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In Defense of Liberal Education Multiple Cultures and the Law: Do We Have a Legal Canon?

Cass R. Sunstein

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In my law school classes in my first year, the shortest measurement of time was the interval between the teacher's asking another student a question and my hand going in the air—just in case the student called on was not ready with an answer. At the end of that first year, in an act of retaliatory affection, the class placed a caption under my picture in the yearbook that read: "Derrick Bell. He knows everything and he wants everybody to know that he knows everything."

I wonder what my classmates would say about Cass Sunstein's steady stream of impressive publications over the last several years, publications covering every aspect of the law and, to his great credit, perusing with seriousness and respect the new and controversial forms of legal scholarship as they appeared. We have asked him here today to share what he obviously has learned: that recognition of the new does not demand belief, that belief in the traditional need not deter examination of the new.

—Derrick A. Bell

Let me begin with my conclusions. We should reject the traditionalist defense of traditional canons, in law and elsewhere. We should also reject what I will be calling the postmodern attack on canonicity, of which parts of Stanley Fish's essay seem to me a possible example. The two positions appear sharply opposed, but actually they have a lot in common. They share the view that if we do not have transcendental or external grounding for our judgments, many things go out the window, including (for example) freedom, and reason, and respect for authoritative texts. I'm going to make instead an old-style liberal case for a form of multiculturalism and for revisiting the legal canon—and just to the extent that these steps help educate our students better, and help make them better lawyers and citizens.

Now for some details.

When I first read Stanley Fish's essay, I had a sudden association with a very striking part of Robert H. Bork's *The Tempting of America*[1]—Bork's treatment of *Brown v. Board of Education*. Bork is of course an originalist, and of course he knows that the framers of the Fourteenth Amendment did not specifically intend the federal courts to eliminate segregation. On Bork's own method, *Brown* seems pretty easy—and wrong. But Bork did not reach this conclusion. Instead he struggled mightily to explain why *Brown* was right after all.

What is interesting for present purposes is not the details of Bork's argument, but the fact that Bork found it necessary to make it. From this and other

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1. New York, 1990.

examples, it seems clear that to have a claim on lawyers' attention, any serious theory of constitutional interpretation must be able to explain why *Brown* was right. In this sense, *Brown* is part of the canon of constitutional law. It operates just like *The Merchant of Venice* in Fish's account of the *Skokie* case.

Now what are we to make of this state of affairs? We could understand this situation in two very different ways.

First: Lawyers have lost sight of the fact that *Brown* was very much a human creation, very controversial (to say the least) in its time. Bizarrely, they take this very human outcome as an absolutely fixed point for an analysis, when they should understand it as a contingent product of distinctive social forces. Lawyers have really committed an act of idolatry. As part of the legal canon, *Brown* stops thought. Our principal interests should instead be in genealogy—in how things got to be this way. What gave *Brown* its special status?

Now here is a second, very different response to what has happened with Judge Bork and *Brown:*

Lawyers take *Brown* as correct for good reasons. Lawyers think that a constitutional order that allowed apartheid would not be worthy of respect. Lawyers think that any system of constitutional interpretation must ensure that our constitutional order is worthy of respect. They have reasons for their conclusion; these reasons have to do with the purposes and effects of racial caste systems for the people subject to those systems.

I am an outsider to the literary and historical debate over the canon, and what I am about to say may be inadequately informed; but in that debate, it seems to me, many people accept some version of response one. They emphasize that the canon is socially constructed, is a product of social forces, and could have been otherwise. They believe that these claims make it hard or impossible to offer response two, which suggests that there are good reasons for giving special status to some texts, for claiming them as authorities. In any case I think that this is what has happened in Stanley Fish's paper.

