Identity Crisis: The Politics of Interpretation

Allan C. Hutchinson

Osgoode Hall Law School of York University, ahutchinson@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Recommended Citation


This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.
Identity Crisis: The Politics of Interpretation

Allan C. Hutchinson*

"I speak in sexual drag." With these words, Mary Joe Frug announces the promise, problems and politics of the postmodern writer. Her pithy pronouncement puts firmly into play the compelling questions of identity, authority and authenticity that dominate much modern theorizing. Who is this "I" that speaks? Whose voice does she "speak" in? What is the force of "sexual"? Is there an "I" beneath the "drag"? Can the "I" ever not be in "drag"? Are there only different "drag" costumes to be fitted and later discarded? Does the "I" choose the attire of living? Is the "I" chosen by the "drag"? What would it mean for the "I" to be spoken rather than to speak? Can there be a "drag" that is not "sexual"?

It is the burden of this essay to place these questions in a postmodern frame of reference and to offer some tentative and provisional answers. If recent episodes in literary and legal circles are anything to go by, there seems to be some force to the claim that the contested questions of identity, authority and authenticity are back in vogue and with a vengeance. The operating assumptions and informing suppositions of the legal community's practice and politics on race and gender are closely implicated in such issues. Apart from remedying old inequalities, it is contended that the appointment of women judges has high priority because they can bring a different experience and sense of judgment to legal interpretation and the decision-making craft. Similarly, it is regularly argued whether there should be affirmative action for women and men of color in order for them to become law students or professors because their identities as women and men of color challenge the allegedly color-blind standards of meritocratic enrolment. Also, it is a matter of heated debate whether the scholarship of women and people of color should be accorded greater significance in discussions of sexism and racism because their understanding of such discrimination is more authentic and, therefore, more deserving of authoritative status.

* Osgoode Hall Law School, York University, Toronto. Many thanks to my Jurisprudence Class of 1992, Pam Carpenter, and Rose Della Rocca for comments and support.

These political and pressing encounters, and the divisions and rancor that they give rise to, touch issues and have implications of profound theoretical significance. At the approaching fin de siècle, law’s life has taken on an increasingly hermeneutical round of existence: it is a troubled combination of intellectual logic and political experience. As a site for interpretive activity, law is both a reflective and reflexive effort to make sense of human struggle. As such, lawyers are engaged as active participants in the mediation and negotiation of political meaning through legal interpretation. Whether in the courtroom, the law-office or the classroom, the practice and skills of interpretation lie at the dynamic heart of the legal enterprise. At times, this involves the expansive reading and re-writing of sprawling social texts. At other times, it concerns the more prosaic writing and re-reading of more parochial legal texts. But, in all cases, unable to escape the creative opportunities and constraining responsibilities of interpretive activity, lawyers function on the contested territory of hermeneutical practice.

Moreover, these contemporary and controversial incidents also provide evidence of the relevance of such theoretical engagements to practical disputes. In particular, the Barthian notion that “writing is that neutral, composite, oblique space where our subject slips away” and where “the author enters into his own death” seems to have been abandoned. Buried, but not dead, ‘the author’ seems bent on resurrecting herself and making her authoritative presence felt in the interpretive encounter: the ghost of authors past stalks present interpretive efforts at avoiding future misunderstandings. This reincarnation is particularly confusing as it seems to be championed by the more radical vectors of literary and legal circles. After years of celebrating the death of the author and urging this fact on an unreceptive audience, there seems to have been a critical change of heart. A strong sense exists that, if “the birth of the reader must be at the cost of the Author,” that cost may have been too high a price to pay: the authorial subject has not slipped away and the space she occupies is far from neutral, composite or oblique. In short, authorship and authenticity matter and they matter in ways that are urgent and political.

In this essay, therefore, I want to demonstrate that writing and reading are important and that the identity of those who write and read is important. The struggle to ensure that there are more women and blacks in the legal and literary community must be continued vigorously. However, I also believe that there is no going back on the under-

4. Id. at 148.
standing of 'the death of the author.' There is no value at all in trying to re-install the author as the authoritative linchpin in the interpretive process or to bestow a transcending authority on the voice of authenticated experience. The challenge, of course, is to show that it is possible (and desirable) to hold on to both claims without fatally undermining either. In this sense, I want to contribute to the postmodern effort of making "the problem of the subject . . . part of the story."  

I. INTERPRETIVE TURNS

In order to get at and explicate the contested notions of authorship, authenticity and authority, I will re-pose and re-answer Michel Foucault's famous and characteristically enigmatic question—"[w]hat difference does it make who is speaking?"  Taking aim at the traditional matching of authorial identity and interpretive authority, he sought to disrupt efforts to use authorial intent as a principle of thrift in the proliferation of meaning. His whole essay can be read as a largely rhetorical dismissal of the relevance of authors in the hermeneutical enterprise—in effect, an indifference to the difference that difference might make, if any, in who is speaking. Foucault is interested in the operation of discourse as a productive process of subject-formation rather than as the formed process of productive subjects; discourse á la Foucault creates as much as it is created.  While I want to hold on to that account, I also want to elaborate and supplement it by showing that there is a different notion of difference that is at work and that is important in understanding fully the hermeneutical problematic—in effect, a serious interest in the kind of difference that difference might make in who is speaking. In short, I will draw a distinction between the metaphysical claim of 'difference' and a political understanding of 'difference.' Whereas the former ought to have no purchase in the world of interpretive practice and theory, the latter is of vital significance. It is through the metaphysical death of the author that the political writer (and reader) comes to life. It is in this important sense that it matters and makes a difference who is speaking (and reading).

The theoretical nature and practical force of the dilemma of difference is neatly captured by an English incident in 1987. Virago Press, a feminist publishing house, accepted for publication a book of stories about generational conflicts in Britain's Asian community. The author was Rahila Khan who described herself as an Asian woman and a recluse. 'She' turned out to be a white, male, Anglican priest named

Toby Forward. Although he insisted that he was a socialist, a feminist and an anti-racist, the publishers expressed outrage and distress at Forward's deception: "'[h]e pretended to occupy a space that isn't his.'" 8 What troubled the publishers about his behavior was more than his free-riding on an enterprise established to redress the historical imbalance in publishing opportunities available to women, especially women of color. They believed that his text was invalidated not so much by its content—after all, the book had been accepted for publication by literary feminists—but by the counterfeited identity of its author. Concerned about the possible insult to the Asian community and their own credibility, the Press decided not to proceed with publication. By way of response, Toby Forward argued that, although there may have been some elements of mischievousness and opportunism in his action, his primary motivation was that he might, by speaking with a voice that was not his own, strive to attain the artistic aspirations of a traditional literary ethic: "'[m]y own alienation was too personal and painful for me to write about, but it gave me a way into the lives and minds of others who for different reasons and in different circumstances felt something of the same things.'" 9

This incident raises a whole raft of queries and questions about the interlocking and controversial character of identity, authenticity and authority. For some, the Khan affair will persuade them that identity has little to do with the search for an authentic and authoritative angle on oppression and exploitation. The mark of good literature—an imaginative effort at understanding the human condition better—is to be found in its effects, not in its causes. For others, the value or merit of a book is closely tied to the circumstances of its creation. The identity of the author will be paramount because the authority of the writing will be derived from the authenticity of the experience from which it arises: the silenced voice of oppression will speak truth to a complacent world. For me, both of these stances are partly right and partly wrong. The value of any contribution to the struggle for a better world can never be only fixed by its maker's identity: there is no one authentic experience of anything that deserves authority purely by dint of that experience alone. However, the weight to be attached to any contribution may well be affected by the circumstances of its making and reception: identity is neither entirely dispensable nor completely determinative.

The resolution of such contested matters like identity, authenticity and authority is less about truth and more about politics: truth is never separable from politics. Any appreciation of what is involved in the familiar acts of reading and writing entails a sense of political commit-

8. KARL MILLER, AUTHORS 183-85, 184 (1989) (quoting spokeswoman for Virago). It should be noted that Miller takes a line on the incident which is very different from my own.
9. Id. at 184 (quoting Toby Forward, LONDON REV. OF BOOKS, Feb. 4, 1988).
ment as much as a talent for philosophical rigor. This does not mean that interpretation is wholly reduced to politics; writing and reading are to be correlated to rather than collapsed into the politics of their history. In the same way that any hermeneutical endeavor cannot slip free of history, jurisprudential reflection is politically charged; legal theories are not an evasion of ideology, but a re-location of it. Even the most intransigent claim that legal interpretation can and must proceed apolitically is of utmost political and ideological significance. Interpretation cannot be grounded on empirical facts nor validated by any metaphysical truth; each is never beyond interpretation, but only takes on meaning within an interpretive framework. By revisiting this whole question of authorial identity, interpretive politics and authentic experience, I hope to debunk further the traditional understanding of metaphysics and epistemology as categories of inquiry that are, and must continue to be, insulated from the adulterating influence of politics. There is nothing above, below, beyond or before politics, but more politics; no interpretation stands innocent of the charge of political involvement.

Because politics and history are always the context for theoretical engagement, it is the case that hermeneutical strategies have implications for politics and history. While it does not have any determinate or necessary consequences for interpretive practice, hermeneutical affiliation does effect a general orientation and focus that renders some outcomes more likely than others.10 Accordingly, any theoretical study must be able to justify itself and can only be useful if it can ease suffering and help change the world. If it is to be of service, it must be prepared to carry some implications or address the real issues that divide and plague society—economic deprivation, literacy, sexual violence, education, racial hatred and other such issues. While penetrating analyses of oppression and performances of textual radicalism will not in themselves bring an end to oppression, they can contribute to that cause. By opening up legal texts and social contexts from the hold of traditional interpretive strategies, it might be possible to make them available for interested attempts at more democratic appropriation.

Accordingly, this essay traverses a whole range of topics and problems that are gathered together under the rubric of identity, authenticity and authority. Writing as a white, male, heterosexual, forty-year-old academic of working-class background,11 I will examine the hermeneutical enterprise in the context of racial, gender and sexual politics. The approach will be postmodern. The first few sections of

10. This claim is, of course, controversial and needs to be defended. See STANLEY FISH, DOING WHAT COMES NATURALLY (1989).

11. I have already tried to address this issue more fully and explicitly in an earlier essay. See Allan C. Hutchinson, Inessentially Speaking (Is There Politics After Post-Modernism?), 89 MICH. L. REV. 1549 (1991).
the essay lay out the postmodern perspective and contrast it with the modernist stance and ambition of more traditional jurists. Next, I will demonstrate how such a deconstructive mode of inquiry re-illuminates and reconfigures the notions of identity, authenticity and authority in legal, political and literary interpretation. The latter sections of the essay reject a politics of identity and adumbrate a more action-based, public politics that is more consistent with the postmodern insight.

II. LAW STUFF

Most will remember the classic Marshall McLuhan scene in Woody Allen’s Annie Hall. Alvy and Annie are waiting in line for a movie. Behind them, there is a verbose academic trying to impress his bored date with his cinematographic erudition. An exasperated Alvy cannot resist intervening when the man begins to pontificate on the views of Marshall McLuhan. When Alvy tells him that his version of McLuhanian thinking is nonsense, the man defends its validity by offering his credentials as a teacher of a communications class at Columbia University. In his comic coup de grace, Alvy brings into the scene McLuhan himself who promptly puts the flabbergasted academic in his place—"You know nothing of my work... How you ever got to teach a course in anything is totally amazing." To end the scene, Alvy turns to the camera and laments, "Boy, if only life were like this.

There are many instructive and insightful lessons in this wonderfully funny scene. First, and not least, it works as a severe chastisement of academics’ propensity to pretention and indulgence; it cautions against the dangers of ignoring too easily common-sensical intuitions and moving too far and too abstractly away from the feet-on-the-floor experience of mundane living. It also points up the male tendency to resort mistakenly to intellectual machismo as a preferred mode of impressing women. But, more substantively, Allen’s acerbic humor touches a raw nerve in the body of jurisprudential scholarship—the relevance, importance and status, if any, of the author in contested matters of textual interpretation. His cinematic text offers an instinctively reasonable critique of academic efforts at hermeneutical sophistication. In particular, it makes a graphic and pointed challenge to contemporary juristic attempts to establish the critical claim that authorial intent and identity have no special privilege in the interpretive task of fixing the meaning of social and documentary texts. Following Mark Twain, Allen seems to be suggesting that academic reports of ‘the death of the author’ as a figure of interpretive authority and significance have been greatly exaggerated.

