' liability—which are now generally forgotten.²¹²

One immediately must ask: Is it necessary to have Professor Danzig tell us that the world has changed since 1854? If *Hadley* truly were locked within

206. *Id.* at 28-29, 30.

207. Gadamer's differences with Smith are revealed in his very different rehabilitation of the concept of taste as a mode of knowing. GADAMER, *supra* note 31, at 35-42; *see also supra* note 168.

208. Danzig, *supra* note 190, at 249-51.

209. *Id.* at 284.

210. *Id.* at 283; *cf. supra* note 107 and accompanying text (presenting Levinson and Balkin's characterization of Holmes as the quintessential modernist).

211. Danzig, *supra* note 190, at 277-84.

212. *Id.* at 267.

the historical circumstances of nascent capitalist development in the mid-nineteenth century, then there would be no need to reveal this because *Hadley* would now be long forgotten, along with the particular circumstances to which it responded. As Danzig readily notes, *Hadley* continues to exert a broad impact long after its publication precisely because we read it in "general" terms, which is to say that it speaks to the contemporary reader rather than appearing to have only a specific, historical meaning.

His excellent historical survey of the specific circumstances surrounding the *Hadley* decision leads Danzig to ask the right question, which is phrased in a manner remarkably similar to the question posed by Professor Gilmore.

How does an opinion whose primary functions seem to correlate with a quarrel over an 1830 transport act and with the needs of a judicial system in the 1850's come to be viewed as "a fixed star in the jurisprudential firmament" 120 years later? . . . Why did this case escape overruling and anonymity?²¹³

Danzig argues that the *Hadley* opinion, like any new invention, was advanced by the marketing techniques employed by the central players in its creation. "If the common law is thought to be some 'brooding omnipresence' working itself pure, it obviously acquired some substantial human assistance in this instance."²¹⁴ In a footnote, however, he acknowledges that the case certainly is not "famous solely" because of such factors, and he notes that it must also have had "functional significance for the other judges" of that time.²¹⁵ Although Danzig obliquely raises the question of the legal classic as defined in this Article, in the end he concludes that the staying power of the case represents an irrational traditionalism that should be corrected on the basis of a critical assessment.

Danzig's article is well written and thoroughly researched, and I consistently am repaid when I read it. The value of the article, though, emerges in spite of its express thesis. The continuing centrality of *Hadley* gives the lie to Danzig's thesis that *Hadley* is an obsolete invention. Danzig's careful historical inquiry reinforces the classical status of the *Hadley* opinion inasmuch as he supplements the historical force that *Hadley* exhibits. By deciding to research and write about *Hadley*, Danzig reinforced its centrality to legal practice even as he advocated for its decreased importance in the modern economy. The classic is not defined so much by universal acclaim as it is by its influence in shaping hotly contested debates. For example, *Hadley* recently has assumed new life in the debates among law and economics

213. *Id.* at 274.

214. *Id.* at 276.

215. *Id.* at 276 n.117.

scholars over the functional efficiency of a foreseeability default rule.²¹⁶ It would be an obvious mistake to think that *Hadley* survives on account of immutable formal qualities that permit infinite commentary. Danzig and Gilmore both describe *Hadley* as a generally worded opinion, but *Hadley* appears this way to contemporary readers only because the pointed factual statement and concise rationale for the decision still sound as if the words were written yesterday. There undoubtedly are many judicial opinions from nineteenth-century England with brief, generally phrased opinions that now are forgotten entirely and would be read as historical artifacts, notwithstanding the abstract generality of their language. *Hadley* is a legal classic because it still serves to clarify the range of legitimate discourse in the continuing development of the common law of contracts.

It is crucial to recall the intersubjective qualities of the classical text that Altieri captures with his description of the dramatic, idealizing performance of reading literature. *Hadley* stands as the progenitive force behind a public discourse and continues as the focal point for a shared effort to define social identity. Although *Hadley* ostensibly operates only within the narrow context of the law of contracts, it is no longer revolutionary to suggest that this particularized public dialogue about legal relations implicates the broader public dialogue about the social world that often is addressed in literature. One might suppose that the adversarial roles assumed by lawyers indicates that legal practice is a wholly instrumental activity; however, under the analysis of the legal classic in this Article, it is more accurate to view these performances as projections of a certain image of the shared law. One would hardly fault an actor for taking different approaches to playing the same character in response to changing political, economic, and social circumstances. *Hadley* continues to provide a perch from which performing lawyers similarly can modify their performances in response to the changing circumstances of their clients. Lawyering is never truly the instrumental behavior of a monadic individual because a lawyer's performance always is shaped in advance by the public realm represented by the historical force of legal classics like *Hadley*. In other words, *Hadley* continues to provide the lines that lawyers use in their performances, and these lines are shared and publicly redeemed rather than individually crafted.

The emerging canon debate in the legal academy, if caricatural in form, would subject *Hadley* to a critical appraisal that would permit only two attitudes: for or against. *Hadley* would be presented as sublime or sexist, inspiring or oppressive, rich or racist. But once we understand that the legal classic transcends the narrow categorization that is suggested by

216. See, e.g., *supra* note 190 (citing sources that discuss the efficiency of a foreseeability default rule).

the ideal of a canon, it is possible to approach *Hadley* with greater subtlety. The classical text exerts its force in a manner that precedes and in part defines the critical stances adopted within the canon debate. The classical text demonstrates that the self-assured critical knowledge of the theorist is always already a manifestation of a wider tradition. *Hadley* is a common-law classic. Theorists should never canonize the opinion as beyond reproach or questioning because this attitude runs contrary to the classic experienced as a challenge or question. Nor should theorists ever assume that a classic can be subverted, as if from outside its grasp. The classic calls for constant questioning and engagement—if we do not turn a deaf ear—but it also partially shapes the field in which the questioning shall occur.