I also think that all this is a mistake.[2] The mistake takes the following form. If we do not have wholly external or transcendent foundations for something—if all we have is produced through human filters—we really have nothing at all. If the self is a social artifact, or a social product, freedom itself is in big trouble. Our beloved belief in liberty is an illusion simply because mental powers are shaped and constrained by external influence; free speech is an illusion too. Thus if antifoundationalism is right—if it was just us who created the canon—maybe *The Merchant of Venice* is regulable under the First Amendment. If Shakespeare is a social construct, maybe his works will have to be demoted, maybe by a lot, and—now not just maybe; now I'm speaking of a real event—in literature departments some teachers will refuse to teach Shakespeare's plays because of the author's reactionary politics. If the canon is produced by us—if it is an outcome of social forces—then we might switch things around very radically.

2. Relevant discussion can be found in Hilary Putnam, Renewing Philosophy (Cambridge, Mass., 1992), and in Martha C. Nussbaum, Sophistry About Conventions, *in* Love's Knowledge: Essays on Philosophy and Literature 220 (New York, 1990).

What—it might be asked—shall we consult when we do this? Perhaps something called "politics"; perhaps "interest"; perhaps nothing at all.

I have said that there is a mistake here. Now let me explain why. From the absence of external or transcendental foundations, it does not follow that everything is up for grabs, or that all we have is conventions, or power, or play. (I refer here, respectively, to Fish, Foucault, and Derrida.) It is right to say that there is no wholly external perspective on human endeavors, that canonization cannot be grounded without language or culture. But this does not mean that good reasons cannot be offered on behalf of one view rather than another. The alleged choice—between transcendental foundations on the one hand and power, conventions, or play on the other—is entirely unnecessary. Instead we need to think about what sorts of approaches will serve what sorts of things we, in our diversity and our commonality, really value. We do not need transcendental foundations to say that a regime of free speech is a lot different from a regime of tyranny. The fact that people are influenced in what they have to say does not in the least impugn freedom, or free speech, or liberalism.

All this has been pretty abstract. Now let me turn to the canon. Some people—I am calling them traditionalists—seem to think that the existing canon in law and elsewhere has a very special claim on us. On their view, any proposal for change or revision reflects a kind of cheap faddishness, disrespect for real quality, or hubris. On the traditionalist view, we really should take our canon as given rather than chosen. If we do not, we will be giving in to a kind of strident, standardless relativism in which political interest, rather than reason, governs intellectual life.

Another group, represented by some postmodernists, thinks that canons in general reflect the interests of certain groups—whites, or males, or heterosexuals, or Europeans—and that a recognition of this fact will point the way to a form of plurality that better serves socially diverse interests. So far, very plausibly, so good. But for some people who hold this sort of view, any form of ranking or valuation or judgment—the view, for example, that Shakespeare is especially good, worthier than most other writers—is perniciously hierarchical, or disabled in some way by virtue of the fact that it comes from human beings. There are no common standards—only diverse interests, power, and conventions.

Both of these positions seem to me to contain important truths. The traditionalists are right to emphasize that much of what is in the existing canon really does belong there. 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. But these important truths notwithstanding, I think that both traditionalism and postmodernism are unhelpful to our question today. They are each other's flip sides; they reflect the same kind of belief in the necessity for wholly external foundations. Traditionalists disregard the fact that there is no sufficient reason to think that any existing canon adequately serves educational goals. If what we want is good learning, and a good appreciation of what

intellectual life has to offer, we should say that the virtues of wisdom, clarity, and good argumentation are not limited to particular periods, genders, races, and countries. And this fact means that some current canons are in for revisiting.

But the postmodern position is little better.[3] At least in some forms, that position makes it very hard to explain why we should engage in intellectual life at all; if political power and political interest are all that is at stake, discussion of texts is hardly a good path to follow. Moreover, what underlies some of the most plausible claims of those who attack the current canon is the belief that the canon *should* include works of certain kinds. This belief—this use of "should"—makes sense only to the extent that it is based on generally acceptable reasons, not on political interest.