On the jurisprudential front, legal theory has been energized by the

need to negotiate between the competing claims of authors and interpreters as the ultimate location of hermeneutical authority over disputed texts. This need is experienced to be particularly pressing in law because answers to questions of interpretive authority and validity can have direct and devastating consequences for individuals and society generally. Consequently, drawing on a whole battery of intellectual and inter-disciplinary insights, it has become the self-assigned task of contemporary legal theory to fathom the disputed roles of author, interpreter and text. While its eclectic efforts are all over the hermeneutical map and defy any simple tracing or general categorization, the juristic ambition is to establish the parameters of a suitable hermeneutical practice for modern times. Unfortunately (or fortunately), postmodernism has thrown a deconstructive wrench in the modernist works.

The traditional approach to interpretation places great authoritative sway on the intent of the author. The meaning of any disputed text can be fixed by retrieving the intent of its author; the hermeneutical exercise is most decidedly a matter of discovery and not creation. Authorship is a communicative act that brings into being a text that functions as a medium through which the writer attempts to convey a discrete experience of consciousness to its potential readers. In such a scheme, meaning is a precious gem that is secreted in the text to be found by diligent and discriminating readers. For example, Richard Posner maintains that legal interpretation is about reconstructing authors' intentions in order to assess how authors might have answered any question of interpretation if it had been put to them: "the reader's task is to open a channel to the mind of the author." In this view, the recoverability of authorial intent works as a point of fixity in a world of flux; it is a hermeneutical haven in an anarchical world. This theory has much greater support, albeit often unthinking and uncritical, in everyday legal practice than legal theorists would care to admit; it is the interpretive common sense of the legal and literary community.

Notwithstanding this, much contemporary jurisprudence has been devoted to working through the implications of 'the death of the author' for legal interpretation. That debate has been most vigorous in constitutional law. The basic claim is essentially normative. Judicial interpretation can only be legitimate so long as it seeks to give democratic effect to the original act of consent by the people to the Constitution as a document to limit governmental power. Most importantly, it is recognized that the best evidence of the Constitution's

14. For a sampling of the different attempts to map the landscape, see Sanford Levinson & Steven Mailloux, Interpreting Law and Literature (1988).
meaning is the Framers' intentions. The overwhelming response to this has been that not only is this claim normatively dubious and contestable, but that, even if it were somehow desirable, it is entirely unrealizable. It is by no means self-evident that democracy is best served by giving effect to the views of long-dead politicians which received only indirect consent from the enfranchised few at the time. Moreover, past intentions, particularly of collective entities, seem doggedly resistant to future understanding. Intention is not a simple fact that stands antecedent to interpretation, but is in need of interpretation before it can be understood in general or specific terms. In short, author-based interpretation is "frequently historically uncertain, practically indeterminate, politically repugnant, conceptually incoherent, and contradicted by the evidence that the Framers' intent was that the Framers' intent should not bind future generations."

Although the majority of mainstream jurists have conceded, if reluctantly, the death of 'the author' as a figure of interpretive authority, they are still fully committed to the hermeneutical enterprise of trying to locate and justify an authoritative method of interpreting legal texts. While there are almost as many theories of interpretation as there are interpreters, legal theorists refuse to accept that there is no legitimate and appropriate form of judicial review—what they choose to call 'constitutional law'—in a democratic republic. The particular challenge that they have set themselves is to ensure that, having wrested control of the text from the tyrannical grip of the author, the interpretive enterprise is not allowed to slide into a maelstrom of reader anarchy in which interpretation is an occasion for personal caprice and self-serving prejudice. In short, although they might have rescued meaning from drowning in a tub of authorial bathwater, they must be careful not to run the risk of allowing the hermeneutic baby to die of thirst.

Accordingly, as a hedge against the imagined twin evils of an overbearing authorial constraint and an undisciplined reader freedom, mainstream theorists attempt to cabin the textual search for meaning in some communal precepts of interpretive regularity or in the establishment of an interpretive practice of institutional integrity. For example,


Ronald Dworkin maintains that legal interpretation should proceed on the basis that legal rights and duties "were all created by a single author—the community personified—expressing a coherent conception of justice and fairness." There still remains the enduring formalistic belief that law involves politics, but only neutrally so; it is important and possible that interpretation be kept distinct from outright ideological debate. Within this framework, the emerging pragmatic understanding holds that interpretive authority is generated in the organic, sophisticated and responsive interaction between the law and its interpreters. As Robert Post puts it, "constitutional adjudication, like all law, is . . . balanced on the human faculty of judgment; . . . pertinent considerations may be more or less compelling, and consequently the ability to exercise judgment more or less sustained."

III. The Critical Cut

One group of critics has refused to play this mainstream game. While obviously not alone in posting the obituary of the legal author, their postmodern or deconstructive approach to matters of legal interpretation makes them its most uncompromising and least tentative necrologists. Their unwillingness to compromise has not only set them clearly apart from more mainstream necrologists, but it has brought them under heavy political fire. Rejecting all mainstream attempts to legitimize legal discourse as an ideologically-neutral pursuit of interpretive truth, they have taken seriously the broader and deeper ramifications of the-death-of-the-author. While they do not always dance irreverently on the grave of authorial authority, they do not lament or fret at its passing. The fact that the author of a text or the text itself cannot authoritatively control or constrain the meaning-giving exercise is put to practical and arguably radical effect. Texts, like the Constitution or doctrinal judgments, that appear to carry a narrow and conservative meaning are shown to be capable of giving rise to transformative and expansive interpretations. Similarly, texts authored by reactionary writers, such as legislators or judges, can also be liberated to serve progressive ends. By taking interpretation seriously, they have struggled to show that even the darkest textual cloud can have its own silver political lining.

However, so the argument goes, the critics have become political victims of their own hermeneutical success. At bottom, the spirited re-

---

buttal to critical attempts to sabotage the mainstream hermeneutical project rests on the argument that the defeat of authorial tyranny and the political inconvenience of textual certainty has been bought at the bankrupting price of reader anarchy. It is claimed that, when push comes to shove, critical skepticism leads to the conclusion that texts mean everything and, therefore, nothing: any text can mean anything that anybody wants it to mean. If any text can mean anything, then all interpretations are equally valid and any interpretation is as valid as any other. The only constraints on interpretation are imaginative ingenuity and political cunning. The text becomes a blank cheque that can be written in the readers' preferred political currency. For the mainstream critic, this is no interpretation at all: it is reduced to only the crudity of ideological appropriation. This point is most forcefully made by Don Herzog in his Woody Allen-esque critique of Mark Tushnet's work:

I have a distressingly large library, one which keeps growing. I lug books from my apartment to my office, from one library to another, from New York to Michigan. I pile them up and occasionally face the incredibly dreary task of loading them into boxes. Why do I bother? Why don't I have just one text, say a large piece of paper with the tantalizing word "TEXT" inscribed in the middle in Gothic lettering? I could then interpret it any way I wanted: I could read Henry James into it, or out of it, or Joyce, or Simmel, or ... And why does Tushnet publish so much? Could he hold the skeptical view about his own work? Would he never complain that he had been misread? Suppose I read Tushnet's article—or the Constitution—as the story of a small boy growing up in Kansas during the Great Depression. (Suppose I read all texts that way.) Is that just a view the community is not likely to endorse, or is it wrong? 21

This line of theoretical criticism leads to a more political objection to the critical approach. It is asserted that, even if there were to be a successful demonstration of textual indeterminacy, it would be of very dubious political merit. By adopting a posture of thoroughgoing skepticism, the critics cut the ground from under their own feet. By proceeding on their campaign of hermeneutical terrorism and razing all interpretive strategies before them, it is contended that there is no place from which to launch or justify their own positive proposals for social change: any political manifesto would be entirely unconvincing and could be "derided as culture-bound, historically contingent, subjective, unverifiable." 22 Consequently, it is contended that the Critical summer is not quite the democratic idyll that it is claimed to be, but is

21. Don Herzog, As Many As Six Impossible Things Before Breakfast, 75 CAL. L. REV. 609, 629 (1987) (discussing Tushnet, supra note 17). In an equally witty aside, Kim Lane Scheppelle compares the Constitution to a recipe for key lime pie. She reports that judges never confuse the two and cooks do not assert that "recipes reveal rights or the separation of governmental powers." Kim L. Scheppelle, Legal Secrets 89-90 n.13 (1988).

22. Posner, supra note 15, at 217; see also Robin L. West, Adjudication is Not
more a fool's paradise where the glib are convinced by their own rhetorical illusions of naive grandeur.

For instance, it is argued that, if deconstruction is such a potent method for transforming and radicalizing textual meaning, there is not only no interpretive warrant for introducing black-authored texts into the canon of literary or legal scholarship, but there is no hermeneutical need for such a political change. The works of white authors will serve as ample diet for the deconstructive appetite and reconstructive imagination. Moreover, the introduction of women-authored texts will be of no particular consequence because, as the critics themselves have amply demonstrated, the authors of texts have no influence over the meaning that can be attributed to their texts; the text and its meaning will be interpreted as its readers decree. On both counts, therefore, there is no need for change from the status quo: white-authored texts can be made to do the work of black-authored texts and women-authored texts will not be able to retain their womanness in the face of disruptive interpretations by white readers. Furthermore, the whole notion of black and white texts is bogus—is it not the *cri de coeur* of the deconstructionists that the identity of a text's author is irrelevant to the interpretive process? As such, mainstream theorists conclude that any support that critics want give to the appointment of more women judges or the admission of more black students into law school is fatally undermined: deconstruction undercuts politics and politics marginalizes deconstruction.

These criticisms offer a powerful challenge to postmodern or deconstructive practice as a radical mode of political engagement or interpretive ingenuity. Is it now time to abandon Barthes' claim about authorship, a claim that has been so important in modern literary and legal theory? Must a space be made for the author to body forth and become a real presence again in the hermeneutical process? Or should we affirm with Barthes that the author is dead and urge that all this morbid talk about authors should cease? Does a radical political practice demand that the author be rehabilitated as an essential figure of interpretive authority? Or does it mean that the re-birth of the author signals the death of textual indeterminacy as a radical interpretive practice?

These questions raise difficult issues and the challenge of mainstream jurists is not entirely without merit. Indeed, the critics themselves are partly responsible for bringing something of this on themselves. In their enthusiastic and rigorous commitment to uncovering false claims to privileged status at every turn, there has been an understandable temptation to herald the demise of authorial authority and its replacement by the empowered reader as a necessarily progres...
sive achievement by critical workers in the name of democratic revolution. While this represents a political advance, such a critical move is very problematic as it simply shifts power from one group and is content to confer it on another. Whereas authors were once privileged, readers now move into the exalted role of meaning-fixer.\textsuperscript{23} However, the whole critical endeavor takes place within the very same framework of hermeneutical assumptions as the traditional agenda that it is intended to subvert. It works within and with the notion of interpretive authority rather than seeking to dispense with it altogether. As elaborated by some of its alleged champions, the postmodern critique is content to topple the old king in order to crown a new queen when it is the very institution of monarchic authority that needs to be overthrown.

By understanding deconstructive critique as a way to confer interpretive authority on readers rather than as a total challenge to the project of locating hermeneutical authorization, the postmodern perspective is tamed and its political edge is blunted. However, once a more appropriate grasp of the deconstructive perspective is achieved, it will become clearer what is involved in the actual theory and practice of legal interpretation. Moreover, it will take the critical wind out of the mainstream’s sails and provide a more cogent account of the possibility and tack of a postmodern politics. It is not that deconstruction undercuts politics nor that politics marginalizes deconstruction, but that deconstruction makes a certain kind of politics attainable and attractive. As such, the rest of this essay is devoted to demonstrating that there is no contradiction between a continuing loyalty to a deconstructive strategy, as properly understood, and the practical realization of a radical political agenda. In short, I will show that a deconstructive approach to law is both textually viable and politically radical. While it is not the ground for a progressive politics, it is a complementary strategy for one.

IV. A Postmodern (Im)posture?

“[A]ll cats may be black at night, but not to other cats.”