VI. CONCLUSION

Defenders of the canon can score some telling points in the impending debate over the legal canon. Perhaps the most important will be to demonstrate that challenging the canon itself is canonized in the Western tradition of rationalism, and that substantively many contemporary challenges to the canon are historically rooted in the very traditions under attack. Defenders will argue that it is unrealistic to paint the Western tradition as a uniform voice of conformity when, in fact, it is a cacophony of competing visions of beauty and truth that continually invite critical engagement. Telling as they are, these points will not carry the day, nor should they. The hegemonic power of canonization is a stifling institutional force that we now concede has subjugated large segments of the community. Deconstructing the legal canon will provide some measure of liberation if it ushers in a commitment to achieving that ever-elusive, quasi-oxymoronic goal: a pluralistic community.

Nevertheless, deconstructing the legal canon is not a self-sustaining critical project that can approach the law from the outside. Deconstruction is only part of the story, even if an important part. As Professor Altieri argues with regard to literary criticism, this

is not to say that literary criticism should avoid demystifying texts or revealing the delusions of certain reverential stances. It is to suggest, however, that such demystifications are neither sufficient goals for criticism as a whole nor adequate measures of the forms of power and identity that literary studies can make available.

....

For once we get the hang of the method of demystification, there is little point to yet one more demonstration.²¹⁷

217. ALTIERI, *supra* note 9, at 6, 8.

The more difficult and engaging topic is the persistent power of the legal classic, which subtends critical stances rather than submitting to them. No legal classic is timeless in the sense that it is destined to last forever, nor can we ever say with assurance which texts hold this power within a pluralistic, dynamic society. But we can recognize the existence and significance of legal classics. This recognition is a vital supplement to the canon debate.

In the critical atmosphere of contemporary scholarship, the battle lines commonly are drawn with sharp resolution: Milton is a raving misogynist or a profeminist; *Hadley* represents outmoded economics or an efficient default rule.²¹⁸ What persists unseen is the power of Milton and *Hadley* to help us define patriarchy and economic efficiency, not simply by providing an example but by helping to shape in advance the demarcation of these topics. Milton suffers the scathing inquiries of feminists and *Hadley* suffers the narrow focus of sophisticated economic analysis, which is to say that Milton and *Hadley* become venues at this point in history for defining these inquiries.

The power of the classic lies in its cognitive significance: it shapes the world in which it appears as a provocation, and its continual reappropriation within a society spells the continuity of the ever-changing force of tradition. Thinking about legal classics, then, leads to thinking about issues of fundamental philosophical importance. What does it mean for a finite being to learn and understand? What defines the social setting that serves as the arena of understanding? Like any tradition, the legal tradition affords no easy analysis with respect to these questions, although thinking about legal classics is certainly a step in the proper direction.

Recognizing the power of the legal classic shapes my practice as a law professor. It would be a mistake to read this Article as an invitation to fatalistic quietism. Legal classics do not predetermine the legal world by means of a mysterious power that is immune to the questions and concerns of the present. I hope that my analysis makes clear my challenge to such a static conception. The legal classic persistently demands an active reader, which is why neither I nor my students can ever say enough in class about the legal classics included in my teaching materials. I strive to accept the questioning challenge of the legal classic while also keeping in check the natural tendency to adopt a critical historicist attitude of superiority that muffles the dialogue with the classic. Reading *through* legal classics rather than wholly *against* them is a better practical strategy for critically engaging the legal tradition and reaching understanding, for it is then that I

218. Stanley Fish, who earned his fame as a Milton scholar, agrees that debunking the unitary canon in favor of pluralistic canons does not necessarily spell doom for the acknowledged classics. Fish cites the dispute even among feminists over Milton's significance for feminist criticism. Fish, *supra* note 29, at 14-15.

(meaning my prejudiced fore-structure) am most at risk within an intersubjective encounter. The cash value of my discussion of the legal classic is earned not in the theoretical discourse of this Article, but in the day-to-day practice that my theoretical discussion is intended to facilitate.

I anticipate that many readers will find that this Article raises many more questions than it has answered in its interdisciplinary discussion of the classic. In my defense, I remind the reader that my goal from the start was rather circumspect: to outline the grammar of a productive framework within which the promise of the canon debate can be realized. Even within this framework the questioning and debating will be ceaseless, but it will be questioning and debating that is productive, rather than polemical. Because it is impossible to formulate a definitive statement about the legal classic, I will close by borrowing, as I have done on many occasions in the past, the wise words of Professor Gadamer.

But I will stop here. The ongoing dialogue permits no final conclusion. It would be a poor hermeneuticist who thought he could have, or had to have, the last word.²¹⁹

219. GADAMER, *supra* note 31, at 579; *see also* WEINSHEIMER, *supra* note 1, at xii:

I do not pretend that philosophical hermeneutics can resolve [the current debate concerning the canon]. Quite the opposite, its effect may well be to prolong it, for the value of philosophical hermeneutics in the context of the classic lies not so much in providing answers as in opening up questions that have not been fully considered.