Against both traditionalism and postmodernism, I suggest that we oppose a third alternative, which might well be called a version of the old commitment to liberal education. I won't be able to say a lot about that commitment now, but at a minimum the commitment requires us to try to impart deep and wide understanding—to counteract ignorance, bias, and parochialism. Some of the current efforts to revisit the canon, in literature and history, are admirably well-suited to that goal. Those efforts have helped bring to the attention of students and teachers materials that are excellent, or that tell us a great deal about culture, politics, and history, and that were excluded only because of ignorance or bias in the past. Of course the class of reasons for inclusion of any particular text is not closed and unitary, but open and plural; and of course we will disagree about what reasons count as good. This is a matter that deserves a good deal of attention. In literature, for example, there are such traditional (and admittedly ambiguous) virtues as depth of human understanding and creativity with language; and works that show otherwise neglected aspects of human experience might well be included even if they are not quite so distinctive on other counts.

Now some brief words on canonicity within law. For lawyers, there are at least three different aspects to canonicity, which should be kept distinct: first, there is the category of authoritative texts; second, there is the curriculum—the courses that we teach; third, there is the choice of materials within each course. And, in the legal context, there is a distinctive element. Law students are being trained to be lawyers, and in order to be lawyers, there are certain things that law students need to learn. This fact imposes a degree of constraint on law school experimentation with the canon. What literature departments do *creates* the canon; the same is less true, or at least it's differently true, of law schools, who have courts and employers to answer to.

But within that fairly broad constraint it is important to expose students to a diverse array of thought and information, so as to equip them to be better lawyers and citizens. American legal education is extremely parochial. Often it seems as if the decisions of high-level American courts between 1970 and the

3. I draw in this and the following paragraph from the valuable discussion in Amy Gutmann, Introduction, *in* Charles Taylor et al., Multiculturalism and "The Politics of Recognition" 3 (Princeton, 1992).

present exhaust the contours of appropriate legal argument. It would be very good for legal education to be both more comparative and more historical. Let me offer just two examples. In the sodomy case, *Bowers v. Hardwick,*[4] both the lawyers and the justices struggled hard to think about the history and nature of homosexuality. In the abortion case, *Planned Parenthood of Southeastern Pennsylvania v. Casey,*[5] the Supreme Court grappled with the causes and consequences of laws restricting abortion. Part of the problem in both these cases was simple ignorance. Compare, for example, the extraordinary historical and comparative material in Judge Posner's book *Sex and Reason*[6] and in Mary Ann Glendon's *Abortion and Divorce in Western Law.*[7] We can quarrel with a lot in both books; but surely it is a huge advance to place, squarely within the legal canon, some works that attend to the extraordinary diversity of attitudes toward gender, reproduction, and sexual orientation. Surely it is important for lawyers to know what Posner and Glendon have told us; this information would have added an enormous amount to an understanding of the issues in both *Bowers* and *Casey.*

Let me add some final notes. Any system of free speech would be unacceptable if it allowed government to censor *The Merchant of Venice.* The *Skokie* case was a hard one, but in the end it was rightly decided; government should not be allowed to stop a political protest without making a graver showing of harm than was provided there. Judge Bork's instincts were entirely right: an approach to constitutional interpretation is unacceptable if it entails the incorrectness of *Brown v. Board of Education.*

Perhaps some of these conclusions are wrong. Certainly we should be willing to discuss the reasons that might be offered on their behalf. A commitment to liberal education entails a commitment to this process of reason-giving. It understands this process to be one that requires both width and depth: an exposure to an array of attitudes and perspectives; a respect for clarity of argument; an understanding that education entails not reinforcement of widely held convictions, but appreciation of actual and potential criticism from internal and external sources. I think that something of this general sort would be a good start toward reevaluation of canonicity in law.

4. 478 U.S. 186 (1986).
5. 112 S. Ct. 2791 (1992).
6. Cambridge, Mass., 1992.
7. Cambridge, Mass., 1987.