-Henry Louis Gates, Jr.\textsuperscript{24}

Postmodernism is a flat rejection of universal knowledge and an outright denial of essential truths. In contrast to the modernist project it begins with an implacable incredulity toward grand theories of social explanation and meta-narratives of ultimate emancipation. Rather than think of the individual subject as a unitary and sovereign subject whose self-directed vocation is to bring the world to heel through the exacting discipline of rational inquiry, postmodernism interrogates the whole

\textsuperscript{23} See Terry Eagleton, Literary Theory: An Introduction 85 (1983).

idea of autonomous subjectivity and abstract reason; it places them in a constantly contingent condition of provisionality. Of course, it does not obliterate the experience of subjectivity nor the availability of reason, but it problematizes them in order to understand them as being multiple, contextual and protean. Subjects and reason can never be entirely self-present to themselves in an unmediated and unsituated form. There is no escape from the historical horizons of social living to the transcending imperatives of Destiny, History, Progress, Nature or whatever. In short, knowledge and truth are always fragmentary. Subjects and reasons abound, but there is no Subject nor Reason. By deploying such a skeptical strategy, the political hope is to destabilize power, displace domination and dismantle hierarchy.

Deconstruction is the interpretive relative of the postmodern family. It does not offer itself as one more interpretive methodology in locating textual meaning. In contrast to Pope’s modernist idea that “Expression is the Dress of Thought,” such a postmodern critique maintains that language is not a jumble of accumulated vestments, but it is a system that neither labels nor represents the world of reality. Meaning is a differentiating function within that linguistic structure itself; reality cannot be apprehended from outside its discursive standpoint. Being internal to it, meaningful thinking does not precede nor can it be the precondition of communication and expression. Meaning is not transmitted through language by independent subjects, possessed of pre-linguistic thought, but the communicating subjects are themselves constituted in and through that discourse itself. Add to this the fact that the discourse is itself dynamic and contingent and, therefore, never outside attempts at political appropriation, the hermeneutical exercise becomes fraught with difficulty. The idea that there could be some authoritative act of interpretation that fixed meaning in a final, incontestable or objective way becomes dubious, if not altogether oxymoronic. None of this denies the possibility of meaning or widespread agreement on the particular products of interpretive processes. Deconstruction does not destruct the idea or practice of meaning, but it does disrupt any hermeneutical exercise that claims to offer standards of decidability or closure. Deconstruction views meaning as always contestable. Meaning can never be a ground for discourse because discourse itself encloses meaning. Moreover, discourse is itself never a grounding for anything, it is only a site or opportunity for interested attempts at hermeneutical acquisition. Reading ends not with a final affixing of meaning, but with a temporary undecidability.

As such, deconstruction calls into question not only the metaphysics of interpretive presence, but the very idea of a metaphysics itself. The tendency to use deconstruction within existing metaphysical frameworks is to be studiously avoided. Deconstruction's task is not to work within the extant matrix of interpretation, but to decenter, destabilize and disorder that framework. While it is devoted to exploring the revealed terrain of ambiguity, paradox and multiplicity, deconstruction does not seek to emulate Nietzsche by reaching for "a clamorous declaration of the antithesis."  

Deconstruction's threat is not its claim to produce alternative and unconventional meanings—although it does that in abundance—but it is its unrelenting challenge to the establishment of authoritative claims of meaning. It rejects entirely the notion of meaning as property that can be circulated in perpetuity between authors and readers. Reading ends not in a final affixing of meaning, but in a temporary respite from a lasting undecidability.

An example of deconstructive technique can be found in its excavation and implosion of 'woman.' While deconstruction works to destabilize and decenter the notion of woman, showing how it attains meaning in relation to 'man' and how man relies upon its opposite for meaning. It does not strive to counter-balance or invert the traditional hierarchy between males and females. On the contrary it exposes the dichotomy in order to junk it rather than rejig it. It does not switch around or reverse patriarchal authority and female submission and create a matriarchal society. Instead it calls into question the very oppositional and contradictory framework within which such categories are framed and differentiated. Trying to break the spell of metaphysics, it aims for disruption and displacement rather than nihilism and negation. The ambition is to become iconoclasts rather than idolaters of an inverted humanism.

In adopting such a stance, the understanding of what 'the death of the author' means and its implications take on a very different hue. Indeed, its most significant consequence is that the death of the author does not give birth to the autocratic life of the reader. The image of

28. DERRIDA, supra note 26, at 95; Sanford Levinson, Law as Literature, 60 Tex. L. Rev. 373 (1981-82).
30. An extreme example of this notion of the discriminating reader is offered by Alfred E. Housman:

Textual criticism, like most other sciences, is an aristocratic affair, not communicable to all men, nor to most men. Not to be a textual critic is no reproach to anyone, unless he pretends to be what he is not. To be a textual critic requires aptitude for thinking and willingness to think . . . . Knowledge is good, method is good, but one thing beyond all others is necessary; and that is to have a head, not a pumpkin, on your shoulders, and brains, not pudding, in your head.
the scepter of divinely-sanctioned authority being passed along the hermeneutical line is misleading. The challenge to hermeneutical authority and the notion of subjectivity as a fixed, unified and bounded identity applies equally to the new-crowned reader. Embedded in a constitutive discourse of power, readers are also disciplined by the extant protocols of power—they are subjects in subjection. There is neither a transcendent author nor a transcending reader. Lives can never be recovered or understood in their entirety: they can never be placed outside of history nor put beyond interpretation in history.

The death of the author is the effect of an anti-metaphysical contagion that attacks all claims to hermeneutical authority, including the designation of an empowered reader as the seat of interpretive power. The reader is no more free (nor no less constrained) to confer meaning and effect closure than the author. The text always says more than the author and reader can determine or dictate. In the same way that "[the author] cannot choose to write what will not be read," the reader cannot choose not to read what has not been written. The reader is no more an originator than the author. In reading as in writing, there is always the inescapable element of the parasitic or the plagiarized. Situated in and sanctioned by an informing context, authoritative readers are also a projection of the same metaphysics that breathes life into the idea of the creative author: each is a cultural, historical and political construct rather than a natural category.

In this regard, Foucault’s insight about the death of the author is more postmodern than Barthes'; it is less literal and more revolutionary. He did not allow what had been thrown out the front door to gain access through the back door. In his famous essay, Foucault’s target was not the writer as such, but the attempted conversion of that historical figure into a metaphysical entity. The transformation of the writer into an author is itself an authoritative projection. In searching to establish new ways of reading, Foucault sought to efface or abolish the author and to negate interpretation as an exercise in re-presenting someone’s mind in textual form. For him, the text is not a crystal window through which the light of experience can shine. On the contrary, the text’s meaning is not the product of anything but the text itself. If anything, the author is an artefact of the text. In making this critique, Foucault’s objective was decidedly not to hand over hermeneutical power to the reader. Like the author, the reader cannot be a firm foundation for hermeneutical authority as the reading subject is the product of discourse as much as its producer. The reading subject is as implicated in the powerful webs of social discourse as the writing subject:


32. See Foucault, supra note 6.
the distance between the two is historical and, therefore, is itself unbreachable in any final or fixed manner.

For Barthes, the death of the author released readers from the author's overbearing influence and allowed them to revel in the enumerable pleasures of the text and its intoxicating brio. Henceforth, the author could only be an occasional guest at the hermeneutical party whose invitations were jealously rationed by the liberated readers. If there was any unity in the Barthian text, it would lie "not in its origin, but in its destination."33 Released from the dead hand of its writing, readers were resurrected to engage in a practical collaboration with the text and to sample its playful possibilities.

In the Foucaultian order of things, the writer as an historical figure remains relevant: its particular importance and role will shift and vary with the task at hand. There is no Theory of Interpretation that can govern or underwrite the particular interpretation of specific texts. Texts only mean in the concrete settings; theoretical understandings about the significance of the writing and reading contexts are part of that setting. The text can never be read in its own abstraction or generality, but must always be read against and within the complex codes of power in which they arise and are attended to.34 There is no vantage-point available from which to survey those codes that is itself not political. As Shakespeare's Coriolanus said, "as if a man were of himself/and knew no other kin."35 In this way, meaning is always to be argued for and never to be argued from. It is neither a sacred shard of archaeological excavation nor an ephemeral whim of narcissistic indulgence.

V. WRITERS AND READERS

If deconstruction relieves authors of the burden of authority, postmodernism reminds readers of the weight of context. The deconstructive critique strips away false claims to hermeneutical authority wherever and whenever they arise. This is done not to deny forever the possibility of meaning, but to defer and problematize meaning for all time. Having cleared away the metaphysical brush, postmodernism relocates the interpretive exercise into its historically open and openly historical setting. While notions of Author, Text and Interpreter wither and die on the vine, writers, writing and readers are nourished and come to life in the rich soil of social living.

Within such an understanding, it becomes possible to grasp, as Foucault intimated, that it does matter who is speaking. But it does so in a way that is very different to the traditional view. Who is speaking is not

34. See Henry L. Gates, Jr., Writing and Difference 16 (1986).
35. William Shakespeare, Coriolanus act 5, sc. 3.
IDENTITY CRISIS

a matter of indifference. The difference that difference makes is different than is conventionally thought. The person who speaks cannot control what is heard or understood and how it is heard or understood. Nonetheless what might make a difference to that hearing or understanding is who is speaking and who is hearing. But that difference is not metaphysical or ontological, it is political and historical. Nothing necessarily follows from the political identity or historical location of the speaker or hearer. Certainly, there is no necessary connection between the speaker's intentions and the meaning of what is said; the idea of authorial authority is consigned to the trash can of failed academic theories. However, the social identity and historical placing of who speaks and who listens is not completely irrelevant or of no effect. The practice of speaking will not cease to be an intentional act and its status will demand attention as such. As Jacques Derrida put it, intention "will have its place, but from that place it will no longer be able to govern the entire scene and system of utterance." The nature, salience and consequence of that intention will always be open to interpretation and re-interpretation, but it will never be the final word of interpretation. In contrast to traditional understandings of hermeneutical practice, deconstruction aims to problematize rather than prioritize any claim to authoritative interpretation. To ignore entirely the fact that someone is speaking and from somewhere is as much a mistake as depending exclusively on who is speaking to determine meaning.

Accordingly, while the dead Author must remain buried and the lively Interpreter must not be brought to life, the writer and the reader can remain vibrant figures on the interpretive terrain. They are acting participants in the meaning-giving process. They do not stand astride the enterprise, but comprise and are constituted by it. Interpretation is not a static act that places the authoritative seal of hermeneutical approval on a finished textual product. Instead, it is a fluid and dynamic negotiation that re-makes the text to be interpreted in the very act of interpretation. Moreover, that interpretive engagement is situated in a historical context that is itself never outside the interpretive engagement. On such a theory and practice of interpretation, meaning is less a piece of property to be surveyed and filed in an authoritative register and more a fire that, constantly stoked by the timber of life, illuminates a sense of wonder in its flames. Interpretation might burnish in writers' and readers' hearts, not their minds, a fiery vision bright that melts the cold charms of the traditional hermeneutical enterprise. On the far side of meaning, it might be possible for future generations of writers and readers to establish an interpretive practice which will have relinquished the urge to locate truth and fix meaning. It will be more interested in cultivating fresh insights and stimulating further senses of wonder.

By deflating the pretensions of any contending candidate for interpretive honors, a postmodern deconstruction roots out privilege and reveals it as a masquerade for expertise. However, it does not pretend to wipe the historical text clean and bestow untrammeled scrawling rights on allcomers. Each practical act of interpretation implies a particular theoretical understanding of interpretation. Such a theory takes a stand, provisional and contingent, on the contested writings of authors, texts, contexts and the like. Because there is not only never an ending to the interpretive responsibility, there is also never a beginning that can act as stable foundation on which to build. Nevertheless, the identity of the author or reader may assume interpretive significance at different times and in different ways.

This point can be neatly made by reference to the relation between Foucault and his own seminal essay. For instance, the question may arise as to whether I have given a fair/objective/correct/valid/et cetera reading to Foucault’s essay. Apart from the obvious ironies of this inquiry, there are some pertinent lessons to be learned from it. First of all, provided that I have acted in good faith, the nature of such a challenge is beside the point in terms of the postmodern understanding that I have offered. The merit of an interpretation is not judged by its formal approximation of faithfulness to some model of interpretive integrity, but by its usefulness and power to illuminate the task at hand. As Foucault himself may have concluded, “the only valid tribute to thought . . . is precisely to use it, to deform it, to make it grown and protest.”

To think or interpret otherwise is to fall back on the discredited and defunct idea that there is a metaphysical distinction between explication and creation that can be made and is worth defending. Consequently, any challenge to my interpretation will be, like the interpretation itself, as much a matter of politics as anything else. Not that this reduces interpretation to only politics, but only that interpretation can never be meaningfully understood apart from politics which, of course, is itself always open to interpretation and never a ground for anything.

Secondly, it is instructive to take Foucault’s arguments on the role of the author and turn them back on himself as the author of his own text. It is important not for hermeneutical authority, but for political reception. The fact that Foucault was gay helps place his work in some perspective for some purposes. It suggests a context for understanding his work as a revolt against the repressive force of ‘normalization’ and for explaining his preoccupation with the social construction of sexuality. However, it does not offer any magical key to the meaning of that work nor does it inhibit any particular reading of it. It is a contextual

38. See infra text accompanying notes 92-93.
fact whose relevance and significance will vary. Such a double reading of Foucault's life and his ouevre is nicely offered by Didier Eribon:

Obviously, one cannot pretend that Foucault's entire work is explained by his homosexuality, as certain American academics do, imagining, moreover, that this would be enough to discredit it. . . . Quite simply, it is possible to see how an intellectual project is born in an experience that should perhaps be described as primary; how an intellectual adventure is created in the struggles of individual and social life—not to remain stuck in them, but to think them through, to go beyond them, to problematize them by ironically turning the question back on those who level it. Do you really know who you are? Are you so sure of your reason?  

VI. INTO THE AUTHENTIC

Almost everyone has received (and/or given) the advice given by Shakespeare's Polonius to his son Laertes on his leaving home—don't get into debt; choose your friends carefully; dress appropriately—and similar sober sentiments. But the real sting is in the tale—"this above all: to thine own self be true, / And it must follow, as the night the day, / Thou canst not then be false to any man."  Both prosaic and profound, puzzling and platitudinous, it is the kind of loving direction that is self-evidently true, but that tends to raise more questions than it can answer. What is this "self"? What would it be for it to be "thine own"? What would it mean to be "true" to it? By way of suggesting its own answer, it suggests that the search for identity is very much a backward-looking expedition of discovery rather than a forward-acting adventure of (re)creation.

In modernist discourse, an identity is something that each person has by virtue of their existence as unique individuals. At its most extreme and historical, there still seems to persist the idea that each subject is born normatively full-grown, like Zeus' children, with a raw set of values, preferences and characteristics that can be more or less given expression to in the historical act of living and socializing. For instance, women are marked by their biology and it is for society to organize affairs in such a way that they can be truly women and express the essence of their female being. Under this view, freedom is the successful resolution of both the search for that true intrinsic identity that lies within and the struggle to live one's life in accordance with its dictates. In both its vulgar libertarian and Marxist guise, justice is reached when people attain an unimpeded sense of themselves: false consciousness is so much old clothing to be discarded in the unveiling of the true self. On a more enlightened modernist version of identity, society plays a more formative role, but is still secondary to the givenness of a

40. William Shakespeare, Hamlet act 1, sc. 3.
particular identity. Either way, the identity is a given quality that must be perceived and preserved.

By contrast, postmodernism rejects the notion of an abiding, fixed or essential identity. Identity is relative, not intrinsic; fluid, not fixed; perspectival, not neutral; and protean, not perfected. The subject is a cultural creation, not a biological given. Nevertheless, while people are not fundamentally fixed by their experience of race, gender and class, they are distinctively marked by such social categorizations: "Identity is in the etched details of mediated lives and struggle." Like history, identity cannot be completely got out of or into: its presence is never entirely self-present to itself so that it can be summarily embraced or evaded. Always shifting and often self-contradictory, identity is part of history, not a ground or precondition for attempts to resist or reinforce history's meaning.

If there is no Knowledge or Truth, there is also no Identity that is unchangeable or beyond re-interpretation. Of course, there are lots of identities, but not one Identity. At any particular time or place, individuals will feel acutely the pushes and pulls of their identity. Being contingent and in flux, the experience is no less real or limiting. To think or postulate otherwise would be to deny and invalidate the racial and gendered oppression of many. But accepting the experiences of racism and sexism as true and real does not deliver a fatal blow to the anti-essentialist project. Postmodernism does not denigrate or dismiss the value and truth of experience—that would be nonsensical. Instead, what it does do is avoid essentializing its value or truth. That experience is given historical force by interrogating it and resisting the modernist temptation to reduce it to a new authoritative source of epistemological knowledge. In this way, the subject becomes a site for the constant and continuing struggle to take on an identity that is conducive to a truly egalitarian society. Notions like subjectivity, false consciousness, experience and personal destiny need not be jettisoned as so much excessive baggage in the postmodern portmanteau, but are retained in a fresh and revitalized shape and substance. In particular, postmodernists suggest that the traditional notion of authenticity—"to thine own self be true"—is an immediate patient for postmodern surgery.

The political implications of this interpretive retooling are wide-

41. See generally Hutchinson, supra note 11; Martha Minow, Making All the Difference (1990).
ranging, but themselves are never beyond contestation or interpreta-
tion. However, the challenge to the conventional idea of autonomy as a
negatively defined zone of non-interference and self-realization is espe-
cially strong. It gives the theoretical lie to the practical understanding
that freedom is an individual state of mind and passive virtue which
aspires to transcend social constraints. Instead, a postmodern insight
reconfigures individual freedom more as a public project than a private
undertaking: it is as much a social state of affairs as anything else. In
short, postmodernism is devoted to "deconstructing the self who could
embody that freedom." Accordingly, the achievement of freedom
comes to look less like a session of personal therapy and more like a
social project to multiply the opportunities to transform oneself.

However, rather than go on at length and in the abstract about this
different idea of freedom and identity, it is more instructive (and
postmodern) to situate my discussion in continuing debates and engage
specific renditions of freedom and identity's conceptual re-constitution.
For this purpose, I will take up Patricia Cain's recent essay on feminist
jurisprudence and lesbian experience. It is a particularly appropriate
piece to study because not only does it provide a convincing critique of
feminist theory's tendency, at best, to marginalize lesbians and, at
worst, to render them invisible. But, more than that, it claims to do so
as an exercise in postmodern thinking. Like Cain, I want to engage in a
constructive conversation rather than attempt to deliver a critical mon-
ologue. My objective is to contribute to her demolition of
homophobia, not to impede the progress of that task. However, I want
to focus on her very grounded and, therefore, troubling notion of au-
thenticity. It is not simply that her almost ontological use of authentic-
ity is inconsistent with her postmodern professions, but that such a
reliance might weaken rather than strengthen her political campaign.
Throughout, my overriding purpose is not to quibble with Cain, but to
explore and develop the effect of a postmodern reconstruction.

For Cain, at the heart of feminist legal theory is the claim that the
female experience must be taken seriously as an alternative to the dom-
inant male perception of reality. But, in so doing, it is imperative that
feminists must studiously avoid simply privileging another critical (fe-
male) standpoint of reality "into a new all-encompassing version of re-
ality." She is thoroughly postmodern in insisting that it is not enough
to argue that women are different from men, but that the extra step
must be taken of recognizing and understanding the differences among
women. The lived experience of women is neither abstract nor univer-
sal and cannot be reduced to theories of "woman as mother" and "wo-

45. Patricia A. Cain, Feminist Jurisprudence: Grounding the Theories, 4 Berkeley
46. Id. at 211.
man as sexual subordinate.’’

Differences of race, class and sexuality must be understood and incorporated into any feminist ethic. In particular, feminists must challenge the institution of heterosexuality so as to overcome lesbian invisibility and marginality. At important junctures, Cain’s text is resoundingly postmodern:

Postmodern thought challenges notions such as objectivity and universality. The post-modern “knowing self” is subjective, concrete and particular, constructed through the lived experiences of the subject.

. . . .

From a postmodern perspective, feminist theory is inadequate when limited by the perception that there is one essential commonality among all women. . . . Good feminist theory ought to reflect the real differences in women’s realities, in our lived experiences. These include differences of race, class, age, physical ability, and sexual preference.

Postmodern legal theorists will want to reject the limitations caused by any categorization. Although they will want to listen to the reality of lesbian experience, these theorists will not be inclined to build a grand theory based on the concept of “woman” as “lesbian.”

Cain’s critique of feminist jurisprudence as a modernist effort to ground an emancipatory project in the categorical experience of “woman” is compelling and cogent. The failure to deconstruct the female identity sufficiently so to abandon its implicit heterosexual generality is highlighted as being beneficial to the interests of some women, but detrimental to the liberal goals of others. Nevertheless, there is a sub-theme that runs strongly through the essay that compromises her commitment to postmodernism. In effect, Cain wants to validate the lived reality of lesbians through resort to the “authentic self.” This would not be so puzzling and non-postmodern a move if she saw authenticity as a fluid and forward-achieving practice rather than a fixed and backward-looking recovery. Of course, reliance on authenticity is not suspect in itself: such a concept has an important role to play in any radical theory of personal politics. But she manages to use “the authentic self” as the metaphysical ground from which to reject and render illegitimate other claims to grounding, feminist and non-feminist, as viable options for theoretical alliances and political allegiances. This is a very suspect move in the postmodern playbook.

As a postmodernist, I do not contend that “[s]o long as patriarchal dominance continues, female authenticity is presumably impossible,’” or that women might “have glimpses of [their] own authenticity even

47. Id. at 203 (citing Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1 (1988)). See Clare Dalton, Where We Stand: Observations on the Situation of Feminist Legal Thought, 3 Berkeley Women’s L. J. 1 (1988); Catharine A. MacKinnon, Feminism Unmodified (1987); West, supra.

48. Cain, supra note 45, at 204-05 (footnote omitted).

49. Id. at 193.
within the patriarchy." If by this, Cain means that the hegemony of patriarchy prevents women from fully developing or constructing the experience and practice of an authentic self, I am in full agreement. However, when she insists that "[r]ebellion (even if it is a minor form of sabotage) is self-affirming in its defiance of the inauthentic self that is thrust upon us," she is appealing to a much more grounded and modernist understanding of authenticity. For her, authenticity provides the justificatory foundation from which to launch the struggle against homophobia:

First of all, I believe that we each have an authentic self that is unique and that it is a moral goal to act in accord with that authentic self.

Furthermore, I believe the patriarchal structure of society prevents women from attaining a sufficient concept of their individual authentic selves.

I associate the concept of "authenticity" with other existentialists, such as Martin Heidegger and Jean Paul Sartre. We are morally responsible when we choose freely and self-consciously. We act in "bad faith" when we attempt to avoid the responsibility of freedom, when we deny the existence of self as subject and instead act according to an objective role created for us—or, indeed, whenever we choose on the basis of something outside "self," including on the basis of an abstract moral principle.

"Authenticity," in the sense that I use it, is necessarily connected with freedom. I, as an individual woman, will have glimpses of my authenticity whenever I am freed from the category woman; that is, whenever I am able to transcend my socially constructed (and unauthentic) self.

This sketch of freedom is not postmodern in character or ambition. It lapses back into the modernist vocabulary of retrieving, uncovering and transcending. It is very individualistic and conservatizing in scope. She puts deconstruction in the service of a modernist ethic that is devoted to the liberation of a pre-social self that is prevented from truly expressing itself until the gag of social experience is untied. This comes close to the essentialist line of treating biology as destiny. In saying this, I do not challenge the lived experience and reality of lesbians. Like Cain (and particularly as a heterosexual man), I believe that everyone should be "careful to listen to women when they describe the harms they experience as women." Yet, I also believe, again like Cain, this must be done so that "we are likely to get the legal theory right (i.e., perceive the problem correctly and propose the right solu-

50. Id. at 194 (footnote omitted).
51. Id. at 193 n.9.
52. Id. at 194 n.10 (emphasis omitted) (citations omitted).
53. Id. at 195.
Furthermore, and again like Cain, I believe that postmodernism is pertinent to that objective. Consequently, I suggest that "the search for the authentic self" will only be "a worthwhile goal" if that search is understood more as a social undertaking to ensure the options for choosing to become a particular identity are multiplied and the choice to assume a particular lifestyle and way of being is fully and equally respected.

The political hazards of the modernist mentality is particularly evident in Cain's references to gay men. For her, because heterosexuality is a central dimension of the male view of reality, the lesbian experience is especially important for the formation of feminist theory. True as this may be, her argument runs the real risk of essentializing and, therefore, misapprehending maleness. Indeed, she goes so far as to say that "male homosexuality is a practice that contradicts the assumption of universal heterosexuality, but it affirms male-centered reality." Yet this surely denies the lived experience of many gay men. In a world of almost compulsory heterosexuality, their reality is equally marginal and invisible. While they do obtain the benefits of being male in a patriarchal society, they only do so if they are prepared to disguise their desired identities as gay men. By coming out, they forego the privileges and protections of a heterosexual identity. Moreover, the tendency to postulate "man" as an homogenous other is to make the same error that Cain rightly chastises many feminists for in their tendency to generalize and prioritize one female view of reality. Gay men are different to heterosexual men in much the same way as Cain concludes that lesbians and Black women are different to heterosexual and white women: "[t]o claim that lesbians are the same as heterosexual women or that Black women are the same as white women is to fall into the assimilationist/essentialist trap."

From such a postmodern understanding of identity, perennial difficulties over false-consciousness and agency are given a very different spin. The problems do not so much disappear, but are re-problematized and given a fundamental reorientation. As Pierre Schlag observes, "We cannot deny our own agency.... We can call agency into question, and we had better, but to call it into question is also to (re)affirm, (re)create, (re)construct it." False consciousness becomes less of a mask that must be pried off to reveal the true identity of its wearer and more of a situational impediment that stymies efforts at collective and personal transformation. Although thoroughly situated,

54. Id.
55. Id. at 194 n.10.
56. Id. at 192 n.1.
57. Id. at 207.
subjects are not entirely saturated. Indeed, the postmodern re-formulation of identity invigorates the subject as an emancipatory agent and contributes to the likelihood of social renovation. Postmodernism calls into question liberalism's fixation with the strong subject and its presumed lightness of social being. It does not problematize agency and politics so as to abandon them. On the contrary, by re-locating subjects in their constitutive culture, it hopes to embolden agents in their political awareness and empowerment. Rather than start with the repressed individual and strive for hermeneutical liberation, postmodernism challenges the bourgeois format of society. It aims to reorganize itself in line with the radical imperatives of an experimental democracy that recognizes the systemic and social character of oppression at the same time that it facilitates provisional, revisable, yet real responses to the alleviation of suffering.

VII. A Matter of Identity

Trite learning is easily and quickly forgotten. In a manner of speaking, there is no point in jumping out of the frying pan into the fire because the metaphysical heat will remain the same. Moreover, it will tend to consume anything but the liberal in its essentialist flames. It is better to switch to an alternative source of postmodern energy altogether. Little is to be gained in any long-term struggle by deconstructing, for example, 'man' in order to replace it by the universal hermeneutical of 'woman.' There is no generic Woman (or Man) because biological attributes and sexual characteristics are experienced and interpreted differently by different women under different circumstances. 'Woman' has no primary or essential identity. Consequently, in the hermeneutical process, nothing necessarily follows from the fact of female authorship or readership. There is no one experience of being woman and their are no necessary truths that can be deduced from nor directed onto that experience. Because Catharine MacKinnon/Phyllis Schafly is a woman, not all women are Catharine MacKinnon/Phyllis Schafly. As a collective or personal undertaking, lives can never be recovered or understood in their abstract generality or originality. Being never not situated in social history, they can never be fixed and placed beyond re-interpretation in social history. Identity guarantees nothing.

But this does not mean that identity does not matter. It matters majorily: it simply does not do so in the essentialist or metaphysical manner that is traditionally thought. Identity's significance is political

and all the more significant for that. The relation between persons and their contexts is like that between writers and texts—nothing necessarily follows. Context is not the author of the person in the sense of inhibiting, binding, or constraining its identity. It is relevant, but not determinative. Similarly, while it is never possible to pin down context in any fixed or finished way, so it is not possible to isolate authorial identity and, therefore, the meaning of the text from that author.

By divesting identity of its spurious claim to metaphysical authority, it is released to play a more important and less confined role in textual, sexual, racial and any other politics. Identity becomes a site that, while guaranteeing nothing, makes everything possible. By moving beyond the debilitating politics of abstraction and ahistoricity, postmodernism looks to create meaning and knowledge in the situated particulars of embedded experience. The ambition is not to fix an all-encompassing Truth in a distant metaphysical realm, but to pay constant attention to the multiple truths and contextual details of engaged living in the here-and-now. Of course, being political, that process will always be open and fluid; meaning will always be provisional and revisable. Moreover, by using rich accounts and critical readings of historical experience to promote political knowledge and action, that politics will always be contestable: politics itself can never be a privileged ground for anything.

For instance, Patricia Cain relates an incident in which a lesbian college teacher sought to establish a course on “The Outsider in Twentieth Century Literature.” Her colleagues dismissed summarily the notion that an author’s sexuality—living as an outsider in a heterosexual culture—is an important aspect of her writing. While they recognized that it might impact on her writing, it was no different than a thousand other likely influences. If the counter-claim is that sexuality is the most important factor in a lesbian’s writing, it is as mistaken as the view that it is of no consequence at all. Like everything else, its importance will vary and depend upon the historical context and psychological framework in which the work was written and read. Nothing necessarily follows from a person’s sexuality. To reduce writings to only their sexuality is as limiting as ignoring it entirely. Like everyone else, lesbians are never only lesbians and to impose such a straightjacket upon them is to reinforce, not release them from, their status as outsiders. A constant and careful attention to contexts is the least (and the most) that can be expected. This will not provide a final resolution, but will leave the question open for renegotiation and reinterpretation.


62. See Cain, supra note 45, at 206-07 (citing Elly Bulkin, Kissing/Against the Light: A Look at Lesbian Poetry, in LESBIAN STUDIES 40-41 (M. Cruikshank ed., 1982)).
IDENTITY CRISIS

The who's, when's, where's, why's and wherefore's of writing and reading will always be contestable. Written in an irretrievable whirl of social circumstances and personal intentions and read (and re-read) in a similar flux, meaning's only destiny is to be multiple and irresolvable.

VIII. SPIKING THE CANON

In recent years, many scholars have turned their attention to the relation of law and literature. Although the primary focus has been upon efforts to establish an appropriate hermeneutic for the legal enterprise, there have been ideological maneuvers to inculcate the values of the so-called great works of literature. In this endeavor, the contested questions of authority, identity and authenticity have played an important, if understated role. A practitioner of such an approach and leading culprit is Richard Posner. Contrary to initial impressions, this is not a new departure for him, but is the continuation of his basic jurisprudential project by more subtle means—a way of distinguishing law from ideology and establishing the Rule of Law's enduring values. In short, his study of law and literary theory operates as a rousing affirmation of that normative tradition. It is not the fact that Posner's and similar work comprises an ideological program that is objectionable, but the hidden and offensive nature of an ideology that bears a striking resemblance to the European cultural tradition of elite individualism.

For Posner, literature is as much to be revered as read or, even better, to be read reverentially. Like law, it is a treasured repository of a traditional wisdom that has been accumulated and passed down through history. Although they arise in particular situations, in particular places and in particular times and involve particular people, law and literature identify and address the enduring questions of human existence. The answers that they give manage to transcend those particularities and achieve an almost timeless quality. Lawyers and literary critics become the stewards of this cultural heritage, taxed with the responsibility and privilege of protecting and promoting its ideals and aspira-

63. POSNER, supra note 15.

64. There have, of course, been other critiques of the link between Posner's literary and legal work. However, these tend to dull the ideological edge of any critique and cut at a much more abstract level. See Stanley Fish, Don't Know Much About the Middle Ages: Posner on Law and Literature, 97 YALE L.J. 777 (1988); James B. White, What Can a Lawyer Learn from Literature?, 102 HARV. L. REV. 2014 (1989); Robin L. West, Economic Man and Literary Woman: One Contrast, 39 MERCER L. REV. 867 (1988). Rather than identify the particular class, gender and racial implications in Posner's work, they are content to argue over his reductionist, unidimensional and simplistic representation of human nature's complexities. See Robin L. West, Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner, 99 HARV. L. REV. 384 (1985); James B. White, Economics and the Law: Two Cultures in Tension, 54 TENN. L. REV. 161 (1986). While these criticisms are not to be trivialized, they tend to share the ahistoricality and classlessness that mar Posner's work.
tions. By attending to these totemic texts of law and literature, Posner maintains that individuals can give humble recognition to the universality of human nature and their own precious, but flawed attempts at its realization. Sharing a fate and a future with earlier generations, modern society can join its ancestors in working towards a lasting achievement of the good life.

The problem with Posner's canonization of literature is that, far from resulting in a "body of writings that are somehow able to speak to people living under other skies, in other times," it actually privileges and authorizes only one particular cultural heritage. In *Law and Literature*, he mentions over 50 books and discusses 34 of them. Among this select group, there is only one written by a woman, none by a black writer and only a few were written in the twentieth century. Like so much of the law and literature approach, Posner's readings and rhetoric attempt to clothe some particular prejudices in the seductive trappings of perpetuity and, thereby, to hide their ideological character. By identifying a canonical archive of great books and urging their popular consumption, he effects a cunning combination of authoritativeness and humility. In the Posnerian scheme of things, devotion to such traditional values becomes a natural sign of social solidarity rather than a partisan act of ideological commitment. On close inspection, Posner's 'eternal verities' are revealed as ephemeral vanities: they are so often the interested views of local commentators who happen to be invested with contingent authority. As such, his own work falls into the very trap against which he warns others: "the occupational hazard of the 'literary lawyer' is putting literature to tendentious use." Posner's mistake is not to exaggerate the fruits of literary study, but to suggest that "it damages literature to press it into the service of political debate." His attempt to preserve literature as the domain which encompasses "the eternal problems of the human condition, not the specific manifestations of those problems and the politics of our century" is itself a tendentious and dangerously political objective.

Of course, he is not alone in mistaking the literary outpourings of an almost exclusively white, European, male, dead and upper middle-class group of authors as cultural achievement *par excellence* that goes beyond the local concerns of any particular culture or tribal tradition. 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

---

67. *Id.* at 175.
68. *Id.* at 356.
69. *Id.* at 357.
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. Posner’s understanding of culture is extremely limited and limiting. For him, culture tends to be largely static and unchanging; any change is as seemingly ineluctable and imperceptible as glacial drift. Posnerian culture accumulates “eventually” and “somehow” from popular and esoteric culture. It is a process of survival and competitive selection in the literary marketplace; the literary analogue of the market’s invisible hand is at work. It is about the building of walls and enclosures—admission being reserved for those who come with a suitably respectful attitude and can trade in the correct moral coinage. In an important sense, Posnerian culture becomes more a Palladian mausoleum than a civic meeting. It is a place where people come to pay obeisance to departed heroes rather than a vibrant venue for dynamic interaction and celebration among living citizens.

In the tradition of Matthew Arnold, Posner wants to encourage us to work at “acquainting ourselves with the best that has been known and said in the world, and thus with the history of the human spirit.” He wants to promote the understanding that culture is out there for everyone as long as they possess or are prepared to cultivate a refined sense of cultural taste. But, once the notion of objective truth is abandoned and replaced by an appreciation of culture’s historical contingency, Posner’s claims begin to reveal themselves as partisan assertions masquerading as universal truths. He fosters the idea and practice of culture as a constitutive social force that is directed to ensuring the hegemony of one paradigm of values over all other competing ideologies; it is a process of discrimination that simultaneously disenfranchises those who are different and confirms the superiority of the dominant tradition. As in the educational system through which such a strategy of social control is implemented, the reinforcement of class distinctions and the silencing of different voices is secured through the learning of an enduring cultural tradition.

In the guise of aesthetic appreciation, Posner delivers a moral homily for modern times: the cultural values of acclaimed aesthetic performances are covertly affixed with the hallmark of cultural validity and deemed worthy of social reproduction. Even though the literary canon of great books does contain some fine representations of artistic elegance, it must be remembered that such stylistic attributes them-

70. Posner, supra note 65.
71. MATTHEW ARNOLD, LITERATURE AND DOGMA (1873).
73. See JOHN BRENKMAN, CULTURE AND DOMINATION 43-44 (1987).
selves are considerably culture-specific. While literary form does not drift free of cultural content, aesthetic approval is not entirely reducible to substantive correctness. Posner's chosen literature embroiders the privileged motifs of ethnocentrism, racism, sexism and classism onto the tapestry of human history, providing it with much of its vivid color and special meaning. It is simply not the case that "no one is apt to question the greatness of Homer or Dante or Shakespeare." Whatever else it may be, the greatness of these texts cannot be entirely separated from (nor totally reduced to) their brutal depiction of women, other races and religions, and the working masses.

The nature and circumstances of the prevailing literary canon have emphasized one particular cultural heritage and the specific view of human existence and worth that it celebrates and embodies. Posner's attempted representation of it as a "coherent . . . unity" reinforces the historical notion of continuity and the political value of homogeneity. It suggests an unbroken and unchanging tradition of accumulated and shared wisdom that runs in a straight line from the ancient Greeks to modern Americans. In particular, these great books are interpreted to emphasize the virtues of individual achievement and sacrifice. As with the appreciation of literature itself, history and society are simply so many contexts to be transcended. Authorship and the completed text is treated as an act of individual genius that is able to break the bounds of its originating circumstances. Like the reader that the canon helps to encourage and inspire, such books praise the value and presence of an individual mind outside particular discourses that should struggle to establish intellectual engagements with other such minds.

Largely unconcerned with the pressing public and social issues of the day, the so-called 'inner life' is prized: the torments of the soul and intellect are paramount. For instance, pity and humility are treated as abstract states of individual minds that warrant much more serious attention than the actual material and collective conditions of human suffering that give rise to such individual feelings and that are often effaced by them. It is not the interest in the inner life that is troubling, but the ontological privileging of the abstract and individual over the material and the social: this encourages a public fatalism and an insensitive privatism. Indeed, the overall picture, projected by a Posnerian-style canon, is of individual citizens who ought to be compliant, dutiful, and resigned, who place a premium on rational action, who take full responsibility for their own feelings and actions, and who are entitled to take individual pride in their achievements.

76. In advocating the preservation of the traditional literary canon and the
To those less cloistered than Posner, it should come as no surprise that existing relations of social domination are inscribed and perpetuated within the cultural practices that comprise the production and reception of literary works. A body of literature that is almost exclusively produced by one group in society is likely to (and, in fact) does give undue weight and significance to the interests and preoccupations of that dominant group. The foisting of this cultural heritage upon all groups within society is an act of imperial aggression that devalues the cultural traditions of dominated and less dominant groups. The worth of other cultural traditions that compete with and often contradict the dominant culture is always evaluated and judged in terms of that dominant culture. This reinforces the dominant and dominated's perceptions of themselves and prevents any suitable rapprochement. It is essential that out-groups speak for themselves and analyze the conditions of their domination and their possible transformation.

As such, for instance, black literature ought to be assessed and appreciated in and on its own terms. It must not be judged purely against the literary standards of the very tradition that it intends to challenge and itself judge. The writings of James Baldwin, Frantz Fanon and Alice Walker (to name but a few) must surely qualify for serious study. It is hypocritical and offensive to oblige black or native children to read Shakespeare and Dante in order that they might think like them and internalize their values so that they can be considered equal to the white children of upper middle-class professionals. However, it is an entirely different and more inspiring matter to work for a cultural environment in which all children read, empathize with and inspire to write like Baldwin, Fanon or Walker. The imperatives of cultural democracy demand a combination of different texts with different ways of reading.

The exclusion of women authors from Posner's literary canon raises similar objections. The male view of the world inscribed in the canon has prevailed not only by virtue of brute force, but also by being proclaimed and eventually accepted as a natural version of human experience. This has resulted in the trivialization and stigmatization of women's experience as 'other' and the continuing reliance upon stere-
otypical representations of women. Moreover, such literary understandings have helped to institutionalize patriarchy as the organizing principle of cultural and political arrangements. Although they can lay a genuine historical claim to being truly enduring and sustaining, the traditional reproductive and domestic spheres of women's activity have been insufficiently explored and thereby undervalued: the world of public affairs has been disproportionately glamorized and invested with a distinctly sexist caste. As well as being ignored or marginalized, the literary work of established women writers, like Virginia Woolf or Jane Austen, has been interpreted in light of men's priorities. In the same vein, others, like Mary Shelley, are primarily treasured for their eccentricity or quirkiness. Consequently, some contemporary women's writing has presented itself as a self-conscious struggle to imagine different ways of being in the world and transforming the inherited meanings of that masculine world.

In making this plea for literary reappraisal in the name of cultural diversity, it is important not to fall into the same essentialist trap that ensnares Posner. Little headway is made by my construction of a universal 'other' to contrast with his universal 'one': a diluted homogeneity only reinforces and validates the invidious hierarchical ordering that is the original target of criticism. Race, gender, ethnicity, religious belief, age and class interact to create difference and caution against the universalist tendency to conflate the condition of one group with the condition of all. Domination has been perpetuated and rationalized both by embracing difference (superiority of men over women and whites over blacks) and by eschewing difference (treatment of women as men and blacks as whites). Consequently, a fully adequate account of women's lives cannot be achieved by men or within a male-oriented framework nor by privileging the experiences and theoretical apparatus of one group of women. A commitment to cultural diversity demands an interpretive matrix that can accommodate changing combinations of sameness and difference, thereby encouraging a conceptual and cultural heterogeneity.

It is simply mistaken for Posner to contend that "the English Renaissance produced a richer literature than has twentieth century England." Unless, of course, he means by "richer" that they embody and represent the esteemed values of a narrow cultural crème de la crème in a

IDENTITY CRISIS

relatively homogeneous society. Although it might not fit neatly within
the restricted stylistic and substantive confines of the traditional canon,
the literature of the twentieth century is much culturally and politically
richer. By these more pluralistic lights, the literature of the seven-
teenth century is impoverished and conventional in its range and diver-
sity. The omission of black women's literature from inclusion in
Posner's canon underlines the cut and substance of its exclusionary ef-
facts; it trivializes and homogenizes the experiences of many and denies
them a voice and a hearing. For instance, the 'popular' writings of Toni
Morrison and Alice Walker offer vivid and wrenching accounts of the
sexual oppression of black women by their white masters and their
black relatives.84 These harrowing chronicles attest not only to the per-
vasiveness of human brutality, but to the injustices that arise through
the insistence on representing the world through essentialist categories
and overlooking difference, in this case the treatment of 'blacks' and
'women' as independent and self-contained identities. This kind of
modern fiction speaks to and, crucially, speaks from a more diverse and
sophisticated society that is no longer dazzled nor intimidated by the
dubious beacon of classical ideology. This lack of conforming com-
monality and cultural homogeneity is not a condition to be lamented,
but is a dynamic state of affairs that is to be carefully nurtured and gen-
erously supported.

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 in-
struction. Shakespeare and the other hallowed artists must be read and
understood as products of their own particular socio-cultural context.
Such textual re-valorization and the demonstration of their rootedness
will facilitate contemporary readers in grasping their own embedded-
ness and advance the popular struggle to progress socially within that
context of understanding.85 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. In this sense, the fact of The
Merchant of Venice's anti-semitism or The Tempest's colonial imperialism is
not a reason in itself to refrain from their continued study, but it should
act as an urgent reminder of the need not to confuse aesthetic apprecia-
tion with cultural validity and to insist upon a critical mode of reading.

Contrary to Posner's advice, the best in literature is not a romantic
escape or transcendence from its concrete context, but is an engaged

---

84. See generally Alice Walker, The Color Purple (1982); Toni Morrison,
attempt to explore and illuminate that concrete structure's latent transformative possibilities. Serious cultural artifacts do not betray human suffering, but bear radical witness to its actual practice.\textsuperscript{86} In a culturally diverse and politically progressive society, the ambition will be to nurture those cultures that are presently overwhelmed by the dominant culture and to maintain a multiplicity of cultures that are constantly borrowing from each other and being constructed anew; it is not about the transmission or imposition of a public monoliteracy over time. The study of cultural texts is warranted as a learning exercise in critical thinking rather a ceremonious act of intellectual genuflection. By investing particular literary works with the imprimatur of the universal, Posner is able to sanction those endeavors and the values that they espouse as a privileged mode of access to moral truth and knowledge. Without such a restraining canon, he no doubt fears that the baneful notion might be allowed to develop that there are no governing verities and that each individual or cultural group within society can go its own way.

\textbf{IX. On Judging}

Mindful that it "is impossible, now more than ever, to disassociate the work we do . . . from a reflection on the political or institutional conditions of that work,"\textsuperscript{87} responsible lawyers should not turn a blind eye to the literary twist in jurisprudential events. Instead, they should reflect on and abandon its political elitism. Establishing an alliance between lawyers and the dispossessed might create public openings for the dispossessed to reestablish their own culture in their own lives. This, in turn, might enrich and transform the lives of lawyers. Different cultures must be valued in themselves and not as quaint contrasts to our own. Within this larger project, the contribution of the legal academic consists in working toward legal hermeneutics that is more democratic and less aristocratic in its practices and principles.

What such a postmodern hermeneutics means for judging is, of course, open to interpretation. But it does suggest certain intimations. As the connection between identity and meaning is never fixed or closed, nothing necessarily follows from the identity of the judge. This has a progressive spin. Solicitous to the circumstances of its release and reception, a judgment cannot be reduced to its author's intentions of identity. Even a crude grasp of legal history demonstrates that there are ample judicial mavericks who managed to confound the expectations of all and sundry.

Yet none of this is to be taken to imply that women judges, black

\textsuperscript{86} See BRENNKAN, supra note 73, at 102-38; SEAMUS HEANEY, THE GOVERNMENT OF THE TONGUE (1988).

judges or gay judges will not make a difference. It is that that difference will be political, not metaphysical, in nature and consequence. While there are not nor can there be any metaphysical certainties, the institutional chances of transforming law and judging are greatly improved. The appointment of women judges, black judges and gay judges will increase the likelihood that a different perspective will be brought into and to bear upon the adjudicative process. In the same way that there is nothing to prevent white, male, heterosexual judges from acting to transform themselves in the law, there is nothing to guarantee that white judges, black judges and gay judges will not continue the existing traditions of law and judging. But the fact is that the experience of such traditional outsiders will work its way into the adjudicative exercise and its doctrinal product. Moreover, their very existence within the ranks of judicial authority might well have important political consequences.

The impact of Thurgood Marshall on the American Supreme Court has been enormous: his presence and self-identification as a black man was a huge part of that impact. Yet this effect was never assured. While Thurgood Marshall is a black man, not all black men are Thurgood Marshall. The debacle over the appointment of Clarence Thomas underlines this. In strictly doctrinal terms, there is nothing that Marshall did that could not have been effected by a white judge, blessed with a similar political imagination and political will. However, it was the fact that he did it that was important. His experience as a black man meant that it was more likely (not certain) that he would understand and champion the history and hopes of black Americans. It was more likely, because of that experience, that he would possess the political vision that he had. Moreover, it meant that his judgments would be more likely to be received differently (in positive and negative ways) than that of white judges. In short, the significance of his judicial career is not the result of his ontological identity as a metaphysical Author and the hermeneutical authority that his judicial text worked in sway of that fact. It is a political story about a political writer in a political world whose significance will always be political.

There are, of course, risks within such a deconstructive reading and postmodern strategy. No political action can be vouchsafed and no particular consequences can be assured. The major risk is that it will be seen to harm the cause of racial, feminist or gay justice. By deconstructing authorial authority and intention, it might be seen “to remove the very levers against power at the moment [that] they have been seized by those who have lacked them.” However, the hazards of clinging to a modernist faith—for that is what it is—are much greater

88. Martha Minow, Partial Justice: Law and Minorities, in The Fate of Law 58 (Austin Sarat & Thomas R. Kearns eds., 1991). For a full discussion of this challenge, see Allan C. Hutchinson, Les Miserables Redux: Law and the Poor (June
and more damaging than the risk of taking the postmodern gamble. If some special authenticity and derivative authority is to be bestowed upon the black judge as black judge, there is no consistent or logical way that the same authority cannot be claimed by the white judge as white judge: consistency and logic are vital standards in the metaphysical almanac. In a world in which the vast majority of judges remain white, male and heterosexual, this would be counter-productive for it would undermine the excellent critical work done in prying judicial texts free of their limiting authorial circumstances and making them available for transformative reading. To return to the traditional hermeneutical practice of author-based interpretation would be regressive. It devalues and trivializes the crucial role of the black, feminist or gay critic to that of ensuring a faithful decoding and technical retrieval. Traditional hermeneutics has to leave the critic to stand obediently aside and allow the authoritative voice of (white, male, heterosexual) authorial experience to speak for itself in imparting Truth to the world.

This is a modernist trap that the postmodernist can help critics of racism, sexism and homophobia avoid. There is little to be gained and much to be lost in re-inscribing the epistemology of transcendence that is the hallmark of traditional hermeneutics. The idea of transmitting authentic human experience through a transparent textual medium for direct and respectful consumption by the popular masses is a travesty of the emancipatory project. By claiming authenticity and authority for previously excluded voices in the name of a transformative politics, the debilitating metaphysics of ontology are given precedence over the politics of struggle. The authorial monarch is returned to power. Yet, it is only in the dark kingdom of the blind that such one-eyed upstarts can feign regal right. At best, the author is a puppet-monarch whose every move is choreographed and staged by the dominant elite. The triumph of a truly democratic politics will only occur when the author-monarch is finally dead and a polity of truly equal readers and writers is established and lived.

However, it is important to emphasize that a dismissal of objectivist jurisprudence does not commit the postmodernist to a subjectivist account that reduces judging to "purely personal choice," a whimsical exercise of capricious opinion or idiosyncratic invention. This depiction of judging is merely the flip side of objectivism and to have any theoretical bite depends upon the possible validity of an objectivist epistemology in which there is only objective truth or subjective opinion. In the deconstructive approach, traditional metaphysics is rejected; the death of the judicial Author does not give rise to the birth of

---

1991) (unpublished manuscript, on file with the author), and infra text accompanying notes 107-110.

the judicial Interpreter. For those who do work within such a para-
digm, the decision to criticize judges for their failure to follow and re-
spect the presumed objective truth of the constitution or the common
law carries some very harsh implications. The charge of indulging per-
sonal predilection suggests that, knowing the real truth of the law's
meaning in any particular instance, the judge made a calculated deci-
sion to deviate from it: this is tantamount to mala fides. Accordingly,
whenever mainstream critics admonish judges for using the wrong in-
terpretive method or applying it wrongly, they are accusing them of not
only being bad judges, but also being dishonest and irresponsible
judges.

On the other hand, a postmodern understanding of judging rejects
entirely this epistemological paradigm and, as such, accepts neither the
objectivist account of judging nor its subjectivist bête noire. Legal do-
ctrine is not simply 'out there,' but is always in need of collective re-
trieval and re-creation. There can be no law without interpretation, no
interpretation without interpreters, and no interpreters without poli-
tics. Yet doctrine is not nothing, but a special kind of something that
has to be interpreted to mean anything. While there will be occasions
of Machiavellian manipulation, it is as mistaken to suggest that the
judge has complete interpretive freedom as it is to claim that the law
exerts complete interpretive control. The distinction between 'that to
be interpreted' and 'that who interprets' cannot be sustained: doctrine
and judges interact to shape each other in a contingent context of polit-
cal power. Contrary to most mainstream critics' views, judgment is
neither the intelligible articulation of objective truths nor the chaotic
fantasizing of subjective experience. Consequently, the postmodernist
is able to deny the idea of objective meaning and, at the same time, to
accept that judges largely act in good faith. While it incorporates the
judges' sense of felt boundedness, it exposes and challenges that deep
set of contestable values on which judges claim to rest their decisions.

X. Identity Politics

Postmodernism does not provide an integrated or finished program
for political action. In the face of the problematized subject, postmodernism does not capitulate to or retreat from the task of strug-
gling towards an enhanced social solidarity and experience of justice.
Instead, it points to a renewed engagement with and sustained chal-
lenge to existing historical conditions. By abandoning the search to
recover or fix a unified and pristine self, the hope is to empower sub-
jects by making them individually aware of their capacity for self-
(re)creation and collectively responsible for establishing a mode of so-

90. See Allan C. Hutchinson, That's Just the Way It Is: Langille on Law, 34 McGill
cial life that multiplies the opportunities for transformative action. Postmodernism problematizes truth, individuals, agency and collective action not to discard them from the radical vocabulary, but to render them more immediately transformable and more politically useful.

However, the radical nature of the postmodern critique has caused acute anxiety in some quarters and has come in for trenchant criticism. The fear is that the postmodern turn will result, for instance, in feminism being steered down a political blind alley in which transformative energies will be exhausted in obsessive and paralysing odysseys in self-consciousness raising. Eschewing all efforts at generalization and characterization in favor of particularity and specificity, identity will be disaggregated to such an extent that there will only be isolated and unconnected individuals: “if generalization is only permitted in the absence of multiple inflexions or interpretive possibilities . . . [w]hat remains is a universe composed entirely of counter-examples, in which the way men and women see the world is purely as particular individuals, shaped by the unique configurations that form that particularity.”

Difference will have obliterated identity: race and gender will be little more than theoretical figments of a diluted political experience. In short, a liberal modernism will have reasserted itself courtesy of its postmodern antagonist.

Many political activists have decided that the practical risks of postmodernism are too great to warrant its theoretical embrace. Without a generalized identity as woman or black, there will be no place on which to mobilize people, from which to establish a viable political challenge to existing oppressive conditions or towards which to direct people:

If it is not a female subject who provides the normative model for a feminist emancipatory politics, then what does? If we fail to recuperate the subject in feminist terms, are we not depriving feminist theory of a notion of agency that casts doubt on the viability of feminism as a normative model? Without a unified concept of woman or, minimally, a family resemblance among gender-related terms, it appears that feminist politics has lost the categorical basis of its own normative claims. What constitutes the “who,” the subject, for whom feminism seeks emancipation? If there is no subject, who is left to emancipate?

This fear is real and cannot be entirely disregarded. Postmodernism cannot guarantee a politics that will be uniformly progressive or whose practice will be consistently effective. But, to think otherwise is to believe that the establishment of foundational truths is possible and could ground a radical political praxis. The felt need that people have

---

for solid ground under their feet is an effect of traditional metaphysics' mistaken insistence that, once fixed, truth will guide and insulate action from error; the dream of reason can too easily become a deep sleep in which the nightmare of lived oppression is forgotten. Politics is inside, not outside, philosophy's suzerainty.

Postmodernism does not reject entirely the validity or use of 'woman' or 'race.' To do so would add theoretical insult to existential injury. Again, it problematizes and de-essentializes them so that their metaphysical status can be challenged and their political character reaffirmed and revised. What is democratic or good politics is always contestable. There is no guarantee against tyranny—nothing can deliver us from that. Postmodernists remind us (and themselves must not forget) that, while there must be talk of a dawn of egalitarianism, there are many who still live in the dusk of oppression. No theoretical standpoint alone can ensure that the long night's journey into light can be accomplished without struggle, mistakes and further pain.

Deconstruction does not rule out or require any particular politics. While it implies a progressive politics, it does not necessarily lead to one. It is not surprising therefore that those who utilize the tools of deconstructive critique have done so in both complacent and contentious ways. For example, whereas Richard Rorty rests content with a liberal rendering of postmodernism's political implications, Cornell West puts postmodernism in the service of a more radical program of transformative democracy. What is progressive can never be determined in advance or in the abstract; such assessment can only be made with an attention to the local conditions and to the prevailing exigencies of the situation. Postmodernism can open spaces for action and increase opportunities for transformation, but it cannot fill these spaces. Whether these openings become holes to fall down or climb out of is left to those minded to act. All that a deconstructive mentality can do is to show that power is never apart from reason: logic and ambiguity, authority and arbitrariness, and universality and contingency are implicated in each other. The risks and responsibility of reconstruction must remain with real people in real situations.

This may be unsatisfactory to many, but metaphysics only offers a false sense of political security. Deflating pretensions about universalizing and totalizing efforts to capture justice and highlighting the systemic and systematic source of oppression, postmodernism cannot respond with its own theories of universalizing and totalizing rationali-

93. See supra text accompanying notes 24-25.
95. Richard Rorty, Contingency, Irony, Solidarity (1989); West, supra note 60.
ties nor with its own systemic or systematic project of emancipation. 96 Nevertheless, a postmodern perspective does provide a compelling and cogent critique of the growing resort to a politics of identity. Pinpointing a salient feature of social struggle and political experience, identity politics infuses that contingent experience with an almost universal validity. Having defined and fixed that identity, it is pressed into ubiquitous use "as a political point of departure, as a multivation for action, and as a delineation of one's politics." 97 Within such a politics, the central challenge is to resolve questions of personal identity and, by doing so, a sense of personal liberation will be achieved through the alleviation of oppression. To find out "who I am" is to engage in the most personal and political of acts.

Initially, identity was found in the sororeal experience of Woman-kind as a contrast to dominant notions of patriarchy. However, it became obvious that a politics of sisterhood can lead to isolation, exclusion and inequality. By flattening the diverse experience of women into one identity, the oppression to be overcome was subtly reinforced. The more recent challenge has been to recognize the multiplicity of women's experience and oppression and to define more sophisticated and less homogenous categories of identity. However, the difficulty has been that, once the Pandora's box of gender is open, it is difficult to salvage any identity that can be usefully defined or fixed as 'woman.' It is insufficient to add qualities, like black, working-class or lesbian, to a primary identity for this will perpetuate the essentializing orthodoxy to be disbanded. Nevertheless, the possibility of identity politics and its radical value are still strongly defended. Many feminists remain committed to the idea that "the most profound and potentially the most radical politics come directly out of our own identity, as opposed to working to end somebody else's oppression." 98

The difficulty with identity politics is that it trades off a devalued essentialism and lingers in the suspect shadows of a Platonic idealism. The crucial problem is not that it incorporates a notion of identity per se, but that the notion of identity relied upon is interpretively invalid and politically disutile. It tends to attribute an abiding unity to the contingent social ramifications of certain biological characteristics and exhausts itself in running the sleeveless errand of placing different women somewhere along a hierarchical spectrum of oppression. In effect, identity politics de-politicizes politics by turning it into a metaphysical issue and reaffirming its stultifying structure and effect. As

96. See White, supra note 25, at 122.
such, it repeats the essentialist error of creating a world based on the

timeless and global truths of black, female, gay lives. Identity politics
treats identity as the only site of political struggle: it is reductionist in
that identity is viewed as the beginning and end of social action. As
Edward Said puts it, the core of identity politics is "the supremely stub-
born thesis that everyone is principally and irredicibly a member of
some race or category, and that race or category cannot ever be assimil-
lated to or accepted by others—except as itself." Identity has an im-
portant role to play in understanding exploitation and oppression, but
it must be a different appreciation of identity.

XI. THE POLITICS OF ACTION

"[A]nd I ask myself and you, which of our visions will claim us /Which

will we claim."

-Adrienne Rich

Identity can be understood in richer and more postmodern ways
that accept that experiences are always partial and mediated and that
identity is always constructed and transformable. However, by taking
identity as something to be recovered and fixed, identity politics seems
to freeze in place the positionality of people and reduce the options for
personal and collective transformation. To understand the condition
of being oppressed as essentially tied to identity reinforces people's sta-
tus as oppressed and forever ties their identity to that of an oppressed
group. Consequently, for the postmodernist, the recognition of iden-
ty only constitutes a starting point, not an achievement, ambition or
program. The identification of someone as "oppressed" is only done
so as to turn that identity into something else and to be rid of oppres-
sion. The oppressed do not have intrinsic values simply by the fact of
their membership in an oppressed group. What they do have is a
strong political claim to be heard: "victims are entitled to insist on
others' attention not because they can offer virtue to a fallen world, but
because they are experts on their own lives."

It is vital to listen, hear and act upon the views of those previously
victimized. But it is almost perverse and patronizing to treat those
views as possessing a Truth that no other voice of experience can claim.
Not beyond criticism, it has a special political valence in contemporary
circumstances of racism, sexism and homophobia. Oppression need

100. See BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK (1989);
Brenda Cossman & Ratna Kapur, Trespass, Impasse, Collaboration: Doing Research on
101. ADRIENNE RICH, Night and Days, in RICH, supra note 80, at 45.
102. Patricia J. Williams, Dissolving the Sameness/Diference Debate: A Post-Modern
Path Beyond Essentialism in Feminist and Critical Race Theory, 1991 DUKE L.J. 296, 307
n.112.
not be idealized, but instead must be understood so as to eradicate it more effectively. The views of outsiders are not essentially more valuable, but they are more likely as a political matter to be of value to the analysis of equality and any action to remedy it. So, for example, diversifying the ownership of broadcast facilities so that people of color and different cultural backgrounds are involved will increase the chances of, not guarantee, a more diverse range of programming alternatives.\textsuperscript{103} Racial, gendered, class, and sexual identity neither guarantees truths nor prevents truths from being established. Identity does matter because the present political terrain is itself contoured by the way certain identities are thought of and treated.

The tendency to essentialize identity and authorize it as the warrant of authenticity forces people to settle upon some united or primary identity. This is debilitating to any prospect of a truly progressive politics. In a postmodern perspective, identity is always constructed, often inconsistent and occasionally self-contradictory. As such, the felt need to identify with one group obscures or blinds people to the multi-faceted nature of injustice and people’s multiple and fragmented selves. At times, one aspect of individuals’ identities may strongly influence their opinions or response. At other times, a different aspect of individuals’ identities will play a stronger role. There is no way to predict with certainty the values or stances that particular people will take in any or every situation. Moreover, the tendency for people to see themselves as only or primarily one identity—man, white or heterosexual—allows them to evade responsibility for other kinds of oppression that co-exist.

In a recent article, Jerome McCristal Culp, Jr. defends the use of personal autobiography in legal academy. As a black man of working-class background, he insists that there is no neutral place to stand in observing the law or any neutral way to engage in the legal process. In some circumstances and locations, such as law school in the 1990s, he argues that “who we are matters as much as what we are and what we think.”\textsuperscript{104} As a matter of contingent political wisdom, there can be little doubt about the truth of the statement. However, as important as race or color might be in contemporary North American society, Culp has other identities as well. He is black, but he is not only black. Whatever else he might be, he is also a man.

About halfway through his essay, Culp reveals the importance of these other identities when he relates a short biographical incident:


\textsuperscript{104} Jerome M. Culp, Jr., Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy, 77 VA. L. REV. 539, 543 (1991). I take this to be a non-essentialist claim because Culp later writes that “my point in this essay is not that all black people have suffered more than all white people, or even that all black law professors have suffered more than all white law professors.” Id. at 558.
I teach tort law, and early in that process I use a hypothetical from my past. As an undergraduate at the University of Chicago, I asked my girlfriend to accompany me to Evanston, Illinois. We got off the train from downtown Chicago with our very long and newly-hip Afros and began walking around Evanston. Near the train station we saw an old white woman. As my girlfriend and I approached the woman, she began to shake. The closer we came to her the more she shook. As I write about this incident, I can remember the beauty of that former girlfriend's face but not her name. But I remember as clearly as I can taste my last cup of coffee the old white woman turning her back and assuming a pseudo-fetal posture as we approached her. I could read that situation as clearly as any other: for the old white woman, the black revolution had come to Evanston. She saw us not as the well-dressed black college students that we were, but as mythic black revolutionaries. In her mind, she knew we were Black Panthers who had come to Evanston to do her harm.\textsuperscript{105}

Asking the class if it would have been an assault to lean over and whisper "boo" to that old woman, he proceeds to use this incident to great political effect in challenging white students to confront racial stereotyping and in invigorating black students in their political sense of belonging. It is an intellectually stimulating and politically effective demonstration of "how much tort law is socially-constructed custom."\textsuperscript{106} However, for all the good work this does on breaking down racial stereotyping, it manages to leave undisturbed and give passive approval to traditional stereotyping of women.

In his account, he refers to his girlfriend who was with him. Mindful that he knew her well enough to be designated "his girlfriend," he recalls that "I can remember the beauty of that former girlfriend's face but not her name." In this dramatic anecdote, the woman remains unnamed and construed only as an object of beauty; the person is eclipsed by the bodily appearance. By the simple device of referring to her as simply a friend without mentioning her gender or status, Culp could have avoided the silent sleight that his insensitivity gives. I offer this observation more as a caution than a rebuke. But, in the struggle to combat one form of oppression, it is important that other kinds of oppression are not ignored or condoned, no matter how slight or unintended the omission. Ending some people's oppression is inseparable from the struggle to end all people's oppression.

Identity does matter and, as Culp convincingly demonstrates, identity alone may sometimes in some contexts speak louder than any words of explanation or indignation. But the ineffable impact of identity cannot always be relied upon to get the job done: it can only be one tactic in a more complex strategy of politicization. The force of identity is important, but only when it is understood as a contingent

\textsuperscript{105} Id. at 552.
\textsuperscript{106} Id. at 553.
and dynamic distillation of what has been done, what is being done and what will be done. While identities affect people’s choices and actions, the choices made and actions taken affect people’s identities. As “the linchpin of social discipline,” identities are a site to be constantly struggled over and frequently transformed; it is not a psychic space of the authentic self to be repaired to or moved toward.

As the postmodern challenge is to Identity as an essential ontology rather than to identities as socio-historical constructs, the deconstruction of identity does not preclude the possibility of a reconstructed politics. A politics of identities will be attainable and attractive. As long as it is not thought of as a backward-looking project to preserve or retrieve a lost identity, but is acted upon as an engaged means of working to overcome all sectarianism. After all, identity is forged through action. Action is not an independent behavior from or an instinctive reflex of a fixed and settled identity: the postmodern temper accepts that “there need not be ‘a doer behind the deed,’ but that the doer ‘is invariably constructed in and through the deed.” What people do is what people are and what people are is what they do.

In understanding action and identity as inseparable and mutually reconstituting, it becomes possible to grasp race, gender, sexual orientation and class as thoroughly historical and, therefore, inescapably political in character. There is nothing essential or “natural” about people’s identities. While experienced as real, they are always constructed and, therefore, always reconstructible. None of this denies the stubborn and almost recalcitrant patterns of oppressive conduct—economic exploitation, sexual violence, racial hatred—that continue to exact their daily toll. However, contrary to their critics’ jeremiads, postmodernists refuse to be despondent or despairing. By hammering home the reconstructive incitements of the deconstructive insight, they can, at least, contribute to the struggle for social justice and individual empowerment.

Perhaps more importantly, postmodernism can give the lie to the fact that discrimination is about personal prejudice. It is and can be about that, but it is about much more as well. Discrimination is a public phenomenon as much as a personal state of mind. It speaks to the social conditions that comprise societies that are long on egalitarian talk and short on effective action. By concentrating more on individuals’ intentions than on the consequences of their actions, the reality of discrimination is obscured. More importantly, steps to eradicate the

problems and improve the lives of those discriminated against are stymied. For example, racism is more than the conscious conspiracy of a power elite or the crazed delusions of bigots; it is part of the historical culture, social heritage and political tradition. Moreover, by re-casting identities in terms of becoming as much as being, a postmodern inquiry can locate the sources of discrimination in the systemic and structural patterns of behavior in which people engage and which go to shape people's identities. As race and gender are constituted in and through social history, racism and sexism are social practices.

Bigotry—intentional racism, sexism, homophobia—is only the most virulent symptom of a much broader and more insidious disease. Private attitudes of contempt and exclusion are to be condemned, but they far from exhaust the catalogue of discriminatory behavior. By focusing on the dubious moral values of limited pathological or jaundiced individuals, the political dimension and character of discrimination is overlooked. Discrimination is not simply about the mores of particular people, but implicates the whole social and institutional setting within which structural conditions of inequality continue. Discrimination remains so pervasive and entrenched because it is not solely personal. Being systemic, it permeates both power structures and personal relations.

To view discrimination in any other way is to allow the majority of non-bigoted people to validate their righteous indignation at being termed "racist." The racist, sexist or homophobe is not an aberrational figure in civic culture. It is the collective culture as much as its individual citizens that is to be chastised. More importantly, a politics of identity rather than action allows people to deny responsibility for the diminished lives of people who still enjoy the social consequences of sexism, racism and homophobia. By persisting in thinking discrimination is more about personal identity and private attitudes than public actions and social conditions, the chances of confounding discrimination and establishing a truly egalitarian society are reduced.

XII. Conclusion

But where is the Author (and/or the Reader)? Who is the Author (and/or the Reader)? Who will speak for the Author (and/or the Reader)? Will he/she/it show him/her/itself so that I might speak to him/her/it, so that I might speak with him/her/it, so that I might speak against him/her/it, so that I might speak about his/her/its text? And who might that Author (and/or Reader) speak to, with, against or about? Who or what is his/her/its "I"? As Mary Joe might have said: "What a drag!"

OBITUARY

Universally acclaimed scholar and raconteur, T.H.E. Author, was pronounced dead after many years of doubt surrounding his whereabouts. Details about his death are as sketchy as reliable information about his life. Most agree though that, throughout his life, he enjoyed a popularity and influence that few others can boast or come close to emulating.

In what was to set a pattern for the rest of his life, the circumstances of his birth and early years are difficult to ascertain or verify: they are the stuff of scholarly speculation and academic dispute. It is widely believed though that, as a beloved member of the Enlightenment, he was adopted into the immediate family of God. He became the founding president of the great Literary Tradition.

Unparalleled in erudition and education, there were few areas of learning on which he was not an authority. Honored by universities throughout the world, he set a standard of wisdom and learning the like of which had not been seen before and is not likely to be seen again. He devoted his working life to the public realm and managed to fulfill an enormous calendar of appearances and events. It is widely conceded that he left an indelible mark on the epistemic legacy of the last few centuries. He led an enviably productive life and was named "Man of the Year" on innumerable occasions.

He travelled extensively and became fluent in a bewildering range of languages and dialects. Always speaking in resonant and authoritative tones, he commanded attention and respect wherever he went. He knew most of the leading figures of his day and was courted by the most powerful figures in various societies around the world. He was an intimate confidante of Babe T. Ruth and Noah Ledge.

However, little is known about his private life. While he was involved in publishing literally millions of books and pamphlets, he left no personal memoirs, journals or diaries. Those who did manage to meet him report that he could be rather distant and aloof, finding it difficult to engage in light conversation or small talk. His manner was such as to brook little dissent and he received a deep, if often begrudging deference from those he encountered. Above all else, he knew his own mind and did not hesitate to speak it.

In his lifetime, he was patron of many organizations and gave his considerable support to all manner of enterprises. His agreement to become involved in any textual cause seemed to ensure its success and well-being. Nevertheless, there were several notorious incidents in which his name and authority were invoked without his permission. It was a testimony to his influence and prestige that, once these bogus endorsements were revealed, the promoted texts lost all value in the marketplace of ideas and often sank without future trace.

By the end of his life, his influence was beginning to wane: centuries of pre-eminence and prominence had taken its toll. Announcements of his presence at any particular gathering no longer generated the same excitement and anticipation. Indeed, as is their wont, some Young Turks began to challenge his right to be heard at all and to
question his credentials for having such an aristocratic bearing. Suddenly beginning to show age and to lose his argumentative edge, he became conspicuous by his absence from the literary and philosophical scene.

The exact circumstances of his demise are as shadowy as those of his birth. Some say he simply died of old age at his desk, while putting pen to paper; he had lost the will to continue the life-long struggle against the forces of anarchy and disorder. As no body has ever been found, some refuse to accept that he is really dead. There are reported sightings of him on a regular basis. Some enthusiasts claim that they still detect a trace of his presence in the most prosaic and profound settings. For such Auctorians, his body may have withered, but his spirit lives on.

Others suggest that he died in more mysterious and less noble circumstances. Suspecting foul play, they maintain that he did not voluntarily step out of the scholarly spotlight, but was shoved. Conspiracy theories abound, and there have been several high-powered commissions established to review all the available evidence; but no genuine consensus exists or is likely to prevail. The main suspect is one Rolly Barthes. Late of an elite French resistance movement, he was also known as The Reader. But most informed observers maintain that it could not have been the work of one person. Consequently, the jury of historical opinion remains out and a whole generation of textual critics are suspect.

Although never married, he is believed to have been a prolific progenitor. Many men and women of all creeds and colors claim to be his legitimate heirs. For good or bad reason, each wants to lay claim to the vast stock of cultural capital that he accumulated in his lifetime and that he is alleged to have stashed away for future retrieval. Although he probably hoped to rest in peace, he is more likely to be wrested into pieces. In a manner of speaking, he was the author of his own fate.\footnote{I am grateful to Wendy Griesdorf whose initial inspiration was responsible for the idea of an obituary.}